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The Rule of Recognition – a Remedy for the External Uncertainty of Law?

Abstract

According to H. L. A. Hart, the rule of recognition is one of secondary rules that is supposed to be a remedy for the uncertainty of primary rules. In this paper we will try to answer the question: To what extent may this rule guarantee legal certainty? After discussing important differences between the concept of the rule of recognition and Kelsenian concept of the basic norm (*Grundnorm*), we will examine the role of the rule of recognition in the context of the problem of the external certainty of law. When analyzing its content, meaning and effects of using the criteria of validity contained in the rule of recognition, we discovered three types of uncertainty related to the rule of recognition: the substantive, interpretive and applicative one. Our considerations have led us to the conclusion that the rule of recognition, having as its aim the function of removing the uncertainties of law, is itself one of the sources of these uncertainties. It is difficult to consider it as a genuine effective remedy to the external uncertainty of law. The construction of the rule of recognition means that the degree of certainty which we obtain as a result of its application appears to be greater than in the case of "ordinary" primary rules within the system, yet we will never obtain a total external certainty of law unless we apply another theoretical construction.

1. Introduction

The rule of recognition has frequently been the subject of extensive analyses within the field of contemporary analytical jurisprudence.[1] These analyses have concerned first and foremost its ontological status, its content, as well as its role within the mod-

[1] See e.g. R. Sartorius, *The Concept of Law*, "Archiv für Rechts- und Sozialphilosophie" 1966/52, pp. 161–193; J.L. Coleman, *Negative and Positive Positivism*, "The Journal of Legal Studies" 1982/11, pp. 139–164; J. Woleński, *Obowiązywanie prawne w ujęciu H.L.A. Harta* [Eng. *Validity of Law in H.L.A. Hart's Conception*], "Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace prawnicze" 1971/51, pp. 277–289; R. Alexy, *Begriff und Geltung des Rechts*, Freiburg-München 1992, pp. 194ff.; T. Pietrzykowski, *"Miękki" pozytywizm i spór o regułę uznania* [Eng. *"Soft" Positivism and the Controversy over the Rule of Recognition*], "Studia z filozofii prawa" 2001/1, pp. 97–121; A. Grabowski, *Zawartość reguły uznania w koncepcji H.L.A. Harta* [Eng. *The Content of H.L.A. Hart's Rule of Recognition*], in: *Prawo-władza-społeczeństwo-polityka. Księga jubileuszowa Profesora Krzysztofa Pałeckiego* [Eng. *Law-power-society-politics. Studies in honour of Profesor Krzysztof Pałecki*], edited by M. Borucka-Arctowa *et al.*, Toruń 2006, pp. 127–135.

ern legal system and legal reasoning. The originality of H.L.A. Hart's idea and special significance of the rule of recognition for the very concept of law itself have been emphasised, with this emphasis also applied to the problem of the delimitation of positive law. Therefore, it appears all the more surprising that within these analyses there has hitherto been little attention devoted to the fact that the rule of recognition – which was, according to H.L.A. Hart, to be a remedy for the uncertainty of law – may itself be a source of the abovementioned uncertainty. It seems that it is exactly this very question that is of special interest not only for theoreticians and philosophers of law. Certainty in the identification of the elements of a legal system, which – according to H.L.A. Hart – was to be guaranteed by the most important secondary rule is undoubtedly a fundamental problem both for legal dogmatists and lawyer practitioners, as well as for "ordinary" addressees and recipients of legal norms. Bearing in mind the importance of this problem, as well as the role which the rule of recognition was to fulfil in its solution, we shall characterise the rule of recognition within the context of legal certainty, which we shall allegedly obtain thanks to its application in a legal discourse.

2. Law as a System of Primary and Secondary Rules

To begin with, we shall recall that the core of H.L.A. Hart's sophisticated legal positivism[2] is the assumption that the law rests on a specific union of two types of legal rules: primary rules and secondary rules.[3] Primary rules are sufficient to explain elementary forms of law. However, the concept of rules itself is not, as it may seem, a simple one. We cannot identify this concept with J. Austin's concept of command issued by a sovereign. The expressing of a system of law in the way outlined by the author of *The Province of Jurisprudence Determined* "failed to reproduce some of the salient features of a legal system".[4] By means of primary rules of obligation, duties are imposed on legal subjects, while rights are conferred on them, hence Hart also refers to them as duty-imposing rules. Parasitic rules in relation to primary rules are secondary rules. These are the rules creating public competence and legal capacities, hence they are also referred to as power-conferring rules.[5]

H.L.A. Hart identifies three fundamental defects within a legal system composed exclusively of primary rules. Primary rules as a principle do not create a system, but are a fairly contingent and fragmentary regulation of human forms of behaviour. They are a regulation devoid of meta-rules determining the extension of a legal system. Besides, primary rules remain almost invariable and they are only subjected to slow evolution. Their non-abidance is merely threatened by an unspecified sanction, as a result of which they are difficult to enforce.[6] Hence, a legal system that is comprised exclusively of duty-imposing rules is uncertain, static and inefficient. According to H.L.A. Hart, it is indeed thanks to secondary rules that one is able to remove these defects within a legal system. A remedy for the uncertainty as to which primary rules are valid legal norms, is the rule of recognition. The rules of change are to eradicate a flaw within a legal

[2] The term introduced by R.A. Shiner, *Norms and Nature. The Movements of Legal Thought*, Oxford 1992, pp. 43ff.
[3] H.L.A. Hart, *The Concept of Law*, Oxford 1961, pp. 78ff.
[4] H.L.A. Hart, *The Concept…,* p. 77.
[5] H.L.A. Hart, *The Concept…,* pp. 35ff., 78ff. Cf. N. MacCormick, *Power and Power-Conferring Norms*, in: *Normativity and Norms. Critical Perspectives on Kelsenian Themes*, edited by St.L. Paulson, B. Litschewski, Oxford 1998, pp. 497ff.
[6] A. Bator, W. Gromski, A. Kozak, S. Kaźmierczyk, Z. Pulka, *Wprowadzenie do nauk prawnych* [Eng. *An Introduction to Legal Sciences*], Warszawa 2006, pp. 129–130.

system that results from its stability allowing primary legal rules to turn out to be inappropriate as a result of changing social relations. In the end, an antidote to doubts as to whether a given primary rule has been infringed, as well as who and according to what procedures the matter should be addressed, are the rules of adjudication.[7] According to H.L.A. Hart, if we do not notice a specific "parasitic" nature of secondary rules (the existence of which has no purpose whatsoever within a legal system without the existence of primary rules), then it will not be possible to explain a host of legal phenomena, such as sovereignty, change in law, legal validity and the application of law. Though admittedly the conception of primary and secondary rules plays the most important role within H.L.A. Hart's theory, it is worth remembering that it does not serve as a definition of law[8], but constitutes "the key to the science of jurisprudence".[9]

Indeed the rule of recognition is merely one of secondary rules, yet it enjoys a specific position in relation to the remainder. According to H.L.A. Hart, it contains the criteria for the identification of primary rules, thanks to which we know which primary rules are legally valid norms.[10] Without the rule of recognition within a legal system, we are dealing with a state of legal uncertainty[11], which is one of defects in a legal system identified by H.L.A. Hart. We shall consider to what degree the rule of recognition in fact allows for a removal of the said flaw. In order to achieve this and to state with full determinative force that it is a remedy to the uncertainty of law, we must examine closer its construction and content. There is no doubt that without the rule of recognition the establishment of the borders of a legal system is exceptionally difficult. However, also the claim that the rule of recognition defines a precise border between the extensions of the concepts of law and non-law itself, arouses numerous objections.

Analysing the use of the rule of recognition for the identification of elements of a legal system, it is worth asking a question about how far this rule may guarantee us legal certainty. Here the matter naturally concerns the certainty of the borders of law, i.e. the possibility of an irrefutable recognition of the components (valid legal norms) of a legal system. In further considerations we shall call this certainty external certainty of law, for the problem lies in precise establishment of a borderline between law and non-law, i.e. the differentiation of law from other normative systems, in particular from morality. Can we, in fact, thanks to the rule of recognition, establish with certainty which norms belong to the system of law? In other words, can we establish which norms are valid and which are invalid?

3. The Rule of Recognition *vs.* Basic Norm (*Grundnorm*)

Before we attempt to answer these questions, we should emphasise that the concept of the rule of recognition is undoubtedly an entirely original idea on the part of H.L.A. Hart. Before his idea was formulated, the fundamental subject of interest amongst legal positivists considering the problem of supreme norms of a system of law had been H. Kelsen's conception of basic norm. It was *Grundnorm* that constituted the base for the reconstruction of a law system, and although one may perceive certain

[7] H.L.A. Hart, *The Concept…*, pp. 89–95.
[8] J. Woleński, *Obowiązywanie prawne…*, p. 280.
[9] H.L.A. Hart, *The Concept…*, pp. 6ff., 79.
[10] H.L.A. Hart, *The Concept…*, p. 92.
[11] J. Woleński, *Obowiązywanie prawne…*, pp. 279–280.

similarities within the concepts of the rule of recognition and the basic norm, the differences between them are fundamental and worthy of mention.

However, we shall start our comparison of H.L.A. Hart's rule of recognition with H. Kelsen's *Grundnorm* from an indication of their similarity, which – as K. Opałek notes – may be perceived within the context of a problem of the effectiveness of a legal system.[12] For H. Kelsen, the efficacy of a legal system is a condition of existence and therefore also the validity of law (as it is well known, H. Kelsen identified existence with the validity of legal norms).[13] This can be best seen in the formulation of *Grundnorm,* in which there is a reference to the system of law which is *im großen und ganzen* efficacious. In Hart's theory, however, an external statement on the effectiveness of law is a presupposition of an internal statement about the validity of legal rules.[14] Therefore, for both authors, the validity of law is connected with its effectiveness. It is, however, difficult to identify other important similarities, wherein it is equally difficult to agree with a thesis that the difference between the *rule of recognition* and *Grundnorm* is not as big as it seemed.[15] It is impossible not to notice a clear difference between each of these concepts. A comparison of their nature, which we shall undertake in a moment, no only allows for underlining of the originality of H.L.A. Hart's conception, but it also clearly displays significant features of the rule of recognition, which are important for our further analyses.

We shall commence from the most fundamental difference. For H. Kelsen, *Grundnorm* is a transcendental presupposition, a hypothesis, or a necessary fiction in the legal cognition of law.[16] For H.L.A. Hart, however, the existence of the rule of recognition, which he initially referred to as a master rule[17], is a matter of facts[18], and not a presupposition or postulate of legal reasoning.

The second difference concerns the question of the validity of these two rules, the most important ones within a system of law. The basic norm is valid, for its validity is presupposed, while for H.L.A. Hart the question concerning the validity of the rule of recognition is pointless for "it can neither be valid nor invalid".[19] In reference to the rule of recognition, there is no need to establish its validity, for the existence of the rule of recognition as a customary norm[20] is a fact. As a customary norm, the rule of recognition belongs to a legal system as a result of its acceptance by officials, state organs and citizens.[21] Therefore, in H.L.A. Hart's positivism there is no need to have

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[12] K. Opałek, *Problemy statycznych i dynamicznych systemów normatywnych* [Eng. *The Problems of Static and Dynamic Legal Systems*], in: *Studia z teorii i filozofii prawa* [Eng. *Studeis in Theory and Philosophy of Law*], edited by R. Sarkowicz, J. Stelmach, Kraków 1997, p. 87.

[13] More on H. Kelsen's concept of the basic norm see e.g., J. Raz, *Kelsen's Theory of the Basic Norm*, in: idem, *The Authority of Law. Essays on Law and Morality*, Oxford 1979, pp. 122–145; A. Peczenik, *On the Nature and Functions of the Grundnorm*, "Rechtstheorie" 1981/2, pp. 279–296; K. Płeszka, *Hierarchia w systemie prawa* [Eng. *The Hierarchy in Legal System*], Kraków 1988, pp. 67ff.; St.L. Paulson, *Die unterschiedlichen Formulierungen der "Grundnorm"*, in: *Rechtsnorm und Rechtswirklichkeit. Festschrift für Werner Krawietz zum 60. Geburtstag*, edited by A. Aarnio *et al.*, Berlin 1993, pp. 53–74; J. Stelmach, *Norma podstawowa* [Eng. *Basic Norm*], "Studia z filozofii prawa" 2001/1, pp. 63–70.

[14] H.L.A. Hart, *The Concept…*, p. 101. Cf. J. Woleński, *Obowiązywanie prawne…*, pp. 282–284.

[15] K. Opałek, *Problemy statycznych …,* pp. 87.

[16] See R. Alexy, *Begriff und Geltung…*, pp. 173ff.; St.L. Paulson, *Die unterschiedlichen Formulierungen…*; U.U. Bindreiter, *Presupposing the Basic Norm*, "Ratio Juris" 2001/14, pp. 143–175.

[17] H.L.A. Hart, *Introduction*, in: J. Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence*, edited by H.L.A. Hart, London 1954, p. xiii.

[18] H.L.A. Hart, *The Concept…*, pp. 106–107.

[19] H.L.A. Hart, *The Concept…*, p. 105.

[20] J. Raz, *The Concept of A Legal System. An Introduction to the Theory of Legal System*, Oxford 1980, p. 198; P.M.S. Hacker, *Hart's Philosophy of Law*, in: *Law, Morality and Society. Essays in Honour of H. L. A. Hart*, edited by P.M.S. Hacker, J. Raz, Oxford 1977, p. 23.

[21] Z. Pulka, *Legitymizacja państwa w prawoznawstwie* [Eng. *The Legitimisation of the State in Jurisprudence*], Wrocław 1996, p. 129.

recourse to the highest fictitious norm. What, in that case, is the rule of recognition – a norm or a fact? There is no unequivocal answer to this question. It is a norm in the sense that as a collection of criteria of legal validity it functions within the framework of internal legal discourse. Its existence is a fact that can be easily perceived from an external point of view.[22]

We arrive at the subsequent, third difference. For H. Kelsen one is able to substantiate the validity of other norms in a dynamic legal system only thanks to the fact that the basic norm is valid, whereas H.L.A. Hart's rule of recognition supplies merely the criteria for the validity of other norms. It is first and foremost to serve as the identification of valid legal rules (norms), and not as justification for their validity. This facilitates an answer to the question as to what counts as the law.

In this way we find already the fourth dissimilarity between the rule of recognition and *Grundnorm*. Hence, the rule of recognition may indicate a series of criteria of validity, with one of them superior in character – it is an ultimate criterion, for a basic norm has a much simpler form – it is a single meta-rule.[23]

The next – fifth – difference is based on the fact that the very content of the rule of recognition (as a customary rule) undergoes spontaneous changes, while in the case of a basic norm the content is always the same, in as far as it maintains the continuity of a given legal order, initiated by the first "by and large" (*im großen und ganzen*) effective constitution.[24]

The sixth difference is connected with the already discussed concept of the effectiveness of a legal system. The basic norm allows for the recognition as valid of any (with regard to the content) legal system, even if it has been imposed by force, under the condition that it is "by and large" effective. In the case of H.L.A. Hart's conception, if the foundation of a legal system is to be accepted by the subjects of law, it must adhere to the rule of recognition from an internal point of view. This excludes the recognition as valid and binding of a system of law which is comprised of rules imposed by force, i.e. by an authority not recognised by the addressees of legal norms as legitimate for law giving acts.[25]

Finally, the seventh difference, which from the point of view of our considerations is extremely important, concerns the phenomenon of the open texture of concepts and legal rules. As opposed to the basic norm, the rule of recognition, in a similar way to other legal rules, is characterised by its "open textual structure".[26] The problem of *open texture*, which is exceptionally important for our research, will be presented in a broader fashion in the next fragment of our deliberations, already directly concerning the problem of the external certainty of law.

At the end of our comparison between H. Kelsen's concept of basic norm and H.L.A. Hart's rule of recognition we would like to make one more reference to the source of the above indicated differences. This is first and foremost the philosophical ground from which the two theories are derived. In the case of H. Kelsen, this is neo-Kantian philosophy. H.L.A. Hart, in turn, represented the Oxford philosophy of ordinary language. We would also like to draw attention to the fact that both philosophers perceive

[22] H.L.A. Hart, *The Concept…*, pp. 106–107.
[23] H.L.A. Hart, *The Concept…*, p. 108.
[24] J. Woleński, *Obowiązywanie prawne…*, pp. 285–286.
[25] Z. Pulka, *Legitymizacja…*, p. 129.
[26] Z. Pulka, Legitymizacja…, p. 129.

a system of law in different ways. An analysis of H. Kelsen's normativism leads one to the conclusion that it is constructed from the perspective of a lawgiver, who by means of acts of will creates the law. H.L.A. Hart, in turn, adopts an internal point of view, characteristic for a lawyer applying the law. His theory is constructed consequently according to a bottom–up research strategy. A lawyer reconstructs a system of law, checking whether a given norm fulfils the criteria of validity designated by the rule of recognition. At this point it is worth remembering that both legal positivists adopt fundamentally different empirical principles. For H. Kelsen, the existence of a science of law is a fact, for his theory attempts, among other things, to find an answer to the typical Kantian question of how a science of law is possible. H.L.A. Hart, conversely, accepts the existence of law as a fact– the so called municipal legal system irrefutably exists, while the fundamental question is: Why and in what form does it exist?

4. The Rule of Recognition and the Problem of External Legal Certainty

Let us return to the analysis of the rule of recognition in the context of the problem of the external certainty of law. We already know that it is to serve determination of valid legal rules which belong to a given legal system.[27] In order for a system of law to exist, two minimally necessary and sufficient conditions must be fulfilled. The first of these is the effectiveness of the law involving that the "rules of behaviour which are valid (…) must be generally obeyed".[28] The second minimal condition for the existence of a system of law is – according to H.L.A. Hart – the acceptance of the rule of recognition by officials and other legal subjects, defining the criteria of validity for primary rules and the remaining secondary rules – other than the rule of recognition itself. A fundamental question for our considerations is first and foremost the content of the rule of recognition, that is the criteria entering into its composition. The degree of certainty that we obtain in applying the rule of recognition in the aim of identifying legal rules in force is going to depend on these criteria.

We have already highlighted that there may exist a number of criteria of validity which enter into the make-up of the rule of recognition. The certainty of the law relating to the rule of recognition and therefore the certainty of differentiating legal norms from other social norms is determined, first and foremost, by the nature of these criteria. Their correct characteristics are equally paramount here, for they must precede an answer to the question about whether and to what degree the rule of recognition guarantees the external certainty of law. The answer to this question requires, in our opinion, the conducting of an analysis of three aspects which directly influence law certainty: an examination of the content, meaning and effects of using the criteria of validity contained in the rule of recognition.

In H.L.A. Hart's understanding, the content of the rule of recognition (the criteria comprising it) may be the effect of not only an act of will on the part of a lawgiver (expressed in form of the provisions of statutory law), but may be defined in the jurisdiction,[29] for it functions as "a customary legal rule noticeable only through social practice".[30] If this social practice is the source of the rule of recognition, then it

[27] H.L.A. Hart, *The Concept…*, p. 92. Cf. Z. Pulka, *Legitymizacja…*, pp. 131–132.
[28] H.L.A. Hart, *The Concept…*, p. 113.
[29] H.L.A. Hart, *The Concept…*, pp. 92–93.
[30] B. Wojciechowski, *Dyskrecjonalność sędziowska. Studium teoretycznoprawne* [Eng. *Judicial Discretion. A Jurisprudential Study*], Toruń 2004, p. 28.

surely arouses no doubt that establishment of the wording of this rule may result in significant difficulties of a cognitive character. How is one to research such a practice? Will it be well described? What point of view is going to be the most appropriate to research the practice? Additionally, it is necessary to consider the fact that the rule of recognition undergoes constant, spontaneous and unpredictable changes, which may significantly make the process of conducting empirical research more difficult.

Another problem is connected with the quantity of the criteria. The rule of recognition may have from a few to a dozen or so criteria of validity. This results in uncertainty about whether the rule of recognition constructed at a given moment contains all the criteria. What is more, assuming that the rule of recognition is examined through consistent practice, how are we to establish its wording if there are many counter examples indicating that this concordant practice in reality does not take place whatsoever.[31] It appears that in this case the difficulties are first and foremost practical in nature. There may be problems researching social practice or jurisdiction on the basis of which the wording of the rule of recognition is established. Removing at least the first of the mentioned uncertainties is not a simple task because the rule of recognition is complex in nature. Summing up, when we consider the question of the content of the rule of recognition, at least three charges may be levelled in connection with the fact that: (1) this rule is subjected to constant spontaneous changes, (2) the criteria of validity contained within it come from various sources, and then (3) there exist serious difficulties (in the empirical sense) in the correct identification of the contents of the rule of recognition both with regard to the quantity as equally the content. Thus, it appears to be clear that the claim about the substantive uncertainty of the rule of recognition is justified.

Let us now examine the uncertainty of meaning and result of applying the rule of recognition. The interpretation of the content of the criteria contained in the rule of recognition, as well as their application in a concrete case may cause the greatest difficulties and fundamentally reduce the degree of the external certainty of law. Let us note that even knowing all of the criteria that comprise the rule of recognition, we may have doubts as to their meaning (proper interpretation) or means of application. The following example may vividly show us the problems connected with the question of interpretation of the criteria contained within the rule of recognition. Let us suppose that the rule of recognition is as follows: "The law is what the sovereign says (it is)". This means that we are dealing already with the first source of uncertainty, i.e. with the substantial uncertainty of the rule of recognition. We know the wording of the highest validity rule in a system of law. We may claim *prima facie* in this case that such a formulated criterion is precise, and its interpretation appears unambiguous and, in this sense, certain. However, in our case this is merely superficial and partial certainty, for here we are only dealing with a certain designation of what the criteria sound like. In order for the external certainty of the law to be realised in practice, a criterion or criteria (expressed in the rule of recognition) must not only be correctly identified, but also fulfil two additional conditions. Firstly, this criterion should be formulated by means of terms allowing for an unequivocal interpretation. The second condition,

[31] M. Pichlak, *Odniesienie do prawa w ramach praktyki społecznej. Koncepcja Herberta Harta a założenie świata życia* [Eng. *The Reference to the Law in the Frame of Social Practice. Herbert Hart's Conception and the Assumption of the Lebenswelt*] in: *Z zagadnień teorii i filozofii prawa. W poszukiwaniu podstaw prawa* [Eng. *Problems of Theory and Philosophy of Law. In Search of Foundations of Law*], edited by A. Sulikowski, Wrocław 2006, p. 111.

inseparably linked to the first one, is the lack of applicatory doubts connected with settlement of the question about which norms are valid legal norms.

In the above, superficially extremely simple, example, interpretive difficulties may be aroused in essence by not very clear and not totally precise terms, such as "sovereign" or "say". It is not always easy to ascertain who is the sovereign, particularly in a situation of states with limited internal and/or external sovereignty. And does "says" mean equally the same as what the sovereign will write, sing or express by means of some gesticulation, and is it, by so doing, going to constitute a valid law? Naturally, a fundamental source of the indicated interpretive doubts are features of the language in which the criterion was formulated. Interpretive uncertainty is linked with characteristic features of every natural language, like vagueness and semantic indeterminacy of the majority of linguistic expressions. As T. Gizbert-Studnicki writes: "The semantic and syntactical rules of natural language are loose and imprecise".[32] Hence, the wording of the rule of recognition may arouse doubts as to its meaning, even when the rule is fully formulated in a legal or juristic language, for these languages equally possess, although to a lesser degree, the mentioned traits of a natural language. As a result, interpretive doubts may also appear. In other words, the interpretive uncertainty which we are writing about relates to the meaning of the rule of recognition. Comprehending it in a different way – even if the criteria applied in undertaking a decision on legal validity are certain (in the sense of their wording) – in no way resolves the question of interpretation. What is more, H.L.A. Hart himself draws attention to the fact that the language of a legal text is characterised by potential vagueness, which he calls "open texture" – making use of the concept introduced by F. Waismann.[33] Generally speaking, the essence of vagueness lies in the fact that words used in a legal text are not unambiguous.[34] Classic vagueness may be eliminated through measures regulating meaning – for example, a legal definition, although open texture by definition cannot be entirely eliminated. It may always occur that though admittedly our present knowledge of a given term may enable us to treat it as a precise term, this in no way means that in the future there will not be a context which will cause lack of certainty with regard to the classification of a given person, phenomenon or state of things by means of this term.

The feature of open texture concerns equally the rule of recognition, which is especially important from the point of view of the law's external certainty. This means that irremovable potential vagueness of the rule of recognition may cause a situation in which there will be lack of certainty of whether a given primary rule fulfils the criteria contained in the rule of recognition or not. This will be brought about by the features of the language in which they are expressed. In such a situation, even if we establish the wording of the rule, its semantic scope may remain uncertain. We may therefore deal with the interpretive uncertainty of the rule of recognition.

We shall examine another source of uncertainty – application of the criteria contained in the rule of recognition. The problem of application is directly connected with the problem of interpretation, because classification (i.e. the inclusion of some object to the extension of a given name) must be, at least partly, dependent on the in-

[32] T. Gizbert-Studnicki, *Język prawny z perspektywy socjolingwistycznej* [Eng. *Legal Language from a Sociolinguistic Perspective*], "Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z nauk politycznych" 1986/26, p. 107.

[33] See F. Waismann, *Verifiability*, "Proceedings of the Aristotelian Society. Supplementary Volume" 1945/19, pp. 119–150. Cf. B. Bix, *H.L.A. Hart and the "Open Texture" of Language*, "Law and Philosophy" 1991/10, pp. 51–72.

[34] B. Wojciechowski, *Dyskrecjonalność sędziowska*…, p. 30.

terpretation of the criteria of inclusion. The interpretation itself is necessary because the rule of recognition is formulated within a language. Therefore, it is not possible to move onto the next stage of determining which norms are valid legal norms without earlier interpretation of the content of the rule of recognition. The process of interpretation, however, does not have to be directed to the indication of which norms belong to the law in force.

To illustrate the now considered applicative uncertainty of the rule of recognition, we will use the example of the process of selecting eggs at a hatchery. If the hatchery owners qualify the eggs in terms of size, that is by means of an instrument which measures the eggs (e.g. up to 5.5 cm in circumference – Class S, from 5.5 to 6.5 – Class M, more than 6.5 cm – Class XL), they are automatically sorted without recourse to a person. If we were to, however, divide the hens' eggs into the following categories: "ugly" – Class S, "nice" – Class M, and "beautiful" – Class XL, then their sorting and selection would be problematic. First, it would be necessary to interpret what the terms "beautiful", "nice" and "ugly" meant, wherein the size of the eggs would probably be only one of the factors taken into consideration. The analogy appears a distant one, yet it allows for demonstrating the action of the rule of recognition at the moment of its application. Besides, it is necessary to bear in mind that we do not have such an instrument which would "measure" primary rules and mechanically undertake their classification. In the case of legal rules, no form of automatism is possible, for their application as a rule demands undertaking evaluations. There is no possibility of nominating such a criterion which would automatically allow to designate norms as valid legal norms (as J. Austin wished to do by means of the criterion of a sovereign's command, or H. Kelsen through a formal, dynamic relation between norms, on the top of which we can find *Grundnorm*). The primary condition for the application of the rule of recognition is consequently understanding of the criteria with which it operates. Only then is it possible to conduct a classification, that is recognition of a given norm as being a valid legal norm. Therefore, even if we consider that we know all the criteria – we have undertaken substantive uncertainty – and also that we have established their meaning, there is still classification uncertainty, which, as a result of the essence of open texture, is not possible to ever fully eliminate. Open texture results in a situation whereby we deal with fuzziness of a legal system[35], and that is why the borders of the system are uncertain. This may represent the absence or at least the lowering of the external certainty of law.

There is also a question about how to solve a conflict between criteria which may be in force at the moment of their application. What will happen if a given primary rule fulfils six criteria of validity, but does not fulfil two of them – is it then valid, or is it not valid? It can be seen that – in a similar way to the removal of the interpretive uncertainty of the rule of recognition – there is a necessity to adopt meta-rules, defining a hierarchy between individual criteria of validity contained within the rule of recognition. Unfortunately, these meta-rules may also result in the creation of the above mentioned three forms of uncertainty. And from a purely theoretical point of view, one may add that *regressus ad infinitum* appears to be unavoidable.

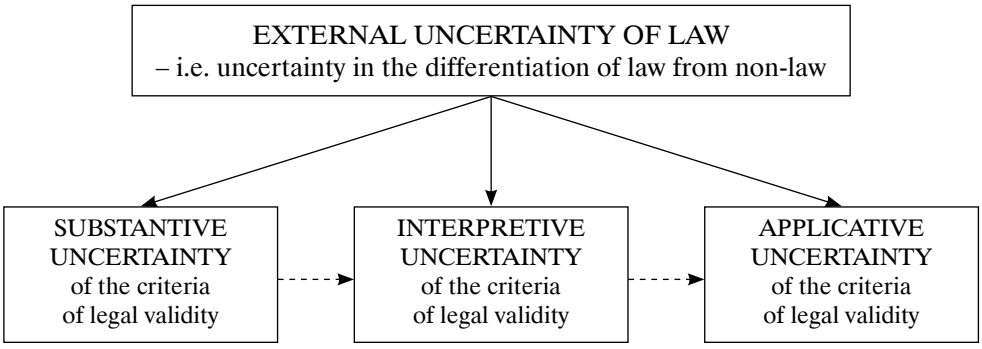
[35] See J. Wróblewski, *Nieostrość systemu prawa* [Eng. *The Fuzziness of Legal System*], "Studia Prawno-Ekonomiczne" 1983/XXXI, pp. 7–24; A. Peczenik, J. Wróblewski, *Fuzziness and Transformations: Towards Explaining Legal Reasoning*, "Theoria" 1985/LI, pp. 24–44.

5. Conclusions

The function of the rule of recognition is to level the defect of uncertainty within a legal system. However, its construction and content mean that a certain degree of the external uncertainty of law does remain, and, what is important, it does not lend itself to complete elimination. Summing up, we may have doubts (be uncertain) as to the following questions:

1. How many criteria of validity enter into the composition of the rule of recognition and what are their wordings? (substantive uncertainty),
2. What does the rule of recognition mean – how should we interpret individual criteria that make up its composition and hierarchical relations between them? (interpretive uncertainty),
3. What are the results of applying the rule of recognition – which legal norms may we consider valid as a result of the application of the rule of recognition? (applicative uncertainty).

These three uncertainties that refer to the rule of recognition mean that in order to obtain the external certainty of law, they need to be eliminated. Firstly, there must be a known number and well established content for the criteria of validity contained within the rule of recognition. Secondly, the terms used in these criteria must allow for an unequivocal interpretation. Thirdly, the results of the established and interpreted criteria must enable their unambiguous application. Hence, in the light of the conducted analyses, it appears that we are able to depict the external uncertainty of law as resulting from H.L.A. Hart's conception of the rule of recognition, not forgetting, however, that there is a close dependency between the identified types of uncertainty, the direction of which is presented by horizontal arrows in the diagram below:



Our considerations have led us to the conclusion that the rule of recognition, whose function is to remove the uncertainties of law, is itself one of the sources of these uncertainties. It is difficult to consider it as a genuine, effective remedy to the uncertainty of law. Naturally, this is not the entire truth. The rule of recognition allows us to eradicate certain defects connected with ascertainment as to what law is and what is not, but this is only the case when we have dealt with a concrete situation in which the three types of uncertainty are already resolved. The fundamental problem is that social reality is unusually varied, changeable, difficult to predict, and because of that establishing what valid law is, is not always an act 100% certain in itself. It seems that H.L.A. Hart,

wanting to create a fully descriptive theory of law[36], understood the defects within the rule of recognition itself. The rule of recognition does not resolve all of the doubts connected with the identification of valid legal norms; such doubts presumably will always be present and manifest themselves, at least in certain difficult, "hard cases". H.L.A. Hart does not agree, however, to the achievement of a total external certainty of law at the cost of other legal values. The rules of law – including the rule of recognition – possess a "penumbra of uncertainty".[37] The construction of the rule of recognition means that the degree of certainty which we obtain as a result of its application appears to be greater than in the case of "ordinary" primary rules within the system, yet we will never obtain a total external certainty of law, unless we apply another – not the rule of recognition – theoretical construction. Of course, this is in as far as the obtainment of the irrefutable external certainty of law is at all possible, for this equally raises doubts.

[36] H.L.A. Hart, *Postscript*, edited by P.A. Bulloch, J. Raz, in: H.L.A. Hart, *The Concept of Law*, Oxford 1994, pp. 239ff. More on the descriptiveness of H.L.A. Hart's legal theory see St.R. Perry, *Hart's Methodological Positivism* in: *Hart's Postscript. Essays on the Postscript to The Concept of Law*, edited by J.L. Coleman, Oxford-New York 2001, pp. 319ff.

[37] See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, "Harvard Law Review" 1958/71, pp. 67ff.; H.L.A. Hart, *The Concept…*, p. 12.

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