Practice Theory and Law

On Practices in Legal and Social Sciences

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Chapter 8

Conventions, recognition and the practical point of view

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Chapter 8

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Sebastián Figueroa Rubio

The idea that law is social is a truism in contemporary legal and social thought. Nevertheless, it is not easy to say exactly what this signifies. In a broad sense, this idea means that law is part of social life and, more precisely, that it is constituted through social interactions. This implies the rejection that law is something the existence conditions of which are independent of the social abilities of human beings. Moreover, since law is (at least partially) made of norms, the norms that are relevant to the understanding of law are also social, in the sense that the existence of norms depends on the social abilities of people and the historical interactions between them.[1]

The theses mentioned in the previous paragraph have been developed intensively in recent decades in the social sciences and practical philosophy for a group of views known as Practice Theory. In this text, I will focus on one stream within this family of theories, more specifically the Hartian stream. This stream builds on the ideas of H.L.A. Hart, who in turn drew inspiration from the work of authors such as Ludwig Wittgenstein and Peter Winch.[2] Furthermore, I will interpret the Hartian views using selected tools from recognition theory to avoid the problems that some of Hart's most influential interpreters have faced. To achieve this, I will first introduce certain basic elements of Hart's proposal and show how it can be understood more generally as a trend in Practice Theory. In this context, I draw attention to how Hart sets out the so-called internal point of view for understanding norms (section 1). I will then focus on how some of Hart's most influential interpreters have understood his proposal based on the concept of convention

1 To say that norms are social means that they depend on social interactions, but it does not mean that every legal norm is a social norm. In the Hartian scheme, the rule of recognition is a social norm (v. Figueroa Rubio, 2022a, 2022b), but not necessarily every jurisprudential or statutory norm is also a social norm.

2 In this text I will deal with this specific trend. In order to understand its place in the broader field of Practice Theory v. Nicolini, 2012, p. ch. 2; Rouse, 2007; Risjord, 2014; 167–172; Regarding the influence on Hart v. Narvaez Mora 2004; Rodriguez Blanco, 2007.

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(section 2). I will then set out some criticisms of the way in which the internal point of view is understood on a conventionalist basis (section 3). To overcome the problematic aspects of the conventionalist view, in sections 4 and 5 I will propose a way of approaching the internal point of view from the philosophy of recognition and show how in this way a Hartian perspective can be reconfigured within the Practice Theory family. Finally, I will discuss some consequences of this proposal for the way we understand change and conflict in law (sections 6 and 7).

Practice Theory and the practical point of view

What the various members of the Practice Theory family have in common is that they understand the social world as "a vast array or assemblage of performances made durable by being inscribed in human bodies and minds, objects and texts, and knotted together in such a way that results of one performance become the resource for another" (Nicolini, 2012, p. 2). In this sense, Practice Theory proposes that there are intimate interconnections between individuals and their social environment that produce their mutual constitution. This implies that the individual is not only to be understood as a passive recipient or observer of the social world, but as an actor who intervenes in this world. It also implies that some social phenomena such as social norms, structures and institutions play a central role in explaining human life and individual's identities. A consequence of these things is that practices are in constant flux and renewal and carry some tensions that manifest themselves diachronically through situated interactions.[3]

These ideas can be found in Hart's philosophy of law, especially in his book *The Concept of Law* (1961). In this book, Hart gives great importance to the notion of social norms in order to understand some normative aspects of our social life. For this reason, his theory is also referred to as a practice theory of norms. As Jeffrey Kaplan points out, "According to the practice theory, two conditions are sufficient for the existence of a social rule. First, there must be a regularity in the behavior of the group members. Second, enough members must take the internal point of view toward that pattern of behavior. This attitude is manifested in criticism using 'normative terminology'" (Kaplan, 2017, p. 472). The quote shows the basic insights of the Hartian theory of social norms, namely that these norms imply a social aspect related to the existence of behavioral patterns which are part of the norms due

3 I have a partial disagreement here with Jesus Vega's critique of the theories of law inspired by the Practice Theory as present in this volume. It is partial because he is right to criticize some views on the legal Practice Theory, but I think that Practice Theory has the tools to capture the diachronic aspects of legal phenomena.

to the attitudes adopted by the members of the community towards them.[4] These attitudes are presented as the adoption of a specific point of view: the internal point of view, a point of view that has certain characteristics and manifestations. Although social norms have a behavioral aspect, they cannot be identified with mere regularities, nor can they be reduced to the attitudes that a single individual member of the community adopts towards her own behavior and the behaviors of others.

Within this framework, the internal point of view and its manifestations became a central component of the theory. According to Verónica Rodríguez Blanco, it is at this point that Hart differentiates his view from the ideas of Peter Winch that inspired him. To show this, she proposes to distinguish between two ways of interpreting the internal point of view. According to Winch's interpretation, the internal point of view is related to the explanatory or motivating reasons that reflect *the participant's point of view*, linking their perspective to their personal motivations and beliefs regarding the pattern of behavior. In contrast, Hart focuses on *the practical point of view* which reflects the normative reasons available to agents in their community, that is, the reasons that count as considerations in favor or against an action or state of affairs.[5] Thus, according to Rodríguez Blanco, "Winch endeavors to explain the participant's viewpoint in terms of what the participants are doing. On the other hand, Hart aims to provide an explanation of how the law enables judges and law-abiding citizens to determine what they ought to do" (2007, p. 454).

In order to see how this way of understanding the internal point of view might be useful, some clarifications are needed. To begin with, it should be noted that the claim that the internal point of view is concerned with normative reasons does not commit us to saying that these reasons are moral, nor that these reasons are universal, nor that these reasons exist outside of social

4 According to Hart, these attitudes make it possible to distinguish habits from social norms (v. Hart, 1994, pp. 55–57). In his scheme, habits can be seen as patterns of behavior towards which these attitudes are not adopted. As he points out: "When a habit is general in a social group, this generality is merely a fact about the observable behavior of most of the group. In order that there should be such a habit no members of the group need in any way think pf the general behavior, or even know that the behavior in question in general; still less need they strive to teach or intend to maintain it. It is enough that each for his part behaves in the way that others also in fact do. By contrast, if a social rule is to exist some at least must look upon the behavior in question as a standard to be followed by the group as a whole. A social rule has as "internal" aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behavior which an observer could record" (1994, p. 56)

5 Regarding the distinction between normative, explanatory and motivating reasons v. Álvarez, 2010; McNaughton & Rawlin, 2018.

practices.[6] Moreover, seeing the internal point of view as concerned with normative reasons illuminates Hart's thesis that members of a community may accept norms for different reasons, such as "calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do" (Hart, 1994, p. 203) and at the same time they adopt the internal point of view seeing the violation of a rule as a "reason for hostility" (Hart, 1994, p. 90), or a red traffic light as a "reason for stopping in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation" (Hart, 1994, p. 90). In the first quote, Hart refers to motivating reasons, while in the last two he talks about normative reasons.[7] As Kaplan (2017) expresses: "There is simply no necessary connection between taking the internal point of view and one's motivation for taking it" (p. 478). This is important when we realize that law is part of a pluralistic and complex society in which different members of the community may have different reasons for engaging in legal relations.

Based on these general Hartian considerations on the understanding of the internal point of view in social norms in general, we can now examine in more detail how this can be applied to the legal realm.[8] Evidence of this is that one of the debates that has shaped contemporary legal philosophy revolves around the characterization of the rule of recognition. Hart presents this rule as a social norm practiced by the members of the legal community, with the function of enabling the identification of the rules belonging to the legal system.[9] Following Damiano Canale (2009), it can be said that "In

6 At issue here is the so-called discussion of the normativity of law, understood as the question of how law provides reasons for action (v. Bayón, 1991; Rodriguez Blanco, 2007; Kaplan, 2017, and the chapter written by Yarran Hominh for this volume). I do not deal with this discussion in the chapter.

7 Thus, for Hart, if there is a social norm in a community, "deviation from the standard is generally accepted as a good reason for criticism" (Hart, 1994, p. 55). I think that this point entitles us to defend an externalist view of reasons for action when we understand norms as such (v. Figueroa Rubio, 2021).

8 Here I accept that the considerations that apply to social norms in general can also be applied to some legal norms and that, furthermore, the practical point of view in the legal sphere has some specific characteristics. As Theodore Schatzki (1996), following Oakeshott, points out: "A practice is a set of considerations that governs how people act. It rules action not by specifying particular actions to perform, but by offering matters to be taken account of when acting and choosing. When observed, consequently, it qualifies the how as opposed to the what of actions. For instance, the words "civilly", "punctually", "scientifically", "legally", "morally", and "poetically" do not specify particular substantial actions. The practices of civility, science, law, morality, and poetry for which they stand are sets of considerations and procedures, which if observed qualify whatever is done as civil, punctual, scientific, legal, moral, or poetic" (p. 98). I will qualify this idea in sections 4 and 5 stressing some normative elements of this family of views.

9 For a revision of the literature discussing the rule of recognition v. Kramer, 2018, p. ch. 3.

Hart's perspective, the rule of recognition R prescribes that a norm N must be treated as belonging to the system if and only if two sets of conditions are satisfied:

1) R is generally used by officials as a rule of conduct in the individuation of norms that belong to the system.
2) R is accompanied by the assumption of the "internal point of view" by the officials, i.e., of the qualified belief that the conduct prescribed by R should be taken." (p. 225)

As it can be seen, this general representation of the rule of recognition shows the pattern of behavior, a certain regularity in the behavior of the members of the community and the attitudes that some members of this community adopt towards the pattern. In this sense, the concept of the rule of recognition aims to explain how a central aspect of law is shaped as a social norm and, in doing so, it vindicates the perspective of the participants.

After Ronald Dworkin's critique of legal positivism,[10] one of the most promising ways of understanding this rule has been developed by legal conventionalists. In the words of Maribel Narváez (2004), the promise of conventionalism lies in the fact that

> just as one can explain the normativity of language from a conventional foundation, it is possible to explain legal normativity from the conventional factors by which the rule of recognition comes about, because it determines what is a correct and what is an incorrect identification, and at the same time provides the criteria for legal validity.[11]
>
> (p. 311)

Moreover, for the Practice Theory, conventions are appealing because they would make it possible to explain how some central norms, such as the rule of recognition, are constituted, and at the same time rescue a central aspect of the Hartian view, namely, that we should explain them taking into account the perspective of those who participate in the convention.

Before we begin examining conventions as a characterization of the rule of recognition, another clarification is in order. The term convention can be used in at least two different senses in these debates. One general way of talking about a convention or conventional practice is to contrast it with a natural phenomenon that does not depend on intentional interactions between people. In this sense, conventional is understood as social, and to say that law is conventional is almost a banality in this context because it means that

10 v. Postema, 2011, p. ch. 9.
11 v. Southwood, 2018, pp. 23–24, 30–31.

its existence depends on human beings.[12] In a second sense, we can speak of conventions as a particular kind of social arrangement. According to this, not every social phenomenon is conventional, but only those that fulfill certain conditions.[13] This idea was developed by David Lewis in his seminal book *Convention* (1969). Lewis's view has been adopted by several legal philosophers, including Hart,[14] to explain how some social arrangements, such as the rule of recognition, can be explained. These Lewisian views were severely criticized, and some important features of the view were abandoned.[15] As a result of this criticism, a second wave of conventionalists emerged in the current century. The new legal conventionalists have developed a very interesting view of how legal reality has a conventional basis. In the following pages, I would like to critically examine some of the advances in this direction by Andrei Marmor and Josep Maria Vilajosana, who have extensively defended legal conventionalism in recent years.

Conventions and the internal point of view

To characterize the role of conventions in the legal context, Vilajosana refers to the existence of conventional facts in a text co-written with Lorena Ramírez Ludeña. These facts "are characterized by the presence of a recurring behavior, beliefs about it that constitute a reason to follow it, and a set of expectations that arise from the common knowledge about these circumstances" (Ramírez and Vilajosana, 2016, p. 13). In this respect, conventions are not simply artificial (i.e., as opposed to natural), nor are they simply agreements between people, but a particular way of dealing with others in everyday interactions, specifically in large-scale recurring coordination problems. Currently, the second wave of legal conventionalists holds that conventions are not limited to solving coordination problems but are a scheme for dealing with a variety of social problems and goals. Consequently, according to this new view, the rule of recognition is not a convention based on the need to solve recurrent coordination problems (i.e., a *coordination convention*), as

12 In this sense, to say that the law is conventional is to state the social sources thesis, the most prominent thesis of legal positivism (v. Bayón, 2002). In this broad sense, Bruno Celano (2010, p. ch. IX) counts the views of Jules Coleman, Andrei Marmor and Scott Shapiro among the post-Hartian conventionalists. As I explain, in this work I am only concerned with Marmor's views. An analysis of Shapiro's proposals can be found in the chapter by George Pavlakos in this volume.

13 v. Lewis, 1969, pp. ch. I, III; Bicchieri, 2006, pp. 34–42; Southwood, 2018.

14 v. Hart, 1994, p. 256ff.

15 v. Dickson, 2007; Green, 1999; Marmor, 2011; Postema, 2011, ch. 11.

Lewis suggests in his classic work, but a *constitutive convention* that shapes the rules of the game or practice in which it operates.[16]

In this context, Marmor emphasizes that two features are always present in conventions: arbitrariness and compliance-dependence. The former has to do with the artificiality and contingency of the content of conventions and consists in the fact that "we should be able to point to an alternative rule that we could have followed instead, achieving basically the same purpose" (Marmor, 2011, p. 76). The latter is related to their dependence on efficacy in the sense that the presence of a pattern that is actually followed by the participants generates the conventional phenomena and shapes the participants' perspective. More specifically, this consists in the fact that: "The reason for following a rule that is a convention depends on the fact that others follow it too" (Marmor 2009, p. 10; 2019, pp. 58–59). This would explain the normativity of conventions, as they generate a particular kind of reasons. They are reasons that appeal to an instrumental rationality that operates in a strategic interaction.[17]

Since this characterization does not presuppose any specific motivation (e.g., moral or political) for the agents to follow the convention, it is possible to explain how the rule of recognition produces criteria for the identification of valid norms, and to make sense of the idea that these criteria are independent of the specific motivations that explain why each individual participates in the practice of identification of legal norms.[18] This in turn, entails the possibility of identifying behaviors that are contrary to or consistent with the rule. This implies the inclusion of a weak normativity according to which it is possible to determine when an action aimed at identifying valid norms is correct or incorrect.

The sum of these ideas allows Vilajosana to distinguish between convention and conviction. In this regard, he says that:

> Conventionality arises when one can formulate a meaningful counterfactual statement for each verbal and nonverbal behavior of a participant, such as: *If others did not say or do what they do, I would not say or do what I do*. (In contrast,) someone who acts out of conviction might say: *Even if no one says or does anything before I do it, I would say what I say or do what I do*.[19]
>
> (Vilajosana, 2019, pp. 89–90)

16 The structure of these two ways of understanding conventions that makes clear their similarities and differences can be found in Lewis, 1969, p. 42 and Marmor, 2009, p. 2.

17 In this sense conventions were initially understood as equilibria of coordination games. v. Bicchieri, 2006, pp. 35–42; Lewis, 1969, ch.I; Risjord, 2014, pp. 158–160.

18 This point is not entirely clear in Marmor (v. 2009, pp. 163–171; 2011, pp. 78–82). In his view, in the case of law, the reasons to follow the convention are conditional insofar as they depend on the agents having reasons to participate in law in the first place.

19 Vilajosana cites the work of Narvaez to defend the distinction v. Narvaez, 2004, pp. 355–359.

Accordingly, given that the rule of recognition is a constitutive convention, those who accept and apply it adopt a conventional attitude and do not act out of conviction while doing so. In contrast, the persons who act out of conviction are not part of the conventional arrangement.

In this way, the compliance dependence condition, combined with the arbitrariness of conventions, makes it possible to characterize the behavior of those involved in the practice when adopting the internal point of view. Furthermore, these conventions simultaneously reveal their constitutive aspect, which defines the limits of the practice. The constitutive aspect of these conventions makes it possible to define who is in the game and who is not, for those who do not comply with the conventional norm are outside the practice, since they are playing a different game, if any. Consequently, according to Vilajosana:

> The internal point of view can be translated into terms of conventional fact. Thus, the statement 'In society S there is the rule of recognition R' can be analyzed as follows:
>
> 1. Most part of the legal community (officials, judges, attorneys and legal scholars) in society S use criteria C1, C2 … Cn (which form the rule of recognition for S) each time they must identify the law of S
> 2. Most parts of the legal community in S believe 1.
> 3. The belief that 1 is given as a reason to use those criteria in these circumstances.
> 4. The previous clause is common knowledge to most parts of the legal community.
>
> (2019, p. 92)

I would like to draw attention to the fact that in this model the existence of an internal point of view is interpreted as an almost purely epistemic matter, based on beliefs (in what others believe) and common knowledge. I suspect that the assumption that the persons involved in the existence of a rule of recognition have predominantly epistemic states may lead us to forget that it is a rule we are talking about and thereby devalue certain elements of the legal phenomenon. These elements are explicitly introduced in the last part of Canale's quotation, when he points out that from the perspective of the members of the legal community the behavior prescribed by R *should* be adopted. Let us look at this in more detail.

Conventions, rebel judges and the practical point of view

As I have already mentioned, the characterization of the rule of recognition put forward by the conventionalists is not entirely satisfactory, especially when we aim to make sense of the actions of the participants in the

legal domain. This becomes apparent when we try to reconstruct what is expressed in an internal statement.[20] Conventionalism would invite us to say something like "rule N applies to the case because everyone else applies it", as well as "it is wrong to identify rule N as valid because everyone else does not do that". It is odd to characterize the claims made by plaintiffs and the decisions made by judges about the validity of norms in court proceedings on the grounds that everyone else usually acts in such a way. According to this reading, the most important practical aspect of a judge's action would be to decide in a certain way because others do so, and this sounds unsatisfactory. Beliefs about what others do as well as about the efficacy of the practice are part of what can be attributed to a person who participates in a practice, but the view she adopts towards a norm cannot be reduced to this.

Here we see a similar problem to the one Hart identified with authors who think that a statement about the validity of a norm is a prediction. A prediction is a cognitive attitude that can be understood as a belief about the future. According to the predictive view, the future behavior of judges in resolving cases is predicted on the basis of past actions, whereas according to the conventionalist view, we act in accordance with what we believe others will do on the basis of their past actions. With respect to predictive views, Hart (1994) points out that the "mistake becomes immediately apparent when we consider how the judge's own statement that a particular rule is valid functions in judicial decision; for, though here too, in making such a statement, the judge presupposes but does not state the general efficacy of the system, he plainly is not concerned to predict his own or others' official action. His statement that a rule is valid is an internal statement recognizing that the rule satisfies the tests for identifying what is to count as law in his court and constitutes not a prophecy of but part of the reason for his decision." (p. 105). The general point is that the practical point of view cannot be reduced to our beliefs about the behavior of others, for it does not do justice to what people do when they decide a case or express a legal claim.

However, the problem is not only that the perspective of the parties involved and what they express in their legally relevant actions and speech acts is insufficiently described if it is based on beliefs about past and future facts. When someone acts within the legal community by invoking the rule of recognition, she is not only expressing that there are common criteria for

20 An internal statement is the one that "manifests the internal point of view and is naturally used by one who, accepting the rule of recognition and without stating the fact that it is accepted, applies the rule in recognizing some particular rule of the system as valid." (Hart, 1994, pp. 103–104). Hart adds that "Those who accept the authority of a legal system look upon it from the internal point of view, and express their sense of its requirements in internal statements couched in the normative language which is common to both law and morals: 'I (You) ought', 'I (he) must', ' I (they) have an obligation'." (Hart, 1994, p. 203. v. Hart, 1994, p. 57).

identifying valid legal norms in a weak sense, but also that these criteria should be used when we want to solve a legal problem. This means that the internal point of view is linked to the adoption of normative and not purely epistemic attitudes towards others and that the normative element does not seem to be reducible to the reasons determined by a purely strategic interaction. In this sense, conventionalism falls short when it comes to characterizing the practical point of view based on people's beliefs.

I think that this problem can be understood as the absence of a practical element, since the existence of the norm and the agent's perspective does not refer to how her will or the will of others should work but remains in a kind of speculation of individuals.[21] My intention is not to deny the possibility of attributing such beliefs to the participants, but to draw attention to the fact that the conventionalist reading falls short when it comes to making sense of what people do and assume in this context.

Another consequence that makes this conventionalist model unconvincing has to do with the conflictual dimension of the legal practice. If we consider Vilajosana's definition of the internal point of view, we can ask ourselves how a conflict over the criteria (Cn) that form the rule of recognition (S) can be interpreted. More specifically, we may query whether it is possible for a judge or any other actor in the system to act, consciously or unconsciously, in specific cases or by adopting policies exactly against what everyone else is doing.[22] The question is whether or not a rebel judge, a judge who acts out of conviction, applies a rule of recognition within the system or not.

These questions aim to find out what it means for conventions to constitute a legal system. In this respect, conventionalists usually make an analogy between law and games like chess.[23] According to them, law, like games, is

21 Using G.E.M. Anscombe's distinction between the idle practical syllogism ("which is just a classroom example" (1963, p. 60)) and the proper practical syllogism, according to which the former has "the disadvantage, so far as its being practical is concerned, that though the conclusion is necessitated [from the premises], nothing seems to follow about doing anything" (1963, p. 59), we can say that the way the conventionalist reconstructs the practical perspective is idly practical.

22 A judge can do this in three different ways. First, by proposing an interpretation of the norm that has not yet been put forward, but which can be considered admissible in the light of the previous actions of the other judges. This type of judge is not necessarily a rebel in the sense that I am advocating in this text. Secondly, we can think of a revolutionary judge who seeks to overthrow the entire system. In this case, the system of norms in which she is a judge must disappear in order for her to act successfully (to make a revolution). Hence, in this case, she is advocating for moving outside the established practice. In contrast, the kind of rebel judge I am thinking of is in the middle of the previous two. She is not proposing an interpretation within the framework in which others have worked, but neither is she making a revolution, but proposing new criteria within the same system of norms, without denying the normative conditions under which her claim makes sense.

23 v. Marmor, 2009, pp. 160–161, 168.

constituted by conventions and if someone wants to participate in the game, she must follow the conventions that constitute the game. So, for example, if you try to play chess without adhering to the norms that say how the pieces should be moved, then you are simply not playing chess at all. If a rebel judge applies criteria that do not correspond to those applied by the others, is she really *playing law*?

Marmor and Vilajosana have two possible answers at their disposal: (a) either that rebel judge is wrong in identifying the valid law within this community, or (b) the rest of the judges (and other participants) are wrong. The consequence of (b) is that we have to deny that there is any practice in this community that can be called "identification of the valid law". If this seems extravagant, to go the other way (a) is to say that the rebel judge simply does not identify the valid law of a community. This is based on the idea that she does not know what valid law in her community is, which means that she is outside the practice constituted by the rule according to the idea that the rule of recognition is a constitutive convention.[24] It seems to me that this answer is exaggerated and that, on the contrary, a judge can apply a rule of recognition by consciously or unconsciously going against the commonly applied criteria of identification of law and that, at the same time, it makes sense to say that other judges do the same (i.e., apply a rule of recognition). To show this, it is necessary to give less importance to the elements emphasized by these legal conventionalists (i.e., the cognitive aspects of the internal point of view) and to include others (i.e., practical and normative) elements. This in turn, as I shall show in the next section, means changing the starting point.

24 v. Narváez, 2004, pp. 318–319, 325, 331; Toh, 2011, p. 118. At this point, deep conventionalism could suggest various arguments to avoid the problems (v. Bayón, 2002, pp. 79–81). However, although Marmor invokes deep conventions, they seem to play no role in the cases discussed (v. Marmor, 2009, pp. 164–175). For example, Marmor expresses: "Could we have anyone in a judicial role in the United States, for example, who seriously doubts that acts of Congress make law? Or that the U.S. Constitution prevails over other forms of legislation? More importantly, as mentioned several times before, there is an inherent limit to how much disagreement about criteria of legality it makes sense to attribute to judges' role as institutional players is constituted by those same rules that they allegedly disagree about" (Marmor, 2011, pp. 75–76 v. 2009, pp. 162–163). A few comments are in order on this quotation. First, while it is true that certain disagreements have their limits, the actions of judges and others involved sometimes express precisely the kind of doubts or interpretive alternatives that Marmor portrays as impossible. Second, because the rules of recognition in our legal systems are complex, it does not follow from a disagreement about some criteria for identifying norms that the parties deny the competences given by other rules (usually the competences are settled by rules of change and rules of adjudication). It is therefore one thing to identify a competent authority and another to disagree on the criteria for identifying norms.

Recognition and practices

As a new starting point, I will explore the concept of recognition, which goes back to the ideas of Rousseau, Smith, Fichte and Hegel.[25] Here I am concerned with the latter two authors and how their ideas have recently been incorporated into some normative models of the Practice Theory.[26] The concept of recognition operates in different contexts using a common structure. The relevant use to this chapter is that from social ontology and not that from political and moral philosophy.[27] The common structure is that it is required that two (or more) persons adopt towards each other the attitudes of both those who make commitments and those who are responsible, thus becoming co-creators of a normative space.[28]

A person can attribute many kinds of attitudes and other mental states to others. For example, we can attribute to someone that she is hungry. This means that we assume that she is capable of identifying something as food and acting accordingly, e.g., by eating it. A fundamental step towards recognition occurs when we acknowledge the authority of the other, e.g., by accepting that what the other identifies is food and consequently we are open to eat it. As Robert Brandom (2019) points out: "To recognize someone is to take or treat that individual in practice as a self: a knowing and acting

25 A few comments are in order on this quotation. First, while it is true that certain disagreements have their limits, the actions of judges and others involved sometimes express precisely the kind of doubts or interpretive alternatives that Marmor portrays as impossible. Second, because the rules of recognition in our legal systems are complex, it does not follow from a disagreement about some criteria for identifying norms that the parties deny the competences given by other rules (usually the competences are settled by rules of change and rules of adjudication). It is therefore one thing to identify a competent authority and another to disagree on the criteria for identifying norms. v. Honneth, 2020.

26 v. Brandom, 2013, 2019; Medina, 2006. This model shares some fundamental issues with the one presented by Jaroslav Peregrin in this volume and with other views inspired by the work of Wittgenstein and Sellars (v. Rouse, 2007; Schatzki, 1996).

27 The moral and political uses are related to discussions that differ from those that concern us here. They concern the question of what the best criteria of distributive justice are and how concepts such as respect, esteem and love are to be understood in our social and political life. The differences between these various uses can be found in Iser, 2019, sec. 2.

28 Axel Honneth points out regarding Hegel and Fichte that "In spite of all the differences between them, both thinkers sought to make plausible what it means for humans to live in a "spiritual world" primarily characterized by our orientation toward shared norms. This necessarily entails mutually ascribing – as a role or normative status – the authority to co-determine what norms are appropriate and how they should be implemented." (2020, p. 147). On the one hand, this idea implies that human beings have certain abilities and capacities that depend on sociality, and that sociality depends on these abilities (v. Schatzki, 1996, ch. 1,3, 6; Honneth, 2020, pp. 150–156; Gallagher, 2020; Tomasello, 2008). On the other hand, the move is necessary to be entitled to affirm that "a practice is maintained by interactions among its constitutive performances that express their mutual accountability" (Rouse, 2007, p. 48). Some consequences of this are analyzed by Jaroslav Peregrin in this volume.

subject, hence as subject to normative assessment as potentially committed, responsible, authoritative, and so on" (p. 246).

Nonetheless, there is a more robust notion of recognition in which what is attributed to the other is to be a recognizer. This step is fundamental, for to recognize another as a recognizer is to accept the authority of her recognitions, recognizing the one whom she recognizes. This in turn means, on the one hand, understanding that some of their behavior is an expression of normative attitudes and, on the other hand, that what this person does can have normative consequences for me (e.g., making me responsible, giving me authority) and for others. If one accepts the other as an authority for what there is and what there is not and understands that one is capable of doing so oneself, then it makes sense to define together what there is and what there is not and what should happen between us. This implies the creation of a normative space. As Axel Honneth (2020) makes clear, according to Hegel at this point "the distinction between the recognizing and the recognized subject vanishes in a certain sense; given the reciprocity of recognition assumed here, the subject must be capable of fulfilling both roles simultaneously. The effects of this form of mutual recognition, conceived of as a kind of normative authorization of our self- and co-determination, consists in both a restriction and an expansion of freedom at the same time." (pp. 139–140).

Another salient feature of recognition theories is that the conflict between wills is part of the model from the beginning. Although the social world is based on a cooperative schema, recognizing another does not mean agreeing with her.[29] Human interactions involve different viewpoints, interests, and positions among individuals. This means that the content of shared norms as well as the status and other elements that configure practices are constantly being challenged. This is a notorious aspect of the moral, political and legal realms. Thus, according to Honneth (1995), "the movement of recognition that forms the basis of an ethical relationship between subjects consists in a process of alternating stages of both reconciliation and conflict" (p. 17). The objectivity that can be achieved in the interaction between persons has as its background negotiation and conflict, not just agreements.

Lastly, the possibility of identifying what actions we perform when interacting with others takes place against the socio-historical background of the interactions in which they arise. Two ideas can be derived from this. The first is that given that relations of recognition are deployed in historical

29 There is a weak sense of cooperation in which cooperation is necessary to generate joint attention and to create or activate a common background (v. Tomasello, 2008, ch. 3). This common background is compatible with non-cooperative behavior in the strong sense, that is, where it is necessary to cooperate in a social scheme to achieve a complex common goal. Weak cooperation is arguably a precondition for strong cooperation and a precondition for the existence of oppressive social structures and various asymmetric relationships.

situation, they are subject to change and are constantly being revised. These changes take place in interpersonal exchanges in which participants interpret past actions and events in a "sort of expressively progressive genealogy" (Brandom, 2019, p. 439) through a process of recollection while proposing how things are in the present (new) context and will be from now on between the participants and other possible participants. As José Medina (2006) points out, "the agency of language users is always moving to new contexts and, therefore, the contextually determinate meanings emerging from their concerted interactions are always slipping and undergoing transformations" (p. 46).[30] The second is that these relations are not plucked out of thin air but arise against a socio-historical background. In this regard, Axel Honneth (2014) incorporates the idea of institutions of recognition (e.g., language) to explain the social context that generates the conditions for meaningful interactions. Accordingly, in relation to any meaningful interaction between two people, he says that: "Subjects must have learned both to articulate their own aims to the other and to understand the other's articulation in order to recognize each other in their dependency on each other" (p. 45). The social background sets limits to what is intelligible and makes it possible to distinguish between different types of judgements and actions as well as to attribute them to others and oneself.[31] Added to this is the reproduction of social structures and schemata through instruction and the formation of habits, which in turn determine the perception and interpretation of the behavior of others.[32] Here, the role that coercion and the tendency towards conformity play in the formation of common patterns of behavior, which are at least partially reproduced in the actions themselves, is anything but unimportant and shapes the way in which interactions are deployed.

Although recognition theories assume that conflicts make sense against the background of unconscious agreements that underlie the communication in which the conflict takes place, such struggles reveal the potential fragility of many of our commitments and the need to actualize and reinforce them through actions of various kinds. The commitments that relate to the content of the rule of recognition can be counted among them.

30 v. Brandom, 2013; 2019, p. 18, 370–373; ch. 12; Medina, 2006, ch. 1.

31 v. Gallagher, 2020, ch 6, 7; Schatzki, 1996, ch. 2, 3. The background is reproduced by the actions of the participants. As Medina (2006) emphasizes: "This background agreement is incessantly renewed by the repetitive agency of speakers. There is a constant performative regeneration of the underlying consensus shared by the members of a linguistic practice. According to pragmatic contextualism, meanings are as stable as the background consensus that sustain them" (p. 30).

32 v. Gallagher, 2020, pp. 148–154; Schatzki, 1996, ch. 3. This seems to be the space of deep conventions in Marmor's theory.

Recognition and the practical point of view

In contrast to the conventionalist view, normative attitudes play a central role in the reconstruction of the practical standpoint in the framework proposed in the previous section.[33] In our context, the attitudes of interest are those that manifest themselves in making demands on others and evaluating their behavior through "criticisms, demands, and acknowledgments" (Hart, 1994, p. 57). These attitudes and their expression include the second-person perspective. As Stephen Darwall has pointed out, following Fichte's proposal, actions from this perspective are directed from an *I* to a *Thou* and, more specifically, are directed towards the will of the addressee.[34] This means that the theory no longer starts from the beliefs of one individual about the beliefs of other individuals, but from the interpellation that some make to others.

In the legal domain, these normative attitudes are expressed in the claims and requirements we make on others (e.g., to be recognized as the holder of rights, to be acknowledged as an owner, to receive compensation, to be imprisoned), claims that others may reject or accept. What leads us to identify a rule of recognition in this context is the need for criteria to support and evaluate people's claims, rejections, and acceptances. In the legal context, supporting our claims implies, among other things, that we can trace them back to a duty that has its origin in a valid norm. This leads us to tie our claim to legal materials, which in turn are linked in one way or another to what we consider to be valid law. This ultimately enables us to identify the criteria contained in the rule of recognition. Invoking these criteria makes it possible to include elements of the third person in our discourse.[35] This perspective appeals to a common normative ground that encompasses the actions of the members of the community or at least the parties in a legal conflict.

Finally, actions in the legal context express an intention the content of which refers to the intention of others to solve problems with a law in common (i.e., with a common system of duties and institutions). This is what

33 On the importance of normative attitudes for understanding social norms v Brennan, et. Al. 2013; Brandom, 1994, ch. 1; 2013; Kaplan, 2017; Schmidt & Rakoczy, 2019.

34 v. Darwall, 2006, ch. 4, 5. The Fichtean model is based on the idea that others summon us to set boundaries for ourselves. These are not natural boundaries, but socio-normative boundaries.

35 There is no exhaustive list of these criteria. As Hart (1994) points out: "Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. The criteria so provided may, as we have seen, take any one or more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases […] In a modern legal system where there are a variety of 'sources' of law, the rule of recognition is […] complex: the criteria for identifying the law are multiple and commonly include a written Constitution, enactment by a legislature, and judicial precedents. In most cases, provision is made for possible conflict by ranking these criteria in an order of relative subordination and primacy". (p. 100)

in Sellars' terms can be understood as a we-intention.[36] This means that, apart from the specific motivating reasons that lead someone to make claims, proposing a solution to a problem in legal terms (e.g., by taking it to court in the required time and form) implies the intention that each of us (usually the members of a political community) will solve the problems under a law in common, from which follows the intention that I will solve the problems under a law in common. We can thus identify elements of the first-person perspective that are not restricted to the content of the specific claim, nor to the motivating reason that explains why the person made a particular internal statement. They are part of the practical point of view.

Consequently, to see what the practical point of view implies, we must consider not only elements from the third-person perspective based on what we think about what another person believes, but also, when we act in a legal context, elements from both the second-person perspective (in terms of appealing to the will of others to solve a problem, recognize a status, and so on) and from the first person's perspective (what the one who makes the claim intends to achieve, as well as a we-intention to solve the problems with a law in common) gain importance and are expressed by those who adopt the internal point of view.[37] This sum of elements in turn expresses the condition that Canale lists in his definition.

Rebel judges, change and context

From what has been indicated in the previous section, some consequences can be drawn for the legal field. One that is relevant to our discussion is that the criteria that conform the content of the rule of recognition are not always constructed on the basis of what we currently believe others believe but may also arise from proposals about what might (or should) be accepted. When we make these proposals, we take into account what has been accepted in previous situations and we suggest possible courses of action for future people in similar situations. In this sense, the application of the rule has retrospective and prospective elements that allow practices to be updated and revised. As mentioned in section 4, this is a manifestation of its historicity. Furthermore, given the importance of how interactions are deployed in a context, the extent to which we explicitly consider what has been said in the past or what will be done in the future fluctuates. In the legal domain, for example, on some occasion we are only concerned with getting an action

36 v. Sellars, 1980.

37 I think that with this idea we can explain why what Kenneth Ehrenberg (2011) calls "anarchist officials" can be part of a legal system. This is because when they participate in a legal system, they adopt this kind of we-intention and, at the same time, actualize the presuppositions that make the practice what it is.

performed (e.g., enforcing compensation), while on other occasions we are concerned with the interpretation of a legal statute or the hierarchy of a norm within the system. In this sense, the endeavor of a rebel judge might be precisely to change, in one way or another, the criteria for identifying valid norms that most judges and lawyers have used so far. This is done by explicitly or implicitly proposing a new interpretation of the content of a common rule of recognition and, as mentioned above, this claim can be accepted or rejected by the other participants. Therefore, I consider that the rebel judge is inside and not outside the practice, even if she clearly does not use the criteria used by the others. If I am right, the distinction made by the conventionalists as to who is inside and who is outside cannot be readily sustained, for then they would have to say that the rebel judge is outside the practice because she applies criteria other than those corresponding to a constitutive convention.

Through our actions and reactions, we construct, actualize or challenge the context in which others express their claims and the basis on which what they say makes sense. As Alex Silk holds:

> The appropriateness of our actions often requires that circumstances are a certain way. In acting, we can thus exploit our mutual world knowledge and general pragmatic reasoning skills to communicate information and manage our assumptions about these circumstances […] The lesson: *by acting in such a way that is appropriate only if the context is a certain way, one can implicitly propose that the context be that way*.
>
> (Silk, 2017, p. 216)

When we legally claim that something must be done, we are proposing to others a way of acting (or refraining from acting) based on a certain way of presenting the circumstances. This means that we are basing our claim on a norm that should be applied according to the rule of recognition, and that we have the intention to act under a common legal order. In turn, when we react in a particular way to a person's claim (e.g., by accepting or rejecting her claim), we are responding to their proposal. With our reactions, we suggest a way of understanding the relationship with this person and the expectations and norms that characterize this relationship, and thus together form the context in which the claim makes sense.[38]

When others react to our claims the context can be stabilized or negotiated. They may also simply deny that a context is shared (e.g., by saying that

38 Schatzki (1996) holds that this dynamic could be described with the German word *Zusammenhag*. He points out that: "A *Zusammenhag* is a hanging-together of entities that forms a context for each. Human coexistence is a hanging-together of human lives that forms a context in which each proceeds individually" (p. 14). In this line, practices depend on how actions and reactions fit together against a common background. v. ch. 4.

it is a moral claim and not a legal one). Thus, when a claim is made in law, it is usually necessary to make clear how the context is (re)constructed: facts, norms and how these are linked to the satisfaction of a claim must be made explicit.[39] Furthermore, the mere filing of a claim implies the acceptance of various procedural and jurisdictional rules. All these elements can be subject to discussion and negotiation. The one that is of interest in the discussion of the rule of recognition has to do with the criteria for identifying legal norms and, as we have seen, leads us to the internal point of view.

In legal discourse, this is shown by making explicit what one assumes when making an internal statement. These statements can be understood as the expression of a claim or its acceptance or rejection. As I have already indicated, this type of act expresses, in addition to the claim, a commitment to a norm that supports that claim, among other things. In this way, we can say that by making a claim and implicitly or explicitly rejecting or accepting it, criteria are presented for the identification of norms, precisely the norms that support what is proposed to be done.[40] This is what a rebel judge does, by proposing criteria that differ from the usual ones. Again, this does not necessarily mean that she does not know what valid law in her community is or that she is acting outside the system. In doing so, she expresses that new criteria should apply to this decision and future similar legal decisions.

In short, when one demands, rejects, or accepts something in this context, one expresses that there are norm-identifying criteria that support what is proposed to be done is covered by the legal order. Those who accept or reject the proposals of others can trigger debates at various levels. Although this is not always the case, it is not unreasonable to assume that a dispute may arise over the norm-identifying criteria of a system.

Concluding remarks

I think that a model based on the considerations developed in sections 5 and 6 makes it possible to understand internal statements as expressions of normative attitudes towards the behavior of others. This means nothing other

39 The requirement to make these elements explicit is generally contained in the requirements that almost all legal systems impose on plaintiffs and petitions in order for them to be admissible. Commonly, every plaint or petition must set out the relevant facts of the problem, the valid norms that might (or should) be applied, and the outcome of that application. In addition, the plaint usually ends with a claim as to how the case should be decided. The absence of any of these elements may render the action inadmissible.

40 Kevin Toh (2011), in a similar argument, has expressed that a person who makes such a statement often instigates or invites others to adopt their proposal about the criteria for identifying norms. At the same time, these statements assume the effectiveness of the rule, as the conventionalists claim (v. Rapetti, 2017).

than taking seriously what an internal point of view entails, as well as the practical aspects of our participation in law and the pragmatic elements to be found in the one who makes a legal claim (second personal requirements, commitments to norms, identification of criteria of validity, etc.), issues already suggested by Hart in *The Concept of Law*.

Within the Hartian trend in the Practice Theory I have outlined some challenges that legal conventionalism faces, and I have proposed some ideas based on the philosophy of recognition to overcome these challenges. This exploration has led to the identification of some differences in the way in which the internal point of view may be understood as a practical point of view. First, in contrast to the conventionalist view, in the model defended in this chapter the practical point of view is not reconstructed in a scenario of strategic interaction, but in one of relations of recognition. This reveals some second-personal practical as well as some conflictual aspects of the interactions that are not clearly visible in the conventionalist view, which is dominated by epistemic mental states. Secondly, the historical aspect of legal practice is introduced in order to understand how agreements and disagreements work, as in the case of the rebel judge. This historicity has been presented having in mind the exchanges between the members of the community and its relationship with the background conditions over those exchanges occur. Thus, making explicit the historical peculiarity of legal practices makes it possible to understand some diachronic aspects of legal change as well as its relationship with other social structures that are part of its background.[41]

To conclude, I would like to note that the analogy with games commonly used by the conventionalists reaches its limits here.[42] Unlike the law, chess players do not question the content of the rules that govern their actions, nor do they change them from time to time while participating in the game. It makes no sense to think about rebel chess players the way we can think about rebel judges, at least as I have presented them in this chapter. This, in turn, leads us to question some consequences drawn from the idea of *constitutivity* inherent in the thesis that the rule of recognition is a constitutive convention, especially with regard to the criteria used to define when someone is in and out of the practice governed by that rule. If we assume that law operates in

41 According to Bruno Celano (2010), this may call into question the idea of arbitrariness of conventions in this context, since it seems that the choice of a set of criteria is not random (although other criteria could have been chosen) (v. Bayón, 2002, p. 62). As Celano points out, the content of a rule of recognition is often the historical product of power struggles, political conquests and revolutions. We must therefore beware of the risk of undermining the conventionalist thesis that such content is arbitrary in the eyes of the participants in a legal community (those who maintain its effectiveness), just like the question of whether to drive to the right or to the left.

42 An alternative critical view on how games are similar to law and legal procedures in Dybowski, Dzięgielewska & Rzepiński (2022).

the same way as chess, both rebel judges and rebel players would seem to be out of the practice, since the constitutive norms of chess, like the constitutive norms of law, draw a sharp distinction between 'in' and 'out'. This does not sound convincing. Lastly, I think that there is room for conviction in identifying valid legal norms in a legal context and that it is not just a matter of convention, as Vilajosana suggests. Again, a chess player who thinks: "Even if no one plays chess with 20 pieces before I do, I would play with 20 pieces" and acts accordingly is not playing chess. In games like chess, the idea that players act out of convention rather than conviction is an important aspect of understanding the practice and the actions of players, but in law it seems to be different. In law, it makes sense to work strategically and *from inside* to change the established common norms. In this way, we can generate new ways of thinking about the legal system in which we are acting, even if no one has done so before. In law, the sharp distinction between convention and conviction fades away.[43]

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