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## **The Internal Point of View as a Rational Choice?**

An Empirical Interpretation of the ‘Normativity’ of Social and Legal Rules\*

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### **Abstract:**

H. L. A. Hart’s seminal book *The Concept of Law* entails arguments which are also of substantial importance for social theory: his claim that the existence of social and legal norms presupposes the dissemination of an internal point of view among the members of a social and legal community presents a serious challenge for any explanation of social order. Hartmut Kliemt emphasizes this aspect of Hart’s work time and again in his own writings—and surely with very good reasons. In my paper I will try to reconstruct Hart’s theory in detail. I will argue that we have to clarify the different dimensions of the concept of an internal point of view to be able to assess its consequences for a theory of social and legal order—especially for a rational choice approach which at first sight seems to be incompatible with the concept of an internal point of view.

### **1. Introduction: Choosing the Right Explanandum**

Already in his early writings Hartmut Kliemt prizes H. L. A. Hart’s analysis of the structure of law and his concept of an internal point of view as a crucial touchstone for every theory in the social sciences and especially rational choice theory (Kliemt 1985, 223ff.; 1987; 1992; Kliemt and Zimmerling 1992). As most social scientists, particularly in Germany, are oblivious of Hart’s theory of law, this appreciation of Hart from the perspective of social theory was (and still is) not very widespread. This is a serious shortcoming as Hart’s theory of law discloses elements and relations in the realm of law which are of utmost interest to general social theory too. Although his theory is primarily aimed at a general analysis of the normative and logical constitution of a legal system, it is also extremely helpful in clarifying the structure of this system as an empirical explanandum. It is a common failing of social scientists to test their theories of rules and norms by only using simple examples. But, obviously, the rules and norms that govern societies are parts of complex systems with intricate internal structures—this is not only true of legal rules but of many social norms. Any so-

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\* I am indebted to Margaret Birbeck and Jan Dörfel who—as so many times before—helped to polish my rough English.

cial theory that claims universal applicability must, therefore, also prove itself in its analysis and explication of these more complex phenomena. But what is so exceptional about a system of legal rules?

It is of central importance here that legal systems essentially include rules which are not just orders backed by sanctions—as common wisdom among many social scientists may suggest—but power-transferring rules that endow actors with certain competences and authority. The explanation of these rules is the real challenge for all empirical theories of law—most of these theories, including rational choice theories, have concentrated far too much on the ‘easy’ cases, rules that are *backed* by sanctions, and too little on the ‘hard’ cases, rules that confer power to *enact* sanctions: in Hart’s words they have focused too much on the “primary” rules and too little on the “secondary” rules. But before a rule backed by sanctions can help to explain the stability of social order, it must first be explained how the order of a legal system can establish—secondary—rules that prescribe which—primary—rules are valid at all and should be enforced by sanctions in the case of deviation.

Hart’s answer to this explanatory challenge is well-known: he claims that a legal system can only exist if sufficiently many members of a legal community adopt an “internal point of view” towards the fundamental rules of this system. Hart believes that this is not only an empirically but also a *logically* necessary condition for a legal system to exist—in fact he thinks that this applies to social norms as well. This would have important—and in the case of rational choice theory potentially fatal—consequences for any empirical theory of social and legal order. Any theory with this focus has then to account for the dissemination of an internal point of view when striving to explain the emergence and stability of a legal system and even of social norms. Hartmut Kliemt’s interest in Hart’s theory centred around this point: if Hart was right, he has presented conclusive arguments against any theoretical approach that tries to explain the facts of human interaction and social order only as the results of ‘extrinsic’ incentives and adaptive strategies to empirical constraints. Kliemt accepted Hart’s assumption that a widespread adoption of an internal point of view is indeed a necessary condition at least for any developed legal systems to exist—leaving open, however, whether these necessities should be interpreted as *empirical* or *logical* necessities (Kliemt 1985, 237f.). In both cases it seems to be unavoidable, though, to draw the conclusion that rational choice theory principally could not cope with Hart’s challenge: rational choice theory can explain rule-following behaviour only as a sequence of opportunistically rational decisions—and not as a result of an ‘internal acceptance’ of a norm. If this were true, the *factual existence* of social norms and legal systems alone would refute rational choice theory as a universally applicable social theory.

In many discussions Hartmut and I both expressed and reinforced our mutual conviction of the plausibility of the above line of reasoning. After coming back to these issues many years later, I am now not as convinced as I once was about our position and think that the problem is at least more complex than we both tended to think. The following discussion is the result of these doubts. I

will discuss three issues: first, whether Hart indeed delivers a *logically* valid argument that social rules—and, as a further consequence, legal rules as well—can exist only if a sufficient number of members of a social community adopt an internal point of view. Secondly, whether he thereby presents a conclusive argument that it is impossible to explain the existence of social rules and especially the existence of legal systems on the basis of rational choice theory. The conclusion of the discussion of these issues will be that Hart’s ingenious analysis of the *concept of law* does *not* principally exclude the possibility that the challenges he raises could be met by a rational choice theory of law and social norms. One reason for this is that the concept of an internal point of view is itself a complex theoretical notion with different dimensions. I will, therefore, thirdly discuss briefly, under what *empirical* conditions an incompatibility between rational choice theory and the existence of social and legal norms has to be acknowledged.

Hart himself was not definitive with regard to this issue which, after all, was not of special concern to him. His corresponding statements are ambivalent. On the one hand, he contrasts the internal point of view explicitly with an attitude that merely judges the consequences of action. On the other hand, he concedes that the allegiance to social and legal rules “may be based on many different considerations: 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, 203). This does not sound like a swan song for rational choice theories—however, Hart himself never delved more deeply into the question how an internal point of view could be the result of ‘calculations of long-term interest’. The following pages try to suggest some possible answers to this question.

## 2. The Logic of Social Rules

H. L. A. Hart starts his famous analysis with the distinction between the *internal* and *external aspect* of rules.<sup>1</sup> He claims that this distinction has “great importance for the understanding not only of law but of the structure of any society” (89). For Hart the internal aspect of rules distinguishes *social rules* from *habits*: social rules share with social habits the external aspect “which consists in the regular uniform behaviour which an observer could record” (56). But a social rule has an internal aspect in addition insofar as the observable “regular uniform behaviour” is the object of a *normative standard* which prescribes that kind of behaviour. A normative standard has a *notional meaning* that could be a subject of understanding and communication, it can be analyzed, applied to concrete cases, used as a premise for logical deduction or as a basis for conduct and criticism, completely independent of the external aspect whether it is actually

<sup>1</sup> Terminological remark: Hart uses the term ‘rule’, throughout also in contexts in which English-speaking authors today would prefer the term ‘norm’ or ‘social norm’. In my paper I keep the wording used by Hart to prevent misreading.

observed or not. But as an essential element of a social rule it is—in contrast to a habit—a necessary condition for “regular uniform behaviour” to occur. Hart illustrates the internal aspect of rules with the rules of games: “Chess players do not merely have similar habits of moving the Queen in the same way which an external observer [...] could record. In addition, they have a reflective critical attitude to this pattern of behaviour: they regard it as a standard for all who play the game.” This reference to the internal aspect of rules finds its “characteristic expression in the normative terminology of ‘ought’, ‘must’, and ‘should’, ‘right’ and ‘wrong’” (57).

If social habits are synonymous with observable regular uniform behaviour the question about the conditions for a social habit to exist is easy to answer: a social habit is a social fact if there is a certain kind of regular uniform behaviour. If social rules are in addition normative standards, the question about the conditions for a social rule to exist is *not* as easy to answer—because it is not self-evident how we can speak of the ‘existence’ of a normative standard as something that is a ‘social fact’. But if we want to make the sociological statement that a certain social rule empirically ‘exists’ in a group, then we must have an idea what it means to say that a normative standard ‘exists’ as “a matter of fact” (110). Or, to put it differently, we must know the truth conditions of a *norm-descriptive* statement that gives a ‘value-free’ description of an empirically existing standard in contrast to a *norm-expressive* statement that communicates an approval and endorsement of a standard.

Hart’s answer is embodied in his concept of the *external* and *internal point of view*. An external point of view exemplarily is the point of view of an observer who can be content merely “to record the regularities of observable behaviour in which conformity with the rules partly consists and those further regularities, in the form of the hostile reactions, reproofs, or punishments, with which deviations from the rules are met” (89). Such knowledge might even enable individuals to live among a group without the experience of unpleasant consequences of their behaviour. But “what the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society”. They use rules “as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment. [...] For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility. [...] They refer to the internal aspect of rules seen from their internal point of view.” (90)

As Hart formulates emphatically in the *Postscript*, the internal point of view embodies the “distinctive normative attitude” of “acceptance” which consists in the standing disposition of individuals to take a rule both as a general standard to be followed by the group as a whole and as a guide to their own future conduct (255). Hart admits that a subclass of the members of a group can confine themselves to an external point of view in being only concerned with rules when and because they judge that unpleasant consequences are likely to follow violation. However, Hart’s claim is not only that a dissemination of an internal point of

view would help to enforce and stabilize a social rule, it is in fact stronger: if “*the internal point of view is not widely disseminated there could not logically be any rules*” (117). For Hart it is a *conceptual truth* that “if a social rule is to exist” sufficiently many members of a group “must look upon the behaviour in question as a general standard to be followed by the group as a whole” (56).

Hart himself does not explicate the structure of his logical argument and its premises further. The assumption that a factual dissemination of an internal point of view is a logically necessary requirement for the existence of social rules would be justified if any plausible interpretation of the statement ‘normative standard *S* exists’ must refer to the empirical fact that people actually accept this normative standard as a standard for behaviour. In other words: the logical argument is sound if one of the truth conditions of the norm-descriptive statement ‘members of *G* should  $\phi$ ’ is the truth of the descriptive statement ‘members of *G* accept that they should  $\phi$ ’. According to this interpretation, a normative standard acquires ‘existence’ in the empirical world by the empirical fact that this standard is subject to factual acceptance or approval.

So far we could reconstruct Hart’s premises and logical conclusion in the following way:

- P1: A social rule *R* exists in group *G*.
- P2: If a social rule *R* exists in *G*, then a normative standard *S* exists in *G*.
- P3: A normative standard *S* exists in *G* only if sufficiently many members of *G* accept *S* as a normative standard.
- P4: If a member *i* of *G* accepts *S* as a normative standard, then *i* sees *R* from an internal point of view.
- C: Sufficiently many members of *G* see *R* from an internal point of view.

To judge the plausibility and range of Hart’s ‘logical argument’, it requires further clarification and explication. I will undertake this task in the next part of the paper concerning the concept of social rules; this will be followed by an application of the results to legal rules and an examination as to whether the special characteristics of secondary rules and especially of a rule of recognition shed new light on Hart’s concepts and arguments.

### **3. Social Rules and the Internal Point of View**

I will try to explicate Hart’s concept of a social rule further by explicitly specifying the crucial kinds of necessary conditions he mentions for a social rule to exist:

A social rule *R* exists in a group *G* only if there is a sufficiently large subset of *G* so that, for each individual *i* of the subset:

1. *i* understands *R* as a normative standard;
2. *i* prefers *R* as a normative standard for other members of *G*;
3. *i* prefers *R* as a normative standard for himself.

The overall condition demands that there must be a ‘sufficiently large subset’ of the members of a group who adopt an internal point of view. This condition results from the requirement that the factual conformity to a rule must, to a considerable extent, be *produced* by the fact that members of the group endorse the rule, otherwise rule conformity would not be the result of the existence of a normative standard but of other, ‘purely’ empirical factors. Of course, how many members of a group will form a ‘sufficiently large subset’ to put a social rule into practice will vary considerably with the empirical conditions in a group.

Condition 1 accentuates an obvious but nevertheless important point: We can only speak of the existence of a social rule as a normative standard if enough members of a population *understand* the difference between the descriptive meaning of factual statements and the deontic meaning of normative statements. People must know what it means that a standard *prescribes* or *proscribes* a behaviour, and they must be able to interpret its content and to identify the situations to which a standard applies—otherwise they would not at all be able to regulate their own behaviour and that of others by use of and reference to normative standards. In Hart’s words condition 1 demands that people are able to refer to the *internal aspect* of rules.

Conditions 2 and 3 are meant to explicate the internal point of view in its core sense. I split the concept into two separate issues for reasons which, hopefully, will soon become clear. Condition 2 is a partial reformulation of Hart’s claim that for a social rule to exist sufficiently many members of a group must ‘accept’ a rule as a normative standard to be followed by the group as a whole. The term ‘preference’ is used here in the wide sense to include wishes, aspirations and the volitions of persons. I replace the term ‘acceptance’ with the term ‘preference’, because analysing the attitudes and choices of individuals on the basis of their preferences increases the awareness of opportunity costs and draws attention to the comparative value of situations. The salience of an ‘acceptance’ can be revealed only if alternative options and their relative evaluation are known: I can ‘accept’ a rule in view of the danger of having no rule at all—but this preference does not exclude that I would prefer a situation even more in which a different kind of rule would exist or in which I personally can get rid of the burdens of following the rule myself.

Having said this, the crucial question is whether condition 2 can count as a logically necessary condition for the existence of social rules. To answer this question, we have to resume the initial discussion as to whether any plausible interpretation of the statement ‘normative standard *S* exists’ must refer to the empirical fact that people actually accept—or ‘prefer’ as we may now say—this normative standard as a standard for behaviour.

First, we must be aware that we are discussing this question from a sociological point of view. That means that the term ‘existence’ refers to ‘empirical existence’, i.e. existence as a ‘social fact’. Possible forms of a non-empirical ‘existence’ of rules are irrelevant from the perspective of descriptive social theory. This does not mean that a sociologist must deny the claims of natural law theories or ethical cognitivism that rules exist ‘objectively’ as metaphysical entities or that normative statements can be true or false. Even if claims like these are justified, rules do not come to the attention of a sociologist before they ‘bridge the gap’ to the empirical world of social practice. That does not exclude the possibility that people may believe that some rules exist ‘objectively’ or that it is ‘true’ that one should not behave in a certain manner. These kinds of normative beliefs may be strong motivational forces and important subjects of explanation. However, from an empirical point of view what exists are the *beliefs* and not the rules independently of those beliefs.

What can bridge the gap between ‘normativity’ and the empirical? Such a bridge is built by the preferences and wishes people have with regard to certain forms of behaviour by themselves or others (Kelsen 1949, 31ff.; Weinberger 1981, 67ff.). Preferences and wishes regarding behaviour are empirical facts. But the *meaning* of these preferences and wishes are normative standards: if I want you to act in a certain way, the meaning of my will is that you *should* act in a certain way. In this way normative standards as abstract, propositional entities can become part of the real world—they are ‘transported’ by the factual aspirations of people to shape and influence the behaviour of other people and their own. Or, to put it the other way round, because people factually *have* preferences and wishes with regard to their own behaviour and that of others, and because the meaning of these kind of preferences and volitions is a normative standard, normative standards could be more than ideal entities and become elements of the real world.

Hence the crucial difference between a rule ‘on the blackboard’ that can be the subject of an intellectual exercise, and an empirically existing rule is indeed the factual ‘acceptance’ of the second—to use Hart’s terminology once again. The special form of empirical existence of a normative standard ‘*a* should *ϕ*’ is the fact that it is the meaning of an actual preference, wish or will; its hour of birth is the moment in which at least one person as a ‘rule-author’ *wants a* to do *ϕ* and is disposed to use the statement ‘*a* should *ϕ*’ as a *norm-expressive* statement to verbalize his will—thereby imposing on *a* the role of a ‘rule-addressee’. Sociologists, by the way, implicitly use this conception if they, as they often do, use the term ‘expectation’ or ‘normative expectation’ to describe the conditions of existence for social rules.

Therefore, assuming that we argued convincingly for the ‘bridging principle’ that a plausible interpretation of the statement ‘normative standard *S* exists’ must refer to the empirical fact that people actually do prefer *S* as a normative standard, we hereby also approved that condition 2 can count as a logically necessary condition for a social rule to exist. As a social rule is addressed to all members of a social group so that an observer could state norm-descriptively

that the group as a whole should conform to this rule, there must be sufficiently many individuals who actually prefer the rule to be normative standard, at least for the other members of their group. This kind of ‘acceptance’ as a ‘distinctive normative attitude’ is indeed conceptually necessary to be able to speak of the existence of a social rule.

Condition 3 states that a sufficient number of members of a group have to prefer a social rule also as a normative standard for *themselves*. The fulfilment of this condition is, of course, *not* implied by the fulfilment of condition 2. Individuals as rule-authors can prefer all other members of their group to conform to a rule, whereas they themselves could deviate and disobey the rule. That does not mean that they will always be able to realise this preference—they would prefer such a situation, but the situation can be such that deviation would not be a sensible choice.

It is obvious that for Hart condition 3 is a constitutive element of the internal point of view. ‘Acceptance’ of a social rule as a normative standard *includes* for Hart to accept this standard as a guide to one’s own conduct. The preference of an individual to have all other members of a group conform to a rule must be accompanied by a preference for his own conformity to count fully as exemplification of an internal point of view. But as an internal point of view is actually composed of these different dimensions, we can analyse them one by one and ask in relation to each separate aspect whether it is a logically necessary condition for a social rule to exist. To use handy terminology we can call a preference according to condition 2 an ‘internal point of view in the *enforcement* sense’, and a preference in terms of condition 3 an ‘internal point of view in the *compliance* sense’.

Is condition 3—in addition to condition 2—also a logically necessary condition for the existence of a social rule as a normative standard? The crucial question is whether condition 3 adds an indispensable element for the truth of the norm-descriptive statement ‘the members of *G* should  $\phi$ ’. The answer is ‘no’: if enough individuals in *G* prefer other members of *G* to conform to a rule *R*, then *R* can be addressed to *everyone* in *G* because there can be a rule-author for every member of *G* who wants him or her to conform to *R*—even if *nobody* prefers *R* as a normative standard for himself. Therefore, the conceptual condition that we can speak of a social rule that demands that all individuals of a group ‘should’ act in a certain way is met already by the requirements of condition 2.

Hart himself implicitly ratifies this conclusion because he does not claim that an internal point of view must be shared by *all* members of a group. It follows from this concession that a social rule can also exist for people who do not accept this rule at all—*neither* in an ‘enforcement sense’ *nor* in a ‘compliance sense’. Nevertheless, we can still say that these people ‘should’ act in the way a social rule demands of them. But if ‘acceptance’ of a rule as a normative standard for one’s own behaviour is not a necessary condition for the existence of this rule, then this must also hold true for individuals in their role as rule-authors. They can make it a reality for other people to be obliged to act in a certain way without applying the standard to themselves. And they can use the normative ter-



minology of 'ought', 'must' and 'should' in the interaction with rule-addressees, criticise them for deviation and can agree that rules 'should' be normative standards for their group without adopting this point of view for their own individual behaviour.

To sum up, there is neither a logical reason why individuals could not at the same time be rule-authors and exclude themselves from the role of rule-addressees; nor is there a logical reason why, under such conditions, we could not speak of the existence of a social rule if the other conditions are fulfilled. It could be a situation in which, in fact, *all* members of a group would prefer all others except themselves to conform to a rule but in which, nevertheless, most or all of them would actually conform—for example because of the desire to please others or to enjoy their esteem, the incentives of reciprocal behaviour, a system of mutual sanctioning or the special authority or power of some of the group members. As long as there are rule-authors who want a rule to be followed as a normative standard, the minimal conceptual prerequisites for the existence of a social rule have been realised.

That does not imply that condition 3 that covers the internal point of view in the compliance sense is irrelevant. Its relevance becomes salient if we do not interpret it as a *logically* but *empirically* necessary condition for a social rule to exist. This thesis again has some plausibility and is worthwhile discussing. But before we do so, we should examine the claim that the *logically* necessary conditions to speak of the existence of a social rule exclude a rational choice theory of social rules.

#### **4. Social Rules and Rational Choice**

Condition 1 demands that an individual understands the deontic meaning of a normative standard, knows the difference between a prescription and a description and is able to identify situations in which a rule is applicable. The rational choice view of an actor does *not* exclude such an understanding of the *internal aspect* of a rule and the different properties of 'is' and 'ought statements'. A rational actor will recognize if other actors prefer him to act in a certain way—for example, to cooperate instead of defecting—and will understand that these actors do not believe that he actually *will* act in a certain way but that he *should* act according to their wishes. He will be able to grasp the meaning of a 'norm-expressive' statement in which they may communicate their will to him. It is also obvious *vice versa* that in many situations a rational actor himself will have the wish and the preference that other individuals act in a certain manner—and he will be likewise able to understand that to communicate his intentions to them means to express that they *should* act in a certain manner, in contrast to just stating his empirical expectations about their actual behaviour. Moreover, there is nothing that would inhibit a rational actor from expressing his wishes by using the 'normative language' of 'ought', 'should' and 'must', 'right' and 'wrong'—because it is the very language that communicates to others the

meaning and content of his wishes as a precondition that they actually can fulfil his aspirations.

Certainly, the fact *alone* that other individuals want an actor to conform to a rule and insofar should act in a certain way does *not* as such create additional incentives on the side of a *homo oeconomicus* who acts straightforwardly according to the principles of expedient choice. The fact alone that he ‘should’ act in a certain way has no genuine motivational force for him, it is *not* an independent reason for acting as long as the preferences of other people are not transformed into external constraints and change his expected payoffs. But a rational actor could be motivated very strongly by the *actions* that rule-authors may perform as a consequence of their preferences, and he may interpret their wants and wishes as indicators of their probable behaviour.

From the perspective of a rule-author, of course, things look different: *if* a rational actor has the preference that other persons act in a certain way, he *has* a good *prima facie* reason to be motivated by this fact and to act according to his wishes—given that in view of the situational restrictions such acting is a utility-maximising choice for him. However, a rationally acting rule-author can express that a rule-addressee should act in a certain way and he can try to enforce his will without putting himself into the shoes of a rule-addressee or being motivated himself to conform to the rule.

This leads to condition 2, the *internal point of view in the enforcement sense*. This condition states that an individual prefers a rule as a normative standard for other members of his group—but not necessarily also for himself. It is evident that a preference of this kind is perfectly compatible with preferences that rational utility-maximisers reveal in many situations. The ‘classical’ examples are situations with the incentive structure of a Prisoner’s Dilemma (PD). In PD-situations a rational actor will prefer mutual cooperation to mutual defection or, to put it into the terminology of rules, he will prefer general conformity to a rule that prescribes cooperation to general deviation from such a rule—however, as a consequence of his opportunism he would prefer even more if all others conformed to this rule and he himself could deviate and hence be free from the costs of conformity. That does not exclude the possibility that a rule of cooperation can evolve with a high degree of general conformity. Even if all individuals ultimately preferred unilateral deviation, there are several mechanisms that could, nonetheless, produce reciprocal rule following. Rational choice theory offers quite a well-equipped toolbox of instruments by which rational actors—given appropriate empirical conditions—can induce effective incentives to conform to social rules, so that mutual conformity and not mutual deviation becomes the equilibrium.

But the important conclusion here is conceptual and not empirical: if it is indeed obvious that a rational utility-maximiser is predestined to be a rule-author because as a thoroughly self-interested actor he is predestined to wish that other people should act in a way to serve his personal interests, then it is indeed nearly trivial that he will regularly fulfil condition 2. The world of rational utility-maximisers will be full of social rules in which this condition is satisfied—and in

which, indeed, *all* members of a group could fulfil this condition without one of them accepting a rule as a normative standard for his own behaviour. Nevertheless, we can say that, as rule-authors, they take an internal point of view—in the enforcement sense—and adopt a ‘distinctive normative attitude of acceptance’: if they want a rule to be followed, they will express that people ‘should’, ‘ought’ or ‘must’ behave in a certain way and “for them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility”. The rule—or rather their preferences and their wishes—will be a basis for claims, demands for conformity, criticism and punishment of deviation. And, as in PD-situations, they could even express their preference for mutual conformity to mutual deviation, or to use Hart’s words, they could look upon the behaviour in question as a general standard to be followed by the group as a whole.

Thus a rational choice explanation can also cope with Hart’s justified claim that there could not logically be any social rules if all members of a group look upon the behaviour in question merely as an option that must be judged according to its pleasant or unpleasant consequences—or, to put the same issue differently, if all members of a group act only as rule-addressees and not as rule-authors. But rational actors could very well differentiate between consequences of their own behaviour and consequences of the behaviour of others, and if they are in the role of rule-authors, they do not judge a prescribed behaviour according to the pleasant or unpleasant consequences it would have if they performed this behaviour themselves, but according to the pleasant or unpleasant consequences it would have if *others* performed this behaviour. Acting as rule-author and using normative standards as guides to the conduct of social life does not exclude consequence-driven decisions. Rational and opportunistic actors are not restricted to an external point of view “which limits itself to the observable regularities of behaviour”—instead they can use normative standards to *produce* observable regularities of behaviour.

We can conclude that the conceptual conditions for a social rule to exist do *not* logically exclude a rational choice explanation. Hart is right that it is a conceptual truth that the existence of a social rule implies reference to an internal point of view—but, as shown, only in the *enforcement* sense, which seems to fit easily with a rational actor approach.

However, as already announced, we can interpret Hart’s claim that a ‘full’ internal point of view—in the *enforcement* as well as in the *compliance* sense—is a necessary condition for a social rule to exist as the *empirical* hypothesis that at least a relevant subset of a group must accept a rule as a normative standard for their own behaviour to ensure a sufficient level of compliance. It could be a *fact* that social rules cannot evolve and exist if *all* members of a group as rule-addressees reveal an ultimate preference for deviation.

Would this additional requirement preclude a rational choice explanation? First of all, as Hart emphasizes himself, especially in the *Postscript*, the ‘acceptance’ of a rule as a normative standard for one’s own behaviour must *not* reflect an *unconditional* commitment or a *categorical* ‘bond’ to a rule. According to Hart

an internal point of view is compatible with the proviso to conform to a rule only on condition that enough other members of a group conform to the rule as well: the “general conformity of a group” can be “part of the reasons which its individual members have for acceptance” (255). Therefore, the first question to discuss is whether an internal point of view that is based on this kind of conditional rule-conformity is compatible with a rational choice approach.

Hart’s initial illustration of an internal point of view proves just that. The initial illustration is *playing chess* (57): if people want to play chess they want their partner to conform to the rules of chess playing and they prefer to conform to these rules themselves—and they use these rules to evaluate their own behaviour and the behaviour of others. But this phenomenon does not confront rational choice theory with a significant explanatory challenge: *homo oeconomicus* is able to play chess!

*Homo oeconomicus* is able to play chess because he can maintain *coordination*. A state of coordination can be characterized, firstly, by the fact that there is not only one possibility to coordinate the actions of individuals, but that all persons involved prefer coordination of their actions to non-coordination; and, secondly, that successful coordination is an equilibrium so that everyone prefers to stick with the common practice as long as the others do as well—or, to phrase it in the terminology we have used so far: individuals prefer a coordinating rule as a normative standard for their own behaviour on the condition that sufficiently many others also conform to this rule. The payoff structure in such situations does not allow single actors to make themselves better off by unilateral deviation. Consequently, if a social rule solves a coordination problem, then rational actors will have an incentive to adopt an internal point of view also in the compliance sense—as a strategy of *conditional* compliance—and the rule will be self-sustaining as a normative standard for ‘the group as a whole’. For each individual the rule will be an effective *reason* to act: the rule ‘you should drive on the left side of the road’ is a reason to drive on the left side of the road as long as an individual believes that other road users also act according to that rule and drive on the left.

Hence the decision to promote, enforce *and follow* a coordinating rule as a general standard for a group is not alien to individuals who strive to maximize their personal utility. If social rules solve coordination problems, then they are not dependent on artificial extrinsic incentives or on utility-dominating intrinsic motivation: individuals who are only interested in the expected pleasant or unpleasant consequences of their actions will follow coordinating rules out of self-interest and rational calculation of their payoffs and will use them as guidelines for their own conduct—it will be ‘right’ for them to conform, and ‘wrong’ to defect, and they can state that they themselves *should* do as the rules prescribe.

To illustrate the nature of social rules with the example of rules for games or traffic rules, as Hart often does, is, however, misleading in some respect. Many social rules are embedded in a different setting: the paradigmatic situation that creates a demand for social rules is *not* a situation that is just in need of coordination but a situation that is marked by a cooperation problem with a mixed-

motive structure of conflict and consent like—typically—a Prisoner’s Dilemma. PD-situations are situations in which—like in situations characterised by a coordination problem—individuals prefer mutual cooperation to mutual defection but in which they also—in contrast to a coordination problem—prefer unilateral defection. Consequently, in a PD-situation a rule that prescribes cooperation does not create a self-sustaining equilibrium like rules that designate the solution for a coordination problem.

Core social rules—like the ones Hart mentions himself as a minimum content of a secularized ‘natural law’ (185ff.)—that forbid killing, robbing, stealing, betraying, insulting, lying and the breach of promises or contracts, are rules that in the first place do not emerge as reactions to coordination problems but as reactions to negative externalities of certain actions and temptations to act at the expense of other people. These rules initially demand a sacrifice from the rule-addressees and impose costs on them. And they are not ‘conventional’ as their content is not arbitrary like driving on the right *or* on the left.

To account for these additional complexities must not undermine a rational choice explanation of social rules that includes an internal point of view in the compliance sense. It is true that in PD-situations rational actors would have *no* incentives to accept a rule as normative standard for their own behaviour, because even and especially if all others conformed to the rule, it would be advantageous for them to deviate. However, empirical conditions can prevail that *transform* the original cooperation problem into a less demanding coordination problem. This can be accomplished in iterated PD-situations when interactions are repeated between actors who recognise each other and remember the history of their interchange, or if information of their behaviour is spread through informational networks that communicate the reputation of persons to third parties. Under circumstances like these, conditional cooperation can become an expedient choice and a social rule can help to solve the remaining coordination problem of selecting a particular equilibrium strategy to secure reciprocal expectations.

The upshot is: if it were indeed an empirically necessary condition that the stable existence of social rules is dependent on a conditional preference for rule-conformity, then this would *restrict* the possible empirical circumstances under which rational actors could establish social rules, but it would not *exclude* a rational explanation of social rules in principle. However, this compatibility is dependent on certain empirical circumstances and the robustness of the emerging social rules will be limited because the ultimate preferences of the actors remain unchanged: they would still prefer a situation in which they could deviate while others are conforming. This preference would become effective if appropriate opportunities opened up—for example, if one’s action remained undisclosed or were insignificant for the aggregated result. One could suspect that the empirical preconditions under which a rational actor would choose an internal point of view in the compliance sense would be too restrictive in many cases for a rational choice explanation of social rules.

It is, therefore, not so far-fetched to imagine situations in which an attitude of conditional cooperation could *not* be explained from a rational choice perspective—and under which, on the other hand, the hypothesis that social rules can only exist if enough individuals are conditional rule-followers would be especially plausible. This would be the case if it is *not* possible to transform cooperation problems into coordination problems because too much mobility undermines the continuity of relations and interactions, too much anonymity prevents the monitoring of actions, or large numbers devalue individual contributions to public goods or produce cascades of defection. Under these circumstances, to conform to a rule on condition that others do as well would *not* be a rational, utility-maximising decision (Baurmann and Kliemt 1995).

Attitudes of conditional compliance under these conditions could nevertheless secure the existence of social rules if sufficiently many members of a group preserved these attitudes against the temptation to deviate and defect. In fact, such an attitude as a preference for mutual conformity to unilateral deviation would also have the potential to transform cooperation problems into coordination problems (Bicchieri 2006, 26f.)—but this time as the result of an *intrinsic motivation* for conditional cooperation and not on the basis of *extrinsic incentives* that make conditional cooperation an advantageous strategy. Thus, this ‘solution’ is no longer compatible with a rational choice approach. We can call such an ‘a-rational’ attitude of conditional cooperation an internal point of view in the *commitment* sense because it presupposes a ‘commitment’ to a normative standard independent of the fact whether conformity to this standard is an expedient choice or not.

We could go further and speculate about an even stronger version of an internal point of view in a *categorical* sense—meaning that individuals are motivated to conform *unconditionally* to a social rule, irrespective of whether others conform to it or not and irrespective of whether it is an advantageous strategy or not. Such a categorical commitment could be empirically necessary for the existence of a social rule if it were typical for rule-addressees to have notoriously insufficient information about the behaviour of others, if unconditional compliance were necessary to start the emergence of social rules, or if actors were not able to solve certain coordination problems without at least some of them practising categorical conformity to a rule (Lahno 2009).

## 5. Rules of Recognition and the Internal Point of View

When Hart turns to the foundations of a legal system, he claims that a *rule of recognition* as the ultimate rule of a legal system is a paradigmatically clear instance of a rule that only exists if sufficiently many members of a group adopt an internal point of view: “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.” (102) The statement ‘it is the law that ...’ is an example of one assessing a situation by reference to rules which one acknowledges ‘as appropriate for this purpose’. Hart calls this 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” (102). The difference between internal and external statements is for Hart especially salient “when we consider how the judge’s own statement that a particular rule is valid functions in judicial decision; [...] he plainly is not concerned to predict his own or another’s official action. His statement that a rule is valid is an internal statement recognizing that the rule satisfies the test 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.” (105)

In his summary of the role of the internal point of view in a legal system, Hart resumes that the officials and especially the courts must regard the ultimate rule of recognition “from the internal point of view as a public, common standard of correct judicial decision, and not as something which each judge merely obeys for his part only” (116). And Hart emphasizes explicitly that “*this is not merely a matter of the efficiency or health of the legal system, but is logically a necessary condition of our ability to speak of the existence of a single legal system*”. He continues with the explanation that “if 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” (116).

In reconstructing Hart’s arguments I will start with his fundamental assumption that to speak of the existence of a single legal system presupposes the existence of an ultimate rule of recognition. Accordingly the conditions for a rule of recognition to exist are closely intertwined with the conditions for a legal system to exist—while it is crucial to consider the different existence conditions for a rule of recognition and other rules of a legal system. The validity and existence of subordinated legal rules is based on a rule of recognition as the ‘highest’ rule of a legal system, but the existence of a rule of recognition itself, that is one of Hart’s central claims, can be based only on non-legal factors, on a certain form of *social practice*—in this respect a rule of recognition is an element of a subclass of *social* rules with special features. The question to be discussed is whether these special features imply new dimensions for our discussion. Does Hart’s analysis of the structure of a legal system shed new light on the salience and characteristics of an internal point of view?

One new aspect could be associated with the concept of an ‘internal statement’ that Hart coins to capture the unique way in which members of a legal system use a rule of recognition to identify other rules of the system. The distinctive feature of an internal statement is associated with the fact that a rule of recognition is a secondary rule which does not seem to prescribe a certain kind

of *action* but establishes criteria to *identify other rules* as valid. The statement that a rule is valid—‘it is the law that ...’—is a statement recognising that the rule satisfies the test for identifying what is to be counted as law. Those who use rules of recognition in this way *thereby*—according to Hart—manifest their own acceptance of them as guiding rules and as common standards of correct judicial decision and not as something which they merely obey for their part only.

To assess this argument we have to clarify the deontic meaning of a rule of recognition. The example ‘what the Queen in Parliament enacts is law’ indicates a central point: a rule of recognition is, at least in all developed and dynamic legal systems, a *power-conferring rule* that *authorises* certain actors to be legal rule-authors, or ‘legislators’ (Kelsen 1949, 110ff.). Hence, the deontic meaning of a rule of recognition is the deontic meaning of a power-conferring rule. This meaning becomes clear if we examine the hierarchical structure of a legal system: a law as a primary rule is a normative standard demanding that people should behave in a certain manner. If a power-conferring rule as a—secondary—rule of recognition determines what counts as valid laws, it determines under what conditions people should actually do what a primary rule demands—and the condition it states is that the rule was enacted by a certain legislator *L* as an authorised source of law. By enacting laws, legislators express their will that people should conform to the rules which are embodied in these laws. Therefore, the deontic meaning of a power-conferring rule is that individuals should act as the authorised actor wants them to act: ‘*a* should  $\phi$  if *L* wants *a* to  $\phi$ ’. If the validity of a primary rule is based on its deduction from a power-conferring rule, it demands conformity on condition that it expresses the will of a certain authority which is designated by the power-conferring rule (Weinberger 1981, 60ff.; Baurmann 2000).

On this basis we can return to the analysis of an *internal statement* that is based on a rule of recognition. Suppose a judge declares that in a certain case ‘it is law that Mr. Smith has to be sent to prison for two years’. What could be the content of the law to which the judge refers in this internal statement? For example: ‘anyone who steals should be sent to prison for two years.’ In declaring that Mr. Smith has to be sent to prison for two years, the judge follows the prescription of the law and applies it to a certain case. His doing so is normally the result of the fact that he applies another, a secondary rule, namely the rule of recognition that defines which primary rules count as valid laws—and, as a power-conferring rule, it is defining valid laws by prescribing that judges and other officials should decide according to the will of the legislator.

But under these conditions the internal statement of a judge expressing that a particular rule is valid and that ‘it is the law that ...’ can just be a result of his *rule-obeying behaviour* and a consequence of the fact that he conforms to the rule of recognition which demands that he should act according to the will of the legislator. We can, notwithstanding, still agree with Hart: ‘His statement that a rule is valid is an internal statement recognizing that the rule satisfies the test 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.’ And, of course, the



judge must refer to the *internal aspect* of rules as normative standards and must understand their deontic meaning to assess whether they are ‘appropriate for a certain purpose’ and to draw the correct normative conclusions in regard to the facts of the case before him—but all this does *not* prove that judges who are acting in this way ‘thereby’ manifest their own *acceptance* of the rule of recognition! They have to adopt the *cognitive* attitude of a ‘hermeneutic point of view’ (MacCormick 2008, 53ff.) but *not* the *volitional* attitude of an internal point of view to follow and to apply a rule of recognition and to discover whether certain primary rules satisfy the criteria for valid laws or not.

To subordinate oneself under the will of a legislator because it is demanded by a rule of recognition does not, therefore, *logically* imply that a judge or official must think that “what he does is the right thing both for himself and for others to do” (115). Also judges who abide by a rule of recognition only reluctantly because they would prefer a different constitutional set up and are only concerned with the material and social benefits of their professional role could understand that a rule of recognition applies to certain cases and can, in following this rule for extrinsic incentives, state ‘it is law that . . .’. Contradicting Hart, it *is*—logically—possible that the attitude of a judge—indeed of *all* judges—can be restricted to the external point of view that a rule of recognition is only “something demanding action from *him* under threat of penalty; he may obey it out of fear of the consequences, or from inertia, without thinking of himself or others as having an obligation to do so and without being disposed to criticize either himself or others for deviations.” (115) A judge *can* see the rule of recognition only as something demanding action from him, and the reason for his obedience could be merely a calculation of the cost-benefit ratio of his options and the amount of his pay checks. Thus there is no essential difference between a judge and other rule-addressees—the difference is only that, in his case, the prescribed action consists in applying a secondary rule first to identify the primary rule he has to follow.

Of course, as in the case of other social rules as well, a rule of recognition cannot exist as a normative standard in a group if *all* members of a legal community only act as rule-addressees and not as rule-authors. There must be a sufficiently large subgroup who prefer the rule of recognition as the normative standard of correct judicial decision at least for other members of the legal community—who adopt an internal point of view in the *enforcement* sense. This demand will be primarily addressed to judges and other officials of the legal system: obviously it is true that a legal system which is integrated by a rule of recognition can only exist if most of the judges and other officials are ready to follow this rule—for whatever reasons.

The dissemination of an internal point of view in the enforcement sense is thus, once again, a conceptual condition, logically connected with the existence of a rule of recognition as a normative standard. But, as it is true of social rules in general, this condition does not imply an internal point of view in the compliance sense, meaning that members of a legal community must prefer a rule of recognition as normative standard for their own behaviour. One could imagine

a legal system in which all judges prefer a certain rule of recognition as a common standard but try to deviate from it if there is a chance to realise some extra gains. Nevertheless, it could be stated that a rule of recognition exists in this legal community. Moreover, it is logically and indeed also empirically conceivable that the unity and continuity of a legal system can be ensured even against the preferences and convictions of judges and other administrative officials. A small group of powerful political actors can enforce a rule of recognition—‘*der Führerwille ist die höchste Rechtsquelle*’—and create a system of control and oppression in which courts and other legal institutions obey this rule from an external point of view for prudential reasons only: because they are afraid of social pressure, punishment or other disadvantages. As the experience with authoritarian systems proves, it is absolutely possible that a legal system including an effective rule of recognition can exist even when every judge merely obeys ‘for his part only’.

But even under such conditions, it is still true that a judge would not use the rule of recognition in court to *predict* his own or others’ official actions. His statement that a rule is valid law remains an internal statement referring to the internal aspect of rules and recognising that a rule satisfies the test for identifying what is to count as law in his court, it still would not constitute a prophecy but a *reason* for his decision. He will understand and use the rule of recognition from a ‘hermeneutic point of view’ as a normative standard—even if he follows the rule against his preferences and convictions.

So far Hart’s assumption that more than an internal point of view in the enforcement sense is logically a necessary precondition of being able to speak of the existence of a single legal system seems to be refuted: for the existence of a rule of recognition the same conceptual conditions are necessary as in the case of a social rule in general—in *this respect* we are in line with Hart. But again, as in the general case, we can treat Hart’s point as a hypothesis that an internal point of view in the compliance sense is *empirically* a necessary condition for the existence of at least some legal systems. I will come back to this point soon.

## 6. Rules of Recognition and Rational Choice

If we check whether the conceptual requirements for a rule of recognition are compatible with a rational choice approach we could recapitulate, *mutatis mutandis*, the arguments already developed in the general case. To start with, there is no reason why a rational utility-maximiser should not understand the deontic meaning of a power-conferring rule: *homo oeconomicus* is not only able to play chess, he can also play soccer and understand that the rule which empowers a person as a referee demands that the players act according to the will of the referee. If rational actors are addressees of a rule of recognition of a legal system, they will comprehend that this rule prescribes that they should do  $\phi$  if the legislator wants them to do  $\phi$ . If they are rule-authors, they will know that they can express their preference that a certain actor is legislator by invoking

the rule ‘all members of  $G$  should  $\phi$  if  $L$  wants the members of  $G$  to  $\phi$ ’. There is nothing inherent in the rational actor model that prevents the attribution of a ‘hermeneutic’ ability to understand the deontic meaning of power-conferring rules to a rational actor.

Additionally, it seems to be obvious that rational and self-interested actors can have preferences for power-conferring rules as well as preferences for certain primary social rules—the fact that preferences for power-conferring rules are quite congruent with rationality and self-interest has already been established by Hobbes. It is a trivial truth that under quite common circumstances it is in the fundamental interest of individuals to establish an authority in their group who has the power of collective decision-making and is able to enact binding rules that are effectively followed. Authoritative coordination can have a greater expected utility than spontaneous regulation processes. According to Hart, a rule of recognition is first of all a therapy for the disease of uncertainty about the content and scope of the rules of a group (92)—and a situation of uncertainty about which rule is valid, under which condition a rule will be enforced and when one has to expect sanctions is, of course, also a problematical situation for rational utility-maximisers for whom the ability to form reliable expectations of their future is of substantial importance.

Moreover, rational utility-maximisers will not be indifferent regarding the content of a rule of recognition and can have good reasons to prefer a rule of recognition that demands of judges and other officials to follow the will of a ‘legitimised’ legislator and not their personal proclivities and convictions (Baumann 1996, 129ff.). A preference to live under a rule of law is nothing alien to rational actors—even if they secretly wish that they themselves may have the opportunity to evade the demands of law’s authority. In addition, a preference for a certain rule of recognition must not include unrestrained and ‘whole-hearted’ acceptance—such a preference can be stable if alternative and superior rules are hard to realise and if the costs for a ‘constitutional change’ are too high. Acquiescence instead of agreement could be sufficient if the difficulties of re-coordinating on an alternative arrangement are prohibitive (Hardin 1999, 141ff.).

It is likewise not such an extraordinary challenge for rational choice theory to explain legal systems in authoritarian regimes in which a rule of recognition in the particular interest of a ruling oligarchy can—possibly in a pact with certain other elites in the population (Weingast 1997)—be enforced by oppression and coercion against the large majority of the rest of society including most of the judges and other administrative officials. An internal point of view in the enforcement sense would, under such circumstances, be limited to a small subgroup of a society who themselves enjoy the privilege of being in the role of rule-authors only and are dispensed from the duties they impose on others. If it were true, as Gordon Tullock once put it, that from the perspective of rational choice theory the equilibrium of human society eventually is despotism (Tullock 1987, 190) then it would be anyway the most plausible outcome for rational choice explanations of legal systems that an internal point of view in the

enforcement sense is regularly detached from an internal point of view in the compliance sense.

In summary, also in the case of a rule of recognition, the conceptual conditions for the existence of such a rule do *not* logically exclude a rational choice approach. Just as with the existence of social rules in general, the existence of a rule of recognition implies reference to an internal point of view in the *enforcement* sense which is compatible with a rational explanation on the basis of the preferences of utility-maximising actors. But again, we can treat Hart's stronger claim about the necessity of an internal point of view in the compliance sense as an *empirical* hypothesis about the existence conditions for legal systems. If such an assumption were true, then at least a relevant subset of a legal community must accept a rule of recognition as a normative standard for their own behaviour to ensure its existence and, by that, the existence of the whole legal order.

Would the truth of this hypothesis subvert a rational choice explanation? To begin with, it has to be conceded that its truth seems to be quite plausible, at least for a rule of law in non-dictatorial regimes. It is hard to imagine that a complex and well-ordered legal system can survive and keep its unity if all members of this system reveal a preference to individually defect from its rules, irrespective of whether the other members conform to them or not. It may be possible, as already noted, that a cleverly ruled authoritarian regime or a dictatorship by a trickily designed system of sanctioning and an artificially created 'pluralistic ignorance' could effectively confer power to a ruler even if everybody in this system were to use all opportunities to realise some extra personal gains. But if we look at legal systems with a stable rule of law, such a constellation seems highly unlikely as such systems usually work efficiently without an elaborate system of complete control and omnipresent sanctions (Baurmann 1996, 261ff.).

However, the requirement of an internal point of view in the compliance sense does not exclude a rational choice explanation, neither in regard to rules of recognition. Equally as in the case of other rules, rational utility-maximisers will prefer rules of recognition as normative standards for their own behaviour if these rules solve *coordination problems*.<sup>2</sup> As already emphasized, the essential quality of a solution of a coordination problem is the fact that actors have incentives to abide by a common practice as long as others behave accordingly.

Now, in the case of a rule of recognition, it is actually even more plausible than in the case of primary social rules that such a rule could indeed have the function of solving coordination problems. As was pointed out earlier, many important primary social rules are initially confronted with cooperation problems

<sup>2</sup> The assumption that rules of recognition solve coordination problems is—explicitly or implicitly—part of the co-called 'conventionality-thesis' which claims that a rule of recognition exists as a "coordination convention" (Coleman, J. 2001; Lagerspetz 1995; Postema 1982) or a "constitutive convention" (Marmor 2001). According to Julie Dickson's thorough analysis, Hart's own position changes from his original account in the 1<sup>st</sup> edition of the *Concept of Law* in which nothing supports the idea "that Hart understood the rule of recognition as a conventional rule" (Dickson 2007, 381) to a "conventionalist turn" in the *Postscript* of the 2<sup>nd</sup> edition.

in which incentive structures favour defection. Even if these situations are embedded in empirical conditions that convert them into coordination problems, the underlying preferences for unilateral deviation survive under the surface of mutual cooperation and endanger the stability of social rules.

This could be different in the case of rules of recognition. Such rules can function from the outset as solutions to coordination problems that unambiguously reward conditional conformity to a common practice. We can illustrate this with the situation of judges and other state officials who play a key role in the enforcement and execution of the laws of a legal community. Without a rule of recognition that fixes an authoritative source for valid laws, judges and other officials would figure out by themselves according to their own judgement and personal evaluation which rules 'exist' in their community that they should back with formal sanctions and enforce as laws. These unofficial rules would not form a coherent system, but would give cause for concern about their exact content and scope, and stable mutual expectations would be hardly attainable. A rule of recognition is the instrument, as Hart emphasises, to *overcome* this uncertainty (92).

For actors who are in the role of applying and executing the law, an elimination of uncertainty through a rule of recognition would be a solution to a coordination problem if two conditions are met: first, they prefer a rule of recognition as a normative standard for legal validity in their group as a whole to overcome the *general* problem of uncertainty. Second, they prefer a rule of recognition as normative standard for their own judgements to resolve the *individual* problem of uncertainty. Uncertainty can be experienced as an individual problem by judges or other official executioners of law because uncertainty about which rule is valid law complicates the fulfilment of their professional roles and involves additional personal efforts and risks. To abide by a rule of recognition as a normative standard for legal validity can significantly reduce decision costs in identifying and executing laws and also substantially weaken personal accountability and responsibility for legal judgements. Under these conditions, judges and other executioners of law can have prudential reasons to follow a rule of recognition that authorises a legislator and fixes sufficiently clear criteria for legal validity—given that this is a common practice and sufficiently many other members of a legal community confirm, support and carry out decisions according to this rule as well.

Therefore, as long as a rule of recognition is firmly embedded in a social practice, it could quite well be imagined that judges and administrative officials would have no additional advantage if they did not use this rule as an instrument to identify valid laws and apply them to the cases in front of them. The chances, therefore, are not so bad that rational choice theory can explain the existence and unity of a legal system even if it is empirically a necessary condition that a relevant subset of members of the legal system act as conditional rule-followers.

However, even in the case of a legal system, it could be possible that an internal point of view in the compliance sense is *not* sufficient and that an internal point of view in the commitment or even in the categorical sense is an empirically necessary condition for a rule of recognition and a legal system to exist. This could be the case, for example, if the “veil of insignificance” (Kliemt 1986) or the ‘veil of anonymity’ is so opaque that judges and other officials regularly face substantial incentives to deviate from the rule of recognition because they can expect to realise additional advantages or relief. Under such circumstances, conditional or categorical ‘commitment’ would be required to overrule utility-maximisation and temptations to escape from law’s empire. It could also be possible that already the general acceptance of a rule of recognition as a common standard for a legal community would have to be based on ‘ideal values’ that transcend individual interests because, for example, the participants in constitutional choice must take into consideration the interests of others to vote for a legal system that includes principles of fairness, impartiality and justice.—But these are questions beyond the scope of this paper.

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