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THE RULE OF RECOGNITION AND THE WRITTEN CONSTITUTION

> "A law, to have any authority, must be derived from a legislature, which has right. And whence do all legislatures derive their right but from long custom and established practice?"[1]

In this article the author deals with two concepts and with their relationship to each other. These are the Rule of Recognition and the written Constitution. One of the key concepts of Hart's jurisprudence is the idea that all legal rules are interconnected in a unified whole a system of primary and secondary norms. The status of one rule as a part of that system is determined by a special category of social rules, called Rules of Recognition. The rule of recognition is the master rule that exists by virtue of the fact of social acceptance and which establishes criteria of validity for other legal rules. In the first part of this article, some of the essential properties of the rule of recognition as a theoretical concept are listed. The second part of the article outlines an account of the most important features of the concept of a written Constitution. Among these the most significant are supremacy, judicial protection, durability and rigidity. Finally the author offers a summary analysis of possible and necessary relations between the two concepts. Some concluding remarks refer to the problems concerning the validity of laws, the legitimacy and authority of a Constitution and to the overarching explanatory power of theoretical concepts.

Key words: *Rule of recognition (RR). Constitution. Legal Validity. Normativity.*

[1] D. Hume, *The History of England*, vol V, Liberty Fund, Indianapolis 1983, 194.

1. INTRODUCTION

One of the key insights of Hart's jurisprudence is the idea that legal systems are not only comprised of rules, but also grounded on them. Instead of Bentham's and Austin`s idea of an unlimited Sovereign who makes all of the legal rules, Hart proposed a thesis that the rules actually make the Sovereign.[2] Consistent with this theoretical U-turn, he also proposed a concept he described as the Rule of Recognition (RR). RR is a special sort of social rule which determines the status of every rule as a part of a particular legal system. Consequently, the RR is the master rule that exists by virtue of the fact of social acceptance, and it establishes criteria of validity for all other legal rules. In the first part of this article, some of the essential properties of the RR as a theoretical concept are listed, specifically those most relevant to the topic.

In a system with a written Constitution, the RR as a criterion of law's validity commonly and at least in part provides that norms which are duly enacted according to the constitutional procedure are valid laws. Therefore, it is clear that the two concepts while closely related are also distinct. The second part of this article outlines the most important features of the concept of a written Constitution. Among them, the most striking are supremacy, judicial protection, durability and rigidity.

The third part offers a summary analysis of possible and necessary relations between the two concepts. Some provisional theses are discussed concerning the problem of the validity of laws, the importance and contribution of a written Constitution to the fulfillment of the function of the RR, and the legitimacy and authority of a Constitution.

Finally, the last part is some sort of a reminder about the value of theoretical concepts in improving our understanding of practical legal concepts.

2. WHAT IS THE RULE OF RECOGNITION?

Ever since Hart and his followers theorized about the RR, it has been under the attentive scrutiny of many critics, although there is no uncontroversial or widely accepted claim about the RR. Among the various challenges critics have asked if it is a rule at all? If it is, what kind of a rule is it – conventional or social? If it is a conventional rule, what kind of convention? Is it duty-imposing or power-conferring? Is there one, a few or maybe more than few RRs? Whose practice is regulated by the RR? And there are more. So, what actually is the Rule of Recognition?

[2] S. Schapiro, "What is the Rule of Recogniton (and does it exist?)", 2009, *http://papers.ssrn.com/abstract#1304645*.

Instead of answering directly, we are going to list and describe some of the distinctive features of the RR, but only those which are important for the subject of the article. It will be neither a comprehensive review of the concept, nor of Hart's original thesis.[3] It is clear that although these distinctive features of RR are well defended and grounded, they are not uncontroversial nor immune to scrutiny.

2.1. Definition of the RR

However, first something must be said which may sound like a provisional definition of the RR. The rule of recognition may be described most simply as a *social rule*[4] which is used to identify rules that are valid as law in a legal system. The RR is on the apex of a legal system's rules: all other rules ultimately owe their validity, i.e. their *legal* status to the RR. On the other hand, the RR is not valid at all as the ultimate or supreme rule of the system.[5] For its existence is a matter of fact: there are two necessary conditions, namely, legal officials must *accept* and *follow* this rule. But what does "accepting and following" the RR actually mean? First, officials *follow* the RR when there exists a common practice of identifying certain rules as a valid legal rules. And second, officials *accept* the RR when they demonstrate a normative attitude towards that common practice, or, as Hart says, the "internal point of view"[6] with regard to what they are practicing, when applying the RR as the ultimate criterion of validity, and criticize deviations from it by using normative terminology".[7]

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[3] Hart fully elaborated the concept of RR in ch 6. of *The Concept of Law* (H. L. A. Hart, *The Concept of Law*, Second Edition with Postscript, Raz & Bulloch eds., Oxford 1994[2], 97 120).

[4] Social rule can be accepted for various reasons, which must not be identical for all the members of a social group. It is only important that there exists convergent social behavior and spreaded acceptance of the rule from whatever reasons, by most members of the group. On the other side, social rules are conventional when the general conformity of the members of a group to them is part of the reasons which every member of the group has for acceptance (H. L. A. Hart, 255).

[5] Because of that, the RR is of utmost importance to the legal world. As Hart says, it "deserves, if anything does, to be called the foundations of legal system" (H. L. A. Hart, 100). Hart claims that a legal system exists if (1) officials accept an ultimate rule of recognition, and if (2) citizens by and large obey the rules it validates (H. L. A. Hart, 112 114).

[6] The internal point with regard to a certain constant pattern of behavior makes this pattern not only regular, but regulated as well (by the accepted rule). The internal point makes a difference between two widespread social practices: social habit and social normative practice.

[7] But it should be remembered that on Hart's opinion, accepting does not mean (morally) *approving* (H. L. A. Hart, 55 7; 83 91; 102 3)

Now, we will return to the essential properties of the rule of recognition as a theoretical concept to highlight some of the Rule's distinctive and striking characteristics. This may be done by posing two questions; first, whose behavior is regulated by the RR and second, what does the RR represent for those whose behavior it regulates? Is it only a reason for action, or a duty-imposing social (or conventional) rule? The second question implies a preceding one namely, what "sort" of social behavior is the object of the RR?

2.2. Whose practice is crucial for existence of the RR?

As we have seen, there is no RR without it being practised. After all, it is the existence condition of every social (conventional) rule. But who constitute the group which practices the RR? Who are the members of the so-called recognitional group? Usually it is said that we identify the RR by observing the practice of legal officials. But, who are *the* officials? Hart claimed that the rule of recognition is "*a customary judicial rule*",[8] in other words, that reference to actual practice actually implies the "way in which *courts* identify what is to count as law...".[9] Thus, if doubts arise as to what is the RR of a given system, the answer lies in "the way in which courts identify what is to count as law...".[10]

But as Kenneth Himma (et al.)[11] points out, legal officials who are observed are not only judges, they include others who play a part in the functioning of a state's machinery. This is because the extent of a court's authority is limited, for example, by the acquiescence of those officials who have authority to enforce the law. If officials decline to support and enforce the court's decisions, for example, with the use of state-sanctioned physical force, then the court's decisions lack the normative consequences that law, as a conceptual matter, must have *if it is to count as law* (at least, in the positivist's sense of the word).[12]

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[8] H. L. A. Hart, 256.

[9] H. L. A. Hart, 198.

[10] H. L. A. Hart, 108. In fact, Hart's answer to the question, "what is recogni tional community?" is not such a straightforward one. Considering all secondary rules it seems that he took all the officials to be the relevant group (Hart, 117). But when he talks about the RR then his answer is less determinate.

[11] See M. Adler, "Popular Constitutionalism and the Rule of Recognition: whose Practices Ground U.S. Law?"*, Northwestern University Law Review* 100, 2/2006, 719 805; L. Alexander, F. Schauer, "Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance", 2008, *http://ssrn.com/abstract 1235202*; S. Carey, "What is the Rule of Recognition in the United States?", *University of Pennsyl vania Law Review* 157/2009, 1161 1197.

[12] K. E. Himma, "Understanding the Relationship between the U.S. Constitution and the Conventional Rule of Recognition", 2009, *http://ssrn.com/abstract 1269748.*

Also, Hart claims that when the suggested rule possesses some features specified by the RR, this rule becomes a rule of the group which must be reinforced within the group *by the social pressure it exerts*.[13] If as Waldron suggests,[14] we replace these emphasized words with *organized (institutionalized) social pressure* (what we believe Hart had in mind) then what is the meaning of the RR if, for instance, it points to some other rules which are never enforced by executives? Such a RR would be pointless. Actually, such a rule would not be a social rule at all. Because a necessary condition for the existence of the RR, as of any social rule, is its expression in practice, Himma is right to assert that "the existence and content of the RR depends on the joint practices of both judges and other officials".[15]

2.3. What "sort" of social behavior is the object of RR?

A further step in our attempt to determine the nature of the RR is to describe the behavior which is regulated by the RR. To answer the question about the nature and especially about the bindingness of the RR, it will be helpful to look at the structure of relevant practice. If we have a clear answer to that question, then whether the RR is social or conventional rule and if conventional what sort of convention it is, becomes less important and simply a matter of terminology.

The nature of a group whose practice demonstrates the existence of the RR has already been discussed. But what are the broad characteristics of such groups? For any such group to exist, its members must *coordinate* their actions to achieve one or more common goals. Such groups achieve coordination through reciprocal action between members, by *interaction*.[16] Coordination through interaction is the normal way of operation of any group. Interaction between A and B exists when an act of A prompts

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[13] H. L. A. Hart, 94.

[14] J. Waldron, "Who Needs Rules of Recognition?", 2009, *http://ssrn.com/abstract 1358477*.

[15] However, this statement must be qualified, because the officials do not often make one uniform, homogeneous group. For instance, sometime in the USA there are strong divisions amongst the executive and justices about what is valid law. This implies that all officials do not share one and same RR (S. Carey, 2009). As Adler convincingly explains, various groups of officials can practice various RR under one ultimate or su preme RR which is usually widely accepted, not only amongst officials, but also amongst the majority of the people (M. Adler, 767 8).

[16] This might suggests that on my opinion the RR regulates the so called shared cooperative activity (SCA). But, I am not sure about that. And this is a very intriguing problem, but the one I am not concerned with here. I only want to emphasize the coop erative nature of official practice, or that in such a practice members happen to be com mitted to the joint activity. Existence of this commitment, as Himma pointed out, induces reliance and a justified set of expectations, that can give rise to duties.

an act of B, and an act of B prompts an act of A.[17] Simple examples include Hume's two rowers having a common goal, to propel the boat[18] or Margaret Gilbert's two walkers going for a walk together.[19]Although the practice which is regulated by the RR has some idiosyncrasy[20], it is beyond doubt one common activity which demands cooperation and interaction of its members. In such activities, group members watch each others' actions, interpret them and adjust their own actions in response to the actions of others. It is clear, for instance, why one judge is likely to follow a RR which is being followed by his colleagues: he has no motive or incentive to abandon this RR because it would be obtuse to follow some "rule of recognition" which none of his fellow judges follows. Notwithstanding the other possible reasons for acceptance of the RR, there is always one explanation which is always the same: the RR is accepted and followed by other members of the group. If they do not accept it, then the rule can not exist nor can establish certain practice.

Although it is clear what kind of behavior the RR regulates and how the RR operates to influence officials' practice, it is a mistake to think of a RR only as some sort of coordination convention.[21] It is generally accepted that every such convention is characterized by the so-called "arbitrariness".

A conventional rule is arbitrary when the reasons for having such a convention are more important to the members of the group than the reasons for preferring an alternative course of action .[22] However, several authors[23] argue strongly in favor of the view that the RR as a conventional rule is not arbitrary, in Lewis's[24] sense of the word. For instance, Scott Shapiro argues that "[M]ost Americans would [not] view the United States Constitution as an arbitrary solution to a recurring collective action problem....many would believe that they had a moral obligation to heed a

[17] T. Honoré, *Making Law Bind*, Clarendon Press, Oxford 1987, 59.

[18] D. Hume, *A Treatise of Human nature*, (I, ii. 2), *http://www.gutenberg.org/files/4705/4705 h/4705 h.htm*

[19] J. Coleman, *The Practice of Principle*, Oxford University Press, Oxford 2001, 91.

[20] Certainly, officials are not as a rowers or walkers, and mutual relations between them are much more complicated.

[21] It is the concept introduced by David Lewis' famous book about conventions (D. Lewis *Convention: a Philosophical study*, Harvard University Press, Cambridge MA 1968). About coordination conventions see J. Postema, "Coordination and Convention at the Foundation of Law", *Journal of Legal Studies* 11, 1/1982, 165.

[22] A. Marmor, "Legal conventionalism", *Hart's Postscript: Essays on the Post script to The Concept of Law* (ed. J. L. Coleman), New York Oxford 2001, 204.

[23] J. Coleman, 94 5; M. Adler, 750; J. Waldron, *passim*, etc.

[24] D. Lewis, 10.

text that had been ratified by the representatives of the people of the United States, regardless of what everyone else did".[25]

Usually, the rule is not arbitrary if a preference for a particular form of the RR (one which also always solves coordination problems) is stronger than the preference for uniform conformity to any other possible RR. Also, it means that such a RR can be accepted by officials both because of some substantive personal convictions and out of their desire and need to act in coordination with other officials. So, here we approach one of the key questions about the RR: is it a so-called duty-imposing rule?

2.4. Is RR duty-imposing, after all?

First a caveat: to claim that the RR is duty-imposing does not mean that the RR can not also be power-conferring.[26] Specifically, a non-supreme RR can be such a rule, when the RR includes (as it usually does) some sort of rule of change.[27] An important example is the power of the U.S. Supreme Court's Justices to invalidate every unconstitutional law, and moreover, to permanently dissent, for instance, in some matters they consider important (Himma, 2009). Only a non-supreme RR is mentioned, because the ultimate RR must be duty-imposing. It is self-evident that if it is not, the RR does not fulfill its function, to bring certainty to a legal order. If every official has only an inclination, or a preference for one criterion of validity, if they are not bound by the rule which establishes such a criterion, then in that society there is no reliable "landmark" to determine what is and what will be and what will not be law. Consequently, one of the purposes of RR, that it provides a specific legal system with a measure of certainty – vanishes!

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[25] S. Shapiro, "Law, Plans, and Practical Reason", *Legal Theory* 8/2002, 387, 426.

[26] The fact that in a legal community there can exist several RR, arises also from the fact that often there are different subgroups of officials. For every group we can imag ine the existence of one sub rule of recognition.

[27] One legal rule can be valid if it satisfies the conditions set forth in RR. But it can be *immediately* valid under RR, and it can be validated by these immediately valid rules. For instance, constitutional rules of change are validated immediately by the RR itself, but a rule enacted in accordance with rule of change is valid under this rule. Some points must be made about the difference between the RR and rules of change, a distinc tion which is blurred for some (J. Waldron, 2009). Although there is only contingent identity of content between two sorts of rules, so long as it is possible, we must explain the difference between them. To discover this difference, we must understand not only the content but their nature and the place these rules have in a legal system. Above all, I have in mind two properties of the rule of recognition not found in the rules of changes. First is its conventionality. The RR is a conventional and not a valid legal rule. Moreover, it validates rules of change themselves. The second is that the RR is first of all a duty im posing rule, while rules of change are always power conferring rules.

However, the real issue is this: how is it possible that the existence of a particular practice (no matter how widespread), gives rise to the duty to abide by that practice?

Hart has given a simple answer: the internal, personal commitment to certain practices transform those practices into rules. Coleman has highlighted a problem with this solution, that in fact the internal point of view alone cannot do the job, namely it can not explain the duty-imposing character of the RR. It is sufficient to explain how some convergent practices become rules and as such, how they becomes a reason for action for those involved in those practices. But, not every reason for doing something in a particular way amounts to a duty. As Coleman explains, "if each of 1.000 individuals separately apply criteria of validity comprised in RR, those separate acts do not impose any duty...It is not just that different judges decide individually and separately to evaluate conduct in the light of standards that satisfy certain criteria, thereby creating reasons for themselves that they can unilaterally extinguish. Rather, they are engaged in a practice that has a certain specific, normative structure where among other things, the fact that some judges apply criteria of legality is a reason for others do so".[28] Thus, such a practice is capable of creating not only reasons for action, but duties as well. While the nature of this conventional duty is a question for ethics and not for positivisticaly orientated jurisprudence, it is important to emphasize again the *non-arbitrariness* of the RR. The non-arbitrary RR is generally justified in practice because it possesses some particular qualities which in the minds of most officials prevail over the qualities of other potential Rules of Recognition. It may promote the smooth functioning of state machinery or it might solve coordination problems amongst officials. But as for the question, why *any one specific RR* is binding, the answer is not to be found simply in these characteristics. It is suggested that at least for some officials and perhaps for most, the duty-imposing character of the RR will be based upon more substantive justification than the need to coordinate mutual actions. It is likely ultimately to be grounded in some normative principles, which means that a *moral duty* to follow the specific RR must ultimately come from somewhere external to the practice itself.[29]

EXCURSUS: HART AND KELSEN RULE OF RECOGNITION AND GRUNDNORM (SHORT COMPARISON)

Both of these views are very similar in that they both claim that there is some kind of a master norm that determines what counts as law

[28] J. Coleman, 91 2

[29] The question of the normativity of RR is of course much complicated than my brief sketch might suggest and my conclusion presented here is only provisional. But even in such undeveloped form, it can serve as a useful "device" for some further conclusions about the topics I have discussed.

in any given legal order. The disagreement is about the nature of this master norm. But in this case the disagreement appears to be insightful.

Kelsen`s well-known concept may be summarized in a few lines as follows. He says that always when we are "confronted" with valid legal norms "we presuppose a norm according to which (a) the act whose meaning is to be interpreted as "constitution" is to be regarded as establishing objectively valid norms, and (b) the individuals who establish this act as the constitutional authorities".[30] This norm – the basic norm (*Grundnorm*) of legal system is not and can not be *posited*, i.e. created by authority entitled to enact the laws by some other, higher norm, because such an authority does not exist. This norm must be *presupposed*.[31] Kelsen stresses that basic norm is not arbitrarily chosen by anyone.[32] It gives authority only to those constitutional rules which are effectively accepted and applied. Simply expressed, when we ask the question "why the specific basic norm is supposed"?, the answer is "because there is standing effectiveness of a legal system, which is grounded by this specific basic norm". So, the content of the basic norm crucially depends of that state of affair which engendered effective legal system, system which is by and large effective.[33] Even according to Kelsen's own account of the basic norm, one can see that there must be more to it than a presupposition, because the content of any such a norm is mainly determined by actual practice.[34]

What kind of lesson we can learn from this short digression about Kelsen's concept of basic norm and its reference to official legal practice? First of all, though a basic norm is in certain respect determined as a presupposition, its content always depends on practice. Although these claims threaten the purity of his theory, Kelsen could not escape from the practice of legal system, eventually from facts, notwithstanding how they are included in his picture of legal system.

But, this leads us to the second point: once we see that *this practice* is rule-governed, namely, that in applying the criteria for determining validity of the laws in their legal systems, the officials follow certain rules,

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[30] H. Kelsen, *Pure Theory of Law,* Los Angeles 1967, 46.

[31] H. Kelsen, (1967), 200; H. Kelsen, *Théorie pure du droit,* Neuchatel 1953, 37, 117.

[32] H. Kelsen, (1967), 201.

[33] H. Kelsen, (1967), 200 201; H. Kelsen, (1953), 118.

[34] Marmor points out that Kelsen's account of the basic norm violates his own antireductionis viewpoint. However, he finds this failure of Kelsen's antireductionism il luminating, because it shows that the idea of the basic norm avoids a reduction of legal validity to social facts (precisely of the kind that Hart later suggested in the form of the rules of recognition) is not viable, A. Marmor, "How Law is Like Chess", *Legal Theory* 12/2006, 349 350.

it becomes clear that there are rules of recognition along the lines suggested by Hart and not only some fictional presupposition about normativity and validity of specific legal system.

3. PROPERTIES OF WRITTEN CONSTITUTION

The reason for referring in this article only to a *written* Constitution is that usually, there is a strong connection and interdependence between the RR and this form of constitution which does not exist between the RR and unwritten constitution.[35] This reason is discussed by Raz, at least implicitly, when he points out that some central features of a written Constitution "give rise to theoretical questions that do not apply, at least not to the same degree, to other law"[36] (and it may be added of an unwritten constitution too[37]). His is precisely the kind of insight that motivates an analysis of the conceptual connections between a written Constitution and the RR.

A written Constitution is a document (or several documents) that contains canonical or codified formulation of what is usually named as a *thin* constitution[38] or *materiae constitutionis*.[39] Usually, *materiae constitutionis* encompasses rules that determine who enacts laws and how, what is the structure and general principles of government, and today in particular, general principles which establish human rights and restrain overall Government power. A written Constitution possesses some characteristics which an unwritten constitution doesn't have so the fact and nature of these characteristics must be taken into account by those who want to understand the relationship between the RR and a written Constitution. Therefore, we must look at the "central features" of A written Constitution.

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[35] Moreover, the distinction between the RR and customary, unwritten form of constitution is unclear or these two types of rules sometimes follow parallel lines, as is shown by the example of the English constitutional conventions (E. C. S. Wade, *Consti tutional Law*, Longmans, London 1960[6], 74).

[36] J. Raz, "On the Authority and Interpretation of Constitution: Some Preliminar ies", *Constitutionalism: Philosophical Foundations* (ed. L. Alexander, G. Postema), Cam bridge University Press, Cambridge 2001, 154.

[37] Because an unwritten constitution is not always customary or common law. Usually, part of it is a written law. In other words, "unwritten" does not mean litteraly unwritten, but only when written, it is in the same way as other written laws, statutes, by laws and so on.

[38] J. Raz, 153.

[39] A. Marmor, "Are Constitutions Legitimate?", *Canadian Journal of Law and Jurisprudence* 1/2007, 69.

The first characteristic of a written Constitution, and probably the most important one is its *normative supremacy*. It means that constitutional provisions prevail over ordinary legislation, i.e. the ordinary laws which conflict with these provisions are invalid. However, it does not mean, as will be reemphasised in the next section, that all laws derive their legal validity from the constitution.

Second, this supremacy must be, as it were, institutionally strengthened. Usually, this is done by entrusting the interpretation of a written constitution to the judiciary, either to specialized constitutional courts or to the regular court system. The essential point here is that there is one court that determines what the constitution means and which law is invalid due to its unconstitutionality.

Further, at least in aspiration, a written Constitution is meant to be of *long duration*. Since, every constitution sets the basic structure of legal and political system of the land, it must be stable and intended to preserve continuity in political structure and therefore, to apply well beyond the generation that created it. Owing to this aspiration, amending a constitution is a more difficult task then enacting and changing ordinary legislation. The more difficult it is to change the constitution, the more rigid the constitution is. *Rigidity* is closely tied to durability. If the constitution should be a long lasting document, than it must be relatively difficult to amend it. Also, *judicial review* and the extent of its authority regarding constitutional interpretation depend considerably on the constitution's rigidity. The more rigid the constitution is, the more lasting power of the judges is in determining its content.

As one can see, all the adduced features of written constitution are in some way interconnected. And they all, as a whole, make a concept of written Constitution important to legal practice. But also, they make the study of conceptual connections with the concept of RR interesting and fruitful.

4. CONCEPTUAL RELATIONS BETWEEN THE TWO CONCEPTS

Now these two concepts will be compared. The intention is not to offer any empirical analysis or a description of the content of the RR in some specific legal system, nor is it intended to assess the potential influence of that system's written Constitution on its RR. To compare rather than to analyze the two concepts is a conceptual not an empirical work and comparison will reveal and highlight some interesting conceptual relations.

4.1. Constitution and the RR: identity or just overlapping?

It is perhaps a trivial but sometimes forgotten fact that RR and a written Constitution cannot be identical. Conceptually, the RR can provide criteria that the criteria of validity of legal rules is their accordance with some provisions of a Constitution, and that these constitutional provisions are in some way superior legal norms. But a rule which set some constitutional rules as superior legal rules can not itself be a constitutional rule. Moreover constitutional rules, unlike the RR, are always *valid* rules.[40] As a matter of a linguistic convention, we say that a Constitution is valid (or it was valid once). As with all other valid laws, constitutional provisions are amended, changed or repealed by a well-defined procedure for constitutional revision and not by less structured or informal processes as is the case with social rules like RR. And yet, the provisions of a written Constitution more often than not reflect and describe some of the principles of the RR. A good example is the U.S. Constitution and the same process can be seen at work on other Constitutions. Article VII. (or so-called ratification clause) of the US Constitution validates the document[41] so it looks as if Article VII validates itself. However, although the Article's text is in the written Constitution, its status as the (original) rule of recognition is external to the document and "rests on its acceptance as the validating rule, not on its validation by having been ratified in accord with its terms." So the ratification clause itself *is not* the rule of recognition, but rather it *records* or *describes* the rule of recognition.[42]

Further, conceptually a Constitution and the rule which is a *supreme*, *valid* rule must not be identical.[43] The RR can refer to some other document as supreme in relation to the written Constitution, for instance the Bill of Rights.[44] Also, it means that it is not the case that *every valid legal rule* is valid on the basis of the provisions of Constitutions. This is clearly the case in the USA (and elsewhere) where the authority over other officials, carried by a decision of the Supreme Court is not immediately based on any constitutional provision, but directly on the conventional rule of recognition.[45]

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[40] And always valid immediately under the RR itself.

[41] "*The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same*".

[42] L. Alexander, F. Schauer, 2008.

[43] D. Priel, "Farewell to the Exclusive Inclusive Debate", *Oxford Journal of Legal Studies* 4/2005, 686.

[44] Although, if the constitution does not have normative supremacy, we could ask the question ...what is the good of the written constitution at all? And in that case, is there a document which we could denominate as a written constitution?

[45] It is one more advantage of Hart's idea over Kelsen's. Namely, Kelsen's basic norm confers validity to all legal norms which are members of a legal system founded on

Finally, it is acknowledged that there may be rules of a *constitutional character* which are not valid rules, rules in accordance with a RR. Thus, the conventions of the English constitution are examples of social rules. If we bear this in mind, I think we can more easily explain the concept of the conventions of the English constitution and their presumed or actual legal status.

4.2. The RR is a remedy for indeterminacy of the pre-legal order

Hart extended his argument about secondary rules, concentrating on explaining some defects of a simple or primitive order which does not contain the so-called secondary rules. Such a system has only primary rules of conduct and secondary rules are introduced to remedy these defects. The most important of these secondary rules, rules of recognition, reduce or eliminate uncertainty about rules of conduct giving us criteria for recognizing these rules and setting the conditions for their validity.

A written Constitution strengthens this important property of the RR, bringing certainty in social order and human relations. When a legal system acquires a written Constitution, which usually *is,* at least in part, an effective social rule (i.e. rule of recognition), then this "strengthens" the function of the RR – at least that part of the Constitution which, as has been said, "records" the content of *the* RR. The fact is, that when some elements of RR appear in a written form (through the Articles of the Constitution) the capacity of the RR to diminish uncertainty and indeterminacy in the legal order is almost certainly improved. It should not be forgotten that one of the functions of legal rule as authoritative verbal formulation is to rescue us from the uncertainty which different and perhaps competing ideas of Good or Justice engenders.[46]

A written Constitution has another important function, to set limits on the power of all branches and agents of government. 'Constitutionalism' gave rise to the movement for limiting the absolute power of the Ruler. In the absence of an absolute ruler, this objective of a contemporary written Constitution is likely to have been modified but the core function, to impose limits on power, is still extremely important. Even the

this very basic norm. There are no exceptions. A norm can not be validated "outside" the framework established by the Constitution, nor can any norm in the system lose validity because it does not possess some characteristic which is not specified in the basic norm, in fact in the Constitution. But as I have said, provisions of a written Constitution which are part of the RR do not necessarily validate all the rules of the legal system, nor are all valid rules necessarily in compliance with these constitutional provisions.

[46] By their formality, simplicity and determinacy, rules help us avoid the huge costs of moral and political controversy. Instead of being told "do the right thing," the rule subject is told "in circumstance C, do X," where C and X are relatively easy for rule sub jects to comprehend and ascertain, L. Alexander, F. Schauer, 2008.

courts, which have a distinct responsibility for the interpretation and "protection" of constitutionality, are limited in their decision-making. Usually, their discretion is to some extent limited by the written Constitution itself. We can see this if we look at one version of the RR in the USA, as formulated by Kenneth Himma: "Supreme Court Justices are obligated to decide the validity of duly enacted norms according to what is, as an objective matter, the morally best interpretation of the [substantive norms] of the Constitution.".[47] This means that although the Supreme Court has some discretionary powers to decide what is and what is not a valid law, its discretion is substantially constrained by the constitutional provisions. Moreover, it also draws attention to the importance of interpretative practice of the Constitution. Kent Greenawalt for instance, thinks that if judges are bound to follow some standards of interpretation[48] in deciding what the Constitution means, these standards need to be accorded some place among the ultimate or derivative criteria for determining the law.[49]

In any case, and in spite of the dilemma about bindingness of specific standards of interpretation, Himma's formulation of the RR is very telling. It shows some sort of "synergy" between the RR and the Constitution. They do the same job, and they do it well in mutual combination.[50] So, the Constitution will accomplish the task if and only if the RR generally works and fulfills its function of bringing certainty to legal order. It is clear therefore, that *without the RR*, the Constitution alone can do little or nothing to limit the discretionary power of officials. As Himma concludes, the officials might not view the written constitution as binding at all, and that is why, in order to understand the role which a written Constitution plays in determining what counts as law, we have to observe all

[47] This does not mean that the Court must reach the objectively correct decision that reflects the morally best interpretation in a given case, or even in any case. The Court must merely ground its decisions in an attempt to determine the morally best interpreta tion. The Court's discretion is constrained, "by what the other officials are prepared to accept from the Court in the way of validity decisions", S. Carey, 1182.

[48] These "standards of interpretations", although never codified by the legislature, may be said to be "law" because they are applied by courts in the interpretation of the constitution and statutes. Cuss Sunstein explains that these standards (canons) include, but are not limited to, principles that derive "from policies that have a firm constitutional pedigree" that may thus be treated as a form of "'constitutional common law'" that has "a kind of constitutional status", C. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*, Harvard University Press, Cambridge MA 1990, 155.

[49] K. Greenawalt, "The Rule of Recognition and the Constitution", *Michigen Law Review*, 85/1987, 655 6.

[50] Indeed, I think that the RR alone, as a matter of fact and without a written con stitution, can be a proper "device" for limiting the power of rulers (I emphasize, *can be*), but at the moment it doesn't matter. What it does matter is that without the RR, a constitu tion alone can not accomplish the task. This point is very clearly put forward by Himma, Alexander and Schauer (see text below).

the relevant practices of officials.[51] Larry Alexander and Fred Schauer draw a similar conclusion. After a scrupulous analysis of constitutional controversies in the USA and dependence of the legal rules on acceptance, they assert that "...once we appreciate the unavoidable fragility of a legal system's non-legal foundations, we discover that the security and stability that constitutionalism is alleged to bring depends less on constitutionalism itself than on the pre-constitutional understandings that make constitutionalism possible. Some such understandings will make constitutionalism more stable than others... It will be a useful reminder that constitutionalism of any sort resides not in a constitution, but in the pre-constitutional commitments that make any form of constitutionalism possible".[52]

4.3. Authority of the Constitution and the Rule of Recognition.

The rule of recognition in some sense helps the constitution fulfill its function. And as the RR can be seen as duty-imposing, and in some sense normative practice, so it is the case with the Constitution. The written Constitution has the potential to be normative (*i.e. to be the reason for the actions of officials*) thanks to the normativity of the RR itself and this normativity of the RR is explained in one of the previous sections Yet, a very important and frequently posed political and jurisprudential question asks if the Constitution can have *legitimate authority* over officials and broadly over the citizenry? Perhaps the concept of the RR hints at an answer to this question?

First of all, it should be emphasized that the RR cannot transmit to written constitution what it itself does not possess, that is, moral justification for the legal system for which the RR is the existence condition. The moral reasons for obeying the constitution cannot be derived from the rules that determine what the law is. If there is a moral imperative to respect and obey the specific RR, then this imperative cannot be expected to come from the function which the RR serves, because every imaginable RR can do it. The moral obligation to respect and obey the specific RR or in other words, to follow the valid law, must come from other types of consideration.

However, we need some qualification here. It is important to remember what has been said about the nature of the RR. Conventions like these are not arbitrary conventions and they have their own value, not least for those whose practice reflects the RR. Such conventions not only give the answer, as Marmor say, about "how" such a practice must proceed, but they also go some way towards explaining, "why" *this* practice

[51] K. E. Himma, 2009.

[52] L. Alexander, F. Schauer, 2008.

is more valuable than any other. In an activity in which participants accept the specific RR for the values it offers them, specifically for some kind of normative, substantive reason (not simply because others accept and follow it), the RR can occupy the moral and political arena. In other words, it may be cited to support, justify and perhaps even legitimise aspects of the Constitution itself. Even so, this does not mean that all and every RR can be used in this way. In fact, this process of justification is always done by reference to some normative theory which stands in the background of both the RR and the Constitution.

5. CONCLUSION

Debates in legal philosophy often involve highly theoretical and abstract arguments about conceptually possible legal systems, while seldom concerning themselves with the mundane problems of actual legal systems. However, it may prove useful both for legal philosophers and the legal community to drag theoretical concepts down from this philosophical high ground into the profane legal world. Generally, there are two ways to accomplish such a task.

First, theoretical concepts may serve practical functions. They can be adapted to describe and explain the actual legal system or to give us *practically* important answers. For instance the RR can help us find answers to questions such as:...which legal system are we to acknowledge when some revolutionary change occurs? ...in transition countries how can we understand and explain why some pre-transition laws persist while others do not? ... should courts draw on sources of law from other nations?, etc.[53]

A second way to do the same thing is to follow Hart`s idea, that theorizing about law means "elucidating *the concepts* that constitute the framework of legal thought"[54] and this is the route chosen to be followed. There is one relatively simple question to be asked: what is the role of the RR, as *a theoretical* concept[55] in explaining one of our important practical legal concepts, the concept of written Constitution?

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[53] L. Alexander, F. Schauer, 2008.

[54] It is well known that Hart has accorded central place in such elucidation and clarification to his idea of legal system as union of two types of rules (H. L. A. Hart, 81).

[55] It seems that there is no doubt about the clasification of the concept of RR as a theorethical one. According to the taxonomy of Robert Summmers, it belongs to a group of highly theorethical concepts (precisely, to "concepts used in formulating theories of law", R. Summers, "Legal Philosophy Today An Introduction", *Essays in Legal Phi losophy*, Basil Blackwell, Oxford 1968, 2), which are neither known to any "educated person", if I can borrow this phrase from Hart, nor used by legal practitioners or legisla

By examining the connections between the two concepts we have highlighted some interesting conceptual explanations which perhaps add something new to our understanding of the properties and concept of a written Constitution. First, it is the insight that although a written Constitution possesses normative supremacy, in fact the constitution *as a whole* is not the supreme rule of a legal system, it is not even necessarily a *supreme valid* rule. Second, it has been demonstrated that in a sense, the crucial and original functions of a written Constitution and the function of the RR are complementary although the Rule of Recognition takes primacy. Finally, it has been argued that the perennial problem of the legitimacy of a written Constitution can not be resolved solely by reference to the Rule of Recognition. Even for officials, the authority of the Constitution and also, at least in part, their reasons for accepting the RR are likely to be found in the normative field. Thus again the "destiny" of the RR and of the written Constitution overlap and remind us that they are closely related not only as concepts, but also as phenomena.

tors, S. Perry, "Hart's Methodological Positivism"*, Hart's Postscript: Essays on the Post script to The Concept of Law* (ed. J. L. Coleman), Oxford University Press, Oxford 2001, 329.