

Hart's Rule of Recognition, in Canada?

by Owen Minns; 2007-05-07.

Hart offers the “rule of recognition” as the bootstrapping mechanism of a legal system, the basic and mandatory device by which the validity of instantiated law may be tested within that system. All other laws in the system are subordinate to it. Hart describes the rule of recognition as an emergent concordance of practice amongst the officials within the system that need not be codified; indeed, Hart writes that, “[f]or the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other official or private persons or their advisors.”¹ The behaviour of individual law users is an expression of the *internal aspect* of the rule, a manifestation of acceptance of the rule's guidance.²

The rule of recognition is a practical tool that informs law users who accept it. Hart introduces the concept as a ward against inescapable uncertainty that would otherwise exist in a system of rules: questions and conflicts regarding the authority, scope and precedence of a society's rules. Without the availability of a rule of recognition, any conflict may have not have a determinate resolution, which would undermine the claim that there was an effective system in place. Because a rule of recognition may be complex, and any particular conflict might involve any number of vagaries, an appeal to the rule of recognition may yield an unpredictable result even while offering, *a priori*, a certainty that a legally valid resolution to the conflict may be reached.

Rules of recognition emerge as fact in the implicit consensus of at least the officials of the community, their validity presupposed by their existence. As Hart puts it, a rule of recognition “can neither be valid nor invalid but is simply accepted as appropriate for use in this way [the validation of rules as laws].”³ Without an understanding that laws are to be followed, it doesn't matter whether or not one is supreme among them. The rule of recognition is, by definition, the supreme authority on the validity of laws in the system. This central role implies unity: a situation in which it appears that there might be more than one rule of recognition is in reality a situation in which a single

rule of recognition has more than one aspect. Indeed, in our world of myriad complex social interactions, the rule of recognition will tend also to be complex, but it is always one rule and not a set of rules. For example, two sources of valid law in a legal system might be (i) the written decisions of judges and (ii) statutes duly enacted by a legislature, but this does not mean that there are two simple rules of recognition in the system, each providing a mechanism to validate the products of one source of law; rather, a more complex rule of recognition within that legal system recognises both as sources. This unity is required in order to provide a resolution for potential conflicts amongst these varied sources of law. A rule of recognition is also exhaustive, covering all possible questions and conflicts of laws within a legal system.

Hart explains that the existence of a rule of recognition within a society may be elided only from empirical observation:

“The assertion that it exists can only be an external statement of fact. For whereas a subordinate rule of a system maybe valid and in that sense 'exist' even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, official, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.”⁴

There must then be a rule of recognition in Canada, for it is plain from the conduct of Canadian officialdom that there are laws in Canada that are recognised as valid. From coast to coast to coast, people *do* talk about laws and legal rights, they *actually* (commonly) avoid behaving in officially proscribed manners, lawyers *do* earn a living through professional practice and there *are* established judicial institutions. The very creation of Canada in its current physical and political form was a long series of legal acts. These facts are expressions of an internal acceptance by the people using rules in these ways that Canada does in fact have a legal system of primary and secondary rules. By Hart's argument, because a rule of recognition a *necessary* firmament on which each legal system is built, there must be a Canadian rule of recognition that we may attempt to describe.

1 H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Oxford University Press, 1994) at 101.

2 *Ibid.* at 102.

3 *Ibid.* at 109.

4 *Ibid.* at 110.

Just as we may examine 'law' as a *concept* by studying its projections into *language* and its displacement in the deep and murky waters of *fact* emerging from the complex enterprise of laws, we may examine Canada's rule of recognition by projection into language and by its displacement in legal fact. Where should we look to find evidence to help us understand the Canadian rule of reception? Hart offers a starting point: "[i]n a modern legal system where there are a variety of 'sources' of law, the rule of recognition is ... complex: the criteria for identifying the law are multiple and commonly include a written constitution, enactment by legislature and judicial precedents."⁵

First, perhaps the most readily apprehended aspect of Canada's rule of recognition is the black letter law of the *written constitution* which states its own primacy amongst the laws of Canada and enumerates a set of other written aspects of the Constitution. This latter incorporation elevates a set of other previously-ordinary statutes, helping to establish the precedence of laws (which indeed we have seen is one of the functions of the rule of recognition). The written constitution also includes the Charter of Rights and Freedoms, a set of rules and principles that similarly enjoy a precedence ahead of ordinary law in Canada. The Charter establishes the supremacy of certain civil and political rights (and not others) for Canadians against government imposition, setting specific constraints on the creation of ordinary laws, establishing some further order of precedence among laws.

Second, the duly enacted *bills of federal and provincial legislatures* are recognised as law in Canada. Laws must be made following certain procedures that are consistent with established conventions (e.g., the rules of order in the House of Commons, the receipt of royal assent), and are then considered valid. Recalling that the Charter imposes limitations, these laws must be consistent with the provisions of the Charter, or where this test is failed, courts may (and have in some cases) ruled that putative laws are 'of no force or effect'.

Third, the rule of recognition in Canada grants *judicial decisions* validity as law. Where the *stare decisis* of the common law is consistent with the dictates of the Constitution, and where the authority of

the legislatures has not already been expressly engaged, the pronouncements of the courts are recognised as law in Canada. Even where the legislatures have acted, the rule of recognition allows that there are conditions under which judicial decisions may take precedence over statute; e.g., through *judicial interpretation* of statute and precedent, courts may modify or nullify statute and establish wholly new precedents.

Fourthly, there are also an indeterminate number of *unwritten constitutional principles* that are understood by officials and citizens alike to be a part of Canada's rule of recognition; the indeterminacy of this set is a part of the law's *open texture*. For example the 'rule of law' is one principle that has been invoked by the Supreme Court of Canada. In the case of *Roncarelli v. Duplessis*⁶, the Court held that the authority of the government of Quebec to create rules was constrained by a requirement to act in good faith; i.e., the legitimacy of the rules created by the government was successfully challenged by an appeal to principle. Such principles that have been exercised to date in Canada include (i) the rule of law, (ii) democracy, (iii) Constitutional supremacy, (iv) Parliamentary supremacy (that the legislature is the presumed owner of collective authority, based on Canada's reception of this principle from its colonial parent), (v) federalism and (vi) respect for minorities.

These four elements of Canada's rule of recognition do not comprise a comprehensive definition of its nature⁷, but they illustrate much of the character of the rule. That it is possible to enumerate these elements and to cite many examples of their use in Canadian courts and civil life is evidence that there is a rule of recognition in Canada.

⁵ *Ibid.* at 101.

⁶ [1959] S.C.R. 121, 16 D.L.R. (2d) 689.

⁷ For example, the status of First Nations within Canada's legal system, the role of Canada's international obligations and the role of civil law (especially in Québec) are omitted.