The Problem of Legal Indeterminacy in Contemporary Legal Philosophy and Lawrence Solum's Approach to the Problem

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At first sight, the law seems to be a system of rules and the judges only adjudicators who work within the mechanism of that system. That is, they make a decision about disputes only by using some basic logical equipment in order to apply some written laws. This means that there is a determinacy in the law and that rules determine the outcomes in every case. This view of law can be called legal formalism. Even though this approach to the law seems to be intuitively acceptable, it has been under attack, at least from the early critiques of legal realists, since the beginning of the twentieth century. However, more rigid and more exact critiques of legal formalism and especially of the notion of legal determinacy have come from another approach. This contemporary approach to the law is called the critical law studies movement. It's advocates have been criticizing not only legal determinacy but all aspects of modern western legal thought. They first view all of these modern legal approaches as a whole without distinguishing the differences between them (i.e. the two main traditions in modern legal theory: the natural law theories and legal positivism) and brand these approaches under the name legal liberalism. They then try to show the inner contradictions of this whole. Thus there has been a long and complicated debate between advocates of the critical law studies movement and advocates of so-called legal liberalism. Since the 1970's, legal philosophy, at least in Anglo-American countries, has been pervaded by this debate.

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In this article I shall attempt to examine the problem of legal indeterminacy and try to show Lawrence Solum's approach to the problem. He is one of the American scholars who has taken part in this debate and has made some considerable critiques of the legal indeterminacy thesis. It would be interesting to take into account his overall thoughts on the topic because his approach might also be useful in grasping more accurately the problem itself. However this would need a more detailed examination; here I examine the problem concisely and rather focus on Solum's arguments or counter arguments. Therefore my references are more taken from his writings.

The Indeterminacy Thesis

The roots of the problem of legal indeterminacy can be traced back to a distinction which can be found in Gadamer's writings. According to this distinction there is an indeterminacy of legal text on the one hand and there is an indeterminacy of a rule when applied to a case on the other hand. Thus, legal indeterminacy is related as much to the legal interpretation as to the legitimacy and notion of rule of law. Besides this, at the core of the problem there is a question of whether the law is wholly indeterminant and whether there are some constraints on a judge's ability to make discretions[1].

Before considering the indeterminacy thesis, it may be needed to define what the term in determinacy means.

There can be five definitions of indeterminacy:

(1) P is indeterminate if P does not come to an end.

(2) P is indeterminate if P is not fixed, is vague or indefinite or has no fixed value.

[1] Gülriz Özkök, "Hukuki Belirsizlik Problemi Üzerine", **Ankara Üniversitesi Hukuk Fakültesi Dergisi,** Vol. 51, No. 2, 2002, pp. 1-18, p. 1 (separately printed). *See also* Michael J. Perry, "Normative Indeterminacy and The Problem of Judicial Role", **Harvard Journal of Law & Public Policy,** Vol. 19, 1995-1996, pp. 375-390, p. 380.

(3) P is indeterminate if P cannot be decided or settled especially of a dispute, in which case P is uncertain.

(4) P is indeterminate if P is not particularly designated.

(5) P is indeterminate if it is impossible to determine P in advance[2].

Except (1), the other definitons can be brought together to make a single definiton which is most relevant to the problem. This single definition of indeterminacy can be stated:

> P is indeterminate if P is not particularly designated hence it is impossible to determine P in advance, in which case P is undecided, unsettled, uncertain, is vague or has no fixed value[3].

When we turn to the problem, we can observe that if a legal system determines that in every case presented for adjudication there will be only one correct outcome, it is said that there is a determinate legal system. On the other hand, if a legal system in any case does not determine any outcome, it is said that there is a indeterminate system[4].

The indeterminacy thesis is defined by Tushnet, one of the important advocates of the thesis, as

> [A] proposition of law…is indeterminate if the materials of legal analysis-the accepted sources of law and the accepted methods of working with those sources such as deduction and analogy-are insufficient to resolve the question, 'Is this proposition or its denial a correct statement of the law?'[5]

Briefly it can be said that the indeterminacy thesis means that the legal propositions are indeterminate. It is important to notice that the

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[2] These definitions are all taken from N. Otakpor, "On Indeterminacy in Law", **Journal of African Law,** Vol. 32, 1988, pp. 112-121, pp. 112-113.

[3] Ibid., p. 113.

[4] Stuart Fowler, "Indeterminacy in Law and Legal Reasoning", **Stellenbosch Law Review**, Vol. 6, 1995, pp. 324-347, p. 325.

[5] Mark Tushnet, "Defending the Indeterminacy Thesis", **Quinnipiac Law Review,** Vol. 16, 1996-1997, pp. 339-356, p. 341.

indeterminacy thesis does not assert that it is a claim about rightness of outcome or difficulties in determining outcome. Rather, it asserts that "no matter how hard one tries, or how skilled one is as a lawyer, legal propositions in the relevant range are indeterminate.[6]"

In other words, the legal indeterminacy argument is that "legal questions do not have correct answers, or at least not unique correct answers.[7]" The defenders of the thesis doubt "whether the *legal materials* are collectively sufficient to determine a (single right) answer to the legal question" and according to them "certain legal issues might have unique right answers when extra-legal materials (including moral principles or the background, training, or biases of the judges) are considered" but this does not mean that the law itself is determinate[8].

Amongst the claims upon which indeterminacy thesis is grounded are "the general nature of rules, the nature of language (e.g. pervasive vagueness, or deconstruction); gaps or contradictions within the law; the availability of exceptions to legal rules; inconsistent rules and principles that overlap in particular cases; the indeterminacy of precedent; and the indeterminacy in applying general principles to particular cases.[9]"

There are mainly three debates in Anglo-American legal theory focused on the determinacy-indeterminacy problem:

(1) the attacks of American legal realist commentators on formalist legal and judicial reasoning;

(2) the revival and modification of the realist critique by some members of the critical legal studies (CLS) movement, with some CLS theorists claiming that law was 'radically indeterminate'; and

(3) Ronald Dworkin's (1931-) view that all, or nearly all legal questions have a unique right answer ('the right answer thesis')[10].

6 Ibid.

7 Brian Bix, **A Dictionary of Legal Theory,** Oxford: Oxford University Press 2004, p. 97.

8 Ibid. (emphasis original).

9 Ibid.

10 Ibid., pp. 97-98.

Thus, the legal indeterminacy thesis as associated with legal realism and the critical law studies movement especially in Anglo-Saxon legal tradition means shortly that "laws (broadly defined to include cases, regulations, statutes, costitutuonal provisions, and other legal materials) do not determine legal outcomes.[11]" In other words, the indeterminacy claim involves the idea that "the law does not constrain judicial decisions… [A]ll cases are hard cases and … there are no easy cases.[12]"

If it is put in another way, the legal indeterminacy thesis can be described from at least four distinguished aspects:

- Law is a historical continuum (that is, "it has no social existence of its own without the context making it interpretable […] and setting it in function […]").
- Law is an open system (that is, "[i]t can only be treated as closed for the sake of its historical reconstruction").
- Law is a complex phenomenon with alternative strategy (that is, "[l]aw as a bipartite phenomenon organized together from two distinct sources raises the question of the character and composite nature of its instrumentality").
- Law is an irreversible process (that is, "law cannot be manipulated in all its components to the same depth")[13].

Thus, it can be concluded that "law is something more than a set of rules and it is even more than a set of enactment.[14]"

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[11] Lawrence B. Solum, "Indeterminacy" *in* Dennis Patterson (ed.), **A Companion to Philosophy of Law and Legal Theory**, Oxford: Blackwell Publishing Ltd. 1999, pp. 488-502, p. 489.

[12] Ibid., p. 488.

[13] Csaba Varga, "Is Law a System of Enactments?" *in* Aleksander Peczenik, Lars Lindhal and Bert Van Roermund (eds.), **Conference on Legal Theory and Philosophy of Science**, Lund, Sweden: D. Reidel Publishing Company 1984, pp. 175-182, pp. 180-181.

[14] Ibid., p. 181.

The Significance of the Legal Indeterminacy Thesis

If we ask the question "Why does *legal indeterminacy* matter?", we can answer in several ways, but the most important ones are related with liberalism and its main ideals. Because, liberalism, as a normative political theory, is committed to determinacy as a political ideal and at the core of this argument there is a notion called the rule of law. There are at least two considerations connecting the concept of determinacy with the rule of law. First, for individuals to know which duties they have under the law and to have opportunities to conduct themselves according to law, the law must be determinate. Second, since legal outcomes are enforced by coercion, if this coercive application cannot be justified by legal reasons, then some legitimacy problems will arise. Beside these two considerations about the rule of law, there may be another one which is concerned with democracy. In democratic theory it is presupposed that only elected legislature "can form a judgement, enact it through legislation, and have its will followed by the courts." but the indeterminacy thesis is not compatible with this presupposition[15].

If the indeterminacy thesis is true, the ideal of the rule of law and the main components of this ideal, that is, the notion of legal justice, will not be fully realized because,

> (1) judges will rule by arbitrary decision, because radically indeterminate law cannot constrain judicial decision; (2) the laws will not be public, in the sense that the indeterminate law that is publicized could not be the real basis for judicial decision; and (3) there will be no basis for concluding that like cases are treated alike, because the very idea of legal regularity is empty if law is radically indeterminate[16].

As understood from above considerations, there are some relations between indeterminacy and legitimacy[17]. It is claimed that to make legitimate decisions judges constrain themselves only by "applying the rules

[15] Jules L. Coleman, Brian Leiter, "Determinacy, Objectivity, and Authority", **University of Pennsylvania Law Review,** Vol. 142, 1993-1994, pp. 549-637, p. 580.

[16] Solum, "Indeterminacy", p. 488.

[17] Kasım Akbaş, **Hukukun Büyübozumu**, İstanbul: Legal Yayıncılık 2006, p. 102.

and not creating their own." By contrast, however, the indeterminacy thesis asserts that "law does not constrain judges sufficiently, raising the specter that judicial decision making is often or always illegitimate.[18]"

The importance of legitimacy can be put more clearly with this quotation:

> If a judicial decision is legitimate, it provides a prima facie moral obligation for citizens to obey the decision[19].

In other words, it can be said that society can only be justified when it requires that "what appears to it as the state be not only restricted by law but be predictable in its actions and be controlled." Thus "it is a natural requirement that the legislation be predictable and understandable.[20]"

Although members of the Critical Legal Studies Movement are not the first defenders of the indeterminacy thesis, the most important and clear explication of the thesis belongs to them. They take the arguments of the thesis as one of the basic issues of contemporary legal theory and take these arguments to their logical results[21].

The members of the Critical Legal Studies Movement use indeterminacy thesis as part of their criticism of liberalism. However, in modern liberal legal theory there are some other liberal theorists like H. L. A. Hart who also accept the thesis, at least to extent that it can explain the fact that there are always gaps in the law. But it is important to notice that the way that liberals use the notion of indeterminacy is a little bit different from the way that the critics of liberalism use it[22]. However, this is not the main task of this article.

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[18] Ken Kress, "Legal Indeterminacy",**California Law Review,** Vol. 77, 1999, pp. 283-337, p. 285.

[19] Ibid.

[20] Csaba Varga, "Transformation To Rule of Law From No-Law: Societal Contexture of the Democratic Transition in Central and Eastern Europe", **Connecticut Journal of International Law**, Vol. 8, 1992-1993, pp. 487-505, p. 493.

[21] Akbaş, **Hukukun Büyübozumu,** p. 99; Fowler,, "Indeterminacy in Law and Legal Reasoning", p. 324.

[22] Akbaş, **Hukukun Büyübozumu,** p. 99, *see* note 222.

The Arguments for Legal Indeterminacy

In order to overcome the claim that their thesis is implausible, advocates of radical indeterminacy have made several arguments. These arguments of indeterminacy thesis have some important considerations. Therefore, before explicating Solum's critiques of indeterminacy thesis, we can take a look at several of these indeterminacy arguments briefly.

1. Patchwork Quilt Argument

Critical legal scholars argue that legal materials are only contingent agreement between competing social groups and these materials reflect the ideological struggles within the society. They further pose that since this agreement is not inherently rational and coherent then the legal materials themselves cannot embody this rationality and coherence either[23]. The most clear statement for this argument is Unger's:

> It would be strange if the results of a coherent, richly developed normative theory were to coincide with a major portion of any extended branch of law. The many conflicts of interest and vision that lawmaking involves, fought out by countless minds and wills working at cross-purposes, would have to be the vehicle of an immanent moral rationality whose message could be articulated by a single cohesive theory[24].

2. Deconstructionist Argument

Critical legal scholars invoke the deconstructionist techniques of famous philosopher Jaques Derrida for defending the indeterminacy thesis. According to the deconstructionist argument which is also called the fundamental contradiction argument, liberalism suffers a fundamental contradicton that in our contemporary societies there is a tension

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[23] Kress, "Legal Indeterminacy", p. 303. *See also* Sururi Aktaş, **Eleştirel Hukuk Çalışmaları**, İstanbul: Kazancı Yayınları 2006, pp. 163-168.

[24] Roberto M. Unger, "The Critical Legal Studies Movement", **Harvard Law Review,** Vol. 96, 1983, pp. 561-675, p. 571.

between needing others, that is, solidarity and fearing them, that is, individuality. Similar to this, there is also another contradiction between needing centralized powers to protect our autonomy, that is, being socially constructed, and fearing that these powers will try to destroy our autonomy, that is, the desire to be separate. This contradiction or tension consists in psychological ambivalence and this ambivalence is deeper than any "abstract theoretical political commitment." Because of this it can be called a fundamental contradiction, contradiction between self and other or between individualism and altruism[25]:

> [W]e are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future[26].

In this context, the term deconstruction is used by critical scholars to increase the justification for the proposition that application of legal rules and legal doctrine result in conflict, contradiction and indeterminacy[27].

3. Epiphenomenalist Argument

This argument accepts the idea that outcomes are predictable. But suggests that the predictability arise from extra legal factors. All legal materials, namely legal doctrines, statutes, case law etc. are only epiphenomena, i.e. "entities without any real causal role in determining the results of legal proceedings." Not the legal materials then, we can say, but ideology, politics or class bias determine outcomes. In other words "easy cases are not easy because the law determines the outcome", rather, because the

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[25] Kress, "Legal Indeterminacy", p. 306; Coleman and Leiter, "Determinacy, Objectivity, and Authority", p. 573; Solum, "Indeterminacy", p. 495.

[26] Duncan Kennedy, "Form and Subsance in Private Law Adjudication", **Harvard Law Review**, Vol. 89, 1976, pp. 1685-1778, p. 1685.

[27] For a more detailed consideration and wide discussion of deconstruction and its impact on legal interpretation *see* Michel Rosenfeld, "Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism", **Cardozo Law Review,** Vol. 11, 1989-1990, pp. 1211-1267.

outcomes are determined by the ideologies, politics and class bias, we can predict them[28].

There is a similar argument that can widen the scope of the epiphenomenalist argument. It states that both the nature of the application of the law and nature of the legal reasoning are socially determined[29]. As to the application of the law, the argument claims that

> [T]he social factors which permeating through the filter of legal consciousness turn up in the law-applying process, operate not only as ad hoc factors effective exclusively in the given case, but also as sets of elements defining the social nature of the application of law and bearing also the marks of generality, however, in the guise of the principles of the policy of law-applying activity, may manifest themselves as postulates for the subsequent application of the law, too[30].

Concerning the legal reasoning the argument advances that

> [...] in the process of reasoning logic acts as factor of control and not as one of determination [...] Also the social conditioning of legal reasoning, i.e. the social contents of law-applying, will perform the function of determining not only in the direction of the components of the process of reasoning, not controlled or controllable by logic, but in the last resort even in the direction of the practical potentialities, depth and effectiveness of logical control itself[31].

4. Rule Sceptic Argument

This argument is based on Wittgenstein's rule-following considerations. More specifically, critical scholars use Kripke's interpretation of

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[28] Solum, "Indeterminacy", p. 496.

[29] *See* Csaba Varga, **Law and Philosophy Selected Papers in Legal Theory,** Budapest: Publications of the Project on Comparative Legal Cultures of the Faculty of Law of Loránd Eötvös University 1994, pp. 317-374.

[30] Ibid., p. 336 (original emphasis).

[31] Ibid., p. 362.

Wittgenstein[32]. Wittgenstein (or we can say Kripke) argues that there is no fact to prove that I mean same thing by using a current sentence as I did before for another past usage. Again, there is no fact to prove that I am using the words in the correct way or applying the rules that govern the usage of words correctly[33]:

> [T]here is [n]o fact about our past use, intention, or attitude towards a word [...] that controls or restricts or limits our future uses of that word[34].

Thus, at the core of the rule skeptic argument there is a claim that "there are no facts that constitute or determine a sentence's meaning." This shows that language is basically indeterminate[35]. Because there can be no objective facts that determine that any sentence and its words mean one thing rather than another[36], we can say that language is "undefinedness." Accordingly, this argument can also be called as linguistic undefinedness[37].

This claim fits well to the legal indeterminacy thesis. Critical scholars take Kripke's interpretation of Wittgenstein[38] to conclude that in following a rule or using a word, correctness or incorrectness of a judgment,

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[32] "A spate of work on Wittgenstein and law has followed the recent debate in philosophy of language between Saul Kripke, who interpreted Wittgenstein's remarks on following rules as posing a sceptical paradox, and various antisceptical objectors", Timothy A. O. Endicott, "Linguistic Indeterminacy", **Oxford Journal of Legal Studies,** Vol. 16, 1996, pp. 667-697, p. 689.

[33] Brian Bix, **Law, Language, and Legal Determinacy,** Oxford: Oxford Clarendon Press 1993, p. 37.

[34] C. Yablon, "Law and Metaphysics", **Yale Law Review,** Vol. 96, 1987, p. 628 (book review), *quoted in* Bix, **Law, Language, and Legal Determinacy**, p. 37.

[35] Because of this, sometimes the term "linguistic indeterminacy" is used, *see* Endicott, "Linguistic Indeterminacy", pp. 667-697. ("I will use 'linguistic indeterminacy' to refer to unclarity in the meaning of linguistic expressions that could lead to legal indeterminacy", p. 669).

[36] Coleman and Leiter, "Determinacy, Objectivity, and Authority", p. 568.

[37] Varga, **Law and Philosophy Selected Papers in Legal Theory**, p. 304.

[38] For a critique of Kripke's interpretation of Wittgenstein's rule-following considerations and its misapplication to legal theory *see* Bix, **Law, Language, and Legal Determinacy**, pp. 36-62.

that is, the concept of meaning, can only be based on social or cultural consensus. The use of a word is correct when it agrees with the use of the vast majority of the others with whom we live together in a community. This shows that the language we use can change due to the social changes. Because of the fact that language is an instrument that can evolve by itself continuously from time to time, while making decision about any particular case judges apply and interpret this instrument again and again[39]. Altough critical scholars may accept the easy cases, they attribute this easiness not to the language used in legal materials but to the consensus of the society. Because this consensus consists in political and ideological elements, and it is asserted that this consensus has been imposed by the powerful upon the rest of the society, "[i]f and when the society's ideology changes, which cases are considered easy will […] also change.[40]"

Arguments of Solum

After examining the main arguments for indeterminacy, we can now turn to the arguments of Solum for criticizing the indeterminacy thesis.

Solum defines the indeterminacy thesis as "the existing body of legal doctrines—statutes, administrative regulations, and court decisions—permits a judge to justify any result she desires in any particular case […] a competent adjudicator can square a decision in favor of either side in any given lawsuit with the existing body of legal rules.[41]"

According to Solum there are two assumptions related to the indeterminacy thesis. The first is that "the indeterminacy thesis always accurately describes the legal phenomena" and the second is that it "plays an important role in support of a related thesis, the mystification thesis

[39] Csaba Varga, "Hukukta Kuram ve Uygulama: Hukuk Tekniğinin Sihirli İşlevi" çev. Hüseyin Öntaş, **Hukuk Felsefesi ve Sosyolojisi Arkivi,** Vol. 15, 2006, pp. 5-17, p. 10.

[40] Bix, **Law, Language, and Legal Determinacy,** pp. 37-38.

[41] Lawrence B. Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", **The University of Chicago Law Review,** Vol. 54, 1987, pp, 462-503, p. 462.

–the claim that legal discourse conceals and reinforces relations of domination.[42]"

Solum argues that both these two assumptions are problematic and that defenders of the indeterminacy thesis (that is, the critical scholars) "have a long way to go in formulating indeterminacy as a workable proposition with real critical bite" and the strong version of the thesis "is actually counterproductive to the program of critical scholarship.[43]"

He chooses as the motto of the thesis this quotation:

> The starting point of critical theory is that legal reasoning does not provide concrete, real answers to particular legal or social problems. Legal reasoning is not a method or process that leads reasonable, competent, and fair-minded people to particular results in particular cases [...] The ultimate basis for a decision is a social and political judgment incorporating a variety of factors, including the context of the case, the parties, and the substance of the issues. The decision is not based on, or determined by, legal reasoning[44].

Solum first distinguishes between two versions of the indeterminacy: One is strong indeterminacy and the other is weak indeterminacy[45]. He defines strong indeterminacy as follows:

> In any set of facts about actions and events that could be processed as a legal case, any possible outcome-consisting of a decision, order, and opinion-will be legally correct[46].

In other words, the strong indeterminacy thesis claims that all cases are hard cases[47].

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42 Ibid., pp. 462-463.

43 Ibid., p. 463.

44 David Kairys, "Law and Politics", **George Washington Law Review,** Vol. 52, 1984, pp. 243-262, pp. 243, 244, 247 *quoted in* Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", pp. 463-464.

45 Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", p. 470. Sometimes radical indeterminacy is used for strong indeterminacy and moderate indeterminacy for weak indeterminacy, *see* Kress, "Legal Indeterminacy", pp. 296, 297.

46 Solum "Indeterminacy", p. 491.

47 Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", p. 470.

From the point of legal practice, strong (or radical) indeterminacy means that "competent speakers of a language can never know whether an expression applies, and that competent lawyers can never know what to tell a client.[48]"

But Solum, like some other scholars, easily defeats this version of indeterminacy with the easy cases argument[49]. According to him, to defend the strong indeterminacy thesis is not simple. Because, he says, if we find even a single case (which in fact we can)[50] "whose results are determined by the body of legal doctrines taken as a whole", it shows that the strong indeterminacy thesis may be wrong[51]. If we look at ordinary cases, claims this argument, we can see the pervasiveness of easy cases and this fact undercuts the strong indeterminacy thesis. Because, these cases have determinate and correct outcomes. Determinate and correct outcomes create some degree of certainty. This amount of certainty shows that indeterminacy may exist but not radically, only moderately. So the burden is "on advocates of radical indeterminacy to overcome the implausibility of their thesis.[52]"

Altough the strong indeterminacy thesis can be rejected in this way, there is still a problem about the word "easy" . For example, eating ice cream in the privacy of one's own home[53] can hardly violate a legal rule. But it is not impossible. There can be some cases that this activity leads to a violation of a rule. Due to this uncertainty of the word easy, proponents of strong indeterminacy have made three arguments which were previously discussed in this article. It is not necessary to examine again these arguments in detail. Instead we may proceed to the counter arguments Solum has made to the strong indeterminacy thesis.

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48 Endicott, "Linguistic Indeterminacy", p. 669.

49 *See* Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", pp. 471-472.

50 Lawrence gives an example to prove that there can be even a single easy case: "This first paragraph of this essay does not slander Gore Vidal. Thus, I prove that one legal rule has at least one determinate application", Ibid., p. 471.

51 Ibid.

52 Kress, "Legal Indeterminacy", pp. 296, 297.

53 The example is taken from Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", p. 472.

1. Counter Arguments To The Internal Skepticism Argument

Internal skepticism tries to demonstrate that so-called easy cases are in fact hard cases. This criticism is internal, because it is grounded on the acceptence of legal practitioners like lawyers and judges. It is asserted that the legal practitioners see the results in easy cases as indeterminate[54].

In order to defeat this argument of internal skepticism, Solum makes a very elaborate claim that distinguishes between concepts of determinacy , underdeterminacy and indeterminacy .

First he takes two sets of possible results of a given legal dispute and shows the relation between these two sets. The first set consists of all imaginable results, no matter how ridiculous or improbable. The second set consists of results that are compatible with the law or can be seen as legally reasonable outcomes. He uses the word the law as "legal materials taken as a whole, including constitutions, statutes, and case law.[55]"

He then offers some definitons:

- The law is *determinate* with respect to a given case if and only if the set of legally acceptable outcomes contains one and only one member.
- The law is *underdeterminate* with respect to a given case if and only if the set of legally acceptable outcomes is a non-identical subset of the set of all possible results.
- The law is *indeterminate* with respect to a given case if the set of legally acceptable outcomes is identical with the set of all possible results[56].

[54] Ibid., pp. 472-473.

[55] Ibid., p. 473.

[56] Ibid (original emphasis). He makes this distinction also in other places. *See* Solum, "Indeterminacy", p. 490; Lawrence B. Solum, "The Virtues and Vices of a Judge: An Aristotelian Guide To Judicial Selection", **Southern California Law Review,** Vol. 61, 1987-1988, pp. 1735-1756, p. 1748 (including note 39). *See also* Sercan Gürler, "Çağdaş Ahlâk Kuramlarının Hukuk Felsefesine Yansımasına Örnek Olarak Lawrence Solum'un

Now, in order to make more clear what he means by the concept underdeterminacy, he says that "a case is underdetermined by the law if the outcome (including the formal mandate and the content of the opinion) can vary within limits that are defined by the legal materials.[57]"

He uses also three more concepts interchangeble with determinacy, indeterminacy and underindeterminacy: for determinacy he uses rule-boun, for indeterminacy unbound and for underdeterminacy rule-guided[58].

He then considers why some cases have taken the name hard . In order to explain this, he offers two formulations of the concept of a hard case:

- Cases are 'hard' when they are underdeterminate in a way such that the judge must choose among legally acceptable results that include outcomes that costitute victory (or loss) for each litigant, or various combinations of victory (or loss) for all parties to the litigation.
- Hard cases are those in which the judge's choice among the set of legally acceptable results will substantially affect a significant practical interest of the litigants[59].

So he concludes that in order to be hard a case does not need to be indeterminate. The underdeterminate cases can also be hard or we can say that it is not the fact that because a case is hard, it is indeterminate; but that it can be underdeterminate[60]. In this way, by elaborating on the concept of the hard case, he believes that he will defeat the internal skeptic arguments.

'Erdem Ahlâkına Dayalı Hukuk Kuramı'", **Hukuk Felsefesi ve Sosyolojisi Arkivi,** Vol. 16, 2007, pp. 141-168, p. 156-157.

57 Solum, "Indeterminacy", p. 489.

58 Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", p. 473.

59 Ibid., p. 474.

60 Ibid., p. 474, 475.

2. Counter Arguments To The External Skepticism Argument[61]

After examining the internal skeptic arguments, Solum attempts to defeat two external skeptic arguments. One of these external skeptic arguments is the rule-skeptic defense of indeteminacy and the other is the deconstructionist defense of indeterminacy.

a. The critique of the rule-skeptic defense of indeterminacy

As Solum understands it, a rule-skeptic argues that "one can always come up with a perfectly plausible interpretation of any rule, including legal rules, such that any particular behavior can be seen as either following or not following the rule." So the argument can easily conclude that, concerning the rules, "anything goes![62]"

In order to show the failure of rule skepticism, Solum makes a distinction between logical and practical possibility. He takes this idea from epistemology and tries to show that the reason for the lack of effectiveness in rule skepticism is the same as that in epistemological skepticism. It can logically be possible to doubt the certainty of knowing, but it does not affect what we do in fact. For example it is possible to say that we can never know anything. But it makes no change to the fact that we are lying on the bed and listening to music. It is same for the rule skepicism: "worrying about rule-skepticism will not have any effect on the way cases are decided." So, he concludes, "[t]he skeptical possibilities invoked by

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[61] He takes the distinction of internal skepticism and external skepticism from Dworkin. *See* Ronald Dworkin, **Law's Empire,** Cambridge, Massachusetts: Harvard University Press 1986, pp. 78-86. Dworkin uses this distinction for legal interpretation and explains it as a distinction "between skepticism *within* the enterprise of interpretation of some practice or work of art, and skepticism *outside* and *about* that enterprise", Ibid, p. 78 (original emphasis). For Solum, "[e]xternal skepticism proceeds from a perspective outside the practice of law", Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", p. 473.

[62] Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", p. 477.

both rule-skepticism and epistemological skepticism are not practical possibilities, and only practical possibilities affect the way one acts.[63]"

b. Critique of the deconstructionist defense of indeterminacy

The deconstructionist defense of indeterminacy, as Solum writes, claims that "the indeterminacy of legal rules is a function of deep contradictions within liberal society, or of the failure of liberal society to reconcile or mediate a deep contradiction within the collective and individual human self.[64]"

In order to show that there are some serious problems with the deconstructionist argument, Solum first has recourse to Dworkin. In his criticism of critical scholars Dworkin argues that the critical scholars "seem wholly to ignore [...] the distinction [...] between competition and contradiction in principles.[65]" So, according to Solum, it is not appropriate to talk about a contradiction within the existing legal doctrine, but it can be said that there is a "compromise between competing principles.[66]"

In addition to this problem, Solum draws our attention to another problem. The deconstructionist argument cannot provide an answer to the argument of easy cases. Even if the claim "some legal doctrimes embody a tension between community and autonomy resulting in indeterminacy" is acceptable, it doesn't prove that all of the law is indeterminate. The defender of the deconstructionist argument "would have to take all cases, including the easiest ones [...] and demonstrate both that they are indeterminate and that this indeterminacy is a function of some deep conflict between self and other." But Solum thinks that neither demonstration has been made. He concludes that the deconstructionist argu-

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63 Ibid., pp. 478-479.

64 Ibid., p. 481.

65 Dworkin, **Law's Empire**, pp. 274-275.

66 Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", p. 482.

ment can only show that "some legal rules are underdetermined over the set of all cases.[67]"

3. Counter Arguments To The Epiphenomenalism Argument

According to the epiphenomenalist argument, as Solum writes, "although legal doctrine is chronologically prior to the result in a particular case, and although variation in doctrine may appear to explain variation in result (at least within the limited domain of easy cases), the doctrine does not *determine* the result because in fact both doctrine and result are determined by something else.[68]"

Solum says that the epiphenomenalist argument has to prove that the relation between real causal factors and results in particular cases has not been determined by legal doctrine. In other words, if the link between real causal factors to the results can be completed by intentional actions of judges who decide the cases using doctrinal enstruments, the epiphenomenalist argument is false:

> [D]octrines would determine results, although the doctrines would in turn be determined by something else[69].

So he supports the view that "doctrines do play a causal role, even though that role is usually underdeterminative." He thinks that this view can supply an explanation "for how doctrines influence outcomes." If the judges took into account the limits of legal doctrine regarding any possible results, they would "act intentionally in choosing results within the legal doctrine they perceive." Because there can be a possible account of the mechanism by which doctrine determines outcomes, the burden is on the defenders of epiphenomenalist argument. Solum concludes by

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[67] Ibid., pp. 482-483.

[68] Ibid., p. 484 (original emphasis).

[69] Ibid., p. 485 (original emphasis). For a similar statement *see* Solum, "Indeterminacy", p. 496.

asking "[c]an the epiphenomenalist defenders of strong indeterminacy offer a similarly adequate causal explanation?[70]"

Thus, Solum has shown the inadequacies of the strong intederminacy thesis from different aspects and instead of indeterminacy he has offered the concept of underdeterminacy. However, there is another argument from indeterminacy he has to cope with: weak versions of the indeterminacy thesis.

4. Weak Versions of the Indeterminacy Thesis and Solum's Critiques

a. Counter Arguments to the Important-Case Indeterminacy Thesis

The first weak version of indeterminacy that Solum attempts to examine is the important-case indeterminacy thesis. In this version, indeterminacy is accepted not for all cases, but only some subset of cases. Solum expresses that some critical scholars admitted that "all interesting or important cases are indeterminate." At the core of this argument is the word *important.* According to this argument, the argument from easy cases may be true but insignificant. Because, if it were true, one single easy case which can be thought to be the proof for inadequecy of the indeterminacy thesis, is uninteresting or unimportant[71].

So, the criteria that define the word *important* is the key for the viability of the important-case indeterminacy thesis. As Solum points out clearly, "[u]nless importance is defined by criteria other than practical indeterminacy itself, the thesis will be trivial: indeterminate cases are indeterminate". The conclusion, which means only tautology, can not damage the argument of easy cases. Further he says that there is no such adequate criteria that has yet been provided by critical scholars[72]:

[70] Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", p. 486.

[71] Ibid., pp. 487-489.

[72] Ibid., p. 489. Solum here examines the arguments of David Kairys and Mark Tushnet,

> Without telling us if and when indeterminacy is really important, critial scholars cannot show that even this restricted forrn of the thesis has bite[73].

b. Counter Arguments to the Modally Weakened Indeterminacy Thesis

It would be useful to take a look to the quotation below to understand what the modally weakened indeterminacy thesis means and the counter argument Solum has made to it:

> [...] They [the Critics] don't mean-although sometimes they sound as if they do-that there are never any predictable causal relations between legal forms and anything else...The Critical claim of indeterminacy is simply that none of these regularities are necessary consequences of the adoption of a given regime of rules. The rule-system could also have generated a different set of stabilizing conventions leading to exactly the opposite results and may, upon a shift in the direction of political winds, switch to those opposing conventions at any time[74].

In short we can say that the modally weakened indeterminacy thesis admits that there can be easy cases, but claims that legal rules do not necessarily determine the outcomes in particular cases. Thus, it weakens the modal status of the indeterminacy thesis[75].

The importance of the thesis depends on the meaning of the word *necessity* and the meaning of the word *necessity* depends, in turn, on the possibility of demonstrating that in any particular case the outcome does

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two defenders of important-case indeterminacy and finds that they can not achive to show the relevance of the word *important* to the indeterminacy thesis. But it doesn't need to stay long on this now.

[73] Ibid., p. 491.

[74] Robert W. Gordon, "Critical Legal Histories", **Stanford Law Review,** Vol. 36, 1984, p. 125 *quoted in* Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", p. 491 (original emphasis).

[75] Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", p. 492.

not need to follow from legal rules. But, according to Solum, the critical scholars did not notice this dependency[76].

To make clear his counter argument he chooses a philosophical apparatus with the term possible worlds and distinguishes between four possible worlds. These are "(1) logically possible worlds - those that are not internally inconsistent; (2) physically possible worlds - those that are not inconsistent with the laws of science; (3) socially possible worlds - those that do not violate our understanding of the limitations on the behavior of humans and their communities; and (4) practically possible worlds - those that are within the realm of sufficient likelihood to be of practical consequences.[77]"

He contends that there are two possible interpretations of the word *necessity*. According to first interpretation, *necessity* means a requirement that "the application of particular legal rules in particular cases produce identical results in all logically, physically, or socially possible worlds." This version of modally weakened indeterminacy thesis, he says, may be true but doesn't have any critical bite. Maybe it is true that, when a legal rule is applied to a case, it can be imagined that there would be different possible worlds in which the outcomes would be totally different. But this makes the indeterminacy thesis trivial. Because, "we could imagine a world so different that this essay violates the securities laws, but this possibility is trivial; it has no claim on our attention.[78]"

Although the first interpretation of *necessity* makes indeterminacy thesis useless, Solum accepts that the second one can be valuable and may save the modally weakened indeterminacy thesis. In this second version of the thesis, the necessity of the relationship between legal rules and particular cases can be formulated so as to keep the critical bite. It would be reasonable to suggest that any change in the political world can affect the result of the application of a legal rule to any particular case. Because of the fact that political pressure is a kind of cause of underdeterminacy

[76] Ibid.

[77] Ibid.

[78] Ibid., p. 493.

or indeterminacy in particular cases, he admits the critical bite of the modally weakened indeterminacy thesis. But he adds that to what extent the thesis can be critical depends on the number of the cases affected by this pressure. He states that "[i]t is not difficult to imagine easy cases that would be unaffected by any change in our world fairly described as 'a shift in the political winds.'" So he shows that this is an empirical question that whether "the modally weakened indeterminacy thesis can demonstrate that most law is indeterminate in all practically possible worlds.[79]"

As a conclusion Solum makes some considerations from his evaluation of the indeterminacy thesis. First, he contends that "legal doctrine underdetermines the results in many, but not all, actual cases." In other words, with the exception of the easy cases, the outcomes "are rule-guided, but not rule-bound." Second, although he admits that in some cases outcomes are underdeterminate, that is, "any party could 'win' under some valid interpretation of legal doctrine", it doesn't mean that "the doctrine itself is indeterminate over all cases". Third, even with respect to hard cases it can not be said that the legal doctrine is completely indeterminate. Even in these cases, judges are constrained with the limits of legal doctrine[80].

As his last resort Solum declares his position with these words:

> My point is that whatever counts as a case, whatever counts as practical determinacy, and whatever empirical study reveals, the truth about indeterminacy is different from that implied by most, if not all, formulations of the indeterminacy thesis in critical legal scholarship. These versions of indeterminacy will seldom, if ever, make a practical difference to the parties to a dispute. It is for this reason that I conclude that these current critical versions of the indeterminacy thesis are dogma[81].

[79] Ibid., p. 494.

[80] Ibid., pp. 494-495.

[81] Ibid., p. 495.

Conclusion

Although the debate around legal indeterminacy seems to have lost its popularity compared to previous decades, there are still some points left unresolved in this debate. During the heyday of the debate in the 1990's, the legal theory, at least in Anglo-American countries, witnessed many interesting and useful attempts to argue for and against the legal indeterminacy thesis. Thus, the boundaries of this theoretical discipline were widened and new research areas for legal theory were opened.

The critical scholars, the main proponents of indeterminacy thesis, by referring to genius thinkers or philosophers outside of the legal theory like Wittgenstein, Gadamer and Derrida, have shown us that there might be a close relation, more than we might expect, between legal theory and the other main branches of contemporary philosophy.

As mentioned before, the problem of legal indeterminacy is related directly with legitimacy on the one hand, and with legal reasoning on the other. But, maybe it is more important to see that the critical scholars, by drawing attention to the nature of liberal legal theory, lead us to think about the problem of legitimacy in the liberal condition. In fact, it seems that critical scholars are more convincing when they speak from the point of view of political theory. They can succesfully show the inner contradictions and incoherency of liberal theory and practice. The mystification argument is so strong that no liberal counter argument can easily resist. Because of this, the mystification argument deserves more attention. However, when the case is for legal reasoning, it has to be said that the indeterminacy thesis, although it might be somewhat interesting and worth thinking upon, can hardly justify its basic arguments. The liberal rejoinder (whether we can still call this counter argument for indeterminacy thesis liberal), at least some versions of it, would be more coherent and structured. As a matter of fact, the indeterminacy thesis has been opposed by many liberal scholars and the basic arguments of the thesis related to legal reasoning have been proved false, or at least incoherent.

As to Lawrence Solum, one of the distinguished scholars who has taken the liberal side in the debate, it can be said that by using some interesting and original conceptual arguments like underdeterminacy, he has led us to notice the importance of the terms used in the debate. Besides this, by taking examples from actual cases, he has shown that arguments made in every part of legal theory, without taking note of the real conditions of life, would lack consistency. However, to appreciate his arguments (or counter arguments), they have to be seen in context, considering his whole attempt to make a more fully elaborated theory. He is known for his virtue-centered jurisprudence. His approach to the indeterminacy problem can be seen as a part of his judicial theory based on Aristotelian virtue ethics. So, his arguments have meaning only if they are understood in this context. However, this would be another task which is out of the scope of the current article.

The last point worth noting is that all these discussions about the problem of legal indeterminacy are rooted in the history of Anglo-American legal tradition. However its main discussions can also be traced in Continental legal tradition; they are directly related to some basic characteristics of the case-law system. Keeping in mind this condition, the debate around the indeterminacy problem can still help us to understand the very nature of the law and how it works.

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