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Criterion of Foundation of Norms as Norms of Good Practices

— A Re-examination of the Principle-based Structure of Norms on the Background of Values

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Norms, principle-based norms, values, value-based norms, philosophy of norms. HLA Hart, R. Dworkin, J. Habermas.

Abstract

Norms are based on rigour and principles; norms don't depend on values. Facts' determination on norms should be limited to strict knowledge of these determinations, which are never normative justifications. However, values may or may not have normative power, but even without normative power, values make us who we are as human beings, on the background of attachments which shape more irrationally our psyche as affects. Rights compared to principles bring back the idea that some determinations cannot be taken away of the definition of norms, instead rights invite us for a compromise, when factual determinations as inequalities impact in unjust ways duties and authorisations, a right-based approach tend to bring light to theses unfair conditions and invite for a redefinition, not following essentially the commandment of rights but rules that are thought to prevent chaotic transition from one set of rules or principles to an other rule corresponding better to a new situation in the world.

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1. Introduction

This article dares a provoking thought experiment on norms, through a brief comparative analysis of three theories of norms, all distinct from the more traditional values-based explanation of these norms, as developed by H. L. A. Hart, Ronald Dworkin, and Jürgen Habermas[1]. These perspectives are not intended to unfriendly distancing from cherished values, the objective is simple, it is to illuminate different ways of distinguishing a key concept for building a good practice-based model of governance, in the background of facts, values, and norms in everyday life.

We suggest that the distinction between values and norms in particular, when properly explored, can yield three interpretive approaches—each useful in navigating the contemporary landscape of good governance as found on valid norms. The lessons learned from this thought experiment, as we hope to establish with humility, is revisiting certain foundational concepts in the philosophy of norms borrowed from the philosophy of law—concepts which, we argue, remain defensible, and even sufficient conditions for any normative engagements outside of the legal field. Our aim is to show that, while the legitimacy of given norms or values is inevitably shaped by the Zeitgeist, the three perspectives examined here—offer in the 20th century enduring conceptual tools that remain relevant in the 21st century.

Before we proceed to outline the key concepts from the three thinkers we consider most relevant to understanding what constitutes a norm of good governance, we will make a very brief digression. George Orwell (born Eric Arthur Blair, 1903–1950) posed, in 1949, an urgent question about human freedom and moral obligation—pointing at an insidious form of interference with norms: the manufacturing of (counter-)values by a power that manipulates language. His concept of a *Newspeak*, which is seen as replacing

[1] This article is based on a presentation done the 28 May 2024, Ética, educación superior y sociedad, for Universidad Católica de Cuenca, Ecuador. Parts of this essay have been translated and rephrased with the assistance of OpenAI's ChatGPT language model.

gradually our *Oldspeak* (by 2050, following the estimation), symbolised the erosion of traditional ways of living and thinking, in an unusual way. It is for the sake of our argument important to notice that Orwell opens a debate on values and counter-values, he does not discuss norms, rather depicts a phenomenon of hyperinflation of values, a situation where an overuse causes the idea to become almost meaningless. Such ossification or mumification of conventions and standards should not be exaggerated, but reveals some profound truth. Norms and values may mutually profit from being considered as distinct realities, with proper ontological world and precise categories. If we fail to do our housework, and present a blurry distinction between both spheres of the reality, social life may lack some essential oxygen to properly function, and we fall in the network of a subtle system of passive submission.

If a precise semantic and conceptual cartography is not available and provided, with the possibility of impoversihment of the language, we would face a problematic situation where the possibilities for dissenting thought to occur would dramatically diminish. One symptom of the semantico-conceptual impoverishment is the proliferation of conceptual antinomies that obscure epistemic modalities, conceptual categories, and ontological dimensions.

In ordinary contemporary discourse, meaning is often elusive: suggestion replaces clarity, while hyperbole, understatement, anaphora and euphemism saturate communication. Digital technologies further accentuate this trend by producing "ready-to-think" content, potentially generating waves of value trends, analogous to consumer fads, shaped by the sheer volume of information and thematic trends.

It is striking how vulnerable teleology—or the science of the hierarchic (axiological) dimension of value—is to the way we use our language of thought in the background of our language of communication. Statements about action (e.g. duties or permissions) are easily conflated with value-laden ends. Failing to comply with a duty—such as driving on the correct side of the road—violates both a formal norm (you ought to drive on this side of the road) and the underlying goal of safe collective circulation. To drive in the wrong direction is also to misjudge the factual premise that traffic flows in a given direction.

Exploring the tension between facts and norms in the form of an antinomy recalls *Hume's Law*, the prohibition on deriving an "ought" from an "is"[2] —what Hume himself referred to as an "artificial virtue", which as norms of justice differ from natural virtues, or those sets of virtues we attach to moral sentiments such as egoistic feeling of pride, or social virtues of friendship and mutual collaboration. Extending the logical difference between the two concepts of value and norm has been realized by the legal positivist H. L. A. Hart in the 20th century, when we are further made aware that thinking in terms of "rules" distances us from the moralistic terrain of "values and conflicts" (Ladd, 2022)[3]. But recognising rules as distinct from values does not imply an irreconcilable antinomy, it is an approach defined as grounded on social practices and institutional facts. Not through the lens of values, as moral or natural law theorists do, norms are instead extracted from observable social behaviours. Without imposing Hume's "is–ought" dichotomy in an uncritically way on Hart, risking that legal reasoning devolves into simple dichotomies of for and against, as Ladd observes, Hart's definition of norms is remarkably clear and precise, looking into human actions, practices, recognitions and use, not in abstract values[4]. It allows to depict an "internal view", how participants see a set of rules as normative, i. e. obligatory.

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[2] The reference to Hume's law appears in *A Treatise of Human Nature*, a work Hume began writing at the age of twenty-three, with the first edition published in 1739–40.

[3] I draw inspiration from a particularly illuminating reflection on the concepts of fact, value, and norm by K. Ladd, in Ladd, Kevin. « Faits, valeurs, normes : Y a-t-il une vérité du droit ? (Putnam critique de Habermas) », in : *Revue interdisciplinaire d'études juridiques*, 2022/2, Vol. 89, 119-146. DOI : https://doi.org/10.3917/riej.089.0119

[4] Duncanson (2011, Ch. 1) has captured this problem of abstract rationalisation of the law, which Hannah Arendt saw at the centre of the problem of the "banality of evil" in the A. Eichmann Trial, he cites Adam Smith as example, he who has not transmitted his vast experience in legal matters during his lifetime and denied firmly that "law unfolds in the matrices of policy and the protocols of an internal logic of, as one twentieth century jurist put it, "law beyond law". "In other words, he did not believe that law could be grasped as an abstract structure, but only, and in this his thought

Let us present a brief history of the state of the question on norms before Hart, following the utilitarian tradition, around the general idea that the role of *social utility* in shaping virtues should be the main focus for norms—what is useful to society is considered both as a virtue and a norm.

Applying Social Utility Rigorously: A Short Comprehensive Introduction

Jeremy Bentham was the first true systematic utilitarian. His view of norms is grounded in the principle of utility defined as the greatest happiness of the greatest number. Bentham borrows two key intuitions from David Hume's account of justice: first that a norm was related to utility and refusing a vision where norms and law emerge from an original compact or contractual agreement[5]. Second, Hume established interestingly (Hume, 1752) that no such contract truly ever existed between a leading power and the citizens, or constituent stakeholders, and that a global anthropological survey could easily corroborate this claim, providing an empirical but also plausibly universal justification for the utility associated norms, attached to the strict social conditions that render it useful (*An Enquiry Concerning the Principles of Morals*, 1751 and *Of the Original Contract*, 1752).

As general tendency of trying to understand human behaviour and the origins of states and institutions through natural explanations, in the 18th century, it is a common view to see leaders govern by force or inheritance. As traditional source of authority, sovereigns began through "succession, conquest or

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resembled that of Edmund Burke, by reference to particular contexts and specific contents".

[5] This point of view is shared among both the Utilitarian tradition and the analytic positivist view of Hart, even social constructivism of Habermas, based on communicative action and the role of the public sphere, against main 20th century figures such as John Rawls (See Finlayson, 2019). Rawls on the contrary thought that the veil of ignorance of an original position, would suspend all sorts of value-related preference. There is an ongoing and enduring effect of the reception of the Habermas-Rawls debate, based on the exchange which took place in the 1990s.

usurpation" (Hume, 1752). By contrast, the view that basis of governance is on popular consent, and on forming the idealized fiction of a contract is considered as based on *no historical evidence* (Hume, *Of the Original Contract*) (our ital.).

This line of view refined by Jeremy Bentham, focuses on a hedonistic ethical theory in a very systematic and philosophically rigorous manner, thinking that norms are justified insofar as they promote pleasure and minimize pain. In doing so a possible value-neutral enterprise is left aside by Bentham's utilitarianism, which was quantitative and hedonistic, centred on normative and legal reforms.

John Stuart Mill and Henry Sidgwick (*The Methods of Ethics*, 1874) would refine further and expanded the utilitarian normative scope in the 19th century, to include sophisticate modal contexts and develop tools to provide solutions for complex ethical dilemmas. It is in this context that building on John Austin's early legal positivism (*The Province of Jurisprudence Determined*, 1832/1863), HLA Hart's view diverges not so much in the method of looking in the social conditions, but sharply on the grounding. Does law prescribe norms *in the name of values* such as utility, or promotion of pleasure (hedonism) without any claim to *truth*, or does it do so because it rests upon a normative aspiration to truth, not any precise value (be it well-being or even the prevention of pain or harm) — a claim made not in the service of ideology, but in the name of rigour (Schofield, 2021)[6]?

To move to the view of Hart, a careful study of the notion of commandment or injunction is needed, based on the preliminary systematic discussions of Austin. Only with appropriate methodological caution can abstract reasoning be made useful in describing real-world phenomena. Otherwise, impoverished vocabulary will fail to capture the complexity at hand. Indeed, as Kramer underlines in his recent reference work on Hart, Hart

[6] Schofield, Philip. "Jeremy Bentham and the Origins of Legal Positivism." Chapter 9. In: *The Cambridge Companion to Legal Positivism*, edited by Torben Spaak and Patricia Mindus, 203–24. Cambridge Companions to Law. Cambridge: Cambridge University Press, 2021.

"reinvigorated legal positivism by *disconnecting it from the command theory* of law defended by his predecessors Bentham and Austin[7]" (Kramer, 2021) (our italic).

Similar methodological caution concerns the separability of norms/laws and morals, which founds in the geometric set of fundamental principles, the kind of truth normative system norms may possess. Although we will not lay out a precise theory here—as a watchmaker might with tools and cogs—which would appear only technically relevant for legal scholars or political philosophers. We suggest the reader to approve a very simple claim: that truth of this moral dimension of norms/laws has to be clear in order to secure the conditions of civilisation as legal system, or the conditions of good practice in a normed civil society.

The search for truth in the domain of duty, ought to remain the vanishing point toward which the entire architecture of legal normativity converges. In other words, *truth* is somehow reminiscent of a perfectionist ideal of the *just*, of the *virtue of justice* from the natural law tradition. Like an architect's plan, the norm should be rigorous, a constrained structure—not an imaginary space—whose coherence depends on every part being oriented toward a shared order.

This rigour can be explained ultimately by the position one take with regards to the traditional crossroad between Hume and Kant or Hegel and Marx, on the idea and orientation of a philosophy of History. This observation may seem to imply vast historical philosophical culture. In a sense, inevitably it will, but we would invite the reader not to be too concerned by this aspect of the question, which is important when describing the metaphysical or religious dimension of this question.

To quickly show how norms may reach into complex metaphysical concepts, we could mention the work Habermas released on religion and philosophy in

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[7] Kramer, Matthew H. "The Legal Positivism of H. L. A. Hart." Chapter 13. In: *The Cambridge Companion to Legal Positivism*, edited by Torben Spaak and Patricia Mindus, 301–24. Cambridge Companions to Law. Cambridge: Cambridge University Press, 2021.

2019, where the unity of the lifeworld is seen as associated with a possible religious cultus, moving away from scientific knowledge into a philosophy of History. A notion of transcendence is questioned, on the side of Hegel against Kant, and social determinations become increasingly important, by opposition to the utopian hope for transcendental unity in cosmopolite values[8]. Norms deserve nevertheless a repeated attention. We would argue that the question of free agency should be put aside as deeply metaphysical. As the question of the existence of God, we may leave these aspects of the reality – deep and undoubtedly important dimensions of the reality aside, when defining social norms in an effective manner.

The Ethical Issue

Oxfam's 2025 report on Africa reminds us about the problem that 3/5 of the wealth of the richest persons in Africa comes from inheritance and the traditional sources of power such as nepotism and corruption. If the African States and civil society would just increase by 10% taxation on income and 1% on fortune, it would allow financing access to education and electricity on the whole African continent (Oxfam Int. Report, Africa, 2025)[9].

The need to redefine norms at all levels is revealed less through consensus emerging from civil society's dialogue on values—as one might assume—than through the growing manifestation of a cynical disregard for norms and their constitutive role in public life. Following a simple utilitarian consequential calculus everybody can understand why allowing the richest to pay less taxes, impacts on large social basic goods. Certain social objectives, such as knowledge and information access to schools and bringing digital

[8] Cobben, Paul. Habermas' receptie van het denken van Hegel en Marx in Auch eine Geschichte der Philosophie. ANTW 113 (2): 303–318. DOI: https://doi.org/10.5117/ANTW2021.2.008.COBB

[9] This symbolic and modest increase of tax of Africa's richest "could generate $66 billion a year for the continent". "Africa's richest four hold more wealth than half the continent" – Oxfam, 9 July 2025. Oxfam.org website: https://www.oxfam.org/en/press-releases/africas-richest-four-hold-more-wealth-half-continent-oxfam

connectivity further, into remote areas, are real global needs[10]. In many concrete examples, where we don't find practical engagement with norms: as the duty to pay an annual contribution as taxpayer to our social community, it is not correct to observe the given norm, but the injustice of the consequence of this choice is not subject of debate or discussion. Collaborative civil society initiatives often prove more effective in contexts where critical intelligence is required—not due to the inherent ambiguity of norms, but because of an imbalance in the distribution of power. Let us consider such situations, where the principles of governance themselves are perceived as unjust.

2. Norm and Rigour: Hart as Model

Let us now turn to the question of definition—specifically, a rigorous definition of normativity—through the work of H. L. A. Hart (1907-1992), keeping in mind that although most of the early concepts concern legal frameworks, the categories remain essentially the same, for any type of social regulation or tool of institutional good governance. Justice begins with understanding and applying the correct definition of the relevant set of rules.

In *The Concept of Law*, Hart demonstrates the philosophical importance of grasping the legal order – understand here the normative order – not merely in terms of empirical practice, but "in principle." This involves distinguishing between, on the one hand, the structural relations that constitute the normative/legal system and, on the other, how normative/legal rules are applied by authorities and experienced by normative/legal subjects. Central to his approach is the differentiation between legal norms/norms in general and the idea of justice, which exceeds and transcends the realm of codified norms/law. It is precisely in this conceptual excess that any serious discussion of values must be situated.

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[10] The international civil society NGO Globethics has invested considerable means to realize this objective. It has been named a WSIS Prizes Champion 2025 for the project "Amplifying the Voice of the Global South for Ethical Knowledge and Education in the Information Society" in June 2025 in Geneva, at ITU's AI for Good Summit.

If our conception of norms or governance, for Hart of Justice, were to collapse entirely into existing codes or laws—not in particular cases, but as a general rule—then the legitimacy and justice of the institutional/legal system would become indistinguishable from its legality. As Bayles notes in his analysis of Hart's notion of *definition*, this conflation obscures the philosophical distinction between the normative formal (or in the legal sense law's formal structure) and its evaluative legitimacy (Bayles, 1992, p. 15). *The definition of law is not reducible to its criteria of application*. Hart's contribution is to clarify that legal reasoning must not conflate descriptive regularity with normative justification.

Hart facilitates a sophisticated understanding of norms, proposing that *rigour* in normative thought should not be confused with *coercion*. To think of norms rigorously is not to increase its normative burden through proliferation of codes or authoritarian rules. Rather, it is to refine the precision of normative reasoning, such that civilized tolerance of the difference can be anchored in principled normativity. This rigour reflects a higher-order structuring of norms, either through secondary rules (rules about rules) or through fundamental principles, as Hart explains in his distinction between *primary and secondary rules*.

Depending on whether a rule is primary or secondary, Hart's legal theory suggests a marked distance from approaches centred on conflict, class struggle, or political mobilisation. While socialist, right- or left-wing populists, in short conflict-based theories may view legal norms as sites for democratic contestation and transformation "from below," Hart's framework eschews such ambitions. Instead, it privileges internal coherence, conceptual rigour, and normative restraint.

One truly admirable strength of Hart's approach, in our view, is its translatability beyond traditional normative [mostly legal] systems—extending to domains such as codes of conduct or *soft law*. Let us therefore propose a thought experiment that draws an analogy between *hard* law (as traditionally defined) and *soft* law (such as policy codes or ethical guidelines):

- *Foundational principle*: Rigour lies in the analytic precision of concepts, not in their coercive force. Legal thought is grounded in

the principle of tolerance or negative liberty and in a very minimal conception of natural law (the religious or metaphysical substratum).

- *Corollary*: It is misleading to distinguish hard and soft law on the basis that the former is binding and well-defined, while the latter is merely suggestive or flexible.
- *Aim*: If the concept of legal norm depends on its rigour rather than its enforceability, then *soft law*, too, must be assessed according to conceptual clarity and internal consistency. Once this thesis is accepted, it becomes evident how normative and legal thinking—applied even to non-binding norms—can aid in designing more coherent policies, ethical charters, or codes of best practice. Normative rigour is the backbone of responsible leadership, across any possible system of values.

A long and illustrative passage from *The Concept of Law* (Bayles, ibid.), clarifies further Hart's position on the definitional structure of normative/legal concepts:

> "There is, it seems, some complexity in the structure of the idea of justice. We may say that this idea includes two aspects: a constant element, summarised in the precept 'treat like cases alike', and a shifting criterion used to determine, with reference to some purpose, when cases are alike or different. In this respect, justice resembles such notions as 'authentic', 'great', or 'hot', which implicitly refer to criteria that vary with the class of objects to which they are applied... But justice is far more complex than these, since the criterion of relevant similarity between different cases varies not only by subject matter, but can itself be contested even within a given context. (*The Concept of Law*, pp. 156–158)

Hart notes that in some cases—especially concerning the *application* of the legal norm rather than its content—similarities and differences between individuals are clearly identifiable. When a law is justly applied, it is done

without bias or prejudice: for instance, a criminal normative law is justly enforced when it is applied equally to all those who have committed murder. Here, the legal norm itself supplies the relevant criteria, and justice consists in adhering to them without arbitrariness.

The link between justice and the rule of legal norm is thus intimate. Applying a norm justly means treating similar cases alike, without being swayed by external interests. Yet, as Hart makes clear, conflating justice with mere conformity to legal norms is a mistake. Legal rules themselves can be subject to moral scrutiny. A law may be applied with perfect procedural fairness and still be *substantively unjust*—such as a law excluding people of colour from public parks (as in South Africa, during the Apartheid period).

This case is worth a closer reading and comparing it to current similar situation in the occupied West Bank and Israeli application of law in occupied territories. While South Africa's laws were racially explicit (race-based segregation) as a single normative framework, current Israel's normative legal dualism for Palestinians in the West Bank is slightly different. Framed in terms not of direct normative permission or interdiction as in SA, but indirect legal dualism, applying national security norms, norms of zoning, or norms of citizenship: all which in effect are similar but very different in the normative rigor of the rules. Instead of transparently have an unjust rule, here we have an entrenched inequality and ethno-national domination, as Israeli authorities have central legal and administrative mechanisms used to control land use, settlement construction, and Palestinian development, not a single norm but a dual system. The dual zoning for instance—two populations in the same area governed by two different sets of rules based on ethnic/national identity: retroactive legalisation of unauthorized settlers outposts, is not only unjust because immoral, it is based on self-contradicting normative processes, which make the set of norms further open to arbitrary decisions and coercion[11]. Thus, the concept of justice must remain analytically distinct from

[11] South African Apartheid regime included also *dual legal frameworks* gradually, once it became clear that the first classical model did not meet all expectations: the

legal validity. When both justice and normativity become incoherent at the moral level, revealing manifest injustice, a civilisational hierarchy may emerge—one historically used to justify colonialism. Settlers are viewed as bearers of modernity and norms (and law), while the indigenous population is governed by exceptional or military rule.

When we move from the application of legal norms to the evaluation of those norms themselves, we enter a space of legitimate disagreement—one shaped by differing political and moral worldviews. In the examples above, we deemed the exclusionary rules unjust, not because it was misapplied (in case of Apartheid SA), but because the criterion of racial distinction is irrelevant to the enjoyment of public amenities. The principle underlying this judgment is the prima facie equality of all individuals.

This insight leads to a foundational negation: that rules backed by command and threat do not define legal normativity more effectively than rules defined conceptually as *rules*. The Austinian tradition, which grounds law in sovereign command and utilitarian calculation, poses a challenge to formal,

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Bantu Authorities Act, for instance, is comparable to the Israeli Military Law, in that it substantially reduced civil norms, conceived as a rigorous a coherent unique system for all citizens. Chinese legal system is different as it is a very old Imperial structure, where normative homogeneity has a long history. Nevertheless China had quite similar constitutional and parliamentary normative challenges, when China gradually tried to integrate all 56 different ethnic groups (e.g. the Tibetans with distinct language, religion and culture, Mongols, with again proper language similar to the country Mongolia, Hui Muslims, who are Han Chinese speaking and Han in culture but a population of different religion, the Uyghur Turkic speaking from the Xinjiang, or Manchu people, one of the largest ethnic group, but very well assimilated). Chinese authorities had either thought to try to assimilate regional units or use a "patrimonial" representation method, where oligarchic leaders of the minority regions are granted privilege, in exchange of a dual system of normative loyalty to the Han majority. Here the citizens are not all equals before the law, but they benefit from a symbolic presence in the higher chamber in the parliament, without lower chamber representation. (Ge Zhaoguang in: Marc Andre Matten, Egas Moniz Bandeira, 2023/2025; E. Bender de Moniz Bandeira, 2025).

principled legal reasoning. The case of West Bank shows in a particularly clear way, that sovereign command and utilitarian value system, may open under the justification of legal rationality, the justification of civilizational stratification, while rules in the sense of Hart have stronger universal validity as norms, preventing them from being seen as pure instrumental normativity and legalism. Bentham had initiated a positivistic turn on norms, but he based the aim of rules on the social benefit, which was the reformation or improvement of social orders deemed "irrational" or "primitive.[12]" Our intend is not to enter the complex identity of some legal system, at a given point of time, as Israel's legal and normative structure is one of the most complex and fascinating to study[13].

Austin collapses normativity into observable behavioural outcomes, thereby reducing law to a tool for producing compliance. What is missing from this view is an internal notion of truth—what we might call a minimal natural law.

Hart's response is elegant, systematic, and conceptually economical. He situates law at the level of *foundation*, distinguishing between types of justice that ground the legal order as a rational system oriented toward liberty and coexistence. His criteria are aesthetic, ethical, and intellectual: they elevate the norm above its mechanisms of enforcement. For Hart, legal authority is not vested solely in judges or sovereigns, but in the internal logic of principles. The law must be defensible not only in pragmatic terms, but as a form of reasoning.

We may summarise the conceptual directions opened by Hart and further developped by Dworkin as focusing on rights in two parts:

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[12] We will not expand on the use of Benthamite to reshape colonial legal frameworks, there is a great literature on this subject. See as good critical overview Duncanson, Ian. 2011. *Historiography, Empire and the Rule of Law*, Taylor and Francis, Ch. 1, The Themes Introduced: Law, the Subject, Sovereignty and Certainty.

[13] For further readings in that direction: Nir Kedar. "'I'm in the East, but My Law Is from the West': The East-West Dilemma in the Israeli Mixed Legal System" in: Palmer, V.V., & Mattar, M.Y. 2015. *Mixed Legal Systems, East and West*. Ch. 9, London: Routledge.

1. *First*, how might we define *soft law* or codes of conduct using Hart's notion of legal rule? If rigour, truth, and systematic coherence are the hallmarks of legal normativity, then these traits must also define well-constructed non-binding norms. A good practice rule becomes the core of this extended definition.

2. *Second*, legal rules that confer *powers* or *permissions*—which Hart calls "power-conferring rules"—may be conceptualised as *rights*. Following Dworkin, we will examine how a coherence test can be applied to such rights, permissions, and authorisations from a judicial perspective.

Hart's theory enables us to think of soft law within a rigorous framework, using three conceptual questions that lie at the heart of his legal philosophy:

- **A.** In what way does a legal obligation differ from a command backed by threat, and how is it related?
- **B.** In what way does a legal obligation differ from a moral obligation, and how is it related?
- **C.** What is a rule, and to what extent is law a matter of rules?

Duty and Authorization in Hart's Theory

Hart identifies two fundamental types of legal rules—or, more broadly, rules of sound practice:

- **(1)** Rules that *impose a duty*, from which one can infer an *obligation*. These include conventional practices such as removing one's hat upon entering a place of worship, covering oneself appropriately, or removing one's shoes in culturally significant contexts.
- **(2)** Rules that *confer an authorization or power*—for example, the ability of a court to adjudicate disputes, or the establishment of procedures for entering into contracts, holding elections, appointing authorities, or amending existing rules.

The "hard cases" arise precisely when the liberal principle of rule-definition, grounded in sound practice, falters. This principle, based on clarity and regularity of usage, resists treating interpretation as a genuine issue. However, when we feel interpretation *is* needed, this very necessity may indicate that we are veering away from the rule's intended direction. This occurs, for example, in ethical norms, codes of conduct, or policy frameworks where the lack of clarity reveals an absence of *true practices*. The rules in question lack the inner coherence of lived practices, and instead become instrumental—governed by utility—or merely inconsistent.

Twenty-First Century Hard Cases

Contemporary cases of normative breakdown provide fertile ground for Hart's distinctions:

- **Public Health Failures and Pandemics**: Poor hygiene practices and the lack of well-established behavioural norms have led to preventable health crises. Rules were either missing altogether or imposed reactively, without being grounded in shared practices of care.
- **Demographic Crises and Cultural Tensions from Migration**: In attempts to counterbalance declining birth rates, migratory flows introduce new cultural expectations. Though rules of practice may exist, they often lack genuine adoption due to hesitant educational initiatives, low trust in institutions, and insufficient integration of new actors.
- **Forced Migration and Land Ownership Conflicts**: As climate change—particularly desertification in the Sahel—forces nomadic populations into new territories, they often encounter established property norms they do not recognize or follow. Here again, rules of practice are missing or non-transferable, revealing a deep mismatch between legal expectations and sociocultural realities.
- **Globalization Without Contextual Sensitivity**: The unreflective expansion of global economic norms—driven by principles of

competition rather than context—has led to brain drain, loss of local knowledge, and deindustrialization. Even when rules of practice exist, their overly broad application results in inefficiencies and, worse, perceived injustice. One telling example is the *double standard* scenario: as in sports, where one team benefits from home advantage, legal or policy norms may favour one group over another, undermining their claim to universality.

- **Mismanagement of Energy Transitions**: Social unrest sometimes emerges from imposing expensive and environmentally harmful energy policies while discarding more viable alternatives (e.g., nuclear energy in favour of less efficient options). Rules of practice in this context lack economic sustainability and legitimacy.

- **Lack of Transparency in Geopolitical Conflicts**: Recent escalations in military tensions—especially in the context of the Ukraine war—highlight a new kind of normative breakdown: rules are neither transparent nor ethically consistent. Strategic decisions are often driven by opaque agendas, such as arms industry lobbying (e.g., Lockheed Martin, Raytheon, Boeing, Northrop Grumman), and information itself becomes weaponized.

  As a Reddit participant formulates it:

  "The 21st century appears to be shaping up as a conflict between the hopeful democratic idealism of Habermas and the cynical religio-fascism of Schmitt (influenced by Nazism).

  Habermas's failure was in imagining humanity (as whole) better than it really is. Schmitt's success was in realizing that a small group of authoritarians can cynically destroy the democratic hopes of the whole." In other words: "problems" [...] such as the growing influence within Europe of an illiberal" tendencies, right wing revolutionism different from traditional conservatism, the growing attraction of "undemocratic China, appear ever more pressing".

> "Still eminent in the academy but increasingly marginal outside of it" (B. Smith, Why Jürgen Habermas Disappeared, 2021[14]).

This produces a remarkable novelty: war returns to European soil not merely as military engagement but as a *war of information*. Such conflicts manifest what Orwell termed *Newspeak*—a mode of discourse in which words are hollowed out, rendering real conceptual thought nearly impossible. Even outside physical conflict, the constriction of language and the erosion of semantic clarity mark the rise of a *soft totalitarianism*—one that controls not bodies, but minds.

A striking illustration is the Swiss government's recent stance. While asserting that it would not abandon its traditional neutrality, Switzerland supported sanctions against Russia. The so-called "Peace Conference" at the Bürgenstock resort in 2024, hosted by Federal Councillor Ignazio Cassis, proclaimed: *"We have decided to climb this mountain because everything must be done to stop the violence in Ukraine."* But this language—invoking peace while enabling sanctions—risks saying the opposite of what it claims. The term *"peace"* resonates powerfully in the collective imaginary, and when repeated often enough, it can obscure the true nature of the political act.

This phenomenon illustrates a deeper philosophical point: *authorization without reciprocal intention lacks validity*. A person showing up alone to the town hall cannot be said to enter into marriage—no matter how solemn the ceremony—if the other party is absent. The rule, as a conferral of legal power, only holds if both parties manifest clear and mutual intention. Today, in many European countries, fewer than half of couples with children marry; few still remove their hats to attend church on Sunday. What, then, do we still understand of norms that have gradually lost their sociological force?

- **Disinformation and Digital Overload**: Finally, the combination of Orwellian language, media ethics breakdown, and the exponential rise in data flows across digital networks erodes the *internal truth* on which legal norms rest. When data is manipulated and privacy

[14] Blake Smith, Why Jürgen Habermas Disappeared, *Foreign Policy*, 7 Feb. 2021.

treated instrumentally, trust in digital systems—particularly those purporting to implement legal norms—deteriorates. The opacity of algorithmic governance and surveillance technologies contributes to a growing cynicism toward law itself.

3. Rights Beyond Rigorous Rules. Dworkin's Challenge to Definition and Rules

In his celebrated work *Taking Rights Seriously* (1977), Ronald Dworkin (1931-2013) emphasizes the importance of taking rights seriously, precisely because many of the problems identified in the previous section stem from potential confusion around the concept of rights.

Dworkin invites us to align ourselves with the broader Lockean political tradition, which bases legitimacy on mutual consent to useful social costs and benefits—not by reintroducing a teleological struggle for values, as in class conflict (John Locke, *Second Treatise*, 1689; *An Essay Concerning Human Understanding*, 1690). His goal is to highlight that without the concept of rights, we miss something that the idea of principles alone cannot adequately capture.

The notion of a *right*, akin to Amy Gutmann's idea of human rights, asserts that rights are necessary because collaborative rules based on a sovereign contract, such as national laws, are insufficient. To have a right that is both as robust and as minimal as possible—something basic yet effective—thinking solely in terms of principles is inadequate unless those principles also consider capabilities, as Hart emphasized.

According to Gutmann, even formal norms ultimately require a relationship to the sovereign, introducing the possibility of non-universalizable norms at varying degrees. An authoritarian leader may dismiss the suffering of a minority group so long as the majority (from whom their legitimacy derives) benefits. Hart similarly acknowledges such unjust legal rules.

Dworkin argues that we are *entitled* (understood as a kind of power) to mutually define the framework of legal legitimacy. His approach is more

constructivist than analytical or conceptual, focusing less on abstract principles of liberty and more on reciprocal rights between citizens.

Compared to Hart's formal, rational system of legal rules, Dworkin proposes a specific kind of rule that is essential to capturing the idea of reciprocal liberty. Let us now take an excursus to explore why our conceptual framework can be placed along a value-axis of liberty or reciprocal norms of freedom, starting from a "zero-degree" of liberty: *freedom of expression*.

Freedom of expression is either a purely factual condition—as social animals endowed with language, we naturally communicate when unimpeded—or it is a normative one, raising complex political questions about its purpose. For example, H. Howard suggests that expression functions as a normative vehicle toward broader political aims:

> "Human beings have every interest in communicating their thoughts to others and listening to what others have to say. These interests make it difficult to justify coercive restrictions on communication and support a plausible moral right to speak (and listen), which the law should protect. That legal protections should exist is not disputed by political or legal philosophers. But disagreements emerge when we look at the details.[15]

Following this, Habermas centers a *factual* freedom to communicate within the entire normative fabric of rights and duties. Yet, as Howard warns, expanding this right risks diluting its normative strength by absorbing increasing factual pluralism and value conflicts—something we must now examine.

[15] Howard, Jeffrey W., "Freedom of Speech", *The Stanford Encyclopedia of Philosophy* (Spring 2024 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL = <https://plato.stanford.edu/archives/spr2024/entries/freedom-speech/>.

4. Discourse Ethics, Facts, and Legal Validity: Daring Expression Outside Analytical Normative Practices

Let us introduce Jürgen Habermas (1929-) and the validity of legal norms in light of factual power dynamics in society—particularly in a *communication society*, the kind of society Habermas foresaw becoming ever more central in the 21st century. This conceptual framework will move around a limited number of key adaptations:

1. *Law must not dominate as a system* but must take the living world seriously (skepticism toward positivist sociology of legal norms).
2. *Inequality in access to knowledge and speech*: Habermas critiques systems and focuses on public discourse and ethics.
3. *Discursive nature of the social contract*, not merely electoral but performative, akin to "bottom-up" populist engagement.
4. *Three digital phases of communication society*: databases and access, smartphones, and artificial intelligence.
5. *Freedom from constraint* (negative liberty): freedom from external or excessive authority. In contrast, *positive liberty* (Isaiah Berlin) includes assisting others, developing character, and personal growth—linked to virtue ethics.
6. *Building social networks*: Collaborative use of liberty protects interests, ensures political voice, and strengthens economic influence.
7. *Time: economy of the attention*: Equal respect and fair consideration mean individuals can define their own time use—ensuring reciprocity rather than asymmetric exploitation (Habermas: "colonization of the lifeworld," echoing Spinoza).
8. *Bias, disinformation, freedom of belief/opinion*: If my highest value is an ethics of simplicity (the *summum bonum*), I must be free to form associations around it—either privately (Spinoza) or publicly

(Habermas). Freedom of belief remains essential, whether in a state religion model or an open public society.

From this tradition of legal philosophy, we see the gradual, subtle effects of Enlightenment ideals on rights. The rise of a public sphere is made possible by the socio-economic conditions of a powerful bourgeoisie. When opinion freedom is maximal, a "realm of communication" emerges—marked by debate, open urban space, and print (now digital) culture (Habermas).

In their reading of Habermas's *Between Facts and Norms*, Ott and Mathis highlight a dialectical interdependence between factuality and validity—thus challenging our point of departure in Hume's Law. They note, "the ideal aspect of the unconditional is deeply embedded in the factual processes of mutual understanding." In other words, the authors—like economists—invoke an aggregation of preferences, which departs from intentionality and returns to utility.

Habermas thus seems to seek a non-formal account of norm formation. "Validity claims," he writes, "have a Janus-faced character: as claims, they transcend any context, yet in order to coordinate action effectively, they must be issued and accepted here and now." This issuance and acceptance is not automatic. "Such an approach is necessary to understand how social integration can emerge—or, conversely, fail to emerge—under conditions of unstable foundations and precarious, counterfactual assumptions."

While Habermas (Habermas, 1962/91) broadly follows Kant in positing a social contract from which legal norms derive, he is also drawn to an empiricist positivism. He locates in communicative capacity a functional analogue to the normative capacity required for social life. As we have seen, language shapes our understanding of norms. The risk lies in whether the shared vocabulary—central to shaping our collective vision of living together—remains narrow[16], pliable, and limited to a few hundred words, or

[16] Habermas, J. 1962. *The Structural Transformation of the Public Sphere. An Inquiry into a Category of Bourgeois Society*, trans. by Thomas Burger, 1991. Cambridge:

if building on the inspiration of classical eloquence, we cultivate literacy, as technological enhancements may allow us to save time on repetitive tasks.

The Problem of Factual Inequalities in Habermas and Dworkin's Judicial Ideal

For Habermas, human communication naturally aims at mutual understanding. But grounding fundamental liberty in communicative freedom risks, according to C. Rahm (2005, 97), reducing autonomy to an extreme version of expressive liberty—making unlikely agreements seem plausible despite vast inequalities in speech capacities[17].

If open discourse is meant to *build capacities*, we must ask: should this be grounded in values or norms? And which values? Altruistic principles, empowerment ethics, equal dignity (socialist), basic rights (conservative), revolutionary consciousness (Marxist)? By distinguishing between *values*, *norms*, and *facts*, we may posit *normative compromises* between conflicting values—leading to a legal morality not directly crystallized from social ethos (Hegel) but emerging through *suspension of excessive normativity* in the name of classical political liberty.

Rahm criticizes Habermas's communicative actor model for overreaching. Earlier thinkers were more cautious about language's social polarizing effects. English classical utilitarianism (Bentham) defended press freedom as a *libertarian safeguard* against state censorship[18]. Spinoza, too, valued expression as a vehicle for verifying truth and countering irrationality

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MIT Press. Ott, Walter et Klaus Mathis (2001): Die Rechtstheorie von J. Habermas: Die wichtigsten Thesen im Überblick», *ZSR*, 5. Heft, I. Halbband, 399-418.

[17] Rahm, Claudia (2005): « Habermas' und Dworkins Rechts- und Demokratiekonzeptionen im Vergleich », in: *Recht und Demokratie bei Jürgen Habermas und Ronald Dworkin*, Bern: Peter Lang, 97.

[18] Bentham, Securities against Misrule (CW), p. 33, cf. Bentham, *A Fragment on Government*, p. 97; Niesen, P. (2019). Speech, truth and liberty: Bentham to John Stuart Mill 1. *Journal of Bentham Studies*, 18(1). https://doi.org/10.14324/111.2045-757x.046.

—while accepting certain limits, such as private discourse in closed doors meetings or academic settings; he understood well the risks of free speech, not publishing in his lifetime his extraordinary *Ethics* (1677)[19]. He saw law formation as a disciplined, often majority rule related collective effort and distinguished between *formal legal limits* on speech and *informal social exclusion*. Freedom of expression is a fundamental creative liberty of the human being—a means of verifying facts and a vital check on irrational tendencies in society. It must not, however, unduly interfere with the authority of the State for early Modern thinkers. Spinoza's skepsis against the public potential of the public sphere, expresses a position in many ways opposite to Habermas's ethical discourse model. If the "public sphere" is built on 18th century enlightenment philosophers' concept of individual and collective autonomy, the relative independence of citizens and the bourgeois society, protected by a welfare State, then concrete conditions are set for public sphere to remain functional. Economic security and political participation are preconditions, which influence decision-making, as expansive government do, but with diametral opposite effects, bringing polarized tensions to spread as an epidemic in the social lifeworld. It may be difficult to concentrate the attention on norms and values, when the energy and courage to resist these social tensions diminish. Experts in resilience and conflict resolution bring always the importance of language back into the set of key tools we need, in a well ordered and civilized society. While we apply norms, there is always something to discuss, or words to attach to principles, duties or authorisations that may be unclear. There are always individuals or groups of people who take advantage of the proliferation of ignorance. Empty talk, dishonest rhetoric can conceal manipulations that work against the weakest party in the collaborative scheme.

[19] Spinoza, Baruch. *Ethics,* 1677. E. Curley, translator. The Coll. Works of Spinoza, Vol. I. Princeton: UP., 1985.

5. Conclusion: Principles and Practice

Dworkin provides a middle ground, asking whether principles of justice correspond to legal practice. Rahm argues Dworkin corrects Habermas's neglect of self-determination as a prerequisite to communicative liberty. Instead of strategic speech (which manipulates others), Dworkin envisions judges weighing moral principles coherently.

Judges, through their expertise, test principles for *coherence*—only those passing this test can support normative statements. In contrast, Habermas uses discourse to *simulate* cognitive criteria, but this is only a surface-level legitimacy.

Both thinkers seek to safeguard substantive legal norms while maintaining the law's neutrality toward moral beliefs and majority interests. But both confuse *definition norms* with *application norms*.

As we saw with the concept of rights of Dworkin, liberal consent is, largely, a tautology, if one adopts Hart's definition of a rule of practice—following here a concept developed by L. Wittgenstein in *Philosophical Investigations*, §§198–202. If the rule alone constitutes the fundamental category for norms, with law as merely one possible form of that rule—namely as authorisation or transmission of capacity—then, whether in the case of a judge or any other social role, such a rule as law or permission, as the object of consent, will be insufficient to grasp the totality of the category of normative rule in particular as legal rule. Alternatively, the rule itself would need to be supplemented by a principle of non-harm, or by mediating maxims in the spirit of J. Feinberg, such as *de minimis* rules, which set thresholds of intervention below which more harm is caused than prevented. In other words, one would treat legal intervention itself as a potential source of injustice, possessing a latent normative dimension.

According to this principle of liberty—the *[No] Harm Principle*—one must be attentive to the seriousness of potential harms or unacceptable risks; one must measure the rising probability of such harms or injuries; and one must assess the high negative value as contrary to utility of certain situations, and probability based risks, or potential dangerous acts (cf. J. Feinberg, 1984;

A. von Hirsch, 2004)[20]. It is not yet fully clear to which extent climate risks, migration risks and other epidemic and environmental kind of risks, should be seen as risks properly understood (e. g. harms), often natural law based normative claims are made, or alternatively just rely on Hartian 'rigorous norms', and consider Harm and utility as type of values-based norms.

Dworkin grounds fundamental rights or basic goods in a process of justification based on a theory of coherence, itself rooted in judicial competence and practice. The idea is that, in adjudication, various moral principles may carry comparable weight, but the judge is best placed to formulate these criteria of coherence—criteria that are not derived from just any morally coherent facts, but from those capable of bearing the normative burden of legal principle.

The judge's practice is thus founded on natural law and a cognitivist standard. The difference between Habermas and Dworkin, as Rahm shows (Rahm, 2005, pp. 82, 94, 95), lies in the fact that for Dworkin, only those principles that pass the 'test of coherence' can ground a normative claim, whereas for Habermas, a discourse principle suffices to establish a rational cognitive criterion—even if only in appearance. This shared intent—on both sides—to preserve the substantive importance of legal norms, while at the same time asserting a form of legal neutrality with respect to morality, social *mores*, and majority beliefs or interests, seems in both cases to conflate a criterion of definitional normativity with one of applied normativity in the act of legal judgment. For Dworkin, only judges can determine coherent principles—turning them into near-Herculean figures with extraordinary normative power.

Thus, Dworkin's model illuminates law *ex post*, through realization of justice after the fact, but resists *ex ante* contract-based ideals. Habermas's synthesis of communicative liberty also constructs norms *after the fact*, making it a kind

[20] Hirsch, A. von (2004). 'Introduction: What is are "Mediating Principles"?' a paper for the Colloquium on Mediating Principles for Criminalisation, Castelen Manor, August, Switzerland. Feinberg, Joel. 1984. *The Moral Limits of the Criminal Law*, Oxford Un. Press.

of normative crutch. Instead of grounding law in lived experience or practical reason, both risk multiplying often contradictory norms, rather than promoting a *principle of normative parsimony*—a more economically and functionally rigorous approach.

Legal theory has evolved from a principle or concept-based model, to rights, and finally to a public sphere where equality is most pronounced in discussions of shared concern. Yet the digital age (smartphones, AI textual LLM like ChatGPT) has commodified language, schematizing thought into consumable form.

Meanwhile, Europe has been reminded of old realities: pandemics and war. Hart's legal system, as a formal framework transposable into declarations or codes (soft law), may now seem more urgently relevant than Habermas's civil society discourse. As discourse expands, law appears more as power-based imposition, reviving ideological conflicts. The normative ideal of communicative action is "extremely compelling…" but it confuses to very different things "linguistic comprehension and moral agreement[21]". The German philosopher is in contradiction with a growing interest for a public sphere dominated by ecology; it is for him impossible, given his idealist and anthropocentric view, "to avoid a drift toward political irrelevance" (Smith, 2021; Geuss, 2019)[22]. If our experience of language and communicative action is undeniably, and in quantitative terms, a troubling phenomenon, it is all the more so because of the continued relevance of Orwell's model. Nothing, however, confirms the validity of the fiction that underpins the idea that any and every thought ought to be universally

[21] For Geuss, Habermas's theory of communicative action conflates argumentation with a form of discursive exchange in which one party has the final word, without genuine verbal sparring that calls for qualities of attentive listening, breadth of vision, a wide-ranging historical and cultural knowledge, and a concise style that is mindful of the economy of means involved in any communicative act.

[22] Smith, Blake. Why Jürgen Habermas Disappeared, *Foreign Policy*, 7 Feb. 2021. Raymond Geuss, A Republic of Discussion Habermas at ninety, *The Point*, web-only, Politics, 18 June 2019, https://thepointmag.com/politics/a-republic-of-discussion-habermas-at-ninety/

communicable to all (Geuss, citing the opening of Adorno's *Minima Moralia*). Orwell's *Ministry of Love* as the antithesis of justice, human dignity, and democratic governance is no solution. Simplifying language (by AI?) might on the contrary obscure injustice, not eliminate it. Natural rights persist even when obscured.

Given the ongoing role of actor-based power, it may be more fruitful to *begin with legislative intent and formal definitions* (as constitutional norms) before applying norms—grounding them in *truth or analytical consistency*. For instance, freedom of expression is constitutionally defined in most European states. Recalling these legal foundations may be more productive than multiplying declarations that often trigger value conflicts where *norms need clarity*, in a systematic and historically realistic quest for order and justice.

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