

# Legal Sources, the Rule of Recognition, and Customary Law

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**Abstract:** A perennial puzzle about source-based law such as precedent is what makes sources legally binding. One of the most influential answers to this puzzle is provided by Hart's rule of recognition. According to Hart, the sources of law are accepted as binding by the officials of a legal system, and this collective social practice of officials provides the foundations for a legal system. According to Hart, the rule of recognition differs fundamentally from other legal rules in three ways: (1) the grounds on which it is accepted; (2) the basis for its system-membership; and (3) its mode of existence. This paper argues that (1) should be rejected, and that (2) and (3) do not in fact make the rule of recognition fundamentally different to other legal rules in the way that Hart supposed. Instead, the rule of recognition is a form of customary law *in foro* whose existence is practice-dependent, but which is nonetheless just as much a law of the system as other laws are. The rule of recognition provides a foundation for source-based law, but on that is internal to the system.

The rule of recognition is, in part, Hart's solution to a general puzzle of legal practice. That puzzle concerns the obligation to use the sources of law in a particular legal system. Precedents may be binding on courts and officials, but what is the basis for their having this effect? It is clearly inadequate to base the binding force of precedent on a court decision holding that this is the case, for that would simply presuppose the very thing that is in question, i.e. the binding force of precedent. Nor is the problem restricted to precedent. All legal systems have sources of law that are fundamental, i.e. which do not rest on any further legal basis. What makes those sources legally binding?

Hart's answer to this problem is that once one reaches the fundamental sources of law one must look to the practices of officials to understand why they are binding. Officials share a collective social practice of following and applying the sources of law, and regard this practice as a requirement incumbent on all of those performing an official role. Officials believe that they and other officials should follow the sources that are currently used, i.e. they believe that it is mandatory for all officials to use these sources. It is this social practice that Hart calls the 'rule of recognition'. The rule of recognition is, in a sense, part of a legal system, but it is crucially different to the other

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laws that make up the system, since it is the social foundation for the law and exists simply as a matter of social fact. It is the official custom on which law rests.<sup>1</sup>

Hart's solution to the problem of sources is of interest whether or not one adopts other parts of Hart's theoretical framework, since any theory of law must explain the status of fundamental legal sources. Even if legal systems can contain non-source-based laws, source-based laws such as statutes and precedent constitute a significant part of the law in most legal systems. And even if there can be legal systems without any source-based law, that would still leave the problem of understanding the role of sources in those systems with source-based law. Hart's solution is not of course the only possible approach to this problem,<sup>2</sup> but it will be the focus of this paper for two main reasons. The first is that his analysis is carefully worked out and has been very influential. Many contemporary legal positivists accept some version of the rule of recognition as the best account of the fundamental sources of law.<sup>3</sup> The second reason is that in some key respects Hart's solution is correct. Nonetheless, I will argue in this paper that Hart was mistaken to characterise the rule of recognition as simply an official custom, i.e. as simply a collective social practice of officials. It *is* a social practice, but it is also a form of customary law, and thus just as much a part of the law of a system as any other law. It is law in the same sense that statutes and precedents are law, though it has some distinctive features.

It might be wondered, of course, whether this is a distinction without a difference, or at least a distinction with very little difference. Does it really matter whether one adopts Hart's characterisation of the rule of recognition as an official custom, or the alternative characterisation of it as customary law? Is this primarily a verbal quibble, a matter of labels? In addition, it might be wondered whether this question is only of significance to those with an interest in Hart's theory of law. Is this simply a question of how best to characterise the rule or recognition, i.e. an issue internal to Hart's theory? This paper will argue that the difference does matter, and not just to those with an

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<sup>1</sup> H.L.A. Hart, *The Concept of Law*, 3d ed. (Oxford: Oxford University Press, 2012), 100–17.

<sup>2</sup> Kelsen's "pure theory of law" is an obvious rival: H. Kelsen, *The Pure Theory of Law*, 2d ed., trans. M. Knight (Berkeley: California University Press, 1967)

<sup>3</sup> E.g. J. Coleman, *The Practice of Principle*, (Oxford: Oxford University Press, 2001), part 2; J. Gardner, *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012), chapters 2 and 3; M.H. Kramer, *Where Law and Morality Meet* (Oxford: Oxford University Press, 2004), 103–14; A. Marmor, *Philosophy of Law* (Princeton: Princeton University Press, 2011), chapters 2 and 3; and J. Raz, *The Authority of Law*, 2d ed. (Oxford: Oxford University Press, 2009), e.g. 68–9, 90–8, 311–12.

interest in Hart's theory. Hart presents a solution to the problem of the status of the fundamental sources of law, but the problem is not created by Hart's theory, it is one that exists independently of his theory. And whether the fundamental sources of law amount to customary law rather than simply official custom matters both in theory and in practice. At a theoretical level it matters in terms of how we understand the basic structure of a legal system. In particular, it bears on the question of whether the rule of recognition should be understood as a 'conventional rule'.<sup>4</sup> At a practical level, how we understand the sources of law matters for how we think they can or cannot be altered.

My argument will proceed through the following stages. In the first part I will provide a brief overview of the rule of recognition, including some of the refinements suggested by others to Hart's original conception. I will then consider three main lines of argument for the view that the rule of recognition cannot be assimilated to the status of ordinary laws, and attempt to show that those arguments merely establish the distinctive nature of ultimate legal sources rather than their inability to constitute ordinary laws. Finally, I will sketch an account of the nature of the customary law of the courts to which the rule of recognition belongs. This paper aims to establish that Hart was right to argue that the existence of ultimate legal sources depends on official practice, but mistaken in thinking that this makes them law in a fundamentally different sense to laws such as statutes and precedents. Instead, it shows them to be part of the customary law of the courts.

## **I. The rule of recognition**

The rule of recognition occupies a key place in Hart's conception of a legal system. For Hart, the law is a system of rules with a complex internal structure. Although Hart uses the term 'rule' throughout his work, he uses it to cover standards of different kinds, and to avoid the misleading impression that importance should be attached to the particular term 'rule' I will use the term 'standard' interchangeably with it.<sup>5</sup> A legal system has many different types of standards, but there are three types that are crucial to its structure and operation: (a) the 'rule of recognition'; (b) 'rules of change'; and (c) 'rules

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<sup>4</sup> See section III below.

<sup>5</sup> See e.g. Hart, *The Concept of Law*, 130–3 (and for a brief overview of Hart's ideas about rules and standards see N. MacCormick, *H.L.A. Hart*, 2d ed. (Stanford: Stanford University Press, 2008) 55–8).

of adjudication'.<sup>6</sup> The rules of change capture the fact that legal systems contain methods for deliberately altering the content of the system's standards, such as through legislation, case-law, or referenda. The rules of adjudication point to the fact that legal systems contain official bodies that have the function of making authoritative rulings on whether the standards of the system have been complied with in some situation. The function of the rule of recognition, on the other hand, is to provide authoritative criteria for the identification of standards as belonging to the system, i.e. for their identification as legal standards. According to Hart, whilst legal systems may have multiple rules of change and adjudication, each legal system has a single rule of recognition. Or to be more precise, each legal system has a single *ultimate* rule of recognition, as Hart sometimes calls it.<sup>7</sup> There are many legal rules that provide authoritative criteria for the identification of standards as belonging to a system, e.g. primary legislation providing criteria for the identification of valid subordinate legislation. But such rules are themselves identified by *other* legal rules, which may in turn be identified by yet further legal rules. Ultimately this chain of identification must come to an end with a rule that identifies other rules but is not itself identified by any further rule: this is the ultimate rule of recognition.<sup>8</sup> According to Hart the rule of recognition may contain multiple distinct criteria for the identification of the standards of the system, such as enactment by the legislature or being the ruling of a court, but the rule of recognition constitutes a single rule because it provides a ranking of criteria as superior and inferior, so that if rules satisfying different criteria conflict, the superior one prevails.<sup>9</sup> Thus the rule of recognition may be internally complex, but it still one rule.

Hart describes the rules of recognition, change and adjudication as being 'secondary rules', and characterises a legal system as involving a 'union of primary and secondary rules'.<sup>10</sup> There are other secondary rules apart from the rules of recognition, change and adjudication, and at a preliminary point in his analysis Hart provides a

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<sup>6</sup> Hart, *The Concept of Law*, 94–8.

<sup>7</sup> *Ibid.*, 106, 107, 109, 110, 112, 114, 115, 116, 120, 121, 149, 292.

<sup>8</sup> *Ibid.*, 107.

<sup>9</sup> *Ibid.*, 95, 100–1. Hart is more explicit about this in his later article "Lon L. Fuller, *The Morality of Law*" in *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), 360. Hart also seems to regard the unity of a legal system as resting on all of the officials accepting the same rule of recognition: *The Concept of Law*, 116. Whether a legal system need have only one rule of recognition has been doubted, e.g. J. Raz, *The Concept of a Legal System*, 2d ed. (Oxford: Oxford University Press, 1980), 200, *Practical Reason and Norms*, 2d ed. (Princeton: Princeton University Press, 1990), 147, and *The Authority of Law*, 95–6.

<sup>10</sup> *Ibid.*, 81, 98–9 (and the chapter title for chapter V).

general characterisation of the distinctions between ‘primary’ and ‘secondary’ rules.<sup>11</sup> This analysis has been widely criticised for drawing distinctions which cut across each other rather than coinciding,<sup>12</sup> and it is not crucial to Hart’s account of the rule of recognition. When he comes later to talk about the legal system itself he emphasises the idea that these three types of secondary rules differ from primary rules because they are all *about* other laws, and the ways in which those laws can be ‘ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined’.<sup>13</sup> This distinction, in terms of the three types of rules being ‘second-order’ rules—rules about rules—seems to be the key one for Hart.<sup>14</sup>

There are complex questions concerning the inter-relationships between the rules of recognition, change and adjudication, but they need not be settled here. Instead I will focus on the nature of the rule of recognition. The rule of recognition of a legal system is: (a) a standard followed by the judiciary and other officials; which (b) identifies other standards as belonging to the system of standards to be applied by officials; and (c) is not itself identified by any further standard as belonging to the system. So the rule of recognition is an *ultimate* standard whose function is to identify (other) standards as belonging to the system of standards used by officials. According to Hart every legal system has its own rule of recognition with its own content. The content of the rule of recognition is two-fold: (i) criteria by which standards are identified as belonging to the system; and (ii) a ranking of the criteria (where there is more than one) to resolve conflicts between standards satisfying different criteria. More colloquially, we could refer to (i) as constituting the different *sources* of law recognised in a particular legal system<sup>15</sup> and (ii) as providing a ranking of the relative superiority and inferiority of different sources.<sup>16</sup> In the case of both criteria and ranking, there is room for a degree of uncertainty among officials about their content and application. The rule of recognition does not solve every issue that could arise about sources and

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<sup>11</sup> *Ibid.*, 80–1.

<sup>12</sup> See in detail P.M.S. Hacker, “Hart’s Philosophy of Law” in *Law, Morality, and Society*, ed. P.M.S. Hacker and J. Raz (Oxford: Oxford University Press, 1977), 18–22; MacCormick, *H.L.A. Hart*, 130–34; and more generally Raz, *The Authority of Law*, chapter 9, especially 177–9.

<sup>13</sup> Hart, *The Concept of Law*, 94.

<sup>14</sup> And arguably is the key feature of secondary rules generally.

<sup>15</sup> *Ibid.*, 294.

<sup>16</sup> *Ibid.*, 95, 101, 108

ranking, but it solves enough for the system to function as officials can agree about the appropriate answers to a wide range of cases.<sup>17</sup>

Now according to Hart, the rule of recognition is 'law' in a different sense to laws such as statutes and precedents.<sup>18</sup> The latter are identified by the rule of recognition and owe their status as legal considerations to it, and so can be said to be 'legally valid'.<sup>19</sup> For Hart, a standard is legally valid when, and only when, it satisfies some criterion for identification in the rule of recognition (or some criterion of identification in another law that itself satisfies the rule of recognition, and so on). It follows that the rule of recognition cannot itself be legally 'valid': it is the ultimate basis for legal validity, but it is neither valid nor invalid.<sup>20</sup>

What is the normative character of this ultimate standard? Some of Hart's general remarks about 'secondary rules' would imply that the rule of recognition is a power-conferring rule.<sup>21</sup> But the key role of the rule of recognition does not seem to be to confer a power on officials to recognise standards as law, but rather to set out (as Hart himself makes clear) a common standard for official behaviour in recognising certain standards as legally valid.<sup>22</sup> So the rule of recognition is best seen as duty-imposing, whether or not it is also power-conferring.<sup>23</sup> The rule of recognition is the basis for the

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<sup>17</sup> Ibid., 122–3, 147–54.

<sup>18</sup> Ibid., 110–11.

<sup>19</sup> Ibid., 103–05, 107, 108–10.

<sup>20</sup> Even if the rule of recognition happened to satisfy one of the criteria *in* the rule of recognition and could be said to be "valid", that fact would not explain the real significance of the rule of recognition to the legal system. See *ibid.*, 110.

<sup>21</sup> Ibid., 80–1. Hart never explicitly describes the rule of recognition as power-conferring, though his remarks at 112–13 denying that "obey" describes well what judges do in applying the rule of recognition might imply that it is power-conferring.

<sup>22</sup> Ibid., 116, and see generally 114–7.

<sup>23</sup> Hart expressly accepted in later writings that the rule of recognition was duty-imposing: "Rules of recognition accepted in the practice of the judges require them to apply the laws identified by the criteria which they provide and of course the laws so identified are the same as those which impose duties and confer rights on individuals." *Essays on Bentham* (Oxford: Oxford University Press, 1982), 156, and see generally 155–6, 160–1. A common interpretation of *The Concept of Law* is that the rule of recognition is duty-imposing rather than power-conferring: see Raz, *The Concept of a Legal System*, 197–200, *Practical Reason and Norms*, 146–7; MacCormick, *H.L.A. Hart*, 132; Gardner, *Law as a Leap of Faith*, 103; L. Green, "Introduction" to *The Concept of Law*, xxiii. There have been a range of views expressed about how best to characterise the nature of the rule of recognition: see the helpful discussion in G. Pino, "Farewell to the Rule of Recognition?" *Problema: Anuario de Filosofía y Teoría del Derecho* 5 (2011): 265, 275–88, e.g. S. Munzer, *Legal Validity* (The Hague: Martinus Nijhoff, 1972), 50–6, M. Bayles, *Hart's Legal Philosophy* (Dordrecht: Kluwer, 1992), 65–7, and M. Kramer, *Where Law and Morality Meet*, 104–5.

identification of other standards as enjoying the status of being law, and is in *that sense* part of the law.<sup>24</sup>

In addition, the rule of recognition is a matter of official practice and thus of social fact. The rule of recognition is, quite simply, the social rule practised by officials of identifying certain standards as standards belonging to the system.<sup>25</sup> The content of the rule of recognition is determined by whatever criteria the officials actually use to identify the standards that they apply. It exists only in being practised by the officials, and is thus unlike valid legal rules.<sup>26</sup> A valid legal rule is one that is identified by the criteria in the rule of recognition, and it remains valid even if it is overlooked or ignored in official practice (unless being practised is part of the criteria of identification in a particular legal system).<sup>27</sup> The rule of recognition, by contrast, must be practised to exist.

Finally, since the rule of recognition is the ultimate standard in a legal system, the reasons that officials have for accepting and practising the rule of recognition cannot be some further legal standard or criteria.<sup>28</sup> The rule of recognition is the point where the law runs out. When, for example, it is asked why a statute of Parliament is valid, the answer in England is that officials recognise legislation passed by the Queen in Parliament as valid law. But when asked *why* officials recognise legislation passed by the Queen in Parliament as valid, the answer is simply that this is a fundamental part of the law of England. The official practice of recognising such legislation as valid law has no *further* legal basis, or authorisation, such as one might find in a written constitution. This official practice is, for Hart, (part of) the rule of recognition. The officials follow a common standard in recognising other standards as legal standards, but they do not have any further *legal* basis for accepting that common standard. The rule of

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<sup>24</sup> Hart, *The Concept of Law*, 111–12.

<sup>25</sup> In later writings after *The Concept of Law* Hart tended to restrict the rule of recognition to the practices of the judiciary, rather than officials generally: see the *Postscript* to Hart, *The Concept of Law*, and *Essays on Bentham*, 155–61. But as the question of whether the wider or narrower category of officials is the appropriate class for the rule of recognition does not affect the arguments in this paper, I will put it to one side.

<sup>26</sup> This is sometimes understood as meaning that the rule of recognition is a “conventional” rule, but that is far from clear: see J. Dickson, “Is the Rule of Recognition Really a Conventional Rule?” *Oxford Journal of Legal Studies* (2007) 27: 373, and cf. Marmor, *Philosophy of Law*, chapter 3. I will return to this question in part III.

<sup>27</sup> Hart, *The Concept of Law*, 103.

<sup>28</sup> See *ibid.*, 107–8.

recognition may be accepted, instead, for any type of reason (e.g. those of morality, or long-term self-interest, or conformism, or traditionalism ...).<sup>29</sup>

So the key aspects of the rule of recognition are these: (a) it is a duty-imposing social standard endorsed and practised by officials<sup>30</sup>; (b) it provides the basis for the identification of other standards as ('valid') legal standards<sup>31</sup>; (c) it is the ultimate standard in the system since it is not identified by some further legal standard—hence it is neither valid nor invalid<sup>32</sup>; and (d) as it is the ultimate legal standard it cannot be accepted on legal grounds, but must be accepted on some other grounds.<sup>33</sup> On the basis of this account, there are three fundamental ways in which the rule of recognition differs from ordinary 'valid' laws: (1) the grounds for its acceptance; (2) the basis for its membership in a legal system; and (3) its mode of existence. The rule of recognition: (1) is accepted on non-legal grounds; (2) is part of the system because it is ultimate basis for identifying all other standards as belonging to the system; and (3) is constituted by a social practice of the officials. Unlike all other legal standards, then, the rule of recognition is *sui generis*. It is the social foundation for a system of laws and the point where the law runs out.

I will argue, to the contrary, that although the rule of recognition is a distinctive type of legal standard, it is, nonetheless, best understood as just as much a law of the system as any other law. I will consider the three reasons that Hart gives for thinking that the rule of recognition is fundamentally different to other legal standards and argue that they do not in fact establish this.

## **II. Is the rule of recognition fundamentally different to other legal standards?**

### *a. Why the rule of recognition is accepted*

One reason for thinking that the rule of recognition is not simply another law of the system is the thought that it is not accepted for the same reasons as ordinary laws are accepted. The reason for thinking it isn't accepted for the same reasons as ordinary laws is this: a valid legal standard is accepted, in the end, because it is identified by the rule of recognition, whereas the rule of recognition must be accepted for some other

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<sup>29</sup> Ibid., 202–3, 230–2: Hart at these points is not discussing the rule of recognition itself, but his points would seem to be applicable, *mutatis mutandis*, to it.

<sup>30</sup> E.g. *ibid.*, 109–10.

<sup>31</sup> *Ibid.*, 111–12.

<sup>32</sup> *Ibid.*, 107, 108–9.

<sup>33</sup> *Ibid.*, 107–8.



reason. Laws are accepted because they are valid. Validity rests on a law satisfying the criteria of identification in another law. So an ordinance may be valid because it was created in the appropriate manner by a body authorised by delegated legislation to make such ordinances. The delegated legislation itself may be valid because it was made in the approved manner by a government agency authorised to issue such delegated legislation. The authorisation for that government agency will be contained in primary legislation. And the validity of the primary legislation rests on it having been passed in the prescribed manner by the legislature itself. Law, then, involves chains of validity, some short (primary legislation), some long (the ordinance), and the chains of validity must, ultimately, come to an end. For Hart, they come to an end at the rule of recognition. For example, part of the rule of recognition in England is that what the Queen in Parliament enacts is law (i.e. legislation passed in the prescribed manner by Parliament and given royal assent is valid law).<sup>34</sup> The last link in the chain—the rule of recognition—is not identified by any further rule, and so it cannot be valid. Hence it cannot be accepted because it is valid.<sup>35</sup>

Officials accept that the rule of recognition is binding on them. The standard interpretation of this account is that such acceptance also involves accepting that the standards identified by the criteria in the rule of recognition must be applied by officials.<sup>36</sup> The acceptance of the bindingness of legal standards, then, rests on the acceptance of the bindingness of the ultimate standard of the system: its acceptance is the foundation for the acceptance of all derivative standards.<sup>37</sup> Another way of

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<sup>34</sup> Ibid., 102, 107, 111, 115, 116, 120, 293 (and see 145, 148). Contemporary practice is more complex than at the time Hart was writing due to the incorporation of European Union Law through the European Communities Act 1972. I will ignore this complication.

<sup>35</sup> Even if the criteria in the rule of recognition applied to the rule of recognition itself, that would not explain why the rule of recognition was accepted.

<sup>36</sup> Hart never gives this precise formulation in *The Concept of Law*, though it is consistent with what he does say at 105 and 113. But it is the formulation he later favoured in *Essays on Bentham*, 156.

<sup>37</sup> See Hart, *The Concept of Law*, 107–8 (“We can ask whether it is a satisfactory form of legal system which has such a rule at its root. Does it produce more good than evil? Are there prudential reasons for supporting it? Is there a moral obligation to do so? These are plainly very important questions; but, equally plainly, when we ask them about the rule of recognition, we are no longer attempting to answer the same kind of question about it as those which we answered about other rules with its aid. ... So too when we move from the statement that a particular enactment is valid, to the statement that the rule of recognition of the system is an excellent one and the system based on it is one worthy of support, we have moved from a statement of legal validity to a statement of value.”); 116–7 (“... though in a healthy society they [private citizens] will in fact often accept these rules as common standards of behaviour and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution.”); 235 (“But we cannot ask in the simpler case one kind of

presenting Hart's views is this: officials regard the rule of recognition as the operative reason for following and applying the rules it identifies (and the rules identified by rules that it identifies, etc), i.e. it is the ground for following and applying valid legal rules. That a particular rule is legally valid is the auxiliary reason for following and applying it, since it establishes that the operative reason applies to it.<sup>38</sup> Hence the rule of recognition is fundamentally different from valid legal rules. The rule of recognition is a sufficient reason for following and applying valid legal rules, but the reason(s) for following and applying the rule of recognition itself must be some other type of reason(s).<sup>39</sup>

Hart himself thought that the reasons officials might actually have for accepting the rule of recognition could vary widely. As a matter of sociological speculation this seems plausible. On the other hand, it is arguable that for an official to accept that the rule of recognition is binding on other officials as well as herself places constraints on the types of reasons that could rationally support such a belief.<sup>40</sup> My concern is not with this question, but rather with the question of whether the acceptance of the rules of a legal system is based on the acceptance of the system's rule of recognition. Clearly Hart's view is coherent. One way in which to explain why people accept the instructions issued by an individual or body, for example, is in terms of the acceptance of that individual or body's authority to issue such instructions.<sup>41</sup> But is this the right way to understand the law?

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question which we can ask concerning the rules of a system enriched, as municipal law is, by a basic norm or secondary rule of recognition. In the simpler case we cannot ask: "From what ultimate provision of the system do the separate rules derive their validity or "binding force"?". And see "Lon L Fuller: The Morality of Law" *Harvard Law Review* (1965) 78: 1281, 1294 (reprinted in *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), 361–2) ("Here, if I may say so, the author's target should have been my claim that it is both intelligible and important to distinguish the general acceptance of the legally ultimate rule of a system of law which specifies the criteria of legal validity from whatever moral principles or rules individuals act upon in deciding whether and to what extent they are morally bound to obey the law.")

<sup>38</sup> I am utilising Raz's terminology ("operative" and "auxiliary"), *Practical Reason and Norms*, 33–5.

<sup>39</sup> There can of course be good non-legal reasons for following and applying valid legal rules, but I will disregard this fact in the following discussion.

<sup>40</sup> E.g. R.A. Duff, "Legal Obligation and the Moral Nature of Law", *Juridical Review* 25 (1980): 61, and J.M. Finniss, *Natural Law and Natural Rights*, 2d ed. (Oxford: Oxford University Press, 2011), 11–18.

<sup>41</sup> This obviously has affinities to Austin's account of the legal system in terms of the bulk of the population being in a habit of obedience to the sovereign: J. Austin, *The Province of Jurisprudence Determined*, ed. H.L.A. Hart (London: Weidenfeld and Nicholson, 1954 [1832]), lecture VI.

There is an alternative way to understand the role of acceptance in a legal system—one in terms of *systemic* acceptance. On this approach, the rules of the system are not accepted because the rule of recognition is accepted. Instead, the rule of recognition is accepted because the system itself is accepted. The rule of recognition is a rule of the system, and hence it is accepted along with the other rules in the system. There are a number of reasons for thinking that this perspective is both more plausible as an account of official practice in contemporary legal systems, and makes more sense of officials' normative attitudes to the law.

As noted already, Hart's view of acceptance is coherent, because it is modelled on the structure of personal authority (i.e. the authority of an individual or body). In the case of personal authority, we accept the instructions given by superiors because we accept that we should obey such superiors. But law is not a form of personal authority: it is a form of impersonal authority. In the case of law, it is the body of standards that claims our allegiance, rather than the makers of those standards. This is one of the reasons we personify the law, and speak of the claims that it makes on us, and the responsibilities we (may) have towards it. If we should obey the law, it is not because we have a duty to obey the legislature, but because we have a duty to follow the laws properly made by that legislature. So too with case-law: it is not that we have a duty to obey the judiciary, but the laws made by the judiciary. Hart's account of the rule of recognition is not of course that officials accept the authority of the legislature and judges, but rather that they accept the rule of recognition, and their acceptance of valid legal rules follows from their acceptance of the rule of recognition.

In practical terms the distinction between accepting valid legal rules because of the acceptance of the rule of recognition, and accepting legal rules (including the rule of recognition) because of the acceptance of the system as a whole is a fine one. Both are empirically possible, and both it seems lead to the acceptance of the rules of the system. But there is at least one important way in which they differ. The view that the acceptance of the rules of the system is based upon the acceptance of the rule of recognition cannot apply to the acceptance of non-source-based legal standards. Such standards do not, *ex hypothesi*, owe their status as law to a legal source, and thus their acceptance cannot be derived from the acceptance of the rule of recognition. This would apply, for example, to any legal principles that are not source-based, and also to

any customary law of the courts.<sup>42</sup> The view that the acceptance of the rules of the system is based on the acceptance of the rule of recognition, then, extends only to source-based law. Non-source-based law must be accepted separately. So if there is non-source-based law apart from the rule of recognition itself, the acceptance of the system of rules cannot be based on the acceptance of the rule of recognition alone.

Putting the question of non-source-based law to one side, it is notable that many officials such as judges swear allegiance to ‘the law’ when taking up their offices—which is normally understood to mean an acceptance of the laws of the system as a whole.<sup>43</sup> The role of the ultimate criteria of validity from this perspective is to help identify the laws that belong to the system, and to which officials are giving their allegiance. When officials swear to uphold the law, it does not seem to be a case of them accepting the rules of system *because* they accept the ultimate criteria of validity. Rather they are accepting *both* because together they constitute the rules of the system. Hart himself speaks at times of the acceptance of the system, rather than the rule of recognition. The oft-cited remarks that acceptance may be based on ‘many different considerations: calculations of long-term interest; disinterested interest in others; an unreflective inherited or traditional attitude; or the mere wish to do as others do’ are made in this context.<sup>44</sup>

These comments of Hart’s obviously make sense, since it would be unusual for an official to say that she accepted the rules of her legal system because, for example, legislation emanated from a democratic institution, if she also thought that the actual laws made by that institution were wholly deplorable for their inefficiency, their wastefulness, and their failure to maintain minimum standards of security, fairness and justice. Similarly, an official motivated only by self-interest would be more concerned

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<sup>42</sup> Customary law of the courts will be discussed in greater detail in section III.

<sup>43</sup> E.g. 28 U.S.C. § 453. Oaths of justices and judges: Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: “I, XXX XXX, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as XXX under the Constitution and laws of the United States. So help me God.” And in the United Kingdom: “I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will” (s.4 Promissory Oaths Act 1868).

<sup>44</sup> Hart, *The Concept of Law*, 203; and similarly 231–2, in the course of discussing the foundations of international law (“It may well be that any form of legal order is at its healthiest when there is a generally diffused sense that it is morally obligatory to conform to it. None the less, adherence to law may not be motivated by it, but by calculations of long-term interest, or by the wish to continue a tradition, or by disinterested concern for others.”)

with how the system as a whole promoted her own interests, rather than whether the fundamental sources of law did so. None of this is to deny the fact that one of the grounds for accepting a legal system can be (and often is) the desirability of its sources, e.g. legislation adopted by popularly representative institutions. The desirability of its sources is often a very important reason for accepting a legal system. It is just that it is not the only reason for doing so: the laws produced by those sources also matter. Nor is this to overlook the fact that one of the reasons an official may have for abiding by laws that are deeply misguided or deplorable is that it emanates from a desirable source.<sup>45</sup> What would be unusual, however, would be for an official to regard the content of the laws identified by the rule of recognition as irrelevant to the question of whether to accept the system, including the rule of recognition.

Perhaps, though, it might be argued that the preceding discussion misunderstands the relationship between acceptance and the merits of the system. It might be said that the relative attractiveness of the system as a whole just *is* the reason for an official to accept the rule of recognition. So it is a mistake to think that the acceptance of the rule of recognition must be based on the character of the rule of recognition taken in isolation from the rest of the system. Instead, the rule of recognition is accepted (if it is accepted) because of the official's view of the system as a whole. But in fact this line of analysis shows that the acceptance of the *other* rules of the system need not be derived solely from the acceptance of the rule of recognition. It is of course true that if (a) one judges the system as a whole to be acceptable, and so (b) accept the rule of recognition, that (c) one thereby accepts that there is a duty (provided by the rule of recognition) to follow and apply the rules identified by it, i.e. to follow and apply other legal rules. But (a) also provides grounds for accepting the other rules of the system directly, quite independently of (c), i.e. for accepting the rules identified by the rule of recognition, on the basis that they too are part of the system. So the acceptability of the system provides reasons for both the rule of recognition and the other rules of the system to be accepted. The reasons for accepting the other rules of the system do not simply derive from the acceptance of the rule of recognition.

Indeed, it is possible to go further and question why the rule of recognition needs to be understood as creating a duty on officials to *apply* the rules it identifies, in addition to the duty to use the criteria in the rule of recognition to identify those standards as

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<sup>45</sup> At least *pro tanto*: there may be cases where all-things-considered an official should not abide by the law.

belonging to the system. If officials accept the system, i.e. accept that they have a duty (in common with other officials) to apply the laws of the system, that is enough. The rule of recognition still plays an indispensable role in requiring officials to use its criteria to identify standards as belonging to the system, i.e. in requiring officials to acknowledge that certain standards are part of the system, but it need not itself be regarded as the basis for the duty to apply those laws.<sup>46</sup>

The systemic analysis of acceptance does not depend upon the particular view of what is involved in 'acceptance'. It applies, for instance, if the question of acceptance shifts to the question of why an official would accept that the laws of a system were (*pro tanto*) morally binding on herself and other officials (and the general population).<sup>47</sup> It is, again, *conceivable* that an official could believe that the law ought to be applied because the sources of law ought to be followed. (This is why Hart's conception is coherent.) But again it would seem odd to make this judgement independently of the merits of the system as a whole. And if the basis for the judgement that the rule of recognition is (*pro tanto*) morally binding is the merits of the system as a whole, then that judgement also directly supports the (*pro tanto*) bindingness of the rules identified by the rule of recognition, i.e. the other parts of the system, on the basis that they too are part of the system. Again, the merits of the system directly support both the bindingness of the rule of recognition and the other rules of the system. It does not distinguish the rule of recognition from other legal rules.

Finally, could it be argued that the rule of recognition might be seen as capturing the acceptance of the system, rather than the sources of law? There is a collective social practice among officials of accepting the legal system, including the sources of law. Officials regard it as their common responsibility to follow and apply the law, and to criticise official departures from that practice. The sources of law play a central role in identifying the content of the system, but it is not the acceptance of the sources *per se* that grounds the acceptance of source-based law. Such a view of the rule of recognition would indeed be consistent with the arguments in this section. But it is not Hart's conception of the rule of recognition.

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<sup>46</sup> It is unclear, in any case, why the rule of recognition should be thought of as imposing a duty to apply valid laws that are not identified by itself, e.g. delegated legislation.

<sup>47</sup> That is, something along the lines of Raz's "source-based" view of law: see *The Authority of Law*, 68–9, 152–3, 311–12, *Practical Reason and Norms*, 123–48, *Concept of a Legal System*, 210–16.

So Hart's claim that the rule of recognition is fundamentally distinct from the other laws in a system because of the grounds of its acceptance is not borne out from the systemic perspective. The sources of law in a legal system are accepted for the same reasons as the laws based on those sources, i.e. because they are parts of a system of laws that is acceptable.

*b. The basis for the rule of recognition's system-membership*

Perhaps, though, it is wrong to think that what makes the rule of recognition fundamentally different to other legal standards is the grounds on which it is accepted. It might be said instead that what is really key to the distinctiveness of the rule of recognition is the basis for its system membership. It could be argued that Hart's fundamental insight is that the rule of recognition provides the ultimate criteria for the identification of standards as legal standards.<sup>48</sup> The reasons that officials accept the standards is a separate issue. Instead, it is the identification function that establishes why the rule of recognition is fundamentally different from other legal standards and on a different 'level' to them, i.e. that it is not part of the law in the same way that other laws are parts of the system.<sup>49</sup> It is instead, in some sense, 'external' to the system of laws, although it is used to identify the laws that belong to the system.<sup>50</sup>

One thought might be this. To accept a legal system, the content of that system needs to be identified. Legal sources help to identify the content of the system, and the rule of recognition is the social practice of officials that constitutes those sources. But the rule of recognition only 'belongs' to the system in the sense that it identifies the members of it. It does not identify itself as a member of the system but is simply the basis for identification. So what makes the rule of recognition 'part' of the legal system is something radically different to what makes every other standard part of the legal system. Every other standard is law because it satisfies the criteria of membership provided by the rule of recognition, whereas the rule of recognition is 'law' in that it provides those criteria.

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<sup>48</sup> *The Concept of Law*, 94–5, 103, 105, 108–9, 110, 111.

<sup>49</sup> *Ibid.*, 110–12.

<sup>50</sup> In fact Hart uses the language of 'levels' in two different ways in *The Concept of Law*. In chapter V he uses it to indicate that the rule of recognition (and the rules of change and the rules of adjudication) are secondary (*viz.* second-order) rules, i.e. rules *about* other rules (*ibid.*, 94, 97). But in chapter VI when discussing whether the rule of recognition should be classified as 'law' (110–12) he speaks of it being on a different level because it is not part of the system in the way that other laws are, and being in some sense 'external' to the system. It is the latter sense of level that is pertinent to this section.

This line of thought is sound, but it does not show that the rule of recognition is not as internal to the legal system as other laws. All it shows is that the rule of recognition is the ultimate legal standard, i.e. the final basis for the system-membership of source-based law, the last link in the chain. The rule of recognition has the function of identifying standards as legal standards, but it is not unique in doing this: many other legal standards do the same. A standard that is valid by virtue of the rule of recognition may validate other standards, for instance the way that primary legislation may be the grounds for the validity of delegated legislation. Nor is the rule of recognition different from these other legal rules because it merely ‘identifies’ standards as legal standards. The sources of law do not simply play an epistemic role in helping officials to locate and enumerate the standards of the system, as a legal treatise or legal encyclopaedia would. The rule of recognition *constitutes* the standards as members of the system, it confers on them (as Hart says) their *status* as law.<sup>51</sup> The fact that it, like other legal standards, performs this function is a reason for treating it as being as internal as the rest of the standards in the system, rather than the converse.

Still, it might be thought that there is a problem because there must be some basis on which to identify the rule of recognition as a legal standard, and yet there are no further legal grounds on which to do so.<sup>52</sup> True enough, but again this is just to reiterate that it is an *ultimate* legal standard, i.e. one that is not validated by any further standard. The suggestion that this presents a problem presupposes that what makes something part of the law *must* be another law. Hart never provides any arguments for this view, and the better view is that what makes something part of the law depends upon its role in the operation of a legal system, and is an issue for legal theory to answer.<sup>53</sup> In the case of the rule of recognition, the basis for classifying it as a standard of the system is two-fold: (a) it is regarded as *legally* binding by officials; and (b) it constitutes other standards which are indubitably law as parts of the legal system.<sup>54</sup>

Still, there may be some lingering doubts on this issue, that might be expressed by way of an analogy to games. It might be said that the rule of recognition stands in the same relationship to the law as the ultimate criteria for the content of ‘institutionalised’

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<sup>51</sup> Ibid., 101, 109, 110, 111. (Though the way that Hart originally introduces the rule of recognition, in terms of it addressing the *uncertainty* over whether a rule is a primary rule, suggests a primarily epistemic function: 92, 94–5.)

<sup>52</sup> Ibid., 107

<sup>53</sup> See Raz, *The Concept of a Legal System*, 200.

<sup>54</sup> As Hart himself notes in passing: *The Concept of Law*, 111–12.



games stand to the rules of the games themselves. Take the game of chess.<sup>55</sup> The rules of professional chess are today determined by an official organisation, FIDE. If one wants to play professional chess, then one makes reference to the rules sanctioned by FIDE for playing the game.<sup>56</sup> The ‘rule of recognition’ for professional chess would be ‘the rules and standards laid down by FIDE in its official publications’. Although this is the ‘rule of recognition’ for the rules of chess, no one would imagine that this is a rule of chess. Rules of chess concern the movement of the pieces, time constraints, determining who plays white, etc. The same is true for other games that have an official governing body. The governing body determines the content of the rules and its authoritative statement of the rules is regarded as providing the official rules of the game. But the fact that the official rules are determined by the governing body does not make *that* standard (‘that the official rules are those issued by the governing body’) part of the rules of the game.

So why isn’t the law the same? The rule of recognition determines the content of the law but is not itself internal to the system of laws: it tells us which standards are legal standards, but is not itself a standard in the same way. The answer to this lies in the differences between games and the law, particularly in the narrowness of the scope of the activity that a game occupies. The rules of a game constitute an extremely restricted activity, and it is clear that the activity is one that is separate from the activity of determining the content of the game. But law is not like this. Law purports to have extensive authority over the range of activities that it can regulate. Even if the scope is not unlimited<sup>57</sup> it encompasses a wide range of activities, including crucially the activities of law-identification and law-creation themselves. The rules of games, by contrast, which constitute and regulate an activity, have nothing to do with the activity of determining the content of those rules.

So in the case of the rules of games it is possible to speak meaningfully of the ‘rules of the game’ being separate from the ‘rule(s) for identifying the rules of the game’. In the

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<sup>55</sup> This line of argument was prompted by Andrei Marmor’s illuminating work on chess and conventions: see *Social Conventions: From Language to Law* (Princeton: Princeton University Press, 2009), but does not represent Marmor’s own view of the rule of recognition. (See also on games Raz, *Practical Reason and Norms*, 113–23.)

<sup>56</sup> The case is different with casual games of chess between amateurs: here the rules of chess are just determined by accepted understandings of how the game is played: Marmor, *Social Conventions*, 50–1.

<sup>57</sup> See A. Marmor, *Positive Law and Objective Values* (New York: Oxford University Press, 2001), 39–42; cf. Raz, *Practical Reason and Norms*, 150–1 and *The Authority of Law*, 116–18.

case of law, there is no circumscribed activity constituted by the sources of law ('the game') that is separate from the activities of law-creation and law-identification. The latter activities are within the scope of what the law constitutes and regulates, and so are part of the 'game', not something separate from it. As Kelsen observed, 'law regulates its own creation'.<sup>58</sup>

All in all, then, the fact that the rule of recognition is the ultimate basis for source-based standards in the system, and does not owe its status to satisfying the criteria in some further standard, does not show that it is not internal to the system of laws. It differs, of course, from other standards in being ultimate rather than derivative. But that feature does not establish that the rule of recognition is not just as much part of the law as the laws that it identifies.

*c. The rule of recognition as a social fact*

Even if the last two points are conceded, it might be said that the third ground for saying that the rule of recognition is not a law like other laws is the most important for Hart.<sup>59</sup> Legal standards that are validated by the rule of recognition are (for want of a better term) 'abstract entities': they 'exist' in the sense that they are normative standards that are identified by criteria in the rule of recognition (i.e. by reference to the sources of law). To establish the existence of a valid law is to show that some normative standard (e.g. a duty, or right, or power, etc.) meets the preconditions used by officials to identify the source-based standards that belong to the legal system. If a standard satisfies those preconditions then it is law, whether or not officials actually use it (unless, of course, use is itself a condition of existence<sup>60</sup>). By contrast, the rule of recognition is constituted by the actual practices of the officials in identifying standards as law. And it is this that makes the rule of recognition fundamentally distinct from the rest of the law. It is the social foundation for law, the social root of law.

This argument raises a certain question about the nature of the rule of recognition as a 'social rule'. The rule of recognition, according to Hart, is a social rule, not just a social habit: it guides behaviour, and is not simply a coincidence of many different individual actions. As Hart made clear in the *Concept of Law*, a social rule takes a

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<sup>58</sup> H. Kelsen, *General Theory of Law and State*, trans. A. Wedberg, (Cambridge, Mass.: Harvard University Press, 1945), 132.

<sup>59</sup> Hart, *The Concept of Law*, 109–10, 111–12.

<sup>60</sup> *Ibid.*, 103.

*pattern* of conduct as a *standard* to be followed.<sup>61</sup> Now one way to read this analysis is that the standard reflects and answers to the pattern: the content of the social rule is determined simply by the pattern of behaviour. Participants may attempt to *formulate* the standard, i.e. to give it a verbal formulation, but what is determinative of the content of the standard is the actual pattern of behaviour.<sup>62</sup> Now in one sense this is correct. No formulation of the standard has a canonical status, i.e. is itself determinative of the content of the standard. But it is not true that one can understand the pattern of behaviour *as a pattern*, let alone as a standard, without it being capable of being given some characterisation.<sup>63</sup> The pattern, after all, involves a *selection* of what is relevant from all of the features of the situations. Sometimes a participant makes a mistake in attempting to follow the social rule. Which situations count as correct, and which as mistakes, depends upon the *content* of the standard. So in following a social rule, the participants must have at least an implicit understanding of the content of the rule in order to be able to follow it. Indeed, we would not normally think that a group of participants were following a social rule if it turned out that one half of the group would endorse a radically different formulation of the rule to the other half, and it just happened that up to now the application of the two had rarely diverged. Whether a group is following the 'same' social rule, then, depends not just on what they do, but on how they understand what they do. Their understandings need not be identical in every respect, any more than those following a canonical rule must share an identical understanding of the content of the rule: it is enough that there would be a sufficient mutual recognition of the understandings as alternative ways of formulating a common rule.

Hart's original discussion of social rules was designed to demonstrate how they resembled and yet differed from social habits. But the context of the discussion and the way in which Hart developed the distinctiveness of social rules may create the impression that a social rule is a social habit 'plus' an attitude (a 'critical reflective attitude'<sup>64</sup>) towards that pattern of habitual behaviour, i.e. that habits and rules share

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<sup>61</sup> Ibid., 55–7.

<sup>62</sup> E.g. Gardner, *Law as a Leap of Faith*, 67–70, especially 70.

<sup>63</sup> This is not to say that those following a social rule need to have encountered an explicit formulation of the standard, or would be able on their own to provide a satisfactory explicit formulation (e.g. of the rules of grammar). But they would be capable of recognising various formulations as being incorrect or roughly accurate, etc.

<sup>64</sup> Hart, *The Concept of Law*, 56–7.

the same 'external aspect' but rules add on an 'internal aspect',<sup>65</sup> so that it is the pattern of behaviour that is primary. But this view would be misleading. A social rule involves a group following a standard whose content may be regarded as evidenced by past and present practice. What makes it a *social* rule is that it is actually followed by the members of the group. If enough members stop following it then it ceases to exist, i.e. it ceases to be a social rule of that group. So the standard must be practised—followed—to be a *social* standard. But what is being followed is still a normative standard. Indeed Hart himself in his discussions of the 'meaning' and the 'scope' (plus the 'open texture') of the rule of recognition treats it as a standard like any other standard.<sup>66</sup>

So the rule of recognition is indeed a matter of social fact: its existence depends upon it being practised by the officials of the system. The officials regard it as a shared normative standard which guides their behaviour and whose content is manifested in their collective practices of law identification. Officials are following a normative standard (i.e. a standard containing criteria of identification) in ascertaining the applicable law in particular matters, and their view of the content of that standard is based upon both the common understanding of the profession and how the standard has been applied in previous matters.

Still, it might be said that while this is true so far as it goes, it omits the most important fact about the rule of recognition, viz. that not just its existence but also its *content* depends upon official practice. The standard that is being followed is the standard that the officials actually use, not a standard that they *should* be using. This, it is sometimes claimed, has the important consequence that the rule of recognition is not (or at least not 'really') subject to the law. The rule of recognition cannot be altered by the law, but only by a change in the practices of officials. At best then, the law might *seem* to be able to change the rule of recognition, by leading officials to change their practice, but the law would only be the *explanation* for the change—what would matter in the end would be whether the practice changed. So the rule of recognition is not subject to normative alteration by the law, it can only be changed by changing the practices of officials. The problem with this objection is that it is not obvious that the rule of recognition cannot be altered by law. When the British Parliament passed the Parliament Acts in 1911 and 1949, they enabled legislation to be enacted under certain

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<sup>65</sup> Ibid., 55–7, though this would be to overlook the fact that for Hart the critical reflective attitude includes dispositions to comply with the standard of behaviour, to criticise deviations from it, and to accept the appropriateness of criticism of one's own deviations: 57.

<sup>66</sup> See *ibid.*, 109, 123, 148 and section VII.4 "Uncertainty in the rule of recognition" (147–54).

conditions despite the House of Lords having rejected the bills. This certainly looks like a legally authorised alteration to the British rule of recognition. When the Australia Acts of 1986 severed the last remaining constitutional links between the Imperial Parliament at Westminster and the Australian Commonwealth and states, this too looks like an alteration to the Australian federal and state rules of recognitions, since the Acts terminated the power of the Westminster Parliament to legislate for Australia.<sup>67</sup> Similarly, where courts in the United States designate decisions of their appellate branches as ‘not for publication’, they arguably alter the doctrine of precedent in that jurisdiction.

But perhaps the point is this: a legal change to the rule of recognition will only be effective if the officials accept it and change their practices, otherwise it will not. And this is just the converse of the fact that the rule of recognition can *also* be altered by a (legally unauthorised) change in the practices of the officials. From 1937, for example, the officials in the Republic of Ireland recognised the 1937 Constitution as the Constitution of the Republic, despite its having been adopted contrary to the terms of the then 1922 Constitution of the Irish Free State.<sup>68</sup> This is an important point, but its significance should not be overstated. For one thing, the rule of recognition is not unique in this way. It is always possible for laws to be accepted by officials despite their creation not satisfying the standards for validity, and for laws that *do* satisfy the standards of validity to be rejected by officials. So long as officials follow and apply a(n) (invalid) ‘law’ in the same way as they follow and apply valid laws, the (invalid) ‘law’ will, for all intents and purposes, *be* a law of the system. Equally, so long as officials reject the validity of a (valid) law, it will, for all intents and purposes, not be a law of the system. So the fact that the rule of recognition can be altered in ‘unconstitutional’ ways, or remain the same despite ‘constitutional’ alteration, does not make it unique. It is also the case that officials such as courts will ordinarily provide some *legal* justification for an (otherwise unauthorised) change to the rule of recognition, or for refusing to alter it. Doctrines such as constitutional ‘necessity’, or an inherent power for such changes to be made, may be deployed to account for an alteration, whereas a denial of the legal power to effect some change may be deployed to deny the

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<sup>67</sup> S.1 Australia Act 1986 (Commonwealth of Australia): “No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.”

<sup>68</sup> This analysis of the adoption of the 1937 Constitution is not universally accepted, but is a standard view.

alteration. The arguments may not always be convincing, and the circumstances in which they are deployed may render their sincerity suspect, but the fact that they are advanced indicates that officials do not regard themselves as at liberty to alter (or refuse to alter) the rule of recognition in legally unauthorised ways.<sup>69</sup> In any case, it is a mistake to treat this feature of the rule of recognition as the default position, rather than the exceptional occurrence. In the operation of a legal system the rule of recognition is treated as a binding law that may be subject to legal alteration or clarification, but not to modification simply at the will of officials. The best explanation for the general practices of officials in a legal system, despite occasional deviations from those practices, is that the rule of recognition is just as much law as any other law in the system.

In summary, there is no compelling reason for conceptualising the rule of recognition as something other than part of the law of a system. It is true that the rule of recognition is *distinctive*, as it is the ultimate standard for constituting other source-based standards as parts of the system, and as it must be practised in order to exist. But this simply makes the rule of recognition part of the customary law of the courts.<sup>70</sup> At times Hart's conception of the rule of recognition looks back to the theory of law he rejected—Austin's command theory—because the rule of recognition is sometimes treated, rather like Austin's 'sovereign', as above and apart from the law that it constitutes.<sup>71</sup> The 'foundations' for a legal system<sup>72</sup> in Hart's theory becomes a practice (the rule of recognition) rather than an organ (the sovereign), but retains many of the central characteristics of that organ. Thus the rule of recognition for Hart is a social fact, constituted by the actual practices followed by officials in identifying standards as law, just as the 'sovereign' for Austin is a matter of the social fact of the bulk of a population habitually obeying a particular person or body. The rule of recognition is a 'law' in the same sense that the sovereign is a 'legal body', because it is the basis for the system-

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<sup>69</sup> For example, the High Court of Australia ruled on and upheld the validity of the Australia Act 1986 (Cth) in *Attorney-General (Western Australia) v Marquet* [2003] HCA 67.

<sup>70</sup> The only customary law that Hart discusses in *The Concept of Law* are the customs of the general community that the law recognises as binding (44–8, 100, 101), not the customary law of the courts.

<sup>71</sup> Austin, *Province of Jurisprudence Determined*, lecture VI.

<sup>72</sup> Hart, *The Concept of Law*, 100, 292.

membership of other standards. But it does not exist as law at the same way as the ordinary laws of the system, and it is not subject to the ordinary law.<sup>73</sup>

But the better view is that the rule of recognition is one of the laws of the system, albeit a distinctive type of law. Hart's crucial insight was that the ultimate sources of source-based law must owe their existence to being practised, rather than to being validated by some further rule. Law is a social practice, and there must be some way in which non-customary standards can be recognised as belonging to the system. Which raises the question of how ultimate customary laws are to be understood.

### **III. Customary law of the courts**

The nature of the customary law of the courts (custom '*in foro*' as Bentham called it<sup>74</sup>) is an underdeveloped branch of legal theory.<sup>75</sup> The only area where customary law has received extensive analysis has been in the context of Public International Law, but this is not on all fours with the issue in municipal law. Customary international law is most similar to the custom of non-officials recognised by the law (custom '*in pays*'), not to the custom of the officials themselves.<sup>76</sup> When international institutions such as the International Court of Justice apply customary international law, they do so by reference to the practices of states and other international actors, not their own practices.

The key thought behind customary law *in foro* is that it rests on being applied in the practice of the courts: the courts regard some of the standards they follow as legally binding, despite those standards not having a basis in other sources of law such as the constitution, statute, or case-law.<sup>77</sup> What characterises customary legal standards is that

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<sup>73</sup> In fact Hart was ambivalent about the susceptibility of the rule of recognition to being altered by law: see the discussion in *ibid.*, 147–54, especially the final pages (153–4).

<sup>74</sup> J. Bentham, *A Comment on the Commentaries*, ed. J.H. Burns and H.L.A. Hart (Oxford: Oxford University Press, 1977), 182–4.

<sup>75</sup> See, for instance, the brief discussions in J. Raz, "Legal Principles and the Limits of the Law" *Yale Law Journal* (1972) 81: 823 at 852–3 (1972) (reprinted in *Ronald Dworkin and Contemporary Jurisprudence*, ed. M.Cohen (London: Duckworth, 1983) at 79–80), and Gardner, *Law as a Leap of Faith*, 65–74.

<sup>76</sup> See J.M. Finnis, *Natural Law and Natural Rights*, 238–45, and J. Tasioulas, "Opinio Juris and the Genesis of Custom", *Australian Yearbook of International Law* (2007) 26: 199.

<sup>77</sup> I will ignore the fact that some of the practices of the courts could be legally binding because they satisfied some criteria in a rule of recognition, e.g. length of practice, endorsement by senior officials, etc., i.e. that there could be official custom validated by the rule of recognition. This will not help to understand the nature of ultimate customary law such as the rule of recognition itself.

they are: (a) authoritative for the courts; (b) not validated by another legal standard; (c) depend for their existence on being applied in the practice of the courts; and (d) belong to a system of laws. Let us consider each in turn. The first aspect is that a customary legal standard is regarded as authoritative, i.e. it is to be applied regardless of its merits. The second aspect simply notes that its status as part of the system is not derived from its having been authorised by another standard of the system. The third aspect (in conjunction with the second) is what makes the standard customary. To say that its existence depends upon its being practised is to say that being practised is a *condition* of its existence. If it ceased to be practised then it would no longer be a customary standard of the courts; the fact that it is currently being practised is what gives it its existence. Finally, there must be some basis on which to regard the standard as belonging to the system of laws.

Let's consider these in more detail, starting at the end. The fundamental basis on which a standard has the status of a legal standard is that it belongs to a legal system. What makes a system of institutions and standards a legal system need not be resolved here. It does seem, however, to go beyond the structural features of the system to the type of community to which it applies and the scope and type of guidance it provides.<sup>78</sup> But our concern is not with what makes a system a legal system, but why a standard should be regarded as belonging to that system. That is a complex question, but in the case of the rule of recognition the answer is relatively straightforward. The rule of recognition belongs to the system because it is the standard that constitutes other standards which are indubitably legal (e.g. statutes, precedents) as parts of the system. The rule of recognition's role in validating those standards integrates it into the system. More generally than this, what makes a customary standard of the courts a legal standard is that the courts regard it as directly binding on the courts to use in judicial proceedings, irrespective of the merits of the standard.<sup>79</sup> In being binding on the courts to use in judicial proceedings it enjoys the same sort of status and plays the same sort of role as other legal standards, such as legislative and case-law standards.

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<sup>78</sup> Compare e.g. J. Raz, *Practical Reason and Norms*, 149–54, and *The Authority of Law*, 115–20; J.M. Finnis, *Natural Law and Natural Rights*, chapter 10; N. Simmonds, *Law as a Moral Idea*, (Oxford: Oxford University Press, 2007) chapter 2; and J. Waldron, "The Concept and the Rule of Law", *Georgia Law Review* (2008) 43: 1.

<sup>79</sup> 'Directly' binding because it is not binding by virtue of some other legal standard that makes it binding.



As to the existence of a customary law depending upon its being followed by the courts, it is the particular type of dependence that is important here. At the very least, being applied in the practice of the courts is a *condition* of the existence of a customary law: were it to stop being practised it would cease to exist. But this needs to be distinguished from the question of the *grounds* for judges *qua* judges to follow customary law. The ground or justification for following a customary law is that it is part of the law, and judges are bound to follow and apply the law. Its being practised is a precondition for following it, since otherwise it would not exist, but it is the fact that it is part of the law that makes it binding on the judiciary. It is very easy to run these two points together because the use of the standard by the courts is simultaneously the best evidence of its existence and of its character. A judge will look to the existing practices of the judiciary to see if they have treated a standard (that lacks any other form of validation) as merely a matter of good, or desirable, judicial practice, or whether they have treated it as a binding standard on a par with other legal standards. Thus if some aspect of the doctrine of precedent is questioned, a judge will look to see if there is an established practice on this aspect. If there is, he or she will consider whether it is merely a case where other judges have regarded some approach as preferable in those types of circumstances, or where they have treated the approach as required of them as judges, regardless of their views of the merits of the approach. If the former, the judge will consider whether it does make sense to follow the practice. If the latter, the judge will regard themselves as legally bound to take that approach.

Why do judges in the latter position regard themselves as legally bound by the standard? Because a standard with these attributes *is* a legal standard, i.e. part of the legal system—part of the legal practice that judges *qua* judges are duty-bound to apply. Each aspect makes sense in light of the others. The necessity for being practised makes sense in the absence of validation by another law, since its being practised establishes that the standard exists. The role the standard plays in judicial proceedings—as an authoritatively binding requirement—makes sense in light of it being part of the law. And its being part of the law makes sense in light of its being a directly binding authoritative requirement on judges *qua* judges. A customary law is an authoritative standard because the reason for following it is not the merits of the standard itself, but the fact that it is part of the law, and judges are duty-bound to apply the law.

Now of course it might be complained that the problem with this analysis is that its circular: each aspect of the account of customary law *in foro* depends upon the others.

In one sense this is true, but circularity is not a flaw *per se*—there can be virtuous as well as vicious circles. The account of customary law *in foro* locates such law within the legal system more generally, and within the characteristic use of statutory and case-based law in judicial decision-making. It explains what makes this type of law part of a legal system, and how that membership explains its use by the judiciary. All four aspects of the analysis are necessary to make sense of customary law, and they are interlinked and interdependent. One way of understanding the account is in terms of it providing a ‘connective’ analysis, which links the various parts of the practice together to illuminate them.<sup>80</sup>

Another complaint might be that this account of the status of customary legal standards such as the rule of recognition is not consistent with the way that officials think about them. Judges do not simply follow the rule of recognition blindly, because it is part of the law: they also have views about why it is justifiable, or where its merits lie.<sup>81</sup> This is of course true, but it would be wrong to think that because a doctrine is binding irrespective of its merits there is no scope for considering the merits of the doctrine. It is clearly possible to do both. And because the law is not an immutable system there is scope for those views on the merits to lead to alterations in the doctrine. Any part of the rule of recognition may generate debate about its proper basis and its proper scope. There will be a range of routine cases where it is applicable without question, but other situations where its application is not straightforward. Nor, as argued above in section II.c, is there any reason to think that the rule of recognition itself, as a legal rule, can never be (or has never been) altered by the exercise of a legal power. There is no reason, for example, to conclude that the courts *must* lack the legal power to alter the doctrine of precedent, and that case-law cannot supersede customary law, just as there is no reason to think that the British Parliament cannot alter the basis for the validity of Parliamentary legislation (e.g. by abolishing the monarchy). Such questions, and the justiciability of such questions, are themselves legal questions. So there is an important role for debate about the merits of the various criteria in the rule of recognition, but these are not inconsistent with its status as an authoritative customary legal standard.

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<sup>80</sup> See P.F. Strawson, *Analysis and Metaphysics* (Oxford: Oxford University Press, 1992), chapter 2.

<sup>81</sup> A point emphasised (though in terms of the grounds of law, not the rule of recognition) by R.M. Dworkin in *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986). See also on this point Marmor, *Social Conventions*, 170–1.

What bearing does this analysis have on the long-running debate about whether the rule of recognition is a 'conventional' rule?<sup>82</sup> The answer to that question depends in part on what makes a rule conventional. On many views, including those analysing 'co-ordination' conventions, one necessary condition for a social rule to be a conventional rule is that the auxiliary reason for following it is that others do so. Take the case of the side of the road for driving. The operative reason for driving on the same side as others drive is safety. It is dangerous if some drive on the left, others on the right. So if one side is consistently used by other road users, that is the side that ought to be used. The auxiliary reason for driving on the left or the right is that this is the side that everyone else drives on. So the (auxiliary) reason for driving on the left (or right, as the case may be) is that this is what others do. Now the fact that other officials follow the rule of recognition may provide a reason for following it, on the basis that it is desirable that officials act on the same standards. But whether or not this is the case, there is a separate (auxiliary) reason for officials to conform to the rule of recognition, viz. that it is part of the law. The (operative) reason for conformity is that officials have a duty to apply the law. And for officials *qua* officials, this reason is the crucial one.

The same applies to an alternative view of the rule of recognition as a conventional practice developed by Marmor in terms of *constitutive* social conventions, such as the conventional rules that constitute the game of chess.<sup>83</sup> Marmor distinguishes these from the more commonly discussed co-ordination conventions on the basis that constitutive conventions constitute an activity such as a game, or an artistic genre like theatre, whereas co-ordination conventions resolve problems of co-ordinating social actions that exist prior to and independently of the conventions that solve them.<sup>84</sup> Marmor emphasises two aspects of social practices which, he argues, makes some social rules conventions: (a) that they are compliance-dependent; and (b) that they are arbitrary. The first element (compliance-dependence) is characterised in terms of the reasons for following an existing rule being 'dependent' on its being generally followed, i.e. that one follows the rule 'partly because' it is the rule that is generally followed.<sup>85</sup> The second element (arbitrariness) refers to the fact that while there are (operative) reasons

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<sup>82</sup> G.J. Postema, "Coordination and Convention at the Foundations of Law", *Journal of Legal Studies* (1982) 11: 165; L. Green, "Positivism and Conventionalism", *Canadian Journal of Law and Jurisprudence* (1999) 12: 35; Marmor, *Social Conventions*, chapter 7; Dickson, "Is the Rule of Recognition a Conventional Rule?".

<sup>83</sup> Marmor, *Social Conventions*, chapters 1–3.

<sup>84</sup> *Ibid.*, chapters 1 and 2.

<sup>85</sup> *Ibid.*, 10–12, 41–2.

for following the rule, those reasons would equally well support following at least one alternative rule if it was practised instead (and it is not possible (or would be futile) to practise both rules).<sup>86</sup> These two conditions are applicable to co-ordination conventions, but also to constitutive conventions. Marmor argues that the rule of recognition is best understood as a constitutive convention of just this kind, since it constitutes the social practice of law.<sup>87</sup> Here again, however, the reasons for following a constitutive convention can co-exist with the reasons for officials, *qua* officials, to follow the rule of recognition because it is part of the law.

On either view of the rule of recognition as a conventional rule, the reasons for following the rule of recognition *qua* conventional rule do not exclude following the rule of recognition *qua* part of the law. Nor is the reason for following the rule of recognition *qua* part of the law reducible to the reason for following it as a conventional rule. If there are good reasons for accepting a legal system—if the system is sufficiently meritorious overall to warrant acceptance—then there are good reasons for following the rule of recognition, since it is part of the system. And for an official, *qua* official, the membership of the rule of recognition in the system is the key reason for following it.

#### **IV. Conclusion**

If the sources of law are domesticated—if we understand them to be part of the law of a legal system, albeit a distinctive part—then the rule of recognition can be seen to be *central* to a legal system without being a foundation external to it.<sup>88</sup> It is central, obviously, because it provides the ultimate basis for source-based laws. But it is not external to the system, because (a) the reasons for accepting it—that it is part of a(n) (acceptable) legal system—apply equally to the other laws of the system, (b) its ultimacy does not mean it is outside the law, and (c) its being a social rule is consistent with its being part of the customary law of the courts. The rule of recognition is of course different to source-based (i.e. validated) laws because it is ultimate, and because it is customary. In understanding the ultimacy of legal sources, Hart made a signal advance on Kelsen's theory by rejecting the idea that they had to be validated by yet a further standard (the basic norm) which was 'presupposed' or 'postulated' by those who

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<sup>86</sup> *Ibid.*, 8–10, 41

<sup>87</sup> *Ibid.*, 162–71.

<sup>88</sup> "Central" is indeed the term Hart uses at the end of chapter 1 of *The Concept of Law*, 17.

regarded the law as a system of valid norms.<sup>89</sup> Instead, the ultimate sources of law are simply part of the rule of recognition. Where Hart went too far was in thinking that this made the rule of recognition law in only a special sense, i.e. as the basis on which officials identified standards as legal standards, but not otherwise.<sup>90</sup>

Do the arguments in this article go further, however, and show that the concept of a 'rule of recognition' is redundant in understanding the nature of source-based law? No: the rule of recognition still has a role in placing officials under a legal duty to follow the criteria in the rule for identifying other rules as legal rules. But they call into question the idea that the rule of recognition should be understood as imposing a duty on officials to apply valid legal rules. That duty stems from the acceptance of the system. The arguments of the article also support the proposition that there can be non-source-based law, *viz.* customary law *in foro*, besides the rule of recognition itself, so that not all the laws of a system need owe their status as law to its rule of recognition.

This paper has argued that the rule of recognition should be understood as part of the customary law of the courts. It has also sought to make some progress in elucidating the nature of such customary law. Along the way it has argued that it is the acceptance of the legal system as a whole that is primary, and the acceptance of the rule of recognition is derived from that. The acceptance of the system by the officials is a collective social practice: it is this practice that provides the social foundation for the law, since the law cannot exist if the bulk of officials do not accept that officials are required in their official roles to comply with the rules of the system. Officials, then, accept the system that other officials accept, and their mutual acceptance is necessary for the system to exist. But in accepting the system they accept a duty to apply the individual laws of the system because they are part of the law, not simply because there are good reasons (if there are) for doing as other officials do.

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<sup>89</sup> Kelsen, *General Theory of Law and State*, (Cambridge, Mass.: Harvard University Press, 1945), chapter 10, and *The Pure Theory of Law*, section 34.

<sup>90</sup> At least he went too far some times: at other times he seems to treat the rule of recognition as just the fundamental law of the system (e.g. *The Concept of Law* 147–54).