Is Positivism a state-centered theory?

Detlef von Daniels*

Introduction

Legal positivists and their critics nowadays generally share one assumption: the focus of any analysis of law must be on municipal legal systems. The aim of this paper is to question this assumption and to explore the consequences of a different view. The hypothesis is that Hart's analytical concepts are not restricted to municipal legal systems. Moreover, it is argued that it is necessary to introduce a third kind of rules, namely rules that link up different legal systems. Accepting this interpretation will yield as well consequences for the debate over legal positivism.

The reasons for addressing this issue are both historical and systematic. From a historical perspective, it is essential to see that municipal legal systems for a long period of time had neither been the sole nor dominant legal systems, but only one among others. According to Harold Berman, the Western legal tradition was formed within a plurality of legal systems requiring the need for mutual recognition.[1] Berman even argues that during the "Gregorian revolution" in the 11th and 12th century the Church developed the first modern western legal system, which served as a model for the development of the notion of government by law.[2]

*This paper was presented at the 21st IVR World Congress in Philosophy of Law and Social Philosophy in Lund (Sweden). I am especially grateful to Leslie Green, Kenneth Himma, and Will Waluchow for discussion and their criticisms.

[1] Harold J. Berman, Law and Revolution. The Formation of the Western Legal Tradition (Cambridge: HUP, 1983), 292.

[2] Opt.cit. 199 - 224.

The systematic challenge is to understand the present plurality of legal systems brought about by creeping internationalization and the blending of different legal systems in European and on a global scale.[3] A theory confined to municipal systems seems to be incapable of describing those relations. However, no attempt will be made to analyze the current international and transnational relations between different legal systems. Instead the subject will be addressed in the form of a conceptual analysis.

I. The methodological aspect

The starting point of the state centered perspective in legal positivism is H.L.A. Hart's assertion in the *Concept of Law*[4] that one has to recognize "both clear standard cases and borderline cases."(*CL* 4) The proper task of legal theory is then to provide "an improved analysis of the distinctive structure of a municipal legal system."(*CL* 17) One way to interpret this claim is as a methodological maxim to start with a standard case and not with an exceptional one. But such a maxim is not very plausible; on the contrary it is the other way round. In theory as well as in practice it is necessary to investigate difficult or hard cases. According to Karl Popper's methodological criteria, a theory is 'true' if it could not be 'falsified' in difficult cases.[5] Exploring such difficult cases is also a fruitful way to explore new theories as countless examples in the humanities and philosophy have revealed. Take for example Sigmund Freud's discovery of the principles of consciousness by investigating the symptoms of mentally ill people or Willard van Orman Quine's thought experiment of radical

[3] On the characteristics of European law in contrast to international regimes see Michael Zürn, Dieter Wolf. European Law and International Regimes: The Features of Law Beyond the Nation State. *European Law Journal* 5 (1999): 272.

[4] H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), hereinafter cited as CL.

[5] The argument is, however, only an analogy as Popper is concerned with the natural sciences.

translation, which led him to his theory of meaning. It is, therefore, neither a methodological principle nor a prudent strategy to investigate only standard cases.

Hart's claim to concentrate on municipal legal systems can also be understood to mean that those are the most important or mature instances of legal systems. Seen from today's perspective, this assertion needs to be reassessed. Today a legal system that is highly integrated within a supranational legal order and that allows foreign influences and control even by private actors is considered to be a sign of a developed or mature legal system. Jürgen Habermas observes only 'First World' countries can afford to be responsive to broad transnational alliances whereas the strict insistence on sovereignty and refusal of cooperation on the social level is typically a sign of 'Second World' countries.[6] Thus, the insistence on investigating municipal legal systems for the reason that they are the most important or mature does not hold water. From today's point of view, the development of municipal legal systems should instead be regarded as a transitory stage. This does not mean that states or national legal systems are of no importance but that their significance cannot be presupposed and needs explaining.

II. Legal systems without secondary rules

If municipal legal systems are not to be taken as the standard case, then another central idea of Hart needs to be modified, namely that the union of primary and secondary rules is at the center of the legal system. This alteration is, however, not as sweeping as it might first appear. Hart himself frequently stresses that only in examining the standard case of a municipal legal system this union can be found, but that it is not a "generally necessary condition of the existence of rules of obligation or

'binding' rules. [It] is not a necessity, but a luxury, found in advanced social systems."(*CL* 235) He stresses this view in the context of international law. Even though international law resembles a regime of primary rules, as it has no centralized secondary rules, it is a legal system. Therefore, he can say "the proof that 'binding' rules in any society exist, is simply that they are thought of, spoken of, and function as such. ... It is, of course, true that rules could not exist or function unless a preponderant majority accepted the rules and voluntarily co-operated in maintaining them."(*CL* 231) Hart explicitly repeats this view later in an article on "Kelsen's doctrine of the unity of law"[7] where he concedes to Kelsen that international law can be conceived as a "decentralized system of law"(*KD* 340) with no secondary rules. This seems to contradict with Hart's earlier view that only the introduction of secondary rules can be seen as a "step from the pre-legal world into the legal world."(*CL* 94) However, a careful review of the characterization of the primary rules of obligation in Hart's example of the "primitive community" reveals that they indeed qualify as legal rules.

In order to characterize primary rules of obligation as legal rules, it is necessary to distinguish them from mere personal habits or common behavior, from moral rules, and standards of etiquette. The internal point of view distinguishes social rules from mere behavior or habits. Even though Hart struggled hard to refute behaviorism, the basic insight that it is necessary to take an internal point of view toward social phenomena (or to engage in *Sinnverstehen*) can be taken for granted. Taking an internal point of view alone is, however, insufficient when it comes to

---

[6] See Jürgen Habermas, "Kant's Idea of Eternal Peace: At two hundred Years Historical Remove," in *The Inclusion of the Other. Studies in Political Theory* (Cambridge, Mass: Polity Press, 1998).

[7] H.L.A. Hart, Kelsen's doctrine of the unity of law," in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), hereinafter cited as KD.

defining legal rules; for they seem to be still indistinguishable from moral rules and standards of etiquette. Only when these two kinds of rules are clearly demarcated a concept of legal rules on the level of primary rules of obligation can be obtained. For social rules to exist, as defined thus far, two conditions must be present: There must firstly be a "regular conduct with a distinctive attitude to that conduct as standard."(*CL* 85) Thereby it is secondly presupposed that it is the conduct of a specific *group* of people. These groups need not be small, local or even 'face-to-face' groups. The groups may also be *functional* groups, like for instance a religious group whose members recognize each other all over the world in certain common activities. Thus, functional groups can have social rules as well.

This preliminary approach is sufficient to provide a categorical distinction to moral rules. Moral rules (in the strict sense of Hart's "critical morality") are not limited to a particular community but usually apply to *all* people. They are therefore not the multilateral rules of a given group but unilateral rules directed at every single person regardless of the action of others. Certainly, they often coincide with the social rules of given groups. On the other hand, they can still be distinguished by the simple test of asking people whether a behavior would still be wrong if the rules of a community were different. In answer to this question even children at a very young age know the difference between moral rules and group-relative rules.

However, this distinction is still insufficient when it comes to gleaning legal rules out of the myriad of primary rules since it does not distinguish between legal rules and rules of etiquette. Both kinds of rules are multilateral rules of a given group. However, there remains an urge to refrain from regarding every rule as a legal rule. Hart merely points out legal rules are "important for the maintenance of social life or some highly prized feature of it."(*CL* 87) Importance itself, though, is not a

categorical distinction but only a gradual one. A better distinction is to say that legal rules demonstrate a reference to justice or — using an expression from Leslie Green — they are justice-apt.[8] Only with respect to legal rules can one say that it is just to act in such a manner or to respond to the question why one should do or refrain from doing something, "For the sake of justice." It would be odd to invoke this response in regard to the rules of etiquette. It must be noted that justice in this sense refers only to the morals of a group. 'Justice' in this context, thus, may be replaced with the words 'the right and proper thing to do according to the standards of the group.'

In this arrangement, there is no centralized system of sanctions though there can nevertheless be some forms of sanctions. For a system of sanctions can also be decentralized so that the application of sanctions for the breach of the rules is left to the community at large. These sanctions may be mild, like simple chastisement for deviant behavior, but can be equally harsh, as in the expulsion of a member from the group.

It should be noted that even in this case there is something *like* a rule of recognition. It is only similar to the rule of recognition as it is not a secondary rule used by officials. It is, moreover, not even a rule but rather a *practice* which is *shown* in the way members of the group assess their behavior as lawful.

In his thought experiment, Hart overstressed the gap between the 'primitive community' and the developed legal system, which led him to disregard the primary rules of obligation as a "primitive or rudimentary form of law."(*CL* 86) Nevertheless, 'primary rules of obligation' can be used as an analytic notion to describe the law of decentralized legal systems. It is not only international (customary) law that is such a

[8] Leslie Green, "Legal Positivism," *The Stanford Encyclopedia of Philosophy* (Spring 2003 Edition), ed. Edward N. Zalta <http://plato.stanford.edu/archives/spr2003/entries/legal-positivism/>. Green,

decentralized legal system. The notion applies as well to smaller, functional groups, e.g. the law of small spiritual groups. In theory, Protestant parishes do not accept any authority of ecclesiastical officials but claim that the spirit is embedded in every single believer. Speaking in Hart's terminology, the internal point of view is widely shared. Nevertheless, those parishes do have rules, e.g. marriage laws even though they do not have a centralized authority or officials having a special status. From a historical perspective, this point is obvious as many regulations of the canon law continued to exist in Protestant lands.[9]

III. Institutions defined (or refined) by secondary rules

Secondary rules are thus not necessary for the establishment of a legal system or to take the step from the pre-legal into the legal world. Instead, they define certain institutions. One could as well say that they refine institutions since legal rules are already present in the 'primitive community'. Therefore, it is important to note that Hart's description of the 'deficits' of the 'primitive communities' are not to be taken as an absolute. According to Hart's thought experiment, the 'primitive community' is defective as it has no avenue for recognizing or modifying rules, for settling cases, and enforcing decisions.(*CL* 91-99) These remarks need to be qualified. The point is that these functions cannot be performed very efficaciously. Even in a 'primitive community', rules can be altered if everyone supports the change; cases can be decided if one party gives in or is obviously in the wrong; and decisions can be enforced by the community at large. Only, it is not very efficaciously as it requires a strong and shared sense of *appropriateness* (justice in the explained sense). For this

---

however, uses the expression only with regard to whole legal systems with secondary rules.

[9] For details see the collected articles in Richard H. Helmholz, ed., *Canon Law in Protestant Lands* (Berlin: Duncker & Humblot, 1992).

reason, Hart holds that "only a small community closely knit by ties of kinship, common sentiment, and belief ... could live successfully by such a regime of unofficial rules."(*CL* 92) Thus, secondary rules can make a legal system under *certain circumstances* more efficacious by specifying procedures to change, adjudicate, enforce and recognize rules. For example, secondary rules can make more efficacious a large but nevertheless united community with pluralistic value orientations. But this is not true for all circumstances, not even for all modern circumstance. Whether the international system would be more efficacious with a centralized system of sanctions is, to say the least, doubtful.

IV. The dialectic of institutions

One important consequence of the introduction of secondary rules needs to be emphasized. The widely shared internal point of view that is part and parcel of the situation without secondary rules is now an attitude towards the rules of recognition. Private persons obeying a rule need not take the view that it is the right thing to do. They may obey for their part only. Officials, however, "must regard [the rules of recognition] as common standards of official behavior and appraise critically their own and each other's deviation as lapses."(*CL* 117) This might appear to be a loss to private persons since the internal point of view is at least a precondition for accepting and voluntarily maintaining the rules.(*CL* 91) Even a 'detached' internal point of view is more supportive in regard to the society than an open rejection of the rules. However, restricting the internal point of view to the officials can also be advantageous to private persons. Hart observes that they can then "reject the rules and attend to them only from the external point of view as a sign of possible punishment,"(*CL* 91) though he does not specify the advantages of such a move. The

same behavior, rejecting rules or attending to them only from the external point of view, in a group having only primary rules would either threaten the practice of rule compliance or result in the expulsion of a particular individual from the group. For such groups depend on a widely shared sense of 'appropriateness'. Therefore, the choice between the internal and the external point of view provides individuals with a freedom of choice they have not had before.

Hart is, however, well conscious of the pitfalls of this particular arrangement. He writes that usually or in a "healthy society"(*CL* 116) the majority of the people see the rules from an internal point of view.(*CL* 91) Still, a difference remains between the internal point of view of officials and that of private persons; for only the official interpretation can be enforced. It is, however, also possible that the whole official sector becomes 'detached' from the private sector so that it is only the officials who regard the rules from an internal point of view.(*CL* 118) Hart asserts these are "pathological instances" of legal systems. However, this degeneration is a danger to any legal system having secondary rules.[10] It is a *dialectic* inherent in the very idea of a legal system. Using a different terminology,[11] one could say that unorganized social law (primary rules of obligation) can evolve into organized social law (a legal system with primary and secondary rules) which can then degenerate into law of domination (a pathological instance of a legal system). This dialectical account is implicit in Hart's precise description of the different steps, and even the idea of a 'movement' from one step to another can be found in Hart. "The union of primary and secondary

[10] Leslie Green makes the same point in stating a necessary non-derivative connection between law and morals is that the law is "morally risky". See Leslie Green, The Inseparability of Law and Morality, *manuscript* 2003, 11.

[11] For the terminology see Georg Gurvitch, "The Problem of Social Law," *Ethics* 52 (1941/42): 17 – 40, which is an abridged version of his *L'idee du droit social. Notion et système du droit social. Histoire doctrinale depuis le 17e siècle jusqu' à la fin du 19e siècle*, 1. ed. 1932 (reprint Aalen: Scientia, 1972).

rules is at the center of a legal system; but it is not the whole, and as we move away from the center we shall have to accommodate ... elements of a different character."(*CL* 99) It is not productive to extend the analogy further. The main objective was to show that the degeneration forms part of the concept of law.

V. The rule of recognition as ultimate rule

It has been argued that even in a legal system having only primary rules there is a legal practice of recognizing rules, which is manifested in the behavior of the members of the group and their assessment of the behavior in question. In a legal system with primary and secondary rules the rule of recognition is still a practice but now "a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria."(*CL* 110) They make use of the rule of recognition as a "supreme criterion and ultimate rule."(*CL* 106) Hart thereby presupposes implicitly, firstly, that there is only *one* legal system and, secondly, that this legal system is characterized by employing *unconditioned* force. Once it becomes clear that both presuppositions are not necessary, the rule of recognition takes on a different hue.[12]

Hart is well aware that a rule of recognition need not imply unlimited legislative power but can also provide a "set of criteria of validity [and] ... place some clauses outside the scope of power."(*CL* 106) A careful examination shows that this statement needs to be strengthened. A rule of recognition is always restricted to the scope of power. This is not for empirical but for conceptual reasons. As the rule of recognition was introduced to determine the primary rules of a *given* group, it is limited foremost to this group. This is not trivial as the primary rules of groups have

been introduced as a general notion. Just as the members of a community and actors in international law can form groups so can religious followers. For this reason, to identify a legal system it is, first of all, necessary to specify the kind of group in order to conceive the scope of power.

Thus far, one can only infer there is something beyond the scope of power. Again, this might appear to be of little interest if this 'something' remains unspecified. Here Hart's second presupposition comes into play, namely that the rule of recognition is the ultimate rule of *unconditioned* force. This claim also needs to be qualified. According to Hart the rule of recognition is ultimate in the sense that all legal rules and by-laws can be traced back to the rule of recognition. This, however, does not mean that only one rule of recognition can exist. There can, in fact, be several rules of recognition or several legal systems. Hart does not consider this possibility since he assumes that a legal system can only be a territorial legal system and must, therefore, exert unconditioned force, i.e. it must be capable of enforcing the rules in the extreme case even against the will of the governed. The existence of several legal systems with unconditioned force in a territory would indeed lead to a clash of legal systems and dissolve legal certainty. But it is highly conceivable that there are a number of legal systems for specific matters or for specific groups with their own rules of recognition that rely solely on *conditioned* force. The ultimate sanction that can be imposed by such a legal system is the expulsion from the group.

A traditional example of a legal system exerting conditioned force is that of the Catholic Church[13] which coexists peacefully along side the legal system of the

[12] The aim of the argument is to develop a Hartian view without those two assumptions. Therefore, it can remain open whether Hart is a Hartian in this sense.

[13] On the history of canon law see Hans Erich Feine, *Kirchliche Rechtsgeschichte. Die katholische Kirche*, 4th ed. (Köln: Böhlau, 1964) and Harold Berman, *Law and Revolution*.

state, whereby the state retains exclusive right to impose unconditioned force. The ultimate sanction the church can impose is the expulsion from the group by the act of excommunication. Still, it is a legal system having primary rules of obligation, secondary rules and a unified rule of recognition rooted in the complex and concordant practice of clerical officials.

VI. Linkage rules as a third type of rules

If Hart's theory is reconstructed in this way, it is possible to distinguish organized legal systems exerting conditioned force from those exerting unconditioned force. With this distinction laid out, it becomes obvious that a third category of rules is essential for the concept of law, rules that specify the relation between legal systems. These rules are to be called *linkage rules*.

Hart does not employ the term linkage rules himself. In his *Concept of Law*, he barely considers the possibility that different legal systems can be linked together, not even in discussing international law. Hart is more explicit regarding the linkage rules between national and international legal systems in the already mentioned article on "Kelsen's doctrine of the unity of law". Some key points will be summarized here to gain an understanding of the principles of these linkage rules. Hart's interpretation of Kelsen will, however, not be questioned.

According to the monistic view of international law, which Hart attributes to Kelsen,[14] international law determines the sphere of validity of national legal orders. Kelsen claims national and international law must be conceived to form a single legal system as the alternative pluralistic view allowing for different legal systems is for logical reasons untenable.

Hart's main point of critique is that this "journey" to trace the reason of validity back to the basic norm of international law is fruitless because "we cannot break off at the dividing line at which we would wish to break off."(*KD*, 339) These dividing lines are, according to Hart, determined by the practice of the courts and law enforcing agencies. As long as it is predominantly a national practice, the national borders are the lines where we "wish to break off." This does not mean that the decision where to "break off" is arbitrary; it is only that the dividing lines between legal systems are not theoretically fixed once and for all. Hart writes "whether or not international law and the law of a state form one system depends on the manner in which and extent to which a given state *recognizes* international law."(*KD* 321) Thus, the question of recognition must be rooted in an established practice. Whether there is such a practice must be clarified independently from and prior to the question of whether one law derives its validity from another.

From this prospect one can infer two conclusions. The first is that legal systems need to be connected by linkage rules as it cannot be presupposed, as in Kelsen's doctrine, that they form a single legal system. The second is that the linkage rules do not have to be in mutual accordance as the existence of separate legal systems is independent of a single chain of validity leading to the presupposed basic norm.

VII. Various kinds of linkage rules

As Kelsen's arguments for the unity of law are unsatisfactory, Hart is compelled to conceive of the relationships between national and international law in a different manner. In this way, Hart implicitly develops the concept of linkage rules. He names

[14] Hart recognizes that Kelsen's view is more complex as for him the unity of municipal and

three kinds of relationships, which express three kinds of linkage rules; the relationship of validating purport, the completion relationship and the relationship of reception and delegation. Hart introduces the relationship of validating purport with the intend to correct Kelsen's doctrine of the unity of international and national law. According to Kelsen, two rules are intertwined in one system if one "determines the validity" of the other. Thus, rules of international law determine, according to the monistic interpretation, the validity of national laws. Kelsen writes "a norm of general international law authorizes an individual or a group of individuals .... to create and apply as a legitimate government a normative coercive order."[15] Hart's critique is that all one can say is that international law *purports to validate* national law. But whether it really *exists* as part of a single legal system depends "on the manner in which and extent to which a given state recognizes international law."(*KD* 321)

Hart's general line of argumentation in regard to the two other linkage rules, the completion relationship and the relationship of reception and delegation, is similar. These relationships can exist between different legal systems, but it does not suffice to conclude that there is only one legal system. In order to see that linkage rules can relate as well different kinds of legal systems, it is helpful to consider the relation between the church and the state. Reflecting further on the relationship will reveal that the rule of recognition is subject to alteration. Therefore, the example sheds light on a conceptual point.

---

international law could as well be based on a national basic norm. Hart does not discuss this proposal.

[15] Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967), 215.

VIII. The rule of recognition as a coordinated practice

Assuming that there is a church with an organized legal system exerting conditioned force. Such a church can then *purport to validate* an act of the state (e.g. the collection of taxes). The purported validation can be ignored, tolerated or accepted by the other legal system, i.e. the state. Taking two extreme cases, the state can simply collect taxes *regardless* of whether the Church purports to validate it or the state can collect taxes *because* it has been validated by the church. If a state collects taxes *for this reason* and if this is recognized by the law enforcing agencies, the state would become, to a certain degree, a religious state. The validation by the church would become part of the rule of recognition. The rule of recognition would then no longer be a strict hierarchical rule but a *coordinated* practice.

The example of the church shows the effect linkage rules can have on a legal system and demonstrates that linkage rules need not be restricted to states. Similar arguments can be developed for the two other linkage rules, the completion relationship, and the relationship of reception and delegation. In any case, it must presupposed that the other legal system is indeed an existing practice. Whether such a practice does exist cannot be determined by investigating the chain of validity. However, if it indeed exists and if it is recognized by a given state, it might change its rule of recognition from a less hierarchical rule to a coordinated practice.

IX. Outlook

It has been argued that legal positivism needs not be confined to the analysis of municipal legal systems. It is then possible to conceive of different legal systems, their development or dialectic and their interrelationships. As a consequence the rule of recognition can evolve into a coordinated practice. Assuming this view, several

questions may be raised: A presupposition of the rule of recognition is its general efficiency. Hart clarifies this point in saying that in a ‘healthy’ legal system most people see the law from an internal point of view. But how can a ‘healthy’ or ‘viable’ practice be ensured if a municipal legal system is linked to other legal systems so that the rule of recognition becomes a coordinated practice? What does it mean for the discretion courts exert in the application of the law? And finally, is there still a systematic role for Hart’s minimal content of natural law? Those questions cannot be pursued here any further but need to be addressed if legal philosophy shall be able to cope with the challenges the globalized world poses.