HART'S PRIMARY AND SECONDARY RULES

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Since *The Concept of Law*[1] was published several discussions of Hart's main theses have appeared in both legal and philosophical periodicals. Amongst these Hart's statement that law is best understood as a union of primary and secondary rules[2] has come consistently up for criticism. The aim of this article is to show that this has taken two main forms, the first of which can be answered, the second of which can be shown to be not so much an attack on Hart's specific arguments as a criticism of positivism in general.

(i)

The first form the criticisms have taken is that of an attack on the primary/secondary distinction itself. Firstly, writers have argued that the distinction is not an exclusive one and ignores several important aspects of law. Secondly, it has been argued that even if the distinction were free from these defects it nevertheless rests upon a confusion of logical and historical priority.

Cohen[3] says that the term 'power-conferring' as applied to the secondary rules blurs the distinction between a power and a capacity, and that the 'private power-conferring' rules do not confer power except in a distorted sense of 'power'. A person does not have a 'power' to marry or make a will in the same sense as a legislature has the power to make laws, for the law does not ordinarily refer to a person's power to make a will or marry, but rather to his capacity to do so. 'Hence to assert that there are powers of making wills or contracts,' Cohen says, 'is to spread an appearance of unity over the whole range of what Hart classifies as secondary rules while little unity really exists . . . . '[4]

Cohen considers several possible defences to his objection. From Hart's external point of view[5] capacities are powers in that both are given like effect by the law[6] and this could confer an appearance of unity upon the secondary rules. The defence is unsatisfactory however for Hart is specific that the secondary rules must necessarily be looked at from the internal point of view.[7] Another possible support for Hart is that the distortion of the word 'power' here is harmless since it demonstrates that a person with private powers is in fact like a private

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1 *The Concept of Law* by H. L. A. Hart (1961) (Clarendon Press: Oxford University Press), (hereinafter *Hart*).
2 *Ibid.*, 237.
3 Critical Notice on *The Concept of Law*. L. J. Cohen (1962) 71 Mind, 395, (hereinafter *Cohen*).
4 *Ibid.*, 397.
5 For an explanation of the difference between Hart's internal and external points of view, see *Hart*, 86-88.
6 Non-compliance with the relevant legal rule in each case could result in a nullity.
7 *Hart*, 112-113.

legislator. But this merely transfers the distortion: the result is a distorted sense of 'legislation'.[8] If we are to regard wills, marriages and contracts as legislative enactments by private persons then the distinction between changing a law and bringing people within the range of a law will be obscured. It could also be argued that the word 'power' itself is not a vital word, and that any similar word would do that covered the area of secondariness. But in this case Hart's analogy between private and public powers would no longer have support. Finally, it might be a defence to say that secondary rules have nothing essential in common besides the rather negative fact that they are all related to primary rules in varying ways. But why not then, says Cohen, make the secondary rules conditions for, or parts of, primary rules: why stipulate the existence of a different kind of rule? This defence is unsatisfactory. In his criticisms of Kelsen's and Bentham's theories Hart says that secondary rules cannot be reduced to primary rules because this would 'purchase the pleasing uniformity of pattern to which they reduce all laws at too high a price.'[9]

Cohen also denies that the secondary rules of recognition are necessarily power-conferring. He argues that these rules rather set up criteria for or define the sources of law. For example, in the Roman-Dutch law of South Africa, the sources of the law were written long before any kind of community was set up to which these sources were relevant. 'It borders on absurdity,' he says, 'to suppose that the relevant rule of recognition constitutes a retrospective, and possibly posthumous grant of legislative powers to the author of the document or text-book.'[10]

Lee[11] supplements Cohen's arguments by showing clearly that the secondary rules of change and adjudication also do not necessarily confer powers. It is possible, he says, to imagine a kingdom with a benevolent ruler who set up rules of adjudication and change and saw to it personally that they were obeyed. This would be a situation where rules determined how other rules were to be adjudicated and altered but which did not confer powers. Thus Cohen and Lee conclude that the term 'power-conferring' cannot be a necessary or defining characteristic of a secondary rule.

Singer[12] and Hughes[13] argue that some secondary rules, although power-conferring, are more like the primary rules because they more relevantly impose duties. This results, says Singer, from an insufficient analysis of the term 'power'. In some cases courts acting in excess of jurisdiction are more aptly characterised as violating a duty than as merely exercising legally non-existent powers. The problem with the

8 See 'Hart's Concept of Law', Marcus G. Singer (1963) 70 Journal of Philosophy 197, at 211, (hereinafter *Singer*), for a discussion of this.
Perhaps this view is changing. See, for example, the remarks of Lord Denning in *Breen* v. *Amalgamated Engineering Union* [1971] 2 W.L.R. 742, at 750.
> [The Union's] rules are said to be a contract between the members and the union . . . But the rules are in reality more than a contract. They are a legislative code laid down by the council of the union to be obeyed by the members. This code should be made subject to control by the courts just as much as a code laid down by Parliament itself.

9 *Hart*, 38.
10 *Cohen*, 408.
11 'Hart's Primary and Secondary Rules', K-K. Lee (1968) 77 Mind, 561.
12 *Singer*, 207.
13 'Professor Hart's Concept of Law', Graham Hughes (1962) 25 M.L.R. 319, at 332.

primary/secondary distinction is that it does not cope with phrases such as 'the judge's duty' or 'the court is bound by precedent'. An accommodation of duty within the framework of the secondary rules, he also adds, would suggest that the law is not as distinctly separable from morality as Hart maintains.

Hughes argues similarly saying that *another* duty-imposing/power-conferring distinction cuts through Hart's own distinction because the public power-conferring rules of Hart are in fact as well duty-imposing. Hart would have to include official duties within the ambit of the power-conferring rules, and, Hughes says, the only difference between duties imposed by primary rules and duties imposed by public power-conferring rules is that in the case of duty-imposing secondary rules the sanction 'is not canalised and precisely provided for by further rules of the system'.[14] For example, the sanction behind the judge's duty to adjudicate in certain ways is the extreme pressure that bears upon the conduct of officials in public positions. Hughes believes that the sanction that enforces the duties imposed by secondary rules is constituted by 'honour, respect, financial, and perhaps personal security'.

Hart has been criticised on the ground that some rules of law cannot be looked upon as either primary or secondary except through distortion. Cohen points out that the rules of evidence and procedure do not fit comfortably into Hart's analysis. The law of evidence surely accords equal status as law with, for example, the law of contract, but in Hart's scheme, since rules of evidence do not confer powers or impose duties, the law of evidence can only be seen as an adjunct to the power-conferring rules of adjudication or at best as the antecedent of some rule of law conferring power upon an official to adjudicate.

This is open to objection. The law of evidence has often developed independently of rules of adjudication and Cohen says 'it is also arguable that something important would be lost if the law of evidence could not so develop'.[15] The law of evidence is not sufficiently well characterised as a mere adjunct to certain secondary rules. In any case, to regard rules of evidence as parts of the antecedents of rules of adjudication is open to the objections raised by Hart against Kelsen's attempts to regard the criminal law as directions to officials to apply sanctions.[16]

(ii)

There is force in the above arguments to the effect that it does not seem to be the case that the primary/secondary distinction coincides neatly with the duty-imposing/power-conferring distinction. The conclusion is that the relationship between a secondary rule and a power-conferring rule is not a necessary one, and that there may be duty-imposing rules that are not primary rules.

Even if this primary/secondary distinction holds, several writers have said that a further difficulty remains. Hart has suggested that the addi-

14 *Ibid.*, 332. Hughes has shifted the meaning of legal duty here. Under Hart's analysis, the fact that a sanction 'is not precisely provided for by further rules of the system' shows that no *legal* duty is imposed. He would not deny that there is a moral duty. See, also, *The Concept of a Legal System*, by J. Raz (1970) (Clarendon Press: Oxford University Press), 153-4, for a view that concurs with Hughes.

15 *Cohen*, 409.

16 For Hart's arguments, see *Hart*, 38.

tion of secondary rules to primary rules marked the step from the pre-legal to the legal society.[17] It has been argued that this is in fact not true, and that Hart has here confused logical and historical priority.

Lee, for example, points out that it seems misleading to call the rules that in the main determine that the legal system exists, 'secondary rules'. Logically anyway the secondary rules are primary to the system because they set it up and provide the rules of recognition. Lee says ' . . . one feels it is misleading to call those very rules which in the main determine that a legal system exists 'secondary' '.[18] However, there is some point in calling them primary rules since the secondary rules are dependent upon them for their subject-matter: the secondary rules would lack a function if there were no primary rules.

Cohen, on the other hand, criticises the 'historical' thesis. If the private power-conferring rules, for example, rules relating to marriage, the drafting of wills and so on, are dropped as secondary rules[19] then secondariness would apply only to legislative, judicial and administrative rules.[20] This he says 'looks suspiciously like the three branches of law traditionally treated as constitutional law'.[21] Hart's claim therefore seems to become no more interesting than the proposition that it was the creation of constitutions that marked the step from the pre-legal to the legal society.

King[22] in a general criticism of Hart's lack of regard for sociological factors in giving an analysis of a legal system also says that to regard the primary/secondary relationship as one of historical priority is a mistake. His view coincides with Cohen's view in that both see the step from the pre-legal to the legal society as one of the emergence of institutions rather than one of the introduction of enabling rules. Instead of secondary rules being added to primary rules, he argues, there was 'the emergence of courts and judges accepting definite norm-creating agencies as authoritative'.[23]

(iii)

With the possible exception of the criticism of Hart's 'historical' thesis, these two related lines of criticism can be answered. In any case the 'historical' thesis is not central to any of the main theses in *The Concept of Law* and the answer really lies in anthropological inquiry. Malinowski[24] and Diamond,[25] for example, have argued that rules such as the rules of marriage have existed prior to the creation of any legal institutions involving secondary rules.

The remaining criticism is for the most part based upon a too rigid conception of the primary/secondary distinction. In the first place, writers have thought that the distinction is by definition one between duty-imposing and power-conferring rules. In the second place, writers have thought that the prime function of the secondary rules is to 'set up',

17 *Hart*, 91. I shall refer to this as Hart's 'historical thesis'.
18 Lee, op. cit., 563.
19 As he has argued above.
20 The *public* power conferring rules.
21 *Cohen*, 410.
22 'The Basic Concept of Professor Hart's Jurisprudence'. B. E. King [1963], Cambridge L.J., 270.
23 *Ibid.*, 296.
24 Malinowski, *Crime and Custom in Savage Society* (1926).
25 Diamond, *Primitive Law* (1935).

'determine the sources', or 'provide the criteria' for the primary rules. This results from the mistaken view that the secondary rules are really only rules of recognition.

Admittedly Hart makes a number of remarks to the effect that primary rules are duty-imposing and secondary rules are power-conferring. For example, 'rules of the first type impose duties; rules of the second type confer powers, public or private',[26] and at other places he refers to the two main kinds of rules as duty-imposing and power-conferring.[27]

There is evidence, however, that the two main types of rule are not necessarily either duty-imposing or power-conferring and may be placed into the categories of either conduct-governing rules or rules 'about' or 'concerned with' conduct-governing rules. Hart says that giving the heads 'duty-imposing' and 'power-conferring' to the main types of law is only rough, thereby implying that the terms 'primary' and 'secondary' do not necessarily apply to duty-imposing and power-conferring rules. 'In distinguishing certain laws under the very rough head of laws that confer powers from those that impose duties . . . we have made only a beginning.'[28] We are also told that the secondary rules 'may all be said to be on a different level from the primary rules, for they are all about such rules'[29] and ' . . . these secondary rules are all concerned with the primary rules themselves'.[30] It is also clear from Hart's *examples* of secondary rules that their main concern is with primary rules for they are all either rules for recognising primary rules, changing primary rules, or administering primary rules by adjudication.[31]

It does not seem to me to be a serious objection that the idea of rules 'about' or 'concerned with' other rules is rather vague. The primary/secondary distinction arose from the shortcomings of Austin's theory and the difficulties in this theory are at least equally well accounted for by a distinction between rules governing conduct and rules concerning those rules as they are by a distinction between duty-imposing and power-conferring rules. In Austin's theory, where laws are primarily seen as orders backed by threats, laws may be altered, created and extinguished by different lawmakers without any criterion by which to test their validity or distinguish one lawmaking body from another. How is Austin able to account for the fact that we must obey one person rather than another except by arguing circularly that we must obey the laws made by the person whose laws we habitually obey? This explanation almost implies the existence of a secondary rule of recognition: laws are those rules made by the person whom we habitually obey.[32]

The answer to his problem is in the concept of a law whose subject-matter is other laws. The laws of the 'habitually obeyed' ruler can be restricted by other laws that control them, and Austin's difficulties are thus obviated by regarding the secondary rule as rules whose main concern is with primary rules. The concept of a rule that governs other

26 *Hart*, 79.
27 *Ibid.*, 27, 33, 78, 79, 238-239.
28 *Ibid.*, 32.
29 *Ibid.*, 92.
30 *Ibid.*, 92.
31 *Ibid.*, 92-94.
32 It does not quite produce a secondary rule of recognition: it would not distinguish those rules made by the habitually obeyed ruler for his subjects from those rules made by him, for example, to conduct his family affairs.

rules removes his difficulties in explaining the application of law, the limitation of sovereignty and the validity of law despite the lack of sanction. The concept of a secondary rule of recognition, for example, is sufficient to explain the continuity and limitation of sovereignty as well as to remove the problem of the identification of a legal rule.

The specific objections that the primary/secondary distinction ignores several important features of law are met when we see that the secondary rules are 'concerned with' or 'about' the primary rules. Rules that define capacities are still secondary rules for they are about the altering of primary rules: the rules that define the capacity of a person to marry explain how that person might alter his legal relations with other persons. Rules that confer rights[33] are secondary rules because they are about the primary rules in operating to suspend some of them in certain circumstances. Secondary rules that impose duties are rules concerning official action in the administration of the primary rules. Rules of evidence and procedure can safely be regarded as secondary rules since they are about rules concerning the correctness of adjudication of the primary rules.

Hart here seems insistent on one point however: the secondary rules are about primary rules and not secondary rules.[34] It might be objected then[35] that rules of evidence and some rules of procedure are not secondary rules for their main concern is with the secondary rules. This is not an important objection since secondary rules must be concerned with primary rules. They can always be shown to be about primary rules for they are dependent upon the primary rules for their subject matter.[36] Thus the rules of evidence and procedure concern the rules of adjudication which in turn concern the primary rules. These rules would lack meaning if they were not in some way involved with primary rules. Imagine a set of secondary rules setting up courts and officials in a society which has no primary rules. The rules would be idle, serving no purpose.

This explanation makes much of the criticism appear misdirected. The objections attack descriptions which are not of the *defining* characteristics of primary and secondary rules, but only of the usual characteristics. The primary/secondary distinction does not therefore collapse as a result of criticisms to the effect that secondary rules do not necessarily confer powers.

Accepting the arguments against Hart as a criticism of his description of the more usual characteristics of the primary and secondary rules then it is clear that they do not lack point, although it is not clear that Hart would have denied that his use of 'power' was an extended use, or that the primary/secondary distinction was not exhaustive.[37] The conclusion that the relationship between a secondary rule and a power-conferring rule is not a necessary one and that it is at most only a necessary condition that a primary rule be duty-imposing does not seem to be in fact inconsistent with Hart's distinction.

33 Singer, for example, argues that Hart omits from his analysis rules of law that confer rights rather than impose duties. *Op. cit.*, 203.
34 See, for example, remarks by Hart, *op. cit.*, 79.
35 As does Cohen, *op. cit.*, 409, for rules of evidence; and Herbert Morris, Book Review of *The Concept of Law*, 75 Harvard L.R., 1452 at 1460, for some rules of procedure.
36 All of Hart's examples point to this.
37 See Hart's remarks: *op. cit.*, 32.

(iv)

The problem of the apparent confusion between logical and historical priority in Hart's analysis dissolves in part[38] when we recognise that Hart's primary/secondary distinction was drawn for the purpose of constructing a positivist analysis of a legal system free from the defects of Austin's theory. The secondary rules can only be regarded as logically primary if they are validating rules (the rules of recognition) for it is only in their case that the primary rules are dependent upon them for identification, thus creating the paradox that the rules of recognition are both secondary to and more fundamental than the primary rules. However, it is *not* the case that the sole function of secondary rules is to validate primary rules for they have other important functions as well, involving procedure, evidence, alteration of the law and adjudication. Only the secondary rules of recognition validate the primary rules directly.

We can therefore say that only some of the secondary rules appear to be more fundamental than the primary rules. But the fact that only some of the secondary rules appear as logically primary suggests that the distinction between primary and secondary rules has some function besides that of distinguishing between valid and validating rules. Hart has confirmed this by saying that the distinction between primary and secondary rules was not drawn to elucidate differences between valid and validating rules but was drawn 'for a different purpose'.[39] The 'different purpose' should be clear from what has been previously argued: to distinguish those rules whose subject-matter is rules, from those rules whose subject-matter is conduct.[40]

(v)

The second main line of attack on Hart's primary/secondary rule thesis has come from jurists who have placed less emphasis upon rules. The general approach has not seemed to be so much an attack on Hart, as an attack on positivism in general. This is the criticism that positivism insisting as it does on a posited system of *rules* ignores the human element in law. Sociological considerations, it has been argued, must necessarily come at some point into the law.

A legal system as Hart analyses it consists entirely of rules anchored to the empirical fact of acceptance of an ultimate rule of recognition. To some writers this analysis is unsatisfactory because it leaves out of account those parts of the law consisting in principles, standards and policies: those areas of the law where the human element is involved.[41] Singer says that this is Hart's most fundamental mistake. The distinction between rules and standards, for example, he says, 'is not reflected in his elucidation of the concept of law, but is rather obscured by his too frequent use of the term 'rule'.'[42]

38 Leaving aside the 'historical thesis', (*supra*).

39 In a joint Philosophy/Law seminar given by Hart at the University of Otago in 1971 on problems of legal validity.

40 Alf Ross has drawn the same distinction. See his review of *The Concept of Law*, 71 Yale L.J., 1185 at footnote 4, and the distinction he makes between the law of norms and the law concerning norms in his book *On Law and Justice* esp. at 6-11. Also, see Raz, *op. cit.*, 165, for the opposite view.

41 Roscoe Pound in *An Introduction to the Philosophy of Law*, 116 *et seq.* first distinguished legal propositions into rules, principles and standards.

42 Singer, *op. cit.*, 210. Also, Morris, *op. cit.*, takes up this point at some length at 1455 *et seq.*

Dworkin[43] also argues that Hart's use of 'rules' is too sweeping. Rules are of an 'all or nothing' nature. If the facts a rule stipulates are given then the rule must apply and if the facts are not given the rules cannot apply. It is in the areas where the rules do not apply that the judge has a discretion and it is here that principles are involved. For example, a principle such as that referred to in *Riggs* v. *Palmer*:[44] 'no-one shall be permitted to profit by his own fraud' has equally as much right to be called 'law' as has any traffic rule.[45] There is no method, says Dworkin, by which we can distinguish the bindingness, authority or certainty of rules from the bindingness, authority or certainty of principles beyond the circularity of saying that only rules can be legal on the grounds that they are the subject-matter of validating rules. The fault in Hart's model of a legal system is therefore an omission of legal principles for no justifiable reason. 'Since principles seem to play a role in arguments about legal obligation . . . a model that provides for the role has some initial advantage over one that excludes it, and the latter cannot properly be inveighed in its own support'.[46]

King also does not find the analysis of a legal system in terms of rules alone satisfactory. He says that a legal system conceived of in terms of the acceptance of sources is much more viable than one conceived of in terms of the acceptance of a rule of recognition. The authority of the source of law is derived in Hart's thesis from a rule, rather than from direct acceptance by the courts. It is more likely, King argues, that the rules of recognition would be explained by reference to a court's acceptance of the sources than the acceptance of the sources to be explained by a relevant rule of recognition. King advocates the concept of a legal system as one conceived of 'in terms of the acceptance by courts of certain practices and certain sources of rules as authoritative'.[47]

(vi)

It seems to me that Dworkin underestimates the importance of the positivistic nature of Hart's thesis: rules spell clarity and determinateness. The view that principles, standards and policies are an integral part of a legal system automatically introduces a vagueness where Hart is seeking elucidation. The strong point of a positivist theory of law is that it provides a demarcation between what exactly is law and what is not law or only *ought* to be law. It is in this light that rules figure more prominently in a positivist account of law than anything else. Rules are comparatively clear, precise and identifiable whereas principles are often conflicting and indeterminate, and are necessarily non-specific. Hart would not deny that principles, standards and policies are involved with the law. It is very clear that these centre importantly around the areas left to the discretion of judges. But he would insist that there should be a marked step from the extralegal to the legal, so that the law may be readily identified. This is the fundamental attraction of Hart's concept of a secondary rule.

43 'Is Law a System of Rules?' Ronald M. Dworkin, *Essays in Legal Philosophy*, ed. Summers (Basil Blackwell, Oxford, 1968), 25.

44 An American case: (1889) 115 N.Y. 506 at 511. For the British law equivalent see *Cleaver* v. *Mutual Reserve Fund Life Assoc.* (1892) 1 Q.B. 147, where it was held that a murderer could not benefit under the will of his victim.

45 Although it seems to me to be more correct to describe the principle referred to in *Riggs* v. *Palmer* as a *moral* principle.

46 Dworkin, *op. cit.*, 50.

47 King, *op. cit.*, 291.

The analysis of a legal system implicit in Dworkin's approach is much less convincing than Hart's. How can Dworkin distinguish those principles that are legal from those that are not? It is much more instructive to regard the area of judges' discretion as the point where principles, policies and standards enter the law.[48] They become legal rules and are thus made specific and identifiable by being connected to a situation of fact: as with the fraud principle referred to in *Riggs* v. *Palmer*. On ordinary empirical grounds furthermore to call a principle such as 'no-one shall be permitted to profit by his own fraud' a *legal* principle is simply incorrect. We do not ordinarily refer to the *principle* in *Riggs* v. *Palmer*, but to the *rule* in *Riggs* v. *Palmer*.

Both King and Dworkin are open to the same criticism that they are unable to account for the identification of the law. How are we to recognise what the source of law is except by having a rule which states what the source is? It is rules of identification or recognition that distinguish some persons from amongst others as being enabled to have legal effect given their judgments in certain circumstances. King's view that we should look to the sources for the identification of law presupposes that we can identify those sources.

There is a further point which tends to protect Hart from the criticisms of these jurists. Hart himself has made several disclaimers to the effect that, although the concept of a rule is central to the concept of law, he believes that there are certainly other importantly related concepts. He says, '[a] full detailed taxonomy of the varieties of law comprised in a modern legal system, free from the prejudice that all *must* be reducible to a single simple type, still remains to be accompished'.[49] Also, while making various remarks about the 'open texture' of law, Hart admits the importance of standards and principles. 'In any large group', he says, 'general rules, standards, and principles must be the main instrument of social control, and not particular directions given to each individual separately.'[50]

48 Dworkin fails to account for the two levels in the explication of the law: that level concerned with law as it applies to the community, and that both the official and the private citizen obey; and that level concerned with reasoning about the content of law. See 'Sovereignty: Aspects in Constitutional Law and Jurisprudence', M. J. Detmold (1971) 4 Adelaide L.R. 169 at 175 *et seq.*

49 *Hart*, 32.

50 *Ibid.*, 121.