



---

On Indeterminacy in Law

Author(s): N. Otakpor

Source: *Journal of African Law*, Spring, 1988, Vol. 32, No. 1 (Spring, 1988), pp. 112-121

Published by: School of Oriental and African Studies

Stable URL: <https://www.jstor.org/stable/745566>

---

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



*School of Oriental and African Studies* is collaborating with JSTOR to digitize, preserve and extend access to *Journal of African Law*

JSTOR

# ON INDETERMINACY IN LAW

N. OTAKPOR\*

The problem of indeterminacy in law has been the subject of interesting debate for many years now. Pitched against each other in the controversy are Hart,<sup>1</sup> Dworkin,<sup>2</sup> Benditt,<sup>3</sup> American Realist jurisprudence and recent exponents of Critical Legal Studies (C.L.S.).<sup>4</sup> Interesting as the controversy is, it is not as ordinary as our most casual statements seem to suggest, especially if the implications and outcomes necessitated by the existence of legal indeterminacy are examined rather than the concentration on ideologies and perspectives. To consider these implications and outcomes in detail, it is important to develop a generalised overview within which more detailed inquiries may find their context. Thus, in this paper, I shall first, examine indeterminacy as a concept *per se*. I shall then examine a selection of general arguments for and against legal indeterminacy and elucidate what is critically involved in these claims and in their denials. I do hope, at least, to give an idea of the difficulties we meet when we try to get our ideas clear on it and to show how any solution of the problem (if it is soluble at all) is closely connected with other problems in language and politics.

The topic of this paper is indeterminacy in law. So to state precisely at the outset, in all relevant respects what meaning should be attached to the phrase "indeterminacy in law" would be to anticipate, oracularly, the intended conclusion. For the purpose of directing attention towards the conceptual field with which the paper is concerned, and providing an initial premise from which to operate, it will suffice to remark that instances of, at least, the type of legal indeterminacy in question is familiar to many scholars in the tradition of Western European jurisprudence. Notwithstanding, it is still important to ask the question: what is indeterminacy? What does it mean to say that P is indeterminate?

For Curson, to determine means "to come, or to bring, to an end".<sup>5</sup> *Black's Law Dictionary* defines indeterminate as "that which is uncertain, or not particularly designated".<sup>6</sup> And according to the Oxford Dictionary indeterminate means, "not fixed, vague or indefinite, with no fixed value; that cannot be determined, decided or settled, especially of a dispute, the impossibility of determining in advance".<sup>7</sup> In the light of the foregoing the following accounts suggest themselves.

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

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

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

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

---

\* Senior Lecturer in Philosophy, Faculty of Arts, University of Benin.

<sup>1</sup> H. L. A. Hart, *The Concept of Law*, Oxford, 1961.

<sup>2</sup> Ronald Dworkin, *Taking Rights Seriously*, Cambridge, Mass., 1977.

<sup>3</sup> Theodore Benditt, *Law as Rule and Principle*, Stanford, 1978.

<sup>4</sup> Andrew Altman, "Legal Realism, Critical Legal Studies, and Dworkin", *Philosophy and Public Affairs*, 15, 3, 1986, 205-235, and J. M. Finniss, "On the Critical Legal Studies Movement", *The American Journal of Jurisprudence*, vol. 30, 1985, 21-42.

<sup>5</sup> L. B. Curson, *A Dictionary of Law*, Plymouth, 1979, 99.

<sup>6</sup> Henry C. Black, *Black's Law Dictionary*, Minnesota, 1979, 694.

<sup>7</sup> A. S. Hornby, *Oxford Dictionary of Current English*, Oxford, 1974, 433.

Definition (5) P is indeterminate if it is impossible to determine P in advance.

Notice that there are only slight differences between these accounts. However, of the five, the second, third, fourth and fifth stand out clearly in terms of their relevance to the problem at hand. If that is the case, then all four can be collapsed or encapsulated without any serious damage to linguistic forms and conventional usage. Hence: Definition (6) P is indeterminate if P is not particularly designed hence it is impossible to determine P in advance, in which case P is undecided, unsettled, uncertain, is vague or has no fixed value. Anyone accepting definition (6), who believed that P is indeterminate and that a sufficient condition of a person's believing it would be his understanding of some sentence expressing it or a situation warranting it, would doubtless believe that P is not particularly designated, that P is undecided, unsettled and uncertain, or that P is vague, indefinite and has no fixed value, or all of these. If a dispute situation entails this, then the question is: What other mechanisms (if any) of dispute settlement would be available? Specifically, if a legal rule or principle or whatever is indeterminate in relation to a particular dispute, what then happens? What has indeterminacy to do with law or specifically in judicial decision making?

Legal philosophers have often tended to think not only that indeterminacy is a legal problem, but that it is not a politically privileged category. Now, it is saying too much, of course, to hold that all legal rules and principles are indeterminate. It might be more prudent to hold that some obviously are. Which ones? It is not easy to decide ahead of time and by fiat the indeterminate rules or principles. There has to be a legal question or problem before it can be decided whether or not the law is undetermined and not fixed in relation to the specific legal question. Yet, P only becomes a legal question or a case because it can be brought under a legal rule. In other words, P could not be recognised as a legal question or case (of a certain sort) unless there is a rule which allowed its classification in a way that brings it within the purview of the law.

However, if the legal system is a meaningful and vitally useful social mechanism for dispute prevention and settlement (and it doubtlessly is) its most sacred ingredients are supposed to include, among others, generality, certainty and determinateness. These qualities are "checks upon arbitrary decisions, and as a rule that allows an element of prediction in the possible outcome of a case before coming to court. For lawyers, this is clearly indispensable in the matter of advising clients."<sup>8</sup> The problem is that most laws though avowedly general are neither determinate, fixed nor certain. And because of this legal gaps are occasionally encountered in any legal system. Indeterminacy is, thus, responsible for the existence of legal gaps.

Raz contends that "there is a gap in the law where a legal question has no complete answer. A legal question is a question all the possible answers to which are legal statements. A legal gap exists if none of the possible complete answers to a legal question is true."<sup>9</sup> Raz identifies two kinds of gaps in law: legal and jurisdictional. "A legal system is jurisdictionally complete if its courts have jurisdiction over all legal questions. It has jurisdictional gap if its courts lack jurisdiction over certain legal questions. A legal system is legally complete if there is a complete answer to all the legal questions over which the courts have jurisdiction. It contains a legal

<sup>8</sup> Nkeonye Otakpor, "Analogical Arguments in Law: Mood, Structure and Misuse", *AMAN*, 4, 2, 1984, 25.

<sup>9</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality*, Oxford, 1979, 70.

gap if some legal questions subject to jurisdiction have no complete answer",<sup>10</sup> or have no answers at all. Contrary to Raz, a legal gap does exist because there is no decision required by law. The non-existence of a decision required by law does not ossify a legal question that is troublesome. Neither is the legal answer provided by merely assuming the "no decision" posture. The existence of a legal question implies that a legal answer has to be found whether or not the law plainly dictates such an answer.

Why are there legal gaps? Legal gaps exist because of indeterminate intentions and language.

Lack of precision in language leads to vagueness while lexical problems make for ambiguity. Indeterminacy of intention can also create legal gaps if reflected in the use of indeterminate language. But neither indeterminate intention, motive nor language particularly and peculiarly belongs to the law. Vagueness and ambiguity are not necessarily restricted to the legal domain. Legal indeterminacy is rather a reflection of the indeterminacy of ordinary everyday life that is undeniably common, and appears to be an inevitable concomitant of life itself, like the infirmities that are the concomitants of old age. In other words, just as there are glaring instances of imprecision and ambiguities in ordinary everyday life, so it is with law. And just as our ordinary intentions, motives and desires are often in conflict, muddled up and in many cases overridden by indecision and uncertainties, so it is with law.

The language of legislation as supposedly understood by the courts is intended to fix the law, so far as it can. But statutory language, like ordinary language, can be vague or ambiguous, and rules generated can conflict or leave legal questions partially answered or not answered at all. Then the courts seem faced with the task of shaping the law. But helping to shape the law in such situations means that courts do have to abandon the legal maxim that the office of a judge is *just dicere* not *just dare*: to state the law not to give law.

The *just dicere* aspect is meaningful when, and only if the law is determinate in relation to a particular legal question. When it is not, helping to shape the law is a veiled attempt at *just dare*. Though positivist judges are reluctant to admit to such legal proclivities, it does happen. When the law is unclear, uncertain, is not fixed or is indeterminate, courts do not have to follow the law since it is not "particularly designated". They rather go beyond it, that is, they invoke general principles that are impeccably appropriate.

The various arguments explicating legal indeterminacy can be grouped into the following:

- (a) those that treat or regard it as a problem at the fringes or at the periphery of the legal system and therefore, deserving of no serious attention;
- (b) those that believe that it is soluble through the incorporation of general principles in the legal system; and
- (c) those that believe that indeterminacy is one of the central problems confronting any legal system and therefore is not soluble by merely denying its locus and treating it as a peripheral issue or attempting to resolve it once and for all by the use of general principles. In the first group, we find Hart and his co-proponents; the second group comprises Dworkin and his followers while the exponents of Critical Legal Studies (C.L.S.) make up the last category.

<sup>10</sup> *Ibid.*

Hart<sup>11</sup> admits that a large proportion of law is indeterminate but this aspect occupies only a peripheral area in the legal system. In cases where the law is unclear and uncertain or is not “particularly designated,” the problem arises mainly because of the open-texture of natural language; all general terms and phrases have a penumbral range in which it is unclear and uncertain, and indeed controversial as to whether the term applies to some particular, though this does not totally exclude other areas in which such terms are clearly applicable. In such inapplicable instances, the rule is not put to question, only the outcome is grossly in doubt. With this thesis, Hart supposes that he has domesticated the “excesses” of realism. I doubt that Hart’s thesis is a clear and lucid characterisation of the issue. It does not address the realists’ main concern: competing legal rules. There are obvious instances where legal rules are in conflict or are clearly indeterminate in which case no legal answer has been properly designated. There are, of course, instances where legislative intention or the purpose of the rule is in doubt, or where the language of the statute is plainly vague and ambiguous, or cases where a court is confronted by a novel situation. In all these, no clear determinate answer is dictated by law or provided by the legal system. By treating indeterminacy as a problem at the fringes of a legal system on the assumption that natural languages are open-textured, Hart tends to downplay the issue.

Dworkin on the other hand seems to suggest that the inclusion of principles and ideals as part of the law solves the problem of legal indeterminacy. Thus Dworkin argues that judicial decision-making requires the use of principles which take judges “past the point where it would be accurate to say that any test of pedigree exists”.<sup>12</sup> And since judges are bound by principles and not only rules, “legal obligation is imposed by a constellation of principles as well as established rate”.<sup>13</sup> The incorporation and use of principles would indicate the proper scope of the application of competing rules, resolve any conflict by showing that only one of the rules applies to the legal problem at hand. But Hart was never in doubt about the relevance and use of principles. He consistently insisted that “judicial decisions of high constitutional import often involve a choice between moral values”.<sup>14</sup> In what Hart termed “the permissive sources of law”, he allowed that where there is no formally valid rule directly applicable, acceptable general principles which social groups take cognizance of cannot but be used.

Dworkin seems to be saying that “principles are general standards that do not determine a result but only *incline* towards one, because principles unlike rules are not applied automatically whenever a given set of circumstances exists”.<sup>15</sup> How does one find out which principles are inclining a result in a particular situation? Dworkin’s answer is that they are those which belong to the “soundest theory of settled law”.<sup>16</sup> The settled law consists of those legal rules and doctrines taken as authoritative and binding by the consensus of the legal community. It is the most defensible ethical and political theory which coheres with and justifies those legal rules and doctrines. Notice that Hart also talks of acceptable general principles which

<sup>11</sup> Hart, *op. cit.*, 119.

<sup>12</sup> Dworkin, *op. cit.*, 67.

<sup>13</sup> *Ibid.*, 44.

<sup>14</sup> Hart *op. cit.*, 181–182.

<sup>15</sup> Nkeonye Otakpor, “Judicial Discretion and Democratic Theory” *Archives for Philosophy of Law and Social Philosophy* (ARSP), LXVIII—2, 1982, 167–168.

<sup>16</sup> Dworkin, *op. cit.*, 67–68.

social groups take cognizance of. It would appear, therefore, that both Hart and Dworkin are indeed not far from each other on this point. The general principles which social groups must take cognizance of is not substantially different from Dworkin's idea of the consensus of the legal community.

The Critical Legal Studies (C.L.S.) argument is that "the law is infused with irresolvably opposed principles and ideals".<sup>17</sup> To this extent Dworkin's attempt at incorporating principles and ideals neither would rescue nor resolve the problem of legal indeterminacy. The use of principles and ideals invariably amounts to reconstruction but such efforts are doomed to failure to the extent that "we are divided, among ourselves and within ourselves, between irreconcilable visions of humanity and society, and to the extent that opposing ideals and political theories inform legal doctrine and between radically different aspirations of our common culture".<sup>18</sup> In which case, the legal system is not a logically coherent entity mainly because politics, culture and life are not intrinsically symmetric. In effect, for C.L.S., the use of Dworkin's principles and ideals cannot, does not, solve the problem of legal indeterminacy in a definite sense. If anything, the problem is merely pushed to another level of occurrence.

In sum, while the realists insist on competing rules, C.L.S. insists on competing and irreconcilable principles and ideals. Hart conceives of law as a system of rules while Dworkin stresses on the union of rules, principles and ideals, all in an attempt to resolve the problems posed by legal indeterminacy. Yet, all are basically in agreement that a court must necessarily make a choice, make a decision or deliver judgment which is not dictated by law. But how is a judge going to do this in a situation where choices have been ossified by the non-availability of a determinate legal rule? The Nigerian example analysed below, perhaps, helps to illuminate this question.

The main issue raised in the example is the determination of the judicial rights of armed robbery suspects under Nigerian law. The test case was a suit filed by the family of Nosiru Bello,<sup>19</sup> an armed robber executed on 15 September, 1981 after his conviction by AKIN APARA, J. of Oyo State High Court on 13 October, 1980. The particulars are as follows:

The late Nosiru Bello was arraigned before the Oyo State Armed Robbery and Fire Arms Tribunal for trial. He was found guilty and the death sentence was passed on him. His family appealed against the sentence but he was "prematurely" executed while the appeal against his conviction was pending. The Appeal Court, however, dismissed the appeal because it relied on outdated English laws in deciding the case, thereupon the matter came before the Supreme Court of Nigeria. The issues resolved by the Supreme Court in the matter was whether the Oyo State Government acted constitutionally in ordering Nosiru's execution after his dependants had appealed against his conviction in compliance with section 200 of the Constitution.

There was consensus between both parties that the execution was unconstitutional and that the issue in dispute was whether it was illegal and/or wrongful. Counsel for the defendant argued that there is a fundamental difference between an action being illegal and unlawful at the same time.

<sup>17</sup> Altman, *op. cit.*, 217.

<sup>18</sup> Duncan Kennedy, "Form and Substance in Private Law Adjudication", *Harvard Law Review*, 89, 1976, 1685.

<sup>19</sup> *Nosiru Bello v. Oyo State Government*, *The Guardian*, Law Report, Lagos, 6 December, 1986, 1-2.



The execution, to this extent, was unlawful but not illegal. In a supporting argument, the Attorney General of Nigeria argued that the execution was wrongful but not illegal because there had been a valid judgment of a High Court proving the guilt of the executed man. The execution, therefore, although wrongful, was lawful.

The Supreme Court in its judgment held that the law is silent on whether there should be a stay of execution pending the decision of the Court of Appeal. But it is inferred from sections 220(1)(E) and 203(1) of the Constitution that when an appeal is pending there should be a stay of execution. The court also held that although there is no statutory provision for a stay of execution in the rules of Oyo State High Court, it is inferred that the government of the State cannot lawfully order the execution of a convict while an appeal is still pending. On the basis of these inferences, the Supreme Court held that the execution was unconstitutional, illegal, unlawful and wrongful. The execution of Nosiru before the appeal was heard was an infringement of his constitutional right to life and to appeal.

Interestingly enough, the Supreme Court rejected the distinction between an illegal and an unlawful act as well as that between a wrongful and an illegal act. Of particular interest is the fact that (a) the law in Nigeria is silent on whether there should be a stay of execution, and (b) there is no statutory provision for a stay of execution in the rules of Oyo State High Court. A combination of (a) and (b) means that the law as it stands today, both in Nigeria generally and in Oyo State in particular, is indeterminate on this legal question. There is thus a legal gap because the law has no answer, partial or incomplete. To say that an answer can be inferred is not the same as saying that an answer is readily available; it is not the same as saying that a rule that is directly and automatically applicable is readily available. No legal rule in Nigeria is particularly designated in relation to this legal question. None is necessarily applicable and the notion of inference cannot be taken as a substitute, neither can inference and applicability be regarded as equivalents like the words “sister” and “female sibling”, which express the same concept.

To put it simply, to say that the law is silent or that there is no statutory provision in the rules amounts to the acknowledgement of the existence of a legal gap for which no determinate legal rule is clearly available and applicable. The use of the concept of inference is no more than this: an attempt, and a good one for that matter, at “legal” damage control.

The argument that the execution was unlawful but not illegal or that it was wrongful but not illegal is both interesting and revealing. It is Hartian and positivist to the core but fails adequately to address the issue because of the semantic problem introduced by the distinctions. a) To say that P is unlawful is to say that P is “liable to be declared void”.<sup>20</sup> In other words that P “is prohibited or unauthorized by law”.<sup>21</sup> This means that P is in defiance of the law. b) To say that P is illegal is to say that P is “in violation of a law or rule which has the force of law”.<sup>22</sup> It means that P is “against or not authorized by law”.<sup>23</sup> c) To say that P is a wrongful act means that P is “contrary to the rules of legal justice, that P is an infringement of a right”.<sup>24</sup>

<sup>20</sup> Curson, *op. cit.*, 348.

<sup>21</sup> Black, *op. cit.*, 1377.

<sup>22</sup> Curson, *op. cit.*, 161.

<sup>23</sup> Black, *op. cit.*, 673.

<sup>24</sup> Curson, *op. cit.*, 364.

This means that P is not morally right, is mistaken, unsuitable, improper, unjust and unlawful. In other words P is "injurious, heedless, reckless, unfair, contrary to the moral law or to justice".<sup>25</sup>

We may conclude as follows: To say that P is unlawful but not illegal means that P is liable to be declared void, that P is prohibited or unauthorised though P is not in defiance to the law, is not contrary to law, that P is not in violation of a law or rule which has the force of law. To say that P is wrongful but not illegal means that P is contrary to the rules of legal justice, that P is mistaken, injurious, reckless, heedless, unfair, improper and contrary to the moral law or to justice but that P is not contrary to law, that is, that P is not in violation of a law or rule which has the force of law.

Put together, this means that the execution of Nosiru is liable to be declared void because it is contrary to the rules of legal justice, to the extent that it is mistaken, improper, heedless, reckless and contrary to the moral law but that, strictly speaking, the execution is not in violation of a law or rule which has the force of law. These interesting distinctions make less sense however, once Black's position is adopted. Black takes illegal *per se* to mean unlawful in and of itself<sup>26</sup> while unlawfully means "illegally, wrongfully, that which is manifestly illegal".<sup>27</sup> It is no wonder then that the Supreme Court rejected the subtle distinctions overtly intended as distractions. If the execution is legal yet the law is said to be silent on it then there is a puzzle. This puzzle the Supreme Court appears to have resolved by holding that the execution is wrongful, unlawful and illegal, in spite of the apparent tautology in the use of the three concepts together.

The Supreme Court then found an answer where the law is silent, i.e. is plainly not designated. How? The Court found an answer using its discretionary powers. Hart accepts judicial discretion rather narrowly and weakly on the assumption that the vast majority of cases fall within the clear core of concepts. The example analysed here, it would appear, contradicts Hartian doctrine. Dworkin treats judicial discretion, on the other hand, very broadly and strongly because of his thesis of the union of both principles and rules in any legal system. C.L.S., however, think that the use of judicial discretion does not resolve entirely the problems posed by the existence of legal gaps.

Otakpor has suggested that "the need for discretion is certainly present in any imaginable legal system. The two main concerns of Dworkin, discretion occurring because of the conflict of principles or rules, and discretion arising because of the absence of rules are rather of prime importance."<sup>28</sup> As to rules being absent, the rather obvious doctrine that what is not illegal is legal has been given a legal thumbs down by the Nigerian example cited here. Judicial discretion "arises overwhelmingly because of unclarity or ambiguity in an existent rule"<sup>29</sup> or in the absence of an applicable rule. It is to Dworkin's credit that he has attempted to develop his theory of principles into a complex theory of interpretation to deal with the crucial issue of discretion. In deciding the case analysed here, the Nigerian Supreme Court relied on general political, social and moral principles: the right to life and to appeal. The following principles suggest themselves:

Q1. Does the Nigerian Constitution protect human life? Has it provision for appeals?

<sup>25</sup> Black, *op. cit.*, 1446.

<sup>26</sup> *Ibid.*, 673.

<sup>27</sup> *Ibid.*, 1377.

<sup>28</sup> Otakpor, *ARSP, op. cit.*, 173.

<sup>29</sup> *Ibid.*, 174.



- A1. From general political, social and moral principles and from democratic theory, legislatures are the right arena to make collective decisions about these matters, but the same general principles and constitutional doctrine impose duties on the Supreme Court to act for the public good.
- Q2. What interpretation of the Statute best ties the language of it to the legislature's duties and intentions.
- A2. The interpretation which is based, not on some hypothesis about the legislature's intentions, but on a political theory or norm that justified this statute in the light of its more general responsibilities.
- Q3. What principles and policies might properly have persuaded the legislature?
- A3. Well, for example, those broad principles popularly referred to as natural law and natural rights enunciated in Chapter IV, Section 30(1) and (2) of the Constitution dealing with Human Rights in general.
- Q4. But which, specifically speaking?
- A4. The Constitution sets such high priorities and standards that only an interpretation or construction that approaches these standards can make sense. Therefore, the interpretation that appears justified by the general given features of the Constitution is the one that makes sense.

The execution of *Nosiru* is neither particularly designated nor expressly forbidden by a statute. The Supreme Court, nevertheless, may have worked its way out in the manner suggested above. If that be the case, they then relied on general moral principles to arrive at a decision where none was dictated by any rule of law. The existence of such general principles which are implicit in Nigerian legal and political institutions justifies the Supreme Court's decision.

The problem of legal indeterminacy has been exacerbated in countries like Nigeria because courts are independent only in purely non-technical terms. Judicial independence and the principles underlying it are espoused mainly for partisan political purposes and rhetoric. The executive and legislative arms have often subordinated the judiciary to themselves using both overt and not so overt mechanisms like budgetary control, denial of security of tenure, and in most instances outright usurpation of judicial functions. The result is that judges, though knowledgeable enough, shy away from innovativeness and creativity in terms of helping to shape the law when circumstances so demand. In such situations, the law is shot through with inevitable but avoidable indeterminacies. Avoidable because in jurisdictions where courts acknowledge their creative functions and are allowed to actualise them, helping to shape and reshape the law goes a long way in minimising the degree of indeterminacies in the legal system.

So, either indeterminacy in law must necessarily give room to creativity with the political implications involved or it cannot preserve its epistemological implication of novelty. Creativity has a brilliant career in law. Why this has been possible is (a) because of the existence of legal gaps, and (b) because the cult of novelty plays a significant role if the concrete possibilities and directions of renewal and reoccurrence are not known.

The concepts of innovation and creativity in law cover the following: (a) the introduction of a new rule or principle or order—one with which the legal system is unfamiliar with; (b) the introduction of a new rule or principle or order untested by experience; (c) it opens a new legal horizon which the legal system has not previously entered or explored, whether or not this horizon has existed before.

Consequently, the only self-repeating criteria of innovation and creativity

in law is their novelty. As Carl Rogers puts it, "the very essence of creativity is its novelty".<sup>30</sup> Other opinions not necessarily contradictory to Rogers are, for example, A. Roe, who views creative work as "a novel work that is accepted as tenable or useful or satisfying".<sup>31</sup> In the same vein A. Rothenberg contends that "creations are products which appear new and are considered valuable".<sup>32</sup> These approaches have one thing in common—they allude to the usefulness or fitness or creativity, whether direct or indirect. There is also the consensus that novelty is predicated on both innovation and creativity. This is particularly important in any legal system. A legal system will survive the traumas of social life and interaction if courts have the possibilities for real creative and innovative work. On the other hand, society *per se* and social life in particular will be under severe strain, will in fact be threatened if the possibilities for innovation and creativity are absent or stifled by political pressures. The dynamism of any legal system, to a considerable extent, depends on this.

Yet, it must be conceded that innovation and creativity are not only factors and mechanisms for development. They are also factors for decline. If courts fail to innovate or create when they necessarily have to do so or are in fact impelled because of the absence of a rule that is particularly designated, then we can talk of legal decline.

To sum up, the argument that the execution of Nosiru is unlawful but not illegal or that it is wrongful but not illegal is totally reliant on the rules-only aspect of law. It is essentially Hartian, Austinian and positivist. This approach does not give a good account of the place and role of general principles in dealing with the problem of legal gaps. The argument that the execution is unlawful, illegal and wrongful acknowledges the place, role and importance of general indeterminacy. This approach is essentially Dworkinian. And of course, proponents of C.L.S. are correct in their characterisation of the problem as one that is never permanently resolved because legal doctrine is essentially a patchwork "so internally inconsistent and contradictory that there is no coherent theory capable of justifying enough of it to satisfy the fit requirement of Dworkin"<sup>33</sup> or the rules only of Hart.

Legal indeterminacy raises the twin problems of judicial discretion and judicial choice. It directs attention to the fact that innovation and creativity are important factors for legal development. Legal indeterminacy, however, does not take place in a socio-cultural void or vacuum. The questions of legal indeterminacy could be posed and answered correctly only if we proceed from the premise that it could not develop or exist in a social vacuum, and that it is built on particular ideological and value oriented foundations. A foundation in which language can both be vague and ambiguous; in which our ordinary intentions and desires are not easily discernible, and above all a universe in which adjudication is eminently political. Therefore, if legal doctrine is not often in good logical order, is indeterminate, it is primarily because language is, often, not logically ordered, politics is not often in good logical order, life itself is not in good logical order—is neither symmetric nor logically tidy. Since no legal system has answers, partial or complete, to all

<sup>30</sup> Carl R. Rogers, "Toward a Theory of Creativity" in A. Rothenberg *et al.* (eds) *The Creativity Question*, 1976, 298.

<sup>31</sup> A. Roe, "Psychological Approaches to Creativity in Science", in *The Creativity Question*.

<sup>32</sup> A. Rothenberg, "The Process of Janusian Thinking in Creativity", in *The Creativity Question*.

<sup>33</sup> Altman, *op. cit.*, 222.

legal questions over which the courts have jurisdiction, it follows that legal indeterminacy is unresolvable *per se*. It has no special status over and above other “indeterminacies” that are recurrent and plague human life, though its consequences may be more far-reaching.