

2 Hart's Doctrine of the Rule of Recognition

INTRODUCTION

H.L.A. Hart's point of departure is the actual behaviour of the judges and the other officials. Observing them in their respective roles, Hart notices that when establishing "valid law", they are referring to different sources. The problem which Hart faces here is, how to speak of "valid law" *vis-à-vis* observable social facts – or in other words: how to express the so-called "internal aspect" of law: the "internal aspect" of law, Hart says, lies with the officials' acceptance of the so-called Rule of Recognition.

The Rule of Recognition contains criteria that must be satisfied in order to identify rules as valid rules. In the United Kingdom, for example, there is – in contrast to the United States – no written constitution limiting the legislative powers of Parliament, and the identification criterion is identical with the answer to the question, whether or not the validity of a given rule can be traced back to "enactment by the Queen in Parliament".¹

Therefore, Hart's focus of interest is the connection that obtains between the source of the "quality", as it were, of being "valid law", and social practices.²

I shall in what follows investigate into the issue of, how Hart can succeed in changing the "internal" for the "external", that is, factual and observable, aspect of law *via* his doctrine of the Rule of Recognition. Specifically, I turn to different interpretations of the notion of "recognition": considering more closely the arguments that were adduced for each of these interpretations, I show that the Rule of Recognition can be understood both as a rule of qualification, as a conceptual rule and as a duty-imposing rule (2.1 *Rule of Recognition – a Rule of Qualification, a Conceptual Rule, or a Duty-Imposing Rule?*). Thereupon, I try to establish, in what sense or senses Hart himself uses "recognize" and "recognition". In doing so, I focus on the linguistic means he employed in order to express the mental process involved in "recognition" (2.2 *The Instant of Recognition*).

2.1. RULE OF RECOGNITION – A RULE OF QUALIFICATION, A CONCEPTUAL RULE, OR A DUTY-IMPOSING RULE?

The English transitive verb "to recognize" can mean different things: for example, the verb can mean "know again (somebody or something one has encountered

¹ Hart, *CL* p. 293.

² It will emerge, from PART II, that Kelsen's doctrine of the basic norm is not related to this issue.

previously)", or it can also mean "accept (something)" in the sense of admitting it to be correct, valid or binding. Consequently, there have been doubts as to the meaning of the verb when used in connection with the judiciary – for what, exactly, does the recognition of a legal rule, on the part of the judges, actually amount to?

On introducing the concepts of rules of recognition, of change and of adjudication in *The Concept of Law*,³ Hart describes the rule of recognition as a means of establishing whether a certain rule belongs to, or is part of, the legal system in question: such a rule of recognition, he says, points out or specifies which quality or qualities *other* rules must have in order to count, conclusively, as members of the legal system.⁴ The quality or qualities thus pointed out are called, by Hart, "identifying criteria"⁵ or "identifying features".⁶

Thus, the Rule of Recognition is a rule that specifies the qualities another rule must possess in order to be recognized, by the judge, as a member of the system. That far there seems to be no problem – obviously, the verb "to recognize" is used cognitively.

However, when judges express themselves in style with "It is the law that ..." they are making what Hart calls an internal statement, that is, they use a formulation which is, as he puts it, "naturally used by one who, accepting the rule of recognition and without stating the fact that it is accepted, applies the rule in recognizing some particular rule of the system as valid".⁸

What, then – one might ask – is it judges actually are doing when they "recognize" some particular rule as valid? and this issue apart: is it at all incumbent on them to apply the Rule of Recognition? If so, it would be a question of a genuine norm: the Rule of Recognition would, then, be a duty-imposing rule addressed to the judges.

Legal doctrine has paid considerable attention to Hart's Rule of Recognition:⁹

³ See Hart, *CL* pp. 94–8.

⁴ "This [i.e. the rule of recognition] will specify 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" (*ibid.* p. 94).

⁵ *Ibid.* p. 95.

⁶ *Ibid.* p. 96.

⁷ *Ibid.* p. 102.

⁸ *Ibid.* pp. 102–3.

⁹ An early appreciation (as well as criticism) of Hart's doctrine was advanced by Marcus G. Singer, 'Hart's Concept of Law', in *The Journal of Philosophy*, 60 (1963) pp. 197–220, at pp. 208–9; see also Robert S. Summers, 'H.L.A. Hart on Justice', in *The Journal of Philosophy*, 59 (1962) pp. 479–500. Out of the abundance of literature on "Rule of Recognition", the following works are of particular interest in the present context: Robert Alexy, *Begriff und Geltung des Rechts* (Freiburg: Karl Alber Verlag, 1992) p. 159 ff., 171 f., 194 ff.; Kent Greenawalt, 'Hart's Rule of Recognition and the United States', in *Ratio Juris*, 1 (1988) pp. 40–57; P.M.S. Hacker, 'Hart's Philosophy of Law', in *Law, Morals and Society. Essays in Honour of H.L.A. Hart*, ed. P.M.S. Hacker and Joseph Raz (Oxford: Clarendon Press, 1977) pp. 1–25; Matthew Kramer, 'The Rule of Misrecognition In the Hart of

The purposes underlying the rule as well as various themes turning on its existence and content have been discussed abundantly – not to mention the well-known exchange, in Swedish legal doctrine, on the issue of an adequate translation.¹⁰ Notably, it was claimed that the Rule of Recognition was not deserving of being called “rule” since it was not a question of a genuine norm but, rather, of a kind of definition or series of conceptual criteria pointing out the valid rules of a given legal system.¹¹

Notwithstanding the attention that has been paid to Hart's doctrine in general, the very reasons for the ambiguity of “recognition” have, as yet, not been investigated into. Therefore, let us begin at the beginning:

The Latin verb *recognosco*, -ere means

- (1) to know again
- (2) to remember, or recall to mind
- (3) to inspect, review, test, view etc.¹²

On the one hand, meanings (1) and (2) are obviously connected with each other. “Knowing again” indicates that one has met with somebody or something before *and*, right now, remembers having done so – implying that that which one remembers is, at the moment, *identified* as something that is already familiar.

Meaning (3), on the other hand, is different in so far as “inspecting” and “testing” (something) does *not* imply previous knowledge. The Latin noun corresponding to *recognoscere* follows meaning (3) – *recognitio*, -onis f. meaning “inspection” or “review”.¹³

The English verb “to recognize”, by contrast, means¹⁴

Jurisprudence’, in *OJLS*, 8 (1988) pp. 401–33; Neil MacCormick, *H.L.A. Hart* (London: Edward Arnold, 1981); Stanley L. Paulson, Continental Normativism (I/1 n. 67); Michael Pawlik, *Die Reine Rechtslehre und die Rechtstheorie H.L.A. Harts. Ein kritischer Vergleich* (Berlin: Duncker & Humblot, 1993); William C. Starr, ‘Hart's Rule of Recognition and the E.E.C.’, in *Northern Ireland Legal Quarterly*, 28 (1977) pp. 258–86.

¹⁰ In Swedish legal doctrine, in particular, the Rule of Recognition has given rise to an exchange on the issue of an adequate translation. The options were, on the one hand, *Igenkänningsregel*, that is, “Know-Again Rule” (Simmonds 1988 and Peczenik with Aarnio and Bergholtz 1990) and, on the other, *Erkännanderegeln*, that is, “Rule of Acknowledgement” (Strömberg 1991). Further possibilities in Swedish would be *Rekognitionsregel* and *Identifieringsregel*. See Nigel E. Simmonds, *Juridiska principfrågor. Rättvisa, gällande rätt och rättigheter*; trans. Lars Lindahl [Stockholm: Norstedts Förlag, 1988] p. 88 ff.; Aleksander Peczenik with Aulis Aarnio and Gunnar Bergholtz, *Juridisk argumentation – en lärobok i allmän rättslära* [Stockholm: Norstedts Förlag, 1990] at p. 39 f., 44; Tore Strömberg, Review of the latter work in *SvJT* 1991, pp. 458–64, at p. 459.

¹¹ See subsection 2.1.2 below.

¹² According to Christian Cavallin, *Latinsk lexikon till läroverkens tjänst* (Lund 1888), p. 61.

¹³ *Ibid.*

¹⁴ According to *The Oxford English Dictionary*, 2nd edn. (Oxford: Clarendon Press, 1989) [hereinafter: *Oxford*], p. 343. According to *Webster's Dictionary*, the current meaning of the verb “to recognize” is (1) to recall knowledge of, to make out as or perceive to be

Why Grundnorm?

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