Questioning the Rule of Recognition: A Descriptive Challenge

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As H.L.A. Hart has famously argued, the task of legal positivism is to satisfy the:

> …standing need for a form of legal theory or jurisprudence that is descriptive and general in scope, the perspective of which…is that of an external observer of a form of social institution with a normative aspect, which in its recurrence in different societies and periods exhibits many common features of form, structure, and content.[1]

While this quotation states the basic terms of inquiry for positivist accounts, it needs to be acknowledged that such theoretical models also move to represent some of the common ways in which the institutions of law actually operate. The point of the current paper is to advance the positivist project by focusing upon one such operational feature.

I would like to begin this task by emphasizing a few familiar aspects of law. To start with, it is, at least in part, a matter of the institutionalized practice of governance; the law is comprised of structured social activity meant to order the behavior of members of a polity. What is more, insofar as this practice is institutionalized, it strives to be norm-regulated.[2] This is to say that the law is constituted such that individuals who are responsible for its administration generally purport and appear to be acting on the grounds of some particular legal set of legitimating terms, and not solely upon the basis of their own license. Given these characteristics, there appears to be a burden upon anyone interested in participating in the descriptive-explanatory pursuit, just described, to include an account of how to identify the norms that ground the institutional practice of law.[3]

The manner in which this burden is predominantly relieved within contemporary

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[1] H. L. A. Hart, "Comment" in R. Gavison, ed., *Issues in Contemporary Legal Philosophy* (Oxford: Clarendon Press, 1987), 36-37

[2] Here, and throughout this paper, I will be using the term 'norm' to include rules, principles, as well as non-normative laws.

[3] I am referring here to the ontological status of the terms of law, as opposed to their epistemic status. For a discussion of the difference, see Jules Coleman's *The Practice of Principle* (Oxford: Oxford University Press, 2001) at Lecture Seven.

positivist accounts is, of course, through reference to the rule of recognition.[4] This conceptual mechanism was originally suggested by Hart, who thought that it was obvious that "nothing which legislators do makes law unless they comply with fundamentally accepted rules specifying the essential law-making procedures."[5] To theoretically accommodate this observation, he conceived of an 'ultimate' or 'master' rule, which provides authoritative criteria for determining the valid, and hence existent, institutional norms of law.[6] The content of this master rule is, in turn, directly determined by the "way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications." This is to say, that it is informed by reference to the implicit criteria by which legal officials understand themselves to engaging in their law-applying and law-identifying practices.[7] Thus, the rule of recognition is an abstract norm that acts as a "test" of legality, and which is informed by the self-understanding that officials have of their own law-identifying and law-applying practices.

The problem to be addressed in this paper regards the idea that contemporary legal positivism, through its general reliance upon this conceptual mechanism, too roughly parses out this normative aspect of law. More specifically, it will be argued that by identifying the criteria of legal validity with what officials practice and accept it to be, the rule of recognition fails to do representative justice to a number of features of institutionalized legal practice. On this basis, it will be suggested that there are grounds to search for a refined understanding of the rule of recognition, or even a replacement for it, thereby better representing the complexity of the identification of legal rules.

In order to achieve these ends, this paper will begin with two arguments designed to illustrate the problems inherent in the analysis provided for by the rule of recognition.

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[4] Some prominent positivists are moving away from their dependence upon the idea of this mechanism, on terms other than will be suggested herein. See, for example, Jules Coleman "Beyond Inclusive Legal Positivism" Ratio Juris. Vol. 22 No. 3 September 2009 (359–94).

[5] H.L.A. Hart, "Positivism and the Separation of Law and Morals," reprinted in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), at 59.

[6] H.L.A. Hart, *The Concept of Law*. 2nd Edn. (Oxford: Oxford University Press, 1994), at 108.

[7] Some positivist scholars, such as Joseph Raz, have contended that there can be multiple rules of recognition at play within a single legal system. This move is made to accommodate the diversity of norm-identifying practices that can emerge within any given system. I am inclined to accept this assertion, but for the sake of keeping the current discussion focused on the constitution of such rules, I am going to talk about them as though there was only one rule per system. See "The Identity of Legal Systems" in *The Authority of Law* (Oxford: OUP, 2009).

1. Argument From Admission

In order to get this first argument off the ground, it will be helpful to reiterate two important points about how the rule of recognition is supposed to function within positivist theory generally. The first is that the content of the rule of recognition is determined by the criteria that the officials of a polity generally practice, and accept as underwriting, the way(s) in which they distinguish legally valid, and hence legally existent norms, from those that are not. The second is that the rule is supposed to be an actual test of the legality of a norm. As such, should any standard fail to satisfy the criteria of success laid out in within it, then as a sheer conceptual matter, the result must be that it is not, strictly speaking, a law.

These two features of the rule of recognition are going to be put to use within an argument meant to question the ability of this mechanism to accurately represent the legal status of all the norms that ground the institutional practice of law. Yet, I want to be careful not to overstate the point. So, before I engage in the criticism of this apparatus, it must first be acknowledged that by resting its representation of the criteria of validity upon what is practiced and accepted by the body of legal officials, the rule of recognition is grounded in features of the world that are usually determinative of the norms that will actually be in play within the law's institutional performances. That said, this mechanism is constructed in such a way, that there exists a standing possibility that a standard, or set of standards, could be identified and enforced as law by a polity's body of officials, and thereby be given comprehensive institutional influence, despite failing to accord with the criteria of legal validity, that those very same officials accept.

There are at two ways in which I can conceive of this phenomenon coming to pass. On one hand, there is the ever-present danger of human error. Legal officials might simply blunder when assessing the legal validity of some particular rule or rules, and thereby identify and endorse them as valid law, despite their being in disaccord with those criteria. Though perhaps unlikely in primitive legal systems, the possibility of such an occurrence becomes much more plausible within modern legal systems that contain complex and multi-faceted conditions of validity, the satisfaction of which is not always easily determined. An arresting example of this possibility can be found with reference

to the *Manitoba Language Rights Case*, where, in 1984, the Canadian Supreme Court ended up holding that a century's worth of a province's legislative statutes were invalid, because they had ignored a clear constitutional provision, dating back to 1870. When confronted with this rather longstanding oversight, one former premier claimed that, "…everyone believed that the constitutional position was OK. Everyone!...It just came out of the blue as far as I was concerned."[8]

Another way in which such a violation could occur, regards the possibility that officials might intentionally contravene their own regularly practiced and firmly accepted terms of legal validity. Here, I am thinking of what has come to be described as a "state of exception": situations where there is a generally perceived concern of great and immediate practical importance, which legal officials believe requires them to organize their polity in a manner that the criteria of validity do not condone. I think it could be plausibly argued that this is what took place with regard to some of the clearly unconstitutional legislation that was passed and later overturned in the United States, soon after the terrorist attacks of 9/11.

Now, if these kinds of violations could only achieve very limited institutional influence, such as being taken up in a single case, then no problems would arise for a position that incorporates the rule of recognition. After all, any plausible account of the identification of legal norms must be able to distinguish rogue behavior from general institutional policies. However, the situation changes dramatically when one ponders what to make of the possibility of a comprehensively and persistently practiced violation of the terms of legal validity. Consider what a scholar, who's preferred model of law included the rule of recognition, would have to say about the following scenario: within a constitutional challenge the status of a criminal statute is *mistakenly* identified as being valid. On these grounds, the rule in question ends up being fully integrated into the institutional practice of law. As such, it is recognized and used by officials to ground the arrest, trial, sentencing, and sanctioning of myriad citizens of the given polity.

Despite its being officially identified and practically efficacious, it appears that a theorist whose legal model incorporated the rule of recognition, would be forced to

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[8] Premier Duff Roblin, cited in Raymond M. Herbert's, *Manitoba's French Language Crisis: A Cautionary Tale* (Kingston: Queens University Press, 2005) at 15.

conclude that this rule was not valid, and as such, simply did not exist *as a law*. Given that the rule of recognition was created and deployed in order to advance the project of modeling the law from the perspective of an "external observer" interested in capturing the "form of a social institution with a normative aspect", I find this consequence of its adoption to be problematic.

The reason for my discomfort is that the success of a theoretical model should be, at least partially, judged in terms of the accuracy of the representation that it provides of the phenomena that is supposed to be depicting. Yet, if the above points are correct, then it appears that the rule of recognition precludes the positivist model from acknowledging the legal validity, and hence legal existence, of standards that have all the performance-related hallmarks of legal rules. In effect, it precludes as legal standards, a set of norms that can be officially introduced and identified as law, and which could thereby come to efficaciously govern the behavior of citizens and legal officials alike. As such, one would think that, from the perspective of an external observer, this account of the legality of norms is insufficiently sensitive to the positive reality of law. On these grounds, the adoption of the rule of recognition appears to detract from the accuracy of any positivist model into which it is incorporated, in a way that is in tension with the aims of the project that it is supposed to support.

Another way of casting this conclusion is to state that the rule of recognition does not do justice to the openness of the normative structure of law, insofar as it is incapable of accurately representing the legal status of *all the standards* that can come to govern its institutional performance. For its part, the next critique will move in something of the opposite direction. Here it will be contended that the rule of recognition, as conceived within contemporary positivist literature, also fails to accurately represent an aspect of the restrictiveness that the law appears to possess. To this end, it will focus upon how the rule of recognition portrays the relationship between legal officials and the criteria of validity of a legal system.

2. Argument From Validity

To put it very loosely, to talk about the terms of legal validity is to talk about the legitimate grounds of the institutional practice of law. Thus, on the account put forward

by the rule of recognition, the terms of legitimate legal practice are ultimately dictated by what a polity's body of legal officials accept them to be, at a given time. In this way, the law is purported to regulate its own validity in a way that is deeply fluid; the terms of legal validity simply track whatever particular criteria officials accept to be underwriting their own practices. While, there is no denying that officials have an essential role in setting the conditions of legal validity, I am hesitant to accept this portrayal of their part in it.

The reason for my apprehension is grounded in the fact that while the practice of law is primarily oriented towards ordering the lives of legal citizens; it also purports to be capable of normatively restricting the behavior of its officials. Now, the degree to which a given legal system attempts to do this is highly contingent. Throughout history there have been many instances of law where legal officials have been granted near absolute power, including the capacity to alter the criteria of legal validity in just the way suggested by the rule of recognition. However, more and more, legal systems are coming to include norms that claim to restrict legal officials from exercising that kind of unfettered control over the terms of their legitimate practice. This move towards restricting the terms of validity, of course, most clearly instantiated within the realm of entrenched constitutional law. Within many contemporary states, norms are laid down which explicitly purport to delineate the ultimate terms of valid legal practice. What is more, this is done in a manner that is specifically designed to be insulated from changes that might be brought about by shifts in official attitudes and behaviors. Indeed, in the most extreme cases, legal norms are laid down that purport to determine some of the criteria of legal validity in a way that resists the possibility of ever being changed, under any conditions, by anyone. Here, I am referring to certain sections of the French, German, and Honduran constitutions.

Now, I am certainly not claiming that official behavior does not ultimately shape the de facto institutional practice of law. And just as importantly, I am not denying that the practices and attitudes of legal officials represent an integral part of understanding how the criteria of legal validity are to be identified. All that I am suggesting is that, if we take the idea of constitutional constraints seriously, then it looks like there may be more to the story of how a legal system's criteria of validity are established and

maintained, than just those features of the world. On these grounds, positivist scholars face a choice: either they can accept the tale told by the rule of recognition, and thereby hold one of the fundamental tenets of constitutional law to be deeply misconceived; or they can search for an understanding of how the law regulates its own validity, in a manner that better comports with existent constitutional claims to insulate the terms of legitimate legal practice from so readily shifting to accommodate the currently accepted practices of legal officials.

3. The State of Play

At this point it is worthwhile to review the preceding concerns, in order to take account of where things currently stand, as well as to garner an appreciation of where to go from there. First of all, it has been argued that the rule of recognition precludes a potential set of standards from being identified as legal norms; standards, that if instantiated, would bear all the operational hallmarks of positive law. Second, it was argued that the rule of recognition portrays the source of the criteria of legal validity in a way that is at odds with a set of normative restrictions that are sometimes purported to exist within legal practice. Now, it is important to point out these critiques have not been deployed in order to intimate that the rule of recognition is somehow guilty of not modeling such features of law, for it does – it just doesn't model them in a way that I think does descriptive justice to the reality of the law's social practice. Thus, the thrust of this paper should be understood to suggest that positivists have good reason to search for a more refined understanding of the normative grounds of the institutional practice of law; one that would better complementary the features of legal practice highlighted by these arguments.

While this paper will not go on to suggest any sort of refinement or replacement of the rule of recognition, before I finish, I *would* like to draw out a number of lessons that can be gleaned from the discussion to this point; lessons that I think should be taken seriously by anyone seeking to pursue such a project.

The first point to be made, is that it is problematic to identify the legality of norm by only referencing the practices that are accepted by the body of legal officials of a polity. On the one hand, this way of determining the identity of legal norms is *too*

detached from the facts of the law's institutional performance, to provide a wholly satisfactory account of the content of the set of legal standards. On the other hand, this move places the source of the criteria of legal validity *too close,* to the law's institutional performance, to accommodate some of the normative constraints that legal institutions often purport to place upon their own practices. Thus, by relying upon what is practiced and accepted by officials, the rule of recognition becomes caught between these two competing pulls, in a manner that fully accommodates neither.

The second lesson follows from the first, insofar as I think that those two pulls upon the rule of recognition are telling. The point here is that there seem to be two manners by which the legality of a norm ought to be assessed. First, by identifying whether it is officially taken up to govern the law's institutional practice. And second, whether it satisfies the conditions of legitimacy laid down in a legal system. By attempting to model both of these aspects of a norm's legality on the basis of a single test, the rule of recognition appears to be in the unenviable position of trying to make two disparate cuts with a single strike. Thus, I think that any attempt to refine or replace this mechanism, should seriously consider the benefits that might accrue from offering a more complex test through which to identify these different aspects of the legality of those standards that ground the institutional practice of law.

That said, there is a reason as to why the rule of recognition has been constructed in the simple way that is has; a reason which any attempt to improve upon it must take very seriously. By accounting for the standards that govern the institutional practice of law, as well as the terms of their legitimacy, on the basis of a test that is grounded in a single feature of the world, the rule of recognition is able to model both these aspects of law in a way that demonstrates their interconnectedness. In this way, the rule of recognition allows positivists to provide an account of law that emphasizes the unity of the sociological and normative aspects of legal practice. Thus, *the final lesson* to take away from this discussion is that if any refinement or replacement of the rule of recognition is to be proffered, it must not only provide a more complementary descriptive account of the complex terms of a norm's legality, it must do so in a way that does not detract from the project of espousing a unified account of the law, which as Hart described it, is "a form of social institution with a normative aspect".