

CAN THERE BE A PLURAL ACCEPTANCE OF THE RULE OF RECOGNITION? NOTES ON KEVIN TOH'S EXPRESSIVIST ANALYSIS OF HART'S INTERNAL LEGAL STATEMENTS

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ABSTRACT

One of the most intriguing answers to Dworkin's argument from theoretical disagreements is Kevin Toh's expressivist analysis of Hartian internal legal statements. Nonetheless, the rule of recognition's conventional character and the existence of a unique, though complex, social rule accepted by the officials are crucial for Hart's jurisprudence. This new reading comes with too high a price, since in the end it requires one to depart from the Hartian account which is the base of Toh's argument. Without that theoretical framework, legal positivism cannot account for theoretical disagreements in law.

Keywords: H.L.A. Hart; Expressivism; Rule of recognition; Kevin Toh; Ronald Dworkin; Theoretical disagreement.

Although the Hart-Dworkin debate has been carried on by legal philosophers for over 60 years, it has not exhausted its interest and capacity to trigger new ideas. One of its promising developments is Kevin Toh's response to Dworkin's contention that Hartian legal positivism is unable to account for theoretical disagreements in law.

In response to Dworkin, Toh proposes to reinterpret Hart's jurisprudence according to Allan Gibbard's *norm expressivism*. Legal positivists can account for theoretical disagreements about the foundational rules of a legal system if they describe the attitude of acceptance of norms as a plural acceptance, instead of the acceptance of a single rule of recognition. This new account of the nature of the foundations of law replaces Hart's conventionality thesis with a new explanation of the foundations of legal norms, which came to be known as the *predication thesis*. This thesis holds that "people's commitments to laws are predicated on others' like commitments in the sense that those who form plural acceptances of legal rules maintain those acceptances only on the condition

that the rules that they accept would be acceptable to others in their community” (TOH, 2010b, 350).

Nonetheless, despite the elegance of this thesis, we argue that Toh’s theory is unsatisfactory in two aspects: first, since it moves too far from its original Hartian background, it is no longer an instance of legal positivism; second, without its positivist credentials, Toh’s enterprise loses much of its appeal, since lacks a response to Dworkin’s theoretical disagreements argument.

I. A Non-Cognitive Reading of Hart’s Internal Point of View

One of the most prominent references in the discussion about expressivism in the works of HLA Hart is Kevin Toh’s article *Hart’s Expressivism and His Benthamite Project* (2005).³ The recent and growing debate about Hart’s non-cognitivist roots⁴ is based on Hart’s conceptualization of internal legal statements, which can be summarized in the following passage:

The natural expression of this external point of view is not ‘It is the law that ...’ but ‘In England they recognize as law ... whatever the Queen in Parliament enacts ...’. The first of these forms of expression we shall call an internal statement because it 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, 102-103).

For Hart, the use of the rule of recognition to identify the other rules of the legal system is a feature of the internal point of view. Those who use it to determine the content of the law express its acceptance as a guiding rule, in a way that is distinct from the understanding of the observers from external point of view, which does not presuppose the acceptance of what expresses a legal statement. An internal statement will be expressed by those who adopt the internal point of view, accepting the rule of recognition through expressions such as “It is the law that ...”, whereas an external statement is made by an external observer who, without endorsing the rule of recognition, points to the fact that others accept it through expressions such as “In England they recognize as law whatever the Queen in Parliament enacts”. Thus, to adopt the internal point of view amounts to the practical

attitude of acceptance of rules, adopting a convergent behavior that subscribes to legal rules (HART, 1994, 56). So, for the law to exist, it must be true that the rule of recognition is accepted in this sense.

The attitude of acceptance is expressed when we act according to what the rule dictates and when we perform a critical assessment of other participants of the practice who do not conform to the rule. In Hart's own words, acceptance "consists in the standing disposition of individuals to take such 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). In addition, acceptance is usually expressed by statements that use normative terminology such as 'must', 'right' or 'wrong'. These statements are referred to by Hart as internal statements because they express the internal point of view. Moreover, the most common features of the internal legal statements are (i) to express acceptance of the rule of recognition as the appropriate test to determine if a rule belongs to a particular legal system and (ii) to express judgments that certain rules pass the test (SHAPIRO, 2006, 18-19).⁵

II. Toh's Expressivist Reading of H.L.A. Hart

To argue that his expressivist analysis of internal legal statements is capable of solving Dworkin's famous objection that legal positivism is unable to explain the existence of theoretical disagreements in law, Toh proposes a reconstruction of the rule of recognition. Dworkin's description of theoretical disagreement implies that if two interpreters disagree about the rule of recognition accepted by the community in which they live, the problem must lie in their description of what law is. Given that, for Dworkin, the concept of law has an interpretive character, judges and lawyers can share a concept even if they accept different criteria of application for identifying instances of this concept. Consequently, on Dworkin's argument, if two rules of recognition can be admitted in the same legal system by two different officials, there is no rule of recognition arising from a convergent practice.

In Toh's view, an expressivist semantics of that type would be enough to solve the problem of disagreement, since there is a great similarity between Dworkin's critique of conventionalism and the objection made by G.E. Moore against moral emotivism (TOH, 2005, 110). For Toh, Dworkin has interpreted Hart's analysis of internal legal statements as a descriptive naturalistic analysis (TOH, 2005, 112).

Moore was the first author to reject the naturalistic analysis of normative terms because of its inability to explain genuine ethical disagreements. For him, if two philosophers disagree about the meaning of 'good', being for one the same as 'pleasure' and for the other as 'desire', their disagreement will never be genuine if the use of two different naturalistic definitions is recognized (MOORE, 1922, 62-64). Nevertheless, perhaps there is a way out of this criticism. A sophisticated expressivist does not necessarily need to accept the conclusions reached by Moore. If the use of normative terms is being carried out identically, that is, in order to express their normative opinions and influence the opinions of others, disagreements can still be regarded as genuine and plausible (TOH, 2005, 111):

According to an expressivist analysis of internal legal statements, two discussants who disagree about any factual matters – including the matter of what norms are accepted and complied with by the members of their community – can have a genuine legal disagreement so long as they are both uttering legal statements with the requisite intentions of expressing their own legal opinions and of influencing each other's legal opinions and actions. Such an analysis can also account for legal disagreements that persist despite discussants' complete agreement on all factual issues. Even when they agree about what norms are accepted and complied with by the members of their community, they can express their own opinions and try to change others' opinions and actions (TOH, 2005, 113).

Developing this thesis, Toh endorses Gibbard's expressivism and argues that to express an internal legal statement is to express one's acceptance of the norms that constitute the legal system (TOH, 2005). On Gibbard's norm expressivism, when one makes a value judgment one is accepting a norm and expressing certain feelings or mental states. Moreover, the enunciation of moral norms expresses mental states and, as language has a function of coordinating behaviors and expectations, ultimately influences the way people behave (GIBBARD, 1990, 223-226). When one accepts a norm, i.e. when one considers the norm as rational or endorse it, one is neither saying that one accepts a certain independently existing system of norms nor supposing that the individual who accepts the norm has a belief, but only that she is on or has a certain state of mind. To

say that one accepts a norm is to point to a state of mind, not to a belief in the truth or falsity of a state of affairs.

For Hart, when a person utters a legal statement, she expresses her acceptance of a norm and assumes that the norm is accepted and obeyed by members of his community, which is why Toh elaborates his reconstruction of the Hartian thesis about internal legal statements. The first point to reveal traces of expressivism in Hart's work would be his distinction between mere habitual convergence of behavior and the existence of a rule, which is based precisely on the normative semantics used as a signal to refer to rules. According to Hart, an action that deviates from the rule is usually followed by a hostile reaction (or, in the case of legal rules, by a punishment by officials), whereas group habits do not suffer such form of objection.

Toh's approach to the expressivist character of internal legal statements is based on the following passages from the *Scandinavian Realism* article and from *The Concept of Law*:

The concept of legal validity is in some respects different from that of a chess rule to which Ross compares it and much more like that of a score in a game. When the scorer records a run or goal he is using an accepted, unstated rule in the recognition of critical phases of the game which count towards winning. He is not predicting his own or others' behaviour or feelings, nor making any other form of factual statement about the operation of the system. The temptation to misrepresent such internal statements in which use is made of an unstated, accepted rule or criterion of recognition as an external statement of fact predicting the regular operation of the system is due to the fact that the general acceptance of the rules and efficacy of the system is indeed the normal context in which such internal normative statements are made. It will usually be pointless to assess the validity of a rule (or the progress of a game) by reference to rules of recognition (scoring) which are not accepted by others in fact, or are not likely to be observed in future. We do, however, sometimes do this, in a semi-fictional mood, as a vivid way of teaching the law of a dead legal system like classical Roman law. But this normal context of efficacy presupposed in the making of internal statements must be distinguished from their normative meaning or content (HART, 1983, 167-168).

The use of unstated rules of recognition, by courts and others, in identifying particular rules of the system is characteristic of the internal point of view. Those who use them in this way thereby manifest their own acceptance of them as guiding rules and with this attitude there goes a characteristic vocabulary different from the natural expressions of the external point of view (HART, 1994, 102).

Based on these excerpts,⁶ Toh concludes that a speaker utters a legal statement if (i) she expresses acceptance of a rule R and (ii) assumes that R is generally accepted and obeyed by members of his community. Internal legal statements reveal the speaker's acceptance of a norm and a set of dispositions of being governed by that norm, in the same sense as Gibbard's norm expressivism, inasmuch as there are several passages in his work that expressly mention the need to *accept* the rule as binding (HART, 1994, 57; 140; 255). Toh's proposal, thus, is that (i) provides the necessary basis for allowing theoretical disagreement about the content of the rule of recognition. In this reading, there will be genuine disagreement when debaters utter statements such as "let us act according to a norm that is a part of a system of norms with R1 on top and other secondary norms in the middle tiers!" and "let us act according to a norm that is a part of a system of norms with R2 on top and other secondary norms in the middle tiers!" because there is a shared normative meaning about the content of the community's rule of recognition, despite the existence of disagreement about what that rule is.

Throughout his career, Hart dialogued directly with non-cognitivists such as Ayer, Stevenson, and Hare. In Toh's vision, in criticizing Hare's characterization of morality as a matter of applying to human conduct those ultimate principles that the individual accepts or commits to for being "overly Protestant", Hart would be endorsing the rest of the theory of Hare and, aiming to correct this point, proposed throughout his career the idea that the rule accepted by the individual must also be accepted and obeyed by the members of his community.

By the same token, Toh contends that Hart, in the aforementioned *Scandinavian Realism* article, would be refusing emotivism while advocating a form of norm expressivism:

The forms 'I (you, he, they) ought to do that' and 'I (you, etc.) ought not to have done that' are the most general ones used to discharge these critical normative functions which indeed

constitute their meaning. They are not external statements of fact predicting likely behaviour in accordance with the standards; they are internal statements in the sense that they manifest acceptance of the standards and use and appeal to them in various ways. But the internal character of these statements is not a mere matter of the speaker having certain 'feelings of compulsion'; for though these may indeed often accompany the making of such statements they are neither necessary nor sufficient conditions of their normative use in criticizing conduct, making claims and justifying hostile reactions by reference to the accepted standard (HART, 1983, 167).

As we can see, Hart criticizes Alf Ross precisely for analyzing legal validity statements as expressions of emotion, in the sense of Ayer's emotivism.

Another important point in Hart's work that allowed Toh to interpret him as an expressivist was his influence from J.L. Austin. One of Austin's major contributions to philosophy is the idea of performatives (or speech acts). For Austin, it is a descriptive fallacy to say that utterances can only *describe* or *represent* something, since "describing" is just one (among many) of the functions of words.

In *The Ascription of Responsibility and Rights* (1949), Hart proposes a conception of the performative nature of statements based on Austin's ideas, suggesting that "the concept of a human action has been inadequate and confusing, at least in part because sentences of the form 'He did it' have been traditionally regarded as primarily descriptive". Hence, Hart proposes that they should be called *ascriptive* because they 'ascribe responsibility for actions much as the principal function of sentences of the form 'This is his' is to ascribe rights in property" (HART, 1949, 171).

Hart later reiterated the argument in *Definition and Theory in Jurisprudence*, originally published in 1953. In elaborating on the definition of words like law, duty and corporation, Hart notes that most legal expressions have no natural counterpart, and states that the primary function of each is not to describe something (HART, 1983, 31). According to Hart, a sentence such as "A has the right to be paid £10 for B" has a distinctive function: instead of stating the relevant legal rule or describing a fact, the speaker draws a conclusion from the relevant but not stated rule, and the relevant but not stated facts. While not prescribing the future, the ordinary statement does not describe the present either" (HART, 1983, 28).

Another argument used by Toh to support his expressivist analysis of Hartian jurisprudence is Hart's reconstruction of Jeremy Bentham's work in expressivist lines, similar to those that Toh attributes to Hart. For Bentham, a command given by a sovereign differs from other forms of statements in that it is a statement about the speaker's will about the conduct of others. Hart states that this would be a mistake because Bentham should recognize this discourse as non-declaratory and because the utterance of a sentence may represent a speaker's mental state or attitude, expressing something implicit and unstated by its use: "when I say 'Shut the door' I imply though I do not state that I wish it to be shut, just as when I say 'The cat is on the mat' I imply though I do not state that I believe this to be the case" (HART, 1982, 249).

These different passages indicate, in Toh's view, his quest to characterize internal legal statements as non-descriptive speech acts. Nevertheless, Toh acknowledges that some of his analyses are not at all that straightforward, requiring a charitable reading of Hart to allow those conclusions.

III. Hart's Hesitation toward Expressivism

Despite the plausibility of Toh's proposal, the strongest arguments against the expressivist view of internal legal statements came from Hart himself. Toh points out two revisions made by Hart regarding previous works that seems to impose a challenge on Toh's theoretical framework. In the introduction to *Essays in Jurisprudence and Philosophy*, Hart acknowledges that he made some mistakes during his career and notes that he learned a great deal from later developments in philosophy. Among the acknowledgments is the concession that if he had grasped the distinction between meaning and force of expressions⁷, and known the theory of speech acts elaborated by JL Austin, he would not have stated in the 1953 article *Definition and Theory in Jurisprudence* (republished in the 1983 collection) that "statements of legal rights and duties were not 'descriptive', or have suggested, as [he] did by calling them 'conclusions of law' and 'the tail ends of legal calculations', that such statements were always put forward as inferences drawn by their authors" (HART, 1983, 2).

In fact, Hart makes a deep correction in that first statement. He acknowledges that the meaning of utterances fixed by language conventions is relatively constant, and it is not correct to state that:

such statements are the conclusions of inferences from legal rules, for such sentences have the same meaning on different occasions of use whether or not the speaker or writer puts them forward as inferences which he has drawn. If he does put such a statement forward as an inference, that is the force of the utterance on that occasion, not part of the meaning of the sentence. What compounds my error is that though I speak of such sentences as capable of being true or false I deny that they are 'descriptive' as if this were excluded by the status which I wrongly assign to them as conclusions of law, and my denial that such sentences are 'descriptive' obscured the truth that for a full understanding of them we must understand what it is for a rule of conduct to require, prohibit, or permit an act (HART, 1983, 5).

In order to undermine Hart's retraction, Toh states that Hart's arguments are rather confusing, since while rejecting the idea that those legal terms are descriptive, Hart defends Austin's work on performatives as having a permanent value to jurisprudence. For this reason, one could not seriously understand what Hart intended while making that statement:

I must concede that what I say here seems inconsistent with Hart's remarks in the introduction to *Essays in Jurisprudence and Philosophy* (1983a) disowning his claim in "Definition" that conclusions of legal reasoning are nondescriptive (1983b, 2, 5). I find Hart's general discussion surrounding these remarks very confusing and the remarks themselves particularly baffling – especially given that Hart says elsewhere in the same introduction that he considers Austin's work on performatives to be of permanent value for analytical jurisprudence (HART, 1983b, 4) (TOH, 2005, 99, n. 40).

Further evidence of Hart's position on expressivism concerns the reason why the 1949 article *The Ascription of Responsibility and Rights* was excluded from the 1968 collection of works on criminal law *Punishment and Responsibility*. In the Preface to the book, Hart stated that he did not include the 1949 article because "its main contentions no longer seem to [him] defensible, and ... the main criticisms of it made in the last years are justified" (HART, 2009, v), pointing in a footnote to Peter Geach's article *Ascriptivism* (1960), that directly strikes the non-cognitivist thesis that formulations of ethical or other normative judgments would never be

valuable as true or false. Incidentally, Geach's objections to Hare's prescriptivism and Hart's ascriptivism became known as the "Frege-Geach Problem" and represents the main challenge to expressivism, with Blackburn and Gibbard building their own theses in order correct what Geach had pointed out⁸.

It is important to note that, as pointed out by Plunkett and Finlay (2018), the Frege-Geach Problem is one of the biggest objections to expressivism in metaethics, and Hart never bothered to defend his eventual expressivist position from this critique, which seems to indicate that this was never his position.

Nevertheless, Toh remains true to his proposal. For him, even if Hart had expressly rejected the main conclusions reached in those articles, it remains possible to imagine that he never fully understood the implications of Geach's critique and that a more refined expressivist account of internal legal statements will be able to solve the Frege-Geach Problem (TOH, 2005, 102-103).

In order to solve the problem, an expressivist must engage in two tasks: (1) to provide a uniform analysis of statements containing the relevant predicate and (2) to explain the validity of inferences involving statements containing the relevant predicate and their relationship to other statements. Task (1) does not seem to be a difficult problem for an expressivist, as Gibbard seems to have been able to solve it. However, task (2) is quite challenging,

[f]or what makes for the validity of an inference involving only descriptive statements is consistency among premises and the conclusion. An argument is valid if and only if it is logically impossible for the premises to be true while the conclusion is false (TOH, 2005, 104).

Nevertheless, while arguing that Hart has indicated a way to partially solve the problem by doing something that could serve as an answer to the task (2) in the article *Problems of the Philosophy of Law*, originally published in 1967, Toh acknowledges that Hart never provided a semantic approach to normative predicates, so there is nothing in his work capable of accomplishing the task (1).

Finally, with regards to the quoted passage from *Essays in Jurisprudence and Philosophy* (HART, 1983, 168), Kramer contends that Hart makes clear his position on the normative character of legal statements (KRAMER, 2018b, 201), which would undermine Toh's argument concerning

the purely descriptive nature necessary to recognize the correctness of an expressivist analysis.

Indeed, since Gibbard's norm expressivism had not yet been developed, it is impossible to know whether Hart would agree with this expressivist analysis. It is true that Toh's proposal, as he himself acknowledges, is a reconstruction of Hart's analysis of internal legal statements, but there are by no means elements strong enough in *The Concept of Law* and the other articles to state categorically that Hart intended and consciously proposed that the internal legal statements should have an expressivist character.

Moreover, much of Hart's criticism in *The Concept of Law* was directed at the Scandinavian legal realists, who were openly non-cognitivist, further reinforcing the difficulty of arguing that Hart partially positioned himself alongside those philosophers of law without stating this categorically.

IV. Theoretical Disagreements and the Plural Acceptance of Norms

Toh's analysis, however, does not depend entirely on any evidence that there are already expressivist elements in Hart's theory of law to sustain it. The development of the new predication thesis based on Gibbard's lessons might be able to change the way we think about the acceptance of rules. For Toh, Dworkin's argument from theoretical disagreements is based on an analysis of the Hartian theory that was unable to perceive attitudes arising from the internal point of view as normative, which would be sufficient, at least in principle, to recognize the capacity of positivism to explain these theoretical disagreements (TOH, 2010b, 340). Yet Hart would still have to face a bigger challenge, related to his proposition about the attitude of acceptance of the rules. Thus, Toh proposes a revision of Hart's conventionalist explanation of the foundation of the rule of recognition (known as the conventionality thesis) in order to argue that if members of a legal community have a psychological attitude of plural acceptance of rules, positivism would be able to describe law while adequately responding to Dworkin's challenge.

In Hart's vision, a rule is conventional only if the justifying reasons for its acceptance and compliance is that it is a convention, as Hart acknowledges to be the case of the rule of recognition, in the view stated in his 1994 Postscript to *The Concept of Law* (HART, 1994, 255-256). Nonetheless, Dworkin argues that this conventionalist view of the foundations of law cannot be accepted, since legal systems may exist even

when conventions are not present to justify their existence, as well as in the presence of massive disagreements about the grounds of law.

Dworkin's first premise would not be a problem for Hart. However, the second is a much more problematic challenge, because it is related to the psychological attitude of acceptance of rules, which would require the acceptance of a different form of predication thesis. Hart's theory of the concept of law would be unable to differentiate attempts to guide actions from mere attempts to incite a practice and should therefore be revised, for otherwise it would not be able to distinguish itself from the theories of Bentham and Austin (TOH, 2010a, 9).

Hart proposed a theory based on what Toh calls the "rule-mediated practice", that is, a practice performed on the basis of interactions in a group of people sustained on the acceptance and invocation of rules mediated by interactions. To point out that legal practice would not be based on coercion nor on grounds of pure obedience, as primitive legal positivism had proposed, Hart maintained that law must be based on an exclusively normative practice. The idea is that a person would be committed to the existence of commonly accepted superior rules or considerations that could be invoked to justify the application of the other rules, which is an aspirational ideal like the rule of law (TOH, 2010b, 341).

Toh also contends that the commitment to this ideal does not depend on the logical, metaphysical or physical possibility of its realization, but rather on the natural possibility that it occurs, considering the laws of biology, sociology, psychology, and others. The point is that the acceptance of the ideal would be quite complicated to realize in an environment where a large number of participants are present, given the complexity of taking part in a rule-mediated practice. Thus, group members may end up delegating the role of defining acceptance of reasons and considerations to a group of specialists, and the ideal would be achieved throughout the group if realized by the designated expert subgroup, also known as the officials.

Moreover, the group of members of the society will only realize the ideal if officials agree on the most fundamental criteria of legal validity of the system, because they imagine that officials will be able to reach a consensus on those criteria and that any disputes that may arise between group members may be resolved by consulting the ultimate criteria of legal validity.

However, the possibility of official consensus on fundamental rules in modern legal systems is doubtful, inasmuch as even when favorable conditions are present a number of factors (burdens of judgment) preclude

the existence of consensus, v.g.: (i) the complexity of the evidence and the difficulty of make inferences from them; (ii) the diversity of human experiences and how they shape our ethical reasoning; (iii) under-determination of ethical conclusions by available evidence; and (iv) the incompatibility of conceptual normative schemes and disability resulting from any society wishing to accommodate more than one at a time (TOH, 2010b, 344-345). Thus, based on the Rawlsian idea that any realistically utopian political philosophy must account for the fact of reasonable pluralism, the same must be recognized for any legal philosophy:

If the burdens of judgment make it the case that no comprehensive ethical doctrine or even a political conception of justice could win a common acceptance by the citizens of a liberal democratic society, then it is natural to expect that no single rule of recognition could win a common acceptance by such citizens or even by their officials. And whatever the scope of our explanatory ambitions, it includes the goal of explaining legal systems that prevail in modern liberal democratic societies of the sort that Rawls discusses. We can speak of the fact of reasonable legal pluralism (or more specifically the fact of reasonable recognitional pluralism), and Dworkin's second point can be seen as bringing that fact to our attention (TOH, 2010b, 345-346).

Thus, Toh's solution to the problem of theoretical disagreements has three basic pillars: (i) the expressivist analysis of internal legal statements, (ii) the plural acceptance of rules, and (iii) a new thesis of predication. The central idea is that the analysis of legal statements as expressions of plural acceptance of norms would be able to explain two of the main features of legal practice: the fact that our legal interactions, as Hart pointed out, are not fundamentally based on coercion but in normativity; and the fact that there are disputes among participants in the practice about fundamental legal norms, as Dworkin has shown.

As seen, the first premise is based on Gibbard's norm expressivism. For him, when someone makes a value judgment, one is accepting a norm or a system of norms and expressing certain feelings or mental states. In addition, the enunciation of moral norms expresses mental states and, as language has a function of coordinating behaviors and expectations, it ends up influencing the way people behave (GIBBARD, 1990, 223-226).

When one accepts a norm, that is, when one considers the norm to be rational or endorses it, one is neither accepting a particular system of

independently existing norms nor admitting that one has a belief; rather, all that is required is that one is in or has a certain mental state. To say that one accepts a norm is to point to a state of mind, not to a belief in the truth or falsity of a state of affairs. For Hart, when a person makes a legal statement, she expresses acceptance of a norm and assumes that the norm is accepted and obeyed by members of his community, which is why Toh elaborates on his reconstruction of the Hartian thesis about internal legal statements.

The second premise is the attempt to readjust the nature of the acceptance expressed when one utters an internal legal statement to recognize it as a plural acceptance of norms. Toh finds a ground for this assumption in Michael Bratman's theory of shared intentions, which characterizes general intentions and shared intentions as capable of providing background frameworks in which people's practical deliberations occur in order to solve problems affecting human agency in general in modern societies. And one such problem would be the aforementioned fact of reasonable legal pluralism.

For a theory to be able to solve the problem of reasonable legal pluralism, and yet maintaining a normative, rule-mediated conception of legal practice, a fundamental change in Hart's conception of the rule-accepting attitude would be required, in the sense that the members of a legal system should not only depend on the normative force of the rules they accept, but also on the fact that other members are willing to accept those rules. This is the third pillar of Toh's thesis.

The acceptance proposed by Hart would be a simple acceptance because it is based solely on the normative force of the rules, while Toh's proposal would be a plural acceptance because his psychological attitude of acceptance begins with the fact that other people also seem to accept those rules, but also depends on the normativity of the rules to reach legal conclusions and to influence other community members on reaching a position about which everyone can agree.

The core difference between Hart's simple acceptance of the rule of recognition and Toh's plural acceptance is that in Hart's approach the simple acceptance of a rule R influences the one who utters an internal statement because of the normative force of R, and its statement is expected to have sufficient normative force to influence the acceptance of others. The plural acceptance of a rule S, for Toh, only initially influences the utterer and, to the extent that the speaker realizes that rule S does not have sufficient

normative force to influence others, she commits herself to an alternative rule:

In sum, a person who has a plural acceptance of a rule does not rely solely on the normative force of the rule that he accepts in his attempts to influence others, but relies also on others' dispositions to accept certain rules. In his attempts to influence others, he manifests a certain amount of deference towards others insofar as they too are similarly deferential towards him (TOH, 2010b, 348).

Toh's proposal is intended to overcome the fact of reasonable legal pluralism as it offers an insight into legal practice in which members of the community, aware of the existence disagreements, have an attitude of acceptance of the rules aimed at sharing these rules, for their collective acceptance is an ideal that can be achieved for as long as members recognize the possibility of plural acceptance and act in good faith.

The idea of plural acceptance of rules has two main purposes. It aims to establish the correct normative questions and to achieve joint acceptances of the norms, the first purpose limiting the second. Thus, while it is a duty to pursue the correction of their independent normative judgments, people will see their conclusions limited as to what gives them reason to act on their expectations of the acceptance of their normative conclusions by their peers. Therefore, people would be more likely to reach conclusions about accepting rules already shared by their community (TOH, 2010a, 17).

In addition, for plural acceptance to work three commitments are required by participants of the practice. The first is reflexivity. In a group of people who have the purpose of achieving joint acceptance of rules, the common acceptability of a particular normative position must count in favor of the acceptance of that position. A person who makes an utterance expressing a plural acceptance of rules has the expectation that his utterance will serve as a reason for others to adopt that same normative position. Similarly, a statement could be issued in order to change the prevailing norm in the community, since there are strong reasons for changing it.

The second characteristic is the presence of mutual or horizontal deference between the participants of the practice. The person who has a plural acceptance of rules is willing to temper her normative positions in virtue of the acceptance of others, provided that the deference is mutual. By expressing a plural acceptance, a person eventually recognizes the

presence of different and conflicting normative positions, which is why she accepts the possibility that her conclusions will not be accepted by other members of the community and adapt to the rules that are accepted. However, this only occurs if these members are also willing to act in the same way.

Finally, a plural acceptance of rules requires vertical and unidirectional deference to specialists. This gives the reason to identify the correct normative questions. However, these experts are not able to properly solve normative problems, but they should also simulate the thoughts of community members, in order to find common ground on which they are being reached as the shared normativity (TOH, 2010a, 20).

Using these premises, Toh then proposes a thesis allegedly capable of providing the grounds for the rule of recognition in a way that is different from that supported by conventionalism. In ordinary legal discourse our commitments are predicated on the fact that others also have the same commitments. This collectivist aspect of legal practice has led to the characterization of law as conventional in the sense that our commitments are predicated on a conventional practice of adhering to certain fundamental norms (TOH, 2010a, 23). And that, as Dworkin pointed out, is a problem in the face of persistent controversies in law.

Through plural acceptance of norms, a person's commitment to a particular law is predicated on the commitment of others, not in the sense that others currently have similar commitments, but in the sense that their commitment depends on the expectation that others also develop similar commitments on their own and exercising due deference to others (TOH, 2010a, 23-24).

Thus here is a summary of Toh's predication thesis:

People's commitments to laws are predicated on others' like commitments in the sense that those who form plural acceptances of legal rules maintain those acceptances only on the condition that the rules that they accept would be acceptable to others in their community. And the relevant others are those who, in their acceptances of rules, are similarly deferential towards others. Notice that this new version of the predication thesis allows for commitments to rules that are not currently backed up by a convention or some similar kind of practice. A person may accept a rule with the aim or in the hope of instigating a shared acceptance of that rule, as well as in response to an existing shared

acceptance of that rule. This particular feature enables the new version of the predication thesis to escape the criticisms of the conventionalist version I outlined before. That is a considerable advantage (TOH, 2010b, 350).

V. A Conventionalist Response

Toh's thesis is directly related to the nature of the rule of recognition and, while quite innovative and interesting, goes against the way Hart conceived that social rule. As seen, there would be genuine disagreement when participants on the debate utter statements that have different rules on top of a system of norms. Although there is a shared idea about the normative meaning of the community's rule of recognition, participants disagree about the content of such rule. According to Toh's predication thesis, theoretical disagreements would be genuine, since each speaker intends to influence the other to accept a different rule of recognition without appealing to any kind of convention.

Nonetheless, the expressivist solution devised by Toh seems to stretch Hart's notion of rule of recognition too far, regarding the law more like an "argumentative" or "interpretive" practice, in the sense of Dworkin (1986), than as a system or rules grounded in a social practice, in the sense of Hart. It seems to be difficult, therefore, to retain the basic insights of Hart's jurisprudence while envisaging to overcome the conventionality thesis inserted in the Hartian concept of law. By stating that the shared normative meaning of the rule of recognition would be the way speakers use their normative terms in order to allow acceptance of diverse rules, Toh's expressivist analysis neglects the basic condition of the social rule of recognition, namely, the existence of a shared practice of acceptance by officials.

Hart expressly stated in *The Concept of Law* that the "crucial point" for sustaining his theory of the legal system as "a complex union of primary and secondary rules" is the fact that "there should be a unified or shared official acceptance of the rule of recognition containing the system's criteria of validity" (HART, 1994, 115), and "[i]f only some judges acted 'for their part only' on the footing that what the Queen in Parliament enacts is law, and made no criticisms of those who did not respect this rule of recognition, the characteristic unity and continuity of a legal system would have disappeared" (HART, 1994, 116):

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand,

those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. The first condition is the only one which private citizens need satisfy: they may obey each 'for his part only' and from any motive whatever; though in a healthy society they will in fact often accept these rules as common standards of behaviour and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution. The second condition must also be satisfied by the officials of the system. They must regard these as common standards of official behaviour and appraise critically their own and each other's deviations as lapses. Of course it is also true that besides these there will be many primary rules which apply to officials in their merely personal capacity which they need only obey (HART, 1994, 116).

If the idea that a rule of recognition should be accepted as a common standard for the community is dismissed, it does not seem to be possible to maintain the idea that Toh's proposal would still qualify as Hartian. Indeed, this argument seems to rule out the possibility of accepting the expressivist analysis of the internal legal statements, since a part of those statements must necessarily be identified as a social rule and, therefore, subject to a judgment of truth or falsity, having a clearly cognitivist nature.

Also importantly, even if we dismissed the idea that the rule of recognition is conventional, that would not diminish the force of the Hartian counter-arguments available against Toh, because his idea of the existence of conflicting recognition rules is inconsistent with any possible version of the recognition rule as a single, common, shared standard accepted by officials.

Moreover, by stating that theoretical disagreements would not be a problem for his predication thesis, since participants of the practice use internal legal statements to seek to change the fundamental rule through the influence exerted on other participants, Toh falls into the same problem that had already been pointed out by Dworkin. Toh's thesis seems to be pragmatically committed, albeit unintentionally, to the existence of a single rule of recognition to be followed and which may be altered by the ability of speakers to influence each other to accept a different norm, in the presence

of mutual deference. From the internal point of view, each participant in a legal argument must advocate a single rule of recognition, and will not be able to claim an objective status for any proposition of law without relying on the assumption that there is a single rule of recognition for each legal system.

In Toh's proposal, when a speaker utters a legal statement, he is, along with others, plurally accepting a rule of recognition. This means that the speaker is using that statement to influence other members of the community to accept the rule, while remaining open to being influenced by the rule of recognition accepted by another speaker. However, this solution completely deviates from the very idea of objectivity underlying the rule of recognition and precludes the recognition of law from being understood as a social practice resulting from the convergent behavior of officials. To be sure, it comes very close to Dworkin's view that there is a space for argumentative disputes about the foundational rules of a legal system.

VI. On the Argument of the Fallacy of the Double Duty

In a recent work, Toh develops a new argument called "double duty fallacy". In his vision, legal positivism is committed to a number of theses. The most important for our analysis is the fifth one: social facts wholly determine what the law is. One of the core qualities of the Hartian legal positivism is its explanatory capacity. But, for Toh, this explanatory power must be further scrutinized in order to assess its compatibility with the main Positivist theses.

For Toh, any Hartian theory should be capable of explaining the fact that (F1) some laws are power-conferring rules (as opposed to duty-imposing rules); (F2) some customary rules are laws even before being recognized as such by legal officials; (F3) some communities governed by laws are without legislators whose legal powers are unlimited; (F4) some laws retain their binding force even after the deaths of the lawmakers who enacted those particular laws.

Based on these premises, Toh argues that a Hartian theory might be summed up like this:

A community is governed by laws when its members regulate their behavior and practical thought by a set of rules, which set includes some higher-order rules governing the following types of operations of the rules of the set: (i) revision of the rules of the set; (ii) resolution of disputes about the rules of

the set; and (iii) identification of the rules that belong to the set (TOH, 2019, 227).

Futhermore, Hartian theories should commit to the following three theses: (L1) Whether a community has, or is governed by, (a system of) laws is a matter only of certain social facts existing in that community; (L2) Whether a particular rule is a law (or a legal rule) in a community is a matter only of certain social facts existing in that community; (L3) Whether some (first-order) legal claim is true or correct is a matter only of certain social facts existing in the relevant community.

Toh says that, according to this description of Hart's theory, whether a community has a law with a particular content is solely a question of whether that content fulfills the criteria that the prevailing rule of recognition outlines. It would follow that the social facts that result in the existence of a legal system in a community include any social facts that result in the existence of some specific law in a community, causing L3 to derive directly from L2.

Toh understands, however, that this line of reasoning is fallacious. According to Gibbard's conception of morality, "a community is governed by mores when its members regulate their emotions of guilt and impartial anger by a set of rules, and those emotions of guilt and impartial anger in turn regulate the members' behavior and practical thought." (TOH, 2019, 229). Toh argues, therefore, that we can infer that: (M1) whether a community has, or is governed by, (a set of) mores is a matter only of certain social facts existing in that community; and (M2) whether a particular rule is a *mos* (or a rule of morality) in a community is a matter only of certain social facts existing in that community. But if we would infer that (M3) whether some (first-order) moral claim is true or correct is a matter only of certain social facts existing in the relevant community, we would have a very implausible substantive moral thesis since the rightness or wrongness of one's action would depend only on whether the rules that prevails in the community say that guilt and impartial anger are warranted when a person carries out such action.

Applying the principle of parity to the matter, Toh contends that the term law is quite ambiguous and can mean both what *is treated as* legally valid and what *is* legally valid. Toh then divides (L2) in (L2a) "whether a particular rule is treated as legally valid in a community is a matter only of certain social facts existing in that community" and (L2b) "whether a particular rule is legally valid in a community is a matter only of certain social facts existing in that community", causing (L1) to only derive (L2a),

but not (L2b). Accordingly, one cannot also derive (L3) from (L1), so that most positivist or anti-positivist legal theorists, because they have Hartian roots, incur the “fallacy of double duty” because they assume that “theories like (H) do double duty both as a theory that specifies the facts that amount to or constitute a community’s having a legal system or a law, and as a theory that specifies the truth- or correctness-conditions of first-order legal claims” (TOH, 2019, 232).

This whole argument culminates in the denial of (P5) (Social facts wholly determining what the law is) as a necessary element of Hart’s positivism, for what the theory tells us is that social facts fully determine the fact that certain rules *are treated as* the law of the community, but do not necessarily determine which rules *are* community law. This is because of the possibility that the determinants of the fact that some rules are law may include moral or nonmoral normative considerations.

Toh himself acknowledges that this combination of approaches may not be viewed as a positivist theory, for the theory that contains the ultimate determinants of what law is to include normative considerations ought to be an anti-positivist theory. Nonetheless, in this so-called neglected position, moral considerations could only be ultimate determinants of what the law is in tandem with some legal rule. Therefore, this reading of legal positivism would still hold that the prevalence of a legal system in the relevant community is wholly a matter of social facts.

The problem with this development of Toh’s thesis emerges when he holds that it would be quite possible for there to be no rule that is treated by the members of the relevant community as the rule of recognition of their legal system. This simply could not be a Hartian theory, we think.⁹ Hart’s rule of recognition is a social rule that provides the criteria of validity for all the other rules of the system. As we argued before, this social rule ought to be accepted by the officials. And its existence, though not wholly stated, “is shown in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers” (HART, 1994, 101).

There is a relevant difference between acknowledging the possibility of normative considerations figuring among the ultimate determinants of what the law is and to put away a very prominent feature of Hartian legal positivism. Without the social rule that provides the criteria of validity to the rules of the system, it seems that the whole Hartian enterprise would crumble, nullifying any chance of existence for a functioning legal system that is based on the premises of legal positivism in the form Hart developed.

VII. Conclusion

Toh's work on Hartian legal positivism is one of the most interesting accounts developed in recent jurisprudence. But the consequence of accepting the expressivist analysis of internal legal statements is to reject some commonly accepted features of the rule of recognition. Toh's response to Dworkin's arguments about theoretical disagreements comes with too high a price, since in the end it requires one to depart from the Hartian account which is the base of Toh's argument. The rule of recognition's conventional character and the existence of a unique, though complex, social rule accepted by the officials of the legal system are crucial for Hart's jurisprudence. The question is: does Toh need to maintain the idea of a rule of recognition as idealized by Hart? Maybe the best alternative available to Toh is just to let it go and attempt to vindicate his new predication thesis on a non-positivist jurisprudential argument. Otherwise, the whole venture is hopeless because legal positivism could not serve itself from that thesis to account for theoretical disagreements in law.

Notes

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³ See also RAZ, 1993, 148, who regards Hart's argument as a hybrid form of expressivism, since there is a non-cognitive component in every statement about rules from Hart's internal point of view, insofar as such statements show the speaker's agreement with the rule, i.e., his disposition to follow and demand others to follow it (RAZ, 1993, 148). Raz notes that Hart identifies common normative statements as simple expressions of agreement with a given standard, instead of an obligatory expression for executing a command or the presence of some emotional state. Nevertheless, the passage that he mentions in favor of this interpretation, extracted from *Essays on Bentham* (HART, 1982, 159-160), seems to refer to a non-cognitivist theory of legal duties and bear no relation to the expressivist metaethical theory. Matthew Kramer clarified the point: "he [Hart]

was engaged in a dispute with Raz over the concept of legal duty or obligation. Raz believes that the concept of duty or obligation is the same in legal discourse as in moral discourse, and he therefore believes that all invocations of legal duties by officials in support of their endeavors of law-application imply the existence of moral reasons for people to conform to those duties. Hart disagreed with Raz over the notion that a single concept of obligation is shared between legal discourse and moral discourse, and also over the concomitant thesis about the implications of any justificatory references to legal duties by officials. Hart denied that all such references imply that the addressees thereof have had moral reasons to fulfill the duties. He labeled Raz's position on that point of contention as "cognitive" and his own position as "non-cognitive." Although those labels may have been unhelpfully misleading, Hart did not adopt them to signal his allegiance to any general non-cognitivist account of the semantics of internal legal statements. He was instead focused on the point of contention that has just been singled out here. That is, he was contesting Raz's view that every official pronouncement which invokes and applies a legal obligation is implying that there are moral reasons for each addressee of the pronouncement to conform to its terms. Someone can endorse and amplify and refine Hart's position on that matter – as I have done elsewhere (KRAMER, 1999, chap. 4) – while giving a very wide berth to the suggestion that internal legal statements generally are devoid of propositional contents" (KRAMER, 2018a, 408).

⁴ Scott Shapiro argues that there is a mixture of cognitivism and non-cognitivism in Hart's elaboration of internal legal statements. Regarding the existence of the rule of recognition, Hart is cognitivist, because its identification as existing is the enunciation of a fact of the world, subject to a judgment of truth or falsehood. In the other hand, over the existence of primary legal rules, Hart is a non-cognitivist insofar as internal legal statements do not express propositions and therefore cannot be true or false. Thus, with Toh, Shapiro understands that Hart is a norm expressivist, but only in relation to primary legal rules, since he argues that the "very meaning of internal legal statements is given by their expressive function" (SHAPIRO, 2006, 21), and the function of normative terminology employed in Hart's internal statements is expressive, not representational, because it expresses a state of mind, not states of the world (SHAPIRO, 2011, 99).

⁵ It is important to note that, in general, acceptance of the recognition rule is not explicitly stated in the enunciation of an internal statement.

⁶ David Plunkett and Stephen Finlay indicate another passage that would reveal Hart's position, arguing that the primary goal of *The Concept of Law* is to provide an option that neither upholds obscure nonnatural properties nor omits law's character of guiding actions. (FINLAY and PLUNKETT, 2018, 72): "Most of the obscurities and distortions surrounding legal and political concepts arise from the fact that these essentially involve reference to what we have called the internal point of view: the view of those who do not merely record and predict behaviour conforming to rules, but use the rules as standards for the appraisal of their own and others' behaviour. This requires more detailed attention in the analysis of legal and political concepts than it has usually received" (HART 1994, 98).

⁷ In addition to serving as a demonstration of the rejection of non-cognitivism, when Hart states that he understood the distinction between meaning and the force of expressions, he is referring directly to acknowledging the existence of a distinction between semantics and pragmatics of expressions. The topic will not be elaborated in this work though. For a detailed analysis, see KRAMER, 2018b.

⁸ Backed up by lessons from Gottlob Frege, Peter Geach pointed out that emotivism is incapable of explaining moral statements containing moral sentences in unasserted contexts. The classic example is the use of the sentence “killing is wrong” as a statement contained in a longer sentence such as “killing yourself is wrong, so making your little brother kill people is wrong.” In the latter sentence, there is clearly no indication of a sense of disapproval of the act of killing people, which leads to an almost insurmountable problem for Ayer's emotivism, since the semantic function of the sentence “killing is wrong” is different in each one of the statements: when used solely, a moral statement is being made, but in the second sentence, “killing is wrong” does not represent any statement.

⁹ We acknowledge, however, that it might be possible, like Raz suggests, that there is more than one rule of recognition in a single legal order (RAZ, 1999, 147). Nevertheless, this possibility, even if correct, would not affect our argument. Perhaps a legal system has a set of criteria of recognition stated in more than one rule. There are even people who are convinced that there is no need for a rule of recognition at all, since the practice of recognition can be constituted by the acceptance of a myriad of criteria of legal validity (WALDRON, 2009). Nevertheless, even in that case the conventionality of these rules and the correlated idea that there is one shared understanding about these rules can be preserved. As Raz explains in the same sentence where he advocates for the possibility of more than one rule of recognition, “The unity of the system does not depend on its containing only one rule of recognition. The unity of the system depends on the fact that it contains only rules which certain primary organs are bound to apply. The primary organs which are to be regarded as belonging to one system are those which mutually recognize the authoritativeness of their determinations” (RAZ, 1999, 147). Hence, regardless of the possibility of multiple criteria of recognition, and regardless, even, of the possibility that these criteria might conflict (RAZ, 1999, 147), the *conventionality* of these recognition rules is required for any legal theory committed to Hartian positivism, and Toh’s hypothesis fails to sustain it.

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