

RECOGNISING HART'S RULE OF RECOGNITION: A CRITICAL EVALUATION

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Abstract

The rule of recognition is the foundation of a legal system for Hart. This work thoroughly discusses the rule of recognition from every possible aspect and mentions the various ways in which Hart has used it in his literature. This article adds to the list of shortcomings in Hart's treatment of the rule of recognition and finds inconsistencies in his position regarding the same. Hart considers every standard used by the court for its decision as a rule of recognition. Therefore, when a decision is based on a legal principle Hartian theory would consider it as a rule of recognition.

Introduction

The rule of recognition is central to Hart's theory of rules. It is a set of criteria used by the officials to determine which rules are, and which are not, part of the legal system. The standards applied are referred to as justifications for the actions of the officials; though to some extent the standards are also created by those actions. The rule of recognition may sometimes be written down in an official text (e.g. a written constitution) or at the very least, are clearly expressed in the criteria that the officials claim to be following (e.g. to become valid law in Pakistan, proposed legislation must be passed by a majority of each House of Parliament and then signed by the President). At other times, the standards the officials are following can only be determined after the fact by reference to the decisions they have made. The rule of recognition has generated enormous literature on jurisprudence itself. This work explains the rule of recognition as presented by Hart in his *The Concept of Law*, and evaluates this rule, as viewed by his critics, especially Dworkin and others. This work points out that despite the enormous literature about the differences between Hart and Dworkin, especially regarding the former's rule of recognition, no serious attempt has been made to discuss the common grounds between the two philosophers. The thesis put forward in this work is that Hart's assertion in the postscript to his *Concept of Law* that the rule of recognition is a form of judicial customary rule brings him very close to Dworkin's position about principles. The vast literature about the differences between Hart and

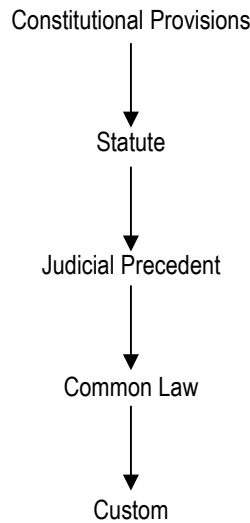
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Dworkin seem to have overlooked this point. The work gives examples of Pakistani legal system to explain important points regarding jurisprudence in general and the rule of recognition in particular. The idea behind this scheme is to analyze jurisprudential concepts in Pakistani context as much as possible. Brian Simpson argues that there are different concepts of law in different legal traditions and therefore one analyses of a legal system might not be appropriate for all legal systems. Unfortunately Hart has never done a comparison of the concepts of law in different legal systems. Hart's analysis of the concept of law is considered by Simpson as 'one size fitting all.' He argues that 'a scholar with the slightest familiarity with the writings of comparative lawyers would surely at least have addressed the point' [comparative analysis of the concept of law] (Simpson, 2011, 160).

What is Hart's Rule of Recognition?

Hart replaces Austin's idea of habitual obedience (severely criticized by him in chapters two, three and four of *The Concept of Law*) by his secondary rule of recognition. He argues that once a rule of recognition is used for the identification of primary rules of the legal system then we could rightly call it the foundation of the legal system.

According to Hart, in a modern legal system, the criteria for identifying the law are multiple and commonly include a written constitution, enactments by a legislature, judicial precedents, and customs. However, these are the sources of law and these were the same in Austinian theory. Moreover, Hart's scheme is not different from Austin when he (Hart) mentions that the primary rules of the system should be generally *obeyed* by the bulk of the population. Hart asserts that, "... those rules of behavior [primary rules] which are valid according to the system's ultimate criteria of validity *must be generally obeyed* ..." (Hart, 1994, 116). In another passage Hart explains who should obey the primary rules. He says, "So long as the laws which are valid by the system's tests of validity are *obeyed by the bulk of the population* ..." (Hart, 1994, 114). The same is mentioned in another passage of the Concept where he says, "The assertion that a legal system exists is therefore a Janus-faced statement looking both towards *obedience* by ordinary citizens ..." (Hart, 1994, 117).

Hart's Criteria for identifying Primary Rules in a Descending Order

The above diagram explains Hart's description of the criteria used by judges of a legal system. It is clear from the above that Hart's rules of recognition are either created by the Parliament (such as provisions of a written constitution or statutes) or by the officials of the system. Thus, precedent and common law are created by judges (judge-made laws). Custom, on the other hand, in Hart's scheme (in chapter six), is dependent upon statute. It is pertinent to note that Hart himself have been using the phrase 'rule of recognition' as well as 'rules of recognition'. Other authors use the expression 'the *rules* of recognition' rather than 'the *rule* of recognition' (Marmor, '2001, 193, 212-7; Zipursky, 2001, 219, 227).

Hart distinguishes between the two aspects of the rule of recognition: the *ultimate rule* and the *supreme criterion* (Hart, 1994, 105-6). In simple words, a custom is subordinate to a statute or the latter is superior, whereas the former is subordinate. Thus, in case of a clash between statute and custom, the former prevails over the latter. This is what he calls the supreme criterion (Hart, 1994, 106). The *ultimate rule* is explained by him by borrowing a familiar example of Kelson's Grund norm. Hart mentions that if someone asks about the validity of a bylaw, he will be told that it is validated by the relevant Parent Act. If the person asks what validated the Parent Act, he will be told that it is valid because it is passed by the Parliament. If he asks why the law passed by the

Parliament is valid, he will be told that ‘what the Queen in Parliament enacts is law’ (Hart, 1994, 107). It may be argued that ‘what the Queen in Parliament enacts is law’ is not a conventional rule but a customary rule. Although Hart suggests that in the primitive society the rule of recognition is a customary law. By this account of the English r o r matches the r o r of the primitive society. Hart argues that there can be no further inquiries concerning validity because the last rule provides criteria for the validity of other rules but “there is no rule providing criteria for the assessment of its own legal validity.” This is how this last one is the rule of recognition and the ultimate rule of the English legal system. For Hart it is important to find the existence of the rule of recognition, its validity is a secondary issue (Hart, 1994, 109-110). In other words, in Hart’s theory, we identify the law by reference to the basic rule of recognition; but we identify the basic rule of recognition by reference to the empirical facts of official behavior. In this way, the content of law can be established by a purely empirical inquiry, without asking any controversial moral questions. Students of legal theory know that this example is borrowed from Kelson although Hart’s project was to provide an alternative to common law lawyers for Kelson.

Hart argues that the rule of recognition i.e., what the Queen in Parliament enacts is law, is neither (strictly) law nor (strictly) fact. Because of its characteristics, it is both. It is law because it identifies other rules of the legal system and it is a fact because its existence is an actual fact (Hart, 1994, 111).

Hart asserts that there are two minimum conditions necessary and sufficient for the existence of a legal system. First, citizens must obey the primary rules of obligations but mere obedience on the part of the officials of the system is not enough. They must accept all the secondary rules of the system. They may regard any deviation as lapses (Hart, 1994, 116-7).

There are some ambiguities in the phrase ‘rule of recognition’. In *The Concept of Law*, Hart uses the phrase ‘rule of recognition’ in three different but interrelated ways. First, he seems to consider the rules of recognition as some sort of linguistic entities that identify the primary rules of the legal system. Hart’s first example of a rule of recognition is ‘an authoritative list or text of the rules to be found in a written document or carved on some public monument’ (Hart, 1994, 94). In the case of

Pakistan, this would be the three words found on most national monuments. These are: faith, unity, and discipline. In his famous article, 'Positivism and the Separation of Laws and Morals' (Hart, 1958), and in the 'Postscript' to second edition of the *Concept*, Hart suggests that the United States Constitution may be a part of the rule of recognition in the American legal system (Hart, 1994, 250). This is certainly an example of a text. According to Zipursky, "[T]he tendency to see the rule of recognition in this way is further supported by the fact that primary rules of a legal system are very plausibly identified with linguistic entities – with texts – and Hart appears to regard primary rules and secondary rules as different species of the same type of thing – rules" (Zipursky, 2001, 227).

Secondly, Hart often suggests that the rule of recognition is a propositional order (such as certain provisions within the United States Constitution). The rule of recognition, on this view, is the designation of standards or criteria that determine what the primary rules of the system are (Hart, 1994, 95-6, 100-01, 106-07). Hart does not give any particular verbal formulation because such formulations only express it. On this view, the rule of recognition is a proposition that sets forth the standards which determine what the primary rules of a legal system are. It is clear that the first, purely linguistic aspect of the rule of recognition is not enough for interpreting *The Concept of Law*: 'In the day-to-day life of legal system its rule of recognition is very seldom expressly formulated as a rule' (Hart, 1994, 101). In addition, Hart frequently speaks of acceptance of a rule, by which he means accepting that certain criteria determine which putative norms are legally valid, and accepting the latter is accepting something of a propositional order.

Finally, Hart frequently claims that a rule of recognition is a particular kind of social practice, which he calls a 'social rule'. This claim, and the analysis of social rules to which it is conjoined, (Hart, 1994, 55-6) lie at the core of his account of law, (Hart, 1994, 116-7) as is suggested by many scholars recently (Coleman, 1982; Marmor, 2001, 194-217; Shapiro, 2001, 149-191). The conceptualization of a rule of recognition as a social rule of treating putative legal norms in a particular manner is seemingly confirmed by Hart himself in the Postscript:

My account of social rules is, as Dworkin has also rightly claimed, applicable only to rules which are

conventional in the sense I have explained. This considerably narrows the scope of my practice theory and I do not now regard it as a sound explanation of morality, either individual or social. But the theory remains a faithful account of conventional social rules which include ... certain important legal rules including the rule of recognition, *which is in effect a form of judicial customary rule* existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts (Hart, 1994, 256). [Italics are mine].

In Pakistan as well as in many other countries with the common law tradition, we may identify few forms of judicial customary rules. Hart's rule of recognition on this account would be the long standing judicial practices of superior courts. For example, in Pakistan as well as in India, the principle that the decision of a larger Bench of a High Court or the Supreme Court is binding on a smaller Bench, (Munir, 2014, 120-124); would be, in Hart's parlance, a form of *judicial customary rule*, and so, a rule of recognition.

The above three different uses of the phrase 'rule of recognition' is confusing. In *The Concept of Law*, the rule of recognition refers to different things in different ontological orders. The problem is that several aspects of his theory depend on certain attributes of rules of recognition. It is, therefore, unclear whether all these asserted attributes could coexist (Zipursky, 2001, 228). On the one hand, Hart says that the rule of recognition is a social practice of judges. On the other hand, it is vital for his theory that rules of recognition state criteria to identify primary rules of the legal system. This feature seems to require the first or second version of the rule of recognition, (that is, a linguistic or propositional entity), discussed above. Yet, a social practice of judges is neither a linguistic nor a propositional entity but is rather a judicial customary rule.

Criticism of Hart's Rule of Recognition

We have already criticized Hart's rule of recognition in part II above but it was basically a response to his description of the same. Here we want to bring more serious attacks on his rule of recognition theory. Let us first mention why Hart introduces his rule of recognition. He asserts that one of the defects in the legal system of the primitive society is that rules are uncertain [the other defects being the static character of

rules and their inefficiency] (Hart, 1994, 92-93) and when “doubts arise [in the primitive society’s legal system] 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” (Hart, 1994, 92). To cure the defect of uncertainty [in Hart’s scheme] he introduces the rule of recognition which identifies and validates all other rules of the legal system. In other words, the rule of recognition makes law certain. But if this is the case then why is there adjudication about what is the law in certain court cases and how can uncertain law be law at all? (Guest, 1996, 39). In addition, since the introduction of the rule of recognition there should have been no uncertainty in law or it means that the rule of recognition has not fulfilled what it was meant for.

Secondly, was Hart the first jurist to use the word recognition? Perhaps Hart has borrowed this term from his contemporary at Oxford J. L. Austin who used it earlier in his article ‘Other Mind’ (Austin, 1961, 44-84 and Austin, 148-187 at <http://www.scribd.com/doc/63288853/Austin-Other-Minds>). In addition, the concept of validity is used to identify actions or transactions and not rules. Hart mentions that rules identified by the rule of recognition are valid rules. Hart also tells that in a modern legal system its rule of recognition is very complicated. This is not true as he himself tells that the sources of law used by courts to arrive at their decisions are rules of recognition. Thirdly, while describing how the rule of recognition is the ultimate rule Hart tells us that it validates other rules but it is not validated by any rule. It means that this is what we have to presuppose just like an act of faith.

Hart’s theory of rules and his rule of recognition have come under a scathing attack from Ronald Dworkin. Dworkin has, in the first stage (produced in 1960s) attacked the core tenets of positivism, especially Hart’s version of it. He gives two American cases, i.e. *Riggs v. Palmer* (1889) and *Henningsen v. Bloomfield Motors* (1960) to prove that in hard cases judges decide cases according to standards other than rules and that such standards are also part of the legal system. In *Riggs v. Palmer*, Francis Palmer made a will that would give most of his estate to his grandson Elmer Palmer, and the rest to his daughters Mrs. Riggs and Mrs. Preston. It can be presumed that Elmer’s father is Francis’ only son.

At the age of sixteen, Elmer poisoned Francis to death. Even though he was sent to jail for second degree murder, Elmer received his portion of the estate and Mrs. Riggs and Mrs. Preston sued to recover his share. The trial court upheld the will as valid denied the claims of Mrs. Riggs and Mrs. Preston. The main issue before the appeal court was whether the person who has murdered the testator nevertheless inherit according to the provision in the will? The Court held that since no one shall benefit from his own wrongdoing, therefore, the murderer shall inherit under the will. In Pakistan this case will come under section 317 of the Qisas and Diyat Ordinance, 1991 which debars a person committing *qatal-i-amd* (premeditated murder) or *qatal-i-shibhi-i-amd* (quasi premeditated murder) from 'succeeding to the estate of victim as an heir or a beneficiary.' In *Maheea v. Shaiya*, (PLD 1991SC 724) the Supreme Court of Pakistan dismissed the appeal of a murderer who was convicted of killing his father but wanted to get his share in his estate. We shall explain Dworkin's point by giving a Pakistani case. In *The Chief Settlement Commissioner v. Raja Mohammad Fazil Khan*, (PLD 1975 SC 331) the defendant had obtained land entitlement certificate from the Settlement Commissioner by fraud. When the alleged fraud was detected the defendant argued that his certificate cannot be cancelled by the Commissioner because it has no jurisdiction. His view was endorsed by the High Court but on appeal the Supreme Court of Pakistan addressed the issue in broader terms and ventured to decide whether a tribunal of special or limited jurisdiction, as distinguished from an ordinary Court of general jurisdiction, had the power to recall, rescind or treat as a nullity, an order obtained from it or any authority by practising fraud. Anwarul Haq, J who wrote the decision for the Full Bench, ruled that "the preponderance of judicial authority is in favour of conceding such a power to every authority, tribunal or Court on the general principle that *fraud vitiates the most solemn proceedings*, and *no party should be allowed to take advantage of his fraud*" (at 345). The Lahore High Court had used the same principle in *Grindlay's Bank Ltd. v. Murree Brewery Co. Ltd.* (P L D 1954 Lah. 745). The words here are: "no party should be allowed to take advantage of his fraud", whereas the Supreme Court applied it again in *Board of Inter & Secondary Education v. Salma Afroze*, (PLD 1992 SC 263, at 274 D). In hard cases, such as those

mentioned above, judges decide cases not according to rules but according to standards other than rules such as principles and policies.

Dworkin rejects a fundamental tenet of Hart's positivism that, when the answer to a legal problem is not available in rules, then judges use their discretion to legislate. For Dworkin, this is inevitable for positivists because they know that rules do not have answers to difficult questions.

Dworkin's attack on Hart's rule of recognition is very harsh. He argues that Hart's rules of recognition are either created by Parliament or judges and officials, whereas principles are neither created by Parliament nor judges. When judges create an original precedent it does not exist before in the legal system. However, the same cannot be said about a principle if it is applied by judges in a legal system (Dworkin, 1978, 40). According to Dworkin, this is why we talk of rules as repealed and of precedents as overruled but we do not use such language for principles.

However, if Hart's assertion in the Postscript that the rule of recognition is a form of judicial customary rule is interpreted to mean judicial customary practice or principle, then on this account, all such principles would also be the rules of recognition. In Pakistani legal system, the decision of a larger Bench, both in the Supreme Court as well as a High Court, is binding on a smaller Bench. Thus, the decision of a Full Bench is binding on a Divisional Bench (comprising of two judges); that of a Divisional Bench is binding on a Single Bench. This repeatedly held by the Supreme Court such as in *All Pakistan Newspapers Society v. Federation of Pakistan*, (PLD 2004 SC 600) and the High Courts. Some examples of this practice in the High Courts are decided by the Supreme Court are: *Province of East Pakistan v. Dr. Azizul Islam*, (PLD 1963 SC 296) and *Multiline Associates v. Ardeshir Cowasjee*, (PLD 1995 SC 423; 1995 SCMR 362). The Supreme Court has held the same to be the case in *Ardeshir Cowasjee v. Karachi Building Control Authority*, (1999 SCMR 2883). There are more than a dozen Pakistani cases on this point. (Munir, 2014, 96-174). The same is the position in India as is shown in *Gundavarapu Seshamma v. Kornepti Venkata Narasimharo*, (AIR 1940 Mad. 36) and *Mahadeolal Kanodia v. The Administrator General of West Bengal*, (AIR 1960 SC 936). The Privy Council has laid down this rule in 1915 in *Buddah Singh v. Laltu Singh*, (AIR 1915 P C 70). There are plenty of Indian cases on this point. But can we say that this is because of the Pakistani/Indian Constitutions or any other enactment in Pakistan or

India? No! It is because of a ‘longstanding practice’ in their legal systems. It would be very unfair and unjust to do otherwise. This is what Dworkin would call a ‘principle’ (obtaining in the legal system over a long period of time) yet, for Hart this is what he has (conceded in the postscript) called a ‘judicial customary rule’. If Hart was not so fond of using the term “rule”, then he would have, perhaps, named it *judicial principle* instead of judicial customary rule. It could be said, however, that when judges decide a case on the basis of such a judicial practice they declare it as a rule of recognition and subsequently the same becomes a precedent which is also a rule of recognition. If this proposition is accepted, it would mean that both Hart and Dworkin are talking about one and the same thing. Dworkin might argue that it cannot be said that such a principle, before it was applied in a case, did not exist, which is not correct of principles because they do exist as part of a longstanding judicial practice. In other words, we should not forget that the differences between Hart and Dworkin are multi-dimensional. Because Dworkin subscribes to the theory that judges discover the law, that already exists, as part of the legal system, (thus principles exist in any legal system and judges simply apply them in hard cases – Dworkin’s view) whereas Hart believes that judges create or make the law (when the answer to a legal question is not available in rules – in Hart’s view). This author has discussed this issue somewhere else (Munir, 2013, 7-40). According to Dworkin, principles (in *Fazil Khan’s* case discussed above) exist, not because of “[A] particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public overtime” (Dworkin, 1978, 40). Hart seems to be saying the same thing in two places of his book. In chapter nine Hart remarks that, “In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values” (Hart, 1994, 204). It can be argued that here principles (of justice) are part of the rule of recognition, and owe their existence to the rule of recognition, whereas, principles (according to Dworkin) are not supposed to be validated by the rule of recognition. Secondly, in the Postscript, Hart describes the rule of recognition as a form of judicial customary rule (discussed above).

Hart seems inconsistent regarding his treatment of principles. He admits in his postscript that “[I]t is a defect of this book (i.e. *The Concept*

of Law) that principles are touched upon only in passing" (Hart, 1994, 259). As is clear from the above, he does not accord principles the status accorded to them by Dworkin, yet in chapter nine of *The Concept of Law*, Hart seems to have forgotten his longstanding stance about morality and principles. He suggests that the decision of the German court in the famous grudge Nazi informer case was wrong because it was against the principle of '*nulla poena sine lege*' (i.e. there shall be no punishment without law) (Hart, 1994, 211; Guest, 1996, 42). Hart has effectively invoked this (moral) principle to prove his point. In chapter nine of the *Concept of Law* Hart argues that to punish the women, a new statute should have been created, making her actions punishable and the statute should have been given retrospective effect. It is strange to see such arguments from Hart because if punishing the woman without law was immoral, giving a new statute retrospective effect would be equally immoral. It is very clear that Hart resorts to principle as no rule can help him. He must be well aware that this principle was not a legal rule but was a standard other than rule. Moreover, if resorted to by the courts, it would not be their creation but they would use it because it was already law.

According to Dworkin, legal positivism must hold that laws are identified by their pedigree (their source of enactment) and not by their content (Dworkin, 1978, 40). In other words, a rule counts as a law not because it is just or fair (a matter of its *content*) but because it has been laid down or established in a statute or a case (a matter of *source* or *pedigree*). Dworkin uses Hart's treatment of custom to tear apart his rule of recognition. As discussed above, Hart says that a rule of recognition might designate as law not only rules enacted by particular legal institution, but rules established by custom as well (Hart, 1994, 101). In chapter three of his *The Concept of Law*, while criticizing Austin for excluding custom from his definition of law, Hart has this to say about custom:

Why, if statutes made in certain defined ways are law before they are applied by the courts in particular cases, should not customs of certain defined kinds also be so? Why should it not be true that, just as the courts recognize as binding the general principle that what the legislature enacts is law, *they also recognize as binding another general principle: that customs of certain*

defined sorts are law? [Author's italics] What absurdity is there in the contention that, when particular cases arise, courts apply custom, as they apply statute, as something which is already law and because it is law? (Hart, 1994, 46).

In the above passage he is asserting that some custom counts as law even before the courts recognize it. It means that custom does not exist because it is created by the rule of recognition but just like the rule of recognition itself. Dworkin has hit this point very hard. He argues that what criterion is used by the rule of recognition to identify custom. "It cannot use", points out Dworkin, "as its only criterion, the provision that the community regard the practice as morally binding, for this would not distinguish legal customary rules from moral customary rule, and of course not all of the community's long-standing customary moral obligations are enforced at law."⁵¹ On the other hand, if the criterion is that whatever other rules the community accepts as legally binding remain legally binding, then it provides no such test at all, beyond the test we should use were there no master rule.⁵² "The master rule becomes (for these cases) a non-rule of recognition", says Dworkin, and it could be said that every primitive society has a secondary rule of recognition, namely the rule that 'whatever is accepted as binding is binding'. Hart's treatment of custom discussed above is, indeed, very confusing because it amounts to a confession that there are some customary rules of law that are not binding because they are validated by a rule of recognition but are binding like the rule of recognition as they are accepted as binding by the community. Hart is, once again, inconsistent because in chapter six he argues that custom owes its validity to statute – a superior source of law (than custom).⁵³ Thus, when he is criticizing Austin for excluding custom from his definition of law, he says one thing, but when he discusses criteria for the validity of other rules of the legal system, he says something different.

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Dworkin concludes his discussion that "[I]f we treat principles as law we must reject the positivists' first tenet, that the law of a community is distinguished from other social standards by some test in the form of a master rule" (Dworkin, 1978, 44). Dworkin argues that principles differ from rules in a number of related ways:

1. Rules apply in an all or nothing fashion. If a rule applies, and it is a valid rule, the case must be decided in accordance with it (Dworkin, 1978, 24). A principle, on the other hand, gives a reason for deciding the case one way, but not a conclusive reason. A principle may be a binding legal principle, and may apply to a case, and yet the case need not necessarily be decided in accordance with the principle (Dworkin, 1978, 26).
2. Principles have the dimension of weight or importance whereas rules do not have such a dimension.
3. Valid rules cannot conflict. There can either be valid or invalid rules. If two rules appear to conflict, they cannot both be treated as

valid. Legal systems have doctrinal techniques for resolving such apparent conflict of valid rules, e.g. the maxim *lex posterior derogate priori*. Principles, on the other hand, can conflict and still be binding legal principles.

4. Rules are dependant on each other. Principles, on the other hand, are independent of each other. In other words, rules are linked together, whereas principles hang together (Dworkin, 1978, 40).
5. Another distinction can be added here. Rules are either created by the Parliament or the Courts (in Hart's view) whereas principles are neither created by the Parliament nor by the Courts but exist in the legal system in a sense of fairness, justice or appropriateness over a long period of time (Dworkin's view).

Conclusion

To sum up the foregoing discussion the main points are summarized below. According to Hart, the rule of recognition is the foundation of a legal system. It is the criteria for identifying, validating and recognizing the law of a legal system and commonly includes a written constitution, enactments by a legislature, judicial precedents, and customs. These sources of law are either created by the Parliament (such as Constitution and Statutes) or the Courts (such as common law and precedent). Hart argues that in most cases, provision is made for possible conflict by ranking these criteria in an order of relative subordination and primacy. Hart asserts that for the most part the *rule of recognition* is not stated, but its existence is shown in the way in which particular rules are identified by the officials of the legal system.

Hart uses the phrase 'rule of recognition' in three different but interrelated ways. First, he seems to consider the rules of recognition as some sort of linguistic entities such as a list of rules or text in a written constitution or carved on a public monument that identifies the primary rules of the legal system. Secondly, it seems to be a propositional order because it identifies other rules of the legal system. Thirdly, he describes it as a social rule what he called some form of 'judicial customary rule'.

Hart is inconsistent in his discussion of custom. When he criticizes Austin, he asserts that customs exist independently in the legal system and when Courts use and apply them they do it because they are already law. Secondly, while talking about the rules of recognition – the different sources of law, he mentions that custom is validated by statutes or

precedents (in the English Legal System). Dworkin uses Hart's first assertion and argues that some customs exist not because they are identified by the rule of recognition but just like the rule of recognition. Moreover, the rule of recognition cannot provide any criteria for the validity of custom. It may be noted that Hart has described, in the postscripts, his rule of recognition as a form of 'judicial customary rule' to accommodate Dworkin's criticism. The expression 'judicial customary rule' should be taken as 'judicial customary practice or principle' which would amount to the assertion that such a rule of recognition is a principle as it is the longstanding practice of the courts. Hart considers every standard used by the courts for their decisions as the rule of recognition in that case. Therefore, when a decision is based on a legal principle Hartian theory would consider it as a rule of recognition as well.

References

1. Austin, John Langshah.(1961). Other minds", in J. L. Austin, *Philosophical Papers*, J. O. Urmson and G. J. Warnock (eds), Oxford: Clarendon Press,pp. 44- 84.
2. Austin, J. L.(1946).Other minds.*Proceedings of the Aristotelian society*, Supplementary (20),148-187.
3. Coleman, Jules L.(1982) .Negative and positive positivism.*Journal of Legal Studies* (139).
4. Dworkin, Ronald.(1978). *Taking rights seriously*. Cambridge, Mass: Harvard University Press.
5. Guest, Stephen.(1996).Two strands in Hart's Theory of law: A comment on the postscript to the concept of law', in Stephen Guest (ed) *Positivism today*. Aldershot:Dartmouth Publishing.
6. Hart, H. L. A.(1994) *The concept of law*, ed. Penelope A. Balloch and Joseph Raz Oxford: Clarendon Press.
7. Hart, H. L. A.(1958). Positivism and the separation of laws and morals 71 *Harvard Law Review* (71),593.
8. Marmor, Andrei.(2001). Legal conventionalism' in Jules Colman (ed), *Hart's Postscript*.
9. Munir, Muhammad.(2014). *Precedent in Pakistani law*. Karachi: Oxford University Pres.

10. Munir, Muhammad.(2013)Are judges the makers or discoverers of the law?: Theories of adjudication and *Stare Decisis* with special reference to case law in Pakistan. *Annual Journal of International Islamic University Islamabad*. (21). 7-40.
11. Shapiro, Scott J.(2001).On Hart's way out', Jules Colman (ed), *Hart's Postscript*. 149-191.
12. Simpson, A. W. Brian.(2011) *Reflections on the concept of law* .Oxford: Oxford University Press.
13. Zipursky, Benjamin C.(2001). The model of social facts' in Jules Colman (ed), *Hart's Postscript*.

Cases and Statutes

14. *Board of Inter & Secondary Education v. Salma Afroze*.(1992).PLD SC 263, at 274 D).
15. *Buddah Singh v. Laltu Singh*.(1815).AIR P C 70.
16. *Grindlay's Bank Ltd. v. Murree Brewery Co. Ltd.*(1954).P L D 1954 Lah. 745.
17. *Gundavarapu Seshamma v. Kornepti Venkata Narasimharo*. (1940).AIR Mad. 36.
18. *Henningsen v. Bloomfield Motors, Inc.*(1960). 161 A.2d 69, 77 .N.J.
19. *Mahadeolal Kanodia v. The Administrator General of West Bengal*.(1960). AIR SC 936.
20. *Maheeta v. Shaiya*.(1991). PLD SC 724.
21. *Riggs v. Palmer*.(1889).115 N.Y. 506, 511-512, 22 N.E. 188.
22. *The Chief Settlement Commissioner v. Raja Mohammad Fazil Khan*.(1975).PLD SC ,331.
23. *Qisas and Diyat Ordinance*. (1991).