

WHY SECONDARY RULES MIGHT EMERGE?

A Reinterpretation of Hart's Fable

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ABSTRACT

In Ch. V of "The Concept of Law" Hart speaks of secondary rules as remedies for defects of a social order based solely on primary rules. The report setting up the scenario, describing the problems and indicating the solutions is here called, following Gardner, "Hart's fable". As to the nature of the fable, MacCormick and Gardner agree that it is far from a historical report. MacCormick conceives of it as an *ex post facto* argument about the crucial role that a rule of recognition, rules of change and rules of adjudication play in our legal systems and Gardner, agreeing with Hacker, conceives of it as the use of a genetic-analytic method that analyze the nature of secondary rules by means of their genesis in a hypothetical scenario. My paper combines the insights of both MacCormick and Gardner-Hacker with the idea of protection of legal positivism as a key to the reading of "The Concept of Law". My thesis is that Hart's fable is a thought experiment intended to show not only the nature of secondary rules, but also the risks of compromising the functioning of secondary rules by embracing either imperativist or anti-positivist conceptions of law.

Key-Words: H. L. A. Hart – Secondary Rules – Thought Experiment – Legal Positivism

POR QUE SURGEM AS REGRAS SECUNDÁRIAS?

Uma reinterpretação da fábula de Hart

RESUMO

No Cap. V de *O Conceito de Direito*, Hart fala das regras secundárias como remédios para os defeitos de uma ordem social baseada apenas em regras primárias. O relato fixando o cenário, descrevendo os problemas e indicando as soluções é aqui chamado, seguindo Gardner, a "fábula de Hart". Quanto à natureza da fábula, MacCormick e Gardner concordam que está longe de relato histórico. MacCormick a concebe como um argumento *ex post facto* sobre o papel crucial que a regra de reconhecimento, das regras de alteração e das regras de julgamento desempenham em nossos sistemas jurídicos, e Gardner, concordando com Hacker, a concebe como uso de um método analítico-genético que analisa a natureza das regras secundárias por meio de sua gênese num cenário hipotético. Meu artigo combina os insights tanto de MacCormick quanto de Gardner e Hacker com a ideia de proteção do positivismo jurídico como chave para a leitura de *O Conceito de Direito*. Minha tese é que a fábula de Hart é um experimento mental visando mostrar não apenas a natureza das regras secundárias, mas também os riscos de comprometer o funcionamento de tais regras ao abraçar concepções antipositivistas do direito.

Palavras-Chave: H. L. A. Hart – Regras Secundárias – Experimento Mental – Positivismo Jurídico

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Introduction

In Ch. V of *The Concept of Law* Hart speaks of secondary rules as remedies for defects of a social order based solely on primary rules. The argument takes the form of a narrative, reporting how a community that had only primary rules would have to recur to secondary rules as remedies for the defects of its social order. Following Gardner, I call this narrative “Hart’s fable”. The purpose of my paper is to propose and defend a hypothesis as to the nature of the fable. My hypothesis benefits from insights of both MacCormick and Gardner concerning the nature of the fable, as well as from the idea that protecting legal positivism (put in *Positivism and the Separation of Law and Morals*) is the key to the reading of *The Concept of Law* in general, and of the fable in particular. Let me explain how I combine those elements to ground my interpretive thesis.

MacCormick (2008, 134-6) rejects the reading of Hart’s fable as a historical report about how primitive societies passed from a prelegal to a legal stage. Hart speaks of a community and its development in terms clearly solely hypothetical. The language of emerging defects and finding remedies could suggest a constructive rationalism, that is, a view of social development as a product of planning and choice. But Hart is known to adhere to an evolutionary, rather than planned picture of social development. MacCormick then offers his interpretive insight: Hart’s fable is to be understood as an *ex post facto* argument about the necessity of secondary rules. It takes the point of view not of primitive communities, but of modern societies, and scrutinize the problems that would emerge if a society like ours ceased to have secondary rules. Once uncertainty, static quality, and inefficiency would emerge from the lack of rules of recognition, change, and adjudication, the latter can be considered remedies for the former. This character of remedy would be their true nature as rules, the reason why a developed legal system must have them. But this nature is perceived not by the member of the primitive society the fable speaks about, but only by the member of developed societies to whom the fable speaks. As the fable makes an argument

pro secondary rules only convincing for those already accustomed to the value of these rules, it can be seen as an *ex post facto* argument.

Gardner (2013, 82-3), in contrast, agreeing with Hacker, conceives of Hart's fable as the use of a genetic-analytic method. Like MacCormick, Gardner and Hacker reject the reading of the fable as a historical report. They consider the scenario pictured by Hart's fable as a device to analyze the nature of secondary rules. According to this method, it is possible to analyze the nature of a certain institution by showing in which scenario it would be required to exist. That scenario would prove that the institutions in question result of a social necessity. In Hart's fable, the secondary rules are presented as remedies for defects of social orders based on primary rules only. Hart provides a reasonable picture of a community having only primary rules, makes a reasonable prediction of the problems prone to emerge in that community and, in the end, makes a reasonable defense of the secondary rules as remedies for those problems. This would show that secondary rules are necessary and that a legal system emerges only from the union of primary and secondary rules.

As I said, my hypothesis benefits from insights of both MacCormick and Gardner concerning the nature of the fable. But I combine both insights with the idea that protecting legal positivism, by restating it in the method of analysis and the language of rules, is the key to the reading of "The Concept of Law" in general, and of the fable in particular. In the 1958 text, *Positivism and the Separation of Law and Morals*, Hart was concerned with the weaknesses of the imperativist version of legal positivism making room for antipositivist conceptions not only mistaken, but dangerous. At stake were some of the intellectual and political achievements of legal positivism, like the separation of description and evaluation and the separation of law and morals.

I extend the same reasoning for the value of secondary rules. Hart considered the discovery of secondary rules to be his greatest intellectual achievement. He writes: "[W]e shall make the general claim that in the combination of these two types of rule there lies what Austin wrongly claimed to have found in the notion of coercive orders, namely, 'the key to the science of jurisprudence'." (1961, 79). But I argue that, from Hart's standpoint, beside

his intellectual achievement, at the level of theory, of having discovered the ‘key to the science of jurisprudence’, there is, at the level of reality, the evolutionary achievement of society having developed solid secondary rules, turning an aggregate of primary rules into a genuine legal system. The purpose of the fable is presenting the secondary rules as an evolutionary achievement, as something so valuable that it should not be compromised. In my reading, Hart predicts uncertainty, static quality, and inefficiency not as what would follow in social orders based on primary rules only, then requiring secondary rules (the defects-coming-first reading), but as what would follow from the compromising of these rules in the hands of antipositivist conceptions of law (my defects-coming-after reading).

That settles down the itinerary of points I have to make in this paper. First, I have to show that Hart’s fable is a thought experiment (as in Gardner’s “genetic-analytic method”) intended to demonstrate the function of secondary rules from the standpoint of the member of a society with a modern legal system (as in MacCormick’s “*ex post facto* argument”). Second, I have to argue for the advantages of a defects-coming-after reading of Hart’s fable over the defects-coming-first one. Lastly, I have to connect the meaning of the fable in the defects-coming-after reading with Hart’s concern with protecting the achievements of legal positivism as stated in *Positivism and the Separation of Law and Morals*, showing that the same concern remains in play in his later work.

1 Hart’s fable as a thought experiment

In order to maintain that Hart’s fable is a thought experiment, artificially build for the purposes of his theoretical and practical point, two steps are necessary: (a) dismissing the idea that it is a historical report of what happened or could have happened in primitive communities as they grew in size and complexity; and (b) presenting evidence that Hart’s fable can only be taken seriously as a counterfactual scenario intended to prove a particular point. In this section of the paper, I take both steps more or less simultaneously.

Here are the initial words with which Hart begins his fable:

It is, of course, possible to imagine a society without a legislature, courts or officials of any kind. Indeed, there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behavior in terms of which we have characterized rules of obligation (1961, 89).

I highlight the combination of both the expressions “it is possible to imagine” and “many studies claim and depict”, the first being indicative of the hypothetical character of the considerations that follow and the second, indicative of its empirical non-absurdity, that is, of its sufficient compatibility with scientific reports about actual primitive societies. This mixture of hypothetical construction and empirical responsibility will repeat itself many times in Hart’s fable, up to one point (the emergence of the defects) where Hart abandons empirical responsibility entirely and walks with his first leg only. Before that, however, Hart’s fable makes its pace always with a hypothetical step first (“we can imagine this...”) and an empirical step right after (“...but this is not far from reality”).

But, in order to dismiss the idea of Hart’s fable being a historical report, I stress the different role that both factors, hypothetical and empirical, play throughout the narrative: while the hypothetical factor is constitutive (is a positive guide), building the story, the empirical factor is regulative (is a negative limit), only maintaining its plausibility. The hypothetical factor makes the narrative advance. Hart never takes from empirical reports and scientific studies what will happen next in his fable. Nothing happens because the history of actual primitive societies shows that it is what is usual or expected to happen. On the contrary, the later parts of the story are always linked to the earlier parts by nexuses of intelligibility, similar to logical implications of a scenario previously assumed. In contrast, the empirical factor intervenes only to warrant that imagination is not taking us too far from reality. There is no empirical orientation, only empirical responsibility; there is no intention to speak of what happens in reality, only of a picture sufficiently different from reality as to make a point but not excessively different from reality as not to be relevant. The empirical factor doesn’t come as the storytelling element, but only as a prevention against empirical implausibility and argumentative irrelevance.

The same mixture of hypothetical construction and empirical responsibility is found again in two more passages of the narrative. The first is this:

If a society is to live by such primary rules alone, there are certain conditions which, granted a few of the most obvious truisms about the human nature and the world we live in, must clearly be satisfied. The first of these conditions is that the rules must contain in some form restrictions on the free use of violence, theft, and deception to which human beings are tempted but which they must, in general, repress, if they are to coexist in close proximity to each other. Such rules are in fact always found in the primitive societies of which we have knowledge, together with a variety of others imposing on individuals various positive duties to perform services or make contributions to the common life (1961, 89).

Many points in this excerpt confirm the two-step procedure I have just described. Hart says that, provided some truisms about humans and the world, a society with primary rules alone would have to satisfy two conditions, the first being having rules against violence, theft, and deception (the second one is spoken of in the next quoted excerpt). But, if Hart were drawing it out from the history of actual primitive communities, he could indicate the conditions present in every primitive society and would not need to recur to truisms about humans and the world. These truisms play the role of making a hypothetical society not too far apart from a human one. Moreover, Hart says that his two conditions “must clearly be satisfied”, with “clearly” appealing to logical implications and reasonable assumptions, not to empirical information. After introducing his first condition – having rules against violence, theft, and deception – Hart justifies it by mentioning acts of violation that humans are tempted to commit but must repress, being both the temptation and the necessity of repression truisms about humans that Hart can expect any reader to know.

Only then, after making the first condition convincing based on truisms on humans, Hart brings the empirical factor to the table, by saying that the rules against violence, theft, and deception he just required his hypothetical society to have “are in fact always found in the primitive societies of which we have knowledge”. He thus guarantees that what rational thought made us assume is actually not too far from social reality. Hart always mentions the empirical data very vaguely. Earlier he referred to “studies of primitive communities”; now he alludes to “the primitive societies of which we have knowledge”. No study, work, or social

scientist is actually named. It is as if Hart is referring to the common knowledge of modern educated people about the study of primitive societies. Another detail: Hart says that, beside the rules against violence, theft, and deception he put as a condition for the existence of his hypothetical society, actual primitive societies have other rules (imposing positive duties) that he, however, does not see himself obligated to include in his necessary conditions. Again, reality doesn't have a final say. Only rational thought has.

The second passage that illustrates the same two-steps procedure is right after, when Hart speaks of the second condition:

Secondly, though such a society may exhibit the tension, already described, between those who accept the rules and those who reject the rules except where fear of social pressure induces them to conform, it is plain that the latter cannot be more than a minority, if so loosely organized a society of persons, approximately equal in physical strength, is to endure: for otherwise those who reject the rules would have too little social pressure to fear. This too is confirmed by what we know of primitive communities where, though there are dissidents and malefactors, the majority live by the rules seen from the internal point of view (1961, 89).

Same structure: a condition is introduced as a rational assumption and then said not to be too far from reality. The idea that in every society there are "those who accept the rules and those who reject the rules except where fear of social pressure induces them to conform" is not a truism, but a claim made by Hart himself while discussing the internal point of view of rules ("already described", 1961, 88). The rational assumption now is that, if we are talking of a society where social pressure is the only deterrent for violators, for this deterrent to be strong enough the voluntary rule-followers must be the majority. This point is made without empirical evidence, only by means of rational speculation. But then Hart says that "[t]his too is **confirmed** by what we know of primitive communities". Well, if our knowledge about primitive communities were the source of Hart's fable, then it would make no sense that this same knowledge "confirmed" the hypothesis. The talk about confirmation in view of our empirical knowledge only proves that our empirical knowledge is not the source of the narrative. It is only, as I said, its control of plausibility.

The point where the two-step procedure ceases to be followed is quoted below:

More important for our present purpose is the following consideration. It is plain that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a régime of unofficial rules. In any other conditions such a simple form of social control must prove defective and will require supplementation in different ways (1961, 89-90).

Now hypothetical construction and empirical information grow apart. In actual primitive societies, which are small, closely knit by ties of kinship, common sentiment, and belief and inhabitant of stable environments, a primary-rule social order can and does work. Therefore, in primitive societies as those depicted by scientific studies and registered in our common knowledge, the “defects” that move Hart’s argument forward would not appear. In this kind of primitive society Hart cannot prove his point and derive his secondary rules. For this reason Hart is not interested in actual primitive societies. He is interested, instead, in a hypothetical society, that has some features in common with actual primitive societies, but not those (simplicity and solidarity) that make their social order non defective. Hart conceives of a society provided with primary rules alone, with rules against violence, theft, and deception, with a majority of voluntary rule-followers, but without the simplicity and solidarity that make actual primitive societies work. His hypothetical society is similar to primitive societies in the former features, but similar to modern societies in the latter ones. It lacks simplicity and solidarity. It is complex, changing, pluralistic and individualistic, like modern societies. Only a society primitive enough to have only primary rules but modern enough to lack simplicity and solidarity would experiment the three defects Hart is about to address. Only this chimera² of imagination can make Hart’s argument advance.

There is, however, another important feature of Hart’s hypothetical society that should not be overlooked. As Hart proposes such society to have only primary rules and as he conceives of any authority as relying on secondary rules, his hypothetical society thus must be authority-free. Its being void of any authority capable to create and revoke rules and

² “Chimera” is here being used, somewhat analogically, in its mythological and biological meaning, as an artificial being made from the parts of many natural ones. It must thus not be understood in its usual meaning of “nonsense”, “irrelevant matter” etc.

to settle doubts and disputes is the reason why the three defects arise in the first place. So, for Hart's argument to work, it has to be authority-free. However, no primitive society is known to lack authority completely (which would entail lacking political, religious and familiar authority). If Hart were speaking about small groups of hunters and gatherers, which (maybe) could be described as authority-free, his description of these groups as "closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment" would be mistaken, for such a description would be appropriate only to agricultural and commercial societies, which never lack authority. So Hart's chimera goes from being two-legged to being three-legged: Hart's hypothetical society is, like groups of hunters and gatherers, authority-free; it is provided, like agricultural and commercial societies, with primary-rules; and it is lacking, like modern societies, of simplicity and solidarity. No society in history has such features at the same time. Only a hypothetical society, build to fit into the aims of his creator, could make that chimera possible.

And that is the ultimate proof that Hart is not giving a historical report. Actually, he is not even seriously concerned about empirical input, except where it gives his narrative confirmation and plausibility. He is even willing to turn his hypothetical society deeply dissimilar to actual primitive ones in order to approach the defects that will lead to his secondary rules. That leaves room to no other conclusion but that we are before a purely rational thought experiment, artificially built for the purposes of his theoretical and practical point. More: A thought experiment with a narrative convincing enough only for the ears of a member of a modern society – which leads to my next topic.

2 Why Prefer a Defects-Coming-After Reading of the Fable

The last quoted excerpt, however, could be interpreted in a different direction. The part that reads "in any other conditions" could mean not that the defects would appear only if that society were different from an actual primitive society – in not having the same degree of simplicity and solidarity –, but instead that they would appear as soon as the primitive society grew complex enough and faced a changing environment. A primitive society with

simplicity and solidarity could indeed sustain a primary-rules order, but only for the limited time during which its simplicity and solidarity survive; once they vanish, which would happen sooner or later, the three defects would certainly emerge. In both mine and this alternative interpretation, there is a scenario A, where a primary-rule order can be maintained, and a scenario B, where it can't. The difference between both interpretations is that, according to mine, the transition from A to B is made in the mind of the philosopher, as a hypothetical combination of something proper to primitive societies (having primary rules alone) and something proper to modern societies (not having simplicity or solidarity), while, according to the alternative interpretation, the transition is made not in the mind of the philosopher, but in reality (even if in the hypothetical version of it suggested by Hart), and not as a hypothetical step, but as an evolution of scenario A. In this last interpretation, B is a plausible evolutionary development of A, something that A would turn into if some things that happened to some primitive societies also happened to A. So I dub mine as a "combinatory interpretation" and the other one as an "evolutionary interpretation" of the transition from scenario A to B.

Some things can be said in defense of this last interpretation. First, although Hart has not granted his society with an evolutionary temporal scheme, such a scheme could be one of the "obvious truisms about the human nature and the world we live in": in this case, the obvious truism that human societies grow and change over time. Hart could have made the life of his readers easier by saying it explicitly, but his not saying so is no final evidence of his not assuming so. Second, while speaking of the defects that would emerge, Hart employs some expressions which would be more easily understood as references to an evolutionary process. For example, concerning the defect of uncertainty, Hart says: "Hence, if doubts arise as to what the rules are or as to the precise scope of some given rule, there would be no procedure for settling this doubt" (1961, 90). That appears to suggest a process where doubts inexistent before begin to arise. Concerning the defect of the static quality of the rules, he says: "The only mode of change in the rules known to such a society will be the slow process of growth (...) and the converse process of decay (...) [of obligations]" (1961, 90). There

again is the idea of a process, the idea that Hart's hypothetical society moves and changes over time. Finally, concerning the defect of inefficiency, Hart says: "Disputes as to whether an admitted rule has or has not been violated will always occur and will, in any but the smallest societies, continue interminably (...)"(1961, 91). If Hart's society were a static picture, suspended in imagination over the flow of time, there would be no room for violations, doubts and disputes to emerge and "continue interminably". That appears to give the evolutionary interpretation the upper hand over mine.

But that would require the evolution of Hart's hypothetical society to be predictable, if Hart's account were to remain plausible. The reader would have to be able to compare two lines of development: line I, offered by Hart in the sequence of his narrative, taking the experiment from scenario A to B, and line II, following natural consequences of scenario A that any rational reader would predict. Line I would take the reader from scenario A to B (B being the picture offered by Hart where the three defects emerge), while line II would take her from A to B' (B' being the picture to which the reader would come alone, guided only by reason). The more similar B were to B', the more plausible Hart's account would be. As it happens, though, Hart's hypothetical society is too much of a chimera, too different from any society ever known, to retain any predictability as to its further development. At this point, the reader would expect B' to be pretty much anything Hart wants it to be.

When Hart finally reveals his account of scenario B, the familiarity it awakes in the reader is not due to the similarity of B to B'. At this point, as I said, the reader is incapable of preferring a certain version of B' over any other. It is due, instead, to the similarity of B to C (C being our current modern societies), that is, to situations that the reader knows in his own modern society. The reader (even if she is a layperson, but chiefly if a lawyer) is accustomed to some degree of uncertainty about the law, to some delay of the law to keep up with social change, and to some degree of inefficiency of the law against its violators. Hart takes that experience that the reader already has and shows how each of the problems would be greatly magnified if our secondary rules were missing. That makes his account sound natural and plausible. But that plausibility does not come from how well B flows

prospectively from A (by guessing what new problems would emerge), but instead of how well B flows retrospectively from C (by pondering how old problems would be magnified). Only by relying on the experiences of a reader accustomed to C Hart can convince her of B.

That is the broad sense of MacCormick's claim that Hart's fable works as an *ex post facto* argument: it does not show why primitive societies came to have secondary rules, but it does show why modern societies should regard them as necessary. But MacCormick does not take this claim as far as I subsequently will. In my version of it, the defects that Hart assign to a primary-rules order *only appear* in modern societies whose secondary rules have been compromised. It is not only that the social function of secondary rules is more easily acknowledged by the member of a modern society where they already work, but also that the defects Hart is speaking about correspond to *problems and fears* that only a modern society would have. In my view, Hart's fable works as a *cautionary tale* about what would happen if our current secondary rules were compromised. It relies entirely on the problems and fears of the modern social legal experience. My extended version of the *ex post facto* argument is what I dub a *defects-coming-after reading* of Hart's fable.

I name it defects-coming-after in contrast to a defects-coming-first reading, which is still possible even for someone that accepted MacCormick's claim about the *ex post facto* argument. In the defects-coming-first reading, the secondary rules are shown as remedies for *defects that existed before* they come to work. There was a problem unsolved, to which the secondary rules proved themselves to be the proper solution. That they in fact are good remedies for the defects is more easily acknowledged by someone who already lives in a society where the secondary rules are operative. That makes it an *ex post facto* argument. But what is being acknowledged *ex post facto*, that is, after the experience of the fact, is that secondary rules are efficient remedies against defects that existed previously to their appearance. The defects are previous to the remedies, but the knowledge that secondary rules are efficient remedies is posterior to their existence. The reader, relying in her knowledge *ex post facto* of how secondary rules work, perceive that they function as remedies for defects that existed even when such rules have not been invented.

In the *defects-coming-after* reading, which I hereby propose, the defects to which secondary rules are remedies did not exist before secondary rules were operative. They do not exist in societies that still have no secondary rules, but only in societies that already have them – and where they have been compromised. They are not problems of lack of non-existing secondary rules, but problems of loss of already existing secondary rules.

In order to make this more clear, I have to introduce some distinctions. The first is between the hypothetical society of Hart and historical societies. The second is between the secondary rules in general and those specific kinds that work as remedies to the defects. Well, it is true that, in Hart's hypothetical society the defects come before the remedies. But what my reading suggests is that, in historical societies, those defects come after the existence of secondary rules. So, they come first in the hypothetical plan, but come after in social reality. Besides, there have been no historical societies that lacked all secondary rules (for authority of some sort had always to exist), but there have been historical societies that lacked those specific kinds of secondary rules that Hart enlists. My hypothesis at this point is that the functions that the three types of secondary rules play in modern societies have earlier been fulfilled by religious traditional forms of authority. In this case, in historical societies there have been secondary rules maintaining the legal order existent and operative. But secondary rules of primitive societies instituted *religious traditional* authorities, while those of modern societies institute *secular formal* authorities. This Weberian reading of Hart's fable changes the meaning of the transition Hart is speaking about: not anymore the transition from the absence to the presence of secondary rules, but of some kinds (religious, traditional) to other kinds (secular, formal) of secondary rules. In a world where religion and tradition lost credibility (and political enforceability), Hart's fable is a kind of retold history of legal orders – a history that weeps religion and tradition out of the picture.

Someone could call that a sociological interpretation of Hart's fable. It is probably right to say so. But with yet more reason, someone could ask whether that really still counts as an interpretation of Hart's fable. The question would be fair. I'm certainly going way further than Hart's own words would suggest or allow. But I still reclaim for my defects-

coming-after reading the status of an interpretation. Only that I'm not anymore interpreting what Hart was saying as much as what he was doing. It is an interpretation of why to recur to the fable and why to build the fable in such a strange fashion. Once it is made clear that what we have there is a transformed history of law, that is, the history of a modern legal order as it would be retold from the intuitions of a modern individual, the strangeness is replaced with curiosity. There is a gap in Hart's account, a narrative taboo, something that cannot be said, that it is always necessary to swerve around, and that silent presence is the binomial religion and tradition. Every strangeness is a detour from it. Every turn out of the blue becomes consistent as soon as the invisible obstacle is put open to sight. In this sense, it is also an interpretation of why the fable silences about something so obviously important and how this self-imposed muteness explains the strange path it takes. It is an interpretation of what is said on the basis of what is kept without saying.

What is really a society with primary rules alone, authority-free, without simplicity and solidarity and without secondary rules? It is not the pre-modern primitive societies, for sure. My hypothesis is that this society is what would last of our modern societies if they took the risky path of anti-positivism. Once an anti-positivist conception of law would, from Hart's standpoint, undermine the boundaries of law, the authority of officials and the validity of legal rules, it would weaken our substitute for religious traditional order, which is the secular formal order that constitutes modern law. Uncertainty, static quality and inefficiency are not defects of primitive societies, because those are not only simple and solidary enough to pass without the three types of secondary rules, but they are also held together by religious traditional rules. Uncertainty, static quality and inefficiency are defects of modern societies, because their legal orders fall short to provide what religion and tradition did for so long. Only that, if the three kinds of secondary rules are operative, those defects are maintained *at a manageable level*. But if these rules are compromised, what would follow is mayhem. Without religion and tradition, secondary rules are what separates us from a cognitive and practical breakdown of law. That leads to my final item.

3 The risks of anti-positivism: Hart's fable as a cautionary tale

In 1957, giving his Oliver Wendell Holmes Lecture at Harvard, Hart pronounced the speech *Positivism and the separation of law and morals* (henceforth, PSLM), whose published version in Harvard Law Review triggered off the famous Hart-Fuller debate and can easily be classified among the most important texts in the history of legal philosophy. Hart was then a lesser known professor of jurisprudence at Oxford, just-arrived visiting Professor at Harvard, and would publish his *opus magna* only in 1961. Fuller, on the other hand, was already an influent professor at Harvard, and his papers “The law in quest of itself” (1940) and “Human purpose and natural law” (1953) were widely known and debated throughout the Law Schools in the US. Both in his writings and speeches, Fuller was adamant that law had a necessary connection with morality, patently revealed in the way lawyers interpreted law in challenging cases. His argument for the purposiveness of law according to human ends took the form of an exposé of legal positivism and a strong case for natural law. Hart was particularly troubled with these developments and what he regarded as their eventual consequences. In this context, PSLM was both a testimonial of his concern (not only about Fuller but also with others writing in a similar direction) and an attempt to revert the scenario back to the undisturbed hegemony of legal positivism.

From the many quotable excerpts of PSLM referring to the ideas of Fuller and his followers as the product of conceptual confusion, there is one that discloses more than any other what Hart perceived to be the problem. Hart enlists three theses as the traditional core of Bentham and Austin’s legal positivism and then sustains that they are independent of each other, which would allow the most problematic of them (the imperativist conception of law) to be ruled out without prejudice to the other two (the descriptive conception of jurisprudence and the separation of law and morals). Hart says:

These three doctrines constitute the utilitarian tradition in jurisprudence; yet they are distinct doctrines. It is possible to endorse the separation between law and morals and to value analytical inquiries into the meaning of legal concepts and yet think it wrong to conceive of law as essentially a command. One source of great confusion in the criticism of the separation of law and morals was the belief that the falsity of any one of these three doctrines in the utilitarian tradition showed the other two to be false; what was worse was the failure to see that there were three quite separate doctrines in this tradition. The indiscriminate use of the label

“positivism” to designate ambiguously each one of these three separate doctrines (together with some others which the Utilitarians never professed) has perhaps confused the issue more than any other single factor (1958, 601).

The reason why Hart takes this path of argument is that he himself was convinced that the imperativist conception was a poor description of the nature and working of law and was afraid that this problematic passenger would shipwreck the modest but long-lasting raft with which legal positivism navigated the hectic waters of jurisprudence. He was more than willing to sacrifice the rider to save the vessel. His disentangling strategy leaded to pulling up at the harbor of analysis, leaving the imperativist conception on the shore, embarking the rule conception in its place and resuming the journey. With their new crew member, the other two theses were safe, and the raft intact.

That would have an evident cognitive value. Once Hart found Fuller’s criticisms to the separation of law and morals to be a conceptual confusion, their rebuttal was expected to bring conceptual clarity and precision. However, that was not the full extension of its value, since there was also a political component to the enterprise. Hart was concerned that the idea of a necessary connection between law and morals would increase the degree of uncertainty about the content of law and prevent a moral and political criticism of law by spreading the ideology that law was already good and just. Here Hart is not only thinking as an analytical philosopher interested in the best description of law, but also as a liberal lawyer interested to maintain room for moral and political improvement of law by means of constant social criticism. Fuller was not only confused, but menacing the foundations of the liberal approach to law and, therefore, playing the tyrant’s favorite game.

Although written four years later and for slightly different purposes, Hart’s *The Concept of Law* (henceforth, CL) was no stranger to the same concern. Hart announces his main thesis in the book by stating that law has a particular kind of normativity, one that has something in common with both coercion and morality, without being either. So, to this respect, it differs from PSLM for being less a defense of legal positivism than the attempt to reform all existing conceptions of law, including traditional legal positivism. However, beside the analytical argument of offering a better description of law (Ch. II-V), we find

again the normative argument of both preventing uncertainty on the content of law (Ch. VI) and making room for social criticism to law (Ch. IX). That allows us to assume that Hart's point of view as a liberal lawyer is also in play in CL. I would not go so far as to say that his approach to law is normative rather than descriptive, but I would instead hold that he finds the descriptive approach so appealing and necessary for normative reasons too.

If now, after this brief detour, we return to the interpretation of Hart's fable, we can apply the ideas of concern against antipositivism and of being descriptive for normative reasons in order to support the bold hypothesis we raised in the last section of this paper. Since for Hart antipositivism would compromise both the certainty on the content of law and the possibility of social criticism to law, there begins to be interesting similarities between what would happen if a legal system fell under the influence of an antipositivist conception of law and what would happen to a primary-rules order without the assistance of secondary rules. This similarity may provide a clue for the kind of interpretation of Hart's fable that would concord with my very own. However, something remains to be proven: That the harm which an antipositivist conception would inflict to law has something to do with the weakening or disappearing of its secondary rules.

That I sustain based on the idea that having secondary rules is what makes law a subject unfit for any approach other than legal positivism. Sure, in a primary-rules order, legal rules were already conceptually independent of moral rules, but that was too difficult to notice, for both kinds of rules were tightly intertwined. Once the secondary rules emerge and surround the province of law like a protecting wall, any rule only is authorized in or out by officials, that play the role of sentinels of the wall. That gives law the objectivity that makes it possible and necessary to speak of it as differing from our desires, interests, opinions, customs and values. In the main example of it, that is the rule of recognition, something may well be good, valuable, useful or necessary, without any of these qualities counting as a reason to consider it law – unless the secondary rules say so.

Reasoning now *contrario sensu*, what an antipositivist conception of law would do is precisely weakening the functions of secondary rules. Saying it differently, if secondary rules

make law unfit for anything but positivism, there is no other way to present law as fit for antipositivism than weakening secondary rules. The weaker the secondary rules, the fitter law is as a subject for antipositivism. Take Fuller's version as an example. If law must be interpreted in relation to human purposes and these are not completely contained in the very laws, then the rule of recognition would not have the final say about the content and limit of law; the rules of change would not have the final say about the alteration of law; and the rules of adjudication would not have the final say about the application of law. To all these respects, what the secondary rule says can be either completed or revoked by considerations on human purposes not expressed in the very laws. But if that is the case, then Hart would predict, according to the fable, that a Fullerian legal system would have uncertainty, static quality, and inefficiency. Similarly, the same would happen to a legal system that fell under the influence of any other antipositivist conception of law. In short: What happens to the hypothetical primary-rule order in Hart's fable would also happen to any legal system that took part in the adventure of antipositivism. From that I skip to this: The fable not only tells what happens to a hypothetical society, but also predicts what would happen to modern legal systems if they allowed themselves to listen to the chant of the sirens without being closely tied to the mast of legal positivism.

In this sense, my reading of Hart's fable makes it not an account of an actual or hypothetical past, but a cautionary tale about risks of the present. Not about what happens to a society that lacks secondary rules, but what happens to one that, by embracing an antipositivist conception of law, compromised the secondary rules that it once had. The three defects of uncertainty, static quality, and inefficiency would cease to be shortcomings that we have learned how to prevent and would begin to be threats that are expecting for legal systems not careful enough to hold to legal positivism as key for their own survival. Like a duck-rabbit picture, Hart's fable would then appear as a different representation according to the point of view from which it is addressed. From the cognitive point of view of conceptual analysis, it would be a piece of genetic-analytical method for dealing with the nature of secondary rules; from the practical point of view of the liberal enterprise, it would be a

cautionary tale, recurring to an *ex post facto* argument to advert about the risks of taking any path other than legal positivism.

And wouldn't that last meaning be particularly important for legal systems like ours in Latin America, that have started to experience the consequences of embracing Dworkin's and Alexy's versions of antipositivism? Wouldn't our legal systems be undergoing the very problems Hart's fable predicts they would? Aren't the three defects more current than ever in our legal systems? Maybe the cautionary tale was not just an old story after all.

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