

Eine Diskussion über H. L. A. Harts Anerkennungsregel

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Was für die Rechtstheorie in Österreich und Deutschland Kelsens Grundnorm, das ist für England und die USA Harts »rule of recognition«. Der Unterschied liegt darin, dass die Grundnorm (wie ich sie verstehe) eine bloße Denkvoraussetzung in Sinne der Philosophie des Als-Ob bildet, während die rule of recognition eine empirisch greifbare Basisnorm meint, die allerdings nicht als förmlicher Rechtstext gefasst sein muss. Der richtige Vergleichspunkt für die rule of recognition ist daher gar nicht die Grundnorm, sondern die höchste positive Norm im Stufenbau der Rechtsordnung. Wenn man konkret auf eine bestimmte Rechtsordnung sieht, so geht es um die zentralen Kompetenznormen der Verfassung. In der Allg. Rechtslehre (S. 318 f.) ordnen wir die Lehre Harts als Anerkennungstheorie ein. Aber das ist doch sehr grob.

Wer einen feineren Theorievergleich unternehmen will, dem hilft jetzt ein Aufsatz von Scott J. Shapiro, What is the Rule of Recognition (and Does it Exist)? Und vielleicht das ganze Buch, in dem er erscheinen soll (The Rule of Recognition And the U.S. Constitution, herausgegeben von Matthew Adler und Kenneth Himma, Oxford University Press, 2009). Shapiros Aufsatz (auf den ich natürlich einmal wieder durch Lawrence L. Solum aufmerksam geworden bin) steht jedenfalls zur Zeit noch [bei SRRN zum Abruf](#) bereit.

Hier das Abstract:

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of the principal lessons of The Concept of Law is that legal systems are not only comprised of rules, but founded on them as well. As Hart painstakingly showed, we cannot account for the way in which we talk and think about the law – that is, as an institution which persists over time despite turnover of officials, imposes duties and confers powers, enjoys supremacy over other kinds of practices, resolves doubts and disagreements about what is to be done in a community and so on – without supposing that it is at bottom regulated by what he called the secondary rules of recognition, change and adjudication.

Given this incontrovertible demonstration that every legal system must contain rules constituting its foundation, it might seem puzzling that many philosophers have contested Hart's view. In particular, they have objected to his claim that every legal system contains a rule of recognition. More surprisingly, these critiques span different jurisprudential schools. Positivists such as Joseph Raz, as well as natural lawyers such as Ronald Dworkin and John Finnis, have been among Hart's most vocal critics. In this essay, I would like to examine the opposition to the rule of recognition. What is objectionable about Hart's doctrine? Why deny that every legal system necessarily contains a rule setting out the criteria of legal validity? And are these objections convincing? Does the rule of recognition actually exist?

This essay has five parts. In Part One, I try to state Hart's doctrine of the rule of recognition with some precision. As we will see, this task is not simple, insofar as Hart's position on this crucial topic is often frustratingly unclear. I also explore in this part whether the United States Constitution, or any of its provisions, can be considered the Hartian rule of recognition for the United States legal system. In Part Two, I attempt to detail the many roles that the rule of recognition plays within Hart's theory of law. In addition to the function that Hart explicitly assigned to it, namely, the resolution of normative uncertainty within a community, I argue that the rule of recognition, and the secondary rules more generally, also account for the law's dexterity, efficiency, normativity, continuity, persistence, supremacy, independence, identity, validity, content and existence. In Part Three, I examine three important challenges to Hart's doctrine of the rule of recognition. They are: 1) Hart's rule of recognition is under- and over-inclusive; 2) Hart cannot explain how social practices are capable of generating rules that confer powers and impose duties and hence cannot account for the normativity of law; 3) Hart cannot explain how disagreements about the criteria of legal validity that occur within actual legal systems, such as in American law, are possible. In Parts Four and Five, I address these various objections. I argue that although Hart's particular account of the rule of recognition is flawed and should be rejected, a related notion can be fashioned and should be substituted in its place. The idea, roughly, is to treat the rule of recognition as a shared plan which sets out the constitutional order of a legal system. As I try to show, understanding the rule of recognition in this new way allows the

legal positivist to overcome the challenges lodged against Hart's version while still retaining the power of the original idea.

Ähnliche Themen

- [Eine Tagung über die Reine Rechtslehre auf dem Prüfstand](#)