The Practice of Fidelity to Law

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What is it that sets legal systems apart from other kinds of systems of social control? Traditionally, legal philosophers have tried to answer the question in terms of some uniquely essential quality which distinguishes law from everything else. It now seems clear that the concept of law is best understood, not in terms of any single feature to be taken as the essence of law, but as a whole set of family resemblances between the various things we call legal systems (Hart, 1961: 1-17, 234). What I propose to do here is to deal with one particular facet of the concept which, I think, has not been given sufficient attention by the currently dominant positivist school of legal philosophy.

I will argue that an important part of the concept of law involves the notion of a society in which each person governs his own conduct by applying to himself the rules which have been laid down by society for everyone. There are two central points to be made here. First, I wish to claim that a society with a legal system is one in which people apply rules to their own conduct, not one in which people are manipulated by officials who act in accordance with the rules. Second, I want to make the point that it is a society in which people have made a commitment to follow uniformly applicable societal rules when their conduct affects the interests of others, not one in which they make such decisions on the basis of their own unfettered discretion.

A consideration of this aspect of the concept of law is, I believe, of special importance because it makes clear the close connection between the concept of law and a particular view of man in society: a view in which each man is

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seen as a free, responsible agent who owes to each other man in society a duty to respect his equal status as a free responsible agent.

TWO KINDS OF RULES

It is Hans Kelsen who has most clearly stated the view that the chief characteristic of a legal system is that officials exercise coercive control over people under the authorization of a system of rules which justifies such coercion. For Kelsen (1967: 47-48) the crucial difference between the order of a thief and the order of a policeman is that the policeman is authorized to give his order by a rule which is part of a generally effective system of rules, while the thief's order is not. Kelsen centers his attention almost entirely on those rules which authorize official coercion. They are the only proper objects for legal analysis. A legal system is a system of rules governing the use of force by officials. All other sorts of legal standards can be and ought to be reduced to rules of this sort for purposes of analysis. The notice, "No Smoking," for example, is not really an independent part of the legal system. It is merely a crude and incomplete (though, for its purpose, useful) way of restating the norm, "If the court finds that a person has been smoking, it is authorized to visit a sanction upon him." The first form (addressed to the citizen) is entirely "dependent" on the second (addressed to the official) and is "superfluous from the point of view of legislative technique" (Kelsen, 1967: 55; 1945: 61).[1] It is quite natural that, having taken such a view, Kelsen does not give much attention to the way in which the average man understands and conforms to the rules of law which apply to his conduct. Kelsen (1967: 48) in fact concerns himself with this facet of legal experience only in that he requires that a legal system be effective in the territory in which it applies. But this tells us very little. One would assume that the condition of effectiveness would be satisfied so long as the official action authorized by it was being carried on regularly and without serious opposition. The only thing that follows from this in relation to the conduct of the average man is that he is relatively acquiescent. We know nothing more about the way he relates to the legal system.

H. L. A. Hart criticizes Kelsen from precisely this point of view; Kelsen's reductionism achieves uniformity only at the price of serious distortion in that it misses precisely that crucial aspect of the legal means of social control which I am emphasizing here:

> What is distinctive of this [legal] technique . . . is that the members of society are left to discover the rules and conform their behavior to them; in this sense they "apply" the rules themselves to themselves, though they are provided with a motive for conformity in the sanction added to the rule. Plainly we shall conceal the characteristic way in which such rules function if we concentrate on, or make primary, the

> rules requiring courts to impose the sanctions in the event of disobedience; for these latter rules make provision for the breakdown or failure of the primary purpose of the sanction. [Hart, 1961: 38]

Hart's way of escaping this distortion is to look upon law as a union of two sorts of rules: primary and secondary. The primary rules are the prohibitory rules addressed to the populace as a whole; the secondary rules are not prohibitory but authorizing or facilitating rules, rules which authorize the creation, change, interpretation, and enforcement of the primary rules. The rules governing official conduct are of course secondary rules, as are the rules governing the conduct of the private citizen when he makes a contract or executes a will (Hart, 1961: 89-96).

Hart's corrections of Kelsen's analysis have added greatly to the richness of the positivist model of the legal system. It accommodates all of Kelsen's insights into the importance of the rules authorizing official action, while opening up the possibility of a much richer appraisal of the role of the rules which govern the average man's everyday conduct as well.

Hart also makes us aware of the importance of a consideration of the "internal point of view" in the understanding of legal phenomena. He makes it clear that one who takes the strictly external point of view—one who considers only the external behavior of people and does not take their understanding of that behavior into account—will never understand all that it is important to understand about what it is that goes into making a legal system (Hart, 1961: 55-56, 86-88). But Hart is disappointing in his statement of the insights which are to be gained from the internal point of view.

No objection will be raised with regard to Hart's account of the way in which officials must look upon the conduct of their offices in relation to the secondary rules which govern them in a legal system. He effectively makes the point that the officials must not only conform their conduct to the standards set by the secondary rules, but that they must also regard them as "common public standards for behavior." They must use them to criticize their own and other official conduct on the basis of commonly accepted rules if the "characteristic unity and continuity" of the legal system is not to be lost (Hart, 1961: 112-113).

When it comes to a consideration of the internal aspect of the primary rules to be obeyed by the people as a whole, however, Hart's analysis is deficient. It does not effectively elucidate the legal means of control as ones in which people apply "the rules themselves to themselves," as the passage quoted above seemed to promise it would.

Hart is right in asserting that the people as a whole need not look upon each of the primary norms in the way that the officials must look upon each of the secondary norms. This is to a large extent simply because secondary rules have a very different nature from primary rules. It is in the nature of a

primary rule, a rule of obligation that deviation will be a violation of it, and not an exception to it, even if unpunished; even, indeed, if such deviation is very widespread. Only the general failure to abide by the set of primary rules of the legal system as a whole would be inconsistent with its existence as a legal system. An unpunished murder is still a crime even though unpunished, so long as there is in the legal system a law against murder which is generally enforced. But secondary rules are different in this respect. The existence of the secondary rules which delineate official action consists of the very practice of the officials itself.[2] A deviation from what has been regarded as the rule, if such deviation is not met with an effective response, will be in effect an exception to the rule, not a violation of it. What originally seemed to be unauthorized action is established as authorized by official acceptance. Thus the decision of a court may appear to be a clear violation of a rule of law, but it will stand as the law of the case in which it was handed down if not effectively challenged on appeal. If it is upheld on appeal, or not appealed at all, then it will stand as an exception to or modification of the rule, not as a violation of it.

But while this shows that the citizenry need not have the same attitudes toward the primary rules that the officials have toward secondary rules, it does not establish what attitudes the citizenry must have, and it surely does not prove that they need not have any attitudes at all.

Hart does indeed assert that the strictly external point of view does not reveal all there is to know about the way the average man relates to the law, any more than it reveals all there is to know about how officials relate to it. At a minimum then, Hart's insistence on the need to see that all of the rules of the legal system, primary and secondary, have an internal aspect, would apparently lead him to agree that the citizenry at large must have some concern for the rules of the legal system.

HYPOTHETICAL CASE: DISREGARD OF PRIMARY RULES

It is useful to imagine what it might be like to have a system of primary and secondary rules in a society where the people as a whole simply had no attitude at all toward the primary rules, where they simply disregarded them. It is possible to conceive of a society in which people disregard the primary rules, and yet, when seen from the strictly external point of view, people seem to conform their conduct to them. We might imagine a situation in which a group of people are guided in their conduct by a religious morality, the primary rules of which are very similar to the primary rules of the legal system. They are wholly ignorant of the law. When they conform their conduct to the rules, they never have in mind the legal rules; only the moral rules mean anything to them. When they consider the possible imposition of

sanctions in planning their conduct, it is the supernatural sanctions of their religion which concern them, never the legal sanctions. The officials continue to create, change, interpret, and enforce the primary rules in accordance with the secondary rules, but their actions are generally disregarded by the public at large. Yet it still might be said that this is an effective legal system because the primary rules are generally obeyed, or at least not in general disobeyed.[3]

In such a case one who took what Hart (1961: 87) calls the "extreme external point of view" would see all there was to see about the relation of the public to the primary rules. Their conduct happens to conform to the rules; the rules read as if they were descriptions of their conduct, and might be used as a basis for predicting what they are likely to do in the future, but that is all. We need not go further and ask about their internal point of view with regard to the rules of the legal system because they have none.

The peculiarity of this case is of course that the legal system has no apparent function. We have officials treating the people in particular ways in accordance with secondary rules, and judging their conduct on the basis of the primary rules. But it is difficult to see why they are doing this, unless they happen to derive some peculiar satisfaction from it, because they are not effectively guiding anyone's conduct.

Further, one wonders whether this would be a system of primary *and* secondary rules. Clearly there are secondary rules which guide official action, but are there really primary rules? There are such rules on the books, but they do not guide the conduct of the people to whom they are directed. This is a situation where it makes perfect sense to say that they are merely aspects of the secondary rules, that they "are superfluous from the point of view of legislative technique," as Kelsen suggests (1967: 47-48). As Hart (1961: 38) points out, Kelsen's approach on this point is misleading because it distracts us from the point that the rules of obligation are indeed in the normal case primary in their function of guiding everyday conduct, while the secondary rules come into play only when there has been a breakdown in the normal functioning of the primary rules. But in the case we are imagining, Kelsen's approach would be quite appropriate.

The problem is, of course, that we would have great difficulty in saying in such a case that there was a legal system. Of course, there may be and probably are some people in every society who take up this stance toward the legal system, and many of us do part of the time; but if people in general took this position all of the time we would have strong reason for saying that there was no legal system in existence. Surely it seems questionable to call any system of rules an effective legal system if it has no function in controlling the conduct of the people to which it purports to apply.

Once it has been established that people must, at a minimum, have some attitude toward a system of rules if we are to be satisfied that it is a legal

system, it must then be asked just what specific attitudes might or might not be appropriate to a legal system.

HYPOTHETICAL CASE: MINIMAL CONCERN WITH RULES

The next hypothetical situation I would like to consider is one in which the people do take the rules of the system into account in deciding what to do and what not to do, but where their concern with them is so minimal that, as Hart (1961: 87-88) suggests, it could be "very nearly" reproduced from the strictly external point of view.

I am hypothesizing a situation in which people do take the rules into account only when in the particular case they have reason to fear the imposition of a sanction if they do not. In such a situation, assuming that the enforcement mechanism is sufficiently effective to put people in fear of sanctions in the great majority of cases, it would be perfectly reasonable to say that the primary rules were generally obeyed and that the system was therefore effective.

But some of the problems which led us to feel that we might not be dealing with a legal system in the first case are still present here, though in a different form. It is true that in the present case the legal system does have a function. It may properly be called a means of social control. We may still ask, however, whether this control is of a kind which has the major features which we would generally connect with the concept of law. Specifically, we may ask whether this is really a case of social control achieved through compliance with rules by people who regard such rules as applicable to themselves.

This is a case in which the legal rules come into the average citizen's calculations only in the following way: whenever he considers carefully whether to take a particular course of action, he asks, among other things, whether the authorities are likely to stop him or punish him for it. Of course, he will realize that the authorities will probably decide whether to interfere with his actions on the basis of their consistency with the rules under which they operate. But his interest in the rules goes no further than considering them as a factor to be taken into account in predicting whether official action will be taken against him. He will want to know whether the officials will regard his particular actions as violations, whether they can be bribed to think otherwise, whether they are likely to find out about them, and whether they are likely to bother to take action against him anyway. The primary rules form a part of this calculation only because he knows they embody those parts of the secondary rules which will be important factors in determining possible official action against him.

If this is so, then the people do not look upon the primary rules as rules for themselves. They have no sort of commitment to act in general in

accordance with them. They have, as Hart (1961: 87-88) says, "rejected" them, and are concerned with them when, and only when, "it is judged that unpleasant consequences are likely to follow violation." They are seen as rules for the officials, one of the bases on which to predict official action, rather than as rules for the people themselves to follow. In fact, then, they remain no more than aspects of the secondary rules. They are still without existence independent from the rules which govern official action. If no primary rules were promulgated, the only difference it would make would be in the greater difficulty which the citizens would have in making judgments about when officials might take action against them. They would have to work this out from a study of the secondary rules or practical observation of the officials in action. Beyond this, it would make no difference that there were no primary rules. A functioning set of secondary rules conditioning official action with regard to citizens on the previous actions of those citizens, if generally known, would be sufficient to achieve general uniformity in the behavior of the citizenry, under the conditions we have established in this case; this is the only consequence which flows from having primary rules. It is true that this case differs from the first case in that the citizens are seen as taking the rules into account in deciding what to do. But they do not take the existence of the rules as legal rules as in itself a reason for acting or not acting in a particular way. They are simply facts about an aspect of the situation in which the citizen will be acting which may make it dangerous for him to act in a particular way. To the extent that they are rules at all *to* the citizen, they are rules *for* the official, not *for* the citizen. The primary rules are simply an indirect though handy means of finding out whether officials are likely to react unfavorably if they catch you doing certain things. They say, "Don't do this, don't do that," but are taken to mean no more than "We'll deal with you in ways you don't like if we find out you are doing this or that."

It would appear then that the "primary rules" are under such circumstances pretty clearly secondary in relation to what Hart calls the "secondary rules," and, further, that they do not function as rules for the very people to whom they are addressed. The problem might be expressed in terms of saying that mere general obedience to the primary rules is insufficient to bring them to life in the full sense in which they are necessary to an effective legal system. Their internal aspect remains insufficiently developed in that no one looks upon them as standards for their conduct.

Hart (1961: 197) is clearly aware that all of these things would be true of a system in which this attitude (which he himself characterizes as "rejection" of the rules) was general. But while admitting that a system of social control under such circumstances might be abnormal and unstable, he has little doubt that it would be a legal system. Hart (1961: 88) assumes that a society living

under a legal system will normally include both people who reject the system and people who accept it, people for whom "the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility." He also assumes that the health and stability of the legal system will depend to a considerable degree on the proportion of one to the other (Hart, 1961: 197). But he quite clearly envisions the possibility of a system which is rejected by the great majority of the citizenry, but which he would still call a legal system. "The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughterhouse. But there is little reason for thinking that it could not exist or for denying it the title of a legal system" (Hart, 1961: 114). In a primitive, prelegal society, each of the rules of obligation relating to the basic societal need for security must have very general acceptance in order to keep the society together. But for Hart, the peculiar virtue of a legal system is that it allows for the replacement of this general acceptance of rules of obligation with the acceptance of the secondary rules by a small circle of officials, who could then use coercion in order to achieve obedience.

It is surely worth pointing out that there are significant differences between the type and extent of general acceptance necessary to the existence of the rules of obligation in a prelegal community and that which is necessary for the existence of a legal system. But as I have tried to show, it very much overstates the import of the difference to contrast the need for general acceptance in the prelegal case with the possibility of general rejection in the case of a legal system.

OBLIGATION: RULES OF THUMB

Some of the objections which have been made to the hypothetical society which we have been discussing as a model for a legal system might be met by a relatively minor but crucial modification.

The modification is based on the realization that it is indeed unrealistic to set up a model for a legal system in which people generally decide to obey the law only after going through a calculation of the risk involved in each particular case. It would involve changing this hypothetical society into one in which most people have made the long-range decision to obey the law out of fear of the punishment which can generally be expected to follow disobedience. They do not have to calculate in every case in order to decide whether to obey the law or not; they have come to the conclusion that it would in general be better to do so.

It might be thought that in such a situation the primary rules do in fact function as rules for the people. This is not a case in which the decision to obey or not is open in every instance, and the rules might therefore seem to

be rules *for* the citizens though they obey out of fear. But even this does not seem to be sufficient. If there is any sense in which the citizens truly regard the primary rules as rules, it is still only as "rules of thumb" (Rawls, 1955: 23), only as shorthand summations of the practical experience which has led them to believe that the consequences of obeying the law in any particular case are likely to be more favorable than the consequences of disobeying the law. The point becomes clearer when we think about the possibility that people with such an attitude might become convinced in a particular case that there was no real likelihood of punishment for disobedience. In such a case they would regard themselves as having no reason to continue to obey the law. This makes it clear that the status of a rule as part of the legal system is not for them in itself a reason for obeying it. The rules of law do not really function as rules for them. They are not taken to be responsible agents who apply rules to themselves, but rather to be people who respond to the stimulus of fear in accordance with the pattern set by official action regularized by rules.

Of course, there are people under any system who have this attitude. But what would be our reaction to a system in which everyone—including the officials when acting in their roles as private citizens—took this attitude?[4] It would be a system in which no person looked upon the primary rules as rules for himself. It is, for our purposes, not fundamentally different from the model as originally stated. It is still true that the primary rules are only resorted to by the citizens as indications of official action. They guide conduct, but not as genuine standards; they are no more than rules of thumb to be followed generally if you want to keep out of trouble, and to be disregarded in those cases where you have reason to believe that you are unlikely to get into trouble anyway.

Would there be an argument against calling a system of rules an effective legal system under such conditions? It would be a system in which such common expressions as "respect for law" and "fidelity to law" would be inappropriate. It would be a system in which the concept "legal obligation," as I would understand it, would be out of place. I would argue for a notion of obligation which would be applicable only where the existence of rules as established rules of whatever sort (legal or moral or otherwise) is in itself regarded as a reason for obeying them. Seen in this light, the concept is appropriate to those cases in which the individual is seen as a responsible agent who applies standards to his own conduct. But in the case we are considering, even the officials, who are presumed conscientiously to apply the secondary rules in their capacity as officials, regard it as perfectly acceptable to get around the primary rules in their private lives, whenever it is prudent to do so.

It may be preferable, then, to talk about this as a case in which the citizens are in general obliged to obey the legal rules (except of course in those

cases where they were convinced that they could disobey with impunity), rather than obligated to do so.[5] We would also want some new terminology to describe the impact of these hypothetical conditions on the meaning of the officials' commitment to apply sanctions to violations of the primary rules by the citizenry. It again seems not wholly appropriate to use the language of obligation about the application of rules to people who are looked upon in this way. We could better express the significance of the relationship by talking simply about people as being liable or not to the application of sanctions, depending upon whether they conformed their conduct to the rules.

The language of obligation would be unnecessary and misleading in this case. But the notion of obligation is generally understood to be inextricably bound up with the notion of legal system. It therefore appears that a system of rules in such circumstances, for which the notion of obligation would not be appropriate, would have some difficulty in establishing its credentials as a legal system.

DISCUSSION OF CASES

What is missing in all of the cases so far considered is a full development of the internal aspect of the primary rules. It is true that in the last two cases the primary rules did enter into the calculations of the people at large, but not as rules to be followed by them, any more than statistical generalizations which might be formulated about when people are likely to take raincoats because there are signs of rain could be regarded as rules to be followed by the people involved. They give us no sense of a society living under a legal system as one in which each person is assumed to have given up some measure of his absolute discretion to do as he chooses so that the burdens of maintaining the conditions necessary for a common life may be borne equally by all. The internal aspect of the primary rules can be supplied, and the rules themselves given independent existence, only where the existence of the primary rules as rules of the legal system is taken by the vast majority of people as a reason for obeying them.

When this is the case there can no longer be any question about the primary rules being no more than aspects of the secondary rules. They take on a meaning of their own, and become genuinely primary in their function of guiding the everyday conduct of the people, each of whom undertakes the responsibility of applying them to himself.

Such a system might be described as one in which there is a general practice of fidelity or obedience to the law. It is important to make clear just what this would mean and what it would not mean. It would mean that people in general would always have a reason for obeying the law. A practice

which would allow for the existence of the duty in some circumstances but not in others would not do.

The problem with the cases previously considered was not simply that they involved no other motivation than the fear of sanctions. The thing which was important was that the sole motivating factor was that they were examples of a more general category of cases in which the legal system is operated essentially by officials who direct the actions of private citizens, rather than being mainly a matter of private citizens committing themselves to regulate their own actions in accordance with rules. All of the hypotheticals so far considered failed as models for the legal system because in none of them did compliance with the law depend upon a general commitment on the part of the private citizen to obey the law. In each of them the citizens regarded themselves as having a reason to obey the law only under certain circumstances. In the first case (that of the group who shared a moral code by which they regulated their actions but utterly disregarded the legal system) the fact that certain conduct was required by a legal rule was not even among the considerations regarded as relevant by those deciding how they were going to act. In the second and third cases, the fact that conduct was required by the legal system was relevant only to the extent that the individual involved was convinced he would be punished if he disobeyed (or at least was not convinced that he was unlikely to be punished). In each of them a commitment to obey the law was lacking.

This can obviously continue to be a problem even where there are motivations other than the fear of sanctions, even where people are "positively" motivated to obey the law. We might imagine, for example, a society of careful utilitarians. Each of them always tries to do that which seems to him likely to produce the best consequences under the circumstances. Such people would, in a broad range of cases, not take the law into account as a significant factor. This is because they would presumably find that the law required them to do what they would have done in any case, that which seems the best thing to do under the circumstances. There would be other cases in which they would take account of the law just because they would be concerned about the sanction, which might persuade them not to do what would otherwise have seemed to be the best thing to do. So far they resemble the people in the models we have already considered to some extent (as we all do to some extent) either disregarding the law or being concerned with it only out of the fear of the sanctions. But, being careful utilitarians, they would be concerned about the usefulness of obeying the law in ways in which the rather cruder thinkers of the previous cases would not. They would, for example, be aware of the fact that the law sets up public standards which they can rely upon each other to follow in those areas where chaos would result from an absence of some such common basis for reliance. The obvious case would be that of the traffic laws, where we constantly rely upon each

other to follow the regularized patterns established by the law. The people in the model we are considering would take such laws into account before acting, both in making their estimate of what other people are likely to do and in deciding what other people are likely to expect them to do.

But the mere fact that these people do take some of the rules of the legal system into account for reasons other than the fear of sanctions does not in itself mean that they are participating in the practice of fidelity to the law, nor should it remove all doubt about this as a good model for a society with a legal system. There is still no general commitment to obey the law. The legal rule enters into consideration only indirectly. It is a fact on the basis of which they can assume that people will act in a particular way and rely upon them to do the same, unless there is evidence to the contrary. The crucial point is that evidence to the contrary, evidence to the effect that people will not be relying on them to obey the law in a particular case, will be sufficient to wipe out any reason they had for obeying the law (except of course fear of the sanction). Legal rules still function for them as no more than rules of thumb, to be disregarded when other evidence shows they are not useful guides for the prediction of what people are likely to do. Any talk of an obligation to obey the rules still seems inappropriate.

Such a society would not, I think, display the kind of mutual trust and confidence in the willingness of each to bear an equal share of the burden of maintaining order and working toward justice which is characteristic of a legal system. Given the diversity of individual capacities for judgment and self-control, the only sound foundation for such confidence is, I believe, the general commitment of each to obey the law. It should be made clear again that this is not to assert that the citizenry under a legal system has the same attitude toward the primary rules as the officials have to the secondary rules. Each particular secondary rule must be looked upon by all of the officials as a common standard. If a particular rule is not so regarded by all officials, then doubts arise as to whether it is in fact one of the secondary rules of the system, and the "characteristic unity" of the system begins to break down (Hart, 1961: 113). But this would clearly not be the case with the primary rules of the system. The fact that a particular rule may be disobeyed in a substantial number of cases does not raise doubts as to whether it is a legal rule, at least so long as it continues to be enforced by the officials. Nor does the fact that there are a number of such rules which are frequently disobeyed give rise to doubts as to whether the system is an effective legal system, so long as the great majority of its rules are generally obeyed. What I am arguing for is a far more modest view, a view in which some degree of disobedience would be compatible with the existence of the system, and, indeed, even expected.

What is important is that the attitudes of the great majority of the people would be such that they could be described as part of a general practice of

fidelity to the law. This is not a practice which is to be defined by the whole body of the primary rules of the legal system as such (as would be the case with the official's practice of fidelity to the secondary rules). It is not realistic to think of the majority of the citizenry as having adopted each of these rules as a rule to live by. But it is realistic to think of the adoption of a practice which is defined by the single rule: obey the law. It is a practice which relates not to the particular rules of the system, but to the system as a whole.

In this respect it would differ significantly from the kind of attitude necessary to hold together a prelegal society, where "the rules by which the group lives will not form a system, but will simply be a set of separate standards, without any identifying or common mark." (Hart, 1961: 90) In such a situation each separate rule must be accepted as a common standard. The very fact that the rules of obligation in a legal system do form a *system* of rules to be identified on the basis of the secondary rules makes possible its support by a practice which relates to the system as a whole rather than particular rules. Disobedience to a particular rule whether out of ignorance or on the basis of the conscious decision that the reasons for obedience are overborne by the reasons for disobedience in the particular case is not necessarily conduct inconsistent with such a practice. Nor need it involve either moral approval of the rules by the people as a whole,[6] or their constant attention to them at every moment of their working lives. The only attitude which would be inconsistent with the practice of fidelity to the law would be one which would allow for a decision in a particular case that there was no reason at all to obey what is clearly known to be the law.

If there is such a general practice, it does seem appropriate to talk of legal obligation, as it did not in the cases previously discussed. It seems quite natural to speak of obligation in relation to a system of rules which people in general have a reason for obeying just because it is the established legal system. This does not mean that the attitude should be confused with legal obligation as such. It is by no means suggested that a person has a legal obligation to obey a particular rule only if he has this attitude toward it. A person is under a legal obligation whenever a rule of the legal system of which he is a subject says he is. The point being made here is one which relates to the question of whether the system is indeed a legal system. If it is not supported by this practice, then there is some reason to be doubtful on that question. To put the point in another form, it is not the intention here to identify legal obligation with the obligation to obey the law, but only to suggest that the notion of legal obligation would be a very peculiar one if people in general did not regard themselves as being under an obligation to obey the law.[7]

CONCLUSION

I have considered a number of hypothetical models of society in order to illuminate the point that a society living under a legal system is one in which social control is achieved through each person's application of common rules to his own conduct. In particular I have tried to represent this aspect of the concept of law more clearly by developing the model of a society in which the practice of fidelity to law has been generally adopted.

Hart sums up his position on the problems with which we have been dealing by stating two minimum conditions for the existence of a legal system: the secondary rules must be accepted as "common public standards of official behavior" by the officials, and the primary rules must be "generally obeyed" by private citizens.

One way to make the point here would be to suggest a modification of the necessary and sufficient conditions set out by Hart. The requirement that "those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed" might be altered into a requirement that "there be a general practice of fidelity to those rules of behaviour which are valid, etc." But it is not my purpose to establish a new set of necessary and sufficient conditions. I only wish to cast some light on an area of our understanding of the nature of law (an understanding which has been greatly enriched by Hart's book) which is left in partial obscurity by Hart's set of conditions. This purpose will have been served sufficiently well if I have in fact established that the absence of the practice of fidelity to law would throw some doubt on our determination to say that what in other respects appeared to be a legal system was in fact a legal system.[8]

NOTES

1. For the view that Hart makes the opposite error of reducing the secondary rules to aspects of the primary rules, see Jonathan Cohen (1962: 403).

2. Practice is here intended to include not only official action but the justifications which officials would give for it and judgments they would make about it as well.

3. The case is similar to that used by Woozley (1967: 68) to make much the same point.

4. Hart (1961: 113) seems to contemplate such a case when he says that even the officials "need only obey" the primary rules which apply to them in their personal capacity.

5. See Hart (1961: 88). The classical positivist view is, of course, that obligation consists in nothing more than being obliged. See Austin (1832: 14).

6. Thus, I would agree with Hart that it is possible for people to "accept the authority" of the system even though their consciences tell them they ought not to (Hart, 1961: 198-199). See also Woozley (1967: 76).

7. Of course, not enough has been said here to establish the existence of the moral obligation to obey the law, but it should be apparent that the general view of the relation of society to the legal system which is developed here is one from which a general duty to obey the law would arise. See Morris (1965) and Rawls (1958 and 1963). For a critique of this view, see Wasserstrom (1963).

8. The approach is that developed by Morris (1965: 365-368).

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