

*SOCIAL SCIENCE AND JURISPRUDENCE THROUGH
WEBERIAN AND HARTIAN EYES: SUGGESTING AN
EXPLANATION FOR A PUZZLE*

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1. Introduction

Can there be an objective, i.e., value-free knowledge of law or legal phenomena? Anglo-Saxon legal positivists argue in the affirmative. They are committed to the mantra that knowledge of law is one thing, its moral correctness is another.¹

And yet, objectivity is a category that is not of the exclusive domain of legal positivism. Hart must have had this in mind when he invited lawyers, first, to read *The Concept of Law* as an “essay in analytical jurisprudence” and then (to other readers, perhaps?) as “an essay in descriptive sociology”,² as well.

It is obvious, I think, that one should not take Hart’s invitation as giving up on the specificity and distinctiveness of jurisprudence as an intellectual endeavour. What is less obvious, and what Hart was ultimately not explicit about, is the extent to which social science might be auxiliary in the quest for the objective knowledge of law and legal phenomena. More concretely, Hart was not explicit about the degree to which, if at all, Max Weber’s methodological writings served his theoretical purposes. Some important Hartian categories, however, smack of Weberian insights. My contribution to this volume revolves around this problem.

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Acknowledgments: I have benefited greatly from comments by two good friends at the Tarello Institute for Legal Philosophy. I thank Natalia Scavuzzo for her time and her criticisms to an earlier version of this manuscript. I also thank Guillaume Robertson his time, comments and very helpful suggestions. The usual disclaimer applies: all errors in this paper, are mine only.

¹ There is no need to provide here a comprehensive list of all the scholars accepting that this thesis is a shared element in the definition of legal positivism. See, for example, John Austin, *The Province of Jurisprudence Determined* (first published 1832, Cambridge University Press 1995) 157; John Gardner, *Law as a Leap of Faith* (Oxford University Press 2012) 20; Matthew Kramer, *Where Law and Morality Meet* (Oxford University Press 2004) 13, 223.

² H.L.A Hart, *The Concept of Law* (first published 1961, Clarendon Press 2012) vi.

Hence, I here contrast Hart's ruminations on the fact-value distinction and on the concomitant participant/observer-internal/external-point-of view divides (which are central to the concern of legal positivism with objectivity) with Max Weber's take on the notion of objectivity in social sciences. Hart was reluctant to admit any influence of the German sociologist in his elaboration of these categories, but, things are more complex than what largely bibliographical remarks made by some commentators suggest (section II). After positioning this problem in the map of the secondary literature, I shall take my cue from Brian Leiter's critique of Finnis' claim that the knowledge of legal phenomena requires the use of practical reason, and that this take was first advanced by Weber. Leiter's critique is important, but there are Weberian insights which could be of more value for positivists than what Leiter's discussion allow (section III).

The suggested explanation to which my title alludes is the following: Hart's reluctance to admit Weber as a relevant influence, is (or could be) explained due to an important difference in the ways in which both authors sought to maintain the distinctiveness of their disciplines, and on how they understood the nature or features of participants and their role in examining the object under scrutiny. Although Weber's social scientist participates in the selection and conceptual framing of the scientific object according to her values and/or culture, she takes a larger distance with regard to it than some prominent Hartian participants, i.e., officials, do in the determination of what counts or not as law or legal. In a nutshell, although both authors would agree that no knowledge is "presuppositionless", Weberian social scientists do not "bring about" their object in the same way that Hartian officials identify and create law (section IV).

This leads to a conclusion that is dependent upon an exegetical reading of *The Concept of Law*: Hart's hypothetical acceptance of a Weberian influence would have been to an important extent incompatible with his methodological commitment to descriptivism (section V).

2. The quandary: Hart's reluctance

The question whether it is possible to have an objective grasp of legal phenomena that is independent of normative desiderata hinges on the reliance on the prior and fundamental philosophical distinction between facts and values.

The divide is well-known, at least since Hume's bewilderment at the sudden change in the ways some authors argued in his days, moving from the "ordinary way of reasoning, ... [was, and was not]"³ to the use of deontic propositions without additional intermediate premises linking both domains. Moreover, legal positivists claim to be continuing the tradition inaugurated by Bentham, to whom the distinction between the characters of the *Censor* and the *Expositor* was central to legal studies. Accordingly:

[t]o the province of the *Expositor* it belongs to explain to us what, as he supposes, the *Law is*: to that of the *Censor*, to observe to us what he thinks it *ought to be*. The former, therefore, is principally occupied in stating, or in enquiring after *facts* ... To

³ David Hume, *A Treatise of Human Nature* (first published 1896, Oxford 2018).

the *Expositor* it belongs to shew what the Legislator and his underworkman the *Judge* have done already: to the *Censor* it belongs to suggest what the *Legislator* ought to do in future.⁴

Both spheres are not to be conflated. Bentham reminds us in one of the many footnotes in the *Fragments*, that

the question of *Law* has often been spoken of as opposed to that of *fact*: but this distinction is an accidental one. That a Law commanding or prohibiting such a sort of action, has been established, is as much a *fact*, as that an *individual* action of that sort has been committed.⁵

As it is well known, Hart took this distinction seriously as well,⁶ and in a moment, I shall present some of his views on the matter. But, before I proceed, I want to concentrate on a different, prominent and influential account in the social sciences that also relies strongly on the facts/value divide, and which has been nonetheless largely neglected by, at least, and as far as my knowledge goes, Anglo-Saxon legal positivists and others generally following that tradition. That is, Max Weber's.

Weber's take on objectivity and on the facts/values divide was most systematically expounded in a 1904 partly co-authored essay introducing the editorial policies of the new editorial board of the *Archiv für Sozialwissenschaft und Social politik*. Before Weber took over as its chief editor, the *Archiv* was known as the *Journal of Social Legislation and Statistics* and was dedicated to elaborating value-laden analyses of social legislation enacted by the German parliament, with a view to improving the German political system. Weber saw this as problematic and sought to take the journal in the direction of clearly distinguishing "social policy" as a distinctive scientific endeavour from evaluative and normative assessments of proposals of social reforms. The conflation between "existential knowledge", i.e., knowledge of what 'is', and 'normative knowledge', i.e., knowledge of what 'should be',⁷ was to be avoided.

Weber also developed the point elsewhere and in different contexts. Consider, for example the following quote:

But in no case, however, should the unresolvable question – unresolvable because it is ultimately a question of evaluation – as to whether one may, must, or should champion certain practical values in teaching, be confused with the purely logical discussion of the relationship of value-judgments to empirical disciplines such as sociology or economics. Any confusion on this point will impede the thoroughness of the discussion of the actual logical problem. Its solution will, however, not give any directives for answering the other question beyond two purely logical

⁴ Jeremy Bentham, *A Fragment on Government* (first published 1756, Cambridge 1988) 7-8.

⁵ *ibid.* Also, in his *Introduction to the Principles of Morals and Legislation* (first published 1789, Dover 2007) 323.

⁶ See, for example, H.L.A Hart, 'Introduction' in *Essays on Bentham* (OUP 1982); 'The Demystification of Law' in *Essays on Bentham* (OUP 1982); 'Positivism, Law, and Morals' in *Essays in Jurisprudence and Philosophy* (OUP 1983) 50-51.

⁷ Max Weber, "'Objectivity' in Social Science and Social Policy" in *The Methodology of the Social Sciences* (first published in 1904, The Free Press 1949) 51.

requirements, namely: clarity and explicit separation of the different types of problems.⁸

Similarities are undeniable. And yet, Weber's influence on Hart has not been properly theorised. It has only been mentioned in some important works, albeit largely in biographical terms. MacCormick briefly avers that when he met Hart at Oxford, the latter was enthusiastic about Weber's work, but that his knowledge of the German sociologist had been hitherto indirect. MacCormick's only theoretical comment is that "[w]hen Hart ascribes to sociologists the job of *external* description of legal orders, he is presumably referring to Weber's view that the sociologist is not directly concerned with a normative interpretation of the law, but with the probability that people in society will respond in certain ways to *their own* normative interpretation of the law".⁹

Lacey briefly discusses Weber's possible influence on Hart. However, after a fleeting discussion of the criticisms to which *The Concept of Law* was subjected by social scientists, he recognises that Hart's caveat that his was fundamentally a philosophical reflection and not a sociological project proper "was clear, if unlikely to satisfy the critics".¹⁰ Notwithstanding, Lacey is adamant that there is an interesting question about the influence of sociology on Hart's work. In this context, he narrates the anecdote that when Finnis had consulted Hart's copy of *Max Weber on Law in Economy and Society*, he found it to be heavily marked and side-noted. Finnis asked Hart on two different occasions about the influence Weber may have had on his work. Hart replied that none, and that his idea of the "internal aspect of rules" derived from Winch's *The Idea of a Social Science* instead.¹¹ Yet, Lacey points out that notwithstanding Hart's denial, his annotations "strongly suggest that there was a Weberian undertow in *The Concept of Law*".¹² Lacey arrives at this conclusion from Hart's markings and annotations to Weber's discussion on the validity and legitimacy of an order, as derived from its subjects' orientation towards the order's maxims in ways that they regard as obligatory or exemplary.

As helpful as it is for my purposes here, Lacey's discussion does not shed enough light on the extent to which Weber's theses could have for understanding Hart in a philosophically relevant or interesting way. Hart's reluctance to recognise Weber as an influence remains intriguing.

Now consider John Finnis:

[T]he evaluations of the theorist himself are an indispensable and decisive component in the selection or formation of any concepts for use in description of such aspects of human affairs as law or legal order. For the theorist cannot identify the central case of that practical viewpoint [the internal point of view] which he uses to identify the central case of his subject-matter, unless he decides what the requirements of practical reasonableness really are, in relation to this whole aspect of human affairs and concerns. In relation to law, the most important thing for the theorist

⁸ Max Weber, 'The Meaning of "Ethical Neutrality" in *The Methodology of the Social Sciences* (first published in 1917, The Free Press 1949) 8-9.

⁹ Neil MacCormick, *H.L.A. Hart* (Stanford 2008) 43. Emphasis in the original.

¹⁰ Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (OUP 2006) 230.

¹¹ Peter Winch, *The Idea of a Social Science* (Routledge & Kegan Paul 1958).

¹² Lacey (n 10), 230.

to know and describe are the things which, in the judgment of the theorist, make it important from a *practical* viewpoint to have law.¹³

Finnis affirms to have arrived at this insight through Max Weber, and this partly means to him that descriptive jurisprudence is

inevitably subject to every theorist's conceptions and prejudices about what is good and practically reasonable ... if [it is] to be more than a vast rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies.¹⁴

This is more theoretically substantive and helpful for my purposes. However, Finnis remarks in the quote above have been harshly criticised by Leiter. I will dedicate some space here to reproducing the critique for it paves my way out of this literature review and into the upcoming sections.

Leiter rebuffs Finnis (and by extension, Perry,¹⁵ Postema,¹⁶ and Stavropoulos in an unpublished manuscript) for incurring in a non-sequitur in the transcribed passage above, which occurs in the slide from what he refers to as the "Banal Truth" that "evaluations ... are and indispensable and decisive component in the selection or formation of any concepts for use in description of such aspects of human affairs as law or legal order" to the claim that the evaluation in question involves deciding "what the requirements of practical reasonableness really are".¹⁷ In Leiter's view, the "banal truth" is insufficient to ground Finnis' claim that the "presuppositions of the descriptive enterprise require judgments about [practical reasonableness and] that the viewpoint from which 'importance' and 'significance' are assessed is the 'practical viewpoint'".¹⁸

To prove his point, Leiter invites us to distinguish between *epistemic values* and *moral values*, the first of which he sees as necessary and sufficient for the demarcation of "legal phenomena for purposes of jurisprudential enquiry".¹⁹ By contrast, Leiter tells us, moral values play no role in such endeavour.

This distinction is useful. Yet it is problematic in two ways: first, the 'banal truth' seems in fact too banal. The content he ascribes to it does not exhaust what Weber meant to communicate in his discussion of the separation of facts and values. Second, in order to apply his distinction between moral and epistemic values, Leiter asks us to consider an analogy which I think falls short of disproving Finnis' insight on this point. Note that I am not saying Finnis is right. Rather I want to convey that Leiter's critique falls short of disproving Finnis, and that this has consequences for whether it is possible to read Hart through Weberian lenses.

Consider, first, Leiter's brief footnote on Finnis' use of Weberian insights about the idea that the theorists' evaluations are indispensable in the selection and understanding of any

¹³ John Finnis, *Natural Law and Natural Rights* (first published 1980, OUP 2007) 17.

¹⁴ *ibid.*

¹⁵ Stephen Perry, 'Interpretation and Methodology in Legal Theory' in Andrei Marmor ed.) *Law and Interpretation* (OUP 1995).

¹⁶ Gerald Postema, 'Jurisprudence as Practical Philosophy' (1998) 4 *Legal Theory* 329.

¹⁷ Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP 2007) 167.

¹⁸ *ibid* 168.

¹⁹ *ibid.*

concept such as law and legal orders. This, in Finnis' view, corresponds to Weber's notion of *ideal-types*.²⁰ Yet, Leiter avers, "[this invocation] may be misplaced". Based on the insights by two commentators, Leiter affirms in his footnote that there is nothing normative or evaluative about the word "ideal" in the term "ideal-types". Ideal-types, as defined by him are

models, that abstract from certain particulars, and focus on theoretically illuminating features of varied situations; they are, as Weber puts it, 'a technical aid which facilitates a more lucid arrangement and terminology' and allows us 'to determine the degree of approximation of the historical phenomenon to the theoretically constructed type'.²¹

This is indeed banally true.²² But Weber's methodological writings not necessarily lead to the conclusion Leiter draws. One thing is to say, as Weber certainly did say, that there can be no scientific knowledge of values, that no rational validity can be predicated of ideals, and that empirical sciences of the kind he was concerned with "cannot tell anybody what [a person] *should* do".²³ Another quite different is to say that values have no role in the process of determining and constructing the object of investigation in the cultural sciences. Weber clearly thought they did:

knowledge of cultural events is inconceivable except on a basis of the *significance* which the concrete constellations of reality have for *us* in certain individual concrete situations... 'Culture' is a finite segment of the meaningless infinity of the world process, a segment on which human beings confer *meaning and significance*.²⁴

Hence, Weber does not exclude values from the process of identification and study of a certain subject. He is rather saying that cultural objects or, more generally, objects worthy of scientific study are not worthy because they hold some intrinsic value, but because they are seen as valuable by the researcher:

The transcendental presupposition of every *cultural science* lies not in our finding a certain culture or any "culture" in general to be *valuable* but rather in the fact that we are *cultural beings*, endowed with the capacity and the will to take a deliberate attitude towards the world and to lend it *significance* ... Whatever the content of this attitude – these phenomena have cultural significance for us and on this significance alone rests its scientific interest.²⁵

Weber was not concerned with the grouping and the knowledge of scattered data. Neither he thought that sciences were purely concerned with the systematisation of information. Moreover, his notion of *ideal-type* is more than mere technical aids facilitating arrangement and terminology for the determination of the "to determine the degree of approximation of the historical phenomenon to the theoretically constructed type". They

²⁰ Finnis (n 13), 9.

²¹ Leiter (n 17), 167. Reference omitted.

²² Leiter's definition is also partly circular, as it includes the notion of ideal-type in the description of what the concept allows us to do.

²³ Weber (n 8), 54.

²⁴ *ibid*, 80-81. Emphasis in the original.

²⁵ *ibid*.

are that too, but they are *not just* that. Ideal-types are evaluative ideals, not in the sense that cultural significance should be attributed only to valuable phenomena. Rather, such phenomena are cultural

only because and *only* insofar as their existence and the form which they historically assume touch directly or indirectly on our cultural *interests* and arouse our striving for knowledge concerning problems brought into focus by the evaluative ideas which give *significance* to the fragment of reality analysed by those concepts.²⁶

Leiter is aware of this: “The question, then, is whether the judgments of “significance” and “importance” that Finnis rightly insists are indispensable in theory-construction must make reference to moral values in addition to epistemic values?”²⁷ His answer is, however, too quick and the means by which the answer is provided shaky. It is too quick because his definition of epistemic values is question-begging. Epistemic values, we are told, “specify (what we hope are) the truth-conducive desiderata we aspire to in theory construction and theory choice”.²⁸ He then gives examples of these values: “evidentiary adequacy (‘saving the phenomena’), simplicity, minimum mutilation of well-established theoretical frameworks and methods (methodological conservatism), explanatory consilience, and so forth”.²⁹ But, in contrasting this set with *moral* values, and in asserting that jurisprudence is concerned with the former and not the latter, he begs the question of whether moral values or practical reason more generally play any role in the determination of what counts as an epistemic value in the first place.

Leiter’s use of an analogy to prove his point is also not very helpful. He asks us to imagine a dialogue where two participants seek to provide the concept of “city”. One of the participants (‘the Natural City Theorist’ [NCT]) considers that the answer to the question hinges on requirements of practical reason, that non-conforming uses of “city” should be determined from a practical viewpoint, that value-judgments about the importance and interest of the concept shape the enquiry, and that moral and political norms thus delineate the subject-matter. Her counterpart (the “Descriptivist”), instead, considers that we do not need to have recourse to practical reason in order to determine what the paradigmatic uses of “city” are. Rather, she wants to understand what is it that those places we call “cities” have in common as a matter of fact. Moreover, she considers that an appeal to statistical usage suffices for settling the quibble about terminology, and that although the “Banal Truth” cannot be dismissed, the demarcation of the object is still a matter of application of epistemic values.³⁰

Leiter’s analogy is insufficient for two reasons. First, because his discussion is framed in terms of the moral/epistemic values divide that I already indicated was problematic a couple of paragraphs back. Second, and more important for my purposes, because there is something in the nature of the object “city” and about the features of the participants in the analogy that makes it unfit for solving the question of the degree to which, if at all, facts and value intersect in social sciences and in law so that we can speak of them

²⁶ *ibid.* Emphasis in the original. In the same vein, see Weber’s critique of Meyer in ‘Critical Studies in the Logic of the Cultural Sciences: A Critique of Eduard Meyer’s Methodological Views’ in *The Methodology of the Social Sciences* (first published in 1917, The Free Press 1949).

²⁷ Leiter (n 17), 168.

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ *ibid.*

objectively. Further reflection on the categories of object and participants will thus illuminate the differences between Hart and Weber which could have perhaps led the former to distance himself from the insights of the latter. I now undertake that effort.

3. Weber on social science and law

I have hitherto discussed the claim that Hart and Weber shared a reliance on the distinction between facts and values, and that Hart's reluctance to recognise Weber's influence has not been adequately theorised by Anglo-Saxon jurists. In this section I want to suggest a possible theoretical reason for the reluctance, which is related to a certain difference in kind between the social sciences (or cultural sciences, as he called them) Weber was interested in and Law as the phenomenon in which Hart was, in turn, interested.

Neither Weber nor Hart was clear about the boundaries between these disciplines. Hart, as I already mentioned above, said that *The Concept of Law* could be read as an essay in descriptive sociology, an insight which obscures the matter more than it sheds light on it. Weber was not different in this regard. In the writings I here consider, he only mentions Law in some scattered remarks, all of which express a contrast between his understanding of the social sciences as more than purely formal and explanatory disciplines and a rather formal treatment of legal phenomena. Consider, for instance the following remarks:

There is not absolutely 'objective' scientific analysis of culture ... or of social phenomena independent of special and 'one-sided' viewpoints according to which – expressly or tacitly, consciously or unconsciously – they are selected, analysed and organised for expository purposes. The reasons for this lie in the character of the cognitive goal of all research in social science which seeks to transcend the purely *formal* treatment of the legal or conventional norms regulating social life.³¹

Moreover, consider the claim that “the universe of legal norms is naturally clearly definable and is valid (in the legal sense!) for historical reality. But social science in our sense is concerned with practical significance”.³²

This is where the Weber and Hart start parting ways. These fragments suggest that the conception of Law Weber was considering in the quotation above was a formalistic one. That is, one in which the universe of legal norms is determined by their formal validity and existence, i.e. adequacy of prescriptive statements to formal and procedural standards dictated by other higher sources. In this sense, the universe of legality is clearly definable and valid for historical reality. This is further confirmed by Weber's discussion on the influence (or lack thereof) that this formal conception of law could have in the rejection of a materialistic conception of history. Weber criticised those who, like Stammler, thought that since economic life is regulated through law then it followed that economic development “must take the form of striving for the creation of new *legal* forms”.³³ He rejected such correspondence by dissecting cultural significance from “the formal identity of prevailing legal norms”.³⁴ In a nutshell, Weber criticises attempts to apply a formal conception of law to an analysis of cultural phenomena. Rather, cultural phenomena change the meaning and applicability of legal norms. And they could do so even to the

³¹ Weber (n 8), 72.

³² *ibid*, 94.

³³ *ibid*, 83. Emphasis in the original.

³⁴ *ibid*.

point where the existence of such norms become practically meaningless in the face of radical social change:

The statistical frequency of certain legally regulated relationships might be changed fundamentally, and in many cases, even disappear entirely; a great number of legal norms might become *practically* meaningless and their whole cultural significance changed beyond identification.³⁵

Weber elsewhere developed the idea that there was at least one sense (the sense in which he uses the term in the essay I am here commenting on) in which law could be said to exist, which entailed that the knowledge of law was presupposed and thus prior to any application of the object/participant divide. In this sense, law and legal rules serve the ends of scientific knowledge as a *means*, not as an object of this knowledge.³⁶

[T]he empirical legal order is a ‘presupposition’ of the empirical process: the ‘maxims’ employed by judges who decide the case and the ‘means’ employed by the parties to the dispute ... the legal order is also constitutive for the definition of the ‘historical entity’.³⁷

Hence, in these methodological writings, Weber limited his analysis to one among sundry potential uses of norms as means for obtaining knowledge, namely norms as objects whose existence is not dependent upon the perspective of any subject. The universe of legal phenomena is brought about, in this limited understanding, through the compliance with the formal and procedural conditions the legal system itself contemplates for its autopoiesis. Law is, then, sidestepped in Weber’s methodological essays as a problem to which his discussion on the possibility of an objective knowledge of cultural phenomena is directly applicable. From this it follows an important consequence for my discussion: the exclusion of law from the universe of Weberian social cultural phenomena, entails that the knowledge of the former is not thought of as subjected to the same methodological requirements as the latter. Their existence does not hinge, under this specific viewpoint, on a given perspective adopted by a given subject (Weber’s social scientist) who in turn develops a conceptual apparatus (most prominently ideal-types) in order to analyse how phenomena behave according to certain “laws” (largely understood as patterns of regularity brought about by cause-effect relationships, etc.).³⁸

Of course, Weber’s methodological writings were more preoccupied with economics and history than jurisprudence, as per his own preoccupations. Moreover, his methodological reflections took place, remember, in the context of introducing the *Archiv’s* new editorial policies to social scientists. It seems to me that these differences in the nature of the enquiry, which place law largely outside the scope of the cultural sciences Weber was concerned with, gives us reasons to explain why Hart might have decided to deny his influence.

Weber admitted that the formal conception described above was not the only possible meaning of law.³⁹ Why then limiting its use to this specific use? I think Weber wanted to

³⁵ *ibid.*

³⁶ Michel Coutu, ‘Weber Reading Stammler: What Horizons for the Sociology of Law?’ (2013) 40 (3) *Journal of Law and Society* 356, 366.

³⁷ Max Weber, *Critique of Stammler* (The Free Press 1977) 133.

³⁸ Weber (n 8), 76.

³⁹ Coutu (n 36), 364-369.

be cautious in maintaining the specificity of sociology, and even of sociology of law, distinguishing them from jurisprudence or legal dogmatics.⁴⁰

Hartian methodology, however, always required the presence of a kind of participant adopting an internal point of view without which Law is not brought about as a social phenomenon at all.⁴¹ By contrast, when developing his methodological thought, Weber took legal phenomena as existing independently of this relationship.

At this point it is useful to come back to Leiter's distinction between epistemic and moral values and its use in the analysis of the concept of a "city". I averred in the previous section that the analogy fell short of settling his discussion with Finnis. I submitted that the analogy failed to prove Leiter's point that the concept of Law, *just as the concept of a city*, can be grasped and appraised solely through the application of epistemic criteria. My discussion on Weber's unelaborated take on law and legal phenomena gives me a vocabulary to argue why Leiter falls short of closing the debate: cities are not *like* law. They are not *analogous* to Law.

For now, I have suggested Weberian reasons for Hart's reluctance to recognise Weber as a source of theoretical influence. Weber's social science is methodologically different from jurisprudence. The next section sees the problem from Hart's point of view. I will first briefly reconstruct Hart's vision on this problem as expounded in *The Concept of Law*. In Hart's understanding, the object law is *brought about* by certain participants (i.e., officials) without whom, no legal object would exist. The relationship between objects and participants in the (re)production of legality is less distant than it is in Weber's social sciences.

4. Hart's departure

Hart's most general contribution to the question "what is law" is that the law is the union of primary and secondary rules. The usual story about what this union entails says that legal systems exist when two minimum sufficient and necessary conditions are met:

On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.⁴²

Nevertheless, it is not clear why Hart was so explicit in affirming the necessity and sufficiency of both conditions. In the case of the first condition, Hart was adamant that this is the only requirement ordinary citizens *need* to satisfy, regardless of whether they accept the rules of the legal system or not: "they may obey each 'for his part only' and from any motive whatever".⁴³ As for the second condition, Hart says that "officials must regard these common standards of official behaviour and appraise critically their own and each other's deviations as lapses".⁴⁴ Legal systems are, then brought about by the concurrence of the "obedience by ordinary citizens" and "the acceptance by officials of

⁴⁰ *ibid*, 368.

⁴¹ Hart (n 2), 101-110.

⁴² *ibid*, 116.

⁴³ *ibid*.

⁴⁴ *ibid*, 117

secondary rules as critical common standards of official behaviour”. Such duality is, for Hart, “merely the reflection of the composite character of a legal system as compared with a simpler decentralised pre-legal form of social structure which consists only of primary rules”.⁴⁵

Right after describing both conditions, however, Hart qualifies his claim in ways that almost completely deny that sufficiency and necessity are in fact features of the first condition. This part must be quoted at length:

But where there is a union of primary and secondary rules, which is, as we have argued, the most fruitful way of regarding a legal system, the acceptance of the rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for this part alone. In an extreme case the internal point of view with its characteristic normative use of legal language (“This is a valid rule”) might be confined to the official world. In this more complex system, only officials might accept and use the system’s criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.⁴⁶

This is a strange way of presenting the problem. Of course, Hart’s concern was not only with the formal validity of legal norms, but with their relationship to efficacy as well. Yet, the preceding quote puts a strong emphasis on the role of officials and on the normative attitudes *they* must adopt towards rules if a valid legal system is to be deemed as such. So, even in the “extreme case” where only officials follow the directives of the legal system as the result of adopting the internal point of view, we may be, perhaps in the presence of a legal system on the verge of a revolution, or one that is extremely fragile in its capacity to guide the citizens’ behaviour. But we will be in the presence of an existent and valid legal system, nonetheless. Hart is explicit about this.⁴⁷ Hence, as depicted in the text of *The Concept of Law*, both conditions are not copulative and, to the extent that we distinguish validity and efficacy, the second condition suffices for bringing about a valid system.

I am not the only one drawing attention to this and to other concomitant problems, of course. After posing the question “Whose behaviour is structured by the operative rule of recognition?”, Kramer answers that Hart’s answer is sometimes “a bit muddled”.⁴⁸ Kramer also quotes P.M.S. Hacker who notes that Hart treats non-officials, or private persons, more like spectators than like participants.⁴⁹ Barczentewicz also gives a brief overview of the secondary literature discussing what exactly counts as an official. Lamond considers that the group is not limited to the judges,⁵⁰ Goldsworthy that only

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ *ibid.*, 103.

⁴⁸ Matthew Kramer, ‘The Rule of Misrecognition in the Hart of Jurisprudence’ (1988) 8 (3) OJLS, 401, 406.

⁴⁹ P.M.S. Hacker, ‘Hart’s Philosophy of Law’ in P.M.S Hacker & Joseph Raz (eds), *Law Morality and Society: Essays in Honour of H.L.A. Hart* (Clarendon 1977) 23.

⁵⁰ Grant Lamond, ‘The Rule of Recognition and the Foundations of a Legal System in Luís Duarte d’Almeida, James Edwards & Andrea Dolcetti (eds), *Reading HLA Hart’s ‘The Concept of Law’* (Bloomsbury 2013) 112.

senior legal officials alone count,⁵¹ Raz in turn considers that only “primary law-applying institutions” make the cut.⁵² Barczentewicz’s own take is closer to Raz’s.⁵³

Moreover, Barczentewicz notes that Hart suggested that “it is the group of all legal officials of the system in question” that count as legal officials,⁵⁴ but that he subsequently “lapsed into speaking about the courts only”.⁵⁵ “[The rule of recognition] is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts.⁵⁶ Himma, by contrast, thinks that “judicial officials are not the only participants whose behaviour and attitudes figure into determining the existence and content of the rule of recognition”.⁵⁷

So, the central role that Hart gives to “officials” in his theory is “both striking and curious”.⁵⁸ This is not only because Hart “nowhere tells us just what an ‘official’ is or how we recognize one”,⁵⁹ something which has led scholars to discuss, for example, problems of circularity in Hart’s jurisprudence.⁶⁰ The important role given to officials is also puzzling because in the “more complex system” Hart is talking about in the quotation above, could be one in which law is whatever the officials say it is.⁶¹

Simmons argues this would be a rather unfair interpretation of Hart, for Hart is adamant that, to use Simmons example, an official accepting the rule of recognition requiring her to apply acts of Parliament would be having the law wrong by applying one of such acts on the basis that she does not agree with its content.⁶² As it happens, Hart clearly distinguished validity from existence.⁶³ And yet, the predominance of the role of “officials” in recognizing and in bringing about law is manifest in Hart’s jurisprudence, for it is *their* practice what counts as dispositive in determining the content of the rule of recognition and, therefore, in determining the sources that count as obligatory or permitted, which are, in turn, the ones that will ground the norms that they may eventually apply to concrete cases. It may be the case that such a system may lack efficacy and that it may disappear eventually due to its impossibility to guide the behaviour of citizens. But that is a different question: the point is that Hart is clear that what counts as necessary and sufficient for the identification and creation of law is that common public standards of validity criteria are accepted by officials.

This leave us with a quandary. Is it really the case that, in spite of Hart’s explicit reluctance to admit the need for citizens to adopt the internal point of view, all that counts is official behaviour? Adler has affirmed this: “‘For Hart, elite consensus defines law’ ...

⁵¹ Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 2001) 238-243.

⁵² Joseph Raz, *The Authority of Law* (OUP 2009) 108-111.

⁵³ Mikolaj Barczentewicz, ‘The Illuminati Problem and Rules of Recognition’ (2018) 38 (3) OJLS 500, 514.

⁵⁴ *ibid*; Hart (n 2), 117.

⁵⁵ Barczentewicz (n 53), 514,

⁵⁶ Hart (n 2), 256.

⁵⁷ Kenneth Einar Himma, ‘Making Sense of Constitutional Disagreement: Legal Positivism, the Bill of Rights, and the Conventional Rule of Recognition in the United States’ (2003) 4 *Journal of Law in Society* 4 149, 154.

⁵⁸ Nigel Simmons, *Central Issues in Jurisprudence* (Sweet & Maxwell 2013) 158

⁵⁹ *ibid*.

⁶⁰ Kramer (n 48); Matthew Adler, ‘Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?’ (2006) 100 *Northwestern University Law Review* 719, 733.

⁶¹ Simmons (n 58), 159.

⁶² *ibid*.

⁶³ Hart (n 2), 69.

Officials, not citizens, are the recognitional community: that is, the rule of recognition supervenes on official actions, beliefs, judgements, etc., alone”.⁶⁴

Gardner, however, suggested that the general obedience demanded from non-officials cannot merely consist of patterns of action compatible with legal requirements even if these subjects do not realise that they are acting in conformity with the law. He first recognised that in Hart,

... the relevant custom, the one that makes the rule what it is, is not the custom of a population that can identified independently of it. There is no wider population, beyond the official users, who participate in making the rule by their cumulative attempts to follow it.⁶⁵

But then, he added:

This does not mean, of course, that Hart did not regard the existence of a legal system as also depending, in a different way, on the behaviour of a wider population. On the contrary... True, even for Hart, it can't be sheer coincidence that the general population stays, by and large, on the right side of the law. Some explanatory link between their conformity and the legal rules is required. Those who hold themselves out to be the officials of the legal system must be able to affect non-official behaviour by changing or applying the rules, or else they are not officials of the legal system.⁶⁶

Gardner's view was that this “shows just how little ‘social basis’ a system of rules needs, in Hart's view, in order to qualify as a legal system”.⁶⁷ But Adler goes even further, I think for the right reasons. His contention is that “it is pretty clear, as a matter of Hart exegesis ... that Hart believed official practice, not citizen or subject practice, to be constitutive of the rule of recognition and thereby to provide ultimate criterion of legal truth”.⁶⁸

My view is that the disagreement is only apparent. The explanatory link that Gardner asks for is not one that is found in Hart, to the extent that such link derive from an exegetical analysis of Hart's account. This is pretty clear, indeed, *as a matter of Hartian exegesis*.

So, the questions we are left with are, first, why would Hart be so stringent in this role allocation?? And second, is this helpful in answering why would Hart refuse to acknowledge Weber as a source of inspiration?

I think Adler also gives a good answer to the first question. Hart's methodological commitment to descriptivism precludes any logical space for the idea that mere observers, subjects or citizens, have any in role in determining the content of the rule of recognition and, therefore, in determining what is or what isn't law or legal.⁶⁹ Such descriptivism entails moral neutrality and the rejection of any justificatory aim. It entails objectivity. This stance is, as it is well known, explicit in Hart's *Postscript*

⁶⁴ Adler (n 60), 733.

⁶⁵ John Gardner, *Law as a Leap of Faith* (OUP 2012) 283.

⁶⁶ *ibid*, 284.

⁶⁷ *ibid*, 285.

⁶⁸ Adler (n 60), 733.

⁶⁹ *ibid*, 734.

My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law.⁷⁰

This commitment provides the room Hartian positivism needs to say without contradiction, for example, that wicked systems of law, or systems that the entire citizenry regards as unjust, immoral, etc., are systems of law nonetheless. It also allowed Hart to rebuff Dworkin's interpretivist criticism to his theses on the bases that "[d]escription may still be description, even when what is described is an evaluation".⁷¹

Adler makes this point nicely:⁷²

Identifying the rule of recognition as the ultimate, secondary rule accepted by the citizenry would preclude a legal system with an alienated citizenry, and would seem to make the rule virtually vacuous in less dysfunctional systems where most citizens are (rationally) ignorant of secondary legal matters.⁷³

This is an elaborated way of saying that "the sheep might end in the slaughter-house".⁷⁴ However, from this point onwards, Hart cannot be Weberian anymore. Weber made his methodological commitments with a certain type of object in mind – those relevant for the social sciences, where economics and history were the most prominent examples. The nature (and I don't mean anything ontologically strong with the word) of economics and history is such that, under Weber's assumptions, the social scientist can still look at the world as something that is not brought about by her. Picking up on Leiter's example again, cities come about with a larger independence from the practice of the city dweller or the scientist seeking to come to terms with what a city is. Put differently, the existence of object city is less dependent on the Weberian social scientist's say-so of fiat than Law is in Hart's system, which gives officials the capacity to actually bring about their object.⁷⁵

I want to finish with an example from a discussion on originalism and textualism which illustrates this point nicely. Scalia discusses the Supreme Court case *Church of the Holy Trinity v. United States*, in which this church subscribed a contract with an Englishman to move to the United States so that he would take over as rector and pastor. The US Federal Government argued that the contract violated a federal statute that made it illegal for any person to

in any way assist or encourage the importation or migration of any alien ... into the United States, ... under contract or agreement ... made previous to the importation or migration of such alien ..., to perform labor or service of any kind in the United States.⁷⁶

⁷⁰ Hart (n 2), 240.

⁷¹ *ibid*, 244.

⁷² Leslie Green in his introduction to the *Concept of Law* concurs.

⁷³ Adler (n 60), 734.

⁷⁴ Hart (n 2), 117.

⁷⁵ This, of course, within the limitations set by the ultimate criterion, namely the rule of recognition, for which "there is no rule providing criteria for the assessment of its own legal validity". *ibid*, 107.

⁷⁶ Antonin Scalia, *A Matter of Interpretation: Federal Courts and The Law* (Princeton 1997), 18-19.

The Circuit Court for the Southern District of New York decided against the Church and sentenced it to pay a fine. The Supreme Court overturned the decision. The reason, in its central portion was:

It must be conceded that the act of the [church] is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used [in the statute], but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind'; and further, ... the fifth section [of the statute], which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.⁷⁷

Weber could not have explained the validity of this decision. Hart could. The first saw the universe of legality as “naturally clearly definable [and valid] (in the legal sense!) for historical reality” because he was not thinking of law as the same kind of object as the objects of social sciences. Weber could not have deemed the Supreme Court’s decision as valid, for Weberian participants do not have the kind of illocutionary power the Supreme Court is exercising in the case at hand. By contrast, given that the exegetical reading of Hart I have commented on here limits participants in the determination of what counts as legal to officials, and because officials do have the power to change their object by say-so or fiat, a Hartian interpretation of the case commented by Scalia would not lead us to conclude that the Court was trespassing the limits of legality by clearly deciding against the letter of the statute (the only object Weber’s social scientist could have had access to as part of what is “naturally clearly definable”). By contrast, under this Hartian reading the court was merely playing the game of law.

5. Conclusion

In the wording of the editors of this collection, my contribution to this collection has revolved around some of the following questions: “ought jurisprudence be objective, and how can it become so? Should legal sources be objective, and how can they become so? I have reflected on this question from the perspective of the distinction between facts and values as understood by Max Weber and H.L.A. I argued that Hart and Weber shared a basic commitment to this distinction. This shared commitment permeates Hart to the point where authors have seen a Weberian undertow in his work. Hart, nonetheless, never admitted such inspiration.

Secondly, Hart’s reluctance to admit Weber’s theoretical inspiration has not been properly theorised in the secondary literature.

Thirdly, I have suggested that Weber’s methodology was concerned with a certain group of social sciences. Law was not one of them. Moreover, in some scattered remarks in his methodological writings he maintained a limited vision of what law is, in ways separates

⁷⁷ *Church of the Holy Trinity v. United States* (1892) SCOTUS 143.

legal phenomena from the same methodological treatments he gave to social sciences. I thus claimed that given the nature of the enquires each author focused on, Hart could have only followed Weber up to a certain point on pain of betraying his methodological commitment to descriptivism.

As I have stated, my explanation is based on an exegetical reading of Hart and on a reading of Weber's methodological work. These are certainly not the only ones available. I have not attempted here to take sides on many other discussions. My intention here has been merely, as my title indicates, to suggest a plausible explanation for Hart's reluctance to admit Weber's influence.