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Some comments on Burazin's paper.

Professor Burazin's work seem to me to be quite stimulating, even if I do not happen to agree (or maybe because of it) with some of his thesis. It is quite well argued, his positions are also very well defended and, most important of all, it is quite clear. It sheds new light (at least to me) on the problem of the emergence of law in Hart's theory, a problem with, in some circles, it has been neglected and he treats it with all the due care and respect of its complexity.

All of that notwithstanding I have some doubts regarding some of the assertions made by professor Burazin in his work. Many of these doubts may very well be the byproduct of my non-understanding fully his artifact theory of law but I don't believe that is the case for all of them.

Let's begin with a problem which, although not Burazin's own, he takes into heart: the "which came first" problem, the officials or the rule of recognition (RoR), nowadays called in some circles "the chicken and egg problem" due to Shapiro.

According to Hart, as was explained by Burazin, the RoR comes about due to a practice of a group of people, belonging to a certain legal system, called "the officials" but, also, this group are "the officials" of said system ***in virtue of the RoR***. So, how is it possible that "the officials" of a given legal system are constituted as such by a rule that comes into existence due to the behavior of said officials?

This seems, prima facie, paradoxical but it is not the case, at least in Hart although some people like Shapiro for instance seems to think so. They believe that this kind of problem is a classic chicken and egg problem which Hart cannot resolve.

However, these views, and chicken and egg problems in general, are mistaken.

In his own way, Karl Popper gave the definitive answer to the so-called chicken and egg problem:

> «The problem 'Which comes first, the hypothesis (H) or the observation (O)?' is soluble; as is the problem, 'Which comes first, the hen (H) or the egg (O)?' . The reply to the latter is, 'An earlier kind of egg'; to the former, 'An earlier kind of hypothesis'. It is quite true that any particular hypothesis we choose will have been preceded by observations- the observations, for example, which it is designed to explain. But these observations, in their turn, presupposed the adoption of a frame of reference: a frame of expectations: a frame of theories. If they were significant, if they created a need for explanations and thus gave rise to the invention of a hypothesis, it was because they could not be explained within the old theoretical framework, the old horizon of expectations. There is no danger here of infinite regress. Going back to more and

> more primitive theories and myths we shall in the end find unconscious, inborn expectations»[1]

Hart took that same approach to the "which came first" problem of the RoR and the officials that Popper so aptly described and an analysis of his account shows how he is free of any kind of chicken and egg troubles.

According to Hart, the RoR comes about due to a practice of a group of people belonging to a pre-legal system of rules, so this group of people could be considered as an earlier kind of officials, pre-legal officials.

The same could be said of the different rules of this pre-legal system, both primary rules of obligation and other kinds of rules. They are earlier kinds of rules, pre-legal rules. As we all know, in Hart's account, it does not make sense to talk of law before the emergence of the RoR.

The appearance of the RoR is what makes possible to talk about law because this rules determines what can be consider law for a given community. Is in this sense that we can say that the RoR is a constituve rule of the law of a community. The system of rules that used to govern that community could be quite similar in form and content to the new legal system but, because of the absence of a RoR, it does not make sense to call it "law". It is a pre-legal system, what some people call "primitive-law". It is similar to law in many respects, but dissimilar in others and, notwithstanding the similarities cannot be called "law".

Also that the change from the pre-legal to the legal world is not an immediate one.

Even if this account of the emergence of law is not an historical one, it does presuppose stages from the pre legal to the legal world. First, we have a community, probably a small one, ruled only by (pre-legal) primary rules. Secondly, with the increasing complexity of community life the primary rules show themselves to be ineffective in the ruling of said community. Even if this is not an actual historical explanation, it presupposes the passage of time. The increasingly complex community life cannot be explained otherwise.

Due to necessity, new rules arise, rules regarding the application and modification of the pre-legal primary rules: what we may call pre-legal rules of change and adjudication, pre-legal rules of competence so to speak and the incipient emergence of some kind of institutionalization. These new rules single out some members of the community that now have the duty of enforcing and modifying the existent rules, what we may call an earlier kind of official.

Moreover, it is by their continuous manipulation of the pre-legal primary and secondary rules what, with – again! – the passage of time gives birth to a standardized practice of identification of the rules that they ought to apply, of the rules that belong to their system. If a rule does not satisfy said criteria of identification then it does not count as a rule of the system in question. This is the RoR and is just now, and only now, that it makes sense to talk about law and a legal system.

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1 Popper, Karl, *Conjectures and Refutations*, p. ???

Said RoR comes about due to a regular practice of an earlier kind of official empowered by an earlier kind of rule and this new RoR constitutes a new dimension of sense of what counts as an x, that is (in this case) law.

Taken in this way the "which comes first" problem does not seem to affect Hart at all. It is just a question of distinguishing between different dimensions of sense, pre-legal and legal. What causes the constitutive RoR to be belong to a different dimension of sense.

The fact that pre-legal officials can now be considered legal ones due to a constitutive RoR does not seem to be, at least to me, problematic at all. Insisting on this point, as Shapiro does for example, means that one has not understood how constitutive rules work.

The other point I would like to address is Burazin's assertion that there is an author with particular (and maybe determinate?) intentions in the creation of the concept of legal system (even of law?) of a given community with only a non-legal order of primary rules.

This, at least to me, seems to presuppose that appearance of the concept of legal system, that is the emergence of law in Hart's terminology, is something that occurs in a deliberate and planned way. There has to be, if my understanding of what Burazin says is the case, some actual intention by the members of that community to create "the law" and this seems to me to be a bit implausible.

It is in a way no different from taking the metaphor of contractualism too seriously. People get into some kind of accord, given their actual and determinate intentions, to create "the law" and the legal system. It is a bit like them saying, "Ok, we have endured this "primary rules only" order and it is no longer working. At least not in the way it used to work. Things have gotten more complex than usual. We ought to change it, and there is this thing called law and the legal system that could be a good replacement".

I do not believe that this is the way in which law emerges, and Hart does not either. He actually argues that law (and therefore the legal system) emerges in a non-voluntary way. As we have seen, the passage from a non-legal order and a legal one takes time and the changes are introduced due to necessity. Probably what happens is that because of some given and determinate problems changes are beginning to be introduced and the non-legal order of primary rules starts to change slowly. Probably the people of the community arrives to the stage of "law" and the legal system without knowing and probably is going to take some more time for them to even begin to acknowledge that they have "law" and a legal system.

We have to remember that Hart is talking, metaphorically but he is talking about it, about the emergence of law as a social phenomenon, how it comes to be for the first time, etc.

He is not talking about the creation of a new and determinate legal order x, that actually can either be created with

i) a determinate intention to create a legal order (for example the creation of the Argentinian legal order in 1853 through 1860, or the Italian legal order in 1946);
ii) without that intention (for example the Canadian legal order, with was unintentionally created by the British North America Acts from 1867 through 1951[2] and the Statute of

[2] After that the reamaining British North America Acts (1952-1975) were enacted by the Canadian Parliament, not the British Parliament.

Westminster 1931 enacted by the British Parliament and was completely acknowledged as different legal order by the that same Parliament with the Canada Act 1982).

All of this, to coin a phrase, seems to me a bit Shapiresque. It is too similar to the Planning Theory of Law of Shapiro's making, which states that law "emerges" as the result of some kind of Master Plan, the product of a deliberate intention of the planners, something quite the opposite of Hart's idea of the non-intentional, almost accidental, emergence of law and the legal system. To try to explain Hart's RoR in this way seems a bit odd.

Notwithstanding all of this, the idea of an author and intention-laden concept of law and the legal system should not be abandoned. We must only distinguish between at least two kind of concepts of law and the legal system:

i) The ones shared by a given community, which allows them to identify and therefore to have law;
ii) and the ones that we may call theoretical concepts, the ones created and used in legal theory to explain the phenomenon of law for theoretical and even ideological purposes.

Examples of this second kind, just to mention two of the more interesting ones, are Bobbio's scientific or methodological concept of law as a way of doing legal theory and Scarpelli's political concept of law about the convenience of distinguishing law from morals.

These kind of concepts are really second order concepts, meta-concepts, which try to make sense of the first order concept of law and the legal system that is the one implicitly shared by a given community.

Hart's concept of law is a theoretical concept of law in this way. It tries to make sense of what the community understand as law and that is the purpose of the emergence fable, which is a pure conceptual explanation (non a historical one) and deals with law as a phenomenon, not with a given legal order x.

I believe that, perhaps without grounds, Burazin confuses both first and second order concepts of law when he puts an author and deliberate intentions in the emergence fable of law and this causes counterintuitive conclusions a la Shapiro (i.e. the emergence of law-as-a-phenomenon as a deliberate affair) , and I do not believe that Burazin wants to follow this road.

Making a clear and stated distinction between both kind of concepts could reframe his Artifact Theory of Law in a way to avoid this objections.

However, as I said in the beginning, maybe all of this is due to a misunderstanding on my part.