SOME IMPLICATIONS OF ACCEPTANCE OF LAW AS A RULE-STRUCTURE

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A: INTRODUCTION

The aim of this article is to examine the consequences of analysing law as a rule-structure. It will argue that acceptance of any rule-structure has certain implications for the acceptor which will enable us to distinguish the boundaries of the concept of "law" with greater accuracy than hitherto and will indicate solutions to certain other puzzling features of the concept of "law". The examination will take place against the background of a problem which has long existed in law, namely, the identification of those features of law which make us want to say that law *conceptually* requires obedience. We will first discuss an attempt to couple law and obedience, which does not rely on a conceptual analysis. We will then consider other analyses which are conceptual, but which rely on seeing law as a command. After indicating why we consider that these attempts fail, when judged by ordinary language standards, we will pass to the work of Professor H. L. A. Hart, who analyses law in terms of rules. This analysis we will criticise by using the same linguistic standards. To offer such criticism and indicate a remedy, however, it will be necessary for us to outline an alternative analysis and, more particularly, to show the importance of the implications of acceptance of a rule-structure. Finally, we will turn to the question of obedience to the law as seen in the light of our analysis, and will show that application of our analysis, by separating two hitherto inextricably confused questions and demonstrating the pointlessness of one, can solve what has long been a jurisprudential problem.

One of the standards which we will use to accomplish an analysis will be the usage of ordinary language. We will not depend on the examination of this usage for the construction of theories in any positive sense but will use it negatively to criticise either existing or possible analyses of the concepts involved. In other words, we will not hope to build on the actual or supposed usages of ordinary language but will rather test the results of our own or other analyses of concepts by seeing if they accord with what we actually say when we use the concepts (words) in ordinary contexts. Such a method has been criticised, especially when applied to specialised concepts, on the ground that circumstances involving the use of these concepts do not arise in everyday language and thus the supposed ordinary language test cannot in fact be applied. Despite this criticism it seems clear that such tests are applicable in some meaningful and rigorous way; and it is upon this basis that this article will proceed.

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Our confidence in so proceeding is increased by the general occurrence of the word "law" on the lips of people, both lawyers and laymen, without its causing apparent confusion. But, as a number of writers have shown, such ease of application is only superficial. For there are several usages connected with "law" which must be carefully distinguished. We speak of "a law", "the law", "law", and "laws" (for example, of physics). All these usages carry different connotations which help to prevent confusion when the word "law" is used in its various forms in context. Thus "a law" refers to a single statement which we treat either as a proposition of empirical (either scientific or social) regularity, or as a means to effect social guidance or control. "The law" normally refers to the whole structure and apparatus of that form of social control we call "legal" (thus "the majesty of the law", "the full rigour of the law"); while "law" tends to have a narrower, specifically *professional* use. Finally "laws" is used to designate an aggregate of singulars, each of which we could call "a law", as in "the laws of physics", "the laws of the game of Rugby".

In this article we are not considering law as a concept which is sufficiently broad to embrace the laws of physics. On the other hand we will consider it necessary to distinguish lawyers' "law" from the "laws" of a game. This is *not* because any confusion can arise in our talk of lawyers' "law" and the "laws" of a game which does not arise in our talk of lawyers' "law" and the "laws" of physics. In *neither* case are we confused—and this is important. It is rather that an analysis of the concept of law will be offered, which makes use of elements common to both lawyers' "law" and the "laws" of a game but not to the "laws" of physics; the distinction will have to be made at this elementary level to *explain* the lack of confusion. We have already begun to talk of lawyers' "law" and this is how we will proceed. We will not discuss the singular statements constituting particular laws, nor will we discuss the whole structure and apparatus constituting "*the* law". "Lawyers' law" is a usage of "law" which points to the specifically *professional* use of the word; thus the critical test of analyses of the concept "law" will be applied by asking: "Does this analysis result in the sort of things which lawyers say about law?"; or, "Would lawyers recognise the results of such an analysis as constituting 'law' for them? Would *they* call it 'law'?" If the results of any analysis of the concept of "law" lead lawyers to say either: "Well, it seems to account for everything, but it is not what I *mean* by 'law' "; or, "Well, it accounts for a great deal which I call 'law', and in the way I mean it, but there are other things which are left out, which *I* would want included in 'law' ", we may suspect that the analysis proferred is inadequate for the purposes of an examination such as this paper proposes to effect. It is, of course, not possible in this article to conduct a survey of all lawyers and put to them the questions suggested in respect of the analyses of the concept of "law" later examined and proposed; nor would this better satisfy the purposes of this article for it only requires that each reader who falls within the category "lawyer" (a very wide one if we include bush and barrack-room lawyers) puts the question to himself.

Having now fixed one of the pair of words to be examined, we must make clear what will satisfy the condition of one concept "conceptually requiring" another. Our discussion will not in any way be concerned with what psycho-

logical or sociological springs or levers cause people to obey the law or make the law as a system of social control actually work. Nor will it turn on whether it is good to obey the law either in terms of personal or social advantage (what may be considered, broadly, as the utilitarian view) or in terms of morality. We will not consider as a critical case the situation of a subject, when, to conform to the law, he must do an act which is contrary to his morality, as compared to the same subject when the behaviour required by law is morally indifferent. In the terms of our examination these matters, while real and important considerations, would be extraneous; for law would still conceptually require obedience in *either* of the proferred cases; in our examination on each occasion it would still be meaningful to speak of "obedience" and "disobedience" of the law. We will develop an analysis of the concept of "law", which will reduce that concept to a system of denominators which are common to other systems of social control, such as morality, custom and social associations, and yet which may be distinguished from them. The common denominators we employ are *rules* and by examining the concept of "rule" we are led to consider what flows from our treating a statement as a rule. This consideration will ground our showing that law conceptually requires obedience. Our question, however, is an old one and therefore we must first examine alternative explanations of why it is conceptually appropriate to assert that law requires obedience.

There is a traditional analysis of the concept of law which holds that it is bound up with obedience in a manner which is independent of any explanation in terms of cause or of the good which may arise from obedience. Although a feature of many natural law systems, it cannot be identified with them, and might be better called "the absolutist position", in contradistinction to the utilitarian. The absolutist position holds that the fact that law *is* law is a sufficient guarantee that it should be obeyed, for it sees human law as an integral part of a universal framework of laws, including the laws of science, which mirrors the totality of reality in a fixed and static way, and the parts of which can be discovered by the exercise of reason and diligence. It must be noted that we are not dealing here with those systems which bring about the connection by purely overt or covert definitional means. These latter systems usually fall to the criticism levelled either against Austin or Kelsen and dealt with later[1]. The more modern versions of the absolutist position lean heavily on science as an example of an absolute and unchanging system, derived from observations of fact, and thus illustrating the character of the world and the possibility of the absolutist undertaking. In doing so, however, they employ a model of analysis which was propounded by the older absolutists, without the advantage of a critically tested system of science. This model of analysis rests on two propositions, neither of which are defensible. In the first place, absolutists consider that when we speak of human law and scientific law, we are dealing with one basic concept. Secondly, they apply an inappropriate model of scientific laws.

The concept we use in the case of a scientific law is very different from that we use in the case of a human law. This is illustrated at the outset by the absence of any use of "scientific law" to indicate the totality of individual

1. See *infra*, pp. 22, 23.

laws; we speak in such a case of "the laws of science." Scientific laws are formulated from observations of what actually happens under controlled conditions, while human laws do not report what men in fact do; rather they indicate what men *ought* to do. If human laws were of the same logical family as scientific laws, then, as Hart concisely and persuasively points out, we would have no need to enforce them.

The absolutists' view treated scientific laws as indicating the structure of reality *to such a degree that they must be obeyed and cannot be flouted.* They then drew a parallel with the case of human law, and, from this parallel, the conclusion that we must obey the law; we cannot do otherwise without contradicting reality. But talk of events "contradicting reality" because they do not follow the supposed law is quite inappropriate in a discussion of scientific laws. The analogy breaks down in relation to both scientific and human laws, for if, in a given situation, the subjects (whether animate or inanimate) of a scientific law do not on a significant number of occasions act in accordance with the law, it is not they who are in error, but the law. One cannot talk in such a case of events subject to a supposed law "contradicting reality" by failing to follow the law, because the law does not represent reality. The supposed analogy, then, does not ground a connection between "law" and "obedience".

A recent alternative position seeks to recast the analogy in accordance with more modern views on science. It recognises that scientific laws are approximations which by constant refinement are tending to the formulation of the basic laws of energy and matter as a limit. A parallel is drawn with human laws where, so it is maintained, by tedious and stumbling reformulation human legal systems are tending to become perfectly attuned to human wants and desires. Again, however, the analogy fails for we do not endeavour to change reality to make it accord with scientific laws (where these express ideal limits), while we do expect human subjects to change to accord with human laws. We do not formulate scientific laws on the basis that they will operate in some distant millenium when the world has become perfect, because, to make a warrantable extension of meaning of adjectives useful in other contexts, they are descriptive of the world. Human laws, on the other hand, are prescriptive, not descriptive, and the operation of human law to bring about social change cannot be accommodated in any model which analyses "law" in descriptive terms. Although we may consider with Savigny that any law which does not take account of the pressures acting in society at the time of its passing is futile, yet any picture of law which ignores the possibility of its bringing about social change is equally futile. To anticipate matters later developed in this paper, while both human and scientific laws may be viewed as rule-structures and thus have sufficient features in common to allow the application of one word to both[2], the structures are generated by the operation of totally dissimilar principles which we have labelled the "descriptive" and the "prescriptive". So great is their dissimilarity that no operative analogy can be drawn between them which throws any light on our problem.

2. The rules of science operate by generalization and may, therefore, function as guides or directions which latter are aspects of human laws referred to below. But these features are only just sufficient. A defendant at a criminal hearing who listed among his previous convictions the breaking of Boyle's Law would be in danger of being in contempt for making bad jokes.

We have sought to indicate the matter examined by this paper by showing what it does not concern and by showing that the traditional endeavour of the absolutists to show a propriety in connecting "law" and "obedience", which was independent of effects, failed, for they sought this propriety not in language but in the arrangement of the world; they tried to do a logical job by empirical means. This article intends, by analysing the concepts of "law" and "obedience", to demonstrate a logical connection between the two such that we may say that law, in some sense of that hackneyed word, *implies* obedience —that there is a linguistic propriety in such a connection which arises from the use we make of the two words and not from the objects they deal with. Such a demonstration will be based not on the nature of individual men, nor on the nature of society, but on what we mean when we speak of law and obedience. To give a positive illustration of what is meant by "conceptually requires", let us consider analyses which, this article accepts, proceed in these terms, but which, because they cannot meet the ordinary language test already proposed, nevertheless fail.

B: AUSTIN AND KELSEN

John Austin, the founder of the analytic school, defined positive law by reference to effective sanctions in such a way as to allow us by deduction to say that law conceptually requires obedience. Positive law, as defined by Austin, arises by the command of a sovereign. But one can only determine who is sovereign by reference to the issuance of effective sanctions against disobedience. Positive law, therefore, is identified by the presence of an effective sanction. The mark of an effective sanction, we learn, is that it is habitually obeyed; so we see by definition law is habitually obeyed. Our question, on Austin's analysis, would be easily answered (and in logical, not empirical, terms) by saying that the connection between law and obedience is a matter of *strict* implication, for one of the defining marks of positive law is obedience.

This article would certainly count the answer as showing that law conceptually requires obedience, but as being *too* easy and glib, and as overlooking, or, rather, in Austin's case, discounting, other features of law which, though not essential to the formulation of a consistent system of law, nevertheless are part of what a lawyer means by "law". Our system certainly can recognise as "law", systems which are not obeyed, although it is part of this article to show that, in regard to an operative—in our term, "accepted"—system, there is a sufficient relation between the concepts "law" and "obedience" to allow us to say that law requires obedience, and that it is therefore *reasonable* to obey the law. More importantly, the adoption of Austin's analysis would prevent any discussion of lawyers' usage of the words "law" and "obedience" by removing all point from it; we would lose the opportunity of learning much about the two concepts which has repercussions in other areas of our talk about "law". Although Austin would not say that such discussion in other fields or disciplines was pointless, yet, because it has no bearing on positive law (which we may equate with lawyers' law) it has not, in the terms of his analysis, that influence on our reference points for mapping out the topography of law and its relation with other methods of social control which it ought to have.

Another influential writer in the field of jurisprudence, Hans Kelsen, has analysed law in terms of "norms". The "norm" is the abstracted form of the individual statements which, when aggregated with like statements, make up "law". Kelsen, himself, has described norms as "de-psychologised commands"[3], for he sees the norm as a language form which it is appropriate only to obey or disobey. When we use a statement in giving a command, we intend that it should be obeyed; likewise, when a statement is addressed to us which we recognize as a command, we have a choice either to obey it or disobey it but nothing else. In this can be seen an analogy with what we later have to say concerning statements which we accept as rules, but we cannot agree with Kelsen that the concept of law can best be analysed in terms of commands.

Kelsen's position is thus similar to Austin's in that he sees "rule" as a form of command, although he tries to escape the more unpalatable consequences of a complete identification by calling the command "de-psychologised"—a term which receives the just criticism of Hart[4]. His analysis differs from Austin's in two important respects. He does not attach the necessity of actual obedience by subjects to a norm before the word "law" can be applied to it. He does not, therefore, include obedience by definition within the concept of "law". Rather he includes "command" by definition within the concept of "law" and then shows that "command" conceptually requires "obedience". This leaves open the possibility of his adding a refinement to his analysis which Austin lacks, for he argues that each legal system incorporates, as a matter of fact, a *grundnorm*, or basic rule, by means of which all other rules in the system derive their validity. By means of a *grundnorm*, Kelsen establishes a purely deductive system devoid of the necessity of evaluative judgements, whereby the validity of the end-products of the legal system —judgements, orders and penalties—can be established. By means of his deductive system in conjunction with the absence of any insistence by definition on obedience as a necessary condition for law, Kelsen separates the question of the validity of a legal system from that of its efficacy; while in Austin validity and efficacy are indistinguishable, because Austin insists on obedience as a fact before the word "law" can be properly applied.

Kelsen starts from a position accepted by Hart and this article, namely, that laws are rules, but his position errs in its analysis of the term "rule" in the view here presented, because it sees "rule" as a species of command. It is a *tour de force* in its explication of legal systems, in its decisive dissection of certain legal institutions, and in the light it throws on certain aspects of law structures. However, it does not measure up to the facts of linguistic usage. Its failure in this regard is illustrated by the fact that Kelsen finds it necessary to redefine norms as directions to authorities in the system, rather than to those to whom a lawyer would say that the norms are addressed. Part of the law, namely, the criminal law, responds brilliantly to the explanation; but this was the part most adequately explained by the Austinian theory, which Kelsen supplants. Other parts of the law do not respond to this treatment, and these are parts where the Austinian theory also fails.

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3. Kelsen: *General Theory of Law and State* (1961), 35.
4. Hart: *The Concept of Law* (1961), 110.

The explanation fails in being unable satisfactorily to describe what laws, in fact, do. A legal system *can* be looked at from Kelsen's point of view, but such a looking is a distortion, and, what is more, a conscious distortion. It is a pair of spectacles which do show parts of the scene in startling focus, but which leave other parts so distorted as to make the viewer conscious that what he is seeing is unreal. Nevertheless, Kelsen saw that obedience is conceptually required by the form of law and not by considerations external to the concept of law. This article will later demonstrate the force of Hart's remarks, where, in speaking generally of the failure of the command theories, and those resting on a postulated habitual obedience, he says:

> "The root cause of the failure is that the elements out of which the theory is constructed, viz. the ideas of orders, obedience, habits and threats do not include and cannot by their combination yield the idea of a rule, *without which we cannot hope to elucidate even the most elementary forms of law*"[5].

C: HART

Professor H. L. A. Hart anticipated the attacks on the answers to our question, which we have considered to date; because he deals with these answers, we must examine his treatment of the question to see if it meets the requirements we have set for a satisfactory answer. In all his writings, Hart avoided an over-simplification of explanation, which would not do justice to the complexity of the sociological and jurisprudential facts of the connection between law and obedience. Although avoiding the Charybdis of oversimplicity, he ventures somewhat too close to the Scylla of obscurity; not in his language, which is exemplary in its clarity, but in his claims as to what "law" means or embraces.

Hart, in *The Concept of Law*, examined very throughly the preceding analyses of law in terms of command. These he found deficient and concluded that they were so because their proponents were misled by the use of the words "obey" and "disobey" in connection with law. Hart then argued that "obey" and "disobey" were appropriate only to commands while the phrase, "put under an obligation", was peculiarly applicable to law[6]. This phrase he distinguishes carefully from "being obliged". In other words, Hart would say that our question should be phrased thus: "What is there about 'law' which conceptually requires that we be put under an obligation by it?" We consider that Hart's view is, in fact, in error; that his recognition of certain features of the true situation led him to make a distinction between primary and secondary rules which is well-grounded but which he misconstrues, and that his erroneous identification prevents him from distinguishing laws from other means of social control, and means that eventually he cannot escape being influenced by the command theory of law which he eschews. For we argue that "obey" and "disobey"[7] are words appropriate to both commands and

5. Hart: *The Concept of Law* (1961), 78 (italics added).
6. *Id.*, 80-83.
7. But see caveat issued in n. 46, *infra.*

rules, and, incidentally, laws, analysed as a species of rule, while "to be put under an obligation" is, in fact, only properly used in connection with commands. We later argue that one can obey the law without being put under an obligation by the law, and this *not* in the trivial sense of "by mistake", or "unknowingly". When we speak of "oblige" and "obligation", which we may appropriately do in respect of a particular law, we are conceding the force of an element which law often embodies, but which is not the basic element from which law is constructed. This article further maintains that law is best thought of as constructed from rules which are not derived from, or a form of, command, but which are on the same conceptual level as commands. Nevertheless, a rule may embody a command and, if it does so, we can speak with conceptual propriety of our being put under an obligation by that rule. It follows on our view that concentration by Hart on the element of "obligation" leads him to be influenced by the command model of analysis even while rejecting it. This has several important consequences. Because of this influence Hart makes a distinction between primary and secondary rules, which has been criticised in many of the reviews accorded *The Concept of Law*[8]. There are, on our analysis, grounds for making the distinction, but, as we will show, it is not peculiar to law as a system. Further, the endeavour by Hart to distinguish law from other forms of social control, which are reduced to rules, fails both in its reliance on the distinction between primary and secondary rules and because Hart was prevented by the intrusion of the command model of law from seeing what follows from analysing law as a rule-structure.

It is possible to construe Hart as giving an answer to the precise question of the connection between "law" and "obedience". Besides taking a line similar to that of Kelsen, that the mark of any *actual* legal system is the obedience given to it by its subjects (which he does by the extension of the rule of recognition to take a place similar to that of the *grundnorm*), he introduces what he calls "the minimum natural law content" of any legal system, and offers this tentatively as an explanation of, and answer to, our present question. Whether the answer is offered in moral or conceptual terms, Hart never makes clear. He does not see, in the way that Kelsen does, that there is an appropriateness in speaking of obedience in conjunction with law, because, as we have noted, he rejects the propriety of speaking of obedience in conjunction with law. Nevertheless, it is possible to interpret Hart as giving an answer in conceptual terms, for he says:

> "The general form of the argument is simply that without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other. In the absence of this content, men, as they are, would have no reason for obeying voluntarily any rules . . . It is important to stress *the distinctively rational connexion* between natural facts and the content of legal and moral rules in this approach, because it is both possible and important to inquire into *quite different forms* of connexion between natural facts and legal or moral rules"[9].

8. Two examples are the review of L. J. Cohen: (1962) 71 *Mind*, 395, and that of M. G. Singer: (1963) 60 *Journal of Philosophy*, 197.

9. Hart: *The Concept of Law* (1961), 189 (italics added).

We will examine Hart's argument on the basis of such an interpretation. Hart gives several examples of "the minimum natural law content", one of which is the existence of restraints on the free use of force in all legal systems. He relates the presence of this concern to the penetrability of the human skin and in doing so provides a reason for its presence. The supporting analysis he gives can be related directly to the manner in which we talk about "law". The derivation is not direct in the manner of traditional natural law arguments, but calls for a relatively complex chain of reasoning. Hart uses the phrase "minimum natural law content" in inverted commas, which may indicate that he considers the argument as analogous to the form of natural law arguments, rather than as a modern extension of it.

If one considers that the existence of prescriptive rules of behaviour constitutes a restraint on the free use of force, then it is tautologous that in a system of such *rules* there must exist restraints. But Hart might well point out that if the rules were directed to things other than the conditioning of the free use of force, such as dress or table-manners, then it is likely that we should not call such a system a *legal* system, but, rather, enforced custom.

If we lived in a world peopled by creatures with rock-like exteriors, but with very sensitive ears, it may be said that a system of rules relating to screaming, or talking loudly, but saying nothing about the free use of force, would be counted as a legal system. This is a valid and important point. It appears in some way *necessary* that the purposes of the law must be concerned, in the main, with those social transactions which we find important, and, if a system of rules dealt only with unimportant matters, we would be inclined to withhold application of the word "law" from it. Unless the rules dealt, *inter alia*, with the conditions for the free use of force, we would not call it a *legal* system. The direction of a legal system to important human concerns is a condition for our applying the term.

It is later contended in this article that, at the very least, implications of acceptance, which form a central element in the system later proposed, have the same degree of necessity as "the minimum natural law content" proposed by Hart. This article, however, does not categorically claim that implications of acceptance are necessary in any stricter sense than the minimum natural law content. It may be argued that, as a central element of our system has no greater necessity than Hart's and as Hart gives an analysis fitted to answer the same question as is here asked, this article is reviewing an exhausted topic. This is not conceded, not only because we consider that the system later proposed has value independently of the answer it gives to our question, but also because it solves difficulties, which Hart's system does not satisfactorily solve. For Hart's system looks to an analysis of the concept of "law" in terms of rules, and these he recognises, as do we, as a common denominator with other forms of social control[10]. But Hart nowhere, we maintain, successfully distinguishes law from morals, custom[11] or social associations.

10. Hart: *The Concept of Law* (1961), 78, 79.

11. By "custom" we refer here to a structure made up of rules recognized in a similar way to the rules of etiquette. We do not refer merely to habitual behaviour. There is a border area where there is an established and recognized practice. If such practice is or may be reduced to statements which are treated as guides and directions—in Hart's terms, have an "internal" aspect—then we may properly speak of "rules of custom".

Therefore, though we may say that Hart grounds his recognition that law requires obedience in conceptual considerations, his system does not meet the test of lawyers' language, for it does not allow us to make the distinctions we commonly make between modes of social control with the ease with which we commonly make them. It is on this crucial topic of demarcation that Hart's analysis fails, and fails in his own terms. Hart makes several distinctions between law and other forms of rule-structure, which commonly act as means of social control. He rightly does not endeavour to find in the concept of "law" any unique feature or attribute by which we may inevitably recognize a legal system. He uses a method of showing resemblances and differences recently popularized by Ludwig Wittgenstein, that of "family resemblances"; in this method a number of features common to allied but distinct members are shown, but each individual, while sharing one or more features with his relations, yet has his own unique combination of features.

D: PROBLEM OF DEMARCATION

To accomplish his task, Hart first distinguishes "law" from "command" in a manner which has long been recognized, namely, that when we treat a statement as a rule, we are prepared to generalize from it and to treat it, in some sense, as an accepted standard. Hart gives expression to this fact in drawing attention to the "internal" aspect of law for the law-abiding subject. He sees it as exemplified in one of the two conditions which he states as being necessary and sufficient for the existence of the legal system[12], namely, in the use of the laws as common public standards by its officials. The second condition is placed first by Hart and is curious. It is that "those rules of behaviour which are valid according to the system's ultimate criterion of validity must be generally obeyed". Later in the same paragraph he says:

> "The first condition is the only one which private citizens *need* satisfy: they may obey each 'for his part only' and from any motive whatever . . . "

This confusion between obedience and the motives for obedience we refer to at the end of the article[13]. We need only here point out that if the ordinary citizen treats the law as a *rule,* that is, part of a legal rule-structure, then it has an internal aspect in that by treating it as a rule he is prepared to generalize from it and allow it to guide his actions. Once more Hart's use of "obligation" as a criterion for application of the word "law" and the attraction of the command model misdirects his analysis for he sees in the ignorance of private citizens of the actual authority of the laws the fatal possibility of being unable to distinguish habitual behaviour from rule-directed behaviour. He fails to see the power of his own theory of the "internal" aspect of law to make this distinction without recourse to motives for obedience. A crucial case is the difficulty of the law-ignorer rather than the law-breaker, that is, the person

12. Hart: *The Concept of Law* (1961), 113.
13. See *infra,* pp. 43 *et seq.*

who does not consciously break the law, so much as fail to recognize that there is a law to be obeyed. Hart does not recognize the case as in any way crucial for he avoids the difficulty by saying that the acceptance[14] need only be "general", that is, not all members of the community need recognize the existence of law. For certain classes this is self-obvious; for example, lunatics who are incapable of a rational appreciation of anything must be excluded. There may be other classes, however, of which it is true to say that they have no appreciation, but not that they are incapable, for example, certain classes of aliens. But the law would insist on their making themselves familiar with the law at their own peril. Here, Hart contends, we must look to the officials who recognize and apply certain rules in accordance with other rules. In lesser hands a development of Hart's initial position might have been to state that the only evidence for the existence of the rules is what is officially pronounced; that the official pronouncements *are* the rules. Hart treats this error extensively and definitively in that part of *The Concept of Law* which he devotes to rule-scepticism[15]. Yet he does not satisfactorily show us the relation between the importance of general acceptance and the rôle of the officials in a legal rule-system. There is some confusion in Hart's position, because the subjects are not wholly dependent upon the standards the officials use. If the officials diverge too greatly from the standards laid down in the rules the subjects may, and do, ignore the official pronouncements. This is not by appeal to some external "natural" law, but occurs within the framework of the system itself. The officials can err; indeed, *all* the officials can err, without "err" being an inappropriate usage. As we later show, by treating law as a rule-*structure*, we are able to show that acceptance of the structure is acceptance of the whole structure, and that one of the implications of such acceptance is the acceptance of the individual rules making up the structure, which have been created according to its proper forms. This has the advantages of Hart's analysis, but removes the dichotomy between subjects and officials—by acceptance *all* become subjects.

It may be remembered that Hart places great emphasis on the existence in law of both primary and secondary rules. It is possible that he considers that this is a feature which distinguishes law from other forms of social control, for he says:

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14. Hart, of course, does not use "acceptance" as a term of art as this article does. Hart insists that general acceptance is purely a question of fact and is wholly bound up with the existence of a legal system. This leads him to hold that the identification of a rule of recognition is also wholly a factual matter which earns him the justified criticism of M. G. Singer in the review referred to in n. 8, *supra*. In our system acceptance may be manifested in many types of factual situation (see n. 44, *infra*) but the relation it exhibits between the rule-structure and the accepting subject is a logical or conceptual one. It depends on the liability of the accepting subject to the application of arguments in a form similar to the "generalization argument" (as supposed by the "generalization principle") set out by M. G. Singer in his book *Generalization in Ethics* (1963). This is not a rôle for his argument which Singer would necessarily accept. The question of acceptance is crucial to the position of this article, but nothing of greater length than the above sketchy hints can be presented here.

15. *The Concept of Law* (1961), Chapter VII.

> "The remedy for each of these three main defects in this simplified form of social structure consists of supplementing the *primary* rules of obligation with *secondary* rules which are rules of a different kind. The introduction of the remedy of each defect might, in itself, be considered a step from the pre-legal into the legal world . . . "[16]

As Hart does not state what kind of rule-structure could exist in a pre-legal world, we do not know whether it would consist of rules of custom or morality or, indeed, whether we could speak of *rules* at all. It is, however, safe to assume that Hart intends by this move to show a differentiation between rule-structures. Hart assumes that it is possible for a rule-structure to consist purely of primary rules, the rules of obligation. He has previously argued that obligation is a feature peculiar to law; as his primary rules are the rules of obligation the secondary rules are, as it were, left without foundation. They *must* on Hart's argument be secondary and derivative. The secondary rules, therefore, are distinguished by being *derived* from the existence of the primary rules, in the sense that, if there were no rules of the primary kind, the secondary rules could not exist. He puts it thus in *The Concept of Law*:

> "Under rules of one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish it or not. Rules of the other kind are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private"[17].

Hart asserts the possibility of the existence and use of a rule-structure composed simply of primary rules. While his main example is rules of etiquette, he suggests that international law is also basically of this composition[17A]. He holds that no basic rule is required to give rules their validity[17A]; thus in the demarcation of law from other sets of rules used as means of social control he is able to rely, *inter alia*, on at least the specific forms of secondary rule which, he considers, remedy the defects of a rule-structure composed only of primary rules of obligation. But the question at issue is not a sophisticated evaluation of the validity of a particular rule, but, rather, the reasons why we call *this* statement a "rule". Although we normally justify application of the word "rule" merely by appeal to the way people in fact speak[17A], we resolve conflicts about whether a particular statement is a rule in a particular rule-structure (whether legal or otherwise) by appeal to authority in accordance with procedures seen as right in the context of that rule-structure, which, in the case of etiquette, may merely amount to consulting a book. For we must in treating statements *as* rules have procedures or standards to know those which we will treat as rules, what modifications to their content we will allow as valid, and what situations we will treat as relevant or susceptible to the application of our rules. From these aspects arise none other than rules of recognition, change and adjudication.

16. *Id.*, 91.
17. *Id.*, 78, 79.
17A. *Id.*, at 228, 229. But note there may be an ambiguity in "validity".

Unfortunately, despite his brilliant explication of the dangers of confusing "command" and "rule", Hart has allowed the analogy of the command situation to bring him to a false distinction. For these so-called "secondary" rules are implied in all rule situations whether legal or otherwise; nor in any real sense are they either secondary or parasitic[18]. It is true that in law the aspects of treatment of a proposition as a rule above noted have become very much more formalized than is the case in, say, morals. It might also be true to say that such aspects have been expressly reduced to formulated rules, which are secondary in the sense of being further rules. But this is merely another way of saying that such aspects have become explicit, and are subject to examination as formulae. The question of whether one can distinguish law by the *degree* of formalization is treated below. In any event, the secondary rules, as Hart distinguishes them, are in fact all those rules, which are not rules of obligation. Hart has confused two issues here, firstly the differences between the rules of obligation and the other rules in the structure, and secondly the means by which we identify the rules in the structure. But the difference between rules of obligation and other rules does not depend on primacy, but on their incorporating commands. Other rules incorporate principles and standards, or alternatively assign values to facts. Talk of primacy may be linked with the importance we attach to the varying rule-contents, but is not attached to the rôle of the rules in the structure itself.

Passing now to an examination of his specific means of demarcation we find that Hart distinguishes law from morals on four grounds of which the "internal"-"external" distinction commonly made between morals and law is the "compendious expression"[19]. Yet the first ground of "importance" has already been attributed to law to distinguish it from the rules of custom[20]. Law is thought of as imposing an obligation through the "importance or *seriousness* of social pressure behind the rules", which custom lacks. Indeed, at this point Hart considers that law *could not* be distinguished from morals on this ground. This is, of course, quite a defensible position on the "family resemblance" model[21]. The other distinguishing marks Hart lists are immunity from deliberate change, the voluntary character of moral offences, and the form of moral pressure. But each of these, as Hart presents them, is a contingent matter; he exhibits no feature of our language which would allow us to show the combination of factors on which we rely in calling a system "moral" rather than "legal". For it is perfectly conceivable that these last features, which Hart lists, might be otherwise; indeed, the early history of the Christian church might be cited as an example of such a form of morality. The Communist method of social control, which administers its morality through the same channels as law, appears strange to democratic thought precisely because we still recognize the difference between the two disciplines.

Equally an examination of Hart's distinctions between the rules of custom and games on the one hand, and the rules of law on the other, shows that they are merely contingent, and do not give a conceptual basis for a distinction

18. *The Concept of Law* (1961), 78, 79.
19. *Id.*, 169 *et seq.*
20. *Id.*, 84.
21. See *supra*, p. 27.

which, in ordinary language, is made with such ease as to show that it exists at a conceptual level. Hart, further, does not demonstrate in the case of law what combination of those features, which it shares with other rule-systems, are unique to *it*. The contingent matters to which he does point, we will show to be *symptomatic* of deeper conceptual differences.

E: THE BASES OF A NEW METHOD OF DEMARCATION

For our analysis of "law", we return to the point which Hart insisted upon, namely, that a combination of factors used by former writers could not yield the term "rule", and, therefore, were doomed to fail in any endeavour to analyse the concept of "law". This leads to our searching for the basis of our analysis in an examination of the term "rule". In doing so, we will be following paths trodden by many writers of jurisprudence. Of those we have considered, Austin, Kelsen and Hart, all saw law as intimately bound up with rules, though we have criticised the first two for seeing a rule as a special case of command. Although even such a champion of the variable human element in law as K. N. Llewellyn has considered law best thought of in terms of rules, it does not appear that this common place has been fully explored. For example, Hart expressed his reluctance thus in *The Concept of Law:*

> "The most obvious candidate for use in this way in a definition of law is a general family of *rules of behaviour*; yet the concept of a rule as we have seen is as perplexing as that of law itself, so that definitions of law which start by identifying laws as a species of rule usually advance our understanding of law no further"[22].

Although one must agree with Hart that the concept of "rule" is a perplexing one, his latter conclusion cannot be accepted. The understanding of law can be advanced by a study of the concept of "rule" and this for the very reason which makes the latter concept perplexing. For the concept of "rule" is fundamental. If we examine how we operate with it, we will learn something of the way in which we operate with "law". Hart himself, of course, uses an examination of rules to illustrate the importance of primary and secondary rules in law. His conclusions, however, have a wider application than merely to legal structures; that he did not recognise this fully led to the problems of demarcation earlier referred to.

Austin in the *Province of Jurisprudence Determined* makes a thorough and, in many ways, acute analysis of the concept of "rule". He sees it as a species of command, however, and this it is not. There are two immediate differences, one of which Austin uses and which by itself would not invalidate the analysis he gives. On the one hand, although commands may relate to a single instance, rules are always *generalizations.* This is not to say that a rule must of necessity operate more than once. It is possible that a rule may operate only once and then be revoked. It may be that the circumstances under which a rule operates have uniqueness built into them so that they can only happen once; this forms a limiting case. But revocation or uniqueness

22. *The Concept of Law* (1961), 15 (italics added).

are necessary, for while a rule is in force it must always be applied in like circumstances. This is what it is to treat a statement as a rule.

Austin recognizes this difference in his treatment of rules and examines at some length whether the generalization should be of persons or circumstances. He finds rightly that it must be a generalization of circumstances or conditions of application, but the conclusion he drew from this was that rules were, in fact, merely generalized commands[23]. This does not account for the second difference we now deal with, in virtue of which it is here maintained that the two concepts are separate (but can refer to the same objects), and that rules do not form a sub-class of commands. The premises on which the distinction is drawn are controversial but can, it is submitted, be maintained.

The distinction lies in the question of "obligation". As we have seen, Hart noted that what he calls "the primary rules" oblige; but there are other rules, which do not oblige, and which he called "secondary rules". Yet he called them *rules*; in doing so he was followed a common usage which is not metaphorical for they are not merely rules in some sense which is derived from their association with the primary rules—that is, they are not rules merely because they accompany primary rules. The secondary rules do not oblige because they are not necessarily directed to the production of an action, but assign values to certain facts. Nevertheless, we still call them rules, for one is not always put under an obligation by rules. On the other hand, one is always put under an obligation by a command, which one recognizes as a command, *conceptually* put under an obligation by such a command. For if one recognizes a command, one is by such recognition put under an obligation by it. One may obey or disobey the command but the fact that we have only two choices, either obedience or disobedience, to make in the presence of a recognized command arises from the fact that we have been put under an obligation by it. The matter is made more difficult, for, to avoid complex questions which are no part of our purpose, we must concentrate on those commands which are recognized by the subject as commands; we thus set aside controversial philosophical questions concerning a form of words which are intended to command, but are not recognized by the subject of the command as such. If we insist on recognition of a command by its subject, we drawn an immediate parallel between such recognition and the acceptance of a rule-structure by its subject, a matter which forms the basis of this article. Although there are obvious conceptual parallels between the twin rôles of recognition of commands and acceptance of rule-structures, we hold them to be distinct. The possibility of rules having a value-assigning function drove Kelsen, using a command model of law, to interpret all law as commands to authorities. As we have noted, although accounting for many of the most important and striking features of law, it does so in a paradoxical and unsatisfactory way. It just is not the case that, when we discuss parts of the law, we are discussing directions to authorities. Kelsen's view puts too much emphasis on the operation of the enforcement of the law, at the expense of its power-conferring aspects.

If these thesis here suggested also seems paradoxical, it is probable that the source of the paradox lies in the fact that "rule" and "command" have

23. Austin: *Jurisprudence* (1885, Campbell ed.), 92 *et seq.*; *The Province of Jurisprudence Determined* (1954, Hart ed), 18-21.

overlapping reference. It is both the case that a rule can embody a command, and that a command can be treated as a rule[24]. Thus we can answer an objector who considers that the postulation of law as a rule-structure explains too much, and explains out of existence the paradigm of Austinian analysis, the criminal statute, for it is not contended that rules *cannot* command and *a fortiori* oblige; it is merely contended that they *need* not. To put the matter briefly, rules do not form a sub-class of commands, but are a separate class of the same conceptual level, albeit with overlapping reference.

Hart, by acute analysis, has noted the "internal" aspect of rules[25]. This is evidence for the possibility of an analysis founded on the point of view of the commanded, rather than the commanders. It is also a symptom of the importance of acceptance as a feature of any analysis of the concept of "law". But Hart confused this "internal" aspect with the question of being under an obligation[26]. The secondary rules, as Hart recognizes[27], equally share the internal aspect. Yet these rules, he himself contrasts with the "rules of obligation"[28]. The acceptance of a rule-structure by a subject has certain implications, which will be dealt with a greater length below. It is these implications which constitute the internal aspect of rules—and not merely rules of law, but of all rules. A full examination of the concept of "rule", unfortunately is neither within the purpose or scope of the present article. There are, however, certain conclusions, which have been drawn concerning the concept during the course of other studies, but which we must merely postulate here.

As a preliminary, it must be stated that rules form a structure. A rule cannot exist on its own, unless that rule can completely achieve a given purpose without additions; and then it completely changes its character and forms a limiting case. For certain purposes, it is possible to consider that a principle exemplifies such a limiting case. But because we must speak in terms of achieving a purpose, we are led to see that a rule-structure has a purpose, that to talk of purpose in connection with rules is not conceptually inappropriate. Thirdly, rules do not necessarily lay one under an obligation; rules are followed or operate. But the following of a rule requires of a subject the acceptance of the structure of which it forms part; the rule-structure is accepted by those who treat the statements constituting it as rules and is accepted as a whole. Partial acceptance is not acceptance of that rule-structure, but is acceptance of a different rule-structure, so that partial acceptance is, in a sense, impossible. Finally, acceptance has certain implications, that is, certain things flow from acceptance. It is these implications which are of importance to the theses of this article.

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24. This feature of "rules" and "commands" is derived from the possibility of overlapping reference. Certain statements may be members of the class "rules" and the class "commands". By "embodying a command" we mean that a rule may direct that a certain action *must* be carried out by the accepting subjects and may (but need not *necessarily*) punish failure to act accordingly by a sanction, or reward its performance by some benefit or both. On the other hand, commands may be "treated as rules" by generalizing from them and by treating them as an accepted basis for future action.

25. *The Concept of Law* (1961), 55-57.

26. *Id.*, 83, 86.

27. *Id.*, 113.

28. *Id.*, 78, 79.

Because the phrase "implications of acceptance" has such a central position in this article, it is important to set out clearly what is being claimed on its behalf. Accepting that law, morals and the rules of custom and social associations, such as games, all constitute species of the genus "rule-structure", we must examine the component words in the phrase to justify giving it this name, rather than some other, for the name we choose presses us to view the problem in a certain frame of reference and thus may predetermine our conclusions. The word "acceptance" rather than "adoption" is used, because "adoption" smacks too much of conscious choice. A rule-structure is usually passively accepted, rather than consciously adopted—especially in the case of law. "Acceptance" is also of importance because, unless a rule-structure is accepted, it is not operative—in Kelsen's term, it is not "efficacious". It still has implications, but these implications are inoperative—that is, it would still be possible to derive from such a rule-structure the implications which it would have for the accepting subjects, if any such there were. It is possible from the varying combinations of these implications to classify by Wittgenstein's "family resemblance" method the type of rule-structure, for example, either a game, a moral system, and so on. But we use the phrase "implications of acceptance" because the implications only have relevance to a subject of a rule-structure, if he *is* a subject and does accept the rule-structure. The implications we now deal with are implied by the rule-structure itself, however, not by the acceptance; that is, the implications would vary with variations in the form of the rule-structure, not with variations of acceptance.

There are implications which are closely connected with and dependent merely on the fact of acceptance. It is an argument of this article that if X accepts a rule-structure, then it implies that he will obey or follow the rules constituting it, and this is independent of the *form* of the rule-structure. Whether *this* implication can vary with a variation in the form of acceptance is difficult to determine, because it is difficult to know what would count as such a variation. This article would not count these variations in acceptance which would normally spring to mind, namely, partial or conditional acceptance, as variations in the form of acceptance, but rather the total or unconditional acceptance *of a different rule-structure.* The rule-structure partially or conditionally accepted is modified by the conditions of acceptance and has, for example, different rules of recognition, adjudication and change. This is sufficient to make it a different rule-structure, and, indeed, possibly to change its character, for example, from a legal to a moral rule-structure. For this reason, if a rule-structure is accepted, it must be accepted as a whole, for acceptance of a part *either* implies acceptance of other parts derived in the same way, supposing this derivation to be valid by the procedures laid down in the rule-structure itself, *or* amounts to the acceptance of a different rule-structure.

But we have implications arising at different levels, each of which we must distinguish. An example of implications of less generality, but still at a broad level, are those stated by Dr. Ilmar Tammelo[29] which have been formally

29. "Law, Logic and Human Communication", (1964) *Archiv Für Rechts und Sozialphilosophie*, 331, at 353 *et seq.*

proved by use of deontic logic by Ronald Klinger[30]. The implications Tammelo found are as follows:

1. "X is an obligatory action for Y" and "X is an obligatory omission for Y" cannot both be tenable, but either or both of them can be non-tenable.
2. "X is an allowable action for Y" and "X is an allowable omission for Y" can both be tenable or either of them can be non-tenable whereas the other is tenable but they cannot both be non-tenable.
3. "X is obligatory action for Y" and "X is an allowable action for Y" can both be tenable, can both be non-tenable and can be such that the former is non-tenable and the latter is tenable, but cannot be such that the former is tenable and the latter non-tenable. The same can be stated of the pairs "X is an obligatory omission for Y" and "X is an allowable omission for Y", and "X is a licensory omission for Y" and "X is an allowable omission for Y".
4. "X is a licensory action for Y" and "X is a licensory omission for Y" can both be tenable and can both be non-tenable, but they cannot be such that one is tenable and the other non-tenable. The same can be said of the pair "X is a licensory action for Y" and the conjunction of the statements "X is an allowable action for Y" and "X is an allowable omission for Y".
5. "X is an obligatory omission for Y" and "X is an allowable action for Y" cannot both be tenable and cannot both be non-tenable but can be such that one of them is tenable and the other non-tenable. The same can be said of the pair of statements "X is an obligatory action for Y" and "X is an allowable omission for Y". "Allowable" has a special meaning defined by Tammelo in the article referred to[31].

It is obvious that these implications are not confined to legal rule-structures but are common to any rule-structures containing a certain element, namely, that the statements treated as rules may be classified as either allowable (which in turn is defined in terms of either permissory or neutral) licensory or obligatory. Any rule-structure of this form would have these implications. Tammelo treats these implications as rules and, as we have seen in the case of other implications, namely, the rules of recognition, adjudication and change, they may certainly be formalized as rules. If not formalized, they may be treated as principles or guides or even suppressed premises in any operation with the rules of the structure.

The main distinction in the implications of acceptance is that between implications closely connected with acceptance and implications arising from the particular form of the rule-structure. The former we might call implications of a rule-structure considered only in the abstract and without any greater particularity. The contrast we make at this level is between the implications of acceptance of, say, a principle. We do not speak of "obeying a principle";

30. "Some Aspects of a Deontic System in the Service of Law", privately circulated by the Institute of Advanced Studies in Jurisprudence at the University of Sydney.

31. *Op. cit.*, at 355.

we speak rather of "acting on a principle". This is because in one sense[32] we can speak of a principle as a rule which achieves its purpose without the need for accompanying rules and therefore without the need for a rule-structure. It is for this reason that we claim that it forms a limiting case. Therefore, when we accept a principle, there is no implication that we have to act in accordance with other accompanying rules which are not directed to the present action; yet it is this sense of being committed to act in accordance with all the rules in the structure, which leads us to speak of obedience in connection with rules. The sentence "I was merely obeying the rules" though stylistically odd (we would rather say "I was merely following the rules"), is not totally incorrect in the same way as "I was merely obeying the principle" would be.

The term "implication"[33] conveys a sense of necessary connection which accords with the position taken here. The degree of necessity is at least that of the "minimum natural law content", which Hart postulates, and which we have already examined. By analogy we would state that the implications are no less necessary. It has been stated that this article does not make any stronger claim to necessity for the implications of acceptance, but this must not be thought to exhaust the strictness of their necessity. The area has not as yet been plotted. No formal proofs of the implications discussed below will be offered.

As we have noted, Hart possibly sought to distinguish law from morals by the degree of formalization of the rules of recognition, adjudication, and change. We would agree that one of the implications of acceptance of a rule-structure *as* a legal rule-structure would be the presence of such a formalization. It may be that Hart can distinguish a pre-legal from a legal structure by means of the degree of formalization, although such distinction must prove hazardous in the extreme, as L. J. Cohen has pointed out[34]. But in any event, it is here maintained that, even if such a test were devised, it would be merely *symptomatic* of the implication of acceptance of the rule-structure. If we are prepared to treat a rule-structure as a *legal* rule-structure then we must *inter alia*, treat some rule, either express or implied, as a rule of recognition, that is, we *must* formalize a rule of recognition. It is perfectly true to say, then, that, if we examine a rule-structure to see if it is legal or otherwise, *one* of the marks, constituting an implication of acceptance, which in conjunction with others, would allow us to decide that it was a legal rule-structure, would be the presence of a formal rule of recognition. But this observation is tempered by the consideration that it is we who must decide that an implication of our acceptance of this rule-

32. In one sense only. Principles like standards are at the same logical level as rules. But rules can embody principles and standards, although not in the same way as they embody commands. This is because principles and standards conceptually must generalize like rules but unlike commands. The relations between rules, principles and standards are very complex and have yet fully to be charted. For the purpose of this article "rules" may be thought of as a blanket term embracing all three.

33. "Implication" has been used rather than "consequence" or "what is involved in" because of the sensed connection with the recent work being done in the field of deontic logic; this, despite the use by G. H. von Wright in *Norm and Action* (1963) of the word "consequence" for a relation similar to that we are examining.

34. In his review of *Concept of Law* (see n. 8, *supra*).

structure is that we are *bound* to treat this rule formally as a rule of recognition. It would certainly follow, therefore, in the view of this article, that such formalization is *one* of the implications of a legal rule-structure which in combination distinguish it from other rule-structures. Generally speaking, the implications of particular rule-structures differ in such a way as allows us to classify them into rough groups. It is on these differences in the groupings of implications that the possibility of distinction and demarcation lies. To one of these groups we give the name "law".

Some of the distinguishing implications of a legal system are:

1. the factor which Kantorowicz called "justiciability"[35];
2. the social, rather than private, consequences of a legal act;
3. the ability to deal with all cases falling within the ambit of the structure even by the negative method of dismissing intractable ones; and, finally
4. as Hart noted, the presence of determined and specific rules of recognition, adjudication and change.

It is important to note that the last of their own power are unable to demarcate law from a number of other sophisticated rule-structures. Numerous rule-structures, such as the rules of games and certain societies, have rules of recognition, adjudication, and change. They do not have all the other implications which follow from the acceptance of a legal system and probably include other implications which acceptance of a legal system does not imply.

Let us consider in more detail the first of the distinguishing implications of acceptance, that of justiciability. Note that we do not hold that this implication is necessarily confined to the acceptance of a legal rule-structure, though Kantorowicz considered that it was. He explains this as the peculiar appropriateness in situations treated by rules of law for the presentation of argument and the giving of decisions thereon. But the matter may be enlarged. In the decisions on conflict situations in other rule-structures there is an absolute quality which is lacking in law. This is illustrated in different aspects of the treatment of conflict situations. In the first case, let us consider the reactions to a conflict resolving decision in a legal system. If one accepts the particular legal system then one must *logically* accept the decision, provided that it was made by due process and setting aside questions of appeal—and this is in despite of the fact that one may not *agree* with it. This is an implication of acceptance.

However, it is extremely odd to talk in this way of a conflict resolving decision in a moral rule-structure. There must be some concurrence by the subject affected by it in any decision given within a moral system, or else it is not moral; it is against the conscience of that subject. Either he must agree with it or else no moral decision has been reached. It is possible to envisage the appointment of a final arbiter in morals, but only on the basis of a further rule (for example, "I will accept the ruling of X, no matter what my views are") and even then it is *queer* rule which could only be justified on some basis of self-abnegation. Even though we can present argument for and against a moral judgment, it still remains the case that either one must be

35. Herman Kantorowicz: *The Definition of Law* (1958), xxiii, 76.

convinced by the contrary argument or else maintain an opposite view. This is not the case in the formulation of a legal judgment.

On the other hand in a legal system we can argue both for and against the application of a rule. We can bring forth relevant matter to show why the rule should or should not be applied or what legal value should be placed on certain admitted facts. But in competitive games, when we appoint an arbiter, his decision is final. We cannot argue against it. One does not question the umpire's decision. It occurs, of course, but it is against the spirit of the game. Note that this is not merely a contingent matter. If questioning the umpire were incorporated into the game, it would no longer be the same game; it would be different. And it would not be a different *game*.

It is possible to imagine a law-like structure in which the decision of an officer was final or was given without presentation of any preliminary argument. It is from this type of structure that we would withhold the name "law". Commonly this situation is called "palm-tree justice"; it is not called "palm-tree law". There are areas in which from time to time something like palm-tree justice appears in systems which we would call legal. Trial by battle and by ordeal both appeared in the twelfth and thirteenth centuries of Western legal systems. But both only applied after a preliminary determination of the issues and in this preliminary determination argument could be presented as to the legal value of facts.

We must, with Hart, employ the model of the family resemblance[36] to demarcate law from either morals or games, for the distinction noted between law and morals does not apply to law and games, nor does the distinction between law and games apply in the same terms to law and morals. There is, however, a sufficiently unique combination of implications of acceptance of the various types of rule-structures to enable us, as was noted earlier, to classify them in rough groups. Our argument with Hart is rather that even on his own model, he does not point to a combination of features sufficiently unique to allow us to demarcate one group of rule-structures from another with certainty.

The type of necessity which attaches to these implications is derived from features of our language. Giving the label "law" to any structure of propositions does then, finally, come down to a linguistic matter; but not by attaching the label to that which has general obedience. Whether or not a legal system enjoys general obedience is a question which arises after we have determined it to be a legal system. It is, of course, a very important question. But its importance arises in a different direction.

We label a system a "legal" one, because we see what the implications of its acceptance are. It is for this reason that we are able to call it "legal", rather than "moral" or "customary". It is for this reason that we are able to see when it is more appropriate to speak of a disciplinary committee, rather than a full court. Undoubtedly there are other factors, too, social factors, and ceremonial factors, and certain universal accordances; but these are derivations from the central implications—implications of implications, as it were. The matter is not easy to determine for, as law is a very conscious means of social control, we are seldom put in the position of examining a

36. See *supra*, p. 27.

pre-existing rule-structure to determine if it constitutes law[37]. In consciously creating a rule-structure as law, we must build in many of the implications here cited, for example justiciability, social consequences, the treatment of all cases falling within the ambit of the rule-structure and the formalization of rules of recognition, adjudication and change. But an example which may be cited to show the use of implications is the distinction which it allows us to make between legal and purely administrative acts. As we commonly speak of administrative law the area is critical for the making of a distinction. Pure administration works on policy or principle, rather than as a rule-structure. The essence of an administrative action is the implementation of a policy and such action must achieve a specific goal. In this an analogy may be drawn with acting in accordance with a principle. We have noted that the implication of obedience is not applicable to the acceptance of a principle. It is not applicable not by reason of any conceptual difference between the two cases, but because "principle", in fact, forms the limiting case of a rule-structure consisting of one rule. Rule-structures not only give directives to cover sets of facts (this alone would not distinguish rules from principles for the same sort of judgment is required to decide that these facts fall within the ambit of the rule as to decide that the principle applies), they also construct a conceptual framework which gives determinate and limited meanings and values to the facts to which the rules are to be applied, and which directs that certain rules are applicable rather than others. As we have seen we treat a statement enjoining certain action as a rule by our determination to act in a similar way under similar circumstances and this is also an implication of acceptance; there is an internally predictive aspect of rules which governs the acceptor of a rule-structure. On the other hand, purely administrative decisions are designed from moment to moment on the basis of being best suited to achieve the chosen policy and without regard to what may have been done before as in any sense controlling or confirming them. We can distinguish administration from law by the presence or absence in the acceptor of policy or rule-structure of his determination to use the rule as a guide to his present action as an internal prediction or forecast of his actions in the instant case. If there is no suggestion that a rule will cause him to act again as he has acted in the past in similar circumstances, that is, if he does not treat his past actions as constituting a rule either to be acted upon or specifically excepted, then we may call the act administrative. If, however, when implementing administrative policy, an official has regard to past decisions and considers that his action in the present case is determined or guided by past decisions, then administrative law is being applied. From the application of the generalization principle and recognition thereof as an implication of acceptance, we can determine that the administrator is treating a series of past decisions as a rule-structure and is therefore applying administrative law[38].

Alternatively consider, within the ambit of legal rule-structures, the difference between the common law and civil law systems. Roscoe Pound

37. *Cf.* the comments of Julius Stone: "Meaning and the Rôle of Definition of Law", (1963) *Archiv Für Rechts und Sozialphilosophie,* 3, especially at 31.

38. An interesting parallel to these remarks will be found in K. N. Llewellyn's discussion of arbitrariness in appellate decisions in *The Common Law Tradition—Deciding Appeals* (1960), 217-219.

has formulated the difference as being one between the formulation under common law of supposedly minute directions for instant cases (albeit, by the power of *stare decisis* capable of being expanded into rules), and the formulation in civil law of broad principles which are then developed analytically to meet the peculiar facts of the case under consideration. Leaving aside the question of categorization, which is common to both systems, we examine the implications arising in the actual application of the relevant rule. The procedure derived from the bases of the common-law structure is that, if the facts of the instant case are sufficiently similar to the precedent case, then the past decision applies; if they are not, then the past decision is not applicable. Therefore, the procedure is directed to an examination and evaluation of the facts, to show which facts are similar and which different and to a demonstration of the relative importance or otherwise of these similar and dissimilar facts. The implication of the bases of the common law structure illustrated in the procedure adopted is that, once categorization has taken place, the determination is *merely* a factual one; that once the relevance of the facts has been determined, the decision follows as of course. That this, *in fact,* is an oversimplification has been convincingly demonstrated by many writers, of whom we may instance K. N. Llewellyn. It is still an implication which has ruled common law thinking for a considerable period.

On the other hand we have noted that a principle does not involve an accompanying rule-structure; it may be looked at as a single rule which completely achieves a purpose. Assuming at the point of application, that the rule is treated as a principle, we do not have before us a fixed set of calipers which can either gauge the facts or not. Rather, we are able to propose a course of action in respect of these facts, which achieves the purpose embodied in the rules. But the achievement of a purpose does not necessarily have reference to past states of affairs. Although giving a guide to possible means of achieving a purpose, it does not bind us, and changing times and conditions alter the means to be adopted. The civilian lawyer, having categorized his facts, wishes to determine the particular form of the rule which would best express the purpose the rule embodies when applied to the instant facts; he searches for the fullest *expression* of the purpose of the rule, granted the instant facts. The examination is therefore not so much directed to the facts as to an examination of the bases and purposes of the law. The result of the treatment, *at this stage,* of the rules as *principles* is the absence of any absolute reliance on past decisions, that is, an absence of *stare decisis.* This is an accepted feature of civilian law, though again, in light of the changes time brings to the purposes said to be embodied in the rules, an oversimplification.

F: CONCLUSIONS

These are the products of seeing law as a rule-structure, which is capable of acceptance, which acceptance, in turn, has certain implications, one of which is that the acceptor should obey the rules making up the structure. The necessity of the implications is sufficient to ground the proposition that law as an accepted rule-structure conceptually requires obedience. But showing that law conceptually requires obedience is only important if we can show that this is manifested in some practical outcome. We have criti-

cised Austin's theory on the ground that lawyers find that his analysis does not include all that they mean by "law". One of the shortcomings of the theory is that lawyers want some conclusions about behaviour to issue from any discussion of what they mean by law, and this matter Austin divorces from his analysis of positive law. We contend that the fact that law conceptually requires obedience in the manner which we have demonstrated gives a reason to each accepting subject of an actual legal system for obeying the law. If we cannot show this, there is no reason why obedience should not merely be included in our concept of law by its terms of definition, as obedience was included by Austin. A test of the validity of our demonstration, therefore, is that it provides a reason for obeying the law. Once again, this reason will be found in logical consistency and not in any sociological or moral justification.

In order to clarify the issue it is important to examine what the phrase "obey the law" means. We do not often use it and when we do so the word "law" means the whole body of the rule-structure rather than an individual rule. Thus we might very well say: "I was only obeying the law", whereas it would be unusual to say: "I was merely obeying Section 102". In either case the use has justifactory overtones. It would be used when we are trying to explain acts which are contrary, in some way, to expectation. Other more usual usages might be: "The law requires me to . . . " or: "I am required by law . . . " For individual rules of law it is more usual to say that one "complied with" or "observed" a particular section, although one can say: "I am required by the terms of section X to . . . "

There is one usage in which we employ "obey". We are sometimes guilty of "failing to obey the lawful instructions of a police officer". Here, however, the authorized command model is well to the forefront. It appears, therefore, that in legal language itself "obey" is not used often and, on those occasions on which it is used, it has a more general tone. Hart, indeed, does not think in terms of "obey" but rather in terms of "being under an obligation to . . . " "Obey" would be too external a means of specification of a situation to allow it effectively to illuminate what happens in law talk. Nonetheless, it is submitted that talk in terms of obedience has a use in virtue of its long acceptance in our language concerning the law[39]. Notwithstanding this long acceptance, we are not absolved from determining under what circumstances we are prepared to apply the phrase. What would count as obeying the law? It might better be specified by what it is not. That is, we are better able

39. This is in contradistinction to Hart who specifically states (*The Concept of Law* (1961), 109 *et seq.*) that: "In no sense of the word 'obey' are legislators obeying rules, when, in enacting laws, they conform to the rules conferring their legislative powers, except of course when the rules conferring such powers are reinforced by rules imposing a duty to follow them". With this we must disagree. Although we grant it would be stylistically odd to a degree which would signify some conceptual mistake to say that "the legislators *disobeyed* the procedures of the House", we do not grant the same about such phrases as "the Hon. Member must obey [as well as "conform to", or "observe"] the rules of debate and finish speaking", or, "the House adjourned in obedience to the procedure laid down on the death of a member". It is granted, however, that we speak of "obeying the law" rather than "obeying law", although "in obedience to law" might be a possible substitution for " I am required by law". As against Hart's position we would note, however, that there is no such tradition in regard to "being put under an obligation by the law".

to say what is not obeying the law. We would be reduced on this view to saying that obeying the law is acting in a manner or following a course of behaviour which is not contrary to the law. The fact that "obeying the law" can only be specified negatively is very curious.

Such a view concentrates too much on the model of prohibition and in doing so shares the short-comings of a command theory. We can apply the law in circumstances in which to speak of obedience defined in purely negative terms is inappropriate. Entering a contract is not, on this view, obeying the law. It is not obeying the law because it is creative of new legal values. New legal facts are created—or, better, facts are given a legal value. To accommodate law-creative processes within the application of a model based on a negative definition of obedience it is necessary to interpret the behaviour of others in terms of non-interference, insistence on performance and so on. But this shifts focus from where it should lie—on the contractor himself. We must extend the model further to cover a positive view of obedience and say that assigning a legal value to a fact—by a specified process—is "obeying the law". This is consistent with the view here propounded, for "obeying the law" is merely a case of following a rule.

Obeying the law is in fact indistinguishable *externally* from generally following a rule[40]. The apprehended difference between rule-structures lies, it has been argued, in our appreciation of the different implications which each rule-structure involves. Where a man consistently follows the guidance of legal rules or, better, does not behave in a manner contrary thereto, we say he is obeying the law, even though his behaviour may also be consistent with following the rules of morality or social custom. It is possible to make the finer distinction by means of the different implications which the man and we apprehend as arising from his accepting the rule-structure of law. These become apparent from the later reactions and valuations the man and we experience and make of subsequent events in the total situation. We have then the following elements:

1. A structure of specified behaviour;
2. Implications of acceptance of that structure;
3. Something which counts as not behaving in the specified way;
4. A means of classifying or evaluating the subject's behaviour by reference to the specified behaviour and, in cases of behaviour common to different rule structures, by reference to the implications of acceptance;
5. A judgment that the behaviour is not of the type specified in 3.

It is interesting to note that in common law in the framing of indictments and writs, we employ a form of the above schema. We specify what the man actually did, not what he ought to have done, that is, we say that he did an act contrary to section X; not he failed to obey section X, in that he did not do another act.

Generally speaking, therefore, "obeying the law" is merely one way of "following a rule". But "following a rule" is only possible where we have already accepted, have already made a personal commitment to, a rule-structure

40. *The Concept of Law* (1961), 87.

as a whole. The links of the chain follow each from the other and commence with the acceptance of, the personal commitment to, a rule-structure. We may consider it possible to pick and choose among the rules constituting the structure and say: "This statement I will treat as a rule, and this one I will not". But in treating individual statements, which are part of the rule-structure, as rules and ignoring the rest, we are dealing with a different rule-structure, and, more importantly, one which differs from the rest of the community. It is therefore no longer a generally accepted structure with social consequences, but a private thing. This contradicts the implication which flows from the acceptance of a rule-structure, as a *legal* rule-structure, namely, that it has social consequences; on our analysis such a private structure can no longer be called "law". Singer, in a critique of *The Concept of Law*[41], postulates the right of every citizen to pass laws (which are, of course, inoperative). But his assertion is deliberately provocative, for the act of a private citizen, no matter what its form, cannot possibly constitute "law", unless we are considering a revolutionary act (which has been adequately covered in the work of both Kelsen and Hart). The acceptance of a rule-structure logically implies the acceptance of the existence of rules. The treatment of a statement as a rule, in turn, implies following the rule, operating with the rule, acting in accordance with the rule, obeying the rule. This is of what "treating a statement as a rule" consists. Acceptance —what we may call "general obedience"—as a fact does therefore lead to obedience; it is the first link in the chain which leads to obedience. The *reason* for obedience lies in what it is to call a statement a "rule".

This point cannot be too strongly emphasised. The allegiance paid to a system and therefore to its rules flows from many things. The acceptance of a rule-structure by its subjects is the result of the combination of numerous factors, all of which may operate as reasons for acceptance. But they are not *reasons* for obedience. Obedience does not flow from many things; it flows from the concept of a rule as a universalization, applying to all like cases.

Unfortunately, however, there is a persistent confusion, for people, in discussing what they consider are the reasons for *obedience* to the law, in fact discuss those matters which are appropriate to a discussion of the question: "Why should *this* legal rule-structure be accepted?" This leads to two avenues of error. If one considers the latter question, it is patent that it must be confined to a particular legal system, or at least to a particular form of legal system. But often arguments are presented and counter-arguments offered, which do not particularise the form of legal system. For this reason the arguments never fully encounter one another. Secondly, questions on acceptance are bound up in either matters of fact, or matters of morality, but not in conceptual questions concerning the use of the word "law". But, because of the confusion we have noted, it is assumed that an answer to the question: "What (conceptually understood) requires us to obey the law?", has a factual or moral answer. If questioner and answerer were both dealing with the matter of acceptance, this confusion would be of no moment. Unfortunately, the questioner often enough has a dim apprehension of the conceptual links between "law" and "obedience", which the answerer fails to see. The answer given in moral or factual terms, therefore, leaves the questioner dissatisfied and uneasy. Again argumentation ensues, but the opponents never join issue.

41. See n. 8, *supra*.

If we see that the reasons we offer to justify acceptance deal with considerations which are different from the reasons for obedience, we can see why Hart's discussion of "general obedience" is unsatisfactory. We do not call law, "law", because of a general obedience to it, even though general obedience, as an external sign of acceptance, is wrapped up in our considering this particular set of statements to be rules, and, therefore, at one remove, laws. This is true even though, without acceptance, we could not talk of "rule" or "law" as a fact. The proof of this is that we can talk of legal systems which are not, and never were, obeyed—and this not merely because we can imagine general obedience to such a system. Our reasons for calling a system or structure of statements "law" lie much deeper than that. We are able to apply the concept "law" to such a structure of statements, because we are able to see such a structure in the context of the implications of its acceptance.

Because of the confusion between these sorts of reasons, the question of why we obey the law is crucial for both Kelsen, who is representative of a developed form of the command theory, and Hart. Even though Kelsen sees that obedience is connected with recognition of a statement as a command[42], thinking in terms of a command diverts his attention from the rôle of law as a guide to conduct, by means of which its subjects can plan, to law as a series of orders given to its subjects on individual, though recurring, occasions. This context presents the problem of why these orders are obeyed in terms of coercion. Obedience is, therefore, explained by the effect of sanctions. But sanctions are not conceptually required by law. We are unable to argue and support this claim at length but merely point to the fact that such a conceptual requirement is causing a growing number of writers in the field of jurisprudence discomfort. The problem of obedience at this stage, therefore, becomes crucial to the command theory. Hart, by interpreting law in terms of being put under an obligation, also reintroduces the notion of command. He is, however, conscious of the contingent quality of coercion, which he treats in his discussion of law and morality in these terms:

> " . . . and without a minimum of co-operation *given voluntarily* by those who find it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible"[43].

He endeavours to give reasons for obedience to law by its subjects based on its minimum natural law content, but whether the reasons he offers are moral, sociological or conceptual is not made clear. Both Kelsen's and Hart's endeavours fail because of the intrusion of coercion as a factor leading to obedience. But coercion at this level is a matter which concerns *acceptance* of the system. We have already said that obedience is one of the implications of acceptance—meaning by this that a person who accepts a rule-structure is logically bound to obey the rules constituting it. But this emphasis on the commanded—the acceptors—rather than the commanders presents a point of view from which the problem of why we obey the law *no longer seems crucial.*

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42. Kelsen, when speaking of "obey" and "disobey", points out of that under his system strictly speaking these words only have application to the officials of the system and not to the subjects. Therefore, conformity by the subjects is a factual question directed purely to the efficacy of the system.

43. *The Concept of Law* (1961), 189 (italics added).

Although always important enough to be asked, its importance lies in the moral or sociological justification we may have for behaving in accordance with a rule which calls for such behaviour—in other words, for accepting[44] a system which incorporates such a rule. This questioning may lead to disobedience on conscientious grounds, or pressure for change in the law. But the answer to the question cannot lie in the field of the logic of our talk about law, once law is viewed as a series of statements which must be, or (passively) are, accepted as a rule-structure with specific implications of acceptance[45]. If the person who asks the question: "Why do we obey the law?", requires that the answer be confined to talk about how lawyers use the word "law" and what it means, then the answer becomes patently obvious. As we have shown, by use of the analysis urged here we are able to separate two sorts of reasons, one offered for obedience, and the other for acceptance, which are often hopelessly and dangerously confused, by showing that the former is no longer problematical, but is an implication of accepting a rule-structure as such. In case one is tempted to think that our explanation explains too much and that obedience demands (conceptually) a command, it should be remembered that one can obey the directions on a label. To say, with consistency, "I take this statement to be a rule" means, at the very least, that it must be *treated* as a rule. In treating legal propositions as rules, we are obeying[46] the law.

We have demonstrated practically that our analysis has value in separating two considerations concerning law and obedience. We offer this as evidence of its validity. We do not, however, suggest that this would exhaust its explanatory power, nor, as a result, its value. We believe that greater concentration on what we mean when we talk of rules will only demonstrate the validity of Hart's basic claim that in rules (though not necessarily in only two types of rule) is found the key to jurisprudence.

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44. "Acceptance" has a double meaning which is deliberately used. It means "accepting as" a rule. This reflects back to the matters raised in n. 14, *supra*. But this does not exhaust its meaning. It also means "accepting"—as a passive equivalent to "adopting".

45. Hart, in a perceptive passage (*The Concept of Law* (1961), 197), draws attention to a danger to which adoption of the analysis offered by this article exposes us, namely, that in identifying acceptance of a rule-structure by circumstantial evidence, we may be led to hold as acceptors, and therefore bound to obey, persons who are in fact merely victims of an unjust system. We are bound, however, for practical purposes to rely on some circumstantial test to determine those who accept the system. This danger is very real, though arising at a stage which does not invalidate the analysis. We would hope by continuing to insist on the point of view of the acceptors to bear it well in mind; to use this safeguard we must be very careful to ensure that those we call "acceptors" really accept.

46. *Cf.* the review of M. G. Singer (n. 8 *supra*). Singer takes the view, similar to that of Hart but in wider terms, that it is inappropriate to speak of "disobeying" numerous types of secondary rules. We have noted that on occasions when it is inappropriate to speak of "disobeying" it may still be appropriate to speak of "obeying". We take it to be the case that there is a divergence between the usages and that "disobey" is not always an appropriate contradictory of "obey". Nevertheless, it is held that "obey" and "disobey" have *wider* application than merely in the field of commands and that "He disobeyed the committee's ruling" is still a good usage.