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The Inescapability of Law and the Duty of the Rule of Recognition

https://doi.org/10.1515/krt-2025-0010
Received April 14, 2025; accepted October 8, 2025; published online October 20, 2025

Abstract: H.L.A. Hart's legal positivism identifies the rule of recognition as the foundational concept grounding a legal system, emphasizing its basis in social practice rather than moral evaluation. Hart argues for a strict conceptual separation between law and morality, allowing the rule of recognition to neutrally establish criteria for legal validity. Nevertheless, debate surrounds whether this rule inherently creates obligations for legal officials. While some scholars, such as Julie Dickson, argue it merely confers powers without imposing duties, others, notably Jules Coleman and Neil MacCormick, insist it necessarily entails obligations – specifically the duty to adhere exclusively to the recognized criteria when identifying valid laws. This obligation arises from officials committed internal acceptance of the rule, ensuring the system's normative coherence and stability. Thus, despite controversy over its precise characterization, Hart's conception ultimately presents the rule of recognition as a fundamentally duty-creating social practice essential for any developed legal system.

Keywords: H.L.A Hart; rule of recognition; legal positivism; social duties

1 Introduction

H.L.A. Hart's ideas and theory are synonymous with contemporary legal positivism and a social-practice-focused view of law. In his masterwork, *The Concept of Law*, Hart defended the idea that the ultimate foundation of law lies in a general practice of accepting legal rules as authoritative and recognizing certain purported legal sources as capable of creating law. How general this acceptance needs to be varies from system to system, and we can identify it as existing when it is shared by at least those citizens who call themselves legal officials, as long as there is enough conformity to the law for the system itself not to be in substantial active dispute.

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According to Hart, this recognition is evident in a legal system's established methods for creating, modifying, and identifying valid sources of law, as well as in its rejection or criticism of attempts to establish law through means outside these shared criteria and procedures. In contexts where this practice of law-creation and validation is sufficiently shared and consistently applied, we can confidently state that a legal system exists, grounded in a sufficiently stable *rule of recognition*. For Hart, this rule of recognition is the ultimate basis of every developed legal system, and the introduction of this concept into legal philosophy marked a significant advancement over previous theories of law (Hart 1997).

Hart's general theory is a legal positivist view of law. This means, among other things, that it defends the separability of law and morality. Additionally, Hart argues that his theory offers conceptual descriptions of law, arguing that its development and justification do not depend on moral evaluations. Hart's approach emphasizes that identifying what counts as law can be done in a morally neutral manner, and that legal theory itself can maintain a descriptive moral neutrality. This perspective stands in direct opposition to the so-called natural law view, which argues for both a necessary moral aspect in law and its identification, as well as a normatively charged approach to legal theory.[1]

Despite Hart's straightforward defense of the importance of the rule of recognition for his concept of law, the exact characterization of its purported characteristics, as well as the concept's overall plausibility, is a matter of much debate in legal theory. Very generally, one can distinguish between those who argue that the rule of recognition is capable of creating obligations and those who deny that it is.

According to one view, the rule of recognition, as a secondary rule, cannot itself impose duties; it can only establish the criteria for recognizing valid law without requiring obligatory acceptance or practice. This is the position of some authors, such as Julie Dickson and Paulo McDonald (Dickson 2007; Macdonald 2011, 2013).

Alternatively, there are authors such as Jules Coleman and Neil MacCormick who argue that the rule of recognition can only be understood as a normative social rule that imposes obligations and duties – at least the duty to follow it and to use it as the ultimate test for identifying valid law. This does not imply that it is inevitable for every society to have a rule of recognition or a legal system since the possibility of not engaging in law remains genuinely conceivable. However, once a legal system has developed, there is no other coherent conceptual possibility than to accept a rule of recognition that imposes duties (Coleman 2001a; Maccormick 2008; Marmor 2005).

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1 One of Hart's best characterization of legal positivism can be found in (Hart 1958). The most well know modern view on natural law comes from John Finnis (Finnis 1979).

Taking this debate into account, this paper has two distinct objectives. First, it aims to present Hart's doctrine of the rule of recognition alongside his well-established legal positivism, including the debates surrounding the proper characterization and best interpretation of his theory. Second, it adopts a position within that debate, defending a particular interpretation of the rule of recognition and responding to natural law criticisms that call for its rejection.

This position seeks to offer a distinct contribution to the jurisprudential debate while remaining coherent with other well-known views. It follows, for example, on the views of MacCormick and Coleman, who argue that the rule of recognition is indeed capable of creating obligations, but it adds an account of how this is a necessary consequence of the generality of law and its claim to regulate every relevant aspect of life in society.

This will involve defending the very idea of the rule of recognition as one of the most valuable conceptual innovations introduced by Hart's legal philosophy. In short, the argument is that the rule of recognition is a duty-creating social practice that binds at least legal officials to rely exclusively on it to determine what counts as law in a given jurisdiction, as well as the acceptable methods for changing existing law.

2 Legal Positivism and the Concept of Law

Hart's legal positivism, as developed in *The Concept of Law*, is organized around a series of conceptual distinctions that collectively characterize the nature and structure of a legal system. One of Hart's most important insights is that the idea of a legal system cannot be adequately understood merely in terms of isolated commands or habits of obedience. Instead, Hart argues that the law is a complex union of different types of rules, which must be distinguished in both function and logical structure, as well as a general social fact of acceptance of this structure, characterized as general conformance to law, and a critical reflexive attitude of at least legal officials to the rules and their performance.

To this characterization of law, Hart adds a social concept and explanation of legal and social obligation, the all-important distinction between primary and secondary rules, the idea of the rule of recognition, the internal perspective of rules, and the separation between law and morality. While not all aspects of these arguments can be addressed here, the next sections will deal directly with the first three, and a general characterization of the remaining elements will now follow.

The internal point of view of rules explains how legal rules and shared social rules can function as norms. Unlike mere habits, which may involve repeated behavior without any normative attitude, rules are characterized by a shared critical

attitude: those who accept a rule not only follow it, but also regard it as a standard that others ought to follow, and they criticize deviations accordingly. This normative dimension distinguishes rules from mere regularities, and is essential for understanding the authority and stability of legal systems (Hart 1997, p. 101).

A central claim of Hart's legal positivism is that there is no necessary connection between law and morality. This claim, often referred to as the separability thesis, does not deny that laws may reflect moral principles, nor that moral considerations may be relevant in legal interpretation. Rather, it denies that the validity of legal norms necessarily depends on their moral content. Hart argues that it is conceptually possible for a legal system to include morally reprehensible rules, so long as they are validated by the system's rule of recognition (Hart 1958).

These several arguments have at their core a focus on the social aspect of legal practice. They mark Hart's theory as a legal positivist understanding of law, that is, a theory that understands law as a man-made phenomenon, explained through social facts and relations of acceptance, criticism, and coercion, that does not depend on moral and value correctness to exist and that can be identified without a direct evaluation over the achievement of justice or other moral criteria.

Finally, the possibility of separating law and morality depends in part on the way the rule of recognition is constructed. Because the rule of recognition is itself a social rule, its content depends on the practices and attitudes of legal officials. This will be further explained in the next sections.

3 Primary and Secondary Rules

Understanding the distinction between primary and secondary rules is indispensable for grasping the structure and coherence of Hart's legal theory. Even though certain aspects of Hart's presentation of these secondary rules will be put in question later, a general overview is needed. Primary rules are those that impose duties by requiring or forbidding certain types of conduct. They are the rules that most people commonly associate with law – rules against theft, assault, or fraud, for example. These rules govern behavior directly and stipulate what individuals must or must not do. However, primary rules by themselves are insufficient to explain the full structure of a legal system. For such a system to function effectively, it must also include rules that specify how primary rules are to be created, changed, identified, and adjudicated. These are the so-called secondary rules (Hart 1997, p. 81).

These rules function independently of any specialized authority structure; they emerge in simpler societies as the basic mechanisms by which social order is maintained. However, such systems are inherently limited. Without secondary rules, they lack clarity, adaptability, and efficient dispute resolution mechanisms (Hart

1997, p. 81). Secondary rules address deficiencies that would arise in any society governed only by primary rules. Hart identifies three such deficiencies: uncertainty, static character, and inefficiency. To address uncertainty, legal systems require rules of recognition, which set out the criteria by which valid legal norms can be identified (Hart 1997, p. 86).

Secondary rules fill these gaps. In Hart's original presentation, they do not impose duties directly on the conduct of individuals in the same way primary rules do. Instead, they provide the means through which primary rules can be identified, changed, and adjudicated. Hart categorizes these into three distinct types: the rule of recognition, the rule of change, and the rule of adjudication. Each addresses a specific deficiency in a system governed by primary rules alone.

The rule of recognition provides a solution to uncertainty by stipulating the criteria that a rule must satisfy to qualify as part of the legal system. These criteria vary from system to system and may include legislative enactment, judicial precedent, or constitutional text. Hart emphasizes that these rules are not typically formulated in explicit terms but are discerned through the actual practices of legal officials (Hart 1997, p. 34.).

The rule of change addresses the static nature of primary rules by authorizing specific individuals or bodies – such as legislatures or constitutional conventions – to introduce, amend, or repeal legal norms. The existence of such a rule allows a legal system to evolve in response to new circumstances without relying on the slow social consensus that characterizes changes in customary norms (Hart 1997, p. 97).

The rule of adjudication responds to the inefficiency of informal enforcement mechanisms by empowering officials, such as judges, to determine whether a rule has been breached and to impose sanctions or remedies accordingly. This creates a formal and centralized process for resolving disputes, thereby enhancing the predictability and fairness of legal decision-making. This can be the case because the establishment of precedents and the rule-guided application of law in accordance with official procedures enable, and at times even compel, the courts to decide similar cases in a similar way.

Whether this will lead to fairer outcomes depends, in part, on the morality of the law being applied. A just law, applied consistently to all those it is meant to affect, can produce stability in legal decisions and greater fairness among those subject to it, compared to a situation where every case were decided entirely anew. This, however, would hardly be the case when the content of the legal rules themselves are morally flawed (Campos 2025, pp. 133–145).

Importantly, these secondary rules are not hierarchically structured in a straightforward manner. Rather, they interact and often overlap. For instance, a constitutional provision might serve both as a criterion of validity (rule of recognition) and as a guideline for legislative procedure (rule of change). The complexity of

modern legal systems means that secondary rules can sometimes be difficult to classify in purely theoretical terms (Hart 1997, p. 97).

Of these three types of secondary rules, the rule of recognition is the most fundamental. It functions as the ultimate rule by which all other rules are validated. Unlike other rules in the system, the rule of recognition is not itself validated by a higher rule; rather, its existence and content are established by social practice. In particular, Hart argues that the rule of recognition exists when officials in a legal system accept and use certain criteria as the standard for identifying valid law. This acceptance is not merely behavioral, but involves an internal point of view – a reflective attitude in which the criteria are regarded as legitimate and deviations are subject to criticism.

The centrality of the rule of recognition within this typology cannot be overstated. It is the master rule, so to speak, upon which the validity of all other rules depends. Yet unlike other rules, it does not derive its authority from a higher legal source. Instead, its authority stems from social acceptance – specifically, the practice among legal officials of treating the criteria it specifies as authoritative. This practice includes both the actual use of these criteria in legal reasoning and a critical, internal perspective that treats them as standards to be followed and enforced (Hart 1997, p. 34).

4 Duty and Judgments of Importance

While Hart's distinction between primary and secondary rules provides the structural framework for understanding legal systems, the question remains as to how these rules come to be experienced as imposing genuine obligations. Not all social rules generate obligations in the strict sense. For example, social conventions concerning etiquette or linguistic grammar may be widely followed and even subject to criticism when breached, yet they are not typically regarded as morally or legally binding in the same way that rules prohibiting theft or assault are.

According to Hart, the key distinction lies in the seriousness of social pressure and the perceived importance of the rule in maintaining some valuable aspect of social life. A rule becomes duty-imposing – either morally, socially, or legally – when its breach is met not merely with disapproval, but with an intense sense of justified criticism that is seen as applying to anyone who fails to conform. In such cases, the rule is understood not simply as a guide to behavior but as a standard whose violation entails blameworthiness (Hart 1997, p. 87).

Probably a few words over the intense justified criticism characteristic are needed. It is reasonable to assume that any breach of any kind of social rule can lead to some sort of criticism, and it is generally the case, as errors of grammar are

normally corrected and those that are learning the language are incentivized to adjust their behavior and better conform to the parameters of right grammar. However, for Hart, this is not enough to create a duty of obligation to follow on the rules of English grammar.

What distinguishes obligation-creating social practices from others is a shared intensity and a common sense of importance over conformance among those who take part in them. This sense must also be recognized by a sufficient number of participants so that the parameters of the practice and the typical reactions to it are generally known and followed. Those who choose to disregard it must not be strong or numerous enough to undermine the practice entirely. There will be cases in which it is unclear whether the necessary conformance and general acceptance have been achieved, but also cases in which this is undoubtedly so (Hart 1997, pp. 85–88).

Hart's account emphasizes that this shared perception of the importance and intensity necessary for duty-imposing need not be grounded in moral reasoning. People may follow rules and participate in the appropriate intense criticism for different reasons, including tradition, prudence, or conformity. What matters is that the rule is generally accepted as a common standard and that deviations from it are regarded as lapses rather than mere alternatives.

Nonetheless, the line between legal and moral obligation is not always easy to draw. Hart acknowledges that legal rules may reflect moral principles and that individuals may follow them because they believe them to be morally justified. However, he insists that this moral alignment is contingent, not necessary. The authority of legal rules rests on their acceptance within a particular institutional framework, not on their moral correctness. This allows for the possibility of legal systems that are morally deficient or even unjust, yet still function as law in the sociological and analytical sense (Hart 1997, pp. 292–295).

This interpretation preserves Hart's commitment to the separability of law and morality, while also acknowledging the complexity of the social attitudes that sustain legal authority. It allows for a form of normative engagement that is neither purely descriptive nor fully moral, but situated somewhere in between. This middle ground is crucial for understanding how legal rules can be both binding and subject to critique, and how officials can regard them as standards of conduct without necessarily endorsing their content as morally just.

In sum, Hart's analysis of duty and obligation adds an important layer to his theory of law. It explains how legal norms can be experienced as binding without invoking moral necessity, and how the stability of a legal system depends on a combination of behavioral conformity and normative engagement. This account not only clarifies the conditions under which rules are treated as authoritative, but also provides a framework for understanding the dynamics of legal criticism and change (Maccormick 2008, p. 62).

5 The Rule of Recognition

Hart regards the context in which a rule of recognition exists and is applied as the foundation of the legal system. The rule of recognition manifests itself through the practical application of identifying rules based on specific criteria. In complex systems of law, the rule of recognition will be expressed within the practice of identifying laws within the legislative powers established by a constitution and legal precedent. In a simple system, it can be confined to a list of specific primary rules or the set of obligations imposed by a single sovereign.

Hart highlights that certain general and observable characteristics emerge when definite criteria are employed in the identification of rules within a legal practice exhibiting a certain level of systematicity. The author affirms:

> In the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule; though occasionally, courts in England may announce in general terms the relative place of one criterion of law in relation to another, as when they assert the supremacy of Acts of Parliament over other sources of suggested sources of law. For the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers (Hart 1997, p. 101).

To use a recognition rule in a legal system means being able to identify rules of obligation through the criteria commonly used in a given society for such identification. Accordingly, there are various perspectives from which this identification and its explanation can be approached. Hart differentiates between the internal and the external point of view.

The internal point of view is perhaps the central perspective in a system of law, translated in the actions of those who use and apply the law in the day-to-day of the legal system. Theirs usually entails an acceptance of the rule as the proper one to use in the identification of the rules of obligation in a given system. While this inevitably raises the question about the nature of the acceptance just mentioned, for now, it suffices to state that accepting the recognition rule involves using it in the identification and application of law.

The use of the signature of two witnesses in a written will is an acceptance and use of the recognition rule of Brazil and of the criteria that allowed the Brazilian legislature to pass the civil code of the country, namely, an acceptance of the Brazilian constitution as the positive text capable of conferring such powers. This acceptance and application of the internal perspective are also evident in courts, for instance, when a convicted murderer is sentenced to a six–year term in prison in accordance with Brazilian penal law.

Using the Brazilian penal code as a reason and justification for applying a penalty involves participating in the widespread practice of recognizing the Brazilian penal code as the law of the land. This means accepting that the legislative powers established in the constitution are capable of setting the parameters that allow the legislature to create a penal code. This practice of acceptance and use of the shared criteria for law identification is sufficiently widespread across various countries, allowing us to recognize systems of law in operation today, as it is the case in the United Kingdom, the United States, and Germany. While the criteria for identifying law differ among these nations, they share the common characteristic of being a general social practice with a certain level of uniformity.

While the internal perspective is the one responsible for the existence of the praxis, Hart introduces the concept of an external point of view. This is the perspective which pertains to individuals or groups who do not themselves accept the rule of recognition, but still make reference to it when discussing the law of a particular jurisdiction. For instance, someone who does not accept the rule of recognition in a country like Brazil may still acknowledge that the Brazilian legal system is based on the constitution and operates in accordance with that framework. From an external perspective, individuals or groups may make factual statements about the legal practices and norms of a particular jurisdiction without endorsing or participating in them (Hart 1982, pp. 154–155).

It is important to emphasize that the external perspective on a social practice requires a significant number of individual and legal officials to engage with, or at one time have engaged with, the internal perspective. A social practice is identifiable only if enough participants are committed to its norms, making any external view inherently dependent on these internal commitments. This is of course compatible with the internal perspective ceasing to exist, and along with it, the social practice. When that happens, only an external perspective on the no longer actual social practice will be possible, which does not change the fact that for an external perspective to make sense, their first needed to be enough committed perspectives to the social practice.

Hart originally characterized the external point as pertaining to those who do not follow and do not even recognize that a social rule is being followed. Hart's characterization of the external point of view opens the possibility for further refinement, particularly when considering his explanation of the division created by introducing the vocabulary of internal and external perspectives on rules. This refined division can be articulated as comprising the committed internal perspective, the uncommitted internal perspective, the light external perspective, and the extreme external perspective.

Having detailed these different perspectives, it is time to stress the vocabulary and abilities that the existence of a recognition rule brings to the legal system. Before

the rule of recognition, the existence of a social rule of obligation could only mean that a pattern of conduct was accepted and practiced by a sufficient number of members of a society in a critical-reflexive manner that considers a breach of the rule as a justified reason for criticism. The introduction and acceptance of a recognition rule alters this scenario because, once a recognition rule is established, other rules of obligation can exist without necessarily being practiced.

In these instances, the existence of these rules depends not on their general acceptance and practice, but on their validity according to the terms of the rule of recognition. On its part, the recognition rules must continue to be sufficiently accepted and practiced for a legal system to exist. Validity in the system of law can now be said to consist entirely of being in accordance with the criteria of the rule of recognition for successful legislation or whatever form of law creation that the system has. In the extreme case, a valid rule of obligation could be existent even if generally disregarded, what before the introduction of the recognition rule was not possible.

In a complex constitutional legal system, there will probably not be that many rules of direct obligation that derive their validity directly from the rule of recognition. More likely, the prohibition of the negotiation of narcotics, for example, will be valid according to the penal code of the land; the penal code will be valid given the legislative power of Congress, and the rules defining the prerogative of the legislative body will be valid according to the constitution of the land.

Most constitutional systems will have, at the highest point of the validity chain, the constitution itself, meaning that there is no legislative text or authority higher than the constitution. There is, nonetheless, behind the normativity of the constitutional text, the practice of officials and citizens of accepting and recognizing the constitution as the supreme law of the land. The practice of accepting and using the constitution as such can be identified as the rule of recognition of this simplified constitutional system. Once there is a substantial and stable enough practice of following the rule of recognition, meaning once the majority of, at least, legal officials take the internal point of view in regard to it, there will be ways of creating, changing and enforcing legal duties and, correspondingly, there will be a system of law.

Later in the *Essays on Bentham*, Hart presents a developed view of legal duty that integrates the elements presented here:

> To say that a man has a legal obligation to do a certain act is not, though it may imply a statement about the law or a statement that a law exists requiring him to behave in a certain way. It is rather to assess his acting or not acting in that way from the point of view adopted by at least the Courts of the legal system who accept the law as a standard for the guidance and evaluation, of conduct, determining what is permissible by way of demands and pressure for conformity. Such statements are not historical or factual statements describing the past, present or future actions, attitudes or beliefs of either subjects or officials of the legal system, but statements of what

> individuals legally must or must not do; similarly statements of legal rights are statements of what individuals are legally entitled to do or not to do or to have others do or forbear from doing. Such normative statements are the most common ways of stating the content of the law, in relation to any subject matter, made by ordinary citizens, lawyers, judges, or other officials, and also by jurists and teachers of law in relation to their own or other systems of law (Hart 1982, pp. 144–145).

The recognition rule possesses many characteristics, yet it cannot itself be deemed valid in the usual sense. This is because its function is to establish the criteria of validity for all other rules within the system, meaning also that it cannot be used to validate itself. As the original source of legal validity, the existence of the rule of recognition depends on it being sufficiently practiced, effective, and part of the critical-reflexive attitude that is characteristic of the existence of a social rule.

Hart characterizes effectiveness in a complex legal system as sufficient obedience to the valid rules of obligation identified through the rule of recognition. Hart supposes that, for a system to have enough stability to actually exist, at least the majority of citizens must act as the law dictates. If the majority of citizens were actively disobedient, it would likely be impossible for the system's officials to apply sanctions and enforce rules effectively across such a large group of people (Hart 1997, p. 115).

It is conceivable to imagine a society where the majority or all non-official citizens comply with rules without genuine commitment and lack the critical-reflexive attitude that characterizes a strong internal perspective. In such scenarios, there would be substantial shortcomings in the society's understanding of democratic participation, and the application of law might become arbitrary. However, this does not preclude the possibility of such a system's existence. In these cases, the citizens would simply obey the law without actively engaging with or questioning it.

According to Hart, the reasons that can lead to this general uncommitted obedience are varied and can come from sheer indifference to prudential considerations without further acceptance. This is conceptually possible in Hart's perspective, even if it represents an undesirable outcome. Following the rules has practical differences in Hart's conception, depending on whether we speak of officials or general citizens. For a stable legal system to exist from the citizen perspective, it may be enough for the bulk of the population to follow the rules of the system for their part only, that is, without the strong commitment of acceptance and without taking it as a pattern to evaluate other people's behaviors. Things differ when we consider the role of law officials in a system of law (Hart 1997, p. 117).

Most officials must be sufficiently committed to the legal practice. In their case, it is not sufficient for the majority or all of those entrusted with the authority to decide cases and enforce legal rules to merely comply with the system's rules of adjudication and recognition. Instead, they must actively engage in the practice of regarding the

legal rules, particularly the rule of recognition, as a universal standard applied both to themselves and others. In essence, the officials are required to embrace the critical-reflexive attitude that is inherent in shared social rules of obligation (Hart 1997, p. 116).

These claims suggest that in a complex legal system, the rule of recognition is capable of imposing obligations to follow it. Although there is considerable debate in the literature over this point, I view it as the only conclusion that can be drawn from the concepts of rule-guided behavior and duty as presented so far. This involves a long discussion, so it deserves its own dedicated section.

6 A Duty of Recognition

It is a relevant issue whether the rule of recognition imposes a duty for at least legal officials to recognize and apply only the legal criteria shared in a system of law. Some philosophers, like Jules Coleman, Scott Shapiro and Neil Maccormick, understand that this imposition of duty is necessary in Hart's view of law. Other authors, like, Laurenz Ramsauer, and Veronica Blanco, differ, affirming that the rule of recognition is a secondary rule that only defines what validity is, and that does not create a duty for its following and at most makes behavior contrary to it null and void (Coleman 2001a, pp. 85–86; Coleman 2001b, pp. 85–86; Shapiro 2009, pp. 85–86; Maccormick 2008, p. 132; Blanco 2003, pp. 99–124; Laurenz 2023, pp. 83–102).

One reason for the controversy is the fact that the notion of a duty-imposing rule of recognition on officials could contradict Hart's initial characterization of secondary rules as merely power-conferring rules, which might explain why Hart emphasizes that the necessity for an internal, critical, reflexive perspective on the rule of recognition occurs only in complex legal systems. This issue is contentious.

The perspective that denies the rule of recognition as capable of imposing duties focuses on the rule as a power-conferring rule that does not necessarily impose a duty to be followed. This is connected to the fact that Hart identifies the rule of recognition as a type of secondary rule, and sometimes defines secondary rules as those that confer powers but do not impose duties. Specifically, Hart argues in defense of a separation between power-conferring and duty-imposing rules:

> The rules of any complex game may also be profitably studied from this point of view. Some rules (analogous to the criminal law) prohibit, under penalty, certain types of behaviour, e.g. fouling or disrespect to the referee. Other rules define the jurisdiction of officials of the game (referee, scorer, or umpire); others again define what must be done to score (e.g. goals or runs). Fulfilling the conditions for making a run or a goal marks a crucial phase towards winning; failure to fulfil them is a failure to score and from that point of view a "nullity". Here, prima facie, are different types of rule with diverse functions in the game. Yet a theorist might claim

> that they could and should be reduced to one type either because failure to score "nullity" might be regarded as a "sanction" or penalty for prohibited behaviour, or because all rules might be interpreted as directions to the officials to take certain steps (e.g. record a score or send players off the field) under certain circumstances. To reduce the two types of rule in this way to a single type would, however, obscure their character and subordinate what is of central importance in the game to what is merely ancillary (Hart 1997, p. 285).

The issue becomes more intricate considering Hart's explicit statement that the rules granting judges their jurisdiction should be seen as power-conferring rules, which might suggest that they include only the creation of laws and the establishment of the system through the rule of recognition. Nonetheless, a careful analysis of the previously mentioned passage in *The Concept of Law* shows that the characteristics Hart outlines as essential for a social rule of obligation also apply to the rule of recognition in sophisticated legal systems, especially when viewed from the standpoint of legal officials within those systems. This presents a potential tension with the assertion that the rule of recognition is purely a power-conferring secondary rule or that secondary rules do not also impose duties.

I am not the first to notice some inconsistencies in Hart's characterization of secondary rules. In *The Concept of Law*, Hart often describes them solely as power-conferring rules. At other times, he suggests that secondary rules are about primary rules, and if so, it appears that rules concerning primary rules can also impose obligations to exercise legal powers in accordance with the law. Nonetheless, in the passage just mentioned, Hart seems to indicate that a power-conferring rule cannot itself impose duties, and when duties are imposed in relation to the recognition of law, it is due to a different, non-power-conferring rule (Maccormick 2008, pp. 130–140).

Apart from the unnecessary duplication, it is unclear why a single rule could not serve both functions. It would be plausible to propose that a duty-imposing rule, which mandates that a power-conferring rule must be followed, would still qualify as a secondary rule in a broader sense. This would mean it is a duty to follow a specific rule, making it secondary to that rule. Echoing Hacker, Coleman, and Maccormick, I would argue that a secondary power-conferring rule could also impose duties and therefore avoiding unnecessary duplications (Hacker 1977, p. 17).

This line of argumentation requires further elaboration on the type of duty the rule of recognition appears to impose. To begin with, the social obligation Hart describes–arising, at least in part, from the shared commitment of officials to the rule of recognition–cannot be of a legal nature. This is because the practice of the rule of recognition itself establishes the foundation of the legal system. Consequently, asserting that it also entails a legal duty to create the system of law would result in an unconvincing circularity.

The kind of obligation associated with the rule of recognition is, therefore, a social obligation similar to what a pre–legal community holds concerning all of its rules prior to the introduction of a legal system. However, in the case of the rule of recognition, this obligation may pertain exclusively to the officials within the system that is created through the acceptance and enforcement of the rule of recognition.

To recapitulate, social obligation is present, according to Hart, when a certain standard of conduct is taken in a committed internal perspective by a sufficient number of people, where most of those subjected to the rule follow it, and divergence from it is considered by those that follow it as something blameworthy and apt for criticism. Additionally, for it to be an obligation, that support for the rule must be considered as important for the maintenance of the practice–and society–as such. These are all characteristics of what we have called the internal-committed perspective to social rules and obligations.

It is always an open question exactly how many of the participants must take part in this committed instance in order for the social practice to exist. It is likely that this strong internal point of view can and indeed is normally followed by many individuals that follow the practice for their part only, and even by those that often try to break it. Important seems to be that there are enough people committed to criticizing those who act contrary to the rule, and that disrespect for it is not ominous or normally treated with impunity.

If we accept this characterization of a social practice that creates obligations, it appears clear enough that the activity that creates or maintains a rule of recognition for a system of law is a practice that creates obligation at least for legal officials. This would be the obligation to recognize law as law based on the criteria detailed in the practice of the rule of recognition.

Contrary to this perspective, one might argue that the practice of the rule could be indicative of a secondary rule whose application does not necessarily create obligations but merely guides conduct with instructions that may or may not be followed depending on whether someone chooses to engage in the practice. This cannot be the case for the rule of recognition in relation to the actual legal practice of legal officials, for several reasons.

First, once a legal system is established, engagement with it becomes unavoidable. The law's general applicability within a specific jurisdiction ensures that no citizen, whether an official or not, can simply opt out of their country's legal framework. Furthermore, changing citizenship or residence is not a feasible way to escape the legal system, just as not writing a will does not escape the practice of wills. Leaving one country merely substitutes one legal framework for another.

Occasionally, the rule of recognition is compared to the idea of the international meter of Paris, which defined what a meter is and originated, so to speak, the practice of measurement. While the comparison has its advantages, it would be strange to say

that the practice of recognizing the meter as established in Paris is an obligation. People could measure according to other parameters, or not decide to measure at all, just like they could play with chess pieces as they like without deciding to engage in the official practice of chess but still not violate any direct obligation (Maccormick 2008, pp. 138–139).

This cannot be the practice of law and the rule of recognition. Wherever a system of law is in place, there is no option to create a competing practice that contradicts it and is equally valid. Someone could decide not to exercise their rights in court, and avoid any direct participation in the system, but they would still be subjects of law and–if needed–would face the sanctions and obligations of law like every other citizen.

Defiance to the system of law in place, as in the case of trying to create a parallel system and to not recognize the current one, may constitute an offense in cases where the conduct engaged in accordance with the new purported system goes against what is prohibited in the general system of law. This does not need to constitute a danger to the legal practice, as long as the defiance is germinal. Eventually, if a sufficient number of individuals were to cease recognizing the current system as law, it would lead to the breakdown of the legal practice. However, this does not diminish the law's status as an obligation until that point is reached.

This broader context suggests that while general acceptance of the rule of recognition by the citizenry is necessary for the stability and existence of a legal system, overall practical hostility toward it is inconsistent with Hart's conception of the rule. Active resistance to the rule of recognition must be minimal and is typically treated as delinquency, especially when manifested as active sabotage of the system. Thus, refraining from direct defiance of the rule of recognition is an obligation that emerges from its practice.

The situation is even more clear when we consider the relationship that officials of the system of law must have to the law in order for the system to be existent. For while conformance with the law can be uncommitted by the majority of the population, this cannot be the case for officials. Because if most of the officials were uncommitted to obeying the practice of recognizing laws in accordance with the constitution, there would not exist the critical interpretation of other official attitudes necessary for the law to exist.

According to Hart, for the rule of recognition to exist and form a system, there must be a critical-reflexive attitude of considering the criteria of recognition of the system in place as binding and of criticizing, reforming, and opposing behavior contrary to it. Where this critical assessment is considered sufficiently important, a social obligation is also existent. These are related behaviors and conceptual attitudes that characterize and, in a sense, create duty.

A system in which most officials comply with the law without engaging in a critical evaluation of other behaviors would lack the normativity–characteristic of the critique required for conformity–essential for the stability that sustains a legal system. For such a practice to exist, it cannot be inconsequential for most officials when someone, whether official or not, attempts to recognize something as law using non-constitutional parameters. The practice will only align with a social rule of recognition if this deviant application is sufficiently critiqued and, in some cases, actively opposed.

The talk about necessity must be further clarified, since I do think it is a conceptual necessity that the rule of recognition must be understood in this way. To claim that there is merely a contingent or separate first-order obligation to follow the system is simply not enough. While a system of perfect harmony is imaginable – one in which no official is inclined to follow parameters other than those shared by the officials themselves in identifying the law – even in such a case, if we are still speaking about human beings, divergence from the rule of recognition remains a possibility. This may occur due to error, differing interpretations, or deliberate nonconformity, depending on how intentional the departure from the rule is.

In such cases, which inevitably arise when a shared practice is at stake, there must be, on the part of other rule users, an urge for correction, criticism, and pressure toward proper conformity. Without this, there is no rule-governed practice in place. This response cannot occur contingently or be merely a reflection of other primary rules, because the critical and reflexive attitude toward the rule of recognition must already be present for a legal system to exist. It is the primary normative presupposition for the existence of the legal system and, as such, carries with it all the features that define any practice as a normative one.

The possibilities of non-conformity to a country's rule of recognition range from the plausible to the caricatural. This could occur if a court were to apply the *Ten Commandments* instead of the country's penal code to a case, or if there were radical new interpretations of the constitution that disregard basic civil rights and other well–established legislation and precedents. The rarity of such radical deviations in most legal systems is due to the mechanisms of remedy, revision, and criticism that usually address and correct such nonconformities.

This necessity of engaged acceptance for the officials could be compatible with a non-obligation-creating rule of recognition, however, if the practice of law would not be considered as sufficiently important in the terms that Hart characterizes as typical for the social practices that create obligations. Yet, it is difficult to see how a majority of officials who owe their activity to the system of law and apply sanctions and other direct penalties could at the same time consider the practice as non-important while also conducting the criticism necessary for the practice to be existent.

Law is fundamentally significant to any society, and if Hart's assertion is correct, that engaged criticism of non-conformity by at least a majority of officials is necessary for the existence of legal practice, it is not difficult to conclude that such engagement also carries a judgment of importance strong enough to establish a duty. The already not very convincing argument that someone could opt out of law–similar to opting out of chess or the measurement–makes even less sense in the case of an official of the legal system.

Indeed, while someone who applies the law can choose to quit and cease their activities, it is not possible to remain a lawyer, judge, or prosecutor without engaging in the shared practice of interpreting and applying what is agreed to be law. Furthermore, if a sufficient number of officials decided to quit their official activity, the system would eventually cease to exist.

Being part of the majority of officials in a sufficiently stable legal practice primarily involves a committed engagement in the practice of the rule of recognition. It requires following the community-shared parameters for recognizing law and critiquing any application that is non-conforming. This commitment, coupled with the significant role that law plays in the lives of both the applicators and the subjects, configures, in Hart's perspective, a practice that creates a duty for those who apply the law to do so in accordance with the recognition rule.

The characterization of the rule of recognition does not stop at this point. Just as any other social rule, the rule of recognition can also be seen from a non-committed external perspective. So far, it has been argued that the official use of the legal official that builds the system of law is that of taking the rule of recognition as a shared social practice binding the official to the laws of the systems and those laws only, and this is compatible with Hart's first characterization of the rule of recognition as a shared and binding rule that defines what is a valid law in a specific legal system.

While this perspective of the rule of recognition is primary, as it creates and sustains the legal system, this foundational role is not its only function or aspect. Once the legal system is firmly established–meaning that the social practice of the rule of recognition is broadly accepted as binding, at least by the majority of legal officials–there arises the possibility of adopting both a hermeneutic and a detached understanding of the rule of recognition.

A scholar analyzing the legal practices of a country does not need to engage with the system of law as deeply as legal officials do in their judicial decisions. Her interaction with the rule of recognition can be entirely theoretical, serving merely as an informational guide without binding her to any specific actions. This dynamic would shift if she were to present a case in court or advocate for a particular application of a statute or legal resolution. In such scenarios, a certain level of acceptance of the rule of recognition becomes necessary to participate meaningfully in the legal practices of society.

Whenever someone attempts to act within the bounds of legality, this necessarily involves the practical use of the rule of recognition and, to some extent, its acceptance as the criteria that determines the sources of law. Non-acceptance is, of course, possible, but it would result in the social criticism previously mentioned – whether for attempting to recognize something not established as a source of law, such as the *Ten Commandments*, or for trying to create a competing legal system. However, individuals are not required to engage in legal practice at all times. When a legal practice is in place, it remains possible to use the rule of recognition theoretically, merely as a means of identifying the law being applied in that society.

A lawyer may navigate between a committed use of the rule of recognition in court and a theoretical use of it in informing herself and others about what the legal practice is in that jurisdiction. A foreign professor may only use it theoretically, without ever visiting the legal system. The recognition of the possibility of these two forms of the rule of recognition is essential to Hart's conception of law. Later, in the essay *Legal duty and obligations* in the *Essays on Bentham* Hart posited a view of the duty of recognition and the practice of judges in a developed legal system in similar terms as the view presented in this section so far:

> When a judge in an established legal system begins his office, he finds that, although various points are open to his discretion, there is also a firmly established practice of adjudication, according to which any judge in the system is required to apply in deciding legal cases. This established practice is taken as determining the core obligations of the office of judge. Failure to follow the practice would be regarded as a dereliction of duty, a dereliction that would be answered not only with criticism, but also, when possible, with corrections by higher courts (Hart 1982, p. 158).

That the practice of the established legal system as conduct to that point is seen as part of the obligations of the judges, it seems Hart is moving away from the view that duties for legal officials to recognize the law exist only when there are contingent, extra–duty-creating rules that obligate the officials to follow the law alongside the exclusively power-conferring rule of recognition. In this refined view, the duty to recognize the law as it has been established through current practice is inherent to the role of a legal official in developed legal systems.

7 Conclusions

Hart's theory of the rule of recognition constitutes a significant conceptual innovation, placing the foundation of legal systems within shared social practices rather than moral absolutes. Despite debates over whether this rule creates obligations, a careful analysis indicates that at least legal officials are indeed duty-bound to follow

and uphold this recognition rule. This obligation is not derived from higher legal standards but arises directly from the practice itself, making it a unique social duty essential for maintaining the coherence and effectiveness of the legal system.

Although Hart initially described secondary rules as merely power-conferring, his later reflections, influenced by scholars like Neil MacCormick and P.M.S. Hacker, suggest that a duty-imposing dimension to these rules is not only plausible but necessary. Thus, Hart's refined perspective acknowledges that the rule of recognition inherently carries normative weight, crucially demanding officials' engaged acceptance and criticism of deviations. This underscores that Hart's legal positivism, though maintaining conceptual separability of law and morality, does not exclude the possibility that legal authority involves a meaningful normative commitment.

In this article, specific views are proposed, some of which are shared by the authors already mentioned, while others are original, with the aim of presenting a detailed account of how and why the rule of recognition necessarily imposes duties. This involved establishing a connection between the inescapability of law within any given jurisdiction and the position of legal officials, whose roles depend on maintaining a shared and binding perspective of what counts as law. This characterization is novel to the extent that other authors do not examine in such detail how the obligation associated with the rule of recognition should be understood. At the same time, it remains, in my view, fully compatible with the positions of Scott Shapiro, Neil MacCormick, and Jules Coleman, and offers a more precise and coherent development of Hart's theory of law.

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