

# What Makes a Social Order Primitive?

In Defense of Hart's Take on International Law

...the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions...means that the rules for states resemble that simple [i.e. primitive] form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system.

It is indeed arguable, as we shall show, that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules. These differences are indeed striking and the question 'is international law really law?' can hardly be put aside. (*Concept of Law, 3rd Edition*, p. 214).



READING HLA HART'S  
*THE CONCEPT OF LAW*

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# With friends like these....

Jeremy Waldron:

- Hart's arguments in Chapter X "become careless and their application thoughtless in regard to law in this area," and the result is an embarrassingly inadequate account of the nature and status of international law.

Mehrdad Payandeh:

- Hart's "insistence that international law does not constitute a legal system seems almost as problematic as Austin's insistence that international law is not law at all."

Jean d'Aspremont:

- Hart's discussion in chapter X is a "disappointing and unconvincing portrayal of international law as a very primitive set of rules."

Nicole Roughan:

- The nexus between legality and validity "is defined by the analysis of international law's systemic structure in which, contrary to H.L.A. Hart's assessment, there are now secondary rules (including rules of recognition) that determine legal validity."

# Misunderstanding #1 Re: Hart's Treatment of International Law

What distinguishes a primitive from an advanced society?

- A. The **functional distinction** – the absence or presence of secondary rules *tout court*.
- B. The **specialization distinction** – the absence or presence of a division of labor in identifying, altering, applying, and enforcing the general social rules that govern and partly constitute a given society.

# Misunderstanding #2 Re: Hart's Treatment of International Law

Failure to distinguish two functions reference to the rule of recognition serves in Hart's analysis of law:

- A. Epistemic:** the (or a) RoR is a norm that actors can use to identify the law of a particular society.
- B. Ontological:** RoR refers to the practice of holding accountable that makes it the case that rules R1, R2, etc., are rules of a particular society.

# Three parts to the presentation:

1. Argue on basis of passages from Chs. V and VI of *Concept of Law* that:
  - A. Specialization distinction is equally, if not more, central to Hart's understanding of what makes a society primitive than is the functional distinction.
  - B. It is primarily in terms of the implications that specialization has for the ontology of law that Hart understands the idea of a *legal system*, and the ideas of a rule of recognition and legal validity that accompany it.
2. Contrast an interpretation of Hart's take on international law informed by these arguments with critics' mistaken interpretations.
3. Rebut several other criticisms of Hart premised on a misunderstanding of his take on international law.

# Hart on the idea of a primitive society:

- “It is, of course, possible to imagine a society without a legislature, courts, or officials of any kind. Indeed, there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we characterized rules of obligation” (*Concept of Law, 3<sup>rd</sup> Ed.*, p. 91).

# Hart on the idea of a primitive society:

- “A social structure of this kind is often referred to as one of ‘custom’; but we shall not use this term, because it often implies that the customary rules are very old and supported with less social pressure than other rules. To avoid these implications we shall refer to such a social structure as one of primary rules of obligation” (*Concept of Law, 3<sup>rd</sup> Ed.*, p. 91).

# Defects of a primitive society: rigidity

- “There will be no means, in such a [primitive] society, of deliberately adapting the rules to changing circumstances, either by eliminating old rules or introducing new ones: for again, the possibility of doing this presupposes the existence of rules of a different type from the primary rules of obligation by which alone the society lives” (*CoL*, 3<sup>rd</sup>, 92-3).

# Defects of a primitive society: rigidity

- “In an extreme case the rules may be static in a more drastic sense. This, though never perhaps fully realized in any actual community, is worth considering because the remedy for it is something very characteristic of law. In this extreme case, not only would there be no way of deliberately changing the general rules, but the obligations which arise under the rules in particular cases could not be varied or modified by the deliberate choice of any individual” (*CoL*, 3<sup>rd</sup>, 93).

# Defects of a primitive society: rigidity

1. Acknowledgment that extreme case has likely never occurred, together with earlier reference to studies of actual primitive communities, implies two different distinctions in play.
2. Likewise for the contrast Hart draws between “changing the general rules” and changing “the obligations which arise under the rules in particular cases.”
3. “*Deliberately* adapting the rules to changing circumstances” requires at least an embryonic form of specialization; contrasts with customary rule change.

# Defects of a primitive society: inefficiency

- **Adjudication:** “disputes as to whether an admitted rule has or has not been violated will always occur and will, in any but the smallest societies, continue interminably, if there is *no agency* specially empowered to ascertain finally and authoritatively, the fact of violations” (*CoL*, 3<sup>rd</sup>, 93, italics added).
- **Enforcement:** Hart describes as a weakness of a “simple form of life” the fact that “punishments for violations of the rules, and other forms of social pressure involving physical effort or the use of force, are not *administered by a special agency* but are left to the individuals affected or the group at large” (*Ibid*, italics added).

# Defects of a primitive society: uncertainty

- When “doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative” (*CoL, 3<sup>rd</sup>, 92*).
- Crucial first step from pre-legal to legal is not “the mere reduction to writing of hitherto unwritten rules” but “the acknowledgement of reference to the writing or inscription as *authoritative*, i.e. as the *proper* way of disposing of doubts as to the existence of the rule” (*CoL, 3<sup>rd</sup>, 95*).

# Defects of a primitive society: ontology

- Why a *first* but, by implication, not a final step from pre-legal to legal?
- What does Hart mean when he describes even the simplest rule of recognition, such as reference to a list or text viewed as authoritative, as providing “in *embryonic form* the idea of a legal system?”
- Why is it that: “in the simple operation of identifying a given rule as possessing the required feature of being an item on an authoritative list of rules we have *the germ* of the idea of legal validity?”

# Defects of a primitive society: ontology

- **Answer:** We have introduced the possibility not only of specialization in the identification of law, *but a division of labor in the task of sustaining the practice of holding accountable that constitutes it.*
- Hart characterizes this practice of holding accountable in terms of adopting the internal point of view to the social rules that regulate the affairs of members of a given society.

# Ambiguity in the idea of a legal system:

1. 'Legal system' contrasts with a mere set of laws or primary rules of obligation:
  - A RoR systematizes a set of primary rules – e.g. if it arranges them in an order of superiority.
  - RoR is a genuine rule – specifically, a (purportedly) epistemically authoritative description of the practice of holding accountable that constitutes the normative order in question.
  - It does not presuppose any specialization in the performance of governance tasks.

# Ambiguity in the idea of a legal system:

2. 'Legal system' refers to the absence or presence of a division of labor in the task of sustaining the law by adopting the internal point of view to the rules that constitute it.
  - Talk of RoR a misnomer; what Hart refers to is not a norm that officials use to determine what to do or believe. Rather, it is the social fact constituted by officials' practice of holding themselves and one another accountable.
  - Talk of following a RoR – or better, engaging in a particular practice of holding accountable "as a rule" – is ontological.

# Legal system and the ontology of law

- Hart describes as (individually) necessary and (jointly) sufficient for the existence of a legal system in a given society:
  1. General obedience to the law on the part of private citizens, i.e. subjects.
  2. Its officials' "effective acceptance" of common rules for identifying, changing, and adjudicating the law. (*CoL*, 3<sup>rd</sup>, 116).
- Why think satisfaction of both conditions is necessary, and not merely sufficient, for the existence of law, or more accurately, of a legal system?

# Legal system and the ontology of law

- **Answer:** only when both conditions are satisfied (to some considerable degree) will a society have achieved a division of labor *in sustaining the practice of holding accountable that constitutes law* that marks the transition from a primitive to an advanced social order.

# The “most fruitful” way to distinguish primitive from advanced social orders:

- “The assertion that a legal system exists is therefore a Janus-faced statement looking both towards obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of official behaviour.
- [This]... is merely the reflection of the composite character of a legal system as compared with a simpler decentralized **pre-legal** form of social structure ~~which consists only of primary rules~~. In the simpler structure, since there are no officials, the rules must be widely accepted as setting critical standards for the behaviour of the group. If, therefore, the internal point of view is not widely disseminated there could not logically be any rules” (*CoL*, 3<sup>rd</sup>, 117).

# The “most fruitful” way to distinguish primitive from advanced social orders:

- ~~“But where there is a union of primary and secondary rules, which is, as we have argued,~~ the most fruitful way of regarding a legal system [is to observe that] the acceptance of the rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone.
- In an extreme case the internal point of view with its characteristic normative use of legal language (‘This is a valid rule’) might be confined to the official world. In this more complex system, only officials might accept and use the system’s criteria of legal validity” (*CoL*, 3<sup>rd</sup>, 117).

# The idea of a legal system disambiguated:

- When Hart invokes the concept of a rule of recognition that serves the epistemic function of identifying a society's rules and their scope, reference to a 'legal system' refers to a **hierarchy of rules**.
- When Hart invokes the concept of a rule of recognition as part of his ontological account of what makes law, reference to a 'legal system' refers to a **hierarchy of actors**, of officials and subjects, or rulers and ruled.

# Hart's Take on International Law

# Misreading Hart on International Law

- “If the main distinction between the social rules of a primitive society and a more sophisticated legal system lies in the ability of the latter to address the problems of uncertainty, of the static character of the social rules, and of the inefficiency of the system in enforcing the rules, then there is no compelling reason why an international legal order needs to resemble the domestic legal order in *form* – the lack of which is the main reason for Hart to qualify international law not as a system but only as a set of rules.
- “[I]t is more convincing to ask whether the international order comprises structures which effectively fulfill legislative, judicative, and executive *functions* which overcome the defects of a primitive social system. If it fulfills this requirement there are no grounds to deny international law the status of a legal system” (Payandeh, quoted by Waldron).

# Correctly Reading Hart on Int'l Law:

- Waldron's and Payandeh's error: When discussing international law, Hart relies on the specialization distinction between primitive and advanced social orders, not the functional distinction.
- Why accept this claim?
- First reason - Hart tells us so!
  - In the introductory section of chapter X, he writes: "it is indeed arguable, as we shall show, that international law not only lacks *the* secondary rules of change and adjudication *which provide for legislature and courts...*"

# Hart on Int'l Legislation

- Recall Hart's distinction between two kinds of rules of change: deliberate change to general rules, and changes to obligations which arise under the rules in particular cases.
  - Secondary rules that constitute treaty-making are examples of the latter.
  - Were international law to evolve so that multi-lateral treaties were generally recognized as binding states that were not parties to them, then the norms that comprise international law would include secondary rules that provide for legislation - i.e. the ability to make deliberate changes to general rules (in advance of any actor using them to hold himself or others accountable).

# Hart on Int'l Enforcement

- International law does include “secondary rules specifying or at least limiting the penalties for violation,” which might make some contribution to reducing “the smouldering vendettas which may result from self-help” (*CoL*, 3<sup>rd</sup>, 93 & 97).
- But if these vendettas occur primarily because of the “absence of an official monopoly on sanctions,” the fact that international law relies almost exclusively on self-help does indeed make it quite like a simple social order.

# Hart on Int'l Adjudication

- Hart: “disputes as to whether an admitted rule has or has not been violated will... continue interminably, if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation” (*CoL*, 3<sup>rd</sup>, 93).
- Insofar as courts without compulsory jurisdiction lack this authority except in cases where parties to a dispute voluntarily place themselves under it, Hart likely concluded that their existence marks only a small advance in international law’s contribution to the production of social order.

# Is Int'l Law a Legal System?

- Hart: “there is no basic rule [i.e. rule of recognition] providing general criteria of validity for the rules of international law, and... the rules which are in fact operative constitute not a system but a set of rules, among which are the rules providing for the binding force of treaties.”
- If we understand the (or a) RoR as playing an epistemic function – as identifying a hierarchy of rules – then:
  - the claim regarding general criteria of validity is clearly false.
  - the claim regarding the absence of any systematicity is overstated.

# Is Int'l Law a Legal System?

- Suppose we understand a legal system in terms of a hierarchy of agents:
  - Recall: A legal system is a social order characterized by a significant division of labor in sustaining the practice of holding accountable that constitutes a given society's law. This "composite character" is what distinguishes a legal system from "a simpler decentralized pre-legal form of social structure."
  - Most international legal theorists will agree that int'l law is not a legal system in this sense – *except those who mistakenly think international law's status as law depends on its being a system in this sense*. It is precisely those thinkers that Hart targets in the last section of Ch. X.

# Does Int'l Law Lack a (ontological) RoR?

- Hart denies only that we can formulate a *theoretically useful* RoR for a primitive society, and so the utility of doing so.
  - Only where a society is characterized by a division of labor in the performance of governance tasks does the formulation of a “rule” of recognition shine new light on how law contributes to the production of social order.
- Similarly for claims of legal validity. Compare:
  - This is a valid law because it is a law of our society (i.e. we all treat it as such).
  - This is a valid law because it was enacted by the Queen in Parliament.

# Hart on an Int'l RoR Rephrased

- There is no *theoretically useful* basic rule in the international legal order of the sort that could provide *informative* general criteria of validity.
- This reflects the fact that there is relatively little division of labor in the performance of the governance tasks that constitute international law.
- It is, in this respect, not a legal system, and therefore bears a closer resemblance to a simple or primitive social order than to an advanced social order like the one realized in a well-functioning modern state.

Criticisms of Hart premised on a  
misunderstanding of his take on  
international law

# Is Hart's observation re: int'l law trivial?

1. Not if goal is to rebut assumption that specialization in governance tasks is a necessary condition for classifying Int'l law as genuine law.
2. Not if goal is to provide an account of how law contributes to the production of social order – plausible that any particular legal order's ability to do so depends to a significant degree on the extent of specialization.
3. Observation that municipal law includes power-conferring rules is similarly trivial – but calls our attention to a fact we have momentarily lost sight of under the influence of bad legal theory.

Does Hart believe int'l law is “a relatively small and unimportant part of jurisprudence?”

Hart: “only a relatively small and unimportant part of the most famous and controversial theories of law are concerned with the propriety of *using the expressions* ‘primitive law’ or ‘international law’ to describe the cases to which they are conventionally applied” (*CoL*, 3<sup>rd</sup>, 4, italics added).

- Hart is not concerned with definitions, but with facilitating “productive theoretical inquiry and sound moral deliberation.”

Does Hart believe int'l law is “a relatively small and unimportant part of jurisprudence?”

Discussion of int'l law in Ch. X makes three vital contributions to Hart's jurisprudential aims in *Concept of Law*:

1. Reinforces case against command theory of law.
2. Reinforces distinction between law and morality, and the thesis that legal validity does not depend on the law's merits.
3. Illustrates that specialization in governance tasks is not necessary for the existence of law; it's a “luxury,” not a necessity.

# Socio-legal Jurisprudents: Haters gonna hate?

1. Since Hart characterizes a primitive society as “pre-legal” (Ch. VI), and characterizes int’l law as a primitive society (Ch. X), it follows that for Hart int’l law is not law - only “pre-legal.”
2. This conclusion evidences the unwarranted priority Hart gives municipal law in his analysis of law.

Talk in Ch. VI of a simple social order as “pre-legal” means only that such a society lacks a division of labor in the performance of governance tasks.

Hart’s argument in the last section of chapter X aims to establish the propriety of categorizing international law as law properly so-called despite its being “pre-legal” in this sense.

# Hart's undue modesty

Hart's modest goal in Ch. X: defend the claim that classifying international law with municipal law as law properly so-called was unlikely to "obstruct any practical or theoretical aim."

**A bolder claim is warranted:** foregrounding the resemblance international law bears to a simple social order provides both theoretical and practical/moral benefits.

# Learning from Hart's take on Int'l Law:

- **Theoretical benefits:** An improved understanding of how international law produces social order, including the limits of its ability to do so.
- **Practical/Moral benefits:**
  1. Theorists of global justice should look to a broad range of institutional mechanisms to advance the goals or standards they defend, and recognize that law, international or domestic, may sometimes provide a very weak tool for affecting the change they desire.
  2. Attempts to deploy international legal norms for argumentative purposes, as well as calls for reform of international law, ought to take as their starting point the absence (by and large) of a legislature, compulsory courts, and centralized enforcement.