NORMS AND THEIR ‘APPLICATION’. 
THE CITIZENS’ ROLE IN LAW

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ABSTRACT
This paper deals with the issue of normativity from a legal point of view. But whereas a classical account of the normativity of law would directly ask why the law has binding force or what legal obligation is, I am approaching the issue in a rather indirect way. I am interested in the problem of the observance of law. The paper seeks to demonstrate that legal theory is obsessed with the “application” of law, to the detriment of compliance with the law. A number of arguments speak in favour of a conceptual arrangement in which compliance is an essential part. Yet, compliance should not be conceived in terms of plain obedience. A more complex configuration is needed. The paper explores possible candidates for such a configuration, all of them connecting the idea of compliance with the idea of autonomy. The observance of law, then, can’t be separated from its justification.

KEYWORDS
Autonomy, law, compliance, interpretation, norm application

The following considerations do not develop a substantial thesis. Rather, they aim to establish a question that may appear unusual and inaccessible. A site must first be opened up from which the formulation of theses is possible at all. My aim is to identify some assumptions which are often tacitly carried along in legal theory and legal methodology and which become discernible when the figure of the observance of law is analysed. I will first explain the problem in some detail (under I.). In order to define the problem more precisely, I juxtapose two theses in the heuristically formed “antinomy of norm concretisation”. It turns out that some common notions contradict each other (under II.). Several conventional legal theoretical approaches cannot resolve the antinomy (under III.). Only if the self-assessment of the law, i.e. the interpretation of norms by the addressees in the individual case, is taken into account, can this be remedied (sub IV.). Naturally, a series of follow-up questions then arises (under V.).
I. THE PROBLEM: OBSERVANCE AND THE MODEL OF LAW

Anyone who speaks of the observance of law has a certain image in mind: that of subordination. In this image the law – primarily statutes – is in some respects located “above” its addressees. Philosophers of law then ask about the duty to comply with the law, which is seen to imply obedience to the law. Legal sociologists are interested in the success and failure of compliance aspirations. Legal theorists who use the terminology of Hans Kelsen would assign the problem of compliance to the "effectiveness" of the law as a category to be distinguished from the "validity".¹

In the following, I would like to capture this idea of subordination as an "obedience model" of law.² And of course: This model is the problem.

Some may doubt whether the image of subordination is really so widespread. But I think there is good evidence that everyday jurisprudence operates on the basis of the image of subordination and that the theory that accompanies everyday jurisprudence rarely detaches itself from it. The orientation towards obedience is just obvious: The law prescribes something, and this cannot be shaken, even if one does not share John Austin’s strong view that every legal norm is an order behind which there is a threat of sanction.³ The normativity of law as such, however it is described, seems to imply that subordination. Citizens are subject to the laws because the laws are legally valid due to their binding nature. Of course, this is particularly vivid in the case of commandments and prohibitions, but even permissions and empowerments are still subject to that idea.

But on closer inspection it is not that simple. When there is talk of the observance of the law, the "law" seems to have already been established as if it were clear what content and significance the "law" has for the concrete case. It should therefore be possible to first identify "the" law as such, which is the legal norm to be followed, and then to compare reality with it. The question of the observance of law thus leads to a seemingly simple bivalent test: Does the addressee’s action conform to the normative order or not? But in order to carry out this test, a judgment must be made as to what kind of action the law requires of its addressees. This raises the question of how the addressee or a public authority can determine this. It may also be necessary to decide whose assessment is important, that of the addressee or that of the government body. Obviously, the judgment as to whether a norm was followed or not requires the norm to be interpreted. The interpretation on which the addressee relies and the associated behavior are then regularly interpreted by third parties – courts, lawyers, scholars. The category of observance of law thus refers to

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a series of interpretations. Those interpretations are interlinked, however their relationship is not evident.

Take, for example, the Muslim trainee lawyer who wants to wear a headscarf during her training in court. Can she do that, or can the employer forbid her to wear the headscarf? How does the fundamental right of freedom of religion extend here, and what is the content of the trainee lawyer’s official duties? If the success or failure of compliance aspirations is of interest: To what do we want to tie up the findings here?

This outlines only the starting point of my considerations. In the next step, I would like to examine in more detail the question of how the process of concretising those norms "superordinated" to human behavior is thought of and conceived on the basis of the subordination picture. As I would like to show, this is by no means a process free of tensions. The obedience model of law has difficulties in explaining the processes of norm concretisation. In order to make this clear and to get closer to the goal of gaining the right question, the next step is to structure the field of discussion in the form of an antimony.

II. THE ANTINOMY OF NORM CONCRETISATION

The antinomy of norm concretization operates as a juxtaposition of thesis (below 1) and antithesis (below 2).

1. The Thesis: Norm Concretisation in the Addressee’s Perspective

The thesis is that the concretisation of norms is a matter for those addressees to whom the law is directed as a code of conduct.

It’s based on a commonplace: The law regulates human behavior by specifying standards of behavior. The law as an order of conduct concerns the relationship of citizens to the law. The law tells the citizen what to do. Of course, it is necessary that the citizen knows what the law means. This is easiest when the law is clear. The road traffic regulations are a good example. Anyone at a red light knows what to do. The concretisation of norms is, from this point of view, recording and processing information on behalf of the citizen. The standard command is clearly visible and can be easily integrated into the personal decision-making process. Observance of rules

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is part of this concept; it presupposes a kind of concretisation of rules by the addressees, both in the case of compliance and of non-compliance. `Obviously, the thesis – the law as an order of conduct – must establish a strong premise: In principle, each of the addressees of this order can judge for themselves which behavior is expected of them. This precondition becomes precarious when a norm raises difficult questions of interpretation. The example of the Muslim trainee lawyer shows this. How can the law fulfill its function of controlling behavior here? Does the Muslim woman know how she should behave?

2. The Antithesis: Concretisation of Norms is Interpretation and Application by Courts

The antithesis is that the concretisation of norms is a business of the courts, including the administrative authorities. In other words, it is always a matter of competence.

The antithesis draws attention to the state: legal norms need to be interpreted and applied by state bodies. This view is particularly widespread in legal methodology. The predominant paradigm is therefore not observance, but application of the law; application as being primarily a matter for the courts. According to a more recent German textbook on legal methodology, the application of law is "the main problem situation of methodology". The application of law is primarily seen as an operation of the state courts; if scholarship is also included as an "applying" instance, then it is precisely to the extent that it prepares or follows up court decisions. "(M)ethod-conscious judgement" is the problem of legal methodology. Legal methodology is simply "methodology for lawyers". Nothing else applies to large parts of legal theory. Juristic legal theories should differ from philosophical legal theories precisely in that they relate to judicial or other forms of legal decision.

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7 Cf. J. Raz, in: Raz, The Authority of Law, 1983, p. 210: "(T)he law must be capable of being obeyed. A person conforms with the law to the extent that he does not break the law. But he obeys the law only if part of his reason for conforming is his knowledge of the law. Therefore, if the law is to be obeyed it must be capable of guiding the behaviour of its subjects." (213 f., emphasis in the original).

8 F. Reimer, Juristische Methodenlehre, 2nd ed. 2020, p. 26 (emphasis A. F.). H.-M. Pawlowksi, Methodenlehre für Juristen, 3rd ed. 1999, p. 8, for example, also focuses on "the application of law".

9 Occasionally it is pointed out that on the one hand the legislator also interprets the constitution and that on the other hand the implementation of the laws by the administration has a law-applying component, see for instance T. Möllers, Juristische Methodenlehre, 3rd ed. 2020, § 9. This does not change the finding that the perspective of the addressees remains hidden.


11 So the title of the book and the way of speaking at Pawlowksi (n. 8), p. 9.

In this model – this deserves special attention – the addressees of the law stand at the periphery. The "lay interpretation" can indeed be considered as a kind of interpretation, as an interpretation "by the citizens subject to the law". But it does not have a systematic role for law. Citizens interpret, at least, but they do so as citizens "subject" to the law. This also applies to the process of balancing legal principles, insofar as it is regarded as an independent mode of applying law alongside subsumption: It should not be the task of the individual, but exclusively of the public authorities applying the law. In legal proceedings, substantive law is "examined" without its addressee-related meaning playing a role. Compliance is only relevant to the extent that the bodies acting in proceedings align their own conduct with the procedural norms.

Obviously, the behavior-controlling character of the law no longer plays a role for the antithesis. The addressee disappears; for this reason the above-mentioned methodological views can be attributed to the antithesis. In my impression, only very few of the relevant authors see the problem that there is a tension with the assumption that law governs the behavior of its addressees. One of the few exceptions is the German textbook on legal methodology written by Looschelders/Roth, in which the problem is discussed. Starting from the antithesis, the authors take into account that the law actually serves to control behavior. But they quickly add that this should not matter legally. The authors firmly reject the idea of developing the legal methodology "according to the horizon of the norm addressee". The norm addressee is not competent to decide the case. His view could not be decisive for the interpretation and application of the law. However, the authors name a corrective, and this procedure seems to me to be representative of a widespread view. They do not refer to methodological considerations but to principles of substantive law, i.e. to the protection of legitimate expectations, to legal certainty or to the prohibition of retroactivity. Only these substantive legal correctives would be able to bring the addressee's point of view to bear. This thought has to be taken up again. Before this, however, some ways of dealing with the antinomy of the norm concretisation must be discussed.

\[^{13}\text{R. Alexy, in: Alexy, Recht, Vernunft, Diskurs. Studien zur Rechtsphilosophie, 1995, p. 71 (74).}\]
\[^{15}\text{P. Reimer, Verfahrenstheorie, 2015, p. 48 ff., 68 ff.: “law examination” (Rechtsprüfung) instead of “application of law” (Rechtsanwendung).}\]
\[^{16}\text{D. Looschelders/W. Roth, Juristische Methodik im Prozeß der Rechtsanwendung, 1996, p. 13; with a slightly different description J. Raz, in: Raz, Between Authority and Interpretation, 2010, p. 223 (239).}\]
\[^{17}\text{Looschelders/Roth (n. 16), p. 13.}\]
\[^{18}\text{Looschelders/Roth (n. 16), p. 15 ff. At the "micro" level, these aspects become relevant when courts wish to change their existing case law, cf. Möllers (n. 9), § 3/31 ff.; M. Payandel, Judikative Rechtserzeugung, 2017, p. 330 ff.}\]
3. Strategies for Resolution: Ignorance of the Other Thesis

Various conceptual strategies can be identified that mitigate or resolve the antinomy. These strategies consist of either ignoring the antithesis (under a)) or – in different ways – radicalizing it (under b) and c)).

a) Ignorance Towards the Antithesis: the Value of the Indeterminacy of Law

Courts come into play when difficult legal issues need to be resolved. In this respect, a natural path seems to lead from the thesis to the antithesis. One might think that vague norms, i.e. norms that are not clear, impair the capacity of the law to control behavior. The example of the headscarf-wearing trainee lawyer could be interpreted in this way. However, this is not a necessary conclusion. Some authors attribute important functions of behavior control to the indeterminacy of standards, for example in view of the fact that the addressees behave particularly cautiously so as not to expose themselves to the risk of breach of standards. The necessity of standard concretisation could therefore be neglected for the question of what role observance of law plays in legal theory. This would perhaps be an elegant, sophisticated solution that cannot be discussed in detail here. However, the hint can be taken from it that an indeterminacy of the law obviously is not to be rejected under all circumstances and requires differentiated judgements.

b) Radicalization of the Antithesis, option 1: Interpretation is a Question of Competence

Another strategy is to radicalize the antithesis. This procedure can be observed when legal methodological questions of norm concretisation are combined with competence-oriented considerations, i.e. when in particular the scope of judicial competences is taken into consideration: Interpretation is a question of legally conferred, formalized official competence.

This view is particularly popular in German public law. It is rooted in the so-called functional-legal approach. According to this approach, interpretation and legal reasoning must be linked with the distribution of functions and competences among the state authorities. The concretisation of norms is regarded here as a "question of interpretation competence". The prime example and probably also the

Cf. Raz (n. 7), S. 214: „An ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it."


birthplace of the approach is the interpretation of the constitution: the interpretation of the constitution also depends on the scope of the powers of the constitutional court within the institutional structure of the state organs. With regard to the prerogative of the legislature, which is founded in the principle of democracy, the Federal Constitutional Court examines only to a limited extent whether the legislature has respected its constitutional obligations in a contentious case. However, as widespread the functional-legal approach is, and even if it may even be helpful in the area of constitutional law and can be justified there: An extension beyond constitutional law, as actually proposed, is subject to considerable concern. The approach cannot explain how the rights and obligations to which the parties in court are entitled under substantive law can be restricted or extended by considerations regarding the function and competence of the respective court. In the context of compliance with the law, it becomes apparent that the functional-legal approach has difficulties in doing justice to the behavior-controlling character of the law.

This becomes particularly clear when, within the framework of the functional-legal approach, the competence-oriented considerations are decisively turned into the behavioral perspective: The principles of separation of powers relating to the relationship between legislator and judge should also apply to the relationship between the citizen and the state. In other words, so the problematic argument goes: If the power to decide interpretation disputes is ultimately assigned to the courts, then the citizen must accept against himself the interpretation found by the court according to the standards applicable to the court. The behavior expected of the citizen would therefore not be the yardstick for the judicial decision, but the decision would produce this yardstick in the first place. That is an unsatisfactory, seemingly circular consequence.

The functional-legal approach tries to avoid these difficulties by assigning two different norms to a particular legal standard, a norm for action and a norm for control, in order to be operable. As a norm for action, the standard is directed at the addressee, as a control norm it is directed at the courts. The point should be that the required behavior in these two norms is not congruent. The differentiation

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26 It is reminiscient of American legal realism, but for various reasons has little to do with it. The functional-legal considerations concern the relationship of state organs to each other, not – as in legal realism – the relationship of the courts to the individual.
between norms for action and norms for control is intended to make the coexistence of substantive legal requirements – for us: the behavioral dimension of law, in which observance comes into view at all – and of the perspective of judicial control compatible. If, for reasons of the rule of law or of the principle of democracy, the court is only allowed to review the substantive legal situation to a limited extent, then the standard applied should only operate as a control norm. However, this does not change the fact that the norm remains binding for the addressees as a rule of conduct. It is rightly objected to this distinction that it leads to the fact that norms for action lose the character of legal norms. The norm for action degenerates into an appeal. For our topic, this would mean that there could actually no longer be any observance of the norm.

c) Radicalization of the Antithesis, option 2: Irrelevance of the Addressee’s Perspective

As mentioned above, a "substantive-law"-based solution was proposed within the legal methodology in order not to neglect either the role of the courts or the perspective of the addressees (II. 2. at the end). The legitimate interests of the addressees could be taken into account by constitutional principles such as the prohibition of retroactivity or the protection of legitimate expectations. In some cases, however, even this path is rejected in a somewhat divergent radicalisation of the antithesis. One example is the discussion of the question of which requirements are associated with the constitutional requirement of norm determinacy. In this context, the German constitutional lawyer Emanuel Towfigh pleaded for abandoning the addressee perspective. In doing so, the idea that the norm has an addressee is not completely discarded. But the yardstick for whether the norm is sufficiently determined, i.e. whether it satisfies the constitutional requirement of norm clarity, should – in contrast to the prevailing view – not be understood as "addressee-orientated, subjective, but rather as juridical-dogmatic, objective". Towfigh justifies this view with the fact that the complexity of legal norms is not at all controllable by the addressee. It depends on the horizon of understanding of the legal experts. In its interpretation by the legal profession, the law becomes self-sufficient towards its addressees. But are


\[ Jestaedt (n. 24), p. 193. Jestaedt sees the connection with a clairvoyant eye and points out that the legal norm character of the norm of action can 'probably only' be maintained by those who, following Dworkin, take the 'thesis of rights' as a basis (in fn. 249).\]

\[ E. Towfigh, Der Staat 48 (2009), p. 29 (72).\]

\[ "If a standard is incomprehensible, its observance cannot be required. [...]" (translation A. F.) taken as the classic content of the requirement of norm clarity in Towfigh (n. 29), p. 38. Towfigh questions that the law can only be followed by those who understand it (p. 50).\]
laws really made for the jurists, as Towfigh boldly points out in the subtitle of his essay?

III. EXPLORATION: ATTEMPTS TO ESTABLISH DISTANCE TO THE OBEDIENCE MODEL

I have tried to show that the antinomy of the concretisation of norms cannot be resolved by a one-sided approach to the thesis or to the antithesis. My assumption is that both theses, as I have formulated them, are too simple – precisely because they operate on the basis of the obedience model of legal normativity. The image of subordination leads directly into the antinomy. There have been various attempts to modify the obedience model. However, as will be demonstrated in the following by means of three selected approaches, they ultimately prove to be insufficient.

1. Legal Structure: Coordination, not Subordination

Rudiments of a "coordinatively" oriented legal theoretical model can be found in Hans Kelsen’s pure theory of law. Kelsen considers it legally unacceptable to interpret "the relationship of the state to the other subjects as a relationship of domination, as a relation of command".\(^{31}\) According to Kelsen, the state is just as entitled or obliged as other legal subjects; it is "coordinated" with the other subjects.\(^{32}\) Public authorities stand in legal relationships as do other addressees of law. Both sides are thus subject to the law. The question of compliance then arises equally for both sides. This idea of Kelsen’s is interesting. In general, a legal relationship-based investigation of the law has some potential. However, such considerations of structural theory serve above all analytical purposes; questions of normativity and of the concretisation of norms lie outside their horizon.

With another figure, however, Kelsen further sharpens the idea of coordination. Kelsen turns legal normativity itself into a problem. Does the legal norm have the form of an imperative at all? Kelsen rejects this idea because it mistakenly identifies law with morality.\(^{33}\) The legal science should therefore construct the specific legal sentence (Rechtssatz) from the legal material, which would take the form of a conditional judgment that is addressed to the public authorities. If the condition formulated in the legal provision is fulfilled, the punishment or execution is triggered as


\(^{32}\)Kelsen (n. 31), p. 341.

\(^{33}\)“Und in der Tat, wenn das Recht so wie die Moral als Norm angesehen und wenn der Sinn der Rechtsnorm so wie der der Moralnorm in einem ‛Sollen’ ausgedrückt wird, so bleibt doch an dem Begriff der Rechtsnorm und dem rechtlichen Sollen irgend etwas von dem absoluten Wert haften, der der Moral eigen ist." (H. Kelsen, Reine Rechtslehre, 1934, p. 21).
an official act of force. Kelsen, however, arrives at (in my eyes) absurd consequences: People could not "break" or "violate" the law at all. Law is still an order of conduct, but as a specific social technique. By threatening the coercive act as an evil, people are induced to behave in such a way that the condition formulated in the law does not occur. Whatever one may think of this approach, the problem of norm compliance is not solved hereby, but is simply banned from the legal theory area. Observance only stands in the focus of a sociological consideration, be it as a question of the actual exercise of power (so in connection with the legal relationship), be it as a question of the effect of coercive acts (so in connection with the legal sentence).

2. The "Internal Point of View" in the Sense of H. L. A. Hart

Only at first glance is there a distance between the obedience model of normativity and a certain element of H. L. A. Hart's legal theory, the "internal aspect" of rules. Hart used this term to describe a property of social rules. While the existence of a certain behavioural standard can be understood as an external aspect of a social rule, the internal aspect refers to a critical reflexive attitude towards the rule that is adopted by individuals. Normativity of social rules (i.e. not only of legal norms) therefore cannot be grasped without the perspective of the addressees. This building block enables Hart, on the one hand, to describe the idea of obligation and, on the other hand, to grasp the various empowerment functions of law (via so-called secondary rules).

The broad discussion of this model of normativity and in particular of the internal aspect should not be of interest at this point. At any rate in the dominating Hart-interpretation the addressee dimension plays no recognizable role in the determination of legal normativity. Hart himself devotes no deeper attention to it. The prevailing Hart-interpretation focuses on the reflective practice of the rule of recognition by the officials. It is the officials, the bearers of public functions, whose behavior is analyzed from the internal point of view. In this respect, it is justified to say

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33 Kelsen (n. 33), p. 29. In the background of this view is a discussion that was quite intensive in the German legal theory of the penultimate century: Who is the addressee of the legal norm?
35 Hart (n. 35), p. 98 f.
that Hart isolates the world of the officials from the society. Both still face each other. On the one hand, Hart emphasizes that for an adequate understanding of law it is necessary to regard the regulation of conduct as the primary purpose of law and, accordingly, the norms of conduct as the primary rules of law. But Hart carries the perspective of an "official" application of law in this. This becomes clear when Hart, though very briefly, tries to describe what norm compliance means on the part of the addressees: "they ‘apply’ the rules themselves to themselves". In the German edition of the book the word “apply” is – a bit helplessly – translated as beziehen, which means the addressees 'relate' the rules "to themselves". I will return to this idea of self-application, which Hart in this context does not explain in detail. It can be said that Hart further differentiates the obedience model of law, but does not abandon it.

3. Human Agency

A promising candidate for thinking observance of law in distance to an obedience model of law is the philosophical theory of action. The action of the individual, which is based on a rational assessment of the situation in which the norms of law are included as one of many aspects in the assessment, forms the starting point here. In the field of legal theory, Joseph Raz in particular can be regarded as representative of such an approach. In Raz's analysis of law, the concept of the authority of law plays a decisive role, which gives rise to the assumption that he almost par excellence stands for an obedience model of law. Yet Raz's service conception of authority – the authority supports the actor in following autonomous reasons – is related to the agency of the individual, i.e. to his or her behavior as being based on reflection and decision. Norms are reasons for action, reasons for the action of the individual, and this action forms the continuous point of reference of Raz's theory of law. Mandatory norms are excluding reasons, i.e. reasons for setting aside the usual reasons for action. Authority always remains related to the role it plays in this situation of action and decision.

But, an important restriction has to be made. Individual deliberation and norm compliance are not brought together by Raz. Observance of the norm stands next to the weighing judgement on action. With this, however, Raz ultimately leaves unanswered the question of the extent to which action can be presented as compliance with a standard at all. This gap is probably due to the fact that Raz, like Hart,

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39 D. Kyriatsis, Shared Authority, 2015, p. 132 ff.

40 Hart (n. 35), p. 38.

41 Hart (n. 33), p. 39.

42 See above all J. Raz, Engaging Reason, 1999 (reprint 2010).


44 Cf. the presentation in D. Kuch, Die Autorität des Rechts, 2016, p. 75 ff.
draws a sharp line between public officials and citizens. In his conception of services, the reasons that are used for the authority to justify the norms should not play a role for the individual in his or her decision-making situation. These reasons are replaced by the authoritative order. The mere fact that the norm was issued by the authority should suffice as a reason. To this extent, this ultimately confirms the assessment that Raz remains on the path of the obedience model of law.

IV. QUERY: COMPLIANCE AS AN EXPRESSION OF AUTONOMY?

Apparently, an appropriate understanding of observance depends on how the addressee’s perspective is taken into account. The obedience model of law has no place for the fact that the addressees of law themselves concretize the norms. Therefore it is necessary to start again, now with the question whether and how a self-assessment of the law by the addressees can be considered. Or, to put it another and more demanding way: can observance of the law be thought of as an expression of personal autonomy?

1. The Concept of Autonomy

Of course, autonomy is a complex, ambiguous concept. It does not allow to simply put a definition at the beginning and to start developing thoughts and drawing conclusions from such a definition. To grasp the term as self-determination can only be understood as a very first approximation. If this self-determination is linked to the establishment of norms, a fundamental problem arises for practical philosophy. It is far from clear whether moral commandments can really be founded autonomously. The discussion is provoked by Kant’s philosophy, which has placed exactly the autonomy of the individual at the centre of the justification of norms. For some, this attempt is considered as paradoxical: from the autonomous status of the person specifications shall be derived which have a heteronomous effect. More precisely: autonomy presupposes an unbound self, whose independence must actually lend a heteronomous character to any law.

"Raz, Ethics (n. 43), p. 215.
"„Der Wille wird also nicht lediglich dem Gesetze unterworfen, sondern so unterworfen, dass er auch als selbstgesetzgebend und eben um deswillen allererst dem Gesetze (davon er selbst sich als Urheber betrachten kann) unterworfen, angesehen werden muss." (J. Kant, Metaphysik der Sitten, in: Akademie-Textausgabe, Vol. IV, 1968, p. 385 (431)).
"So approximately the characterization at Khurana (n. 2), p. 11 ff. (with further references).
principles, then these principles cannot at the same time be understood as self-imposed. As Robert Brandom puts it, for Kant "to be rational" means "to be bound by rules", and the question is how this rule-bound nature can be reconciled with radical autonomy. The "obedience model of normativity" thus becomes problematic. Ernst Tugendhat formulated this very nicely: "Must we not ask ourselves the other way round why we prefer to think of being bound to morality as being bound to a straitjacket?" For Christine Korsgaard, the paradox is resolved at the higher level of the practical identity of the individual. This identity is constituted by the reflective structure of the human mind. However, a direct answer to this question, especially if it concerns the justification of norms, cannot be attempted in the following. Instead, I would like to take a detour, namely using the example of following the law, to examine whether and in what sense there is room in law for the idea of the autonomy of the individual.

In doing so, account should be taken of a differentiation that is widely made within the concept of autonomy. A number of theories that attempt to trace moral or legal norms back to the autonomy of the norm addressees distinguish between individual and collective autonomy. Both are put into a relationship in a certain way. Collective autonomy is the autonomy that is granted to the individual within a community. Here, the individual is the addressee as well as the source of the norms. This is a highly abstract conjunction; under constitutional law it can be illustrated, for example, by the interweaving of fundamental rights and of democracy. In order to take this connection into account, it will be necessary to place the self-assessment of legal norms in some way in relation to the collective component of autonomy (in law). We now turn to this self-assessment by the addressees.

2. Stages of Self-assessment

Various argumentative arrangements indicate that the analysis of law must include its self-assessment by the addressees. These arrangements differ considerably in detail. Different argumentative stages can be distinguished. I regard them as stages

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49 T. Pinkard, in: Khurana/Menke (n. 2), p. 25 (46 f.).
50 R. Brandom, Making it explicit, 1994, p. 50.
51 See n. 2.
because the respective approaches are becoming more and more demanding from a normative point of view.

a) The Argument from Constitutional Sociology: Interpretation as a Social Structure

"He who 'lives' the norm interprets it (too)," Peter Häberle wrote this – with quotation marks and brackets in his typical style that avoids clear statements – in 1975 in his much-noticed essay on the "open society of constitutional interpreters". According to Häberle, interpretation of the constitution is a matter not only of the public authorities, but also of all "public exponents" and of all citizens and groups – in other words of the "open society". Here we find a first form of self-assessment. The addressees of the norms are involved in the interpretation of the norms.

However, this theory is unproductive for the search for self-assessment: Häberle is inconsistent, because the societal participants should only be "pre-interpreters". "Ultimately" it is up to the interpretive constitutional jurisdiction. This also explains why Häberle integrates functional-legal considerations into his concept. Häberle takes up the above mentioned problem of radicalizing the antithesis, which is connected with the functional-legal approach, so that he moves away from the addressees' perspective again. It becomes clear that the norm addressees play no exposed role at all; Häberle generally aims at the society as a whole. The behavioral aspect of law takes a back seat. This can also be seen from how Häberle bases his thesis. He relies on sociological assumptions about the relationship between law – especially constitutional law – and reality. The idea of the "open society of constitutional interpreters" with its republican-democratic borrowings indeed could be understood as a normative theory. On closer examination, however, the emphasis is on describing republican democracy as a reality.

The theory of the open society of constitutional interpreters therefore is unproductive for our purposes. This can also be shown by the example of the headscarf case previously mentioned. For the dogmatics of fundamental rights, it can certainly be well justified on the basis of this theory that the wearing of the headscarf can at all be assigned to religious freedom. The predominant view is that the self-image of the holder of the fundamental right must be taken into account, unless it is implausible. At the same time this qualification shows the limits of thinking about self-assessment: Other questions of constitutional law, questions of administrative and,
in particular, of civil service law raised by such a case are ultimately below the radar of constitutional sociology. There is no room for this.

b) The Rule of Law Argument: "Self-application" of Norms by Virtue of Human Dignity

A form of self-assessment based on the rule of law that relates to the entire legal system is closely related to the minimum requirements that must be met by the mode of legality, the rule of law. The archetype of this argument is represented by Lon Fuller, who decisively justifies his idea of an internal morality of law with a reference to human dignity. If human behavior in law is to be subject to the rule of law, then man must be thought of as a responsible agent who can understand and obey the rules and who can be responsible for violations. Jeremy Waldron takes this point up and emphasizes even more clearly the reference to human dignity. "Law assumes that ordinary people are capable of applying norms to their own behavior and it uses this as the pivot of their being governed. Ordinary people are capable of acting like officials ..." Legal systems would take advantage of people's capacity to act, i.e. their practical understanding, self-monitoring and self-control skills. Again and again, the law relies on voluntariness and insight. To rule by law is fundamentally different from how a flock of sheep is led by a dog. As Waldron tries to show, the problem of the vagueness of many legal norms does not have to contradict the idea of self-application. Thus, while the solution explained above under II. 3. a) consists in making vagueness functionally usable as vagueness, Waldron emphasizes the fact that the law trusts in the fact that the addressees themselves make a judgement about the application of the norms. Vagueness can therefore be eliminated by the judgment of the addressees, which in no way means that all those concerned must come to the same conclusion.

This justification of a self-assessment is, as shown, based on constitutional motives. But on closer inspection, human dignity is not spelled out with a view to the collective autonomy of the norm addressees (as a community). In other words, the participation of the norm addressees in the justification of the norm is irrelevant. In a sense, the law here still comes "from above" to the addressees. According to Waldron, ordinary individuals are able to behave like public officials: The addressees

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"J. Waldron, How Law Protects Dignity, Cambridge Law Journal 71 (2012), p. 200 (208). Thus, Waldron emphasizes that in case of compliance with the rules of the traffic code not a policeman or a court, but the driver of the vehicle is “the first law applier” (Waldron (n. 5), p. 65). For „self-application” see also J. Waldron, Dignity, Rank, and Rights, 2009, p. 237.
"Waldron, Law (n. 61), p. 206; also Waldron, Dignity (n. 61), p. 247.
"Waldron, Law (n. 61), p. 208, with a reference to Waldron (n. 5).
reproduce official judgements; "acting like officials" is the key formulation. Observance of the norm is modelled according to the model of judicial application of the law.

c) The Argument from Democracy and from the Rule of Law: "Protestant Attitude" to Law

Thus, the question arises whether the inclusion of a democratic component once more modifies the nature of legal compliance. The figure of the "protestant attitude" to law, which Ronald Dworkin developed as an element of his conception of law as integrity, is helpful here. This conception is decisively based on the fact that in the application of law those values that justify the law must again be mobilised in an interpretative way. But not only in the application of law: Because the respective processes, which embrace the contestation as well as the justification of the law, are also incumbent on the ordinary citizen. As members of a community based on the rule of law, the citizens, according to Dworkin, are united by loyalty to the set of principles that have been incorporated into the law and whose identification and interpretation is a matter for each individual member. The member adopts a protestant attitude to law: an attitude that makes every citizen responsible for forming a judgement about what ties his or her community has imposed upon itself and what those ties require in new circumstances. Compliance, then, is not the conformity of individual actions with individual norms, but the fulfilment of a complex legal obligation. The protestant attitude is thus, in the final analysis, no longer just a “mirror image” of the reasoning that judges and other officials practice to fulfil their institutional duties. It almost looks as if, conversely, the institutional procedures of the application of the law were directed towards reproducing the argumentative justification that is located in the relationship between the parties – one side of which can also be the state.

However, it would be too short-sighted to simply turn the tables now. Judicial application of law as well as observance of norms are rather both equally forms of expression of norm assessment. If legal reasoning is widely regarded as a process that would be specific to courts (a central assumption of the antithesis presented above, II. 2.), then, as Raz rightly pointed out, this is merely conventional. The idea that the ordinary individuals would imitate the reasoning processes of the courts is therefore just as mistaken as the reverse idea that the courts would imitate themselves.

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65 Dworkin (n. 64), p. 190.

66 Kyritsis (n. 39), p. 146.


68 Raz, Ethics (n. 43), p. 326 ff. (with regard to legal reasoning).
the reasoning processes of the individuals. The idea of imitation itself is misleading. Both courts and individuals try to determine what is legally valid or how a dispute is to be resolved.

I grasp this consideration as a "democratic" element, because it extends the linkage of norm justification and the position of an addressee – based on the principle of democracy – to the level of norm application. This actually makes "the application an aspect of the authorship of norms". However, one can ask the question whether the concretization of norms is at all an exclusive affair of the respective norm addressee. In theory, all authors of a standard should be able to participate in its application. In this sense, Jürgen Habermas has objected to Dworkin's figure of Hercules – the ideal judge who is able to find the right decision in the dispute – that it is "monological". Instead, the judge must conceive his activity as a joint enterprise of the citizens. Perhaps it is a practical convention if only the judgement of the respective addressee is taken into consideration when a norm is concretised. Usually, third parties simply have no interest in this. But this is not decisive. Rather, the constitutional element comes into play here, which requires a prominent role of the addressee in particular. The granting of rights is associated from the outset with the idea that the holders of the rights form a judgement about the role of the rights in the concrete case. At least they can form such a judgement. This aspect of the rule of law merges in the "protestant attitude" with the democratic aspect of collective autonomy.

d) Observance from a Deliberative Point of View

While the argument just discussed still finds its starting point in the judicial decision and progresses only from this to the individual assessment, agency-based approaches can head for the problem of self-assessment coming, so to speak, from the opposite direction. In this sense Veronica Rodriguez-Blanco tries to show that and to what extent observance of law can be seen as an expression of practical reflection of an individual who assesses the reasons for the rules followed. "(T)o follow and comply with legal rules is an actuality of our practical reason capacities [...]."

Not only must reasons for action be examined under the umbrella of practical reason, as Christine Korsgaard does, for example. Legal normativity also needs to be

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69 Raz, Ethics (n. 43), p. 327.
71 Habermas (n. 54), p. 224. However, in my eyes Habermas does not really meet this requirement by relying on the figure of the discourse of application, as opposed to the discourse of justification (borrowed from K. Günther, Der Sinn für Angemessenheit, 1988).
73 Rodriguez-Blanco, Law and Authority under the Guise of the Good, 2016, p. 35.
understood in terms of practical reason. According to Rodriguez-Blanco, following rules has the structure of practical reason. This does not have to manifest itself in every individual case of everyday life, but it is in principle possible to make every norm compliance and every violation of the norm visible by stating reasons. These reasons ultimately lead to values or "good-making characteristics" which the individual associates with his or her respective actions.\(^7\) This would probably be the highest level in the step ladder of the models of self-assessment of law, because more demanding conditions are hardly imaginable.

In the background there is a consideration of action theory which can already be found in Raz' theory: An action can only be considered to exist if it is intentional, which means that the action takes place for a reason. Reasons, on the other hand, are facts that prove an action to be "good" in the sense of being valuable or preferable.\(^7\) Rodriguez-Blanco wants to refine Raz's approach, but with one important difference. The difference concerns an element of Raz's conception of authority that has already been touched upon previously. According to Raz, the reasons used by authorities to substantiate their norms are at the level of the individual substituted by a single reason, namely the reason that the norm was issued by the authority.\(^7\) Rodriguez-Blanco, on the other hand, argues that in this respect there can be no intentional act at all.\(^7\) All reasons should therefore be accessible to individual deliberation. In principle, the individual thereby regains his full agency. It is noticeable, however, that in fact the interpretation and concretisation of the law are not an issue for this approach. Perhaps they are consumed by the deliberative practical decision, so to speak. Rodriguez-Blanco's reflections on this point are not entirely clear. For the present context, however, it is sufficient to note the great correspondence with the figure of the protestant attitude in the sense of Dworkin's theory. The difference seems to lie rather in metaethical assumptions. Rodriguez-Blanco sees Dworkin's approach to constructive interpretation, whose integral component the "protestant attitude" is, as being only "theoretical". In contrast, she sees her approach as a "practical" one. Dworkin would not make any real reference to values, but only to the best possible interpretation of values.\(^7\) The background to this demarcation is the strong moral realism that Rodriguez-Blanco advocates in this context, which is indeed incompatible with Dworkin's approach. But if one neglects this metaethical difference, "protestant attitude" and "deliberative point of view" probably coincide to a large extent.

\(^7\) Rodriguez-Blanco (n. 6), p. 178 ff.
\(^7\) Cf. Raz (n. 42), p. 22 ff.
\(^7\) See above, n. 45. For other conceivable further developments of Raz's theory that adhere to the separation of office holders and norm addressees, see Kuch (n. 37).
\(^7\) Comprehensively Rodriguez-Blanco (n. 73), p. 139 ff.
\(^7\) Rodriguez-Blanco (n. 73), p. 212.
V. FOLLOW-UP QUESTIONS

In whatever way a self-assessment by the addressees (and authors) is included in legal theory, the question arises whether it does not amount to an idealisation of legal practice. Does such an approach negate that the law regulates the exercise of power, that it is connected with coercion and violence? In other words, does the idea of self-assessment do justice to the institutional character of law?

1. Idealism, Fiction?

The concern that a focus on self-assessment is idealistic can be dispelled. The above considerations attempt to make it clear that a legal theory of legal compliance can only be part of a comprehensive legal theory, which must also have a place for the legally controlled use of force. But this does not mean that self-assessment is excluded. If objections are based on the fact that self-assessments cannot be proven empirically, the theoretical character of the concept of self-assessment must be emphasized. Law is not a natural thing. The description of law does not only depend on psychological or mental states. Dignity and agency are constructions that do not dissolve into empirical conditions. Even empirical theories such as economic analysis work with certain assumptions that are not empirically proven; their view of man, for example, is an abstraction. In my eyes, the theory of law has the task of both describing and justifying law as a social practice. Such a project identifies characteristics and elements of social practice, including the assumptions that shape it. These are assumptions that the participants of the practice generally share and perhaps even have to share.

In this context, a possible misunderstanding has to be prevented. A recourse to self-assessment by the addressees of the law doesn’t imply that the ordinary citizen must consult legal literature or participate in the debates of the professional circles. Professional advice remains indispensable. The role of lawyers and legal scholarship can be interpreted in very different ways. This interpretation depends not least on the importance attributed to self-assessment in law. In the light of the idea of self-assessment, lawyers have the task of making the legal opinions of the parties heard.

2. The Institutional Character of the Law

Nevertheless, the question arises as to whether the institutional character of the law can be sufficiently taken into account if self-assessments of the law by the addressees are to play a role. An obedience model has no difficulties in this respect,

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*Cf. Waldron, Dignity (n. 61), p. 245; Rodriguez-Blanco (n. 6), p. 159 ff. See also Funke (n. 67), p. 62.
*Cf. Looschelders/Roth (n. 16), p. 14; Towfigh (n. 29), p. 67 ff. („Intermediäre“).
*Cf. Waldron, Dignity (n. 61), p. 246.
of course. The institutional moment is in its bones, so to speak. This also applies to
the advanced versions posed by Hart and Raz, separating the perspectives of the
norm addressees from those of the officials. They are not prevented from grasping
the institutional side of the law from the outset.\textsuperscript{83} But if instead, in an alternative
model, the fact that individuals interpret the law in the same way as public officials
is really to be taken into account, how can this be reconciled with the institutional
character of the law, with the fact that the law is shaped by the binding resolution of
disputes?

In order to answer this question, it is helpful to first distinguish the interpretation
as such from the official, authoritative binding decision about such an interpretation.
Of course, the self-assessment of the law by the addressees is not authoritative, and
thus it is not binding in the same way as an authoritative decision. And the point
that self-assessments are relevant at all does not mean that they have to be adopted
by the courts. The above considerations aim at a legal-theoretical modelling. We
want to understand what courts do when they decide. From the lack of binding
character of self-assessment, a complete insignificance cannot be deduced.\textsuperscript{84} If the
element of self-assessment is recognized as a part of a legal-theoretical model, some-
thing becomes clear that would otherwise remain hidden: Judicial decision-making
does not differ structurally from how addressees judge adherence to norms. The
authoritative character is added to the judicial decision.

The fact that court judgments are binding and have legal force does not exclude
the relevance of self-assessments, quite the contrary. If courts make decisions, these
decisions stand in a temporal trajectory. For their part, they are readable as attempts
to take as much account as possible of the fundamental values which the community
has imposed itself to follow.\textsuperscript{85} The understanding of these values and their concreti-
sation, however, continues. Judicial decisions are embedded in this understanding.
This explains why it is possible to regard law as a dynamic, developing social insti-
tution.

Nevertheless, the question remains as to how the idea of self-assessment can be
reconciled with the somehow engineered production of law in legal, administrative
and judicial procedures based on the division of labor. Does the individual assess-
ment of the complex legal obligation perhaps have to feed in institutional reasons?
For example, when contesting an official decision, administrative leeway would have
to be taken into account that results from the relationship between the executive
branch and the legislative branch on the one hand, and the judicial branch on the
other. The figure of the protestant attitude is quite open to such an understanding.

\textsuperscript{83}To Raz in this respect intensively \textit{Kuch} (n. 44), p. 134 ff., 229 ff.; an attempt also in \textit{Rodriguez-
Blanco} (n. 73), p. 142 ff.

\textsuperscript{84}But so, after careful consideration, \textit{Borowski} (n. 70), § 274/24, 43.

\textsuperscript{85}See also \textit{Häberle} (n. 55), p. 173: „Set in time, the appeal stages of constitutional interpretation
go on to infinity.” (translation A. F.).
It would certainly make it possible to combine substantial and institutional reasons. But here hides the danger of a circular reasoning, because the scope of institutional powers also depends on substantial reasons. It seems to me that this problem has not yet been satisfactorily resolved. The situation is similar to the difficulties already mentioned, concerning the functional-legal approaches (under II. 3. b)). But it becomes clear at this point that and to what extent the aspect of self-assessment helps to sharpen the problem: Institutional reasons do not simply affect substantive law, as the functional-legal approaches strive for. The concretisation of norms is aimed at creating norms of behavior. The idea of self-assessment requires that the content and concrete relevance of the behavioral norms are equally accessible to the norm-applying organs as well as to the norm-observing addressees, and this with recourse to both substantial and institutional reasons. Yet it is an open issue in which relation these reasons stand and by which standards this relation can be studied.

3. Prospects of a Justification Model of Law

The different stages of self-assessment identify important aspects of the observance of law. A creature endowed with dignity cannot simply be thought of as being obedient to alien norms. From this point of view, it is necessary to think of legal compliance on the part of the addressee as a reasonable act. The obedience model of law may allow this, but it does not necessarily require it. The more demanding the concept of legal self-assessment is, the greater the distance to the obedience model of law. The contours of a justification model of law emerge, a model which focuses on the argumentative character of law. The empowerment to self-interpret should not be capable of blowing up the law. By no means does the path lead directly from a justification model to civil disobedience, which would be allowed in the case of deviating private interpretations vis-à-vis the authorities of the law. Nor does any legal self-assessment as such suddenly fall within the scope of protection of the fundamental right of freedom of conscience (for instance under Article 4.1 of the German Basic Law). It is more appropriate to regard self-assessment as an aspect of every subjective right. The approach to a justification model has a whole series of implications and consequences. Only one point should be indicated here. In terms of legal methodology, the obedience model works with a certain idea of the norm and its content. Actually, the norm is already complete. On the addressee’s side, it is only necessary for him or her to absorb an information about the norm. If the information is not

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88The justification model is understood as a structure that is open to different ways of justification. A pre-judgement in favour of a moral ‘right to justification’ (R. Forst, The Right to Justification, 2011), for example, is not associated with this.
89See n. 72.
clear, its meaning must be revealed. The semantics of rules is therefore the most important aspect of methodology.\(^{90}\) Even progressive methodologies which also receive pragmatic philosophical approaches see the application of law as a "semantic struggle", i.e. a conflict over the meaning of the legal text.\(^{97}\) It is all about the meaning of the text of the legal norm. In a justification model of law, on the other hand, the text is pushed into the background.\(^{90}\) The concretisation of the norm and the text, strictly speaking, diverge. The text loses its meaning, one could also deliberately say ambiguously. The meaning of a legal act, such as a statute, is not identical with the law as it is shaped by this act. This means that the step from the meaning of a text to the assumption of certain rights and obligations must be argumentative.\(^{95}\) In my opinion, a methodology that regards this argumentation as the centre of norm concretisation, and not as a somehow secondary or complementary area, is a desideratum. Such a methodology should not reject the idea of norm interpretation as text interpretation. But it should clearly take into account from the outset that, in a certain sense, text interpretation is only a process on the surface of a multi-layered phenomenon, comprising many diverse forms of argumentation.

VI. CONCLUSION

"It is fair to say that citizens occupy an uneasy place in legal theory."\(^{94}\) This somewhat resigned statement by Dimitrios Kyritsis, which refers to Anglo-American legal theory, also applies to German-speaking countries. Legal theory and legal philosophy are fixed on public officials, both disciplines deal with the concretisation of norms by courts, administration and legislators. However, jurisprudence should not only think about the application of law, but also about the compliance with it.\(^{95}\) In obeying the law, the citizen acts autonomously exactly insofar she \textit{is} a citizen.\(^{96}\) But this insight leaves open the question of when and under what circumstances the law \textit{is} obeyed. Compliance with the law requires interpretative judgements in several respects: on the part of the addressees, but also on the part of the observers, who have to consider the attitude of the addressees. It is possible to think of compliance with the norm as an expression of personal autonomy. One may even claim that this is a kind of a conceptual necessity. Those who have rights also interpret them


\(^{92}\)Cf. also \textit{Raz} (n. 16), S. 239.


\(^{94}\)\textit{Kyritsis} (n. 39), p. 132.

\(^{95}\)For further implications see \textit{A. Funke}, in: N. Marsch/L. Münkler/T. Wischmeyer (Ed.), Apokryphe Schriften, 2018, p. 31 (42 ff.).

\(^{96}\)\textit{Korsgaard}, Sources (n. 53), p. 106.
(argument of the rule of law), those who legitimize the creation of norms as addres-
ees must not be excluded in the application of these norms (democratic argument). These arguments by no means force individual self-assessments to trump official assessments. The purpose of this contribution was not to highlight the predominance of one perspective or the other. Rather, it should be pointed out that the conceptual world of legal theory and of legal methodology is unconsciously shaped by certain images and ideas that become questionable through the arguments mentioned. The law can certainly be thought in such a way that recipients and authorities of the law meet at eye level when judging the law, without negating the validity of the law. Norms and their concretisation must always prove themselves argumentatively, and this is not an exclusive concern of state institutions. This opens up a field of research in which the transition from an obedience model of law to a justification model of law can be discussed.

*From a theoretical point of view, conflicts are particularly interesting if they concern the self-assessment of empowerment norms. See, with regard to the so-called Reichsbürger (people who claim that the German Reich still exists and that the Federal Republic of Germany exercises illegitimate power), A. Funke, in: T. Herbst/S. Zucca-Soest (Ed.), Legitimität des Staates, 2020, p. 65.*