

Article

Hart's Legal Theory and Taiwan's Challenges in Implementing Human Rights Law

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I. INTRODUCTION

Taiwan, the Republic of China, adopted a constitutional bill of rights fifty years ago, but for the first forty years this ROC Bill of Rights was basically just a piece of paper. If enacting a constitutional bill of rights or signing an international treaty of human rights means that the people of a certain country have accepted the ideas of human rights, this was by no means the case in Taiwan. Instead, it is a laborious and time-consuming process to enforce the function of human rights in Taiwan. From a quantitative viewpoint, the caseload of the Grand Justices of the Judicial Yuan (the Constitutional Court in Taiwan) did not increase to large extent until the late 1980's. From a qualitative standpoint, some of the most influential cases, which declared unconstitutional some notorious statutes representing the past authoritarian era, appeared in the outset of the 1990s. Most importantly, despite this burgeoning success, a sound system of local human rights jurisprudence has not been constructed yet. This is mainly because, in order to enforce human rights law in Taiwan, the Grand Justices need to transplant foreign constitutional jurisprudence, but the problem is: the process of borrowing foreign laws is a very arduous work. In particular, there has been a problem of foreign constitutional jurisprudence being misunderstood or misapplied. Even worse, it is the case that the coexistence of different foreign countries' constitutional laws in Taiwan makes the local human rights law incoherent and unstable.

How can we explain this phenomenon? In particular, how can we explain this situation in comparison to an empirical one? What can we learn from this Taiwan's experience? Can the transformation of human rights law in Taiwan lead to understanding something meaningful? Hart's legal theory is a good start point to answer these questions.

First of all, since most literature dealing with the practice of human rights law or constitutional transformation in Taiwan is concentrated on empirical studies, this paper attempts to offer an explanation from a disparate, jurisprudential perspective. To do this, I will employ probably the most prominent debate in the modern Anglo-American jurisprudence, including various discourses between H.L.A. Hart and his opponents as well as supporters, to illustrate the various essential features of Taiwan's challenges in carrying out the idea and the spirit of human rights. However, since Taiwan's experience in implementing human rights has its own defined features, it is possible that it could be used to evaluate both the advantages and disadvantages of the points made out by Hart and other scholars, particularly Ronald Dworkin and Jules Coleman. Could Taiwan's experience in implementing human rights evince the strength and weakness of Hart's, and various scholars' theory? Most importantly,

could Taiwan's situation help us understand Hart's ideas of the rules of recognition, the social rule theory (or the practice theory used by Hart in the *Postscript*), and the internal point of view? This essay will, therefore, also show Taiwan's unique experience in enforcing human rights could provide some new perspectives on the famous debates between Hart and others.

Thus, there are two interrelated goals of this essay. It applies Hart's legal doctrines to explain Taiwan's practices in implementing human rights, as well as scrutinizes some of Hart's theories by reviewing Taiwan's problems. For foreigners, this paper is aimed at helping them understand how strenuous and difficult a process it is to enforce human rights in a non-western country, such as Taiwan. For Taiwanese readers, the aim of this paper is to make them realize that Taiwan's precious experience in enforcing human rights can endorse, challenge, or revise some parts of Hart's legal theories, which exemplifies the best of the West.

The arguments in the rest of the essay are roughly as follows. At the outset, I will explain why the dual roles of a constitutional bill of rights both as secondary rules, particularly a rule of recognition, as well as primary rules is decisive in understanding the predicaments of enforcing human rights in Taiwan. I will use Hart's theory about the minimum conditions for the existence of a legal system to explain why it took forty years for Taiwan to transform its human rights law. Furthermore, based on Dworkin's attacks on Hart's social rule theory, the distinction between concurrent and conventional morality, I will explain why it is difficult to introduce foreign constitutional jurisprudence as primary rules in Taiwan. In addition, I will look into the difficulty of a constitutional bill of rights functioning as a rule of recognition in Taiwan, due to the fact that its contents will be unstable and unpredictable by having borrowed foreign constitutional jurisprudence. Lastly, to solve the foregoing problems of an unstable constitutional bill of rights as a rule of recognition, the internal point of view emphasized by Hart can be used as a theoretical basis for constructing a better system of human rights law in Taiwan.

But before going to do more detailed analyses, let me describe further the transformation and the problems of enforcing human rights in Taiwan, and explain more why we need to study and apply Hart's legal theory in Taiwan's context at this particular moment.

II. THE PREDICAMENTS OF IMPLEMENTING HUMAN RIGHTS IN TAIWAN

It is a doubtless fact that it took more than forty years for the ROC Constitutional Bill of Rights to be transformed as a real foundation of maintaining people's rights and interests. Indeed, after more than forty

years' struggle, the Grand Justices of the Judicial Yuan at last solidifies the protection of human rights in Taiwan. In reality, the Grand Justices not only interpret the Constitution of the Republic of China, but also try to add new spirit to an old Constitution. However, a comprehensive system of the human rights law cannot be established solely on the foundation of condemning the errors of the past. When becoming accustomed to seeing the "old" laws declared unconstitutional, people will demand more delicate and detailed reasoning from the Grand Justices. In fact, the rationale of an interpretation is no less important than the consequence of it. From a long-term perspective, to facilitate the growth and development of human rights law in Taiwan, the Grand Justices should assume the responsibility of establishing a sturdier theoretical and jurisprudential base. In short, although in the recent decade the Grand Justices of the Judicial Yuan has achieved significant success in fulfilling the function of the ROC Constitutional Bill of Rights, there are still some serious problems contained within the current system of human rights law.

A. *The General Situation: The Grand Justices Build Taiwan's Constitutional Law on Different Countries' Constitutional Jurisprudence*

Probably the most obvious defect of current constitutional jurisprudence in Taiwan is the chaotic coexistence of different countries' constitutional theories. This situation is, perhaps, a little difficult for foreign legal circles to imagine, especially when the opposite force of legal transplanting is now so strong in the West.¹ For some western scholars,² it is hard to imagine the possibility of the coexistence of different countries' constitutional jurisprudence in a third country. For

1. With regard to the opinions about general problems resulted from borrowing foreign jurisprudence, Professor J.H.H. Weiler's paper is an example. Weiler identified four possible difficulties in transplanting foreign jurisprudence. See J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L L. & BUS. 354, 355 (1996-1997).

2. Some leading comparative scholars reminded the American legal circles and people that they should not be misled by foreign countries' using similar language in their constitutions or other legal documents. See William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945, 954-955 (1986). William P. Alford, *Making a Goddess of Democracy from Loose Sand: Thoughts on Human Rights in the People's Republic of China*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES 65, 73 (An-N'am ed., 1992). To further understand Professor Alford's recent opinions on this matter, please see William P. Alford, *Export "The Pursuit of Happiness"*, 113 HARV. L. REV. 1677 (2000).

Other scholars underscore the importance of the influence of culture and political history on a legal system, please see George Fletcher, *Constitutional Identity*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 223, 223 (Michel Rosenfeld ed., 1994). Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 353, 367 (Michel Rosenfeld ed., 1994).

Taiwan, to transplant more than one country's constitutional jurisprudence seems to be an inevitable result of carrying out the idea of human rights.

In fact, in today's globalized society, it is not surprising that a domestic constitutional court, like Taiwan's Grand Justices of the Judicial Yuan, would like to learn from the experiences of its foreign counterparts and use foreign constitutional theories to solve Taiwan's problems, particularly, when there are many similar cases already decided by major western countries' constitutional courts or supreme courts. As the meaning and substance of most fundamental rights are foreign to Taiwan's culture and society, I am not opposed to the use of relevant foreign legal theory to solve Taiwan's problems here. What I am concerned about and want to emphasize are the approach to and the means of appropriating foreign constitutional theories. Generally speaking, the most severe problem is that through only caring about the legitimacy of the outcome of an interpretation, the Grand Justices have not made sufficient efforts to build their structure of reasoning. To some extent, therefore, they are not interpreting the constitution, they are making it. In this area, many questions are important to consider. For example: does the Grand Justices of the Judicial Yuan have persuasive criteria to choose amongst different countries' constitutional theories? Are the foreign theories used by the Grand Justices logically compatible with each other? Are there other theories more suitable to Taiwan's current situation?

The Grand Justices' current practices cause four major problems which I will not consider.

B. *Four Features of Current Situation of Implementing Human Rights in Taiwan*

Because of the limited scope of this paper, instead of analyzing the aforementioned questions in detail, I would rather spell out four features of enforcing human rights in Taiwan.

1. *Unlimited and Uncertain Constitutional Law*

Under the current practices, the scope of the ROC constitutional law becomes unlimited and unpredictable. Since any foreign constitutional jurisprudence that can help solve Taiwan's problems could be invoked by the Grand Justices, the scope of the constitutional law of the Republic of China is unlimited. In other words, even foreign constitutional jurisprudence that is alien in concept to the people and culture in Taiwan will become a part of Taiwan's constitutional law if the Grand Justices Council introduces it. In this situation, the constitution relegates itself to a "text" of appropriated foreign constitutional theories. Moreover, since the

Grand Justices appeal to different countries' constitutional jurisprudence to substantiate the contents of various individual rights from time to time, there is no certain logic that can predict when the Grand Justices will invoke nation A's theory, and when they will employ nation B's one. Therefore, the contents of the ROC constitutional law will be very uncertain. To a large extent, which country's constitutional jurisprudence is employed depends on the Grand Justices and their clerks' expertise on certain cases.

2. *No Benchmark for Appropriation*

The Grand Justices seldom tell us why they appropriate certain foreign constitutional theories. Since major western countries often use different theories to solve similar problems, the people of Taiwan have the right to know why the Grand Justices would choose the constitutional theory from one country over another. On what considerations, grounds or rationale do the Grand Justices make their decisions? On what scale do the Grand Justices make comparisons?³ Regrettably, we have not seen any such serious deliberations within any interpretations. This leads us to ask the question: is this theory invoked by the Grand Justices the most suitable one to Taiwan? Furthermore, the Grand Justices sometimes use vague terms to disguise their intention of invoking foreign constitutional theories and to avoid possible criticism from academics. This practice exacerbates the already difficult task of people who review and criticize the interpretation made by the Grand Justices. From a technical viewpoint, it is understandable that the Grand Justices intentionally use such circular methods of averting any serious comments, but this will prevent the truth from being discovered. In this context, because people are not aware of the whole process of the Grand Justices' employment of foreign constitutional theories, the worst result will be that Taiwan's Constitution will be difficult to plant its root among its society and people.

3. *The Compatibility of Various Foreign Theories*

Until now, the Grand Justices of the Judicial Yuan rarely takes any steps to solve the issue of the compatibility between different countries' constitutional jurisprudence. Since it is the Grand Justices that bring different countries' constitutional jurisprudence to coexist in Taiwan, it also should be their responsibility to clarify the relationship between them. There are at least two logical reasons to do this. First, since

3. See Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT. L. J. 221, 250-254 (1999).

different foreign constitutional theories originate from different backgrounds, it is very doubtful whether they can coexist. For example, the Grand Justices often invoke the German principle of proportionality,⁴ which deals with the question of whether certain legislative restrictions of certain rights are reasonable.⁵ According to Professor Donald Kommers, it is similar to the U.S. system of the idea of the substantive due process,⁶ which has been also appropriated by the Grand Justice. Professor Currie also expressed a similar point.⁷ In other words, from a functional viewpoint, to some extent, these two concepts overlap. Do we need two similar concepts at the same time? If the Grand Justices decide that we really need both, what is the relationship between them? Second, the ultimate goal of introducing foreign constitutional theories is to establish an indigenous constitutional jurisprudence. Consequently, if the Grand Justices do not try to differentiate as well as harmonize various countries' theories, how can Taiwan build a constitutional jurisprudence that is meaningful for its social and historical context? Furthermore, if the Grand Justices just let them "alone," those theories will be forever German or American ones and a real indigenous constitutional jurisprudence will never be achieved.

4. *No Constitutional Canons*

The coexistence of different countries' constitutional jurisprudence in Taiwan makes it very difficult to establish Taiwan's own constitutional canons. Here I want to borrow the three kinds of constitutional canons formulated by Professors J.M. Balkin and Sanford Levinson⁸ to explain Taiwan's situation. The first is the pedagogical canon, which decides what kind of materials should be put in books and be taught in class.⁹ The second is cultural literacy canon, which designates the materials that average educated people should know.¹⁰ The third is the academic theory canon, which sets out the materials that law professors should be familiar with.¹¹ Under the current system, all three of these canons are very difficult to be established in Taiwan. With regard to the pedagogical canon, for example, it is difficult to know how the US, German and other

4. A brief discussion of the meaning of proportionality, please see DAVID CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 20 (1994).

5. *Id.*

6. See DONALD KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 46 (1997).

7. See CURRIE, *supra* note 4.

8. See J.M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998).

9. *Id.* at 975.

10. *Id.* at 975-976.

11. *Id.* at 976.

countries' constitutional jurisprudence can be introduced smoothly into a Taiwanese constitutional text book. The most common solution is for scholars to focus on the country's constitutional jurisprudence that they have gone abroad to study. With regard to the cultural literacy canon, since those various countries' constitutional jurisprudence is all foreign to Taiwan's culture, how can average educated people naturally know all of them? Normally, only a few stories already well known world-wide will be spread in Taiwan's elite class. With regard to the academic theory canon, since it is very arduous to be skilled in more than one foreign country's constitutional jurisprudence, and every scholar is inclined to stress the importance of the jurisprudence that he is proficient in, it is naturally hard to set up our own academic theory canon. Under these circumstances, the worst situation, perhaps, is that scholars cannot exchange opinions in a positive way.

In sum, based on the present practice of human rights, the Grand Justices of the Judicial Yuan may be able to increase its legitimacy by creating a welcome interpretation for a fleeting moment. However, in the long run, because the Grand Justices do not expend much of an attempt to "localize" a foreign constitutional theory, it looks as though the succeeding generation will be forced to spend more time in reconciling their once glorious legacy. How can we make a powerful explanation on the de facto situation of implementing a constitutional bill of rights in Taiwan? Hart's legal theory is a good starting point.

III. THE REASONS OF USING A JURISPRUDENTIAL EXPLANATION OF TAIWAN'S PREDICAMENT OF ENFORCING HUMAN RIGHTS

In order to analyze the aforementioned problems of practicing human rights in Taiwan, it is not too difficult to find both historical reasons and empirical evidence. Nevertheless, the question remains: can we find more universal and theoretical causes to explain the de facto situation in Taiwan?

A. *The Debate Between Hart and Others as an Advantageous Starting Point*

Legal positivism should bear an inevitable responsibility for this. The reason is very simple. Although the origin of the concept of human rights is relevant to the idea of natural law, as Professor George Fletcher has said, "positivism holds all law is enacted law,"¹² thus, as long as human

12. See GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 33 (1996). With regard to the general idea of legal positivism, please see Jules L. Coleman & Brian Leiter, *Legal*

rights are embodied in a domestic constitutional bill of rights they naturally belong to the domain of positive laws. In other words, a constitutional bill of rights, just like any other statute, is simply a positive law. If a constitutional bill of rights cannot sever its ties with the concept of positive law, can theories of legal positivism thoroughly explain the circumstances in Taiwan? Specifically, can any positivist persuasively and convincingly explicate the following three questions? First, what are theoretical reasons for Taiwan having taken more than forty years to transform its human rights law? Second, can any positivist theories explain the necessity and difficulty of appropriating foreign constitutional jurisprudence into Taiwan in order to specify the contents of various individual rights? Third, can any positivist identify the crucial elements that can assimilate various foreign countries' constitutional jurisprudence and build a stable constitutional jurisprudence in Taiwan? Fortunately, the dialogue between Professor H.L.A. Hart and his arch rivals, as well as his chief supporters, provide us with a very advantageous tool to analyze Taiwan's practice of human rights.

In addition, some would be curious to ask: since the positivist theories have been improved a lot recently, why is a debate from thirty years ago meaningful to this essay? The relevance of the old debate is evidenced, partly, through its use in some recent scholarly works¹³ to develop arguments by extensively discussing these old issues, but particularly, through the appearance of the Postscript in the second edition of *The Concept of Law*¹⁴ which makes "the debate" very much still alive. Many younger generation legal philosophers join this old debate from various sides, reviving the passion of studying the old issues.¹⁵

In fact, from the standpoint of the transformation of modern Anglo-American jurisprudence, the status of Hart's legal theory is like the polestar in the sky. His opponents and proponents alike must create their own theories by criticizing, endorsing or modifying it. Professors Ronald Dworkin, Joseph Raz and Jules Coleman are the three most well-known examples. Starting from his famous attacking Hart's positivist doctrine and creating the influential terms such as "hard cases"¹⁶ and "semantic stings,"¹⁷ Dworkin later developed his own theory of "law as integrity."¹⁸

Positivism, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 241-260 (Dennis Patterson ed., 1996).

13. See MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS (1999). JULES COLEMAN (ed.), HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW (2001).

14. See H.L.A. HART, *THE CONCEPT OF LAW* (2nd ed. 1994).

15. Some contributors in the book "Hart's Postscript: Essays on the Postscript to the *Concept of Law*" are the typical examples of this. They include Brian Leiter, Andrei Marmor, Stephen Perry, Scott J. Shapiro, and Jeremy Waldron.

16. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977).

17. See RONALD DWORKIN, *LAW'S EMPIRE* (1986).

For Raz and Coleman, they construct their own theories by counter-attacking Dworkin's critique of legal positivism, but, nevertheless, they go different ways. Razian theory sticks to the idea of social thesis and emphasizes the significance of the concept of authority, and is therefore ascribed as the so-called strict or exclusive positivism.¹⁹ In contrast, by allowing the morality to be the contents of the rule of the recognition, Coleman's theory is called as the soft or inclusive positivism or incorporationism.²⁰ To some extent, the fight between strict and soft positivisms is no less severe than that between Dworkin and Hart.²¹ Moreover, those new terms such as "conventionality" and "practical differences" mark the great legacy of this new round of debates.²²

Besides, in terms of the issues dealt with in this essay, three of Hart's major contributions to modern legal positivism are highly relevant to Taiwan's practice of human rights. First of all, Hart's distinction between primary rules and secondary rules can give us a tool to tackle some most intractable issues in the modern constitutional law and in particular to solve Taiwan's current problems. Second, we can employ his social rule theory to understand the necessity and difficulty of substantiating the contents of a constitutional bill of rights by introducing foreign constitutional jurisprudence to Taiwan. Finally, Hart's description of the conditions and characteristics of the rule of recognition are very helpful for us to understand the principal factors in establishing a sturdy basis of human rights jurisprudence in Taiwan.

B. *The Scope and Arguments of this Paper*

Since it is impossible to do an all-encompassing study of Hart's legal theory and a complete review of his critiques and followers in a single essay, I will only concentrate on what I consider to be the more important

18. *Id.*

19. See Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L. J. 823 (1972). JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979). JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1985). JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* (1994). Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW I (Jules L. Coleman ed., 2001).

20. See Jules L. Coleman, *Negative and Positive Positivism*, 11 THE JOURNAL OF LEGAL STUDY (1982). Jules L. Coleman, *Authority and Reason*, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 287-320 (Robert P. George ed., 1996). Jules L. Coleman, *Second Thoughts and Other First Impressions*, in ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 257-322 (Brian Bix ed., 1998). Jules L. Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, 4 LEGAL THEORY 281 (1998). JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001).

21. This can be represented by Coleman's criticism of Razian theory.

22. Please see COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY*, *supra* note 20.

issues that have been discussed by Hart, Dworkin, and Coleman. Particularly, this paper will pick up some significant issues from the debates between Hart and Dworkin in Hart's book *The Concept of Law*²³ and Dworkin's two papers *The Model of Rules I*²⁴ and *The Model of Rules II*²⁵, the later of which is a series of attacks and counter-attacks between Coleman²⁶ and Dworkin,²⁷ and finally Hart's posthumous *Postscript in The Concept of Law*²⁸ and Coleman's most recent studies on the *Postscript*.²⁹ From the Section IV to Section VIII, I will develop the following five arguments.

First, agreeing with MacCormick's insightful observation that, in Hart's theory, a rule could be both a primary and a secondary rule at the same time,³⁰ I will first argue that from a generally theoretical viewpoint, if some rules can be primary and secondary rules at the same time, Hart's theory about the legal system will be probably damaged. Indeed, I will show and explain why a constitutional bill of rights could be a primary and secondary rule at the same time. Based on this, I will affirm that the double roles of a constitutional bill of rights in a legal system can explain some consequential realities in human rights jurisprudence. In other words, to deal properly with some tough constitutional issues, we must remember that a constitutional bill of rights has the status of both a primary and a secondary rule. Only by recognizing the dual roles of a constitutional bill of rights, as both primary rules and secondary rules, can we understand the precise development of human rights in Taiwan.

Second, since the ROC constitutional bill of rights was de facto not effective in its first forty years, I will use Hart's theory about the minimum conditions for the existence of a legal system to explain why it took forty years for Taiwan to transform its human rights law. In short, when the constitutional bill of rights as a primary rule cannot work in

23. *Id.*

24. See DWORKIN, *supra* note 16, at 14-45.

25. See DWORKIN, *supra* note 16, at 46-80.

26. Coleman is probably the most important scholar in constructing the role and status of the rule of recognition except for Hart. From his early work, Coleman has demonstrated insightful opinions of the rule of recognition. See Coleman, *Authority and Reason*, *supra* note 20.

27. See Ronald Dworkin, *A Reply by Dworkin*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247-300 (Marshall Cohen ed., 1984). The introduction of Dworkin's rebuttal here is only confined to the papers before the appearance of his outstanding book *Law's Empire*. This is because in *Law's Empire* the main focus of Dworkin is to establish his own theory of "law as integrity" rather than criticize legal positivism. In this context, Dworkin retreat from the original debates. See SIMON HONEYBALL & JAMES WALTER, INTEGRITY, COMMUNITY AND INTERPRETATION: A CRITICAL ANALYSIS OF RONALD DWORKIN'S THEORY OF LAW 1 (1998).

28. See HART, *supra* note 14, at 238-276.

29. See Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, *supra* note 20. See also COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY, *supra* note 20.

30. See NEIL MACCORMICK, H.L.A. HART 104 (1981).

Taiwan, it is not because people or government officials did not obey the constitutional bill rights, but because most people dared not challenge the authority of the ruling party, and government officials did not know that what they did was unconstitutional. When the constitutional bill of rights as a secondary rule did not function in Taiwan, it was indeed because the Grand Justices did not treat it as a constitutional bill of rights as a binding force from the internal point of view.

Third, based on Dworkin's attacks on Hart's social rule theory, I will explain why it is difficult to introduce foreign constitutional jurisprudence as primary rules in Taiwan. Using Dworkin's distinction between conventional and concurrent morality, we can explain the necessity and difficulty of appropriating foreign constitutional jurisprudence into Taiwan. Further, Dworkin's distinction between conventional and concurrent morality also can be used to explain the diversity of constitutional jurisprudence in the world, which is another difficulty that Taiwan meets in enforcing human rights.

Fourth, when a constitutional bill of rights functions as a rule of recognition in Taiwan, the real difficulty does not lie in Dworkin's arguments that principles cannot be identified by a rule of recognition, or that morality as a part of criteria of a rule of recognition will make this rule very uncertain. Rather, the real problems are as follows. Since the content of a particular right will change as new content is specified into it, the scope of the whole constitutional bill of rights as a rule of recognition will change, too. In this situation, the content of the rule of recognition will be very uncertain and unpredictable. Further, in terms of transplanting foreign constitutional jurisprudence, it is hard to put some tests in this rule of recognition to identify which foreign country's constitutional jurisprudence is better for Taiwan to adopt, or to decide how to adjust foreign constitutional jurisprudence to Taiwan's needs. Under these circumstances, the content of the rule of recognition will be very unpredictable.

Lastly, since transplanting foreign constitutional jurisprudence destabilizes the constitutional bill of rights as a rule of recognition, I will argue that to establish a solid foundation for a rule of recognition in Taiwan, the Grand Justices of the Judicial Yuan must write detailed reasoning in the decisions. To do this, I will begin by reviewing Coleman's version of the social rule theory, which sought to modify Hart's original theory by abolishing the internal point of view, because of the attack from Dworkin's distinction of conventional and concurrent morality. By scrutinizing the strengths and the weaknesses of Coleman's version of the social rule theory, I will argue that the internal point of view emphasized by Hart can be used as a theoretical basis for constructing a better system of human rights law in Taiwan.

IV. THE DUAL ROLES OF A CONSTITUTIONAL BILL OF RIGHTS AND THE CHALLENGES OF IMPLEMENTING HUMAN RIGHTS IN TAIWAN

Let us begin with Hart's famous distinction between primary rules and secondary rules, which is a very crucial factor for us to analyze Taiwan's situation in enforcing human rights.

Hart claimed that not every rule in a legal system is a rule of obligation.³¹ There are other rules that exist to confer power on people.³² This insight is the basis of his theory that the union of primary rules of obligations and secondary rules is the foundation of a legal system. This seemingly reasonable distinction leaves one matter unresolved: could a rule be a primary and a secondary rule at the same time? Hart did not give us any answers to this question. However, this is an issue that we meet when we try to study and expound the practice of human rights. Logically, since primary rules and secondary rules have different characteristics, theoretical foundations and conditions of existence, if we are not sure to which category of the two rules a constitutional bill of rights belongs, how can we make a persuasive and convincing explanation about Taiwan's practice of human rights?³³ In other words, if we would like to apply Hartian legal theory to analyze the situation of enforcing human rights in Taiwan, we should determine the characteristic of a constitutional bill of rights first. Consequently, during the process of understanding the nature of a constitutional bill of rights, we naturally will encounter the question of whether a constitutional bill of rights plays the role of a primary rule and secondary rule at the same time.

In fact, Hart's attitude towards the status of a constitutional bill of rights is vague. He mentioned that a written constitution is a rule of recognition,³⁴ but never states why this is so. This raises two interrelated questions: first, does any clause in a written constitution identify the rules of obligation? Second, does any clause in a written constitution directly impose obligations on people? The answer is not easy to find. Also, when most modern constitutions roughly consist of two sections--a bill of rights and a section of structure of government--should we treat both in the same way? When considering above, it is essential to comprehend the status of a constitutional bill of rights first. However, before proceeding to discuss the status of a constitutional bill of rights, I would like to review more

31. See HART, *supra* note 14, at 81.

32. *Id.*

33. The dual roles of a rule of recognition were ignored by other scholars also. For example, when applying Hart's theory of the rule of recognition to discuss the compatibility between legal positivism and judicial review, Professor David Beatty fails to consider the dual roles of a rule of recognition. See David Beatty, *Human Rights and the Rules of Law*, in *Human Rights and Judicial Review* 23-31 (David Beatty ed., 1994).

34. See HART, *supra* note 14, at 101.

completely the basics of Hart's idea of distinguishing primary rules and secondary rules.

A. *Hart's Theory of the Union of Primary Rules and Secondary Rules as the Foundation of a Legal System*

One of Hart's major contributions to modern legal positivism is his distinction between primary rules of obligation and secondary rules.³⁵ The function of primary rules is to impose duties or obligations on people, i.e., to identify an individual's responsibility to do or not to do something. Secondary rules are not directly relevant to individuals, but instead are pertinent to primary rules. Basically, secondary rules are used to determine how to ascertain, modify, and eliminate the primary rules, and to decide the validity of primary rules and whether there are any violations of primary rules.³⁶

According to Hart, if a legal system only had primary rules of obligation, there would be three severe defects. The first problem is the uncertainty of the primary rules of obligation.³⁷ The second defect concerns the static character of a legal system with only primary rules.³⁸ The third defect, according to Hart, of a legal system with only primary rules is the inefficiency of the enforcement of law.³⁹ For these reasons, a legal system needs some secondary rules that can recognize, modify, and enforce primary rules of obligation. To confront the uncertainty of pure primary rules, Hart employs a secondary rule called the rule of recognition.⁴⁰ The rule of recognition specifies some feature or features that can be used to identify primary rules that belong to a particular legal system. Depending on the different legal systems, primitive or modern, the rule of recognition can be simple or complex. With regard to the static quality of primary rules, as mentioned above, a legal system needs a kind of secondary rule called a rule of change.⁴¹ The rules of change empower a person, persons or an institution to amend, modify or eliminate old primary rules, or to create new primary rules. Lastly, regarding the inefficiency of social pressure caused by pure primary rules of obligation, the rules of adjudication must be introduced.⁴² Generally, despite the possibility of strengthening by further rules placing duties on judges, rules of adjudication not only specify the people who are to make legal

35. *Id.* at 79-99.

36. *Id.* at 94-98.

37. *Id.* at 92.

38. *Id.* at 92-93.

39. *Id.* at 93-94.

40. *Id.* at 94-95.

41. *Id.* at 95-96.

42. *Id.* at 96-98.

decisions, but also indicate the decision-making procedure. The function of rules of adjudication is to give judicial branches the power to deal with breaches of obligation.

The foregoing explanation gives us a clear picture about the relationship between primary rules and secondary rules. Nevertheless, what are the principal differences between primary rules and secondary rules? With regard to this question, Hart has said:

*“...Under the rules of the one type, which we may well be considered the basic and primary type, human beings are required to do or abstain from certain actions, whether they wish or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations.”*⁴³

Based on this statement, Hart seems to think that there is a clear line between primary rules, those imposing duties or obligations or involving physical movement, and secondary rules, those conferring the power to change the original obligations. Theoretically, imposing obligation and conferring power are two very different things, but is this true in practice?

B. *The Double Roles of a Constitutional Bill of Rights*

I agree with those scholars who believe that Hart does not consider the possibility of the foregoing two situations coexisting within the same rules.⁴⁴ As Professor Neil MacCormick indicates, two complex situations emerge from these vague distinctions between primary rules and secondary rules: “First, a difficulty arises from the very way in which power-conferring and obligation-imposing rules do interact ... Secondly, a difficulty arises because of the possibility that some duties and obligations may not merely depend for their content on reference some juristic act, but may actually be duties or obligations respecting the exercise of some

43. *Id.* at 81.

44. See C.F.H. Tapper, *Powers and Secondary Rules of Change*, in OXFORD ESSAYS IN JURISPRUDENCE, Second Series, Chapter 10.

power and performance of some juristic acts.”⁴⁵

I am not sure whether Hart considered that some laws might meet the definition of his ideas of primary rules and secondary rules at the same time. Nevertheless, from the standpoint of the logic of this theory, as just mentioned, this could happen. Further, if a rule can be a primary and a secondary rule at the same time, particularly when a rule enjoys the status of the rule of recognition and primary rule at the same time, it will be a serious challenge to Hart's theory. However, this is the very case of a constitutional bill of rights.

C. *Why a Constitutional Bill of Rights is a Primary Rule and a Secondary Rule at the Same Time?*

First of all, why is a constitutional bill of rights a primary rule of obligation? From the perspective of ordinary people, provisions contained in a constitutional bill of rights entitle every person to the “right” to do something, and are seemingly not relevant to the issue of obligation. However, the very original idea of a constitutional bill of rights was to limit government's power and to establish a limited government.⁴⁶ In other words, people's rights to some extent are equal to government's responsibilities. Moreover, when certain concrete cases emerge and any provision in a constitutional bill of rights is appealed to, discussion should be naturally shifted to center on whether government or other people have the “obligation” to respect an individual's rights. In other words, it is just like two sides of a coin. On the one side, a constitutional bill of rights endows people with the basis to protect their interests. On the other, if a certain person has certain rights to do something, we have an obligation to respect it. This situation is more obvious when a person invokes a provision in the constitutional bill of rights to petition a court to prevent him from being interfered with by government or other people, in this situation government and other people have an obligation not to contravene someone's rights. In short, as some scholars claimed, “rights and responsibilities can hardly be separate; they are correlative.”⁴⁷ In this context, it is no doubt that a constitutional bill of rights is a primary rule of obligations.

Second, why is a constitutional bill of rights a rule of recognition? This answer is more obvious. In addition to the fact that Hart mentioned that a written constitution is a part of a rule of recognition, from a theoretical viewpoint, since the function of a rule of recognition is to

45. See MACCORMICK, *supra* note 30.

46. See BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND* 1 (1992).

47. See STEPHEN HOLMES & CASS SUNSTEIN, *THE COST OF RIGHTS* 140 (1999).

determine the validity of laws,⁴⁸ constitutionality is certainly one of the factors that decide this. Therefore, when a constitutional bill of rights is employed to determine the validity of an ordinary law, it should be a part of the rule of recognition. Moreover, when a statute is declared unconstitutional because of the protection of a constitutional bill of rights, old obligations are changed or eliminated. In this situation, a constitutional bill of rights also should be viewed as a secondary rule, i.e., as a rule of change.

Hart himself has not discussed the status of a constitutional bill of rights. In the postscript to the second edition of *The Concept of Law*, Hart uses U.S. constitutional amendments at numerous points as examples to make out his arguments or support his theories. For example, when he employs U.S. constitutional amendments as a model of non-conclusive principles, it seems that he thinks that those amendments mentioned by him are primary rules.⁴⁹ However, in other paragraphs, it seems that Hart considers a constitutional bill of rights as a rule of recognition. Hart says: "... in some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justices or substantive moral values, and these may form the content of legal constitutional constraints."⁵⁰ Afterwards, when he discusses the pedigree of a non-conclusive principle, again, it seems that Hart thinks those U.S. constitutional amendments, including those in the bill of rights, a part of the rule of recognition.⁵¹

D. *The Necessity of Clarifying Two Roles of a Constitutional Bill of Rights*

After the foregoing analyses, probably some will still doubt the necessity of distinguishing the dual roles of a constitutional bill of rights. They will ask: why does the assertion of dual roles of a constitutional bill of rights help us understand the essence of some human rights issues? I think that there are essentially two reasons for this. To a lesser extent, through this, we see more clearly the strengths and weaknesses of Hart's legal theory, and thereby understand more fully the contribution that Hart gave to us. To a larger extent, since according to Hart primary rules and secondary rules have different theoretical foundations and the minimum conditions of existence, this is a constructive distinction to understand some tricky issues within the development of human rights law in Taiwan. In other words, if we do not first make sure our position of whether to treat a constitutional bill of rights as a rule of recognition or as a primary

48. See HART, *supra* note 14, at 101.

49. *Id.* at 261.

50. *Id.* at 247.

51. *Id.* at 264.

rule, we cannot accurately analyze and explain Taiwan's experience of practicing human rights. Thus, in the next four sections, I will utilize the double roles of a constitutional bill of rights as a basis to explicate four substantial issues of practicing human rights in Taiwan: the forty-years dormant system of human rights law, the necessity of transplanting foreign constitutional jurisprudence, the inevitability of the co-existence of foreign constitutional jurisprudence, and the approach to build a stable constitutional jurisprudence in Taiwan.

V. HART'S DISTINCTION BETWEEN THE CONCEPTS OF VALIDITY AND EFFICACY, AND THE DORMANT SYSTEM OF HUMAN RIGHTS IN TAIWAN

After understanding the dual role of a constitutional bill of rights in a legal system, the next question we should ask is: are there any theoretical reasons to explain why a legally valid constitutional bill of rights does not work? Two concepts are relevant here: validity and efficacy. Taiwan's constitutional bill of rights was absolutely *de jure*, but was not efficacious for the first forty years of its existence. Therefore, how can we explain a valid law that lacks efficacy? Based on Taiwan's practice of human rights, to assert that a legally enacted norm without efficacy is valid cannot explain the whole story of implementing human rights law in Taiwan. In the following three subsections, I will first apply Hart's explanation about a newly-established legal system to explain the overriding factors that make a constitutional bill of rights impossible to be efficacious at its outset. Afterwards, I will employ Hart's theory of the minimum conditions of the existence of primary rules and secondary rules to explicate the crucial factors that cause a constitutional bill of rights begin to work in Taiwan. With regard to the minimal conditions of a legal system, since a constitutional bill of rights has the both status of primary rules and secondary rules, we should discuss them separately.

A. *Hart's Theories of a Newly-Established Legal System*

Among Hart's legal theories, the one that is most relevant to Taiwan's practices in implementing human rights is probably his ideas about a newly established legal system. Hart has said:

"In either case (newly-established or discarded legal system)⁵², the normal context or background for making any internal statement in terms of the rules of the system is absent. In such cases it would be generally pointless either to assess the rights

52. Added by the author.

and duties of particular persons by reference to the primary rules of a system or to assess the validity of any of its rules by reference to its rule of recognition. To insist on applying a system of rules which had either never actually been effective or had been discarded would, except in special circumstances mentioned below, be as futile as to assess the progress of a game by reference to a scoring rule which had never been accepted or had been discarded.”⁵³

What Hart says here is very important in explaining practice of human rights in Taiwan. The concept of rights was foreign to most East Asian societies, and so the human rights law system was new to the citizens of the ROC. Consequently, even after the ROC Constitutional Bill of Rights was instituted nearly sixty years ago, in its early days very few people would invoke its provisions to protect their own interests. In other words, although a new “rights-oriented” system was established, to some degree people still preferred to use the traditional “obligation-oriented” approach to solve their own problems. In such a situation (the new system is symbolically introduced but the old one is still at work.), the status of primary rules and the rule of recognition is very dubious. Only after people are more familiar with the ideas and values of the new system and are willing to give up their old tradition, will the whole situation be able to change. Consequently, what Hart stresses in the absence of “the normal context or background for making any internal statement” in a newly established system is exactly right. The efficacy of a new legal system largely depends on people’s internal acceptance of it.

However, despite the persuasiveness of this theory, the question remains: how long after a legal system is established can we still call it new? Since human rights law has been instituted in Taiwan for more than fifty years, the theory of a newly established system at least cannot explain the whole story. How can we explicate the dormant human rights law system for almost forty years in Taiwan? Let me use Hart’s theory about the minimum conditions of a legal system to explain further.

B. *Hart’s Concept of Validity and Efficacy and the Minimum Conditions of a Legal System*

Before Hart, Hans Kelsen discussed both the concepts of validity and efficacy. He asserted that an individual norm is valid only if the whole legal system to which this norm belongs is efficacious.⁵⁴ In other words,

53. See HART, *supra* note 14, at 103-104.

54. See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 42 (1941).

Kelsen does not think that the validity of a norm depends on its own efficacy, but on the efficacy of the entire system. Although Hart also thinks that the efficacy of an individual norm is not relevant to the issue of its validity, except the rule of recognition of this system which has efficacy as one of its requirements to evaluate the validity of a norm,⁵⁵ he also states that the efficacy of the entire legal system is presupposed to determine the validity of various norms contained within this system.⁵⁶ However, Hart's relevant opinions are not finished here. To look at Hart's exact attitude towards the relationship between the concept of validity and efficacy, we should turn to another of Hart's contributions to legal positivism, the minimum conditions of the existence of primary rules and secondary rules.

For the primary rules to be valid, people need not accept the law or treat the rule as a standard behavior before they decide to follow the regulations of any rule.⁵⁷ They need not take a critical attitude towards those people who breach primary rules of obligation, either. In short, only if most people obey primary rules, even if only for their own parts, the minimum condition of existence of primary rules is met.⁵⁸ However, this is not the case for the secondary rules, especially the rule of recognition. Here, Hart develops his theory by criticizing Austin's theory of law as a general habit of obedience to orders. Hart asks us: is mere "obedience" the minimum condition for the existence of every rule?⁵⁹ In the situation of primary rules of obligation, since those rules directly impose a duty or obligation on private people, to obey a law sufficiently meets the minimum condition of the existence of primary rules. But what about a secondary rule? Can we say that legislators have to obey the law that confers upon them the power to legislate? Similarly, can we say that judges should obey the rule of recognition? From a purely semantic viewpoint, it is certainly inappropriate to say that either legislators or judges should obey their relevant rules. Therefore, the most important difference in the minimum condition of existence between primary rules and secondary rules, especially the rule of recognition, can only be illuminated from the internal point of law.⁶⁰ This means that to make the whole legal system of the rule of recognition work, judges must share a common attitude towards the rule of recognition from an internal point of view.⁶¹ In other words, to establish a unified legal system, the rule of recognition should be generally accepted by most judges and used to

55. See HART, *supra* note 14, at 295.

56. *Id.*

57. *Id.* at 114.

58. *Id.* at 115.

59. *Id.* at 112-113.

60. *Id.* at 115-117.

61. *Id.* at 115.

criticize any other judges' lapse that deviates from that rule.⁶² If most judges do not generally accept the rule of recognition in a certain legal system in that system, the deplorable result will be conflicts of contradictory decisions. In this context, the unity and continuity of a legal system will no longer exist.⁶³

Although the minimum conditions of the existence of a primary rule are different from that of a secondary rule, they do share a common criterion: efficacy. For primary rules to exist, they must be generally obeyed by most people. This means Hart really thinks that the validity of primary rules depends on whether they are efficacious at least from an external point of law. For secondary rules, since they must be accepted by officials through the internal aspect of law, efficacy becomes a necessary element to decide the validity of a legal system. Based on the shared opinions of Kelsen and Hart on validity and efficacy, we can assert that the validity of a legal norm relies on the efficacy of the whole legal system from which this norm derives. Hart's relation of validity and efficacy is not wrong. However, according to Taiwan's experience in practicing human rights, there are probably different reasons to explicate why a legal system is not efficacious.

C. *The Conditions of the Existence for a Constitutional Bill of Rights as a Primary Rule*

As previously mentioned, for Hart, the minimum condition of the existence of a legal system is that primary rules should be obeyed by most people from an external point of law. As argued in the previous section, when a constitutional bill of rights is a primary rule of obligation, it imposes duties on people, administrative officials and judges as well as legislators. In this context, according to Hart's theory, the minimum condition for a constitutional bill of rights to be carried out in a legal system is that it should be generally "obeyed" by ordinary people and various officials.⁶⁴ However, Taiwan's human rights law system, the situation is more complicated. Only employing the external point of law to decide whether people or officials are "obeying" the constitutional bill of rights is not sufficient to expound the fact of practicing human rights in Taiwan. The crucial element consists in what Hart mentioned in the foregoing cited passage, the absence of the internal statement of law in a newly-established system. I would like to distinguish the situation of ordinary people from that of officials to explain further.

62. *Id.* at 116.

63. *Id.*

64. What I mean by "obey" here is that ordinary people and various officials recognize the value and function of a constitutional bill of rights.

Generally speaking, it is ordinary people who control the initiative of appealing for provisions in a constitutional bill of rights to protect their interests. However, resorting to a constitutional bill of rights is premised on people's knowledge of it. If people cannot comprehend the function of a constitutional bill of rights, this bill of rights is only a decoration. Moreover, even if people know that they can invoke provisions in a constitutional bill of rights to maintain their own interests, it is not in every society that people have enough courage to challenge the laws passed by the government, especially when the political atmosphere is very authoritarian. This is the case in Taiwan. Consequently, we should say that in the first forty years the reason why people in Taiwan seldom invoked the constitutional bill of rights was not really because people did not "obey" them. Rather, it was because people were not courageous enough to undergo the severe risks of intimidating the government and to undermine its hegemony by appealing to the constitutional bill of rights. In this situation, despite the existence of a constitutional bill of rights, which is valid from an external aspect of law, because people did not treat the constitutional bill of rights as the supreme criterion from an internal statement of law, it is hard to say that a constitutional bill of rights existed.

For officials, the term "obey" is probably more suitably here. In terms of the function of officials, the main reason the human rights law in Taiwan was dormant for nearly forty years was because officials did not "obey" the constitutional bill of rights. Or, put another way, those officials who were responsible for making unconstitutional administrative acts, judicial decisions and legislation, did not suffer a hostile reaction from the public. Since people in Taiwan did not understand the essence and function of human rights, even when officials had violated and trampled on fundamental rights, the people would not put pressure on government to reform. Further, the real factor that gave officials the "courage" to disobey the constitutional bill of rights was still that people did not treat the constitutional bill of rights as the supreme norm from the internal point of view.

With regard to why officials did not "obey" the constitutional bill of rights as primary rules in the first forty years after its enactment, we also need to discuss it more in the following section, when a constitutional bill of rights is a part of the rule of recognition.

D. *The Conditions of Existence for a Constitutional Bill of Rights as a Rule of Recognition*

According to Hart, the minimum conditions for the existence of a rule of recognition is that most officials who have the power to use it should

accept this rule.⁶⁵ Based on this theory, if a rule is supposed to be a part of the rule of recognition in a legal system but has not been accepted by most officials, this rule does not belong to the rule of recognition. To apply this theory to explain Taiwan's dormant system of human rights law in the first forty years touches on the crucial point. The main reason why a human rights law system could not fulfill its function in Taiwan in the first forty years is because judicial independence did not exist. In short, in the first forty years, when political atmosphere was still not open and authoritarian, the ruling party controlled the judiciary, including the Grand Justices of the Judicial Yuan, to a large degree. In this situation, it was difficult for the Grand Justices to declare regulations or laws unconstitutional. Thus, we can say that the values of the constitutional bill of rights were not *de facto* accepted by most Grand Justices. Furthermore, since the Grand Justices seldom declared laws unconstitutional, people also seldom petitioned for any constitutional interpretation. This is the main cause of the failure of the human rights law system in Taiwan in the first forty years. In short, although a constitutional bill of rights should have been a part of the rule of recognition in Taiwan just as it was in most major western countries, since most Grand Justices did not apply it, it was a different story.

The aforementioned state of affairs creates something of a paradox. Instead of rulers' goodwill, it is people's initiative in pursuing democracy and acceding to the values of constitutionalism, which changed the whole political picture in Taiwan. Consequently, the Grand Justices' acceptance of the constitutional bill of rights in reality reflects the people's embracing of it. In other words, it is the democratic movement that compelled the Grand Justices to change their attitudes towards the constitutional bill of rights. Looking at the transformation of human rights law in Taiwan from this standpoint, it seems that the acceptance of human rights law by the Grand Justices is not the most decisive factor to make the constitutional bill of rights as a rule of recognition work.

VI. THE DIFFICULTIES OF APPROPRIATING FOREIGN HUMAN RIGHTS JURISPRUDENCE

Another problem revealed by the practice of human rights in Taiwan is the difficulty of introducing foreign constitutional jurisprudence, including choosing one western country's constitutional jurisprudence

65. Hart does not confine the scope of the officials to those who have the power to use the rule of recognition. However, I believe that if we want to stress the point that the acceptance of certain officials is the precondition of the existence of a rule of recognition, it should be reasonable that only the acceptance of those officials who have the power to deal with law can explain the effective existence of a rule of recognition.

over another, and the problems resulting from the coexistence of different foreign countries' constitutional jurisprudence. Can we find any theoretical reasons to explain this? In other words, when foreign human rights law as primary rules, how can we transplant them? Let me first employ Dworkin's attack on Hart's rule of recognition and the social rule theory to explain this problem. To apply Dworkin's attack on the social rule theory is to demonstrate the necessity of appropriating foreign constitutional jurisprudence, and also to show the diversity of foreign legal jurisprudence that Taiwan are exposed to in the process of doing so.

A. *The Distinction Between Conventional and Concurrent Morality*

Given Hart's criticisms of Austin's idea that "the majority of a social group habitually obey the orders backed by threats of the sovereign person or persons, who themselves habitually obey no one,"⁶⁶ it was necessary for him to establish his own theory as to why people have obligations to obey the law. In fact, as Dworkin pointed out, Hart's social rule theory is not only a general theory to establish the idea of obligations but also a specific theory to determine judges' duties in applying law.⁶⁷ Here I would like to start by introducing Hart's idea of general obligation.

For Hart, the existence of social rules can explain the meaning and idea of obligations in two ways. First, the presence of such rules makes some actions standard behavior in society.⁶⁸ Second, the existence of such rules can cause any particular person to pay attention to whether his behavior meets the standard.⁶⁹ Thus, we can conclude that obligations can originate from the social rules, which are followed regularly by the majority of the people in a society and are accepted by those people. Based on this, Hart's social rule theory consists of two components: people's convergent actions and their acceptance of these actions. Between these two elements of the social rule theory, I think that Hart emphasizes more people's acceptance, the internal aspect of rules, than people's convergent actions.⁷⁰

Because the social rule theory is applied to explain the origins of ordinary obligation as well as the specific duty of judges to enforce the law, Dworkin launches his assault on the general theory of obligation of social rules first. The essence of the social rule theory is that social practices decide the content of the rules and the rules determine the scope

66. This passage is borrowed from Professor Coleman. See Coleman, *Incorporationism, Conventionality, and the Practical Differences Thesis*, *supra* note 20, at 285.

67. See Dworkin, *supra* note 16, at 51.

68. See HART, *supra* note 14, at 85.

69. *Id.*

70. This is based on Hart's criticisms of Austin's theories.

of obligation.⁷¹ Dworkin thinks that we should review first whether there is a rule, and whether the corresponding practice exists.⁷² Using the example of the argument made by a vegetarian, Dworkin shows that there are some normative rules which exist without their being accepted social practices and social rules.⁷³ As a result, if the social rule theory is to remain plausible, it will be only sometimes that some normative rules have corresponding social practices to provide the foundation of duty. Moreover, even in what Dworkin calls a weak version of the social rule theory, it still meets some difficulties of explanation. According to Dworkin, social morality should be divided into two categories: conventional and concurrent morality.⁷⁴ Conventional morality means that most people in a society have a consensus upon which to assert normative rules. Concurrent morality means that although people act in the same way on its appearance and assert the same or almost the same normative rules, the rationale to behave similarly is independent and even different. Dworkin asserts that the social rule theory can only explain the situation of conventional morality. Furthermore, Dworkin declares that the social rule theory cannot even explain the situation of conventional morality.⁷⁵ This is because people will disagree with the scope of obligation. What's worse, some people find conventional morality disgusting and therefore requiring no duty. In this context, Dworkin thinks that the social rule theory can only be applied to explain the existence of some trivial cases like games rules.⁷⁶ Based on the foregoing analysis, Dworkin concludes that existing social practices and social rules do not constitute normative rule; but only justification for them.⁷⁷ In fact, in any community, different people will appeal to the same social practices to support different normative rules.⁷⁸ The above-mentioned analyses about the general theory of obligation can also be applied to explain the situation of judicial duty.⁷⁹

Facing this serious attack from Dworkin, Hart made the following responses in the *Postscript*. Regarding the most substantial issues about

71. See Coleman & Leiter, *supra* note 12, at 246.

72. See Dworkin, *supra* note 16, at 52.

73. *Id.* at 52-53.

74. *Id.* at 53.

75. *Id.* at 54-55.

76. *Id.* at 55.

77. *Id.* at 57.

78. *Id.* at 58.

79. Dworkin says: "It may be that judicial duty is a case of conventionality morality. It does not follow that some social rules state the limit, or even the threshold, of judicial duty. When judges cite the rule that they must follow the legislature, for example, they may be appealing to a normative rule that some social rule practice justifies, and they may disagree about the precise content of that normative rule in a way that does not represent merely a disagreement about the facts of other judges' behavior." *Id.*

the social rule theory and the contents of a rule of recognition, despite the fact that some scholars, such as Jules Coleman, played down the importance of the internal point of view in the social rule theory,⁸⁰ Hart still maintained his original position in *The Concept of Law*. The only serious “conversion” is that he admits that his social rule theory cannot be applied to explain the origins of primary rules of obligation as well as the concept of morality.⁸¹ Indeed, Hart says: “Judges may be agreed on the relevance of such tests as something settled by established judicial practice even though they disagree as to what the tests require in particular cases.”⁸² Notably, when responding to Dworkin’s claim that since there are no agreements about moral criteria and substantive values among judges and, thus, a rule of recognition should be a normative rule, Hart stresses the exact fact that, despite the existence of some iniquitous social practices in some legal systems, people still defer to it simply out of respect for tradition.⁸³ Consequently, when some objectionable practices are still obeyed by people, a rule of recognition under the social rule theory still can work. Above all, Hart still thinks that the social rule theory can be employed to explain the function of the rule of recognition persuasively, which, according to him, is basically judicial customary law, and whose existence is conditioned by the acceptance of officials who apply it to identify other rules.⁸⁴

B. *The Necessity of Transplanting Foreign Constitutional Jurisprudence*

Due to Dworkin’s attack, as mentioned, Hart has admitted that because the same practices do not always come from the same rationale, his social rule theory is not persuasive enough to explain the general origins of primary rules of obligation, but rather should only be said a true account of conventional social rules.⁸⁵ As far as this essay is concerned, despite its limited sphere, I believe that the social rule theory is still a very valuable means of understanding the de facto situation of human rights law in Taiwan. This is because if we agree that most people in any major western country have generally accepted the idea of human rights for some time as a good thing, human rights should belong to the domain of conventional social rules in the west. Therefore, I think that the essence of Hart’s social rule theory, the practice of deciding the origins of the rule and the rule determining the scope of obligation, is still a very useful tool

80. See Coleman, *Authority and Reason*, *supra* note 20, at 298-302. A more detailed discussion, please see Part VIII.

81. See HART, *supra* note 14, at 255-256.

82. *Id.* at 258-259.

83. *Id.* at 257.

84. *Id.* at 256-259.

85. *Id.* at 255-256.

to analyze some problems of practicing human rights in Taiwan.

Above all, Hart's social rule theory can explain why people in Taiwan were not familiar with the idea of human rights and still need to transplant foreign constitutional jurisprudence. In short, if different countries have different social practices, we can easily infer that there certainly will be divergent obligations in those societies. If one compares the situation in Taiwan with that in most major western countries, as I have discussed in the previous section, they share the same or at least a very similar goal to promote human dignity, but they use different approaches to achieve it. According to traditional Chinese culture, especially the teachings of Confucius, the government and its officials have a paramount duty to promote people's welfare. To some extent, Chinese culture stems from the government and officials' obligation to uphold the protection of human dignity. Consequently, the traditional practice of protecting human dignity on Chinese soil that has existed for thousands of years is established in the description of the obligation of government and its officials. However, this is not the situation in modern western countries. From the 16th century onward, the concept of rights has become a tool to force government to protect people's interests. Particularly after the birth of the U.S. Constitution and its amendments, the concept of fundamental rights is not only a political declaration but can also be enforced through the system of judicial review. From then on, especially proceeding into this century, the practices of protecting human dignity by means of a constitutional bill of rights and a system of judicial review have become an overriding approach in major western countries.⁸⁶

Based on the foregoing analyses, we can say that although both Chinese and western culture want to promote human dignity, they use different social practices to accomplish this task. In this context, the value of the social rule theory is revealed. A constitutional bill of rights cannot be efficacious from its very beginning in Taiwan simply because there were no the same social practices existing in Taiwan as there were in western countries. This can be reviewed in two ways. For the government and its officials, as no social practice of protecting interests by appealing to the concept of fundamental rights existed, they did not feel any particular obligation imposed by the constitutional bill of rights. For average people, since they had not accepted the values embodied in the constitutional bill of rights as a part of their culture, they naturally did not create the custom of using it to protect their interests. Therefore, it was only after the same social practices of protecting human rights in western

86. With regards to the question of why the concept of rights never appeared in the traditional Chinese thoughts, this is a paramount as well as an exciting issue to be studied in the future.

countries were introduced in Taiwan, did the constitutional bill of rights begin to fulfill its function.

C. *Different Social Practices Among Western Countries: The Diversified Human Rights Jurisprudence*

As noted in the previous section, the general idea of Hart's social rules theory can be used to describe why it was difficult to make human rights law work in Taiwan. Similarly, Dworkin's arguments about the distinction between conventional and concurrent morality and the existence of the disagreement about the scope of conventionality, which are both later accepted by Hart, are also a good base from which to expound upon the difficulties encountered by people in Taiwan when they decide to embrace western ideas of human rights: the diversity of constitutional jurisprudence in the west.

As noted, the distinction between conventional morality and concurrent morality is that in the former situation people share the same grounds to commit the same social practices, but in the latter people use independent reasoning to perform the same social practices.⁸⁷ This distinction is useful when explaining the diversified phenomenon of human rights law in the west. In some fundamental rights, it seems that every country adopts almost the same approach, and incorporates similar contents into these rights. For other kinds of rights, different countries have different reasons and take diverse approaches to deal with them. For example, on the issue of abortion, it seems that most major western countries' constitutional courts (such as the U.S. Supreme Court and the German Constitutional Court) share a basic tone: under some certain conditions, a woman can abort her fetus. However, on other issues, like the freedom of broadcasting, because of the different contexts in different countries, various countries take different means of enforcing the idea of the freedom of broadcasting.⁸⁸ Moreover, various countries' provisions in their constitutional bills of rights also can demonstrate the disagreements about the scope of conventional morality. Again, let us use the issue of abortion as an example. Although every major western country grants women the right of abortion, the conditions of this right are different. In fact, it is because of the different conditions necessary to have an abortion that we should encourage a comparative study about the issue of abortion.⁸⁹

87. See Dworkin, *supra* note 16, at 53.

88. With regards to the different regulations of the freedom of broadcasting among western countries, please see ERIC BARENDT, BROADCASTING LAW 31 (1993).

89. For a very meaningful analysis about the major western countries' abortion law, please see MARY ANN GLENDON, ABORTION AND DIVORCE LAW IN WESTERN LAW (1986).

The debate between Hart and Dworkin about the social rule theory provides a theoretical basis for the analyses. In short, different countries adopt different approaches to solve the same problems, and even when adopting the same means to deal with the same problems, the details are different. Facing these two levels of diversity, it is no wonder that importing human rights law is full of frustrations and obstacles for people in Taiwan.

VII. FACTORS THAT MAKE A CONSTITUTIONAL BILL OF RIGHTS AS A RULE OF RECOGNITION UNSTABLE IN TAIWAN

After understanding the difficulties of transplanting foreign human rights law when a constitutional bill of rights as primary rules, the next problem is: when a constitutional bill of rights is a rule of recognition, what are the most intractable issues? Another one of Dworkin's criticisms of Hart's legal theories is a good starting point here. By raising the concept of principles, Dworkin challenges Hart's legal theory in an all-encompassing way. On the one hand, the rule of recognition must be able to identify principles in a legal system.⁹⁰ On the other, if legal positivists attempt to embody morality into the rule of recognition to solve the previous problem, it will make this rule uncertain.⁹¹ Although Taiwan's core issues of concern are similar to Dworkin's argument, the certainty of the rule of recognition and the characteristics of issues are really very different. The real difficulty in Taiwan lies in uncertainty caused by the dual roles of a constitutional bill of rights. Let me elaborate further.

A. *Dworkin's Attack, Legal Positivists' Defense and Dworkin's Response on the Status of Principles*⁹²

In his paper *The Model Rule I*, Dworkin attacks Hart's theory of the status of principles in a legal system. According to Dworkin, three interrelated questions must be answered by any legal theorist, including Hart. First, are there any legal norms called principles different from "rules" in a legal system?⁹³ Second, do principles have binding force on judges?⁹⁴ Third, if various principles can bind judges during the process

90. See Dworkin, *supra* note 16, at 39-44.

91. See Dworkin, *supra* note 27, at 248.

92. This problem should exist in any legal system with a constitutional bill of rights and judicial review. However, I believe that this problem will be more severe in a country that appropriates foreign constitutional jurisprudence. This is simply because no limitations on the process of introducing foreign constitutional jurisprudence make the whole situation even worse.

93. See Dworkin, *supra* note 16, at 22-28.

94. *Id.* at 31-39.

of applying law, can Hart's concept of the rule of recognition identify principles in a legal system?⁹⁵ In short, for Dworkin, it is impossible for Hart or any other legal positivists to deny the existence and the binding force of principles. Thus, if Hart's rule of recognition cannot identify the existence of principles, Hart's theory of law will certainly fail.

Since the forms of legal norms are not confined to rules only, Dworkin's attack on legal positivism based on the existence of principles in a legal system is quite forceful and reasonable. Positivists therefore must at least modify part of their own theory, particularly the contents of the rule of recognition. Facing the difficulties of explaining the binding force of principles under the basic structure of legal positivism, Professor Rolf Sartorius and others agree that moral norms can be treated as laws but their validity depends on their pedigree.⁹⁶ In other words, under this modified version of the rule of recognition, only if moral principles can be delineated from a social source do they enjoy the status of law in a legal system. Although this modified version of the rule of recognition allows moral principles to be legally binding, it only "technically" modified Hart's original theory by following Dworkin's reasoning that the rule of recognition is a pedigree rule or a non-content specific rule. Consequently, other scholars like Jules Coleman sought to modify the rule of recognition to a larger extent to create so-called soft positivism or incorporationism.⁹⁷ Under this further modified theory, moral principles can be legally valid rules not only through their pedigree or history, but also on their own substantive merits. In short, only if moral principles meet the demand of the conditions set forth in a rule of recognition are they valid laws.⁹⁸

Facing counterattacks from various positivists, Dworkin denies the incorporationist's version of legal positivism in four ways.⁹⁹ First, a rule of recognition with moral criteria will break another positivist's tenet, the separability thesis, which advocates that there is no necessary connection between law and morality.¹⁰⁰ Second, to embody moral criteria within a rule of recognition will damage the positivist's commitment to source theory, which states that the validity of law depends on its manner and form of legislation.¹⁰¹ Third, a rule of recognition with moral criteria will destroy the epistemic function of it, making people lose the stable norm to

95. *Id.* at 39-44.

96. See Rolf E. Sartorius, *The Enforcement of Morality*, 81 YALE LAW JOURNAL 891 (1972).

97. See Coleman, *Negative and Positive Positivism*, *supra* note 20.

98. See also HART, *supra* note 14, at 250-254.

99. The following four points are based on Dworkin's *A Reply by Ronald Dworkin*, and Coleman and Leiter's analyses in the paper *Legal Positivism*. See Dworkin, *supra* note 27. Coleman & Leiter, *Legal Positivism*, *supra* note 12, at 251-253.

100. See Coleman & Leiter, *Legal Positivism*, *supra* note 12, at 251-252.

101. *Id.* at 252.

guide their conduct and identify valid legal rules.¹⁰² Fourth, a rule of recognition with moral tests, which will cause disagreements and controversies among officials and judges, should not be a social rule.¹⁰³ To sum up, a rule of recognition containing morality as a part of criterion will be very unstable.

Replying to Dworkin's powerful re-attack, positivists' (or more precisely only soft-positivists') responses are roughly as follows. Regarding the separability thesis, Coleman's answer is that instead of saying law is no absolute relationship with morality, he only advocates law is not necessarily based on morality (or no necessary connections between law and morality).¹⁰⁴ With respect to the other three rebuttals, Hart offers his own answers in the *Postscript*. Basically, sticking to the ideas of the camp of the soft-positivism, Hart asserted that Dworkin's arguments are relied on two beliefs: first, legal principles cannot not be identified through their pedigree, and secondly, that a rule of recognition can only embody pedigree criteria.¹⁰⁵ For Hart, these two beliefs are both mistaken.¹⁰⁶ He emphasized that "there is nothing in the non-conclusive character of principles nor in their other features to preclude their identification by pedigree criteria,"¹⁰⁷ and "a provision in a written constitution or a constitutional amendment or a statute may be taken as intended to operate in the non-conclusive way characteristics of principles" which provides reasons for weighing one principle over another.¹⁰⁸ Further, responding to the challenge that a rule of recognition embodying substantive values will destroy the very legal stability that the rule of recognition seeks to achieve, Hart emphasizes that he never states that legal certainty is the paramount and overriding function of a rule of recognition. The real concern is the extent to which uncertainty can be tolerated.¹⁰⁹

B. *The Rule of Recognition and Transplanting Foreign Human Rights Jurisprudence*

Dworkin's terrific showing of the identifiable nature of principles under the rule of recognition was a serious blow to Hart's legal theory. Nonetheless, for the case of enforcing human rights law in Taiwan, the theory of the rule of recognition is challenged by further reasons.

102. *Id.*

103. *Id.* at 252-253.

104. See Coleman, *Authority and Reason*, *supra* note 20, at 291.

105. See HART, *supra* note 14, at 264.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 251.

In Taiwan, from the perspective of the function of the constitutional bill of rights, the rule of recognition is not only used to designate legal rules or principles, but is also applied to introduce foreign constitutional jurisprudence. In other words, the ultimate rule of recognition in Taiwan is a means of transforming foreign jurisprudence to local one. Second, unlike principles, the foreign constitutional jurisprudence is not produced within the ROC legal system. They are really "foreign" to Taiwan. In this context, when considering the issues submitted by Dworkin, whether principles can be identified by the rule of recognition is not a big concern. Rather, people in Taiwan need a theory that can tell them when and how to borrow foreign human rights law. In terms of what I have just discussed, the theory of soft-positivism cannot contribute too much to solve Taiwan's particular problem. The issue in Taiwan is not whether the rule of recognition can designate the origin of a certain principle, but whether the rule of recognition can determine how to introduce foreign constitutional jurisprudence. To further comprehending the essence of the difficulties, let us return to Hart's idea of the rule of recognition briefly.

According to Hart, the rule of recognition in a particular legal system is "seldom expressly formulated as a rule."¹¹⁰ On most occasions the rule of recognition is unstated and its existence is demonstrated by the ways that primary rules of obligation are designated by officials or private persons. Despite no concrete and specific "rule" of the rule of recognition, we can draw some fundamental conclusions. Above all, that there are multiple criteria embodied in a rule of recognition. In a modern complex legal system, on the whole, the rule of recognition includes "a written constitution, enactment by legislature and judicial precedents."¹¹¹ Furthermore, most systems' rule of recognition also provides the criteria to decide the relative level of subordination and primacy of various norms.¹¹² Consequently, the rule of recognition not only can decide the validity of a particular rule by identifying it, but also can resolve conflicts between rules by determining a rank of order and significance in a certain legal system. However, Hartian legal theory of the rule of recognition has not told us how to deal with foreign jurisprudence (a situation which it would perhaps be hard for Hart to imagine). Thus, in Taiwan the major question here is: can the rule of recognition tell us when and why we need to transplant foreign constitutional jurisprudence? Moreover, since there are diversified constitutional jurisprudences in the world, the tough question for establishing a rule of recognition is: are there tests to decide when we should introduce country A's constitutional jurisprudence rather

110. *Id.* at 101.

111. *Id.*

112. *Id.* at 105-106.

than country B's? Is it also possible to put some elements into a rule of recognition to determine how to transform foreign constitutional jurisprudence into a local context? Since we cannot design any test to tackle the foregoing issues, when used to transplant foreign constitutional jurisprudence (transplanting foreign constitutional jurisprudence through interpreting local constitutional texts), a constitutional bill of rights as a rule of recognition is very uncertain.

C. *The Inevitable Uncertainty Caused by Constitutional Interpretation*

Nevertheless, the challenge that Taiwan faces in the process of enforcing human rights does not end here. To a large extent, the problem originates from the dual role of a constitutional bill of rights. Why do I say that the double characters of a constitutional bill of rights and the whole legal system are very uncertain? Let us rethink the characteristic of constitutional interpretation.

When deciding whether an ordinary statute is unconstitutional, we not only should interpret the statute, but also should specify the contents of the relevant provision in the constitutional bill of rights. Since most provisions in a constitutional bill of rights appear in the style of principles rather than rules, it causes problems for constitutional judges when they interpret provisions or clauses in a constitutional bill of rights. Notably, the relatively abstract and general regulations in a constitutional bill of rights give constitutional judges a huge interpretative power to crystallize new meanings or new contents into the various provisions of the original bill of rights. Thus, from the perspective of the Hart's theory, when a constitutional bill of rights is utilized as a rule of recognition to decide the validity of a certain statute of a primary rule, we not only determine the contents of that primary rule, but also modify the contents of the constitutional bill of rights itself as a secondary rule. In other words, when we specify the contents of a constitutional bill of rights as a rule of recognition then to decide the constitutionality of a statute, we also expand or reduce the scope of a constitutional bill of rights as a rule of recognition. For example, when the Grand Justices Council introduced the constitutional jurisprudence of the institution of the U.S. due process of law and the German constitutional principles of proportionality, it not only decided the constitutionality of certain statutes but also expanded the substance contained in the original constitutional bill of rights. In short, the process of transplanting foreign constitutional jurisprudence or international human rights jurisprudence makes the scope of the original ROC constitutional bill of rights more unlimited and unpredictable in Taiwan, increasing or reducing its contents. Consequently, this is why we should say that the double role of a constitutional bill of rights is the main

cause of legal uncertainty in Taiwan.

In fact, Hart has expressed more or less similar opinions when he discussed the relationship between the rules of adjudication and the rule of recognition.¹¹³ Since to decide whether a rule of obligation is violated, we also should determine what the relevant rule in the legal system is, so “the rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of the courts and these judgments will become the ‘source’ of law.”¹¹⁴ However, “unlike an authoritative text or a statute book,” judicial decisions are not rendered in general terms.¹¹⁵ Further, because of deriving from particular cases, the function of judicial decisions as “authoritative guides to the rules” is not solid.¹¹⁶ Thus, to grasp what rules are implied in a decision depends on the consistency of different judges as well as the ability of the interpreters.¹¹⁷ In this situation, therefore, the rules of adjudication are “committed to the rule of recognition of an elementary and imperfect sort.”¹¹⁸ This is the reason why the relationship between the rules of adjudication and the rule of recognition is “intimate” but “imperfect.”

VIII. THE STABILITY OF THE CONSTITUTIONAL BILL OF RIGHTS AS A RULE OF RECOGNITION AND THE INTERNAL POINT OF LAW

Since the chief cause of uncertainty of a rule of recognition is its dual role, how can we solve this problem? Moreover, can Hart's theory of the rule of recognition explain this feature? Theoretically, how can we know which point is decisive in maintaining the certainty and predictability of a rule of recognition? I will argue that the crucial theoretical point is what Hart called “the internal point of view”. Relying on the concept of the internal point of view, I would like to assert the importance of detailed reasoning by the Grand Justices. As noted, because of Dworkin's distinction between conventional and concurrent morality, Hart gave up his social rule theory in explaining individual and social morality. However, as noted, Hart still maintained that the social rule theory could be used to support the foundation of the rule of recognition.¹¹⁹ Interestingly, some other legal positivists, like Coleman, did not think so. Coleman tried to establish his own version of the social rule theory without underscoring the importance an internal statement, but finally gave up. In this section, I will criticize Coleman's social rule theory to

113. *Id.* at 97.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 256.

highlight the crucial element in building a stable rule of recognition in Taiwan.

A. *The Once Coleman's Version of the Social Rules Theory*

As noted, to solve the binding force of principles, under Hart's soft-positivism, moral tests could be a part of the rule of recognition.¹²⁰ For Dworkin, if morality is a part of a rule of recognition, since judges will disagree about the contents of morality, a rule of recognition will become unstable.¹²¹ Since it is true that there are disagreements about morality among people, including judges, Dworkin's argument is compelling for pointing out the defects of Hart's social rule theory, which fails to consider the situation of convergent practices based on different internal aspects of law. In this context, as judges would disagree with each other on some issues theoretically because of different moral reasoning, how can a rule of recognition be certain and predictable? If there is something severely wrong with Hart's theory of the internal point of view, do we need to modify Hart's social rules theory to make the rule of recognition workable? In fact, Coleman tried to do so.¹²²

To overcome the challenges from Dworkin, Coleman once gave up his support of Hart's social rule theory. His reasoning for modifying Hart's social rule theory is a good starting point for discussing the relevant issues in this section. As above mentioned, Hart emphasizes that there are two essential components of social rules: the existence of convergent practices and the acceptance of them based on an internal statement.¹²³ As also noted, although Hart has admitted the failure of the social rule theory to explain the origins of primary rules of obligation, Hart still maintained that this theory is a reasonable basis on which to explain the existence of the rule of recognition.¹²⁴ Most importantly, for Coleman, the internal point of view is not the major part of the social rules theory. He stresses that the real force that makes social rules normative is convergent practice rather than acceptance from the internal point of view.¹²⁵ Coleman's reasoning is roughly as follows. Under Hart's theory, the significance of acceptance from the internal point of view is due to the fact that it can be used as ground to criticize deviant actions and to justify the actions of most people. Using this as a basis, Coleman asserted that the real momentum that makes a social rule normative is the

120. See the discussion in *supra* Part VII.

121. *Id.*

122. See Coleman, *Authority and Reason*, *supra* note 20, at 298-302.

123. See *supra* Part VI Part A.

124. See HART, *supra* note 14, at 256.

125. See Coleman, *Authority and Reason*, *supra* note 20, at 299.

reaction of the majority of the people.¹²⁶ In other words, the rule itself is not reason-giving; rather, the hostile response from the majority of the people makes this rule reason-giving.¹²⁷ Moreover, according to Coleman, accepting a rule from an internal point of view itself is a convergent practice. Therefore, Coleman strongly argues that if a convergent practice cannot make a rule normative, the acceptance of a rule from the internal statement of law, a part of a convergent practice, cannot do so either.¹²⁸ In short, for Coleman, the acceptance of a rule from the internal aspect of law does not “ground the normative force of a rule” but is “a reliable indicator of the practice being normative.”¹²⁹ Thus, he advocates that “[c]onvergent practice is the core of social rules, and if social rules are to have normative practice, convergent practice must figure in the explanation of it.”¹³⁰

Coleman's establishment of the social rule theory in this way seems persuasive and convincing, but he eventually “silently” gives up this version.¹³¹ Why does Coleman return to embrace Hart's creation of the internal point of view?¹³² Since Coleman does not give us any explicit explanation about his changes of the theory, I would like to use the practice of human rights in Taiwan to demonstrate the advantages of Hart's version of the social rule theory in building up the foundation of a rule of recognition. In fact, I will argue that only the internal point of view can help us understand and explain the difficulties of implementing human rights law in Taiwan. My points will be developed through considering the following three points. First, Coleman's theory will meet serious difficulties when a constitutional framework is based on a written constitution, the separation of powers, and the idea of checks and

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*, at 300.

131. In one of Coleman's most recent papers, *Incorporationism, Conventionality, and the Practical Thesis*, Coleman has not mentioned his modified version of the social rule theory and purely talks about Hart's original one. Moreover, Coleman said: “In my view, the rule of recognition is a coordination convention that creates reasons for acting in the way in which coordination conventions generally do—when they do. This is by creating a system of reciprocal, legitimate expectation. The internal point of view, I suggest, is part of the *causal* explanation of how such a rule creates stable, reciprocal expectation... The internal point of view, as expressed in public behavior, creates and sustains a sense of reciprocity: that free riding or non-compliance is subject to public criticism, and so on. Stability, reciprocity, and mutuality of expectation are created and enhanced by the behavior exhibited by those accepting a rule from the internal point of view.” See Coleman, *Incorporationism, Conventionality, and the Practical Thesis*, *supra* note 20, at 400.

132. Coleman does not return to Hartian social rule theory completely. Actually, Coleman has developed a much wider and deeper studies on this subject. Please see COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY*, *supra* note 20.

balances. Second, Coleman's theory also fails to consider the principle of judicial supremacy and other world-wide judicial practices. Third, in terms of maintaining legal certainty, only convergent practices of officials are not sufficient to explain the factors. Consequently, only Hart's assertion that the "shared and unified official acceptance of the rule of recognition"¹³³ can be the cornerstone of dealing with the uncertainty caused by the coexistence of various countries' constitutional jurisprudence in Taiwan.

B. *The System of Separation of Powers, the Principle of Judicial Supremacy, and the Internal Point of View*

As will be explained in the following paragraphs, the main problem with Coleman's version of the social rule theory is that, if founded mostly on convergent practices, a rule of recognition will become very unstable and uncertain in a country with a written constitution and a system of judicial review. Nevertheless, Coleman is not the only legal positivist making this kind of mistakes, which is indicative of a failure to contemplate the compatibility between a theory and positive judicial institutions. In fact, because all legal theorists have an ambition to establish an abstract and universal legal theory, they are inclined or predisposed to ignore the various positive judicial designs in the world. Positive judicial designs do not necessarily cause problems in creating a universal theory, but sometimes focusing on studying a particular country's positive practice prevents us from reaching a better conclusion. Since Coleman's fault derives from undertaking his discussion within the framework instituted by Hart, let us return to Hart's theory briefly to see the probable origin of the problem.

As noted, Hart distinguishes different conditions of existence between primary rules of obligation and secondary rules. Hart strongly advocates that the existence the rule of recognition and other secondary rules stems from the effective acceptance of officials. This is a general statement, and there are many questions we can ask based upon it. There are at least the following two exceedingly important questions¹³⁴ we should ask, but they have not been given sufficient attention by any legal theorist. First, why does Hart emphasize the fact that a rule of recognition is usually unstated? Second, who are those officials whose practices determine the scope of the "ultimate" rule of recognition? Hart does not give us clear answer to these questions. Why? Here I want to follow Judge Richard Posner's very

133. See HART, *supra* note 14, at 115.

134. There are at least two other important questions. First, is it possible that different officials decide different parts of this ultimate rule of recognition? Second, is it possible that there are diverse practices among different officials?

insightful statement. He suggests that Hart's theory is based on a description of the British legal system.¹³⁵ In short, Britain is a country without a written constitution, the system of the separation of powers, and yet the principle of the supremacy of parliament is sacredly obeyed. Without a written constitution, the rule of recognition is "usually" unstated. Thus, officials' internal acceptance of relevant positive laws as well as constitutional convention is an ineluctable approach to define the meaning and the scope the constitution. Besides, without the system of the separation of powers, there will be no substantial dialogues about the meaning of constitutional law among the different branches of the government. Further, due to the legislative supremacy, the judiciary is relegated to second place in protecting human rights. Consequently, in the context of the British system, the internal aspect of law is a very useful tool to understand the function of the rule of recognition.

Furthermore, from the perspective of understanding the operation of the rule of recognition, Hart's internal point of view is even critical in a country with a written constitution and the system of judicial review. Taking the U.S. legal system as an example, there is an issue about judicial supremacy, which deals with the question of whether the Supreme Court can monopolize constitutional interpretation. If we recognize the principle of judicial supremacy, there are only nine officials who determine the scope of the ultimate rule of recognition. If we say that there is no principle of judicial supremacy, including the President and Congress, there are nearly six hundred officials determining the contents of the ultimate rule of recognition. However, because of the principle of the separation of powers and the idea of the checks and balances, what we should really be concentrating on are the decisions made by these three branches rather than individual congressmen or the Supreme Court Justices.¹³⁶ However, since the three branches of government are on equal footing and the relationship between them is a system of checks and balances rather than of cooperation, how can we decide the contents of the ultimate rule of recognition when there are conflicts between them? Therefore, Such analysis brings into serious doubt about Coleman's theory that the social rule theory is mainly established on convergent practices of officials.

Moreover, even if the legal system is under the principle of judicial supremacy, the claim that only convergent practices of officials can lay the foundation of the social rule theory will also lose its ground. This is, firstly, because of the principle of judicial supremacy, which means that there are a very limited number of officials whose practices can determine

135. See RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 92 (1999).

136. Of course, the executive branch is represented by only one man, the President.

the contents of the ultimate rule of recognition, i.e., the constitutional judges.¹³⁷ Second, according to widely-accepted judicial practice, convergent practices alone cannot provide any rule with any reason-giving force. Let me discuss these points further in the next section.

C. *World-wide Judicial Practice and the Internal Point of Law*

Now let us look at why under a system adopting the principle of judicial supremacy, convergent practices of officials by themselves are insufficient to explain the normative force of a rule of recognition.¹³⁸ Let us take Taiwan's introduction of foreign constitutional jurisprudence as an example.

In Taiwan and in most countries in the world, the power of judicial review lies in the hands of only a few people, the constitutional judges. Since any decision must be delivered through the consent of more than half of the judges in a court, Coleman's statement that "the fact that the majority of the population treat it (the rule) as reason-giving"¹³⁹ makes the normative quality of the social rule meaningless and misses the decisive characteristic of judicial process. Most importantly, when there are more than one judge in a court, it is impossible from a theoretical as well as a practical standpoint for them to reach a final resolution without exchanging opinions with each other. If the process of exchanging opinions is necessary to reach a judicial decision, we cannot say that it is the behavior of the majority of judges to treat the rule with normative force that is decisive. Furthermore, prior to the process of deliberation among judges, there is no existence of either the majority or the minority opinions, so how can we, according to Coleman's theory, find the majority that treats a rule normatively? In other words, since in normal judicial custom the majority vote is an essential and necessary condition in achieving a decision, the existence of a convergent action (i.e., majority vote) is not strong enough to make a rule normative by itself. When trying to reach a decision, judges do their jobs as "insiders" rather than as "observers."

According to world-wide judicial custom, any judicial decision that deals with substantive issues should include reasoning that reflects judges' attitudes towards law from an internal point of view, rather than simply following the majority's behavior. In this context, the internal aspect of

137. Certainly, the premise is that the practice of other officials' obedience to the principle of judicial supremacy should exist.

138. In one of his most recent book, Coleman also applied judicial practices to endorse the importance of the internal aspect of law. Certainly, his theory is more philosophical than the one I develop here. Please see COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY*, *supra* note 20, at 91.

139. See Coleman, *Authority and Reason*, *supra* note 20, at 299.

law grounds the normative force of a rule rather than acts only as a reliable indicator of a rule. The fact that it is the internal statement rather than convergent behavior that gives normative force to a rule will be solidified if we look at the institution of concurring and dissenting opinions. If any judicial decision is delivered by a unanimous vote, the rule created by this verdict will be far more powerful or normative than the rule created by any other split verdicts. This is particularly significant in the case of concurring opinions. If only the behavior of majority action can give normative force to a rule, there should be no difference between a judicial decision with unanimous votes and one with concurring opinions since both reach the same outcome. However, practically speaking, the normative force of a rule is different in these two verdicts. Therefore, if the internal point of view cannot give normative force to a rule, how can we explain the foregoing situation of preferring a unanimous vote? It is this concern that judicial authority will be whittled down by the institution of concurring and dissenting opinions that makes most Continental European countries dare not follow the footsteps of the Anglo-American legal system.

D. *Legal Certainty and the Internal Point of View*

Ironically, the last defect of Coleman's theory is the problem that his theory wants to solve: the certainty of the rule of recognition. He ignores the simple fact that if a judge needs to write down his or her opinion about the merit of a case, he or she must have to express legal opinions from his or her own internal point of view rather than from an observer's external point of view. In this context, it is the quality of the reasoning deriving from the judges' internal aspect of law in a particular case that determines the normative force of their decision. Thus, convergent practices are by no means the most important thing. In fact, just because we recognize that Dworkin's attack on the social rule theory is very powerful, especially his distinction between conventional and concurrent morality, how can we treat judges' dealing with cases at hand as an outsider of the legal system by only observing the process of his colleagues delivering a decision? Only by grasping the judges' internal point of view in a specific decision can we understand why the majority reached a decision on a specific rationale, or some concurring and dissenting opinions occurred. Further, only by comprehending the sameness and differences of the majority and the minority's reasoning, which demonstrate both their internal point of views, can we construct a better constitutional jurisprudence with more predictability for future similar decisions. Considering the situation in Taiwan, which introduces foreign constitutional jurisprudence to solve internal problems, through Coleman's theory, we will find even more

defects.

If it is only because the Grand Justices have the practice of introducing foreign constitutional jurisprudence to solve Taiwan's problems then we say that the Grand Justices have the obligation to embody foreign constitutional jurisprudence into the contents of Taiwan's constitutional bill of rights, this situation will make the rule of recognition in Taiwan much more uncertain. Most importantly, without judges' internal point of view, we cannot understand why judges use one country's jurisprudence in some cases and employ another country's theory in others. To develop a mature legal system, it is necessary to know the rationale by which judges adopt certain foreign constitutional jurisprudence in particular situation. The Grand Justices should tell us why it is necessary to appropriate foreign constitutional jurisprudence. They should also tell us why they prefer country A's constitutional jurisprudence to B's, as well as the advantages and disadvantages of each. However, this can only be accomplished through judges' internal aspect of law. Without knowing the judges' rationale, people in Taiwan can never build a rule of recognition of their own. Consequently, in order to lay a strong foundation of human rights law in Taiwan, the Grand Justices should express their rationale for introducing certain foreign constitutional jurisprudence in every case as detailed a manner as possible. This is the most essential factor in building a solid base of human rights law in Taiwan.

IX. CONCLUSIONS

As a witness of the process of establishing a western-style constitutional democratic government in Taiwan, the current of democratic achievement in Taiwan cannot be taken for granted and should be consolidated seriously. One way to solidify democracy is to improve the protection of human rights, letting people recognizing more the values brought by a democracy. Thus, it is very consequential for us to consider how to improve the present human rights law jurisprudence in Taiwan. To achieve this, many approaches can be used to help us understand and solve some tough problems of implementing human rights in Taiwan. This essay is a product of this. It employs a jurisprudential perspective to search for some theoretical explanations of the problems of practicing human rights in Taiwan. Using Hart's legal theory and the conflict opinions between him, Dworkin, Raz, and Coleman with respect to some significant issues, this paper provides us with a jurisprudential explanation of Taiwan's situation. Further, in the process of explaining Taiwan's challenges in enforcing human rights through a jurisprudential standpoint, this paper also reviews strengths and weaknesses of Hart and

others' legal theories. Indeed, the contribution of this jurisprudential explanation to understanding Taiwan's challenges in implementing human rights law can be summarized as follows.

Most importantly, Hart's theories of rule of recognition and social rules give us a precious ground to analyze and justify the challenges that Taiwan has faced in implementing human rights. They illuminate the issues about why it took nearly forty years to attain an initial success in implementing human rights in Taiwan, and why it is inevitable for people in Taiwan invoke foreign human rights jurisprudence in human rights implementation. What's more, this jurisprudential analysis illustrates the most pivotal factor that causes the problems of enforcing human rights in Taiwan: local constitutional law becoming unstable and uncertain during the process of legal transplant. Further, in terms of solving the current problems in enforcing human rights law in Taiwan, this jurisprudential analysis reveals us two important and interrelated things. On the one hand, improving the quality of implementing human rights in Taiwan largely depends on the practices of judges and people. Only if people are more familiar with the ideas and values of human rights will the protection of human rights be dramatically improved. Another important element in building a concrete foundation for constitutional law lies in the quality of the decisions rendered by the Grand Justices of the Judicial Yuan. More detailed judicial reasoning symbolizes better human rights jurisprudence. Only through suitable adjustment and transformation by people as well as by the Grand Justices, foreign jurisprudence can be very helpful for Taiwan.

With this understanding, the practice of human rights law in Taiwan will be significantly improved, continuing its endless but rewarding journey into a whole new frontier. Moreover, with strong confidence and commitment, people should continue to study the protection of human rights, founding a quintessential system of human rights law that other East Asian societies can follow.

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