

Rule of Recognition and Legal Official's Duty -- A Reanalysis based-on the Hart-Fuller Debate

Yanbo Zhou

College of Art and Science, Vanderbilt University, Nashville, TN 37203, United States

Abstract. This paper is a reanalysis of the Hart-Fuller debate based on the Grudger Informer case, which discusses whether the German court should incorporate morality in determining the validity of laws. Hart proposes that the rule of recognition, customarily practiced by legal officials, is the test of legal validity. Law and morality are therefore not necessarily connected because legal officials have duty to obey the law, represented in the rule of recognition. Fuller claims that law and morality are connected given the fact that extremely unjust laws lose their validity. This paper argues instead that extremely unjust laws cannot be valid still fit in the rule of recognition as the test itself is limited due to political constraint. This is an implication of Hart's theory that is not directly claimed by Hart.

Keywords: Hart-Fuller Debate; Rule of Recognition; Legal Validity; Legal Officials.

1. Introduction

The Hart-Fuller debate, which centers on the case featuring the sentencing of a German woman in post-war Germany for following the Nazi law, is one of the most famous debates in the history of jurisprudence. It reflects the differences between natural law theory and legal positivism. The German woman's case is particularly interesting as it shows that following the law might still lead to punishment after the regime falls, whereas breaking the law might have immediate legal consequences; it, therefore, puts individuals in a dilemma. It also puts legal officials in a moral dilemma as they are forced, in a sense, to choose between following the law and following their conscience. The case challenges many traditional views on the validity of laws and changes the way that ordinary citizens see the relationship between laws and legal officials. It brings a different understanding of the nature of the duty that legal officials owe to the law when bringing justice to the table.

Both the natural law theory and legal positivism offer a relatively simple and direct answer to the question of whether unjust laws should be considered valid. Natural law theory would answer no because laws must satisfy certain moral standards to be valid. Legal positivism, on the other hand, believes that there is no necessary connection between morality and the validity of laws, so unjust laws should still be considered as valid laws. However, different legal philosophers, including Hart and Fuller, hold very different arguments, and there are many nuances between their arguments and the simple answers offered by natural law theory or legal positivism. The Hart-Fuller debate incorporates many aspects (social, psychological, political, etc.), and differences in any of these aspects would lead to a view that deviates from the standard natural law or legal positivist position. Hart especially completes an exhaustive analysis, in his book *The Concept of Law*, of the rule of recognition, which is the test for legal validity. This paper examines from an analytical perspective the validity of laws and their relationship with a class of people - the legal officials.

It is important to note that legal validity cannot be established merely from logical deductions. It requires factual support; the statement that a law is valid means that the law is or will be carried out by legal officials. Normative arguments are feeble and meaningless as no standard outside of the legal and political system could be relied on in normative evaluations. Many of Hart's arguments indeed include necessary conditions for the successful functioning of legal and political systems; readers are prone to falling into the normative assumption that successful and long-lasting societies are desirable. Factually speaking this is what all rational human beings wish to achieve in such a populous and diverse world. In addition, this paper offers an analytical viewpoint in the realm of legal philosophy. Many sociological and psychological arguments could be made about the legal officials; however, these arguments cannot be evaluated in their logical coherence and are therefore not related to the

law itself. Another element worthy to be stated upfront is the focus in this paper; it is also true in debates in jurisprudence in general. The paper chooses to focus on legal officials instead of ordinary citizens because, realistically speaking, only the actions of legal officials, in the modern world, matter in legal actions. Ordinary citizens are merely recipients of legal actions unless in a revolutionary time, which is beyond the scope of this paper and also unlikely in today's world. Understanding the above information is important before proceeding to the body of the argument in this paper.

This paper endorses Hart's position that legal officials' attitude to the law determines the validity of laws through the rule of recognition, but points out that the rule of recognition is subject to political constraint and is therefore limited. The first part of the paper discusses the case that the Hart-Fuller debate centers on. The paper then examines Hart's theory of legal validity, which is dependent on legal officials in the form of the rule of recognition. The role of legal officials is afterwards inquired. From here, this paper moves to the position that law and morality are not necessarily connected, which is a legal positivist position that is endorsed by Hart. Finally, this paper probes the legal officials' duty and its relationship with the rule of recognition, and reaches the conclusion that the rule of recognition is limited. This is an implication of Hart's theory that is not directly stated in Hart's book, *The Concept of Law*.

2. The Grudger Informer Case

The German woman's case is discussed at length by Hart and Fuller. They agree on the fact of the case, but differ in their evaluation of the correctness of the ruling of the court. The fact of the case is such that the German woman, who was also the defendant, desiring to get rid of her husband, reported to the Nazi authorities' derogatory remarks her husband has made about Hitler, according to the anti-sedition laws in 1934 and 1938. The woman testified against her husband, and her husband was sentenced to death by the military tribunal according to statutes making it illegal to "assert or repeat any statements inimical to the welfare of the Third Reich" [2]. Her husband's sentence was later converted to service as a soldier on the Russian front, and after the fall of the Nazi regime, her husband returned to Germany and instituted legal proceedings against the woman. The trial court considered the woman and the judge who sentenced her husband as guilty for their unlawful deprivation of another's liberty under § 289 of the German Criminal Code of 1871, which had remained in force throughout the Nazi period. The appellate court, which was also the final court of appeals for criminal cases in Germany, acquitted the sentencing judge but held the woman guilty because she "utilized out of free choice a Nazi law to the sound conscience and sense of justice of all decent human beings" [2].

Hart believes that the German courts made an erroneous decision because no matter how heinous the Nazi laws were, they were following the Enabling Act passed by the Reichstag, and were therefore valid. The ruling by the German courts implied that the Nazi laws were not valid, so the rulings were wrong. According to Hart, a body of rules, called rule of recognition, provides criteria of legal validity: "To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system" [1]. Hart believes that the Nazi laws satisfy the rule of recognition, so they are valid. The German court erred in failing to recognize valid law as binding in its ruling.

3. Rule of Recognition

Rule of recognition has an important position in the legal system - it decides how laws are created and modified. It is the "law to make laws." In practice, Hart argues, a functioning legal system does not rest on morality or logic; all it needs is a rule of recognition that is actually practiced by the people under its dominion. Parliamentary enactments in the United Kingdom and congressional legislations in the United States are law not because of their moral credentials or logical presupposition, but because an actually practiced customary rule recognizes them as such. For the most part, according

to Hart, the rule of recognition is not explicitly 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” [1]. It is important to note here that despite legal officials’ adherence to the rule of recognition matters the most in evaluating the correctness of their actions, ordinary citizens’ concurrence with legal officials in the identification of the source of laws is important to the successful functioning of legal systems.

The implication of such customarily practiced rule of recognition is a denial of the claim that law and morality are to any extent necessarily connected, since “the existence and content of the law can be identified by reference to the social sources of the law (e.g., legislation, judicial decision, social customs) without reference to morality” [1]. Laws, in practice, are social rules instead of reflections of moral ideals. Hart admits that the formation of laws and legal systems are influenced by morality and that laws would, in turn, affect people’s moral ideals, but he denies that laws lose their validity when it conflicts with morality. In other words, morality is not an internal element in laws or legal systems. When judges decide on cases, they base their decisions entirely on their understanding of the language on existing laws and often let their personal moral beliefs yield to clearly stated language in statutes or previous rulings that are binding.

4. Role of Legal Officials

Compared to ordinary individuals, Hart is more concerned when written laws are against the conscience of legal officials. In Hart’s theory, whereas the existence of law requires the population in general little more than acquiescence with respect to the mandatory norms of the system, officials and judges must actively follow the rule of recognition and use it as justification when solving matters related to the law. For Hart, the King in Parliament is made a sovereign by the fact that officials and judges recognize it as the right source of law. When government officials enforce the laws or when judges issue verdicts, they are executing their political function while being guided by the rule of recognition, which is necessary to the successful functioning of political systems.

An analysis of Hart would lead to the following conclusion about legal officials, which explains why they are always bound under the rule of recognition but not always under morality. Knowing that there exist a right source of all laws and that their duties are to execute laws and to make judgements based on the law, legal officials become aware not to allow their personal beliefs, including conscience and other moral forces, to affect the proper functioning of the government and their obedience to the laws. The reason is simple: legal officials are aware that failing to yield their personal moral beliefs to statutes or previous court rulings that are binding would be a wrong practice as in the German court’s case. Doing so is equivalent to regarding themselves as the real lawmaker, which is in direct contradiction to their oath, without which it is impossible to become an official, to observe the Constitution. Policemen are clear that their job is to arrest those that are likely to be guilty according to the law rather than arresting whoever they want. Prosecutors charge suspects, lawyers write documents, and judges issue verdicts based on what the law provides rather than their moral belief of what should be done. The reason is that they know their own moral judgement is less qualified than the law to receive the power of execution of the entire society.

Hart categorizes rules to two subgroups: primary rules and secondary rules. Primary rules are rules of obligation, and secondary rules, part of which is the rule of recognition, are necessary steps “from the pre-legal into the legal world” that address the problems of uncertainty, staticity, and inefficiency for societies just with primary rules [1]. Law, according to Hart, is the union of primary and secondary rules. In this model, legal officials are in the middle of primary and secondary rules: judges are empowered to make interpretations on laws but their interpretation is still bound by the “law to make laws” which they are not empowered to change. The rule of recognition clearly states what the proper source of law is and through which proper processes are laws made and modified. The modification of the rule of recognition requires a political process; legal officials have no power to change it. Instead,

the rule of recognition regulates the behavior of individual legal officials. However, it does not rule by threat of punishment; rather it functions like customary laws.

Legal officials shoulder more responsibility than ordinary citizens in maintaining the structure of the legal system through confirming and reaffirming the rule of recognition in their practices. It is similar to how customary laws gain their validity. The fact that judges do not make use of the law at their discretion¹ in judicial decisions confirms that they are subject to the rule of recognition. While legal officials have power over the primary rules, which in turn have power over ordinary citizens, legal officials are strictly bound under the power of the rule of recognition. The ultimate rule of recognition, nevertheless, relies on the consent of the people as any functioning legal and political system would require some form of consent from the constituents. That is, as aforementioned, the political restraint on the rule of recognition, which would later in this paper explain its incapability of becoming an unlimited power.

5. Morality and Legal Validity

Hart holds that the rule of recognition is simply a convention, where nothing related to morality is a necessary component of such convention. It is a convention because a judge's reason for treating the Constitution as the source of law consists of the fact that "his judicial colleagues concur in this as their predecessors have done" [1]. However, common practice by judges is not sufficient to justify the supremacy of the Constitution as the right source of law; it is necessary that there is a belief, among lawyers and judges in a long succession of time, that the Constitution sets a just government. Justice here refers to procedural justice instead of the final results that come out of the Constitution; for government structures are designed to last for a long time, when moral ideals would change. American judges in the post-Civil War period who are personally against discriminative and segregation laws could still be said to believe in the efficacy of the Constitution.

The fact that many judges would issue verdicts that are following the written laws but are contrary to their conscience is worth attention as it sheds light on the complicated attitudes that judges may hold toward the law. Judges and lawyers must trust the legal system in general and have a common belief in what the right source of law is, but it is not necessary to the survival of the legal system that each judge must regard every law to be in accordance with the society's moral ideals. Besides, for legal officials to consider a particular rule to be valid, they need to "presuppose the truth of the fact that the system is generally efficacious" [1].

In fact, in the majority of cases when a specific legal code goes against a judge's moral beliefs, the judge would probably think that his or her personal views is not compatible with the social value, and knowing that his or her job is to carry out the social value as expressed in the law, would issue rulings according to the law as written. It is important to note that although common law systems sometimes leave judges a great extent of discretion in interpreting the law, Hart insists that judges are still bound by clearly stated language in statutes. For example, there might be a leeway available to anti-slavery judges to act on the part of freedom when the laws were unclear; however, after a series of Supreme Court decisions upholding the pro-slavery position on several unresolved issues of constitutional interpretation, the opportunities for natural law (i.e. bringing morality into judicial decisions to reach anti-slavery decisions) diminished steadily in this period. When positive law established and protected slavery, it was controlling. After the Supreme Court foreclosed all reasonable possibilities that the Fugitive Slave Laws could be interpreted as unconstitutional or favoring giving liberty to escaped slaves, judges almost invariably chose to apply the settled law despite their libertarian consciences.

The disappointing reality suggests that individual judges and lawyers are almost always powerless in front of the rule of recognition, which is the standardized practice in the legal profession. After years of legal training, judges and lawyers would find it hard to act against settled laws. Judges know that when the law leaves open an area for free interpretation, they could use their skills to change the law, through judicial interpretation, in the direction their moral beliefs instruct them. However, they

also respect the unchangeability of laws when statutes and binding judicial decisions close out all possibilities for free interpretation. They feel obligated to carry out the law no matter how heinous they find the law is. This sense of obligation in judges (and also in governmental officials in a similar sense) is the underlying reason that legal positivists like Hart argue that laws are still valid even when they are in direct contradiction to morality.

It is the fact that individual legal officials are powerless in front of the rule of recognition and the strong sense of duty felt by legal officials to follow the laws as written that cause laws to be somehow conservative in nature. As laws are written in the past, judges, when making decisions, are also referring to ideas in the past. The pressure for consistency in legal reasoning would increase the possibility that ideas in the past are extended to the present case. Such pressure, in fact, becomes part of the sense of obligation in judges to follow the legal reasoning in the past, overcoming their personal moral beliefs.

Morality differs from laws in that it does not have such conservative nature. Their paths of development are fundamentally different. Even if a particular law, when being made, was a perfect reflection of moral ideals, it might later become a heinous and extremely unjust law in people's minds. The truth is that morality is sometimes more flexible and changeable than laws. A perfect example would be the code that penalizes private homosexual behaviors between consenting adults. When the code was introduced, people see homosexual behaviors as strongly immoral. However, as people's attitudes toward homosexual behaviors changed, the law remained in force before it was repealed or superseded by other legal codes. Prosecutors and judges had to face, during the interval when the law was not changed or repealed, a dilemma to choose between their conscience and the law. While both prosecutors and judges technically have the power not to carry out the law by refusing to prosecute or pass a sentence, most of the time they choose not to use such power. There are indeed cases when judges or prosecutors reach a consensus not to follow a particular law, but such consensus cannot invalidate the statement that legal officials are strictly bound by the rule of recognition. In those cases, the consensus that certain laws only remain in formality is already taken into consideration in the rule of recognition.

The fact that legal officials sometimes intentionally choose to follow a particular law rather than their morality when there is a clash between them is necessary for the claim that the law has legal validity. A valid law always has legal authority, and it would be meaningless to say that a particular law has authority if legal officials only follow it when it is in alignment with their will. To say that a law has authority necessarily means that it will arouse a sense of duty among legal officials when they are called to arrest, prosecute, or sentence people whose behaviors violate what the law prescribes. Such sense of obligation must take precedence over all other forces, including moral forces, in the mind of these legal officials when they make the decision. It is because of such sense of obligation, which factually exist in the minds of legal officials, that makes the claim that legal officials are bound by the rule of recognition to be true.

6. Legal Officials' Duty

Fuller also recognizes that legal officials sometimes need to choose between following the law and following their conscience, but Fuller disagrees with Hart's theory that legal officials feel obligated to carry out the law no matter how heinous they find the law is. Fuller argues that morality is always taken into consideration in legal officials' application of laws. When the law is found to be extremely unjust by legal officials, they refuse to carry out the law, and the law thereby loses its validity. Morality is the standard by which the law is examined in this process. Fuller refuses the argument that legal officials have a paramount duty to follow the law; he believes that their duty to follow the law always yields to their duty to follow morality and conscience. Fuller phrases such duty as "fidelity to law," which means that legal officials' ultimate legal duty is interpreting the law according to their conscience. This suggests that the literary meanings of laws are not, but certain principles of laws are,

the highest binding power to legal officials. The ultimate duty for legal officials is not to examine the law itself but rather critically interpret the intention behind the laws according to morality's dictates. It seems that Fuller is right because there are laws that are considered unjust by the consensus of legal officials in well-functioning legal systems and these laws are not followed.

However, the fact that they are not followed does not establish that they are considered as unjust by legal officials. The reason, as stated earlier in this paper, is that laws are allowed to exist only in formality. For instance, it was not until 2022 that Singapore repealed the penal code that forbids homosexual behaviors between consenting adults; for a long time, this piece of law appeared in the penal code but was not actively enforced. The reason that the law existed in formality had to do with the nature of politics; repealing the law would face stronger opposition than keeping it on the book but not actively enforcing it. In the parliamentary debate on Section 377A of the criminal code in 2007, which criminalized homosexual behaviors, the Singapore Prime Minister, while acknowledging that homosexuals are part of the Singaporean society, "stopped short of supporting repeal" and explained for "retaining the law, while not proactively enforcing it" that "it signaled social disapproval" [3]. The consensus among legal officials in not actively enforcing the law, however, is part of the rule of recognition. This demonstrates that the rule of recognition is, in a sense, limited. It is limited in that it is impossible to exist in the strongest form - that every piece of law that comes from the right source is strictly enforced by legal officials. The test for legal validity cannot be a simple sentence; it will include some exceptions that is carved out. This is the hidden part of Hart's theory that is not explicitly stated, that the rule of recognition, despite being perfect in explaining the behavior of legal officials, cannot be applied indiscriminately as a simple standard. The diverse thoughts harbored by different legal officials prevent a simple test to be able to fully explain the process of recognizing which sources of laws as right and which laws are valid.

The limited nature of the rule of recognition can also be seen from the fact that although legal officials agree with each other in the right source of laws in general, it does not necessarily mean that no legal official have a personal moral belief that contradicts a particular law. The only necessary component of the duty of legal officials that a functioning legal system would require is that they find the legal system to be just in general. There is an important distinction: morality does play a role in the establishment of the legal system but plays no role in determining the validity of any particular law. The fact that extremely unjust laws are not valid does not disprove the statement that legal officials' duty is restricted to the content of the law where moral examination of the intention of laws is not included. Legal officials are still strictly bound by the rule of recognition, but the test of legal validity itself has certain exceptions.

7. Conclusion

Legal validity is showcased by the internal thoughts of legal officials. It is wrong to say that the validity of a particular law "is to predict that it will be enforced by courts or some other official actions". The attitude of legal officials is paramount to, while the general population's opinion has minimal effect on legal validity. The specific experiences of legal officials cause them to value laws to be more important than morality, which is why, in practice, law and morality are not necessarily connected. The fact that the general population often think that laws require moral support is irrelevant.

Hart proposes the idea of the rule of recognition and points out that it has authority over the actions of legal officials. The rule of recognition is established by the legal officials as a class, but individual legal officials are strictly bound under it. It is a factual analysis rather than normative statement. The normative aspect only comes in through Hart's belief that the rule of recognition should be a standard to evaluate the correctness of the German woman's case.

Hart also points out that the legal official is the middle layer in the structured legal system - it can affect the application of primary rules, but secondary rules such as the rule of recognition could, in turn, affect its behavior. Political process, rather than legal process, is required to change secondary

rules. This implies that the rule of recognition is limited in some sense - that it cannot be a simple sentence and must have some exceptions that is carved out. It could also be seen from the fact that a law usually no longer has authority if it is extremely unjust. Because the rule of recognition, as all secondary rules are, does not include extreme cases since its political foundation prevents it from doing so. Legal official's duty to obey the law indicates that law and morality are not necessarily connected, and such duty is explained by the rule of recognition - a test of legal validity as well as a secondary rule. Hart's explanation is closest to reality, and this paper points out that Hart's theory ignores the limited aspect of the rule of recognition, which must be true if deducting from Hart's theory in *The Concept of Law*.

References

- [1] Hart, M. *The Concept of Law*. Oxford Press, 2012, p. 94, 101-104, 267-269.
- [2] *Harvard Law Review*, 1951, p. 1005.
- [3] The Human Rights Watch, 2022, <https://www.hrw.org/news/2022/08/22/singapore-decriminalize-gay-sex>.