

Social and Justified Legal Normativity : Unlocking the Mystery of the Relationship

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I.- Introduction

H.L.A. Hart in his book *The Concept of Law* (Hart 1994) advanced an important idea that aimed to solve fundamental problems in our understanding of the normative character of law: the internal point of view. The internal point of view *might be seen* as a promising idea to perform a number of tasks of which the most important was to explain how rules provide reasons for actions to the legal participants and thereby explain both the notion of legal obligation and the duty-imposing character of law. If the idea of the internal point is thought to provide a satisfactory explanation of how law imposes duties and obligations, this should mean the triumph of legal positivism over natural law conceptions as the internal point of view would be able to show that there is no need to postulate a common good as mysteriously metaphysical (Hart 1994, 82) that is only realisable through the law to explain the normativity of law. Legal positivism would also triumph over empirical views of the law as it would show that there is something more to the law than merely power or predictable facts such as the mental states of judges and citizens. Yet the notion of the internal point of view remains obscure and confusing (Hart 1994, 82).

I have traced elsewhere (Rodriguez-Blanco 2007) the historical roots of Hart's idea of the internal point of view and show the inherent tensions between a social and publicly ascertainable conception of the internal point of view and the demands of a much robust normative conception. Central to Hart's internal point of view is the idea of 'acceptance' and intentional action. If officials' actions *are guided* by legal rules, their actions must be both intentional and voluntary. But how should we understand Hart's conception of intentional action? This paper aims to disentangle the underpinning conception of intentional action that Hart's internal point of view would need to presuppose for it to be intelligible. Reaching an understanding of his underpinning conception of

intentional action might enable us to look more favourably upon his attempt to lay out an intermediate realm between empirical-predictive theories of law and natural law views. In the 1980s a number of criticisms were leveled against Hart's idea of the internal point of view. John Finnis (Finnis 1980) advanced the view that the 'internal point of view' is an unstable position, Joseph Raz (Raz 1999) put forward the view that Hart's practice theory of legal rules cannot explain how legal rules provide reasons for actions and impose obligations and duties on citizens and officials and Ronald Dworkin (Dworkin 1977 and Dworkin 1986) adumbrated the view that there need to be 'an interpretive stance' toward the end or point of our practices, and that the best possible interpretation of what our legal practices are ought to satisfy the two criteria of fitness with our past legal materials and moral soundness. All of these criticisms are illuminating but they do not explain *why* the *internal point of view* as formulated by Hart cannot perform the task of explaining the normative character of legal rules (Raz 1999, 53-58). John Finnis provides some guidance to elucidate this point on the first chapter of his book *Natural law and Natural Rights* (Finnis 1980). He argues that law should be understood from the deliberative point of view -in his terminology the point of view of the man who possesses practical reasonableness- and not from the internal point of view. Using the Aristotelian notion of central analysis or focal meaning, Finnis shows that the deliberative point of view is the central or paradigmatic case to determine the nature of law. In my view, the Aristotelian notion of the central case does not assist us in showing the primary role of the deliberative point of view (Rodriguez-Blanco 2007b) that Finnis aims to defend. The argumentative strategy of this paper is to adumbrate arguments to show the primary role of the deliberative point of view in understanding the normative character of law. However, my strategy is very different, and in my view, more fruitful than the one advanced by Finnis (Finnis 1980, 235-237). I show that the notion of intentional action as outward-looking towards an end as a good-making characteristic is *primary* to the inward-looking notion of intentional action that relies on the pair desires/beliefs.

Contrary to the view advocated by Hart's critics, Hart did not think that the the internal point of view could explain how legal rules can impose duties and obligations. On the contrary, Hart aims to explain the *beliefs* of legal participants who *recognise* that law imposes duties and obligations (Pattaro 2005). In other words, Hart aimed to explain the social normativity of law. Arguably, Hart was not interested in the justified character of the normativity of law whereby the law-abiding citizen is guided by legal rules as providing reasons for actions and imposing genuine obligations. Hart aimed to describe the behaviour of participants when they *accept* rules which they *believe* are duty-imposing and reason-giving (Pattaro 2005). However, the social normativity of law is merely a *partial* explanation of the normative character of the law and this is perhaps the target of Hart's critics. They are unsatisfied, rightly in my view, with the notion of social normativity if it is presented as a *comprehensive* explanation of the normativity of law.

This paper aims to defend the thesis that Hart's notion of social normativity is *parasitic* on the notion of justified normativity (*the parasitic thesis*). The arguments adumbrated in the paper do not purport to show that Hart's notion of social normativity is false. Rather, the point of the paper is more subtle, it aims to show that justified normativity is *prior to* and more important than the social normativity of law. Furthermore, the intelligibility of the latter depends on the intelligibility of the former.

The paper will be divided into three parts. The first part will examine Hart's underpinning notion of intentional action and its relation to his idea of the internal point of view. The second part will show the limits and paradoxical nature of Hart's notion of intentional action. The third part will consider some possible objections to the *parasitic thesis*.

II.- Hart's non-cognitivist account of intentional action and the internal point of view

II.1 Some textual analysis

Contrary to Kelsen who only aims to explain the regulative role of law, Hart aims to explain the guiding role of legal rules. He emphasises the view that rules should be examined not only from

the point of view of the legal official who applies them, or the legal scientist who aims to know and explain them, but also from the point of view of the man who wishes to be *guided* by such legal rules. For Hart a legal official, such as a judge also use the rule as his guide and the *breach of the rule as his reason and justification for punishing the offender* (Hart 1994, 10). Apart from applying sanctions, legal rules guide the behaviour of citizens and officials. In his book the *Concept of Law*, Hart points out: “*The principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court*”. (Hart 1994, 39) Shortly after this Hart asserts:

Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They appear then as an additional element introduced by the law into social life over and above that of coercive control. This is so because possession of these legal powers makes of the private citizen, who, if there were no such rules, would be a mere duty-bearer, a private legislator...Those who exercise these powers to make authoritative enactments and orders use these rules in a form of purposive activity utterly different from performance of duty or submission to coercive control (Hart 1994, 40-41).

For the legal official and the citizen the predictive aspect of the legal rule is irrelevant, the judge does not say “this man will breach the rule and then we will punish him”, and the citizen does not say “I will breach this legal rule, then the authority will punish me”. By contrast, Hart tells us, rules have terms such as ‘ought’, ‘must’, ‘obligation’, ‘should’ and a sound understanding of such terms cannot be achieved if we consider that legal rules have a merely predictive function. **Consequently, legal rules, including criminal legal rules, generate genuine legal obligations.** The terms ‘ought’, ‘must’, ‘obligation’ and ‘should’ are addressed to the legal community in order to determine what to do and how to organise their affairs. Hart criticises Austin for reducing legal rules to commands and habits (Hart 1994, 18-25). For Austin, law is conceived as a coercive order

and such order creates a habit of obedience. Hart argues, however, portraying law in this way does not help us in distinguishing law from illegitimate situations of coercion. When we obey the law we say that we have an obligation, we do not say that we have been obliged. According to the Austinian theory of law, therefore there is no distinction between the threats of the State and those of the gangster. Threats and coercion result in effective obedience to the law because there is a *belief* in the possibility of coercion (Hart 1994, 23). But how many people must either effectively obey the legal rules or ought to believe in the threat to have a settled legal system? Hart raises doubts about the possibility that general habitual obedience to general orders backed by threats explains the *settled character and continuity which legal systems possess* (Hart 1994, 24). Furthermore, as the above quote demonstrates, criminal legal rules are just one specific type of rule, there are other kinds of rules, such as rules that confer powers to make wills or contracts, these rules are related to capacity and cannot be described as orders backed by threats.

But how does Hart account for the guiding function of legal rules without resorting to the idea of the common good or moral ideals (Finnis 1980; Simmonds 2007)? Hart identifies the following key features possessed by social rules. Criticism or deviation from the rules is regarded as legitimate or justified (Hart 1994, 55); followers of social rules have a reflective critical attitude (Hart 1994, 54), this means they regard rules as the standard according to which they adjust their behaviour, and they use normative language such as ‘you ought to’, ‘I ought not to’, ‘you must do that’, ‘that is right’, ‘that is wrong’(Hart 1994, 56) What can explain these recurrent features of social rules?. Hart’s answer is that social rules, as distinctive from habits, have an *internal aspect* (Hart 1994, 55-56). The internal aspect is shown by acceptance and use of the rule . Thus, accepted rules are forward-looking, their aim is to regulate and guide future behaviour, not to predict behaviour. For Hart it is only required that officials *accept* legal rules from the internal point of view (Hart 1994, 59) but how can this acceptance *be known or observed?* Hart argues that general acceptance is a complex phenomenon: officials may expressly say that they accept the fundamental

rules of the legal system and the legislators will make laws according to the rules. Thus, it is not required that the citizens accept the legal rules (Hart 1994, 59), but in a healthy legal system citizens do show this acceptance. Through making their acceptance conspicuous, they contribute to the *existence* of the legal system (Hart 1994, 59). According to Hart, the Austinian sanction theory of law does not show the *active* aspect of identifying, applying and obeying the law. Hart puts this as follows: “*The weakness of the doctrine is that it obscures or distorts the other relatively active aspect, which is seen primarily, though not exclusively, in the law-making, law-identifying and law-applying operations of officials or experts of the system. Both aspects must be kept in view if we are to see the complex social phenomenon for what it actually is*” (Hart 1994, 60).

But what does Hart mean by ‘acceptance’ of a rule? What is this *active* element that, for Hart, is so central to understanding what law is? We cannot understand how the rule of recognition will perform all of its complex functions without an understanding of the *active* element that Hart identifies. Hart recognises the important connection between rules and actions. He argues that there are two main kinds of rules; rules that confer powers, public or private, and rules that impose duties. Both kinds concern *actions* and the latter kind involve variation upon or the creation of duties and obligations (Hart 1994, 79).

II.2 Hart’s Non-Cognitivism

There are a number of possible interpretative solutions that can be given to the questions ‘what does Hart mean by ‘acceptance’ of a rule? and what is this *active* element that for Hart is so central to understanding what law is?’. First, one can assert that Hart as a non-cognitivist (Toh 2005 and Toh 2007) in relation to normative statements would assert that ‘acceptance’ of legal rules by officials and citizens is merely an expression or an attitude of approval towards these legal rules. It does not describe normative facts, values or what is good. Citizens and judges are not saying that legal rules are *obligatory* but merely that they are *judged* to be obligatory and that this is *expressed*

by those who accept such rules. How are intentional actions to be interpreted as being non-cognitivist? According to non-cognitivists (Blackburn 1984; Gibbard 1990; Dennet 1987), intentions are mental states and an adequate naturalistic psychological theory should be able to provide a full explanation of such states. However, there seems to be a tension between Hart's non-cognitivism (Raz 1993) and his rejection of sanction-based and predictive theories of law.¹ There is an explanatory gap in Hartian texts on this issue. What kind of non-cognitivism did he advocate? What are the implications of his non-cognitivism as his understanding of intentional actions and practices in the context of the law and their relation to legal rules? This is a problem for Hart as plausible explanations of non-cognitivism are naturalist and therefore tend to sit well with 'scientific' theories of behaviour and intentional action. In spite of this tension, let us pursue the non-cognitivist reading of the notion of 'acceptance' of the legal rule. Alan Gibbard is one of the most sophisticated defenders of non-cognitivism or expressivism in morality and rationality. In his book *Wise Choices, Apt Feelings* (Gibbard 1990), he begins his inquiry with the question 'what is rational to do or believe?'. In other words, 'what makes sense to do' and 'what ought we to do?' (Gibbard 1990, 6-7). His answer, which has a Hartian flavour, is "to call something rational is to *express* one's acceptance of norms that permit it" (Gibbard 1990, 6-7). Using Gibbard's analysis in the context of the law, we might say that 'when I say I ought to stop at the traffic lights I am *expressing* my acceptance of the legal norms'. Gibbard is aware of how cryptic his answer is and asks what does it mean to accept norms? Gibbard distinguishes between *internalising* a norm and *being governed* by a norm. In the former case, we act by habit and mere adaptation such as for example when we have a conversation with friends or strangers and physically move nearer to or away from them. There are a set of social norms concerning degrees of intimacy or distance. In the latter case, we act by *acceptance*. We work out in community how to think, what to do and how to feel (Gibbard 1990, 72), we share our evaluations and accept norms on what to do. According to

¹ For an illuminating discussion of the tension between Hart's non-cognitivism and his criticism of the sanction and predictive theories of law and Hart difficulties in explaining legal normativity, see (Perry 2006).

Gibbard, acceptance involves spontaneous and sincere avowal and consistency (Gibbard 1990, 74-75). However, later in the text, Gibbard moves from mere *expression* to a *psychological* condition. He states: “*Normative governance by the norm is a tendency to conform to it. Accepting a norm is whatever psychic state, if any, gives rise to this syndrome of avowal of the norm and governance of it.*” (Gibbard 1990, 74-75) This move can be explained by the fact that from the first-person perspective to say “ ‘I accept the norm’ or ‘we accept the norm’ is merely the way either I express myself or we express ourselves” is absurd. To make sense of the first-person perspective Gibbard needs to give a more *psychological* account and this account sits well with non-cognitivism about what I or we ought to do. Gibbard rejects the view that there is such a thing as the ‘faculty of reason’ (Gibbard 1990, 1981) that exercises ‘rational control’. Our different capacities for governance of action, avowal and acceptance are called by Gibbard ‘putative reason’. The connection that links ‘putative reason’ and ‘what I ought to do’ is *belief*. Gibbard puts this as follows: “*On the analysis I have proposed, the connection between rationality and the deliverances of putative reason is this. For a person’s faculty of putative reason to permit something is for the person to believe that thing to be rational*” (Gibbard 1990, 81).

We can reconstruct Hart’s notion of ‘acceptance’ of a rule as the view that *beliefs* and *motives* are sufficient to establish the truth of the proposition that ‘X accepts the legal rule’. The explanation will be that X has a pro-attitude; i.e. a desire, a motive to follow the rule and believes that this type of action is the one indicated by the rule towards which he has a pro-attitude (Davidson 1987a, Hursthouse 2000). Is this how we should understand the notion of ‘acceptance’? Thus, the legal rule that ‘vehicles should not park in the Park’ is *accepted* by the citizen or the official if and only if he *believes* that the type of action that is commanded by the rule is the action that he favours, and he has a pro-attitude i.e. a belief or desire, to act following the pattern of behaviour such as ‘I *want* to follow this pattern of behaviour because it is beneficial for me’. We can formulate this as follows:

Acceptance thesis: “C accepts the legal rule LR if and only if a) he believes that the type of action or pattern of behaviour that is indicated by the rule is the one that he has a pro-attitude towards and b) he has a pro-attitude (desire/ motives) towards the pattern of behaviour indicated by the rule”.

Thus, for example, in the case of the rules of chess, I have a desire to act according to the rules of the game of chess as I want to play chess and I believe that to move the queen and the knight in such and such a way are part of the pattern of behaviour indicated by the rules of chess. Similarly, *qua* legislator I desire to act according to the rules that regulate the process to enact statutes and I believe that to raise my hand to vote for the enactment of the statute is the type of action or pattern of behaviour that is indicated by the rule and the one that I have a pro-attitude towards.

At first glance, Hart seems to reject this interpretation:

Thus not only is it the case that the facts about B’s actions and his beliefs and motives in the gunman case, though sufficient to warrant the statement that B was obliged to hand over his purse, are not sufficient to warrant the statement that he had an obligation to do this; it is also the case that facts of this sort, i.e., facts about beliefs and motives, are not *necessary* for the truth of a statement that a person had an obligation to do something. Thus the statement that a person has an obligation, e.g., to tell the truth or report for military service, remains true even if he believed (reasonably or unreasonably) that he would never be found out and had nothing to fear from disobedience (Hart 1994, 81).

It appears, in this paragraph, that Hart collapses the notion of ‘a pro-attitude towards following a pattern of behaviour and the belief that the type of action indicated by the rule is the one that is favoured’ with the idea that ‘his pro-attitude is the fear of disobedience’. In other words, he collapses the sanction theory of law, the predictive theory of law and the belief/pro-attitude conception of intentional action. In other paragraphs, it is unclear whether the ‘acceptance thesis’ is

the one that underlies his notion of the acceptance of a legal rule. Let us examine carefully the following paragraph:

“When we move a piece in chess in accordance with the rules, or stop at the traffic light when it is red, our rule-complying behaviour is often a direct response to the situation, unmediated by calculation in terms of the rules. The evidence that such actions are genuine applications of the rule is their setting in certain circumstances. Some of these precede the particular action and other follow it: and some of them are stateable only in general and hypothetical terms. The most important of these factors which show that in acting we have applied a rule is that *if* behaviour is challenged we are disposed to justify it by reference to the rule: and the genuineness of our acceptance of the rule may be manifested not only in our past and subsequent acknowledges of it and conformity to it, but in our criticism of our own and others’ deviation from it. On such or similar evidence we may indeed conclude that if, before our ‘unthinking’ compliance with the rule, we had been asked to say what the right thing to do was and why, we would, if honest, have cited the rule in reply. It is this setting of our behaviour among such circumstances, and not its accompaniment by explicit thought of the rule, that is necessary to distinguish an action which is genuinely an observance of a rule from one that merely happens to coincide with it. It is thus that we would distinguish, as a compliance with an accepted rule, the adult chess-player’s move from the action of the baby who purely pushed the piece into the right place (Hart 1994, 36-37).

According to Hart, the acceptance of the rule is shown explicitly; i.e. through acknowledgement of the rule, or implicitly as a) criticism when there is deviation, b) justifying reason when one is challenged, c) justifying reason when one is asked to reflect on one’s actions.

Are these all ‘expressions’ or ‘attitudes’ towards the rules? Let us imagine three different examples:

A) You are playing chess and the other player incorrectly moves the knight, you criticise her and ask her why has she broken the rules?

B) You are playing chess and the other player asks you why you are moving the queen in such a way. You respond that this is because the rule of chess teaches how to move the queen.

C) You are playing chess and the other player asked you why are you moving the queen in such way. You respond because this is the rule of chess on how to move the queen.

In all three cases, you have shown that you accept the rules of recognition. But *to whom* has it been *expressed* that *you* accept the rules of chess? It has been *expressed* to the other player and when we ask the other player, ‘how do you know that your opponent accepts the rules of chess?’ He has two possible answers. He can take an outward-looking approach and seeking the goal of the action he could ask to his opponent, *why* do you move your hands, the answer to this will be ‘to move the queen’ and he could then ask ‘why did you move the queen’, and the answer to this will be ‘to play chess’, but the enquiry could continue and he might ask why do you play chess, the response might be ‘to win’ or ‘to be entertained’. The end of the action is presented as a good-making characteristic and you could infer that he accepts the rule. We could formulate this ‘acceptance thesis*’ as follows:

‘Acceptance Thesis*’: C accepts the legal rule if and only if a) his actions are explained in terms of other actions and such actions are the core instance of what it is to follow the legal rule and b) the purpose or end of the action is its reason and is formulated as a good-making characteristic.²

The problem with ‘acceptance thesis*’ is that it involves an evaluation and understanding of the goal of actions that are instances of ‘following a rule’. This means that in order to understand the action as intelligible, one needs to understand that the end or goal has a ‘good-making’ characteristic for the agent who performs the action. It has been proposed that one does not need to endorse the good-making characteristic of the action to be performed as it merely involves identifying the ‘good-making’ characteristics of the action *for the agent*. Raz has advanced this in a sophisticated form. He argues that there is a detached viewpoint from where we can make evaluations without endorsing them.

² For a criticism of the idea that a reason for action ought to be presented as a good-making characteristic, (Hursthouse 1991; Stocker 1979; Setiya 2007;) Cf. (Raz 2000). For a helpful discussion of the idea of values as part of our actions see Watson, 1975.

The second possibility is to argue that the other player knows that you accept the rules of chess because he has identified your beliefs and pro-attitudes; i.e. your desires. Your desire to play chess and your belief that moving the queen is a pattern of behaviour indicated by the rules of chess. In other words, Hart advocates the ‘acceptance thesis’.

In the next section, I will reject the view that the ‘the acceptance thesis’ and “the detached viewpoint on the ‘the acceptance thesis*’” are independent from the ‘acceptance thesis*’. First, I will argue that the ‘acceptance thesis’ presupposes that the player is able to take the theoretical viewpoint of the other player’s agency and I will show that such a theoretical viewpoint is parasitic on a deliberative or first-person perspective (Finnis 2003 and Finnis 2008). I will adumbrate the ‘social version of the acceptance thesis’ and argue that this might be seen as the most plausible view advocated by Hart. However, I will also argue that the ‘social version of the acceptance thesis’ is also dependent on the ‘acceptance thesis*’. In other words, I will show that 1) the ‘acceptance thesis’ and the ‘social version of the acceptance thesis’ are parasitic on the ‘acceptance thesis*’, 2) that, contrary to appearances, “the detached point of view of the ‘acceptance thesis*’” is a *theoretical* standpoint that depends on the *deliberative* viewpoint of intentional actions. In other words, “the detached point of view of the ‘acceptance thesis*’” is parasitic on the ‘acceptance thesis*’. These two core arguments constitute the ‘parasitic conception’ that I defend (Finnis 1980, 11-19).

III.- Why did I park my vehicle in the park: A defense of the parasitic conception

III.1.- The practical standpoint: the distinction between the deliberative and the theoretical viewpoints

What is the distinction between practical and theoretical knowledge?. Let us take a modified version of the example provided by Anscombe (Anscombe 1957, §32). A man is asked by his wife to go to the supermarket with a list of products to buy. A detective is following him and makes notes

of his actions. The man reads in the list ‘butter’, but chooses margarine. The detective writes in his report that the man has bought margarine. The detective gives an account of the man’s actions in terms of the evidence he himself has. By contrast, the man gives an account of his actions in terms of the reasons for actions that he *himself* has. However, the man knows his intentions or reasons for actions not on the basis of evidence that he has *of* himself. His reasons for actions or intentions are self-intimating or self-verifying. He acts from the deliberative or first-person perspective. There is an action according to reasons or an intention *in doing* something if there is an answer to the question *why*. It is in terms of his own description of his action that we can grasp the reasons for actions of the man. In reply to the question ‘*why* did you buy margarine instead of butter?’, the man might answer that he did so because it is better for his health. This answer, following Aristotle’s theory of action (Aristotle 1934, II. V. 18-21; Aquinas 1969, a2æ. 12, I) and its contemporary interpretations advanced by Anscombe and others (Anscombe 1957; Kenny 1979; Pasnau 2002, Finnis 1998a, 62-71 and 79-90; Finnis 1998b; Raz 1999; Quinn 1993; Korsgaard 2008; Moran and Stone 2008; Thompson 2008) provides a reason for action as a desirability or good-making characteristic. According to Anscombe, the answer is intelligible to us and inquiries as to *why* the action has been committed stops. However, in the case of the detective when we ask *why* did you write in the report that the man bought margarine, the answer is that it is the truth about the man’s actions. In the case of the detective, the knowledge is theoretical, the detective reports the man’s actions in terms of the evidence he has of it. In the case of the man, the knowledge is practical. The reasons for action are self-verifying for the agent. He or she does not need to have evidence of his own reasons for actions. This self-intimating or self-verifying understanding of our own actions from the deliberative or practical viewpoint is part of the general condition of access to our own mental states that is called the ‘transparency condition’(Evans 1982, 225; Edgley 1969, 90; Moran 2001, 2003 and 2004; Reginster 2004; Wilson 2004; Heal 2004; Lear 2004; Shoemaker 2003; O’Brien 2003; Moya 2006; Carman 2003 and Gertler 2008). Its application to reasons for action can be formulated as follows:

(TC for reasons for actions) “I can report on my own reasons for actions, not by considering my own mental states or theoretical evidence about them, but by considering the reasons themselves which I am immediately aware of” (Aquinas 1969, Ia 87.2 ad 2).

The direction of fit in theoretical and practical knowledge is also different. In the former case, my assertions need to fit the world whereas in the latter, the world needs to fit my assertions. The detective needs to give an account of what the world looks like, including human actions in the world. He relies on the observational evidence he has. The detective’s description of the action is tested against the tribunal of empirical evidence. If he reports that the man bought butter instead of margarine, then his description is false. The man, by contrast, might say that he intended to buy butter and instead bought margarine. He changed his mind and asserts that margarine is healthier. There is no mistake here.

III.2 Problems with the ‘acceptance thesis’ and the formulation of the ‘Social Version of the Acceptance Thesis’

The ‘acceptance thesis’ presupposes an inward-looking approach to action as opposed to an outward-looking approach. The latter examines intentional actions as a series of actions that are justified in terms of other actions and in view of the purpose or end of the intentional action as a good-making characteristic; e.g.. to put the kettle on in order to boil the water, in order to make tea *because* it is pleasant to drink tea. The former examines the mental states that rationalise the actions; however, at the ontological level, it is argued that these mental states cause the actions. The mental states are the pair belief/ pro-attitude towards the action. If the ‘acceptance thesis’ is the correct interpretation of Hart’s central idea concerning the internal point of view towards legal rules, then criticisms that are leveled against inward-looking approaches of intentional actions also apply to the

‘acceptance thesis’. The main criticism that has been raised against the idea that the pair belief/pro-attitude can explain intentional actions is the view that this conception cannot explain deviations from the causal chain³ between mental states and actions. Let us suppose that you intend to kill your enemy by running over him with your vehicle this afternoon when you will meet him at his house. Some hours before you intend to kill your enemy, you drive to the supermarket, you see your enemy walking on the pavement and you suffer a nervous spasm that causes you to suddenly turn the wheel and run over your enemy. In this example, according to the belief/pro-attitude view, there is an intentional action if you desire to kill your enemy and you believe that the action of killing your enemy, under a certain description, has that property. Ontologically, the theory would establish that you had both the desire to kill your enemy and the belief that this action has the property ‘killing your enemy’. Thus, this mental state has caused the action and there is an intentional action. The problem with this view is that it needs to specify the ‘appropriate causal route’. Davidson has made much effort in specifying the ‘attitudes that cause the action if they are to rationalise the action’:

And here we see that Armstrong’s analysis like the one I propose few pages back, must cope with the question *how* beliefs and desires cause intentional actions. Beliefs and desires that would rationalize an action if they cause it in the right way -through a cause of practical reasoning, as we might try saying-may cause it in other ways. If so, the action was not performed with the intention that we could have read off from the attitudes that caused it. What I despair of spelling out is the way in which attitudes must cause actions if they are to rationalize the action (Davidson 1980, 79).

In the following paragraph, Davidson seems to fear that the idea of attitudes causing action might lead to *infinite regress*:

³ The first to discuss deviant causal chains was Chisholm, R 1964. Cf. Bratman, M. (1984 and 1987) The debate on the causal status of reasons for actions go back to Norman Malcolm (1967 and 1968) and Charles Taylor (1964) who argued that reason explanations are in rivalry to neurological or biological explanations. So far, there is no satisfactory explanation on the role of mental content in reason explanations.

A climber might want to rid himself of the weight and danger of holding another man on a rope, and he might know that by loosening his hold on the rope he could rid himself of the weight and danger. This belief and want might so unnerve him as to cause him to lose his hold, and yet it might be the case that he never *chose* to loosen his hold, nor did he do it intentionally. It will not help, I think, to add that the belief and the want must combine to cause him to want to loosen his hold, for there will remain the *two* questions how the belief and the want caused the second want, and how wanting to loosen his hold caused him to loosen his hold.

Here we see Davidson struggling with his own proposal (Vogler 2007). He asks *how attitudes must cause actions if they are to rationalise actions?* Davidson's model of intentional action does not help us to determine whether there is an intentional action, it only help us to determine the *conditions* that would explain the existence of an intentional action. The intentional action is already *given*. A similar criticism is applicable to the 'acceptance thesis' and to this we now turn.

Let us suppose that I intend to go to the park, read a sign that states 'Vehicles are not allowed to park in the park', I turn the wheel of my vehicle, reverse it and park a few streets away. You ask me why I turned the wheel of my vehicle, reversed and parked a few streets from the Park, I answer that I carried out these actions because there is a rule that states 'Vehicles are not allowed to park in the park'. According to the 'acceptance thesis', my desire to follow the pattern of behaviour indicated by the rule and my belief that turning the wheel of my vehicle, reversing it and not parking in the park is the type of action or pattern of behaviour indicated by the rule. However, let us suppose that I desire to avoid parking in the park and have the respective belief. In other words, I accept 'not parking in the park'. On my way to the park, however, whilst following directions to the park, I take a wrong turning and end up parking just outside the park entrance. Even though the two criteria of the 'acceptance thesis' have been met, this was not a case of following the legal rule by acceptance since I comply with the rule by accident.

The problem with the ‘acceptance thesis’ is that it does not consider the action from the deliberative point of view. This means that the action as it is seen from the point of view of the agent or deliberator. When the agent explains his actions he does not examine his own mental states, rather he looks outwards to the vehicle, the park, the sign and so on. The reasons for actions; i.e. turning the wheel to reverse the vehicle, then parking outside the park to follow the rule, are self-evident or *transparent* to him. But then, an objector might advance, what is the good-making characteristic of a rule that, as in the example of the shopper who intends to buy margarine because it is healthier, is the goal of the action of avoiding parking in the park. My reply is as follows. When the driver is asked why he or she is turning the wheel and reversing the vehicle, his answer will be ‘because of the rule’. But this is still not completely *intelligible* unless we *assume* or *know* that he is a law-abiding citizen or that he believes in the general fairness of the legal rules, etc. We can still ask him ‘why, because of the rule, do you do this?’. His answer would need to be in terms of reasons as good-making characteristics for him, in order to make intelligible his intentional action. He will probably reply that he has reasons to follow the legal rule because it is the best way of preserving the peace of the Park, or that he has reasons to follow legal rules in general because it is the best way of preserving coordination (Anscombe 1981) among the members of a community. In a nutshell, the agent or deliberator needs to provide the reasons for the action in terms of good-making characteristics and the end or reason of the action provides the *intelligible form of the action*. This explanation of action has also been called a *naive* explanation of action as opposed to a more sophisticated explanation of action; i.e. in terms of mental states.

III. 3.- The Social Version of the Acceptance Thesis

It could be argued that the ‘acceptance thesis’ is not what Hart aimed to convey when he asserted that the internal point of view and the acceptance of the rule is shown by

criticism from deviance or the justification given for following a rule. Indeed, Hart rejected the view that mental states can cause actions as was apparent in his stern and implacable criticisms of the predictive and sanction theories of law. An interpreter might assert that we can recognise acceptance merely by observing social behaviour, including the linguistic behaviour of citizens and officials. Let us recall the example of the driver of the vehicle who wishes to follow the rule that prohibits vehicles from parking in the park. Suppose that a friend is driving with him and *observes* that he is turning the wheel. His friend will interpret this action as meaning that the driver shares with him the social practice of following the rule ‘vehicles are not permitted to park in the park’. They both share ‘the internal point of view’ and the friend can see that the driver’s convergence behaviour is the same as the practice. The social version of the acceptance thesis can be formulated as follows:

Social version of the acceptance thesis (SVAT): “ X accepts the legal rule (LR) if and only if a) there is a social pattern of behaviour as indicated by the legal rule and b) the social pattern of behaviour is recognised as an instance of the common understanding of the content of such a rule as provided by social practice amongst the participants of a community.⁴

The problem with this definition, apart from being a mouthful, is that it does not say much about the description of the action provided by the agent himself. Thus, there can be a social pattern of behaviour as indicated by the rule ‘vehicles are not allowed to park in the park’, and the recognition of such behaviour as an instance of our common understanding of the content of the rule ‘vehicles are not allowed to park in the park’. We can see a driver reversing his vehicle and avoiding parking in the park, but it might be the case that the

⁴ The SVAT seems to be supported by Hart in the ‘Postscript’ of his *Concept of Law* “Acceptance consists in the standing dispositions of individuals to take some patterns of conduct both as guides to their own future conduct and as standards of criticism which may legitimate demands and various forms of pressure for conformity” (Hart 1994, 255)

driver has suffered a nervous spasm and purely by accident has followed the rule. However, against the latter view, one could argue that it is unlikely that there will be a large number of cases where the rule is followed purely because of accident, habit, unconscious behaviour, etc. Therefore there will not be a regular pattern of convergence behaviour due to equivocation. Consequently, the theorist who supports the 'Social Version of the Acceptance Thesis' will assert that the criticism is not well-grounded and that his interpretation of Hart's internal point of view is sound. However, we might object that the SVAT simply establishes *the conditions of existence of the acceptance of the rule*. In other words, the acceptance is *given* and the explanation provided only elucidates the existence condition of the *given*, the acceptance. The existence conditions are the ones established in the SVAT. It would become more perplexing had Hart adumbrated the acceptance of legal rules; i.e. the internal point of view towards the rules, as the explanation of the existence condition of a legal system. This might lead to an *infinite regress* as follows: do we need to analyse the existing conditions of our existing conditions of acceptance; i.e. the social pattern of behaviour and the recognition of the social pattern of behaviour as described in the SVAT?

Arguably, to avoid cases in which the recognition of the pattern of behaviour does not coincide with the intentional action, we need to rely on the description of the intentional action provided by the agent *himself or herself*. It is thus, in terms of the deliberative or agent's point of view; that we can understand the intentional action and this is an element that the SVAT lacks. Furthermore, Hart emphasises the importance of the 'internal aspect' of the rule, where the agent is able to justify and criticise actions that aim to be categorised under 'rule-following' and it can be argued that to justify and criticise these actions is somehow to describe them in terms of the point of view of the agent. Consequently, SVAT cannot be the view advocated by Hart to explain his notion of the internal point of view. The SVAT is rather *too close* to what Hart called the 'external point of view'.

I have defended the argument that the ‘acceptance thesis*’ better grasps the deliberative or first-person point of view. The ‘acceptance thesis’ is the view that comes closest to Hart’s notion of the acceptance of legal rules. However, I do not wish to defend the view that the ‘acceptance thesis’ is false, rather I would like to defend the idea that *if the ‘acceptance thesis’ is sound, it is an explanation that depends on the deliberative point of view and on the ‘acceptance thesis*’*. In other words, *qua* another legal participant who shares the internal point of view, if I am able to comprehend that you believe that reversing the vehicle and driving away from the park is an instance of the type of action indicated by the legal rule, and I grasp your desire that you want to follow the rule ‘vehicles are not allowed to park in the park’, it is because I understand that you avoid parking in the park *because* you see it as good to be a law-abiding citizen, or because, for you, the following of legal rules in general is good, or because it is good to have a peaceful park.

III.4. The detached point of view of the ‘acceptance thesis*’

It has been argued that the ‘acceptance thesis*’ does not require a direct evaluation (Raz 1999, Dickson 2001) of the good-making characteristics that are the ends of actions which are aimed at following legal rules. Raz adumbrates a ‘detached viewpoint’ or uncommitted viewpoint that provides practical advice and advances reasons for action without endorsing said reasons for action (Raz 1999, 170-77). Thus, a barrister or a solicitor may explain *what* the reasons for actions are according to the legal system they live in. They do not explain the *beliefs* of the people for instance of judges and legislators but the reasons for actions, what should be done according to the legal system. Yet the solicitor, advisor or barrister is only giving a *report* or a *theoretical reason* of what ought to be done, *given* that the legal system is accepted.

Let us imagine the following extreme example. There is an island, ‘The Diablo’s Island’ where the legal officials and some citizens share the internal point of view towards

the basic rule or rule of recognition and the legal rules of the legal system. There is *inter alia* a rule that imposes upon officials and citizens the obligation to kill disabled children and it is well known that this takes place through the poisoning of dairy products. A man has been asked by legal official Z to buy butter and milk and the man is conscious of the evil purposes of the command. He asks for advice from his lawyer who states “from the legal point of view, Z has moral authority” and may also add “from the legal point of view, you ought to buy the milk and the butter”. If this proposition has any practical force on the man, it needs to be part of his practical reasoning. But how does a mere *theoretical reason* be part of his practical reasoning? Arguably, unlike the case of the man who is asked by his wife to buy butter but buys margarine because it is healthier, in this example the man neither has : a) a transparent reason and b) a reason in terms of good-making characteristics. The authoritative reasons of Z are presented to him as a theoretical reason. Let us think about the following analogy; when, as an A-level student of Physics, you were given reasons for believing in the truth of classical mechanics, the reasons were presented on the evidence given. Some classical laboratory experiments were performed during class and you came to have these reasons ‘on observation’. Similarly, the lawyer provides reasons in terms of the evidence she has. She has read and carefully studied the basic norm of the island’s legal system, and knows that the order that has been given to her client is compatible with the basic and all the norms of the legal system. She merely reports the reasons that she has learned by evidence. But the man does not ‘have’ these reasons as *practical reasons* because he *simply* cannot acquire *reasons for actions* by observation. For these reasons to make a change in his practical situation, he needs to ‘have’ them. Let us suppose that, after consultation with his lawyer, he declares: “I intend to buy the butter and the milk as ordered by Z”. If it is an act that follows a practical authority for *reasons*, then the question *why* is applicable. We ask the man *why* and he responds, “because it is the point of view of the

law”. But he has now probably misunderstood the question. We are looking for a *reason for action* and he has not provided this. We can continue our inquiry and ask *why* he intends to buy the butter and the milk and follow the ‘point of view of the law’, and his answer might be “because authority is good”. The man can continue: “Though the authority *does not purport to do the good*, it is good”. We can now stop our inquiry. The reason provided is both a) transparent and b) it is presented by the agent as a good-making characteristic. But now we see that the only reason he can give is from the *deliberative viewpoint*. The phrase of the lawyer “from the legal point of view” has no independent force in his deliberations. If I am asked whether ‘X believes that p’, I need to assess X’s *beliefs* about p. However, if I am asked to do something because ‘X believes that p’, I do not assess X’s beliefs and her mental states, I rather look outward and assess p. Similarly, if someone asks me whether a legal official *believes* that the law has moral legitimate authority, I need to examine the mental states of the legal official. However, if I am asked by the legal official to do p, I need to look outward and assess whether I should do p in terms of reasons for p. The phrase ‘according to the law’ simply indicates who has issued the alleged authoritative command, but to understand any subsequent actions, we need to understand why the man takes the boat to the mainland, why he goes to the shop, and why he buys the butter and milk, and why is the end of these series of actions. We also need to assess the man’s response. Only the agent can justify and explain why he is following the legal rule. We need to understand and determine whether his reasons are ‘good-making’ characteristics. Like him, we need to look outward, at the reasons for action, not *at what his beliefs or mental states are*. The agent can be mistaken about his reasons as good-making characteristics and to assess this we need to engage in thinking about the end of the action. The man could assert that “‘to kill disable children’ is good” as ‘it will produce a better world’. But is this a reason for action as a good-making characteristic? Proponents of the acceptance thesis could avoid this result by

arguing that 'it is his desire to produce a better world' and it is his belief that his action is an instance of 'producing a better world' that rationalises and explains his action, but this is not the position of the 'detached point of view'. The detached point of view aims to describe not *mental states*, but rather *why* a person ought to accept a legal rule, and purports to describe from an uncommitted point of view. But I have argued that if this description is successful it ought to be parasitic on the deliberative or first-person point of view and therefore on the acceptance of the rule from such a viewpoint; i.e. the acceptance thesis*.

IV.- Objections to the argument that the detached viewpoint of the 'acceptance Thesis*' is merely theoretical and therefore it is parasitic on the 'acceptance thesis*'

IV.I The 'detached point of view' is neither deliberative, nor theoretical, but rather a 'third point of view'. However, this 'third point of view' is, like the deliberative one, a practical point of view; the difference lies in the fact that it is formulated from a third-person perspective.

The 'detached point of view', an objector might point out, is neither a deliberative viewpoint, i.e. from the first-person perspective, nor a theoretical viewpoint. Statements made from the 'detached point of view' cannot be reduced either. Following Raz, an objector might say that I have presented a very narrow interpretation of the practical point of view and have reduced the 'detached point of view' to the deliberative point of view. According to Raz, the 'detached point of view' has two core features and should be characterised as follows:

First, they are true or false according to whether there is, in the legal system referred to, a norm which requires the action which is stated to be one which ought to be done; secondly, if the statement is true and the norm in virtue of

which it is true is valid, then one ought to perform the action which according to the statement ought legally to be performed. Such statements are widespread in legal contexts. It should be emphasised again that statements from a point of view or according to a set of values are used in all spheres of practical reason, including morality. Their use is particularly widespread when discussing reasons and norms which are widely believed in and followed by a community. There are always people who accept the point of view and want to know what ought to be done according to it in order to know what they ought to do (Raz 1999, 177).

Let us first think about examples outside the law as suggested by Raz. When you give advice to a friend who, for example, is vegetarian you do not, according to Raz, consider *your* reasons for actions, but rather *her* reasons. You probably love meat, but you give to advice to your friend within the framework of her normative system, i.e., vegetarianism.

My reply to this objection is as follows. In the example used by Raz, being vegetarian is good and if you tell your friend when you go to a restaurant that she has to eat either the spinach or the cabbage (the only vegetables on the menu) both are good things to eat *qua* being vegetarian and *qua* being human. In this example you can tell her “you’d better have the cabbage as you are vegetarian”. There is no further question *why* that advice has been given. The goodness of eating either cabbage or spinach is obvious in the context. Thus, it is given as a good-making characteristic and is transparent to you and her. It is, I argue, parasitic on the deliberative viewpoint. The reasoning might be as follows:

(1) Cabbage is good for vegetarians

You are vegetarian

Cabbage is on the menu

You ought to order cabbage.

The dependence or parasitic relationship of the ‘third point of view’ on the deliberative viewpoint is also apparent in examples very different from premise I. Franz Stangl⁵ was the commander of Treblinka. When he first was appointed as head of a euthanasia clinic, he was morally repelled by the actions of the Nazis. But then he was afraid that he would lose his job and career. He began to think that euthanasia was a necessary evil and it was a favour to those killed. Let us suppose that Stangl was my friend in 1943 and that before he began his process of self-deception, he asked me for advice on *what he should do?* According to Raz, I could have replied to Stangl ‘according to the normative system of National Socialism, you ought to continue being head of the clinic’. But, according to Raz, like a vegetarian who has accepted the normative framework of being vegetarian, Stangl has already accepted the normative point of view of National Socialism. His question is like the question of a chess player: given the rules of chess, how ought I to play? He has *already* accepted the rule.

In response to my assertion ‘according to Nazi law, you ought to remain head of the euthanasia clinic’, Stangl might sensibly have asked ‘*why should I?*’ The *why* is directed to the action that I have given as advice. He has asked for advice in terms of *a reason for action*, not just in terms of an action *simpliciter*, for example a voluntary action that is done for *no* reasons, and my answer needs to be also in terms of *reasons for actions*. When people look for practical advice they are seeking for reasons. Children do this all the time. They ask parents, teachers, relatives, friends *how* to do this and this, and *why* should they do this and this. They learn that some ends are valuable and worth pursuing and others are not. To give advice to Frank Stangl in terms of *reasons for actions*, as in the case of the vegetarian friend, I need a premise like *(I) vegetables are good*. What kind of premise can play this

⁵ Example given by Eleonore Stump to explain the interrelation between intellect and will in (Stump 2003, 355).

role? My argument is that only a premise that is a) transparent and b) that describes the action as a good-making characteristic could play this role. In this case, the premise “Legitimate authority is a good” can play the role of I. The reasoning could be as follows:

(II) *Legitimate authority is a good sort of thing*⁶

Nazi law has legitimate authority

A nazi official has commanded that “ you ought to remain head of the euthanasia clinic”

You ought to obey the command

But here my advice is mistaken. I know that Nazi law has no legitimate authority because it is not an instance of ‘authority as good’. The second premise is false. It is similar to the case of vitamins and oranges as follows:

Vitamin C is good for the immune system

This synthetic orange *without* vitamins is good

You have a cold, you ought to boost your immune system

You ought to eat this synthetic orange.

As in the case of Nazi law, my advice is mistaken because my reasoning is defective as the second premise is false. Stangl has no reason to surrender his judgement. If my advice stops at the moment of expressing ‘from the legal point of view, you ought to obey the law’, my advice is incomplete. He can legitimately demand *reasons for actions*; namely an answer to the question *why*. Then I need a premise like I or II.

⁶ You can interpret this statement in a wider sense. For example as expressed by McCormick in terms of commitment to the political values of the legal community (McCormick 1994). Cf. Simmonds 2007.

IV.2 We do not, and cannot, commit ourselves to all the different normative systems that coexist in our practical experience. In other words, we act following different norms that we do not fully endorse. A citizen of a State does not commit a contradiction in saying : “I ought to do what the legal official has commanded, but I do not believe they have legitimate authority”. The ‘detached point of view’ aims to explain the cogency of the latter statement.

The objection raises a sound point. True, there is no logical contradiction in such a sentence, but it nevertheless has a paradoxical nature. There is a parallel between Moore’s paradox types and the statement “I ought to do what the legal officials have ordered, but I do not believe they have legitimate authority”. Moore’s paradox (Sorensen 2007; Adler and Armour-Garb 2007; Gallois 2007; Heal 1994) can be found in statements such “It is raining, but I do not believe it”. The oddness is caused by an assertoric sentence and its negation such as “x, but I do not believe x” or “I ought to x, but I do not believe ‘I ought to x’ ”. To believe or assert is to look outwards to the world and determine whether the *object* of your belief or assertion is true or not. Presumably, when a person says “I ought to do what the legal officials have ordered” she conveys the idea that she has surrendered her judgement on the basis of believing that the authority is legitimate, otherwise she will use sentences such as ‘I am obliged’, ‘I am ordered’, ‘I am coerced’ and so on. Then she adds, “I do not believe they have legitimate authority”. This clause can be replaced by “ I do not believe ‘I ought to do what the legal officials have ordered’”. The paradox arises because propositional attitudes are outward looking and we are required to look at the *object* of our beliefs. The paradox, arguably, might be explained because the person takes a ‘distanced’ or ‘detached’ viewpoint on herself. It is as if there are two different people inside her⁷: the one who believes in the legitimacy of the ‘ought’ demanded by legal officials, and the one who

denies that the 'ought' of legal officials has any legitimacy. This problem arises only from the first-person perspective, both deliberative and theoretical viewpoints. There is no paradox in asserting "she ought to do what the legal officials have ordered, but she does not believe it".

Arguably there is some kind of alienation (Shoemaker 1996, 3-73) when, from the deliberative viewpoint, the citizen engages in such a thought as "I ought to obey the law", but then denies avowal or practical endorsement of his own thoughts by asserting "I do not believe that I really *ought* to obey the law, because it does not have legitimate authority".

V.- Conclusions:

The argumentative strategy of this paper can be summarised as follows:

- A) Hart's internal point of view plays an important role in explaining the social normativity of law.
- B) The internal aspect of rules is made explicit through the acceptance of the rule. To accept the rule is to use it as a justification for the behaviour or as a standard of criticism of conduct that deviates from the rule. The rule is used by the legal participant as *guiding*.
- C) Hart argues that the Austinian explanation of habitual obedience is unsatisfactory in accounting for the guiding and duty-imposing character of legal rules.
- D) Hart advocated non-cognitivism, but remained unclear on what kind of non-cognitivism he advocated and how this, and his rejection of the predictive theory of law, might be reconciled.
- E) I argue that in order to fill this explanatory gap, we need to understand the notion of 'acceptance' of a legal rule. I propose beginning with the more sophisticated account of

non-cognitivism offered by Gibbard. For Gibbard there is acceptance of norms as the result of a biological adaptation strategy to coordinate our activities with others. However, he argues that this acceptance is *expressed* through our behaviour, including linguistic behaviour. He also argues that acceptance to a norm is a *psychic* state that involves *beliefs*.

F) I ask what kind of explanation of action is required that will correctly show the role of beliefs and psychological states and actions. I use Davidson's approach and argue that an intentional action has two components: a) a belief and b) a pro-attitude. As a result we can formulate the acceptance thesis as follows: "C accepts the legal rule if and only if a) he believes that the type of action or pattern of behaviour that is indicated by the rule is the one that he has a pro-attitude towards and b) he has a pro-attitude (desires, motives) towards the pattern of behaviour indicated by the rule.

G) I argue that the 'acceptance thesis' is the strongest interpretation of Hart's internal point of view. However, I criticise the 'acceptance thesis' as it cannot provide a complete explanation of intentional action. I offer instead the Aristotle/Anscombe model of intentional action, and show that the notion of intentional action in terms of other actions and a reason that is presented to the first-person deliberator as transparent and having good-making characteristics is more basic or primary than any sophisticated explanation. Following the Aristotle/Anscombe model I formulate the 'acceptance thesis*' and argue that the 'acceptance thesis' is parasitic on the 'acceptance thesis*'. The 'acceptance thesis'* grounds a justified conception of legal normativity and consequently the social normativity of law is parasitic on the justified normativity of law. In other words, Hart's internal point of view can explain the acceptance of norms and their use in practical justifications because we can understand action in terms of other actions and in terms of good-making characteristics.

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