Fundación Universitaria
TECNOLÓGICO COMFENALCO

Serie Documentos de Trabajo

2016/07

# HART ON PRIMARY AND SECONDARY RULES

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# HART ON PRIMARY AND SECONDARY RULES

There are two main objections against the rule-based components of Hart's legal theory: The first attacks the reductive character of Hart's notion of rule, and the second rejects the Hartian distinction between primary and secondary rules. In this paper, argue that these two common criticism of the Hartian account of rules are based on familiar misconstructions and grant us with an opportunity for some useful clarifications that will be presented in this section.

## The Hartian Idea of Rules

A number of critics have joined Ronald Dworkin in attributing to Hart a "narrow" understanding of rules referring to "relatively precise or categorical concepts," as opposed to a more "generic" sense that includes "principles, precepts, standards, maxims—implicit, tacit, not in fixed verbal form."[1] While narrow rules are common in state-law, critics continue, typical instances of non-state law do not count as rules in the narrow sense, including soft-law, guidance, recommendations, practices, standards of technical standardization, customary norms, and abstract norms such as those of human rights. For instance, Gunther Teubner claims that *lex mercatoria,* the main example of global law, "is

[1] Twining, *General Jurisprudence*, 120, n. 137. Dworkin famously claimed that Hart "model of rules" defined rules as or as "all-or-nothing standards." Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), 24.

more a law of values and principles than a law of structures and rules."[2] Moreover, William Twining rejects the Hartian emphasis on rules, "because it is possible to conceive groups or cultures in which norms are never articulated or the articulated rules seem to bear little relationship to the actual decisions or the members do not think in terms of general prescriptions."[3] Since "rules lose the strategic position they once had as core elements of law,"[4] it is common that such critics propose alternative models like those based on self-generating "communicative processes," as in Teubner's autopoietic account of law, or non-rule-centred forms of collective action.[5]

> These sorts of objections rest on a misunderstanding of Hartian theory of social rules. Per this account, a social rule is a rule whose content is fixed by a pattern of group behaviour that members of the group follow from what Hart calls "internal point of view."[6] The internal point of view involves a "reflective critical attitude" towards the pattern, which consists in regarding the pattern as a standard of behavior that oneself and others members of the group should follow. The main forms of doing so are conforming to the pattern, justifying own and other's behavior by appealing to the rule, and criticizing others who deviate for their deviation. Critical social pressure

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[2] Gunther Teubner, "'Global Bukowina': Legal Pluralism in the World Society," in *Global Law Without a State*, ed. Gunther Teubner (Aldershot: Dartmouth Pub Co, 1996), 18.

[3] Twining, *General Jurisprudence*, 120.

[4] Teubner, "'Global Bukowina': Legal Pluralism in the World Society," 13.

[5] Hans Lindhal have developed an account of legality based on "Authoritative Collective Action" to account for transnational legal phenomena. Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013). In the context of state-law, the most remarkable example is Shapiro's "Planning Theory of Law." Scott J. Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011), chap. 5–6.

[6] Hart, *The Concept of Law*, 55–8.

might occur in several forms, ranging from verbal disapproval to the imposition of physical sanctions. To use Hart's example, an observer is warranted in concluding that a social rule requiring males to remove their hats when entering the church exists in a group if (1) members of the group generally take off their hats while entering the church, and (2) some members of the group take the internal point of view with respect to the pattern of behavior—i.e., they to take that the pattern "male should bare their head when entering a church" as a common standard of conduct to which the group has a reason to conform and to criticize the deviations. Pace critics, the rule is not equivalent to the practice or the pattern of behavior. [7] It is not the social fact, but the normative propositional content (i.e., that someone has a duty, right, power, or reason to do something) which is fixed by the practice (i.e., when members converge in accepting pattern from the internal point of view). The common label "practice theory of rules" is thus misleading.

It is a neglected Hartian insight that social rules can be articulated in two forms. In the first form, a social rule exists when a sizeable number of members of the group accept the pattern of behavior from the internal point of view and exercise the social pressure directly. This first form of rule-articulation based on *broad social support* is compatible with the existence of a minority that breaks the rule and resists to consider it as a standard of behavior for them or the group.[8] For instance, the rule about hats in the church exists in this first form if most members of the group take the internal

[7] Dworkin, *Taking Rights Seriously*, 48–58; Joseph Raz, *Practical Reason and Norms*, 2nd ed. (Oxford: Oxford University Press, 1999), 53–58; Shapiro, *Legality*, 102–3. For defences against these objections Stefan Sciaraffa, "The Ineliminability of Hartian Social Rules," *Oxford Journal of Legal Studies* 31, no. 3 (2011): 610; Wilfrid J. Waluchow, "Lessons from Hart," *Problema. Anuario de Filosofía y Teoría del Derecho* 5 (2011): 373–378; Matthew H Kramer, "In Defence of Hart," in *Philosophical Foundations of the Nature of Law*, ed. Wil Waluchow and Stefan Sciaraffa (Oxford: Oxford University Press, 2013), 31–33; Kevin Toh, "Four Neglected Prescriptions of Hartian Legal Philosophy," *Law and Philosophy* 34 (2015): 333–368.

[8] Hart, *The Concept of Law*, 55–6.

point of view with respect to the pattern of behavior and impose social pressure to those who deviate for their deviation. While the broad social support model is suitable for many situations, particularly in cases of small, simple or temporary groups, it is impractical for more complex and permanent social structures.[9] An alternative way to articulate social rules does not require broad social support for the rule, but only that a minority of influential individuals accepts the rule from the internal point of view. In this second form based on *concentrated social pressure*, the social rule that males should bare their head exists not because of the bulk of the population accept the pattern, but only for a subset of influential agents accepts the rule from the internal point of view and exercises the relevant social pressure. For instance, it might occur that only the priest accepts the rule from the internal point of view and he himself exercises the social pressure (e.g., by giving bad looks to those who deviate), while the rest of the members simply acquiesce or comply with the with the priest's pressure without any relevant reflective attitude.[10]

It should be clear then that the first set of objections is unsuccessful. Hart did not hold the "narrow" understanding of rules that it has been attributed to him.[11] In this theory, "rule" is used to denote any standard—general or particular, explicit or tacit, determined or vague— that guides the conduct of some person or group of persons,

[9] Ibid., 60–1, 114 Cf. 20–1.

[10] Ibid., 116.

[11] On this point, see, Genaro Carrió, *Principios Jurídicos Y Positivismo Jurídico* (Buenos Aires: Abeledo-Perrot, 1970); Joseph Raz, "Legal Principles and the Limits of Law," *The Yale Law Journal* 81, no. 5 (1972): 845; Philip Soper, "Legal Theory and the Obligation of a Judge: The Hart- Dworkin Dispute," *Michigan Law Review,* 75 (1977): 480; Genaro Carrio, "Professor Dworkin's Views on Legal Positivism," *Indiana Law Journal* 55, no. 2 (1979): 231–232; David Lyons, "Principles, Positivism, and Legal Theory," *The Yale Law Journal* 87, no. 2 (1977): 422; Cf. William Twining and David Miers, *How to Do Things with Rules* (Cambridge: Cambridge University Press, 2010), 84. See also Hart's comments in the *Postscript*, Hart, *The Concept of Law*, 263. "But I certainly did not in my use of the word 'rule' claim that legal systems comprise only 'all or nothing' standards or near conclusive rules."

and gives reasons to evaluation and criticism. This understanding cover principles, rules of thumb, and recommendations and other less strict standards, so we should not preclude a description of soft law, *lex mercatoria*, human rights, and the other examples in terms of Hartian social rules. The other objections also fail. For rules are primarily connected with practices, contra Twining, they might never be articulated or thought as rules by the participants, or they can be ascertained by observers even when agents do not think in terms of general prescriptions, and the practiced rules might differ from the stated rules. Moreover, critics are mistaken in suggesting is difficult to determine the existence of rules in societies that accept "situation ethics' or 'act-utilitarianism,'[12] or which regulated by "forms of Khadi justice that do not make strictly rule based decisions." [13] In fact, the Hartian might provide reconstructions of the vague rules practiced in such community such as "do what is best in your situation per some conception of the good instead of other" or "let the Khadi decide." We should not dispose of them as meaningless rules, not only because they can be used for criticism, but also—as we will see in the following section— these rules might empower some agents (e.g., the Khadi) to make normative decisions in a social practice.

**Primary and Secondary Rules**

A second set of objections pertain to Hart's thesis that a legal system is a "union" of primary and secondary rules, which he deems the "key" of jurisprudence. [14] In this account, the secondary rules are three kinds of high-order social rules regulating some central normative activities of the legal system: the "rules of change" control the procedures for

[12] Twining, *General Jurisprudence*, 120.

[13] Brian Z. Tamanaha, "What Is 'General' Jurisprudence? A Critique of Universalistic Claims by Philosophical Concepts of Law," *Transnational Legal Theory* 2, no. 3 (2011): 294.

[14] Hart, *The Concept of Law*, 91–99.

the creation, change and elimination of rules; the "rules of adjudication" empower certain individual or institutions to apply them, and, the "rule of recognition" is a convergent pattern among particular members of the population for identifying certain rules as the valid laws of the system. Primary rules are those regulated by the secondary rules of change, adjudication and recognition.

A number of theorists argue that Hart's distinction between primary and secondary rules is introduced with contradictory statements.[15] In some passages the division is about two different types of norms: While primary rules are "duty-imposing," secondary rules are "power-conferring."[16] Yet in other passages, it is presented as a distinction between different normative levels or different social functions: primary rules are rules that "guide conduct," whereas secondary rules of a "different level from primary rules, they are about such rules."[17] It is clear that a rule can impose a

[15] See, L. Jonathan Cohen, "Critical Notice," *Mind* LXXI, no. 283 (1962): 395–412; N. Bobbio, "Ancora Sulle Norme Primarie E Norme Secondarie," *Rivista di Filosofia* 59, no. 1 (1968): 35; Neil MacCormick, *H.L.A. Hart*, 1st ed. (Stanford: Stanford University Press, 1981), 103–6; C.F.H Tapper, "Powers and Secoundary Rules of Change," in *Oxford Essays in Jurisprudence*, ed. A.W.B Simpson, vol. 2 (Oxford: Clarendon Press, 1973), 242–277; Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (Oxford: Oxford University Press, 2009), 177–179; D. Gerber, "Levels of Rules and Hart's Concept of Law," *Mind* 81, no. 321 (1972): 102–105; P. M. S. Hacker, "Hart's Philosophy of Law," in *Law, Morality, and Society: Essays in Honour of H. L. A. Hart*, ed. P. M. S. Hacker and Joseph Raz (Oxford: Clarendon Press, 1977), 19–21; Juan Ruiz Manero, *Jurisdicción Y Normas* (Madrid: Centro de Estudios Constitucionales, 1990), 100–6; Michael D. Bayles, *Hart's Legal Philosophy: An Examination* (Dordrecht: Springer, 1992), 57–60.

[16] Hart, *The Concept of Law*, 81, 40–1.

[17] Ibid., 94.

duty to apply other rules ("secondary" in the second sense but not in the first) and a rule can confer a power on someone without directly dealing with further norms ("secondary" in the first sense, but not in the second). If this distinction is not tenable even in the state-law, critics hold, it is not advisable to extend it to instances of law beyond the state. [18]

This distinction should be clarified. In my view, the key statement is that secondary rules are "of a different level from primary rules." The claim that secondary rules are "about primary rules" does not imply that every rule dealing with another rule is secondary, nor that every rule regulating the recognition, change or adjudication of another rule is. Instead, the Hartian distinguishes between *two levels* of regulation: The primary rules are laws or *constituted* rules created according to the secondary rules—or, as I will explain later, according to other primary rules made according to the secondary rules—whereas the secondary rules are *constitutive social rules* establishing the conditions in which the primary rules are possible. The presence of these levels is one of the "central themes" of Hart's project and it is applicable to "any form of social structure."[19] The "normal, though unstated, background or proper context" in which we talk about primary rules presupposes the existence of a valid set

[18] These objections, conjoined with the scepticism about officials that we will discuss in the next section, are the central motivation for the "Institutional Turn" of analytical jurisprudents like Joseph Raz and Neil McCormick who have moved away from practice-based rules to embrace institutions as the pivotal important tool to account for law, both inside and outside the state. Raz, *Practical Reason and Norms*, 123–162; Raz, *The Authority of Law*, 105–111; Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford: Oxford University Press, 2007), chap. 1. For examples of the "Institutional Turn" in transnational law, see, Twining, *General Jurisprudence*, 176–8; Detlef von Daniels, *The Concept of Law from a Transnational Perspective* (Aldershot: Ashgate, 2010), 77, 113–116; Culver and Giudice, *Legality's Borders*. The institutional turn will be discussed in the next chapter at greater length.

[19] Hart, *The Concept of Law*, vi.

of social rules.[20] That is, when we talk about rules and moves of a game, rights or duties according to a social convention, we presuppose that there is a shared set of social rules amongst certain group—the practitioners of a game or the convention—that constitutes the practice and regulates the main aspects of its operation. Similarly, the legal system is a particular form of social practice including a complex of constitutive customs specifying the criteria for creating, adjudicating and ascertaining its laws. The difference between constituted and constitutive not in the normative type; but in the level of regulation. In this account, there might exist enacted rules and recognized customs establishing criteria to recognize, change or adjudicate which are also primary rules. They do not qualify as "secondary," however, for they do not regulate constitutive elements of their respective normative system.

By introducing these three kinds of secondary rules as "power-conferring," Hart seems to suggest that an important but not exclusive function of this complex of

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[20] Ibid., 85, 88, 103–4, 108. Cf. H. L. A. Hart, "Definition and Theory in Jurisprudence," in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 33–35. In fact, the distinction between constituted and constitutive rules was already common before the publication of the Hart's *The Concept of Law* See, e.g., John Rawls, "Two Concepts of Rules," *Philosophical Review* 64, no. 1 (1955): 23–6; G. C. J. Midgley, "Linguistic Rules," *Proceedings of the Aristotelian Society* 59 (1958): 279; G. E. M. Anscombe, "On Brute Facts," *Analysis* 18, no. 3 (1958): 71–2; Tony Honoré, "Real Laws," in *Making Law Bind: Essays Legal and Philosophical* (Oxford: Clarendon Press, 1987), 83.

In the same tradition, John Searle attempted to capture the distinction between 'regulative' and 'constitutive rules,' treating for latter as rules in the form "X counts as C in Y" See, John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969), 50; John R. Searle, *Construction of Social Reality* (New York: Simon & Schuster, 1995), 27–9. I agree with Warnock and Raz, this distinction is incomplete and not fully coherent, among other things, because it does not differenties between duties and powers. Geoffrey James Warnock, *The Object of Morality* (London: Methuen, 1971), 37–8; Raz, *Practical Reason and Norms*, 108–9. As I will try to show in the next section, Hart's division between primary and secondary rules, thus clarified, illuminatingly captures the distinction in a form that meet these objections and offers a better theory of institutionalization that Searle. Cf. Bernard Weissbourd and Elizabeth Mertz, "Rule-Centrism versus Legal Creativity," *Law & Society Review* 19, no. 4 (1985): 626–629.

constitutive rules is the creation of normative powers for some agents. This power-conferring nature is very clear in the language used for rules of change and adjudication, which are defined as "empowering" certain people to make and apply the laws of the community. Still, it has been considered that the rule of recognition could not be conceived in similar terms. Many writers have argued that the rule of recognition does not empower anyone, but instead it imposes to officials the obligation of applying the rules that it identifies as law.[21] Currently, there are two camps in debate: the majority views the rule of recognition is duty-imposing, while the minority sees it as power-conferring like the other two members of the Hartian trio.[22] In my opinion, such debate has led to an impoverished picture nature of secondary rules in general, and of rules of recognition in particular, at least for two reasons.

[21] For examples of this interpretation of the rule of recognition as a duty-imposing rule, see, Hacker, "Hart's Philosophy of Law," 24; Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Oxford: Clarendon Press, 1980), 199–200; Raz, *The Authority of Law*, 92–3; MacCormick, *H.L.A. Hart*, chap. 9; Leslie Green, *The Authority of the State* (Oxford: Oxford University Press, 1988), 118; Scott J. Shapiro, "What Is the Rule of Recognition (and Does It Exist)?," in *The Rule of Recognition and the U.S. Constitution*, ed. Matthew Adler and Kenneth Einar Himma (New York: Oxford University Press, 2009), 240; Stephen R. Perry, "Where Have All the Powers Gone? Hartian Rules of Recognition, Noncognitivism, and the Constitutional and Jurisprudential Foundations of Law," in *The Rule of Recognition and the U.S. Constitution*, ed. Matthew Adler and Kenneth Einar Himma (New York: Oxford University Press, 2009), 305; Shapiro, *Legality*, 85.

[22] The power-conferring understanding of the rule of was recognized by Lon Fuller (*The Morality of Law* (New Haven: Yale University Press, 1969), 137–8.), Ronald Dworkin (who understands the rule of recognition as the "fundamental master rule… that assigns to particular people the authority to make laws." *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 34.) and Wil Waluchow in his early work ("Hart, Legal Rules and Palm Tree Justice," *Law and Philosophy* 4, no. 1 (1985): 45, n. 9; but Cf. *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994), 77.) For a defence of this interpretation, see Philip Mullock, "Power-Conferring Rules & the Rule of Recognition," *University of Pittsburgh Law Review* 36 (1975 1974): 29–30. A contemporary endorsement, in, Sciaraffa, "The Ineliminability of Hartian Social Rules," 606 n. 5.

First, while conceding that the rule of recognition has a duty-imposing aspect, I believe that Hart wanted to preserve a relevant power-conferring nature for all secondary rules. It seems that rules of recognition empower certain people to ascertain the criteria of validity in the legal system. Consider the rules of recognition, 'Whatever Rex orders,' the simple rule of recognition of the Austinian world, or 'Whatever the Queen enacts in Parliament,' Hart's reconstruction of United Kingdom's system. In both cases the rule of recognition empowers certain individuals or institutions, Rex and the Queen, to authoritatively ascertain the existence of certain laws, their actions are the hallmark of law. This is an important function by its own merit. Contra critics,[23] this power is not redundant with rules of change, the powers to create and modify the existing rules. in one purely customary legal system, for example, the law-adjudicating authority has the capacity to recognize the relevant customs without changing them. Nor this power is redundant with rules of adjudication, because the law-ascertaining capacity is independent of the ability of Rex or Queen to adjudicate violations of the rule. Instead, both the powers to change and adjudicate laws depend on the previous ascertainment of the rules of the system by the rule of recognition. The rule of recognition, especially in mature legal systems, should be thus understood as a complex of duty-imposing and power-conferring rules.[24]

More generally, second, I believe that it is too reductive to characterize constitutive, secondary rules only as duty imposing or power-conferring, or as a mixture of both. In fact, all secondary rules seem to include additional elements of different kinds. Rules of adjudication mainly include powers, but these powers are "reinforced" by rules imposing "duties on judges to adjudicate," and they include definitions of

[23] See, e.g., Jeremy Waldron, "Who Needs Rules of Recognition?," in *The Rule of Recognition and the U.S. Constitution*, ed. Matthew Adler and Kenneth Einar Himma (New York: Oxford University Press, 2009), 327–350.

[24] This interpretation has been advocated by Matthew H Kramer, *Where Law and Morality Meet* (Oxford: Oxford University Press, 2004), 103–4; Kramer, "In Defence of Hart," 29–30.

"important legal concepts" such as those of "judge, court, jurisdiction and judgment."[25] Similarly, rules of change do not only include powers. For instance, rules regulating legislation "specify the subject-matter over which the legislative power can be exercised; others the qualification or identity of the members of the legislative body; others of the manner and form of the legislation and the procedure to be followed by the legislature."[26] The rules of recognition also include conceptual element—a shared understanding amongst the relevant practitioners of the legal system about the marks of legality—which are not accurately characterized as a duty or a power. [27] Accordingly, we should conclude that secondary rules are better characterized as normative complexes that confer powers but *also* specify some duties, rights, regulation of procedures, and even some non-normative elements.

In sum, I have clarified two aspects of Hart's distinction between primary and secondary rules. On the one hand, the distinction is better understood as the separation between a constitutive background of social rules, and a constituted set of rules which are created by the formed. On the other hand, I have suggested that all constitutive, secondary rules are normative complexes including many kinds of normative and non-normative components, but Hart specified a fundamental power-conferring aspect to all of them.

**Explanatory Value and Limits of Rules**

In the Hartian understanding, the idea of rule is a foundational concept applicable to several forms of arrangements, including games, institutions, legal systems, customs, common law

[25] Hart, *The Concept of Law*, 97. Cf. 19, 134.

[26] Ibid., 31.

[27] The idea that the rule of recognition include some conceptual elements is defended by Eugenio Bulygin, "On the Rule of Recognition (1976)," in *Essays in Legal Philosophy*, ed. Carlos L. Bernal et al., by Eugenio Bulygin (New York: Oxford, 2015).

principles and even some moral rules. Here the focus is not on any discourse or any form of collective action, but those discourses and forms of collective action with the normative or deontological capacity of changing the reasons for action of their addressees. Some of this reason-giving rules are the customary norms that give rise normative systems and institutions, some other rules exist within normative systems, as practiced or as enacted norms. Since rules provide a foundational explanation of the core of normative systems and institutions, both inside and outside the state, they cannot be hastily excluded from accounts of law.

> While this normative system created by constitutive rules plays a key role in our social and legal life, we should not overstate its importance. Hart concludes the explication of his model with a "warning:" while the union of primary and secondary rules "explains many aspects of law (…) this cannot by itself illuminate every problem;" it is "at the centre of the legal system; but it is not the whole." [28] Here he endorses the widespread view that constitutive rules do not explain all the aspects of the institutional and legal worlds. This same intuition is best captured by Hubert Schwyzer, who imagines community where chess is practised, not as a game aimed to victory, but as a yearly rite of the priests to determine the fate of the crops. While that practice has the same constitutive rules, they differ in what Wittgenstein cryptically called "grammar"—these elements that make it the kind of thing it is. Our chess has the grammar of a competitive game (as soccer), theirs has the grammar of a religious rite.[29] Other tools attempt to capture this intuition, like the idea of "meta-

[28] Hart, *The Concept of Law*, 99.

[29] Hubert Schwyzer, "Rules and Practices," *Philosophical Review* 78, no. 4 (1969): 451–467. Relatedly, Joseph Raz claims the explanation of a game is not limited to its rule, but it also needs to take into account "values" of the game, like winning or losing. Raz, *Practical Reason and Norms*, 117–123.

institutional concepts" developed by social ontologists; [30] Andrei Marmor's idea of "deep conventions,"[31] and the notion of "social sphere" used in socio-legal circles.[32]

I shall follow Schwyzer in calling "grammar" to a new conceptual tool, not present in Hart, that captures non-institutional concepts, values, and goals that make practice intelligible and which are not regulated by its constitutive rules. In the same way that a linguistic grammar is implicit in a language, and it is not the product of a plan or design, these grammars are implicit in social institutions and partly defined what they are. In the legal realm, the Hart hints some "principles, concepts and methods" that

[30] Recent social ontologists call "meta-institutional concepts" to notions, like the idea of victory in a game, whose relevance "to the institution depends not on constitutive rules (…) but on the overall meaning of the system of rules as an instance of a given social practice." Corrado Roversi, "Conceptualizing Institutions," *Phenomenology and the Cognitive Sciences* 13, no. 1 (2013): 205; Giuseppe Lorini, "Meta-Institutional Concepts: A New Category for Social Ontology," *Rivista di estetica*, no. 56 (2014): 127–139; Cf. Dolores Miller, "Constitutive Rules and Essential Rules," *Philosophical Studies* 39, no. 2 (1981): 183–197. Similarly, Barry Smith called "basic institutional concepts" is to those notions "not capable of being further defined on the institutional level." His examples include *context, counting as* in Searle's theory; *winning*, *losing*, *playing*, *breaking* a rule in games; and others like *ownership*, *rule*, *obligation*, *benefit*, *exchange*, *utterance*, *uptake*, *understanding*, *agreement*, *preference*, *sincerity*; and, *command*, *decision*, *authority*, *consent*, *acknowledgement*, *jurisdiction*, in law. Barry Smith and John Searle, "The Construction of Social Reality: An Exchange," *American Journal of Economics and Sociology* 62, no. 2 (2003): 298–9.

[31] Andrei Marmor's distinction between the "surface" and "deep conventions." The former are the ordinary conventions that regulate, e.g., games and art-genres. The latter "enable a set of surface conventions to emerge and many types of surface conventions are only made possible as instantiations of deep conventions," like those that regulate competitive games or those that set values or goals to art. Andrei Marmor, *Social Conventions: From Language to Law* (Princeton, N.J.: Princeton University Press, 2009), 59.

[32] Dennis Galligan introduce the notion of "social sphere" for application of the Hartian model for social-legal studies. "A social sphere may be described," he writes, "as an area of activity in which the participants share understandings and conventions about the activity, and which influence and guide the way they engage in it." For example, the practice of lecturing in a university to illustrate a "common set of understandings and conventions as to the purposes of lecturing and what is acceptable practice" Denis Galligan, *Law in Modern Society* (Oxford: Clarendon Press, 2006), 103, 114–5.

"municipal law" might share with international law,[33] but not with other institutional frameworks, which might be taken as its grammar. For instance, whereas other rule-constituted practices have a defining goal or object, for Hart no particular function identifies or characterizes state-law. Moreover, non-state institutions might not include the coercive enforcement mechanisms, certain concepts (e.g. contract, punishment, sources of law, the division between civil law and common law, constitutional principle) or the "minimum content of natural law" that are typical of municipal law. Hence, even when the structure of sub-state state and non-state legal institutions can be explained in terms of constitutive rules, they have differences regarding in their goals, values, and concepts, which cannot be captured by an elucidation of its constitutive and constituted rules. The Hartian recognizes that a complete theory of an institutional and legal activity must explicate the meaning and the "deeper" grammar that inform institutional practices.[34]

[33] Hart, *The Concept of Law*, 237.

[34] This provisional understanding will suffice for now. I will return to this notion in chapter 5, when I explore a form of transnational ordering which, among other things, allows for communication between different legal orders.