Conflicting Norms, Values, and Interests: A Perspective from Legal Academia

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This essay argues that norms, values, and interests are not different universes of legal normativity, morality, and specific interests, but are interrelated concepts. Unfortunately, legal discourse tends to lose sight of that, due to its exclusive focus on the study of norms (and legal normativity in general). If a lawyer were to look at the confluence of conflicting values, norms, and interests, he would quickly realize that he has dared to examine murky and largely uncharted waters. Of course, this might be different if the same waters were looked at from the perspective of a social scientist, philosopher, or specialist of social ethics. But for lawyers, at least, only some sandbanks and reefs would be visible, while the submerged landscape and hydrology of the waters would remain a mystery. The reason for such a lack of reliable maps from a disciplinary perspective is relatively simple: Legal academia, as an academic mode of reflection corresponding to a largely practical profession, is focused on the specific system of legal norms. The law, as a particular subsystem of modern society with its large degree of functional differentiation, deals with a very specific tool of societal coordination, that is, the mode of coordinating behavior via the enactment, implementation, and judicial enforcement of formal standards and rules qualified by the legal order as parts of the legal system.[1]

The core business of legal academia thus does not cover the entire field of norms, but is restricted to certain types of norms qualified by the legal order as being binding under the law.[2] We know from legal sociology and anthropology that there exist other kinds of norms that might also influence social conduct,

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but since these social norms are not qualified under the formal system of the (state) legal order as binding, they do not count in the technical world of legal business (and legal academia).[3] It is true, there are niches of legal academia that might be interested in these other types of norms, such as legal theory, legal sociology, and legal anthropology, but most lawyers choose to ignore them and stay within the seemingly clear-cut and safe world of "pure" legal normativity.

Law, as a science of norms, has developed a very elaborate intellectual and theoretical framework for the internal structure, formal logic, and hermeneutical concretization of legal norms.[4] An understanding of the moral underpinnings of law as well as the empirical perspective of how law influences social practice get easily lost in these exercises of "pure legal reasoning." As a result, you can be a very good lawyer, in technical terms, without ever having dealt with issues of a sociological or anthropological nature, to say nothing of empirical studies of norms in terms of social science. Accordingly, moral values and national interests are largely "unknowns" in the world of legal science. Here again a note of caution is needed: There are strands in legal philosophy that have reflected intensely on the relationship between legal norms and moral values, or the different epistemic landscapes of legality and morality, in order to find some answers for how to model the relationship between the system of legal norms and the corresponding worlds of morals and ethics.[5] However, these reflections are not part of the mainstream canon of legal academia, but niche phenomena at the margins of legal studies.

Moral values usually constitute a subject of philosophical studies, but also of empirical research with a sociological background (for example, the "World Values Survey").[6] This essay is not the place to deal with the differences between morals (as a standard that underpins behavioral patterns) and ethics (as a systemic structure of "oughts" debated in the language of academic discourse with reference to the laws of formal logic).[7] We know that certain sets of values underpin social behavior and constitute more or less coherent sets of normative orientations and belief systems. The value systems of a society are a strong driving force for patterns of social behavior, but also for contestation of social practices that are not seen as compatible with the reigning value system.

Of the areas under discussion, the most unknown to lawyers is the concept of "national interests." These are epistemic constructs with an underlying assumption that there exists an objective rational calculus that ascribes a certain (joint) interest to a given national collective.[8] The problem with such an ascription is the heterogeneous nature of the collective,[9] composed as it is of a rather diverse

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set of subgroups and individual members with very different characteristics, orientations, and preferences. The construct of one (more or less) homogeneous collective interest only makes sense if there exist specific challenges threatening the entire collective, producing a joint interest in the very survival of the group. Whether the accumulation of resources and the desire to aggrandize power really unites all members of the collective is questionable. Undoubtedly, the political elites of the national collective will have such interests, since they stand to profit from them. There exists a presumption that the national interest constitutes something given, an empirically observable phenomenon outside the world of normativity. Whether this is really true is another question, and social constructivism has educated us to distrust the ontological tales of objective givens in the world of social organization.[10] We are told that "national interest" is a phenomenon observable and open to reconstruction by social scientists, in particular experts from political science.

As mentioned earlier, the three different categories under discussion—legal norms, moral values, and national interests—do not exist in clinical isolation, and there are some schools of thought that reflect on the interrelationship of the three. In fact, legal discourse often refers to "values"—partly as a social fact, and partly as underlying moral foundations of norms. The German Federal Constitutional Court, for example, uses in its jurisprudence the famous formula of the "Basic Law as a value-based order."[11] Legal discourse also does not completely repress social and political interests. There is a long tradition, in particular in German legal academia, of basing legal arguments on the interests of the actors involved. The famous intellectual school of the so-called "*Interessenjurisprudenz*"[12] was very influential some hundred years ago, and has left deep traces in international legal discourse. Its heritage became particularly influential with the famous New Haven School in the United States, leaving its marks on American international legal thinking and legal practice.[13] Theoretical studies on the relationship between legal norms and social, economic, and political interests have also found their place in the subdiscipline of "Law and Society," which has gained some prominence in legal academia.[14] However, there does not exist any comprehensive mapping of the interrelated nature of legal norms, moral values, and national interests from a legal perspective, and in the following sections I will try to fill that gap by looking briefly into the diverse conceptualizations of each of these three concepts in turn. The concluding section will present

some preliminary insights into their interdependence in order to initiate a more systematic discourse on their interrelated nature.

Legal Norms

As noted, legal norms belong to the realm of legal academia. The basic characteristic of any legal norm is that it is enacted in a certain mode of a formal nature and is designed by the system to which it belongs in order to exert binding force on legal actors.[15] Legal norms typically describe specific conditions under which a certain legal consequence will apply, thus linking specific factual conditions that must be fulfilled to specific legal consequences. A full and complete legal norm thus contains a comprehensive set of conditions and a specific legal consequence, and can be applied without further act of public choice. Of course, there exist other types of normative programming that lack such a comprehensive set of conditions and consequences. This brings up an important distinction of fundamental significance for modern legal discourse: the difference between "rules" and "principles," which is so closely linked to the work of the German legal theorist Robert Alexy.[16]

Rules are designed as complete norms that are intended to give clear normative guidelines for resolving concrete cases. Admittedly, rules also must often work with abstract notions and vague formulations. Despite the vagueness that often characterizes norms, it is possible to operationalize them with the hermeneutical tools of interpretation. They are intended as the source of case-specific prescriptions. This is different from principles, which are general guidelines, the logical skeleton of a normative order. They inevitably remain relatively vague, but are at the same time all-encompassing. They steer the legal operations of rule concretization (like the principle of proportionality) and determine the interplay of rules (like the *lex specialis* principle).

The interplay of norms is one of the most problematic aspects in the operation of normative orders. National legal orders tend to strive for a unity of the legal order—a goal that is more an aspiration than a reality. Even in the national sphere, norms are drafted and adopted by different sets of actors, and this is even more dramatic in the international sphere, where the discourse on fragmentation of international law has made this phenomenon the subject of heated debate.[17] The universe of rules in a given (national) legal order usually contains relatively precise preference rules (such as *lex priori* rules or *lex specialis* rules); it also

has an explicit hierarchy of norms, with the national constitution serving as a source for norm harmonization. Organizing the interplay of norms is much more problematic in fragmented legal orders, such as the world of international law, where there is no single legislative body and no unified set of courts and tribunals.[18] The lack of clear rules and principles results in the phenomenon of "regime collisions," a concept that describes a situation where norms from different origins ("regimes") with different orientations end up in competing prescriptions that are not easy to harmonize with each other.[19] The same is true when principles conflict: there are no preference rules organizing their interplay.[20] Balancing principles, however, entails a specification of the normative values at stake, and forces the norm operator to establish a kind of priority judgment.

As an illustrative case, we might briefly look to Kosovo's 2008 declaration of independence and its (non)recognition by third states. From a normative perspective, there are colliding rules and principles at stake. On the one hand, Kosovars and their supporters draw on the principle of self-determination, which seems to give an entitlement to a previously oppressed people to claim (and found) their own state. On the other hand, Serbia, Russia, and a number of EU member states that oppose any precedent of unilateral secession point to the basic principles of sovereignty and territorial integrity, which are seen as fundamental for the international legal order. The interplay between these divergent rules and principles is far from clear.[21] Self-determination constitutes a fundamental principle in international law; not only is it referred to in Article 1 of the United Nations Charter but it also reflects an underlying value of the modern state system. In addition, it is often claimed to be a rule (such as in Article 1 of the International Covenant on Civil and Political Rights).[22] By contrast, sovereign equality and territorial integrity embody the fundamental values of the Westphalian order and underpin the entire international legal system.[23] There is no built-in normative hierarchy or priority that gives absolute precedence to one of these principles; this remains an open question. The necessary balancing depends on the epistemic constructions underpinning one's understanding of the system of international law and its foundational values.

Moral Values

Values have a dual character: they are emanations of philosophical systems of moral and ethical judgment, but they are also empirical phenomena mirroring

the belief systems of persons and societies. Values have long been the subject of moral philosophy.[24] There is, of course, the ancient Aristotelian legacy, which medieval scholasticism then embedded in Christian theological thinking, and which Kantianism further developed in Enlightenment philosophy. Such philosophically grounded value-systems often underpin national constitutions. As a result, it is not astonishing that reference to such philosophical traditions and their underlying value-systems regularly pervades legal argumentation. Such reference to the value-base of the normative system is also not rare in international law, although it is much more difficult to assume the existence of a rather homogeneous value-system as the basis of international legal normativity, given the plurality of value systems around the globe.[25]

This becomes even clearer if one looks at empirical research, such as the "World Values Survey," which demonstrates a marked plurality of value systems. Moreover, the hierarchy of values also differs enormously across various cultures and religious traditions. This is observable along nearly all the important axes structuring value systems: the importance of the individual versus the centrality of the community, the role and position of women, the importance of social stability versus the priority of individual preferences, the significance of democracy as a primordial principle of political ordering versus the efficiency of top-down social ordering. From an empirical perspective, the existence of a harmonized societal value system even within a nation proves to be a problematic construct that presumes a fictitious unity of societal preferences and values.[26] In most societies throughout the world, we observe a growing plurality of individual and collective orientations and values, often highlighting the inherited cultural diversity within them.

National Interests

Interests are an even more difficult concept than norms and values for legal academia. This category from the social sciences serves as a reference point in some legal discourses, but without any systematic inquiry in legal research about how to construct it. This is because, as a more empirical category linked to preferences and models of rational choice, it escapes the methodological grip of legal research. Interests may be taken into consideration in legal debates, but the construction of the category will be imported from social sciences.

Even in the social sciences it is very much disputed what types of preferences and utilities constitute the interests of individuals, social groups, or nations.

The construction of such interests depends very much on the epistemic landscape in which such interests are defined. This observation is particularly true for something like "the national interest." The term is common in the lexicon of the international relations (IR) school of realism, and scholars within that school assume that there is something like an aggregate national interest dictated by the laws of geopolitics, with the underlying desire of society being to maximize power.[27] Such an assumption might be true for segments of the political and economic elite that directly profit from growing resources and aggrandized power. However, it is much more doubtful that ordinary people share such an orientation.

From an institutionalist IR perspective, the perception of what might be called "the national interest" will be more diverse. Any society will have a common interest in achieving certain objectives or common goods. Participation in certain kinds of global public goods, such as civil aviation, global telecommunication, or the preservation of the global climate, might be something like a national interest, but not the production and preservation of collective goods as such. The issue becomes even more complex from a constructivist perspective. Here, shared normative frameworks and moral value systems play an important role in shaping the preferences and interests of individual and collective actors.[28] There is a huge discrepancy in the construction of interests in foreign affairs, depending on the role that an actor attributes to international law in foreign policy. In a neorealist epistemology, the national interest will be an intuitive given. In a legalist epistemic framework oriented toward the rule of law in international relations—a framework that Ian Hurd has called the "empire of international legalism"[29]—the upholding and strengthening of the international rule of law will constitute the primordial national interest.

The construct of a given national interest becomes an analytical quagmire if broken up into categories of political economy. The toolbox of rational choice theory allows us to disaggregate the so-called "black box" of the nation state. There does not exist a homogeneous collective with a single interest, but a marked plurality of groups and individuals with extremely diverse values, preferences, and interests—a fact that the IR school of neoliberalism has been stressing for decades. In a pluralist society, there will always exist very different sets of interests, all of which fuel fierce internal struggles on how to define the collective preference or national interest. Such a common interest will always remain contested and thus dynamic, as do all social processes construing any kind of collective meaning.[30] Interests thus are analytical constructs that allow us to grasp some elements

of the competing preferences at stake, but they are always fragile constructs in theoretical terms.

Norms, Values, and Interests

As noted at the beginning of this essay, values and interests are not different universes of legal normativity, morality, and specific interests open to empirical research. They are interrelated concepts, but their interdependence has become masked by disciplinary specialization. Law, philosophy, and the social sciences have developed quite different epistemologies and construe their basic notions and concepts in very different theoretical frameworks. The concepts that mark the orientations underlying social action and communication interact with each other, however. Values clearly shape norms, often underpinning them, and informed lawyers know that very well. At the same time, concrete norms (rules) are often fragile constructs trying to balance competing interests, though, again, for lawyers this insight borders on trivial. Finally, norms and values play an important part in defining a concept such as national interest—an insight that dates back decades and was revived and reformulated by the constructivists.

Value systems are already quite diverse within societies and between different parts of the elite, and accordingly there will be conflicting values that come to the surface when political and intellectual elites discuss which values should determine the course of political action. This diversity is even truer for interests: Each society is a dynamic system of social interaction where interests constantly conflict. Such struggles over competing and colliding interests may be largely invisible in authoritarian structures of government, for the sake of a proclaimed social harmony that privileges one set of collective interests. However, even in such cases a diversity of interests exists, often with a repressive elite marginalizing the diversity of societal interests, suppressing personal freedom and democratic participation.

Norms are not free from these conflicts of values and interests, and to a large degree they even reflect them. This is visible in processes of norm creation, but also in processes of norm concretization in institutions, judicial courts, and subsequent practice. The underlying conflicts of values and interests are in a way constantly being renegotiated, with the normative text of statutes and treaties constituting transitory reference points. Ruling elites will proclaim constructions of the normative reference points that are in line with their values and interests.

Other segments of society will contest such normative constructions, arguing for a meaning that is more in line with their own values and interests. Different concepts of normativity will thus compete with one another, trying to establish themselves as the dominant construction. Which construct will succeed depends on the institutional framework and the mobilizing force and negotiating strength of the various strands. Normative understandings, value systems, and the perception of collective interests are all closely intertwined and mutually influence each other in very subtle ways.

NOTES

[1] Niklas Luhmann, *A Sociological Theory of Law* (London: Routledge & Paul, 1985); see also Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1993).
[2] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (New York: Cambridge University Press, 2009), pp. 362–75.
[3] Christoph Möllers, *Die Möglichkeit der Normen: Über eine Praxis jenseits von Moralität und Kausalität* (Berlin: Suhrkamp, 2015), pp. 395–434.
[4] H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 3rd ed. with a postscript ed. by Penelope A. Bulloch and Joseph Raz, 2012).
[5] W. Bradley Wendel, *Ethics and Law: An Introduction* (Cambridge, U.K.: Cambridge University Press, 2014).
[6] To access data from the survey, see www.worldvaluessurvey.org; see also Russell J. Dalton and Christian Welzel, eds., *The Civic Culture Transformed: From Allegiant to Assertive Citizens* (New York: Cambridge University Press, 2014).
[7] See Armin Nassehi, "Die 'Theodizee des Willens' als Bezugsproblem des Ethischen," in Armin Nassehi, Irmhild Saake, and Jasmin Siri, eds., *Ethik – Normen – Werte* (Wiesbaden: Springer VS, 2015), pp. 13–43."
[8] Scott Burchill, *The National Interest in International Relations Theory* (Basingstoke, U.K.: Palgrave Macmillan, 2005).
[9] Christopher Hill, *The National Interest in Question: Foreign Policy in Multicultural Societies* (New York: Oxford University Press, 2013).
[10] Jutta Weldes, "Constructing National Interest," *European Journal of International Relations* 2, no. 3 (1996), pp. 275–318.
[11] Thilo Rensmann, *Wertordnung und Verfassung: Das Grundgesetz im Kontext grenzüberschreitender Konstitutionalisierung* (Tübingen: Mohr Siebeck, 2007), pp. 43–146.
[12] Jens Petersen, *Von der Interessenjurisprudenz zur Wertungsjurisprudenz* (Tübingen: Mohr Siebeck, 2001).
[13] W. Michael Reisman, Siegfried Wiessner, and Andrew R. Willard, "The New Haven School: A Brief Introduction," *Yale Journal of International Law* 32, no. 2 (2007), pp. 575–82.
[14] Austin Sarat, ed., *The Blackwell Companion to Law and Society* (Malden, Mass.: Blackwell, 2004).
[15] Möllers, *Die Möglichkeit der Normen*, pp. 271–305.
[16] Robert Alexy, *A Theory of Constitutional Rights* (New York: Oxford University Press, 2002).
[17] Mads Andenas and Eirik Bjorge, "Introduction: From Fragmentation to Convergence in International Law," in Mads Andenas and Eirik Bjorge, eds., *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge: Cambridge University Press, 2015), pp. 1–33.
[18] Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014), pp. 75–100.
[19] See the contributions in Kerstin Blome, Andreas Fischer-Lescano, Hannah Franzki, Nora Markard, and Stefan Oeter, eds., *Contested Regime Collisions: Norm Fragmentation in World Society* (Cambridge: Cambridge University Press, 2016).
[20] Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012), pp. 45–74.
[21] I explore this in more detail in "The Kosovo Case – An Unfortunate Precedent," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 75, no. 1 (2015), pp. 51–74; see also the contribution of Rafael Biermann to this roundtable: Rafael Biermann, "Secessionist Conflict: A Happy Marriage between Norms and Interests?" *Ethics & International Affairs* 33, no. 1 (2019), pp. 29–43.

[22] Stefan Oeter, "Self-Determination," in Bruno Simma, Daniel Erasmus-Khan, Georg Nolte, and Andreas Paulus, eds., *The Charter of the United Nations: A Commentary*, Vol. I (Oxford: Oxford University Press, 3rd ed., 2012), pp. 313–34.
[23] Ibid., pp. 332–33.
[24] David Wiggins, *Needs, Values, Truth: Essays in the Philosophy of Value* (Oxford, U.K.: Basil Blackwell, 1987).
[25] Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (New York: Oxford University Press, 2007).
[26] Frederick M. Barnard, *Democratic Legitimacy: Plural Values and Political Power* (Montreal & Kingston: McGill-Queen's University Press, 2001).
[27] Burchill, *The National Interest in International Relations Theory*, pp. 31–62.
[28] Ibid., pp. 185–205.
[29] Ian Hurd, "The Empire of International Legalism," *Ethics & International Affairs* 32, no. 3 (2018), pp. 265–78.
[30] Antje Wiener, *A Theory of Contestation* (Heidelberg: Springer, 2014).

Abstract: The analytical tension between legal norms, moral values, and national interests seems no uncharted territory in political science, but has found very little interest in legal academia. For lawyers, moral values and national interests are largely "unknowns," dealt with by other disciplines. Looking a bit deeper, the picture becomes more nuanced, however. As part of a roundtable on "Balancing Legal Norms, Moral Values, and National Interests," this essay argues that norms, values, and interests are not different universes of legal normativity, morality, and specific interests, but are interrelated concepts. Values clearly influence norms and often underpin them, while seemingly concrete norms (rules) are themselves often fragile constructs trying to balance competing interests. Value systems are quite diverse within societies, and this is even truer for interests; each society is a dynamic system of social interaction where conflicting interests are constantly playing out. In a way, underlying conflicts of values and interests are constantly being renegotiated in the legal system, with the norms enshrined in the text of statutes and treaties serving to constitute transitory reference points.

Keywords: legal norms, moral values, national interests, legal academia, constructivism