Towards A Relational Paradigm for the Concept of Law: Uncovering Implications of Hart's Rule of Recognition to Develop a Relational Foundationalism, as Expressed in Preliminary Terms through the UN Right to Health

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Without contraries [there] is no progression
William Blake[1]

Abstract

A fundamental, neglected problem of relation to the individual and marginalised groups exists within Hart's description of the foundational rule of recognition for legal systems. This article aims to establish the need for a relational foundationalism for law that engages with the concrete other, given the limitations of Hart's foundationalist account of the rule of recognition which assumes an abstract, generalised other. This leads to a focus on a contextual process of recognition, as a relation to the individual and marginalised groups, resonant with conceptions of Kantian dignity that treat a person as an end and not a means. Rejecting Teubner's non-foundationalist focus on communication, as well as Raz's reduction of the rule of recognition to include solely legal officials, it is argued that relational foundations of legal systems do *not* exist and are needed. A subsidiary argument is that the UN framework on the right to the highest attainable standard of health is a significant, though preliminary, step towards a relational foundationalism; it engages with the concrete other, providing indicators disaggregated by at least sex, race, ethnicity, rural/urban, and socio-economic status, as well as a dialogical process of voice with the relevant community, including marginalised groups.

Keywords

Rule of Recognition – HLA Hart – Foundationalism – Right to Health – Dignity – Structural Indicators – Ethic of Care – Kant – Raz.

1. Introduction

The tension between care and justice is an ongoing one that a human rights focus needs to bridge. It is a pervasive theme in Western thought ranging from feminist jurisprudence to Schopenhauer in the 19th century and back to classical times. At the intersection of these concerns was a focus of Schopenhauer's postulation of compassion as a challenge

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[1] The marriage of heaven and hell. In *The Poetical Worksof William Blake* (OUP 1908).

to the 'abstract cognition'[2] of Kant's unconditional ought of the categorical imperative as a basis for a universal morality. This debate was taken up in a different mantle by Carol Gilligan's[3] challenge to Lawrence Kohlberg's abstract logic of justice. She emphasised a contrasting contextual ethic of care as a nonviolence, focusing on who is left out. Indicators for the UN right to the highest attainable standard of health, particularly under the International Covenant on Economic, Social and Cultural Rights[4] (ICESCR) take a similar contextual focus on who is left out, through indicators disaggregated by at least sex, race, ethnicity, rural/urban and socio-economic status.[5] They involve a dialogical process of voice with the relevant community, including marginalised groups.[6] HLA Hart's rule of recognition,[7] seeking to describe a foundational rule for law as one that picks out other rules as being legal, does not directly engage in this well-established tension between dialogical contextual care and abstract justice. However, implications of Hart's descriptive rule of recognition will be shown to invite consideration of the need to address this tension between care and justice more directly, for future directions in legal systems based on human rights.

A tension between care and justice is resonant within Seyla Benhabib's[8] feminist critique of an abstract, generalised other underlying the veil of ignorance in John Rawls' modern reformulation of social contract theory.[9] Ann C. Scales'[10] feminist jurisprudence similarly describes the need to resist abstraction itself. Gilligan's contextualism is a continuation of a distinctive Western tradition, in which the Greek sophists offered similar visions of truth as mutable, contextual and pragmatic, a contextualism extolled as well by the Western thinkers Vico, Voltaire, and Montesquieu.[11] Even within a logic of justice, the English common law tradition, for example, has long recognised the need for equity, that is, more flexible contextual principles of interpretation than the general common law category interpreted in a literal fashion as the letter of the law. Moreover, the very notion of an abstract impersonal other is a distinct socio-historical construct emanating from ancient Rome, in contrast with the ancient Greek emphasis on individuality. Hegel has highlighted the loss of individuality in the shift from ancient Greek to Roman citizenship for the Roman 'abstract ego, which must be distinguished from individual idiosyncrasy' in the construction of impersonal legal rights.[12]

The wider question arises, against the backdrop of this brief overview, as to how contextual care and abstract justice can exist in a legal system, not simply side by side as distinct traditions.[13] Any such coexistence requires conceptions of justice and human rights that can actively integrate the relational contextualism of the concrete other, including the individual and distinct marginalised groups, into the logic of justice

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[2] Arthur Schopenhauer, *The World as Will and Representation*, vol 1 (first published 1818, Christopher Janaway ed, Judith Norman and Alistair Welchman trs, CUP 2010) 395.

[3] Carol Gilligan, *In a Different Voice* (Harvard University Press 1982).

[4] United Nations International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNTS 3.

[5] UNCHR, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health', Paul Hunt (2006) UN Doc E/CN.4/2006/48.

[6] ibid.

[7] H. L. A. Hart, *The Concept of Law* (OUP 1961).

[8] Seyla Benhabib, 'The Generalised and the Concrete Other: The Kohlbergian-Gilligan Controversy and Feminist Theory' in Seyla Benhabib and Drucilla Cornell (eds), *Feminism as Critique: On the Politics of Gender* (Basil Blackwell 1987).

[9] John Rawls, *A Theory of Justice* (Belknap 1971).

[10] Ann C. Scales, *The Emergence of Feminist Jurisprudence* (1986) 95 Yale Law Journal 1373; in which Scales raises concerns with a model of *incorporation* of care into justice, as leaving the underlying unequal power distribution unchanged at the systemic level.

[11] See J. M. Kelly, *A Short History of Western Legal Theory* (Clarendon Press 1992).

[12] G. W. F. Hegel, *The Philosophy of History* (first published 1837, Dover Publications 1956) 279.

[13] See also Paul Downes, *The Primordial Dance: Diametric and Concentric Spaces in the Unconscious World* (Peter Lang 2012) ch 4.

reasoning process in legal systems. This problem will be explored through an interrogation of the foundations of law in Hart's rule of recognition, where the individual and marginalised groups remain the 'other' vis-a-vis the legal system, an abstract generalised other, shorn of particularity with regard to their needs and situations. The rule of recognition gives expression to Hart's foundationalist approach in *The Concept of law,*[14] in what has been described as 'the most important and influential book in the legal positivist tradition'.[15] Hart's rule of recognition is a social rule, made possible by a practice accepted from a point of view internal to actors in the legal system. It assumes a prior commitment to the validity of this system. In other words, it is a foundation for the legal system that is neither proven nor rational, but basically conventional. It is a habit of obedience which is taken for granted. Taking place in 'a huge variety of forms, simple or complex' in a modern legal system, the rule of recognition is a rule that picks out other rules as being legal and requires a different source for its claim to validity.[16]

This article's primary aim is to demonstrate the need for a relational foundationalism for legal systems, given the implications of and descriptive limitations to Hart's incomplete account of relation in the rule of recognition. The article seeks to outline the contours of this relational foundationalism. A developed rule of recognition is needed for developed legal systems which are both committed to respect for the dignity of the individual and based on human rights. This is relevant *both* for the legal system as a whole in a given context where human rights standards are used to evaluate the legality of other proposed laws and to a specific human rights focus as a subdiscipline of law that is human rights law. It is acknowledged that such recognition processes do not exist within all systems of law, but the focus is on legal systems that are developed or are in Hart's words 'mature'[17] or going further than this, on legal systems which seek to be developed - on legal systems based on human rights and a commitment to dignity of the individual. It will be argued that relational foundations of legal systems do *not* exist but are needed - and that the UN framework on the right to the highest attainable standard of health under ICESCR is a significant, though preliminary, step in that direction.[18] The subsidiary argument of this article is to propose features of the UN right to the highest attainable standard of health as an expression of such a relational foundationalism, albeit in preliminary terms, and as an exemplar for future directions of relational foundationalism in developed legal systems based on human rights.

Section 2 argues that a fundamental and neglected problem of relation to the individual and marginalised groups exists in Hart's rule of recognition. This is not an argument that Hart's positivist approach, which he treats as descriptive for law in the rule of recognition, is instead a normative one necessarily pertaining to justice; rather it takes Hart's descriptive concerns for the rule of recognition on its own terms, examining the normative implications of this description. This argument does not predominantly seek to challenge the accuracy of Hart's description of the rule of recognition, though it does highlight a range of descriptive limitations in Hart's account. Rather, it seeks to open future possibilities for legal systems, including human rights law, as part of a primary focus on developing a more dynamic rule of recognition process, with inferential correlates of voice, care, compassion, and a focus on the concrete other through a systemic lens.

[14] Hart *Concept of Law* (n 7).
[15] Jules Coleman, 'Incorporationism, Conventionality and the Practical Difference Thesis' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (OUP 2001) 99.
[16] Hart *Concept of Law* (n 7) 94.
[17] Hart *Concept of Law* (n 7) 106.
[18] While Hart's rule of recognition pertains to national legal systems, it will be argued that the fact that the UN right to the highest attainable standard of health emanates from international law does not represent an insurmountable barrier to its relevance for the proposed development of the rule of recognition in terms of relational foundationalism.

In Section 3, the extent of this problem of relation can be seen through a counterpoint to Hart's foundationalist rule of recognition, namely, Gunther Teubner's non-foundationalist approach which emphasises law as communication.[19] While Teubner adopts a radically different approach to legal foundations, both Hart's and Teubner's directly contrasting approaches leave this problem of relation to the individual and marginalised groups largely untouched. Critique of Teubner's non-foundationalism is also important to distinguish the argument for relational foundations from charges of non-foundationalism, as well as to foreground the omission of the individual and marginalised groups from both Hart's and Teubner's frameworks.

In Section 4, the problem of relational foundations and the limits of foundationalist and non-foundationalist approaches is shown to exist within a wider context, as an aspect of an older problem of foundations highlighted by the Kantian *a priori,* in Kant's analysis of the antinomy between freedom and causality.[20] Thus, the problem of relational foundations for a given legal system operates against the backdrop of the problem of foundations per se. Kant's antinomy, and locating Hart's rule of recognition in relation to this age old problem, is a key part of the descriptive limits of Hart's incomplete account and the proposed solution through relational foundationalism. Hart's descriptive limitations are implicitly reliant on Kant's antinomy. Moreover, the Kantian framework is needed to explain why relational foundationalism is not a non-foundationalist position and also not a mere deconstruction of legal authority. Relational foundationalism is proposed as an innovative solution to an age old problem of Kant's antinomy, a problem that Hart did not resolve but rather presupposed with his rule of recognition. Initial steps towards a pathway out of this problem of relational foundations can be set out, once an interpretation of the Kantian backdrop to this whole problem is given fuller recognition.

These issues of relational foundations to law and foundational justifications more generally, are considered in Section 5, in terms of Joseph Raz's interpretation of Hart's rule of recognition. Raz's work has greatly influenced much of the secondary literature on Hart's rule of recognition.[21] While Raz's approach could be seen as broadly supportive of the proposed move to a more dynamic rule of recognition, this makes it all the more important to firmly distinguish the proposed relational foundationalism from Raz's account. Sections 6 and the conclusion lead to identification of particular features of the UN right to the highest attainable standard of health as an exemplar of a paradigm of relational foundationalism for legal systems.

2. Initial Critique of a Foundationalist Approach to Legal Systems in Hart's Rule of Recognition

This section highlights the problem of relation in Hart's description of the rule of recognition and its implications for both the recognition of individuals' dignity and the recognition of the voices of marginalised groups. These themes are pertinent to human rights and the UN right to the highest attainable standard of health, discussed in subsequent sections.

Hart's positivism identifies a blind spot in legal argument and legal systems of authority as the rule of recognition, namely, that norm underlying other derivative norms, which itself is not subject to rational reconstruction in terms of legal rules but is rather mere 'presupposed' convention.[22] Hans Kelsen's positivism similarly postulates a basic norm, a *Grundnorm*, which provides an interpretive leap to the creation of other norms in

[19] Gunther Teubner, 'How the Law Thinks: Toward a Constructivist Epistemology of Law' (1989) 23 Law & Society Review 727.
[20] Immanuel Kant, '*Critique of Pure Reason (1781A)'* in L.W. Beck, ed., *Kant: Selections* (Macmillan 1988).
[21] See section 4 of this article.
[22] Hart *Concept of Law* (n 7) 105.

a legal system, through an act of will rather than a conclusion from a premise by an intellectual operation.[23] Again, this can be described as a blind spot in legal interpretive logic. Whereas Kelsen places an ineluctable sea of irrationalism between the *Grundnorm* and subsequent legal norms, Hart recognises the prior vast ocean of irrationalism to be shored up against in the very constitutive process of the *Grundnorm*. This shoring up process is his rule of recognition. Both legal positivists are marked by a commitment to a central foundation or ground, as part of a hierarchical edifice for the legal system.

Hart offered a range of features of the rule of recognition. They are secondary power conferring rules on primary rules of obligation: '[t]he rule of recognition providing the criteria by which the validity of the other rules of the system is assessed is in an important sense…an ultimate rule'.[24] This ultimate rule amounts to a social rule, the validity of which derives from the fact of its 'acceptance' by the pertinent community.[25] This is frequently an 'unstated' acceptance of a legal system's foundations, '[n]o such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate, for use in this way'.[26] Even if taken as a purely descriptive positivist account of law as a system, this does not detract from the inference that follows from Hart's description of the rule of recognition – it is a rule without substantive justification. An implication of Hart's position is that there is a fundamental abyss at the heart of legal foundations - at the very foundation of law there is a void of justification, the rule of recognition.

Jeremy Waldron goes so far as to state that 'there is no basis whatever in Hart's account for speaking of a general *prima facie* obligation to obey the law…But the fact that what exists in consequence of these patterns of behavior with this internal aspect is a *legal system* is not itself a reason for saying that the people concerned are receiving the benefits that would actually *justify* their holding themselves to be under this sort of an obligation'.[27] Waldron offers a normative implication of Hart's description. Without necessarily having to go as far as Waldron in stating that there is no general *prima facie* justification in Hart's account for people to obey the law, it is evident that a stronger basis is needed for the legitimacy of law as a normative domain, as distinct from mere imposition of power, building on implications of Hart's description of the rule of recognition.

It is notable that this rule of recognition, as a taken for granted assumption or habit of obedience, is not necessarily expressed in language. It can be interpreted as what Martin Heidegger would term a horizon of understanding, a pre-given background against which intentional acts operate.[28] Andrei Marmor expands on a historical dimension to Hart's rule of recognition, though with an emphasis on history as stability rather than change, on historical accumulation of a kind of sedimentary practice:

> Social practices exist when there is a custom of following a rule. The idea of a custom, however, is not to be confused with something like "a lot of people doing the same thing". There is no custom of drinking water, although most people drink water very often…A social practice has a history, a set of values it instantiates, and a sense in which the fact that others follow the same rules is, in itself, crucially significant.[29]

[23] Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1945).
[24] Hart *Concept of Law* (n 7) 105.
[25] ibid 102.
[26] ibid 103, 109-110.
[27] Jeremy Waldron, 'All We Like Sheep' (1999) XII CJLJ 169.
[28] Martin Heidegger, *Being and Time* (first published 1927, Basil Blackwell 1962).
[29] Andrei Marmor, 'Legal Conventionalism' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (OUP 2001) 212.

Custom is treated as the basic foundation for any legal system through its rule of recognition.

The rule of recognition is not relational. It is a rule of recognition that does not recognise. It does not recognise the person, even as the "other". As conditioned drones into habits of obedience, the voices of marginalised groups and individuality of the person is excised from this founding role. Yet recognition, at least if that word is to retain any vestige of meaning beyond being a shell and fiction, is a two-way process – between an individual person or marginalised group and the legal system.[30] P.M.S Hacker has noted that from Hart's point of view private persons are more like spectators than participants in the rule of recognition. They may keep themselves informed about the fundamental criteria of recognition but they need not do so. Even taken as a purely descriptive positivist account, Hart's terminology would need to be altered from being a rule of recognition to a rule of obedience, if this two-way dimension to recognition is to be occluded. It may be accurate in many contexts, factual and historical, to state that a two-way process of recognition does not need to take place and has not taken place for law to function causally. Nevertheless, even descriptively, it is a violence to the term 'recognition' to characterise any such processes that do not include a two-way process as being norms of 'recognition.' The individual's and marginalised groups' recognition of the law and the legal system's recognition of the individual and marginalised groups require further explication to investigate this potential two-way process of recognition.

Kantian dignity is based on the view that a person is to be treated as an end and not as a means.[31] The veiled authoritarianism in Hart's rule of recognition that threatens a Kantian dignity of the individual can be traced to the point at which Hart draws his terms of reference for examining *habits of obedience* for the rule of recognition both from Jeremy Bentham and John Austin. Bentham's *Fragment on Government*[32] explicitly refers to the habit of paying obedience to law through principles of utility based on pleasure and pain. Austin's law as command echoes a Benthamite concern with habits of obedience.[33]

Hart's *Concept of Law* rejects Austin's model of law based simply on coercive orders as being derived too exclusively from patterns of criminal law and as largely inapplicable to those aspects of a modern legal system which confer public and private legal powers and obligations such as over wills, marriages, contracts, the powers of the legislature or the jurisdiction of the courts. Hart repeatedly highlights a pivotal weakness in Austin's theory, the impossibility of deriving norms from mere habits. Austin's basic hierarchical framework, such as in *The Province of Jurisprudence Determined,*[34] with an introduction by Hart in 1954, conceptualises law in terms set by political 'superiors' to political 'inferiors'. Austin's definition of sovereignty envisages the mass of society as partaking in a habit of obedience or even submission to a particular common 'superior', a perspective which jars with a human rights perspective based on equality between individuals, and democratic assumptions that government derives its authority from the people.

Hart's power-conferring concerns in *The Concept of Law* are a significant broadening of Austin's law as command. However, within his lens of habits of obedience, Hart is operating against a historical backdrop of hierarchical approaches resonant also with behavioural psychology. While a pleasure-pain calculus does not derive from

[30] P. M. S. Hacker, 'Hart's Philosophy of Law' in P. M. S. Hacker and J. Raz (eds), *Law, Morality and Society* (OUP 1977).

[31] It is to be recognised that this commonplace, contemporary understanding of Kantian dignity in legal discourse is somewhat an oversimplification: see, for example, Oliver Sensen, *Kant's Conception of Human Dignity* (2009) 100 Kant-Studien 309.

[32] Jeremy Bentham, *A Fragment on Government* (with an introduction by F. C. Montague ed, Clarendon Press 1891).

[33] John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (with an introduction by H. L. A. Hart, Weidenfeld & Nicolson 1954).

[34] ibid.

Bentham, and can be traced to Lycurgus in ancient Greece,[35] it is a calculus drawn upon in psychology through B.F. Skinner's radical behaviorism that goes in Skinner's own words 'beyond freedom and dignity'.[36] Individuals are considered to be fundamentally passive, their actions merely in response to environmental manipulations of positive and negative reinforcements; they become means to ends given to them by others, where considerations of Kantian dignity can be rendered superfluous. Similarly, Benthamite utilitarianism, while offering some challenge to traditional hierarchy through a principle that the law is only to be useful, nevertheless is far from being a recipe for individual's or marginalised groups' agency as its Archimedean point is augmentation of the happiness of the community. Behavioural habits of obedience inculcated through environmental conditioning based on reward and sanction offer a trite conception of individual or group agency and subjectivity, rendering humanity equivalent to behaviorist rats and pigeons, in its passivity to environmental conditioning of its habits through positive and negative reinforcements.[37] This is a fragile basis for legal foundations of description and justification, at least for those that seek to incorporate Kantian dimensions of human dignity.

As part of a differentiated focus on the concrete other to challenge a generic abstract other in a process of recognitions, the emphasis given to the need for a recognition process to engage with marginalised groups additionally builds on the Rawlsian concern that the social contract and legal authority must be justified to those with the lesser liberty, to be appraised from their point of view, to enable them to possess a minimum stake in the society and legal order which engages with them.[38] However, such a concern with marginalised groups is not simply predicated on a Rawlsian framework. It also builds on the right to the highest attainable standard of health to address power asymmetries, with its explicit concern with the needs of disadvantaged groups.[39] Moreover, Hart's rule of recognition needs to develop law beyond being a potential manipulation of marginalised groups into habits of obedience, groups which may be particularly vulnerable to such manipulation. A developed rule of recognition in a mature legal system needs to be more than the mere exertion of force, where law becomes merely the will of the stronger.

The emphasis given to the need for a recognition process to engage with the individual is resonant with Kantian concerns regarding the dignity of the individual, as well as being part of a commitment to a liberal societal order where the individual possesses rights that cannot simply be subverted by utilitarian concerns with the majority. While this is resonant not only with J.S. Mill's views on liberty of the individual,[40] it goes beyond this to distinguish, on the one hand, legal systems which respect an array of fundamental rights of the individual (akin to those expressed in the Universal Declaration of Human Rights (UDHR) which in its Preamble views itself 'as a common standard of achievement for all peoples and all nations' [41]) from, on the other hand, legal systems for which developed individual human rights are of minimal value. For example, Article 4 of the UDHR states that 'No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms'[42]. This distinguishes developed legal systems from ones with much less developed conceptions of individual human rights, such as the Roman legal system. This is again a concern with a legal order that is not the mere

[35] See also Kelly (n 11).
[36] B. F. Skinner, *Beyond Freedom and Dignity* (Jonathan Cape 1972).
[37] For a discussion of Hart's social rules in terms of reproofs and coercive pressure, going beyond feelings, see also Margaret Gilbert, 'Social Rules: Some Problems for Hart's Account, and an Alternative Proposal' (1999) 18 Law & Phil 141.
[38] Rawls *Theory of Justice* (n 9).
[39] UNCHR Paul Hunt (n 5).
[40] J.S. Mill, On Liberty (first published 1859, Harvard Classics, Volume 25, P. F. Collier & Son 1909).
[41] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III).
[42] Ibid, Art 4.

systematisation of force, as the exertion of power of the tyranny of the majority or most powerful.

It may be suggested that Hart's rule of recognition is a minimalist account at legal description, without recourse to a maximalist approach that would incorporate moral standards. N.E Simmonds aptly envisages 'a spectrum of possible theories ranging from austere minimalism to full maximalism' for the rule of recognition, while characterising Hart's project as a minimalist one.[43] However, the relational concerns regarding Kantian dignity for the rule of recognition import a questioning of the possibility of a value-free descriptive minimalism for Hart's rule of recognition; this is not necessarily a predilection for a maximalist position emphasising strong prescriptive moral standards for the rule of recognition. Rather, this question of relation of recognition to the individual as an end, and not merely as a means, questions the possibility of achieving, in Simmonds' words, a 'relatively neutral' framework of minimalism as a 'piece of pure conceptual clarification'. The excision of relation to the individual and marginalised groups in Hart's rule of recognition is a non-neutral preconception, including for a legal order based on human rights. Even if descriptively accurate, such a description then raises normative consequences. This relational question renders problematic even the possibility, in principle, of a minimalist rule of recognition as *recognition*.

The rule of recognition depends on this relational background to the individual private person, marginalised groups and the population at large; it exists either in a basic assumed connection to or assumed separation from these people. Any such description of the rule of recognition is inescapably relational, even if this relation is being non-relational. It is this relational backdrop that implicates Kantian concerns with the dignity of the individual in relation to the rule of recognition.

As a descriptive account of a causal process, this rule of recognition may gain some leverage as an historical fact in some societal contexts. Yet Hart's account clearly does not meet even basic standards of cross-cultural, empirical description in the social sciences to evince this causal process. Marmor describes 'the condition of efficacy' underpinning the rule of recognition, namely, that 'there is no point in following a conventional rule that is not actually followed by the pertinent community'.[44] The pertinent community is culturally variable and requires a cross-cultural and historical lens for adequate scrutiny of Hart's rule of recognition, if it is conceived in positivist terms as a purely descriptive empirical phenomenon. Hart's *Postscript* treats the rule of recognition not as a feature of all legal systems but rather of 'developed' legal systems.[45]

Edward Said observes that in 18th century Europe, 'Vico, Herder and Hamann, among others, believed that all cultures were organically and internally coherent, bound together by a spirit, genius, Klima, or national idea which an outsider could penetrate only by an act of historical sympathy'.[46] Hart's conventionalism must surely offer more than resort to such invocations. Moreover, Hart seeks a recognition process that is explicable without recourse to the misty-eyed dreams of mythical ancient social contracts. His descriptive rule of recognition purports to elucidate rather than serve as a fiction.

Yet it is significant that Hart's account of his rule of recognition is not to be reducible simply to descriptive 'historical facts' or 'plain-fact positivism'; Hart's *Postscript* appears to envisage a dynamic, evolving feature of a rule of recognition where, 'in some systems of law…the ultimate criteria of legal validity might explicitly incorporate… principles of justice or substantive moral values'.[47] This potential culturally specific dimension may move Hart's rule of recognition further along the scale into maximalist territory. However, Hart leaves this point somewhat underdeveloped. There is a tension

[43] NE Simmonds, 'Bringing the outside in' (1993) Oxford Journal of Legal Studies 13, 147,155.
[44] Marmor (n 33) 210.
[45] H. L. A. Hart, *Postscript to The Concept of Law* (Penelope A. Bulloch and Joseph Raz eds, 3rd edn, OUP 1994) 246.
[46] Edward Said, *Orientalism* (Routledge & Kegan Paul 1978) 118.
[47] Hart *Postscript* (n 50) 247.

between this normative potential dimension to the rule of recognition in 'a mature legal system' and Hart's view of a recognition process that basically omits marginalised groups and the individual's voice from a two-way process of recognition, where rather 'the rule of the group' is 'supported by the social pressure it exerts'.[48]

An obvious problem in rendering a relational, two-way dimension to a rule of recognition process is that legal foundations become merely beholden to the vicissitudes of moral subjectivism. A charge of subjective relativism applies to contextualist approaches generally, as Amalia Amaya highlights with regard to legal justification.[49] This invites a further question about different kinds of foundation to those of sheer subjective relativism.

Whether envisaged as an empirical phenomenon or otherwise, Hart's rule of recognition requires interpretation against the backdrop of a number of other conceptual issues in order for its role in relation to the individual, marginalised groups and human rights to be clarified. Marmor distinguishes between conventional rule 'coordination' functions and 'constituting' rules in discussing legal conventionalism underlying a rule of recognition for a legal system.[50] Marmor contrasts the 'relative stabililty' of coordination conventions with constituting conventions which 'tend to be in a constant process of interpretation and reinterpretation, which is affected partly by external values and partly by those same values constituted by the conventional practice itself'.[51] The dynamism of the constituting level is brought to the fore here, while also suggesting that this aspect of a rule of recognition process operates through a different reference point of time to the coordination level.

Yet a somewhat neglected feature of Marmor's account of convention underpinning a putative rule of recognition needs to be highlighted. Namely, that a coordinating/constituting convention contrast is central also to accounts of language conventions, such as Ludwig Wittgenstein's language games.[52] Wittgenstein advocates a cultural relativity of language games in which languages, like games, follow initially arbitrary rules as social conventions. However, as A.W. Brian Simpson notes, Hart's work never invoked Wittgenstein's language games directly.[53] Michael Billig observes a notable limit to the game metaphor: it deals only with rule-acceptance and not rule-generation.[54] In other words, language games explanations are unable to accommodate an explanation of constituting processes but focus more on coordination of conventions as rules. The rule of recognition as a foundation for legal systems through convention based explanations is better at explaining the coordination of practices than it is how these practices are constituted.

A hollowness to this type of convention-based justification *via* coordination rather than as an account of constituting processes for legal rules emerges through Wittgenstein's statement:

> Certain events would put me into a position in which I could not go on with the old language-game any more. In which I was torn away from the *sureness* of the game. Indeed, isn't it obvious that the possibility of a language-game is conditioned by certain facts?[55]

[48] Hart *Concept of Law* (n 7) 110, 94.
[49] Amalia Amaya, 'Legal Justification by Optimal Coherence' (2011) 24 Ratio Juris 304, 323.
[50] Marmor (n 33) 205.
[51] ibid 209.
[52] Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell 1958); Ludwig Wittgenstein, *On Certainty* (Blackwell 1969).
[53] A.W. Brian Simpson, *Reflections on 'The Concept of Law'* (OUP 2011).
[54] Michael Billig, *Arguing and Thinking: A Rhetorical Approach to Social Psychology* (CUP 1987) 49.
[55] Wittgenstein, *On Certainty* (n 57) 617.

A predominantly coordinating role for a convention-reliant rule of recognition offers little to explain or prevent the individual or group being torn away from the sureness of the conventions served to habituate people into a legal system's realities and practices. Abdication of a framework for understanding rule constituting is a failure to allow for doubt and questioning within the operation of a legal system. Concentration on rule coordination, whether for a rule of recognition or a language game, amounts to a significant sacrifice of scope, ambition and meaning for legal systems. It interrogates modes of coherence but not constitutive features of these origins.

To summarise, Hart's foundational rule of recognition for a legal system can be interpreted not simply in behavioural terms as habits of obedience. These habits can be treated as what Heidegger terms horizons of understanding, namely, pre-intentional, pre-linguistic, background taken for granted assumptions that may be dynamic and susceptible to change. However, a number of weaknesses in Hart's foundational rule of recognition need to be addressed. These include the poverty of the quality of recognition envisaged by Hart; namely, the non-relational mode of interaction between the individual, marginalised groups and the legal system in this rule of recognition, where the individual and marginalised groups are largely passive and removed from relevance in the recognition process. This passivity treats the individual as a means rather than an end in violation of Kantian dignity and is resonant with the emphasis on habits of obedience in a basically authoritarian tradition drawn from Bentham and Austin that suppresses the individual. Moreover, this issue of relation to the individual in Kantian terms calls into question the possibility of accepting, even in principle, a purely minimalist goal for Hart's rule of recognition in descriptive terms as a *recognition*. A further weakness is the need for adequate analysis of constituting and not merely coordinating conventions for the rule of recognition.

3. Contrasting Teubner's Non-Foundationalist Autopoietic Systems for Law with Hart's Rule of Recognition

In this section, it will be argued that Teubner's non-foundationalist account of law as an autopoietic system operates a covert reversal of Kantian precepts of human dignity, central to human rights. In doing so, Teubner's theory displays many limitations also common to Hart's foundationalist rule of recognition.

Teubner not only sought to reinvigorate conceptualisation of law as a system, he also attempted to move into a terrain of non-foundationalist approaches to justification of legal norms, without expressly naming it as such.[56] This postmodern, non-foundationalist turn for interrogation of basic concepts in legal systems built on the work of Michel Foucault's conception of discourses and Niklas Luhmann's autopoietic systems.[57]

In Teubner's view of law as an autopoietic system, communication forms a closed autoreproductive network, as a system of its own that is inaccessible to any psychic processes.[58] For Teubner, law is:

> made up neither of rules nor of legal decisionmakers, but of legal communications, defined as the synthesis of three meaning selections: utterance, information and understanding. These communications are interrelated to each other in a network of communications that produces nothing but communications. This is what is basically meant by autopoiesis: the self-reproduction of a network of communicative operations by the recursive application of communications to the results of

[56] Gunther Teubner, 'How the Law Thinks' (n 23).
[57] Michel Foucault, *The Archaeology of Knowledge* (Tavistock 1972); Niklas Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie* (Suhrkamp 1984).
[58] Teubner, 'How the Law Thinks' (n23).

former communications.[59]

Describing Foucault's discourse as an 'anonymous, impersonal, intention-free chain of linguistic events', Teubner adopts with minimal critique a view of legal foundations as simply based on power rather than any more normative construction of legitimacy: it is simply discourses that transform discourses and it is the ubiquity of power that is a key quasi-foundation for legal discourse.[60] Teubner explicitly states that there is 'no need for an *a priori* foundation' reiterating that 'discourse formations are historically contingent, lacking any *a priori* foundation'.[61]

Teubner operates a largely silent and subtle reversal in the relation between description of a legitimising process such as Hart's rule of recognition and the legal system itself. Whereas Hart treats the mature or developed legal system as contingent upon the rule of recognition, Teubner's relativistic discourse for law places what can be termed a modal distinction between any rule of recognition and the subsequent laws. Paul Franks distinguishes Cartesian and Leibnizian terminologies regarding a modal distinction. For the purposes of the current argument in order to offer a critique of Teubner, a feature of a Cartesian modal distinction is being relied upon. This is expressed by Franks in the following terms: '[i]n the Cartesian tradition...X and Y are really distinct if each *can exist* when the other does not; X and Y are modally distinct if either one can exist when the other does not, but not vice-versa...'.[62]

In such a modal distinction, the subsequent mature legal system is not contingent upon the rule of recognition but rather the reverse. The rule of recognition has no independent existence apart from the legal system. In stark contrast, a legal system as a free-floating discourse without a foundational description of a justifying rule serves to operate as an independent existence from a rule of recognition. Teubner executes a radical reversal with regard to legal legitimacy without making explicit that his treatment of law as an autopoietic system is such an inversion of foundational accounts such as that of Hart's rule of recognition.

Teubner's is a not a claim that a rule of recognition has been removed from existing legal systems; it is a lens that is not concerned with seeking removal of the rule of recognition but rather assumes that even if the rule of recognition exists in a legal system, it is not particularly relevant to the self-perpetuating autopoietic system of law that feeds happily off itself without any such grounding nutrients of a rule of recognition. For Teubner, the legal system can function causally and meaningfully without such a rule of recognition; as a causal explanation it is a mere bonus, at best icing on the cake, at worst mere fluff of irrelevance obfuscating a clear view of the legal edifice of relations.

As a fundamentally self-contained system of communication, law feeds off itself and the issue of grounds does not appear to arise, since value is simply relative to the internal reality-constructions within the system. Issues of relation between the individual, marginalised groups and the system are also treated as subservient to the internal systemic logic.

For Teubner, legal 'actors' are 'only role-bundles, character-masks, internal products of legal communication'.[63] They are shells of agentic action, rendered entirely passive within a system that consumes them. This is highly resonant with the treatment of individuals and marginalised groups in Hart's rule of recognition, as basically unrecognised, non-relational entities embedded into habits of obedience that operate at a largely pre-intentional level. Thus, as well as sharing a commonality of emphasis on the legal system as being governed fundamentally by convention, Hart's foundationalist

[59] ibid 740.
[60] ibid 735.
[61] ibid.
[62] Paul Franks, *All or Nothing: Systematicity, Transcendental Arguments and Scepticism in German Idealism* (Harvard University Press 2005) 54f.
[63] ibid 741.

concerns and Teubner's rejection of foundationalist concerns are also conjoined at birth through a merged assumption of the passivity of the individual and marginalised groups in the construction of the legal system.

An implication of Teubner's account is that while the legal system is fundamentally a system of communication, it does not communicate with people to justify itself. While Hart's relation between the individual and the legal system in his rule of recognition is one that is a mere shadow of mutual recognition, Teubner's communication model for law as an autopoietic system is similarly authoritarian. Hart's rule of recognition does not substantially recognise the individual or marginalised groups; Teubner's model of law as communication does not communicate *with* the individual to justify itself. Rather Teubner's law communicates *to* the individual about the operations of legal logic and evades a communicative discourse about justifying the foundations of this systemic logic.

As with Hart's rule of recognition, Teubner's account of law operates a covert reversal of Kantian precepts of human dignity, central to human rights. Teubner's account serves to treat the legal system as an end and humans as mere role-bundles, beholden as a means to serve this autopoietic process. In doing so, Teubner's perspective not only flattens human dignity, it suppresses a fundamental question regarding the purposes of law. Law as an end of itself rather than a means no longer needs to offer an account of its goals or functions; purpose reduces the law to being instrumental, a means to an end, whereas an autopoietic system is an end of itself. It has become its own purpose.

4. The Rule of Recognition as a Holistic Structuralist System rather than as Atomic Structuralism *via* Kant's Third Antinomy between Freedom and Causality

In this section, it will be argued that Hart's approach to the rule of recognition as a single fundamental grounding rule is an atomic structuralist approach which is not descriptively wrong but is descriptively limited, especially with regard to the potential development of legal systems based on human rights. A different description of the rule of recognition in terms of holistic structuralism offers a more dynamic, present and future focused conception of the rule of recognition being actively constituted, as an active ongoing process of recognition for legitimacy of legal authority in legal systems rather than simply a historically focused rule of recognition. This proposed holistic structuralism as a dimension of a relational epistemology for developed legal systems committed to respect for the dignity of the individual and based on human rights, places the grounding rule of recognition not externally to the legal system in anterior fashion. Rather it is embedded and immanent within the ongoing contextual working of the system to offer scope for integration of care with justice concerns, as part of a bridging process of recognition that recognises the need for legal systems to compensate for the lack of recognition and irrationalism of justification as an implication of the rule of recognition identified by Hart. Reconceptualising Kant's Third Antinomy of Freedom and Causality highlights not only the limits of Hart's foundationalism but also paves the way for a description of the rule of recognition in relational terms. Without changing the diametric oppositional relation between the poles framing this problem of Kant's antinomy, law is stuck within the conceptual poverty of the freedom-determinism polarity (Hart's foundationalism versus Teubner's non-foundationalism). The Kantian framework is key to showing the one-sidedness of Hart's description in his rule of recognition.

Immanuel Kant's antinomies of pure reason are expressed as a thesis and antithesis. For example, his Third Antinomy:

> Thesis – There are in the world causes through freedom. Antithesis – There is no freedom, but all is nature.[64]

[64] Kant, *Critique of Pure Reason* (n 24).

For Kant, both sides of the antinomy can be equally permitted to stand on their own terms. Hart's rule of recognition and Teubner's law as an autopoietic system can be interpreted as falling on either side of this antinomy: Hart seeks to buttress against this transcendental freedom "thesis", whereas Teubner omits its relevance and concentrates on the causal processes feeding off each other in the closed autopoietic system, in a manner akin to Kant's "antithesis".

In explicating his Third Antinomy, Kant outlines the well-known self-referential problem of infinite regress in causal explanations for empirical realism:

> The causality of a cause, therefore, through which something takes place is itself an event which, again according to the law of nature, presupposes an anterior state and its causality, and this again an anterior state, and so on.[65]

According to the laws of nature, there will never be a 'first beginning' and the series is incomplete; Kant thus asks about a counterpole to causality as part of this antinomy, 'is it not possible that empirical causality itself could nevertheless without in the least breaking its connection with natural causes, be an effect of a nonempirical, intelligible causality?'[66] This proposed intelligible ground of a transcendental cause as freedom concerns 'thought in the pure understanding'.[67] Kant treats freedom as a transcendental idea, as the counterpole to empirical causality:

> Reason, therefore, acts freely, without being determined dynamically in the chain of natural causes by external or internal conditions earlier in time. That freedom must then not only be regarded negatively, as independence of empirical conditions … but should be defined positively also, as the power of beginning spontaneously a series of events.[68]

Reason is not to be regarded as a 'concurrent agency only, but as complete in itself'.[69]

On this view of Kant, reason is '*determining*, not *determined*'.[70] Hart's rule of recognition seeks a determining reason at the root of the subsequently causal processes of a legal system (even if he would not treat them as naively deterministic processes) to express the freedom he recognises as existing at the foundational roots of law. In contrast, Teubner treats reason as determined and has abdicated even the potential for freedom within the layers of autopoietic systemic processes of law.

From out of this morass of Hart's rule of recognition that is not a substantive recognition and Teubner's law as communication that is not a communication with individuals and marginalised groups, where can a path for progress be forged that is more than the sum of the parts of these foundationalist and non-foundationalist approaches to legal legitimacy? Both approaches can be interpreted as being trapped on either side of the fence of Kant's Third Antinomy, where Hart's rule of recognition is preoccupied with the transcendental ground of freedom and Teubner's autopoietic systems are immersed in causal chains of determination where individual agency and transcendental justifications are omitted. A way off this fence needs to be found.[71]

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[65] ibid A474.
[66] ibid A572.
[67] ibid A574.
[68] Ibid A582.
[69] ibid A583.
[70] ibid A583 [emphasis in original].
[71] See also Matthew Kramer for a discussion on circularity and infinite regress in Hart's rule of recognition. As Kramer states, 'what Hart deems to be the foundation of any legal system turns out

A further possibility can be acknowledged, beyond the respective edges of Kant's Third Antinomy. This was not so much an approach accepted by Kant but by subsequent thinkers in relation to his work. It is what Franks describes as the heterogeneity condition.[72] Whereas a homogeneity condition for freedom as an initial cause of a subsequent chain of causal processes treats transcendental freedom as being basically homogenous in form with the subsequent causal events, that is, it shares a causal form of some kind, a heterogeneity condition treats such freedom as coexisting with the causal events against the backdrop of a different dimension than simple causality. The heterogeneity condition approach focuses less on a transcendental cause such as freedom or Hart's attempted rule of recognition to ground a causal process, but rather on an immanent, embedded pattern or structure of freedom, linked with and in some way impacting upon the causal chain. It would place the grounding rule of recognition *not externally to the legal system in anterior fashion but rather as embedded and immanent within the ongoing working of the system*.

Teubner's shift of emphasis from rules to communication does however cast some light on a questioning of the communicative dimensions underpinning Hart's characterisation of a recognition process as a 'rule' (or 'norm') in his rule of recognition. Hart's description of a 'rule' is an argument for homogeneity or continuity between the grounding rule of recognition and the subsequent rules of the legal system. Both are termed 'rules'. Yet the rule of recognition is frequently a pre-linguistic, taken for granted assumption as a habit of obedience. Unlike legal rules, it is not typically to be clothed in language. It is a pre-intentional horizon of understanding for acceptance of the legal system. Thus, the rule of recognition is a rule that bears only passing resemblance to a legal rule, perhaps through retaining a notion of compulsion underlying it. It is, however, not implausible to claim that just as recognition is barely a recognition process, the rule is barely a rule in Hart's rule of recognition.[73]

There is here a meaningful distinction to be drawn, nevertheless, between a rule of recognition as a public social feature of a given legal system and the relational modes of concrete individuals and marginalised groups to the legal system as a whole, considered more broadly and more actively than as a habit of obedience. Simmonds, for example, draws an important related distinction between 'Hart's rough, "pre-interpretive" understanding of what counts as law' and 'an interpretation of legal practices as concerned to provide publicly ascertainable rules for the ordering of conduct'.[74] This invites the further issue of the need to develop a relation or bridge between these two levels. Such a bridge between what could be described as a 'pre-interpretive' understanding focusing on relation of law to the individual and marginalised groups - and a public social foundational rule of recognition brings to the fore the need for an immanent bridging *process* of recognition to be embedded in a given legal system.

Hart's rule of recognition purports to offer understanding of the legal system as a system. However, this conception of systemic relations remained relatively unsophisticated. Hart's foundationalist approach was that of atomic structuralism, where the rule of recognition is a basic atom-like core or centre upon which the legal system is to be based. Atomic structuralism seeks elements which are completely specified apart from their role in some larger whole. In holistic structuralism, what counts as a *possible* element is defined apart from the system of elements but what counts as an *actual* element is a function of the whole system of differences of which the particular element is

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to presuppose that a legal regime exists already' M Kramer, 'The Rule of Misrecognition in the Hart of Jurisprudence' (1988) 8 Oxford Journal of Legal Studies 401, 407.

[72] Franks (n 67) 102-104.

[73] As with the linguistic slippage in use of the word 'rule' in rule of recognition, Hart's earlier examination of definition and theory in jurisprudence highlights the dangers of assumptions that the same word has the same or even comparable meaning, when transferred to another context. Hart, '*Definition and Theory in Jurisprudence'* (1954) 70 *Law Quarterly Review* 37.

[74] Simmonds, 'Bringing the outside in' (n 47) 157.

a part.[75] Claude Lévi-Strauss' holistic structuralism in anthropology requires that all possible terms be identified apart from any specific system, for example, opposites such as raw and cooked, fresh and rotten.[76] The specific system of terms then develops which possible terms actually count as elements in a system of meaning which can serve a group as conceptual tools for the formation of abstract notions and for combining these into propositions.

A holistic structuralist conception of the legal system would seek to embed the rule of recognition more firmly and pervasively in actual instances of the legal system[77] rather than hold it apart as simply being a static atomistic foundation. The rule of recognition would be not simply transcendent to the subsequent legal system but immanent in a holistic ongoing process of renewal of that system.

Shifting the rule of recognition from being a static, atomic foundation for a hierarchical edifice opens up a potential avenue for dynamism within the concept of a rule of recognition as a relation. Such a search for a *relational* structure or process underlying a rule of recognition is not tantamount to a postmodern decentreing of origins, where there is a complete rejection of foundations, at least in its more simplistic versions. As an implication of the limitations of the recognition process in Hart's historically focused rule of recognition, search for a relational epistemology for legal foundations, encompassing holistic structuralism, requires a bridging process of recognition to be established as part of the legitimacy of legal systems founded on human rights.

5. The Tripartite Flattening in Raz's Foundationalist Approach to Interpretation of Hart's Rule of Recognition

Advocating a holistic structuralist rule of recognition, as a precursor for a relational epistemology to be expressed in preliminary terms through the UN ICESCR right to the highest attainable standard of health and to underpin foundations of a legal system founded on human rights, may at first blush appear to offer much resonance with Raz's approach to interpreting Hart's rule of recognition. Raz emphasises systemic dimensions to understanding law, postulates a diversity of rules of recognition, moves from a static focus on historical origins, and recognises the lack of clarity in the relational aspects of Hart's rule of recognition. In this section, it will be argued that while Raz points in the direction of a holistic structuralism for the rule of recognition, he does so at the price of undermining the key role of Hart's rule of recognition for understanding descriptive accounts of issues relevant to the legitimacy of law in a developed legal system committed to respect for the dignity of the individual and seeking to protect human rights.

Raz raises the question of a diversity of rules of recognition: 'It is not clear on what Hart bases his view that there is only one rule of recognition in every legal system. Why not say that there are various rules of recognition each addressed to a different kind of official?'[78] However, commitment to a holistic structuralist rule of recognition need not break the rule of recognition into disparate pieces, while acknowledging its immanence

[75] See HL Dreyfus, & P Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (Harvester Wheatsheaf 1982).

[76] Claude Lévi-Strauss, *The Raw and the Cooked: Introduction to a Science of Mythology I*. (Jonathan Cape 1970). This focus on a holistic structuralism is by no means to accept commitment to the rest of Lévi Strauss' work or paradigm. See also Marmor, *Legal Conventionalism,* (n 33), 193 on a related challenge to a hierarchical ordering of the rule of recognition, though not expressed in terms of holistic structuralism.

[77] Such actual instances could include specific meaningful dialogue processes with marginalised groups in the formation of laws that affect them, as part of a dynamic recognition process. Further examples of actual instances will be provided in terms of structural indicators for the right to the highest attainable standard of health, in section 5 of this article, as part of a potentially wider use of structural indicators for a human rights focused dialogue process with marginalised communities.

[78] Joseph Raz, *The Concept of a Legal System* (Clarendon Press 1980) 200.

across diverse aspects of a system. Fragmentation of the rule of recognition into many rules would serve to attenuate its force and relevance as a fundamental aspect of law. Raz's questioning of the unity of Hart's rule of recognition goes further than Hart's own acknowledgment of the complexity of its forms in a given system; a holistic structuralist view embraces a complexity of forms without necessarily jettisoning a basic unity to the function of the rule of recognition.

A further step taken by Raz offers a diversion away from historical origins governing the importance of a rule of recognition, that is, he argues,'[i]t is impossible to explain the conditions of continuous existence of a legal system on the basis of the principle of origin alone – other considerations must be taken into account'.[79] Here Raz is seeking to add dynamism to a tradition of legal positivism which elsewhere he acknowledges is 'held to present a static view of the law'.[80] This shift undertaken by Raz is away from a descriptive emphasis on historical origins; it is akin to a Rawlsian[81] reconstruction of Rousseau's social contract theory away from a historical to present day emphasis, though for different purposes. A somewhat similar shift is central to a holistic structuralist emphasis on current immanence of dimensions embedded actively within a given system of relations. Nevertheless, Raz's shift of the rule of recognition away from 'the principle of origin'[82] conflates two different dimensions to an origin principle – a historical origin aspect and a conceptual origin aspect.

It is this movement away from a concern with *conceptual* origins that paves the way for Raz to interpret the rule of recognition as a problem not of creation of law but rather of enforcement of law. This enforcement of law framework serves as a blanket within which Raz wraps perhaps his most fundamental question about Hart's rule of recognition: Raz asks, 'Whose practice constitutes the conditions for the existence of the rule of recognition? Hart's answer is far from clear'.[83] This pivotal question is elsewhere a concern of Raz, when referring to 'the difficulty of finding who are the norm-subjects of the rule of recognition'.[84]

Raz is explicit that his account of the rule of recognition is an interpretative fleshing out of gaps in Hart's rule of recognition: 'Hart's discussion of the rule of recognition falls short of the high standard of lucidity characterising the rest of his book and requires interpretation'.[85] Raz treats the subjects of Hart's rule of recognition as being law enforcement officials rather than the citizenry or population at large:

> The rule of recognition should…be interpreted as a D-law [duty-law rather than power conferring law] addressed to the officials, directing them to apply or act on certain laws. Hence only the behaviour of the officials and not the behaviour of the population as a whole determines whether the rule of recognition exists.[86]

Raz perceives the problem of the lack of specification of Hart's rule of recognition regarding its relation to people, such as to the population at large.

Raz enters the terrain of the problem of the dearth of interactive relation in Hart's rule of recognition. However, Raz's solution to this problem, to this relational void, is to

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[79] ibid 109.
[80] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1994) 238.
[81] John Rawls, *A Theory of Justice* (n 9).
[82] Raz, *Concept of a Legal System* (n 83) 109.
[83] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) 92.
[84] Raz, *Concept of a Legal System* (n 83) 198.
[85] Raz, *Ethics in the Public Domain* (n 85) 91.
[86] ibid 199. Scott Shapiro explicitly endorses Raz's reductive treatment of the rule of recognition as being in terms of legal officials. See Scott Shapiro, 'What is the rule of recognition (and does it exist)?' (2009) Yale Law School *Public Law & Legal Theory Research Paper Series, Research Paper No. 181*.

bypass a description of the foundations of law to people in general and to make it an implementation and enforcement problem solely for officials.[87] This moves the rule of recognition into non-foundationalist territory, evading the need to explain or even describe in terms of this rule of recognition why people obey the legal system. As Hart's *Postscript* acknowledges, his concern is with 'the justification of coercion [by law] to which the rule of recognition contributes…'.[88] Hart's rule of recognition is concerned with a *conceptual* basis for the origins of the law. Gilbert aptly expresses this issue as 'the bindingness problem':

> Is there an appropriate basis for this feeling of being 'bound'? Or must this be written off as illusory or as reflecting something other than genuinely being bound? Where there are social rules are group members indeed bound to perform in some relevant sense, perhaps in a sense connected with the justified reprimands of others? [89]

This problem can be restated at this stage as follows: Given that the structure of a legal system is ultimately founded on largely arbitrary social convention in the social rule of recognition, how can habits of obedience to the law or processes of recognition to give rise to such obedience be justified (morally or through other forms of justification) internal to the views of an individual, marginalised groups and the population at large?

Raz asserts that, '[t]he fact that a rule is an ultimate legal rule means no more than that there is no legal ground, no legal justification for its validity. It does not imply that there is no ground or justification for the rule, only that if such ground exists it is not a legal one'.[90] This importation of purportedly rational foundations from social features of law is a significant attenuation of the force of Hart's point regarding the necessary contingency upon which the rule of recognition, as an ultimate rule, is based. Hart's words lie in an ineluctable tension with Raz's above characterisation, when Hart states:

> No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use…To express this simple fact by saying darkly that its validity is "assumed but cannot be demonstrated" is like saying that we assume, but can never demonstrate, that they standard metre bar in Paris which is the ultimate test of the correctness of all measurement in metres, is itself correct.[91]

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[87] Matthew Kramer acknowledges the broader scope in Hart's text, that 'in several places, Hart writes that a rule of recognition can be distilled from the relevant behaviour of private persons as well as of officials.' Kramer, 'The Rule of Misrecognition' (n 7) 406. Margaret Gilbert examines 'the bindingness problem'for social rules such as Hart's rule of recognition, in terms of joint commitment of a social group or population (n 41) 159. The reduction of the ambit of concern for Hart's rule of recognition exclusively to legal officials *via* Raz must not become hardened into an orthodoxy.

[88] Hart, *Postscript* (n 50) 250.

[89] Gilbert (n 41) 158.

[90] Raz *Ethics in the Public Domain* (n 85) 69. Though committed to Raz's interpretation of the rule of recognition solely in terms of legal officials, Julie Dickson nevertheless expands on the conceptual fragility of this non-legal aspect in Hart's account, writing that 'practically the only remarks which Hart makes in the 1st edition of the book concerning non-legal reasons for accepting the rule of recognition are negative ones: he is at pains to point out that such acceptance need not entail regarding the law as morally justified…none of the possible reasons for accepting the rule of recognition mooted are presented as necessary reasons, and nor does Hart claim that one of those possible reasons has primacy over the others.' Julie Dickson 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27 Oxford Journal of Legal Studies 373, 380.

[91] Hart, *The Concept of Law* (n7) 109.

The radical contingency at the roots of social convention in Hart's rule of recognition appear to be defined out of the very domain of relevance of jurisprudence by Raz's commitment *a priori* to legal philosophy as being concerned with 'the necessary and the universal' leaving 'the contingent and…the particular' for sociology of law.[92] Hart's subtlety in his rule of recognition is to, in effect, challenge such a rigid dichotomy through what amounts to a position of the necessary contingency in the rule of recognition as a foundation of a given legal system; a certain indeterminacy is a structural feature of the foundations of law, for Hart. Interpreted in terms of Kant's antinomy between causality and transcendental freedom, Hart recognises the problem that an infinite regress of causes cannot be fully resolved through a further cause but requires a different kind of transcendental justification. In contrast, Raz seeks to reinstate a different cause from a legal cause into this infinite regress to bypass the void underpinning legal foundations.

Hart's rule of recognition, criticised by Raz for a lack of clarity he considered unusual in Hart's work, seeks to go beyond traditional dichotomies, beyond a diametric split between descriptive and normative standards, beyond the opposition between necessity and contingency through the vehicle of the necessarily contingent rule of recognition. However, in retaining the clothes of Bentham and Austin, regarding a fundamental reference point of habits of obedience of the bulk of society within which to wrap his rule of recognition, Hart is not only minimising relational dimensions of the rule of recognition to individuals, he is fleshing out his rule of recognition theory with vestiges of authoritarianism.

Raz can be construed as flattening in multiple ways Hart's rule of recognition's concerns with legitimacy of a legal system: this occurs *via* i) a displacement of focus solely onto legal officials and away from the individual, marginalised groups and the general population, ii) through a law enforcement focus that excises a law creation one, as a collateral feature of the limitation of concern with (both historical and conceptual) origins and iii) a rejection of a radical contingency at the heart of the rule of recognition regarding criteria upon which this foundational rule is based. This flattening serves a purpose of foreclosure, of preventing the opening of a Pandora's box of questions regarding legitimacy of legal foundations, if the contingency immersed in the roots of its foundational rule of recognition is to be fully acknowledged.

Raz can be seen to have glanced towards the fundamental question of the problem of relation to individuals for Hart's rule of recognition and turned away from such issues with his attempted formulation of this rule of recognition solely for legal officials. Raz's foundationalism can be termed an *assertive* foundationalism as it assumes that the rule of recognition does not need to engage in a recognition process with individuals, marginalised groups and the general population, beyond its mere assertion as a social fact applied by legal officials. This contrasts with what can be termed Hart's *contingent* foundationalism that acknowledges doubt and instability of justification and legitimacy, in its description of the foundations of law through the rule of recognition. The question that arises is whether there can be a *relational* foundationalism, where the individual and marginalised groups are actively engaged with in the rule of recognition? This would bring a dynamic, ongoing process of recognition, actively renewed rather than fossilised in ancient historical terms.

Hart's rule of recognition amounts to a short-circuiting of a process, a process of relation to the individual and marginalised groups, a process of recognition that might give relational foundations to a legal system. Any such short-circuiting process of recognition would impinge upon the quality of legitimacy of a given legal system. It may take a myriad of forms. If attention were drawn upon legal foundations of legitimacy as a current, ongoing systemic set of relations – scrutiny would take place of the *quality* of the contextual process of recognition in relation to given individuals and marginalised groups to underpin the contingent foundations of the rule of recognition.

[92] Raz, *Ethics in the Public Domain* (n85) 104.

A response of relational foundationalism bringing bridging processes of recognition seeks to address the irrationalism at the heart of legal authority. This irrationalism is identified and confronted at least partly by Hart's rule of recognition, in contrast to Raz's attempt to evade this irrationalism by displacing focus solely onto recognition by legal officials in Raz's version of the rule of recognition.

6. The UN Right to Health as an Illustrative Embodiment of Relational Foundationalism for the Rule of Recognition in Legal Systems

Relational foundationalism seeks to address the irrationalism at the heart of legal authority in Hart's rule of recognition by moving the focus onto shaping current and future developed legal systems founded on human rights that are rationally justified through a bridging process of recognition. There is a need for improved *quality* of the process of recognition in relation to given individuals and marginalised groups in order to underpin the contingent foundations of the dynamic ongoing rule of recognition. This section argues that a relational ongoing rule of recognition *process* can build on the systemic framework of structural indicators established for the international human right to the highest attainable standard of health.

The right of everyone to the enjoyment of the highest attainable standard of physical and mental health is given legal foundation by a range of international legal instruments, including Article 25(1) of the Universal Declaration of Human Rights, Article 12 of the International Covenant on Economic, Social and Cultural Rights, Article 24 of the Convention on the Rights of the Child,[93] and Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women,[94] as well as the right to non-discrimination as reflected in article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination.[95] According to the criteria of the UN Special Rapporteur on the Right to Health:

> Health indicators may be used to monitor aspects of the progressive realisation of the right to health provided:
> (a)They correspond, with some precision, to a right to health norm. There has to be a reasonably exact correspondence - or link - between the indicator and a right to health norm or standard…
> (b) They are disaggregated by *at least sex, race, ethnicity, rural/urban and socio-economic status.*[96]

It is important to emphasise that this systemic approach to indicators, while drawn from the context of the right to health as set out in the UN human rights system, is potentially transferable to much wider legal systemic contexts, both for international and national law. The framework of systemic indicators for analysis of transparency and progress over time expresses what can be described as a relational epistemology of law,

[93] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[94] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.
[95] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195. Art. 5 stresses that States must prohibit and eliminate racial discrimination and guarantee the right of everyone to public health and medical care. Non-discrimination and equality further imply that States must recognise and provide for the differences and specific needs of groups that generally face particular health challenges, such as higher mortality rates or vulnerability to specific diseases. See The Right to Health. Fact Sheet No. 31. Office of the United Nations High Commissioner for Human Rights, Geneva Switzerland, June 2008.
[96] (n 5) para 49, emphasis added.

as assumed connection between the legal system, the individual and marginalised groups. This lens treats the individual not simply as a general other but as being supported by key rights-based indicators that express aspects of his/her concrete identity.[97]

In the words of the Special Rapporteur regarding a range of structural indicators to give expression to a dimension of the international right to the highest attainable standard of health:

> Structural indicators address whether or not key structures and mechanisms that are necessary for, or conducive to, the realisation of the right to health, are in place. They are often (but not always) framed as a question generating a yes/no answer. For example, they may address: the ratification of international treaties that include the right to health; the adoption of national laws and policies that expressly promote and protect the right to health; or the existence of basic institutional mechanisms that facilitate the realisation of the right to health…[98]

The focus with structural indicators is on relatively enduring features (structures/ mechanisms) of a system, features that are, however, potentially malleable. For a State to assert that it is meeting the target set in any given structural indicator, generally framed as a yes/no question, evidence may need to be furnished to validate this assertion. The detail of such evidence may depend on the kind of specific structural indicator and may require different levels of detail for different structural indicators.[99] The level of detail may also depend on the form of the reporting process with regard to assessment of a State's successful implementation of a given cluster of indicators.

Examples of structural indicators identified by the UN Special Rapporteur on the right to health include as follows:

> A national strategy and plan of action that includes the right to health. Because the right to health demands that a State has a strategy and plan of action that encompasses the right to health, including universal access… The participation of individuals and groups, especially the most vulnerable and disadvantaged, in relation to the formulation of health policies and programmes… Access to health information, as well as confidentiality of personal health data.[100]

Structural indicators can potentially operate at different system levels such as the individual institution, local, regional, national, EU and UN levels.[101] A key feature of the questioning for structural indicators is that it leads to at least potentially verifiable factual statements (as yes/no responses). Any suspicion that a State is 'window dressing' through giving a positive response to a key structural indicator, when in fact it is not in a position to do so, can be followed up on, if necessary, with further questions to require proof of claims being made.

Structural indicators can give expression to key relational concerns in feminist jurisprudence regarding the needs of the concrete other, power imbalances in society,

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[97] This is not to advocate a role for a relational epistemology across all areas of law. There are legal domains, including for prevention, such as for example, the rules of the road, where a basis for a predominant focus on impersonal requirements for an abstract other are arguably more compelling than a focus on differentiated needs of a concrete other.

[98] SR Report (n 5) para 54.

[99] Paul Downes, *Access to Education in Europe: A Framework and Agenda for System Change* (Dordrecht Springer 2014).

[100] SR Report, (n 5) para 49.

[101] ibid.

and addressing concrete historical contextual problems. These feminist jurisprudential concerns include: a call for the inversion of the primacy of rule over facts;[102] to know what is not the good society, even if it is difficult to know *a priori* what is the good society;[103] a focus on discrimination as a product of power, powerlessness and domination not simply irrationality,[104] as part of what Catherine A. MacKinnon terms the dominance approach to gender equality, seeking change in the distribution of power .[105] Through identifying structural indicators for system change based on factual analysis of concrete problems for concrete individuals and marginalised groups, it is possible to identify what is not acceptable from a right to health perspective and to address system-change issues in a structural fashion that challenge the power of specific groups and help overcome the powerlessness of other groups. Structural indicators for the right to health focus pragmatically on a contextual, problem-solution type of reasoning. The factual identification of problems can be supported by concrete experiences of victims or marginalised groups to inform structural indicators, for example, through a narrative phenomenological approach to human trafficking victims,[106] echoing Heather Ruth Wishik's[107] feminist inquiry into experience and life situations. Structural indicators to tackle power distribution issues and to maximise the voices of marginalised groups can address their representation at a process level on key decision-making committees and for health decision-making and allocation of resources affecting their communities.

A context-specific focus on the concrete other of marginalised groups is central to indicators for the UN right to health. The UN Special Rapporteur was explicit on this point of access and participation of ethnic minority, disadvantaged and local groups as key issues regarding fulfilment of indicators of the right to health under the ICESCR:

> [The right] must be accessible to all, not just the wealthy, but also those living in poverty; not just majority ethnic groups, but minorities and indigenous peoples, too; not just those living in urban areas, but also remote villagers; not just men, but also women. The health system has to be accessible to all disadvantaged individuals and communities. Further, it must be responsive to both national and local priorities...Properly trained community health workers…know their communities' health priorities…Inclusive, informed and active community participation is a vital element of the right to health.[108]

As John Tobin observes, local context sensitivity invokes a degree of flexibility that is 'sensitive to, informed by, and reflect[s] the needs and interests of local populations'.[109] Developing this contextualism, a 'collaborative process [is] necessary to identify the practical measures required' for implementation; such consultation and negotiation involves a 'dialogue with the interpretative community'.[110] This interpretative community goes beyond simply nation states to local community stakeholders. A contextual focus on differential treatment between individuals requires justification

[102] Benhabib (n 8).
[103] Deborah L Rhode 'Feminist Critical Theories' (1990) 42 Stanford Law Review 617.
[104] Benhabib (n 8).
[105] Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987).
[106] Paul Downes, Anda Zule-Lapimaa, Lilya Ivanchenko & Sirle Blumberg (eds), *Not One Victim More: Human Trafficking in the Baltic States,* (Living for Tomorrow NGO 2008).
[107] Heather Ruth Wishik 'To Question Everything: The Inquiries of Feminist Jurisprudence' (1985) 1 Berkeley Women's Law Journal 64.
[108] United Nations Economic and Social Council (2005a, February 11). Commission on Human Rights Economic, Social and Cultural Rights. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Paul Hunt, paras 6, 7.
[109] John Tobin *The Right to Health in International Law* (OUP 2012) 111.
[110] ibid 98.

through pursuit of a legitimate aim to adopt measures that are necessary, that is, reasonable and proportionate, for the purposes of achieving the aim.[111]

The UN Special Rapporteur emphasises the importance of focus on 'disadvantaged' individuals and communities in relation to the right to health:

> In general terms a human rights-based approach requires that special attention be given to disadvantaged individuals and communities; it requires the active and informed participation of individuals and communities in policy decisions that affect them; and it requires effective, transparent and accessible monitoring and accountability mechanisms. The combined effect of these - and other features of a human rights-based approach - is to empower disadvantaged individuals and communities.[112]

As well as systemic indicators to reflect dimensions of the concrete identity of the person, a further relational feature is the requirement of voice through consultation. It commits to community consultation and participation processes and a focus on the needs of particularly disadvantaged communities. A key theme highlighted by the then UN Special Rapporteur, for example in his report on Romania, is the importance of community participation in health policymaking:

> Participation of the population in health-related decision-making at the community, national and international levels, is vital to the fulfilment of the right to health. It is also linked closely with the human right to take part in the conduct of public affairs, and other human rights. A human rights approach to health requires active and informed community participation, including in the formulation, implementation and monitoring of health strategies, policies and programmes. Participatory policy-making better reflects the needs of local communities and vulnerable groups, including…minorities, and helps create conditions conducive for good health.[113]

As well as this participation principle, the principle of progressive realisation for the right to health offers another contextual focus for establishing progress in implementation of this right over a period of time, and arguably of other rights, whether internationally or in future in national legal systems. Put simply, the principle of progressive realisation expects that a State's efforts will improve over a time period of five years, regarding the identified indicators for the right to health.[114]

Additionally, the principle of common yet differentiated responsibility developed in international environmental law and applied by JR Caddell[115] to the right to health in the context of human trafficking in the Baltic States, might offer another lens for a differentiated response building on systems of structural indicators. This principle recognises that some states are in a stronger position in terms of resources to underwrite the practical demands of
compliance with their international commitments. As resource constraints are already recognised as relevant in realising the right to health,[116] the principle of common yet

[111] ibid 168.
[112] SR Report (n 5) para 25.
[113] United Nations Economic and Social Council (2005b, February 21). Commission on Human Rights, Economic, Social and Cultural Rights, Report submitted by the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health. Paul Hunt, Mission to Romania, para 19.
[114] SR Report (n 5).
[115] JR Caddell, 'Legal responses to people trafficking: An overview of the international and regional framework' in Downes, Zule-Lapimaa, Ivanchenko, & Blumberg (n 115) 110–154.
[116] SR Report (n 5).

differentiated responsibility could be a dimension of this recognition of the relevance of resource constraints. However, as Lavanya Rajamani acknowledges, this principle needs to be used sparingly.[117]

Rajamani's account of the status of the principle of common yet differentiated responsibility in international law explores its contextual application in the areas of international human rights law, international economic law, international institutional law as well as international environmental law. She observes the need at times to keep such a principle 'carefully hemmed in'[118] to specific contexts in the area of human rights; she notes this is the case with the International Covenant on Economic, Social and Cultural Rights 1966 which recognises implicit norms of differential treatment, such as in Article 2(1), which requires each state to take steps, 'individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources' with a view to 'progressive realisation' of the rights recognised in the Covenant. Rajamani highlights that the universality claims of human rights require that differential treatment between states is only 'grudgingly permitted'.[119] She writes that '[t]he carefully circumscribed nature of differential treatment'[120] can include the need for states to act expeditiously and effectively to implement key indicators—and recognise that a common and yet differentiated responsibility is appropriate only in so far as it 'furthers equality rather than entrenches inequality'[121] and moreover, this principle ceases to exist when the substantive differences in contexts cease to exist.[122]

It may be objected that the rule of recognition pertains to national legal systems, whereas the UN right to the highest attainable standard of health is a principle of international law. However, the right to health's operationalisation through structural indicators pertains to national systems and contexts, illustrating its relevance as part of a dynamic, ongoing rule of recognition (that is, a holistic rather than atomic structuralism of Hart).

Structural indicators to give expression to the right to the highest attainable standard of health offer one example of a relational legal epistemology, as a dynamic, ongoing rule of recognition process with inferential correlates of voice, care, compassion and a focus on the concrete other through a systemic lens. It is to be emphasised that all of these structural features can be potentially applied to many other legal domains through a focus on structural indicators, as well as process and outcome indicators to monitor and review systemic progress. The transferability of a framework of structural indicators for system scrutiny could occur directly, for example, the right to education, minority rights, women's rights, and children's rights. It is the weight of importance given to these legal systemic review processes interrogating structural, process and outcome indicators that would give expression to this conception of a revitalised relational rule of recognition process for law. Strong enforcement and review mechanisms for such systems of structural indicators need to be established as part of this relational epistemology underlying the conception of legal systems, whether internationally or domestically.

7. Conclusion

This article has developed the concept of relational foundationalism as a response to the problem of the necessary contingency in the foundations of law identified by Hart's rule of recognition. Hart's description of the rule of recognition is that the ultimate rule for a legal

[117] Lavanya Rajamani, *Differential Treatment in International Environmental Law* (OUP 2006).
[118] ibid 22.
[119] ibid 47.
[120] ibid 23.
[121] ibid 6.
[122] ibid 254.

system is not rationally reconstructed but rests on the social pressure of habits of obedience. Hart's descriptive account of the rule of recognition, though incomplete, brings serious implications that need to be addressed. Problematic implications of Hart's rule of recognition have been identified as including, *inter alia*: the lack of meaning for the word 'rule' in such a rule, the poverty of the quality of the recognition process in the rule of recognition, with little recognition of the voice or dignity of the individual or marginalised groups. This passivity treats the individual as a means rather than an end, in violation of Kantian dignity and resonant with the emphasis on habits of obedience in an authoritarian tradition that suppresses the individual, drawn from Bentham and Austin.

Key features of relational foundationalism have been identified. These include a focus on the rule of recognition as a dynamic, ongoing process, with current and future-looking aspects, a contextual care for the concrete other, and engagement with the voices of marginalised groups. The following Table 1 summarises distinctive features and key principles of a paradigm of relational foundationalism and relates these to development of the rule of recognition in contrast to the versions of Hart, Raz and Teubner, as analysed in the sections above. It also summarises key aspects of a framework of structural indicators as a manifestation of a relational epistemology in the UN right to health.

Table 1. Key Features of a Paradigm of Relational Foundationalism for Legal Systems

Traditional Foundationalism (Hart, Raz) & Non-foundationalism (Teubner)	**Relational Foundationalism: Rule of Recognition**	**Relational Foundationalism: Distinctive Features**	**Relational Foundationalism: Structural Indicators and the Right to Health**	**Relational Foundationalism: Key Principles**
Abstract other – one way process of recognition through social pressure rule of society as a group exerts	Concrete other with focus on marginalised groups – two way process of recognition	Factual problem focused	Disaggregated indicators by social class, gender, race, ethnicity, urban/rural	Community development
Hierarchy leading to rule of recognition, though no ultimate foundation - Hart's contingent foundationalism	Multiple networks for unified rule of recognition process	Focus on opening system power spaces to marginalised groups	Health workers know their communities health problems	Participation
Historical, past focused	Dynamic, current ongoing *processes* for system change as rule of recognition	Context specific	Responsive to local and national priorities	Progressive realisation
Atomic structuralism of Hart; Holistic structuralism of Raz	Holistic structuralism	Life situations and experiences	Accessible to all not only the wealthy	Common yet differentiated responsibility
Rule coordinating - Raz's assertive foundationalism and Teubner's nonfoundationalism	Rule constituting		Marginalised groups represented on key policy and resource allocation committees	Action guiding

Relational foundationalism offers a way out of the diametric opposition between the foundationalist versus non-foundationalist framework. This argument does not seek to reject Hart's contingent foundationalism but rather to supplement it, through a future-looking concern with possibility for legal systems. It reorients the descriptive versus normative debate, to focus on possibility on an axis of actuality-possibility regarding potential relational rule of recognition processes for legal systems.

The dynamism of holistic structuralism is arguably a better response to the problem of lack of rational reconstruction, identified by Hart as underlying the rule of recognition for the origins of the creation of law. This proposed relational foundationalism requires a description of the rule of recognition in dynamic, holistic structuralist terms rather than in static, historically focused atomic structuralist terms that are reliant on a basic atom-like core or centre upon which the legal system is to be based. Contextually meaningful structural indicators based on dialogue with relevant communities, including marginalised groups and addressing factual, problem based issues, offer one aspect of such a bridging process of recognition of the concrete other for developed legal systems founded on human rights.

Key aspects of the right to health involve dialogue with the interpretative community, including marginalised groups; action guiding structural indicators; as well as indicators disaggregated by at least sex, race, ethnicity, rural/urban and socio-economic status. These offer a preliminary expression of a relational epistemology for law. A concern with factual, problem-based questions pertaining to the concrete other, as part of a relational epistemology for legal systems founded on human rights, is also strongly resonant with feminist traditions of jurisprudence. Framing responsive laws to address lived experiences of injustices of marginalised groups in concrete historical contexts requires a relational systemic rule of recognition for the legal system as a whole, as well as for a specific human rights focus on indicators. A developed rule of recognition process (through relational foundationalism) for developed legal systems committed to respect for the dignity of the individual is pertinent *both* to the legal system as a whole in a given context and to a specific human rights focus. For both dimensions, improved dialogical and implementation structures and processes for the establishment of indicators with legal effect are required.

While building on an intellectual history in Western thought that focuses on contextualism and care, the framework of the UN right to the highest attainable standard of health offers a significant though preliminary step towards a model of legal process for developed legal systems generally, as well as for human rights law, that gives expression to a relational foundationalism. While this framework offers an important reference point for a new relational paradigm for human rights law and developed legal systems more generally, this is still very much an emerging paradigm and future avenues for human rights and legal systems generally need to build from this right to health exemplar and to develop improved attention, resources and processes of recognition, including to give effect to implementation of structural indicators. This development is envisaged as taking place in a contextual, dialogical, incremental manner, as is the case with crafting the structural indicators themselves.

A further concern is that there is an absence of any real mechanism for determining any conflicts between competing claims as to the legal content of the UN right to the highest attainable standard of health. This is already recognised by the current UN Special Rapporteur on the right to health:

> Accountability in respect of the right to health and a health system is often quite weak (see A/63/263). Judicial accountability has been highlighted by the work of the mandate (see A/69/299) but other forms of accountability, such as health impact assessments, have also been addressed, including during country visits (Romania, Sweden and Uganda).[123]

The importance of a relational legal epistemology embodied in the UN right to the highest attainable standard of health points to the need for a greater emphasis on future development of bridging processes of recognition and implementation processes, not

[123] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dainius Pūras, 2 April 2015 UN doc A/HRC/29/33.

only for this right regarding structural indicators, but more widely, for structural and other indicators for human rights in general, as well as recognition processes for legal systems more generally. Implementation processes can build on frameworks of action guiding contextually adapted structural indicators addressing concrete needs of marginalised groups. As a factual, problem-based, approach there is an additional need for developing the relationship between empirical studies of need and the establishment of such clusters of indicators, whether for the right to health or for human rights more widely.[124] Empirical studies have informed the establishment of recent structural indicators in reports for the European Commission,[125] though these approaches to structural indicators are for developing system quality regarding health issues in education systems, rather than as a rights-based argument.[126] An epistemology of a dynamic, future focused relational foundationalism for law offers a paradigm to support and arguably require that such a context-sensitive, dialogical focus on structural indicators be given significance in future for developed legal systems based on human rights.

[124] See also the Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dainius Pūras, 2 April 2015, A/HRC/29/33, 9.

[125] Paul Downes, Erna Nairz-Wirth & Viktorija Rusinaite, *Structural Indicators for Developing Inclusive Systems in and around Schools in Europe (*Publications Office of the European Union 2017); Paul Downes, & Carmel Cefai, *How to tackle bullying and prevent school violence in Europe: Evidence and practices for strategies for inclusive and safe schools* (Publications Office of the European Union 2016). See also European Commission/EACEA/Eurydice, 'Structural Indicators for Monitoring Education and Training Systems in Europe – 2016', Eurydice Background Report to the Education and Training Monitor 2016. Eurydice Report (Publications Office of the European Union 2016).

[126] It is not being claimed that current legal implementation and review processes for structural indicators are, as yet, adequate. There is a need for rendering clusters of structural indicators justiciable, an issue which is beyond the scope of the current article.