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Luka Burazin

## The rule of recognition and the emergence of a legal system

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Luka Burazin

# The rule of recognition and the emergence of a legal system

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## 1 Introduction

- 1 According to Hart, the rule of recognition represents the foundations of a legal system. All other rules in the legal system are identifiable as members of a system only in virtue of the existence of such a rule of recognition. Since other rules can be seen as belonging to a system of rules only through the lens of the rule of recognition, it is said that the rule of recognition creates unity among different rules.
- 2 The relevance Hart attaches to the rule of recognition, as well as some of its characterisations in *The Concept of Law*, indicate that the rule of recognition is first and foremost a rule in virtue of which other rules *are* legal rules. It explains the *existence* of legally valid norms as such. As a matter of conceptual truth, the satisfaction of the rule of recognition constitutes a norm as law. It can thus be said that the rule of recognition plays an important ontological role<sup>1</sup> and thus has the character of a constitutive rule. By 'constitutive rules' I here mean the rules which lay out certain conditions that have to be met within a particular context in order for something to have (count as having) the relevant status function or for there to be (count as being) something of the relevant status function. For the status function to be imposed, constitutive rules have to be collectively accepted by the relevant community. But what is the rule of recognition constitutive of? Does it constitute merely particular legal rules as members of a system or a particular legal system as a whole? From what Hart says about the rule of recognition, it can be inferred that it certainly serves at least the first function. It is no doubt the constitutive rule of particular legal rules as elements of a system. However, even though this is not what Hart claims (at least not explicitly), one might also be tempted to see it as a constitutive rule of a legal system as such.
- 3 What I claim in this paper is that the rule of recognition, given the way it is presented by Hart, cannot be a constitutive rule of any legal system as a whole, but rather a constitutive rule of (primary) legal rules as elements of a legal system. That is, I claim that the rule of recognition does not lay out the conditions that have to be met within a particular context in order for there to be (count as being) a legal system but only the conditions that have to be met within a particular context in order for something to count as a '(primary) legal rule'. Since I take the legal system to be an institutional artifact kind, I further claim that, in order to account for a legal system as a whole, at least two further constitutive rules, in addition to the rule of recognition as a token-element constitutive rule, are needed – one constitutive of legal officials and the other constitutive of a legal system as a token.<sup>2</sup> However, given the central role the legal officials' practice occupies in establishing a particular instantiation or token of a legal system, I also claim that the rule of recognition cannot be understood as 'merely' a token-element constitutive rule but also as a legal system's implementation or concretisation rule. By 'implementation rule' I here mean the rule through the satisfaction of which the author of a token  $x_i$  makes conditions  $C$  from the type constitutive rule  $Tx$  obtain.
- 4 In this paper I first present (Section 2) Hart's account of the rule of recognition, advocating an interpretation of the rule of recognition as a constitutive rule by its nature. I also point to some objections (as to the way officials acquire their legal or official status, as to why the rule of recognition is itself a member of a legal system, as to why acceptance by officials is sufficient for establishing the rule of recognition, and as to what grounds the ordinary citizens' duty to obey the law) that raise questions concerning what the rule of recognition is constitutive of. Then (Section 3) I analyse Hart's account of the rule of recognition against the background of the artifact theory of law, expounding the claim about the rule of recognition being both a token-element constitutive rule and the legal system's implementation rule. Finally (Section

4), I reconsider some of the objections levelled at Hart's account of the rule of recognition and try to show that the interpretation of the rule of recognition given within the framework of the artifact theory of law fares far better in overcoming such objections.

## 2 Rule of recognition as a constitutive rule

- 5 On Hart's account, the rule of recognition is a special kind of social rule forming the foundations of a legal system. Its existence is manifested by the way officials identify the rules of their system, i.e. the law. The thus identified law is what Hart calls primary rules of obligation. Since any primary rule is valid only if it can be identified or recognised as a member of a legal system according to the criteria laid down in the rule of recognition, Hart takes these criteria to be the system's ultimate criteria of validity. The fact that the validity or membership of all primary rules of a system can be traced back to a single rule confers on the rule of recognition a special capacity, i.e. the capacity of unifying the thus far unconnected set of rules into a system of rules. By providing unity, which is a distinctive feature of every system, the rule of recognition, as Hart says, "introduces /.../ the idea of a legal system".<sup>3</sup>
- 6 As has already been said, the rule of recognition also plays an important constitutive role. The question is only what precisely does it constitute. Legal rules are the most notable candidate. That the rule of recognition constitutes legal rules may be inferred from Hart's account of the identification test and his view of the way in which primary rules acquire their legal status. First, the criteria (of validity) set out in the rule of recognition are not just some useful tool which helps us recognize that something is already there, prior to these criteria. According to Hart, the criteria set out in the rule of recognition are part of "the test for identifying what *is to count as law*" (emphasis added).<sup>4</sup> And this test is manifested in the way in which officials, e.g. courts, "identify what *is to count as law*" (emphasis added).<sup>5</sup> So, it is not that legal rules only *are* identified by these criteria. More importantly, the criteria say which rules *are to be* legal rules. Despite the way in which criteria of validity are often referred to, their position with regard to legal rules makes them more of a set of obligatory requirements than a mere identification test. The second argument speaking in favour of characterising the rule of recognition as a constitutive rule is based on Hart's view of the way primary rules acquire their legal status.<sup>6</sup> According to Hart, a rule can acquire its status of a legal rule, a rule that is a member of a legal system, only upon satisfying the criteria provided by the rule of recognition.<sup>7</sup> Thus, it is the rule of recognition in virtue of which particular (primary) rules come to be *legal* rules. Rules do not have legal status prior to being recognised as having such status according to the criteria of validity laid down in the rule of recognition. The rule of recognition thus "confers on the rules their *status* as legal rules".<sup>8</sup>
- 7 Besides its constitutive role with respect to the rules of a system, one might perhaps try to imagine its constitutive role with respect to a legal system as such. In the latter case the rule of recognition would be a rule in virtue of which not only particular rules are legal rules, but also a system of these rules *is* a legal system. If the conditions laid out in the rule of recognition were to obtain, there would be a legal system. The rule of recognition would thus confer on the system its *status* as a legal system. And this image in fact, though not explicitly expressed, seems to accompany the rule of recognition. Since the rule of recognition plays a vital role in Hart's account of the existence of a legal system, this should not present a surprise. Hart, of course, does not claim that the rule of recognition is a constitutive rule of a legal system as a whole. Quite to the contrary, Hart maintains that an introduction of each of the secondary rules (rules of recognition, change and adjudication) represents only a step from the pre-legal into the legal world, or from a set of customs (primary rules) to a legal system and that only all secondary rules taken together are sufficient to convert the regime of primary rules into a legal system.<sup>9</sup> And even though, for Hart, the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication represents the heart of a legal system, the union of primary and secondary rules is not the whole of a legal system.<sup>10</sup>
- 8 However, the claim that the rule of recognition has a constitutive role with respect to a legal system as a whole might find some elusive support in Hart's theory. Thus, for example, according to Hart, the rule of recognition, even when amounting to only a reference to an

authoritative text, “introduces *.../ the idea of a legal system*: for the rules are now not just a discrete unconnected set but are, in a simple way, unified” (emphasis added).<sup>11</sup> Since the necessary feature of a legal system is that it is a system rather than a set of rules, and since it is the rule of recognition that can provide for this unity of rules, one might say that the rule of recognition constitutes not only each of the rules of a legal system but also the system as such. Another support for this kind of claim may be found in Hart's view that if anything deserves “to be called *the foundations of a legal system*” (emphasis added), it is the “social situation where a secondary rule of recognition is accepted and used for the identification of primary rules of obligations”.<sup>12</sup> Yet additional support is found in the following claim: “the rule providing criteria for the identification of other rules of the system may well be thought *a defining feature of a legal system*” (emphasis added).<sup>13</sup>

9 Be that as it may, an interpretation of Hart's rule of recognition as being the sole constitutive rule of a system as a whole would undoubtedly violate the principle of charity. However, it seems that some of the objections that are regularly levelled at Hart's explanation of the rule of recognition implicitly call for some such rule, be it the rule of recognition itself (in a reinterpreted form) or some other kind of rule, that would be constitutive not only of primary legal rules but also of secondary legal rules as elements of a legal system or of a legal system as a whole. I here use the term 'primary rules' to refer to all types of 'first-order' rules in a legal system (be they duty-imposing or power-conferring), with the exception of the three secondary rules (rules of recognition, change and adjudication) as 'second-order' rules.

10 Take, for example, the objection that the rule of recognition is not able to explain why it itself (as well as the other two secondary rules) is a member of a legal system. If a legal system is a union of primary and secondary rules and if the rule of recognition serves only to constitute the primary rules of a system, then there has to be some other rule that would be constitutive of the secondary rules of the system. In this context it is also curious how the rule of recognition can provide for the union of primary and secondary rules. By stating the membership criteria for primary rules, it certainly does provide for unity among the different primary rules of a system but it cannot account for unity between primary rules and, e.g., the secondary rule of change or adjudication.

11 Or to take another example – the famous dilemma about what comes first, the rule of recognition or officials. If it is the practice of officials that grounds the rule of recognition, then officials *qua* officials have to exist prior to the emergence of the rule of recognition. Their role as officials cannot be constituted by this same rule which they themselves constitute. And according to Hart, officials (e.g. legislators or judges) can acquire their official role only in virtue of some rule.<sup>14</sup> One might perhaps insist on claiming that legislators and judges acquire their official capacity in virtue of the rules of change and adjudication. This, however, would imply that these rules precede the rule of recognition. Yet Hart made no mention of the chronological order in which any of the secondary rules are introduced into the system. It would also be conceptually wrong to presuppose their precedence in respect of the rule of recognition since what according to the rules of change and adjudication legislators and judges do is introduce changes to and adjudicate upon the rules identified as the rules of a system, which cannot be done unless a rule of recognition setting out the criteria of validity already exists. Hence, if officials do not acquire their official role in virtue of any of Hart's secondary rules, one again requires some other rule that constitutes their official status and precedes the rule (of recognition) which is constituted by their own official practice.

12 Another problem often linked with the rule of recognition relates to why acceptance by officials is sufficient for establishing the rule of recognition. That acceptance of the rule of recognition by officials is sufficient for its emergence does not seem troublesome if we conceive the rule of recognition as constitutive of only primary (i.e. 'first-order') rules of a system. As primary legal rules are elements of a legal system as a whole, the rule of recognition is only constitutive of the elements of a system. This presupposes that a legal system has already been constituted, which again presupposes that a particular group of people, in virtue of some other constitutive rule, has already acquired its status of legal officials. By acquiring the status of legal officials, this group has acquired the official capacity to practice the rule of

recognition and thus lay down membership criteria for the primary legal rules of their legal system.

- 13 Finally, there is the objection that the rule of recognition is incapable of grounding the ordinary citizens' (legal) duty to obey the law since it is a rule of officials alone. If the rule of recognition is established by the convergent practice of behaviour and critical attitude of acceptance of one group of people (officials), it can create a duty to obey the law for no other group but this. However, this potential group of officials could not have acquired its official status if other people, both potential officials and non-officials (ordinary citizens), had not accepted that potential officials be counted as officials with the capacity to make law that must be obeyed. So, again, in order to account for the normativity of law in respect of all the members of a particular community there has to be a rule which precedes the rule of recognition. Of course, this is only so if we do not accept the view according to which there exists some moral duty to obey law or that law is normative in virtue of the various elements of a legal institution giving people a reason to obey (such as the authorisation of coercive enforcement mechanisms).
- 14 These examples point to two important conclusions. First, Hart's rule of recognition cannot be fruitfully conceived as a (sole) constitutive rule of a legal system as a whole. Second, these examples raise a conceptual problem. If Hart's account of the rule of recognition holds, then there need to be at least two other constitutive rules, i.e. one establishing officials and the other introducing the initial concept of a particular legal system. I shall consider the latter within the theoretical framework of the artifact theory of law in the next section.

### 3 Legal system as an abstract institutional artifact and its constitutive rules

- 15 According to the artifact theory of law, legal system is an abstract institutional artifact.<sup>15</sup> It is an artifact since it is created by an author (as a rule a collective one) who has a particular intention (resulting from the author's collective intentionality) to create the institutional artifact 'legal system', based on the author's substantive and substantively correct concept of what a legal system is, under the condition that this intention be largely successfully realized.<sup>16</sup> By being institutional by nature, it differs from 'ordinary' artifacts (such as chairs, hammers or clocks) in that it is rule-based and requires collective recognition (acceptance) by the relevant community. This means that it can initially be created only if there is collective recognition of the relevant constitutive rules and can continue to exist only for as long as this recognition is maintained.<sup>17</sup> Finally, it is abstract in the sense that it is not created by imposing the status function 'legal system' to any existing physical object or person but by making it the case that it exists provided certain conditions are fulfilled.<sup>18</sup> Making it the case that a legal system exists is, of course, realised through the collective recognition of the (existential) constitutive rule laying out a set of conditions for there to be a legal system. The rule through the collective recognition of which the relevant community makes it the case that there is a legal system creates the context in which an instance of the legal system can emerge.
- 16 The set of conditions laid out in a legal system's constitutive rule represents sufficient existence-conditions for there to be a legal system. Since a legal system is an artifact kind, this set of existence-conditions seems to include at least the set of conditions for being an artifact. It thus includes the conditions of both authorship and intention. The authorship condition requires that there be an author, collectively recognised as such by the relevant community, who creates a legal system.<sup>19</sup> The intention condition requires that this author have a particular intention to create the institutional artifact kind 'legal system', that this intention be based on the author's substantive concept of the legal system,<sup>20</sup> and that eventually this intention be at least largely successfully realised.<sup>21</sup> Since these conditions define the artifactual character of the legal system, one can say that they, in fact, amount to the initial concept of the legal system. This, further, means that through collective recognition of a legal system's constitutive rule the relevant community's concept of the legal system plays a stipulative role in establishing the 'nature' of the legal system.<sup>22</sup>

17 However, the community's (collective) concept of what the legal system is is what determines the 'nature' of the legal system at the first level only. The relevant community collectively recognises that if something is created with the intention that it be a proper member of the institutional artifact kind 'legal system', then it is a legal system. This, no doubt, requires that the relevant community have at least some (however general) concept of what the legal system is.<sup>23</sup> However, since a legal system is an artifact after all, it must have an author. The author must have particular intentions. He must also have a substantive (and substantively correct) concept of what the legal system is. The correctness of his concept is then judged by the fit between the community's collective concept and the author's concept of the legal system. For the author's concept to be correct, it should at least substantively match the relevant community's concept of the legal system. However, since the author only needs to have a substantive (and substantively correct) concept and since this concept needs to be realised only largely successfully, it may be said that the final real 'nature' (character) of a produced legal system is, at the second level, nevertheless shaped by its author's intentions (and the intentions of those sustaining it). Of course, apart from being relevant to the making of a legal system, the relevant community's (collective) concept is relevant to its continued existence. A legal system exists only in so far as the relevant community collectively recognises it as being a legal system or only in so far as the author's intentions at least largely match the relevant community's (collective) concept of the legal system. This is in tune with Hart's claim that where there is a general disregard of the rules of a system, one should say that "in the case of a new system, that it had never established itself as the legal system of a given group, or, in the case of a once-established system, that it had ceased to be the legal system of the group".<sup>24</sup> It follows therefrom that some person or group of persons could create a new system of rules which would have its rule of recognition but which would not amount to a particular community's legal system since there would be a general disregard of its rules. According to the artifact theory of law, the authors and their intentions would no doubt exist but since collective recognition by the relevant community lacks, there would be no institutional artifact.

18 So how does Hart's rule of recognition fit into this account? The function of the rule of recognition is to make possible the existence of primary (i.e. 'first order') legal rules of a legal system. However, despite the fact that the said rule is constitutive of all legal rules of a system, it is constitutive of individual legal rules and not of the legal system as such. If one takes a legal system to be a system of rules, the rule of recognition might best be conceived as a constitutive rule of the elements of a legal system. It could be formulated as follows:

For any rule  $x$ , we (legal officials) collectively accept that if  $x$  meets certain conditions  $C$ , then it counts as a legal rule of our legal system.

19 The conditions  $C$   $x$  is to meet in order to be counted as a legal rule could include, e.g., the fact that a certain rule is part of some authoritative text of rules, that it has been enacted by a specific body, that it has a long customary practice or that it is related to a judicial decision.<sup>25</sup> These conditions, of course, presuppose the officials' concept of a legal rule since they specify, as Hart put it, "some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts",<sup>26</sup> i.e. that it is a 'legal' rule. Yet the conditions laid out in the rule of recognition also presuppose the officials' concept of a legal system. For, according to Hart, the rule of recognition, even in its simplest form (one amounting to only a reference to an authoritative text), introduces "the idea of a legal system" and may be understood as a "defining feature of a legal system".<sup>27</sup> If one remains within the framework of Hart's theory, it is reasonable to assume that the concept of a legal system officials have includes at least the following two features: that the legal system is a system of valid legal rules, i.e. rules that are members of one and the same system of rules, and that the legal system is structured as a union of primary and secondary legal rules. However, given that for Hart the rule of recognition is the ultimate rule in a legal system, the question of how legal officials (e.g. judges or legislators), in whose practice the actual existence of the rule of recognition consists, acquire their status of 'legal' officials remains unanswered. It seems that in order to account for the emergence of legal

officials and to avoid the circularity problem (the dilemma about how the rule of recognition can account for legal officials when it is the practice of legal officials that constitutes the said rule) one requires a constitutive rule of the following form:

Of this group of people  $z$ , we collectively recognise that  $z$  counts as legal officials.

20 According to Searle's theory of the construction of social reality, 'legal officials' as an institution in some context  $C$  can only be created if there exists collective intentionality imposing a special status, that of 'legal officials', (and consequently a function with certain "deontic powers", i.e. rights, authorisations, duties, obligations, etc.) on some group of people.<sup>28</sup> And this holds regardless of how the group was initially distinguished – whether the group distinguished itself as legal officials by means of power or was recognised as such by others.<sup>29</sup> The collective intentionality needed for imposing the status of legal officials is expressed through collective recognition of a particular group as having this special status. Those collectively recognising the group as legal officials are ordinary citizens (addressees of rules produced by officials) as well as potential legal officials themselves. By imposing the status of legal officials on a particular group, members of the relevant community assign to the group special functions with corresponding "deontic powers": the functions of identifying, creating, modifying and applying law.

21 Yet in order to impose the status function of 'legal' officials on some group of people and to assign to this group certain "deontic powers" it is necessary that the relevant community already have at least some general concept or idea of what 'law' or 'legal system' and 'legal' is. Furthermore, since legal systems are institutional artifacts, there already has to exist an appropriate constitutive rule laying out a set of conditions that have to be met for there to be a legal system. Such is, of course, the rule through the collective recognition of which the relevant community makes it the case that something has the status function 'legal system' thus creating the context in which an instance of a legal system can emerge. This constitutive rule may be formulated as follows:

We (collectively) recognise that, if conditions  $C$  obtain, then there is a legal system.

22 As has been said above, the conditions laid out in a legal system's constitutive rule (which amount to the concept of a legal system) include at least the conditions that have to be met in order for there to be an institutional artifact 'legal system', but they can also include other conditions. Thus, conditions  $C$  from a legal system's constitutive rule may vary from the simple requirement that whatever a group of people whom the community (collectively) recognises as its legal officials counts as a legal system is a legal system to the more detailed and informed existence conditions of a legal system (e.g., that the totality of rules legal officials count as belonging to a legal system is a legal system or that a legal system is whatever legal officials count as a legal system as long as they themselves are also legally limited by it or provided that the legal system upholds human rights, expresses the rule of law principle, etc.). The concept of law is, after all, the concept of an artifact and since artifacts are susceptible to change (depending on human interests), their concepts can also change.

23 In this way, by collectively recognising a legal system's constitutive rule, the relevant community stipulates the 'nature' of its legal system. This, however, is a first-level stipulation only. The relevant community thus sets out the general idea of its legal system but does not as yet create an instantiation of it. For an instantiation of a legal system to emerge, someone has to concretise or implement the general idea (i.e. someone has to bring about that conditions  $C$  from the legal system's constitutive rule obtain). Since the relevant community empowers legal officials to identify, create, modify and apply the law, one may say that legal officials are the true authors of a particular instantiation or token of the legal system. And if legal officials are indeed the authors of a legal system, collectively recognised by the relevant community as having the status function 'legal officials' (a function which implies the corresponding "deontic powers" of identifying, creating, modifying and applying law), it should not be false to assume that their practices are intended by them as practices exercised in view of fulfilling their official role. The manifestation of their intention to act in such a way is most discernable in their

regarding their patterns of behaviour as a rule – a rule (of recognition) which, according to Hart, forms the foundations of a legal system.<sup>30</sup> It may thus be said that their intention is the intention to create a legal system. So what the relevant community's constitutive rule of a legal system does is create the context in which the practice of legal officials as authors of a legal system, resulting in the rule of recognition and other secondary rules, can be understood as concretising or implementing the community's general concept of a legal system and stipulating the 'nature' of the legal system at the second level. For, as Finnis says, “the making of the artefact is controlled but not fully determined by the basic idea (say, the client's order), and until it is fully determinate the artefact is non-existent or incomplete”.<sup>31</sup>

24 A legal system acquires its main feature (i.e., that of being a system of rules) through the rule of recognition. For the rule of recognition unifies the thus far unconnected set of rules into a system of legal rules. And it is against this background that Hart's claim that the rule of recognition introduces “the idea of a legal system” and that it may be understood as a “defining feature of a legal system” should be interpreted.<sup>32</sup> Since legal systems are institutional artifacts, in need of collective recognition for their existence, the rule of recognition alone, of course, does not suffice to bring about a legal system. In order to fulfil its role of constituting legal rules as elements (members) of a system of rules, thus giving shape to the existing system, the rule of recognition requires such context as is established by the relevant community's practice of recognising what counts as a legal system and who counts as a legal official. So in addition to the rule of recognition being a token-element constitutive rule, practiced by officials, at least two other constitutive rules are required – a constitutive rule of a particular legal system and a constitutive rule of this legal system's legal officials, both of which are practiced by the relevant community, i.e. the community whose members are addressees of the legal rules of their legal system. However, since officials are the authors of a legal system and since it is mainly through the rule of recognition that they concretise the community's concept of a legal system, it may be said that the rule of recognition is not 'merely' a token-element constitutive rule, but also a legal system's implementation or concretisation rule.

#### 4 Reconsidering some objections to Hart's account of the rule of recognition

25 In Section 2 I pointed to four objections that are often levelled against Hart's account of the rule of recognition. Analysis of each of them revealed that the rule of recognition alone is not sufficient to fully account for what one might suppose it should account for. Thus, for instance, it was shown that the rule of recognition, as conceived by Hart, is incapable of accounting for its, or indeed the other secondary legal rules', being a member of a legal system, or for the status of legal officials, or for why acceptance by officials is sufficient for its emergence, or for why ordinary citizens have a duty to obey the law. However, after having introduced some basic theoretical tools of the artifact theory of law in Section 3, it is now possible to reconsider these objections. Since the issue of accounting for the status of officials has already been dealt with in the previous section, I will tackle the remaining three objections and try to show how additional constitutive rules that were identified as the necessary conditions for the emergence of both the rule of recognition and a particular instance (token) of the legal system in conjunction with the overall framework of the artifact theory of law may provide us with more plausible answers.

26 Let us start with the problem of accounting for the fact that secondary (i.e. second-order) rules (rule of recognition included) are members of a system of legal rules. According to the constitutive rule of a particular legal system, the relevant community collectively recognises that if certain conditions obtain, then there is a 'legal system'. As has been said above, these conditions, in their simplest form, can stipulate that a legal system is whatever legal officials count as a legal system, or they can be more elaborate stipulating, e.g., that the totality of rules legal officials count as belonging to a legal system is a legal system. One set of rules officials undoubtedly count as forming a legal system are primary (i.e. first-order) rules. By performing their main function under the rule of recognition officials identify certain rules as the system's primary legal rules. However, primary legal rules do not exhaust the list of rules belonging to



and thus forming a legal system. The list includes secondary rules as well. So what needs to be shown is that legal officials count secondary rules, in addition to primary rules, as legal rules belonging to a system of rules. And for the reasons explained above this cannot be shown by invoking the rule of recognition. According to Hart, secondary rules do not emerge solely out of a certain pattern of behaviour followed by officials. Officials also need to have a distinctive critical attitude of acceptance towards this pattern of behaviour, which attitude of acceptance raises the said pattern to the level of a public standard to which they should conform. So what officials in fact do is *count* their pattern of behaviour as a rule. But do they count such rule as a legal rule and a rule belonging to their legal system? Since secondary rules consist of *legal* powers and duties (to identify, make, change or apply law) ascribed to a group of people by the relevant community's collective recognition of a constitutive rule in virtue of which this group acquires its status function '*legal officials*', then the rules in question cannot be anything but *legal* rules. It is thus the character of the deontic content of the secondary rules of a system, ascribed through the rule constitutive of legal officials, that gives these rules the status of legal rules. Furthermore, as has already been said, the rule of recognition presupposes some concept of a legal system that is shared by officials (as the legal system's authors), which concept presumably includes the officials' understanding of the special structure of the legal system represented as a union of primary and secondary legal rules. Eventually, if ordinary citizens regularly take rules defining the sources of law or empowering someone to enact new legal rules or making authoritative determinations in legal disputes as legal rules, it can hardly be denied that legal officials act in the same manner, i.e. that they count these rules as legal rules and members of their legal system.

27 The second issue relates to why acceptance by officials is sufficient for the emergence of the rule of recognition. What Hart advances is that, even though in the simple society the rule of recognition might be accepted by both citizens and officials, in the complex modern state “the reality of the situation is that a great proportion of ordinary citizens – perhaps a majority – have no general conception of the legal structure or of its criteria of validity”.<sup>33</sup> Since the complex modern state necessarily has a legal system, it then suffices that only officials accept the rule of recognition. This argument, however, amounts to an intuitive claim unsupported by empirical evidence. Moreover, while it might be true that the great majority of ordinary citizens have no general conception of a legal system's structure or its validity criteria, it cannot be inferred from this that no acceptance or, e.g., some minimum acceptance by ordinary citizens is necessary. G. Lamond offers two arguments in support of the claim that acceptance by officials is sufficient for the emergence of the rule of recognition. In modern legal systems, so his first argument goes, the rule of recognition “seems to be a rule constituted by the practices of officials, since it is the rules identified by official practice that amount to legal rules”.<sup>34</sup> His second argument states that since “in contemporary systems it would seem that the views of non-officials are not usually regarded by officials as partly determinative of what the criteria of recognition are in those systems /.../ the rule of recognition is constituted exclusively by the practices and the beliefs of officials in these systems, and are social rules of officials”.<sup>35</sup> While the first argument represents the logical fallacy *petitio principii*, the second argument is again an intuitive claim unsupported by empirical evidence. Moreover, even if it were true that the views of non-officials are not determinative of the validity criteria, the fact that the views of non-officials are not *usually* regarded by officials as partly determinative of these criteria cannot lead one to infer that the rule of recognition is constituted *exclusively* by the practices and beliefs of officials. On the other hand, the argument following from the artifact theory of law is rather a conceptual one. By collectively accepting the rules constitutive of a legal system and of legal officials the relevant community imposes on a given group the status function '*legal officials*' and makes this group the authors of their legal system. Since officials are the authors of a legal system and since their status function includes the function of identifying rules as legal rules and rules belonging to a system of rules, it is the practice and the distinctive normative attitude of those who were ascribed the status function of officials by the relevant community that are sufficient for establishing the rule of recognition.

28 Finally, there is the question of how the rule of recognition can account for the ordinary citizens' duty to obey primary rules when it is the rule of officials alone. While it is true that the rule of recognition, as envisaged by Hart, cannot account for the duty of non-officials to obey the law, the account of the rule of recognition as part of a set of higher constitutive rules (one constitutive of a legal system and the other of legal officials) fares far better in this case. Since the relevant community (both ordinary citizens and potential officials) collectively accepts that whatever the group on which it has imposed the status function 'legal officials' counts as law is law and since it assigns to officials relevant "deontic powers", including the power to make binding pronouncements, it also commits itself to obeying such pronouncements when they are created as valid legal rules. So it is the fact that members of the relevant community (ordinary citizens included) establish the above described context in which the rule of recognition can emerge that explains how primary legal rules of a system can create legal duties on the part of citizens and not the rule of recognition itself.

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### **Bibliography**

Luka BURAZIN, 2016 (forthcoming): Can There Be an Artifact Theory of Law? *Ratio Juris – An International Journal of Jurisprudence and Philosophy of Law*. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2326744](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326744).

John FINNIS, 1984: *Natural Law and Natural Rights*. Oxford: Clarendon Press.

Herbert L. A. HART, 1994: *The Concept of Law*. New York: Oxford University Press.

Kenneth E. HIMMA, 1999: The Epistemic Sense of the Pedigree Thesis. *Pacific Philosophical Quarterly*. 80. 46–63.

Grant LAMOND, 2013: The Rule of Recognition and the Foundations of a Legal System. *Reading HLA Hart's 'The Concept of Law'*. Eds. Luís D. d'Almeida, James Edwards & Andrea Dolcetti. Oxford and Portland (Or.): Hart Publishing. 97–122.

John R. SEARLE, 1995: *The Construction of Social Reality*. New York: The Free Press.

—, 2010: *Making the Social World*. New York: Oxford University Press.

Sanne TAEKEMA, 2008: Does the concept of law need officials? *Problema: Anuario de Filosofía y Teoría de Derecho* 2 (2008). 157–183.

Amie L. THOMASSON, 2003: Realism and Human Kinds. *Philosophy and Phenomenological Research* 67 (2003) 3. 580–609.

—, 2007: Artifacts and Human Concepts. *Creations of the Mind*. Eds. Eric Margolis & Stephen Laurence. New York: Oxford University Press. 52–73.

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### **Notes**

1 Despite the fact that it has sometimes been argued that the rule of recognition also plays an important epistemic role, K. Himma convincingly argues that this role is, at most, considerably more modest. See Himma (1999: 48).

2 Of course, a part of my claim is that the rule of recognition is insufficient to explain the empirical emergence of a legal system. However, even though one might argue that, according to one conception of a set, a set is a totality constituted by its elements so that any systematic set of legal rules can be considered a legal system conceptually (as an abstraction), I also claim that the rule of recognition alone cannot be a constitutive rule of a legal system as a matter of conceptual truth since it is a constitutive rule of only a part of the elements of a total set (i.e., of only primary legal rules). Furthermore, which is indeed a question different from the question of whether the rule of recognition is a constitutive rule of a legal system, one should bear in mind that the existence of a rule of recognition alone does not constitute a legal system; in addition, the rules valid under the rule of recognition must be efficacious. And that opens the relationship between empirical and conceptual conceptions of a legal system. Thanks to the anonymous reviewer and K. Himma for pressing this point.

3 Hart (1994: 95).

4 Hart (1994: 105).

5 Hart (1994: 108).

6 This point was made by Lamond. See Lamond (2013: 114–115).

7 Hart (1994: 109, 110 and 111).

- 8 Lamond (2013: 115).
- 9 Hart (1994: 94).
- 10 Hart (1994: 98 and 99).
- 11 Hart (1994: 95).
- 12 Hart (1994: 100).
- 13 Hart (1994: 111).
- 14 Hart (1994: 80 and 97).
- 15 A part of this Section is based on Burazin 2016: Sec. 5.
- 16 For an intentional-conceptual theory of artifacts on which I base my artifact theory of law see, e.g., Thomasson (2007: 52–73) and Thomasson (2003: 580–609).
- 17 For this aspect see Searle (1995: 44–45).
- 18 For the difference between concrete and abstract institutional objects see Thomasson (2003: 587–588).
- 19 Since in principle no one person creates a legal system from scratch, since usually a legal system has no precisely identifiable authors, and since it seems that many people with different roles over a long period of time contribute to the emergence and continuous existence of a legal system, the artifact theory of law sets and uses a very broad concept of authorship. The theory does not preclude collective authorship and accepts as authors a wide range of persons, even including those who sustain the artifact in question and its active users. However, it takes it to be a conceptual truth that legal systems, being man-made entities, have authors.
- 20 The author's concept of the legal system is, of course, a 'non-theoretical' or 'practical' concept of law constitutive of a legal system.
- 21 It may seem too constraining for a theory of law to limit itself a priori only to those instances of a legal system that were intentionally created. However, since legal systems are undoubtedly highly complex institutional artifacts, it seems strange to claim that such complex entities could emerge (wholly) unintentionally. It is not like someone messed around, produced an entity *x*, and later realized that it was an instance of a legal system. Furthermore, the intention condition does not preclude that a part (or even the greater part) of the process of an institutional artifact's coming into existence involve its gradual emergence from a standing practice. Additionally, if it is true that legal officials are the authors of a legal system, then it seems plausible to assume that they act with the intention that what they produce is to belong to the kind 'legal system' and not some other system of rules.
- 22 Compare Thomasson (2003: 591–592).
- 23 The relevant community's concept of the legal system is, as is the author's concept, a 'non-theoretical' or practical concept of law constitutive of a legal system.
- 24 Hart (1994: 103).
- 25 Hart (1994: 95).
- 26 Hart (1994: 94).
- 27 Hart (1994: 95 and 111).
- 28 Searle (1995: 114) and Searle (2010: 6–11). Note that Searle's "deontic powers" include both powers and obligations, which avoids the problem of attributing to judges only powers.
- 29 Of course, one could claim that the latter situation makes law a (more) legitimate system of rules. See Taekema (2008: 171). However, even in the former situation the group has to be collectively recognised as the group of legal officials in order to have the status function 'legal officials'. Just like a gang is not a gang if not collectively recognised as such.
- 30 Hart (1994: 100).
- 31 Finnis (1984: 284).
- 32 Hart (1994: 95 and 111).
- 33 Hart (1994: 114).
- 34 Lamond (2013: 109).
- 35 Lamond (2013: 110).

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## References

### Electronic reference

Luka Burazin, « The rule of recognition and the emergence of a legal system », *Revus* [Online], 27 | 2015, Online since 05 December 2015, connection on 30 January 2016. URL : <http://revus.revues.org/3363> ; DOI : 10.4000/revus.3363

## Bibliographical reference

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## *Abstracts*

The paper claims that the rule of recognition, given the way it is presented by Hart, cannot be a constitutive rule of any legal system as a whole, but rather a constitutive rule of (primary) legal rules as elements of a legal system. Since I take the legal system to be an institutional artifact kind, I claim that, in order to account for a legal system as a whole, at least two further constitutive rules, in addition to the rule of recognition as a token-element constitutive rule, are needed – one constitutive of legal officials and the other constitutive of a legal system as a token. However, given the central role the legal officials' practice occupies in establishing a particular instantiation or token of a legal system, I also claim that the rule of recognition cannot be understood as 'merely' a token-element constitutive rule but also as a legal system's implementation or concretisation rule.

*Pravilo o priznanju veljavnosti in pojav pravnega sistema.* Avtor trdi, da pravilo o priznanju veljavnosti, kakor ga predstavi Hart, ne more biti konstitutivno pravilo nobenega pravnega sistema kot celote. Pravilo o priznanju veljavnosti je lahko kvečjemu konstitutivno pravilo posameznih (primarnih) pravnih pravil kot sestavnih delov pravnega sistema. Če slednjega razumemo kot institucionalni artefakt, potrebujemo ob pravilu o priznanju veljavnosti kot konstitutivnemu pravilu posamičnih pravnih pravil vsaj še dve konstitutivni pravili, da bi lahko razložili pojav pravnega sistema kot celote: eno konstituira pravne uradnike, drugo pa konstituira posamičen pravni sistem. Ker ima praksa pravnih uradnikov osrednjo vlogo pri vzpostavitvi posamičnega pravnega sistema, pa naj bi pravilo o priznanju veljavnosti po avtorju ne imelo le vloge konstitutivnega pravila posamičnih pravnih pravil, ampak naj bi imelo obenem tudi vlogo implementacijskega pravila pravnega sistema.

## *Index terms*

**Keywords** : rule of recognition, constitutive rules, artifact theory of law, institutional artifacts, legal system

**Ključne besede (sl)** : pravilo o priznanju veljavnosti, konstitutivna pravila, artefaktna pravna teorija, institucionalni artefakti, pravni sistem