

LAW ACTUALLY: PRACTICAL REASON, ANARCHISM AND THE LEGAL RULE-COMPLIANCE PHENOMENON

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ABSTRACT

Law transforms our lives in the most important way: it changes how we act and because of this it gives rise to fundamental questions. One such question concerns legal authority and individual autonomy and asks; if we are autonomous agents how do legislators, judges and officials have legitimate authority to change our actions and indirectly change how we conduct our lives? The strategy of this article is to focus on the agent, i.e. the addressee of the legal command or directive who performs the action requested by the legal official. This strategy is bottom-up, from the level of agency and practical reason to the justificatory framework of authority.

Keywords: Individual Autonomy. Legal authority. Compliance Phenomenon.

1 INTRODUCTION

Law transforms our lives in the most important way: it changes how we act and because of this it gives rise to fundamental questions. One such question concerns legal authority and individual autonomy and asks; if we are autonomous agents how do legislators, judges and officials have legitimate authority to change our actions and indirectly change how we conduct our lives? We conceive ourselves as active agents who determine how and when to act, and we conceive ourselves as the planners of our own lives and the creators of change. Law asks us, however, to perform actions that range from the trivial to the complex. Law requires us, for example, to: stop at traffic lights; park our vehicles in specially allocated areas; exercise our professional judgment in a responsible and non-negligent manner; pay our taxes; recycle our rubbish and so on. Law asks us to perform innumerable tasks, almost all of which we perform intentionally and in full awareness. But how is it possible for me to do, in full awareness, as the law asks and, at the same time, be in control?

But how is control possible when I am simply trying to conform with what the law says? This means, I am trying to follow what the law

says without giving much thought or without engaging my will or intention.

Legal and political philosophers have tended to examine legal authority and autonomy and have consequently put forward the following questions: a) Can there ever be legitimate authority? b) What are the conditions of legitimate authority?; and c) Does the possibility of legitimate authority diminish or assuage the antagonism between authority and autonomy?

I find that posing the problem and the questions in this way is unsatisfactory because it presupposes what we need to explain, i.e. the nature of authority and whether there is a 'genuine' antagonism between autonomy and legal authority. Within this framework authority is given, and the starting point of the theorist is the following statement: If there is a legitimate authority then conditions x, y, and z need to be fulfilled, but it is not shown how there is or whether there could be something such as legitimate authority. The received view begins by recognising the phenomenological fact that legal officials and authorities issue commands and directives. It is usually said that if authorities have the right to command and addressees the duty to obey, then the officials have legitimate authority.

Theorists usually argue in favour of a particular political theory, for example liberalism or perfectionism, and engage with a set of key values, for instance expert knowledge or democratic values that provide the grounds for 'rights' and 'duties' and that enable us to grasp the conditions of legitimate authority. The traditional strategy, therefore, begins top-down from a plausible view on political theory that leads to the framework that justifies authority. There is no doubt that the traditional strategy has provided us with a rich understanding that has advanced our grasp of the normative conditions that make possible legitimate legal authority. However, the traditional strategy fails to provide a microscopic view of the phenomenon of legal authority and falls short of explaining how legal authority truly operates on individual human beings.

By contrast, the strategy of this article is to focus on the agent, i.e. the addressee of the legal command or directive who performs the action requested by the legal official. This strategy is bottom-up, from the level of agency and practical reason to the justificatory framework of authority. It also begins with the naive phenomenological observation that X commands Y to perform the action ϕ . Thus it is intelligible to us that Y performs the action p as requested by X. The key question that this article aims to investigate is how a legal command or directive, *just because* it is a legal command or directive, effectively changes the agent's course of action. A set of sub-questions arise: Does the command intervene in the practical reasoning of the agent or addressee? If this is the case, how does this intervention operate? Moreover, what are the limits of our phenomenological observations, in other words can I truly observe that you are performing an action because you are complying with a legal directive or command? What happens in the agent that enables her to comply with the legal command or directive? When we perform an action because we are complying with the legal command or directive, are we still active, self-governed autonomous agents? In what sense are we still autonomous agents? The task is to explain what legal authority is and the premise of the study is that this question can only be answered through understanding of how legal authority operates upon the agent: if we recognise that legal commands or directives intervene upon, affect and change the agent's practical reasoning, then we need to understand and explain how this happens.

Answering the question above raises other, difficult, questions however. For instance we quickly come to see that the question of legal authority is closely tied up with the issue of the normativity of law. Raz¹, for example, has asserted that to understand what normativity is, we need to understand what reasons for actions are.² But reasons for action are not 'free-standing' reasons in the world where agents play no role, they do not stand independently of the agents and their practical reasoning. The philosophical literature on reasons for action is vast and for the last thirty years philosophical studies have focused on the notion of reasons for actions, but few philosophers have concentrated on the nature and structure of practical reason.³ Paraphrasing Raz, understanding the nature of legal normativity involves understanding the nature and structure of practical reason in the context of the law.⁴ We have, now, two very closely related issues. The point can be summarised as this: if we are able to understand how practical reason under legal commands, directives and rules operates, and how practical reason operates by following reasons for actions, then we can fully grasp the nature of legal authority and legal normativity. There will be paradigmatic cases⁵ of legitimate legal authority, but we also aim to explain cases of legal authority where there is only 'apparent' legitimacy.

The paper focuses on unpacking the nature and structure of practical reason so that it may shed light on the phenomenon of legal authority and normativity. I defend the classical view of practical reason and focus on the philosophy of actions of Aristotle and Anscombe.

I begin by examining the "anarchist" view as formulated by Wolff who aims to show that there can never be legitimate authority since this

- 1 RAZ, Joseph. *Engaging Reason*. Oxford: Oxford University Press, 1999. p. 67.
- 2 I will use 'reasons in action' and 'reasons for action' interchangeably. At the end of the article it will become clear the reason for this interchange of terminology.
- 3 For some exceptions, see VELLEMAN, D., *Practical Reflection*. Princeton: Princeton University Press, 1989 and *The Possibility of Practical Reason*. Oxford: Oxford University Press, 2000, Korsgaard, C., *Sources of Normativity*. Cambridge: Cambridge University Press, 1996) and *Self-Constitution: Agency, Identity and Integrity* (Oxford: Oxford University Press, 2009).
- 4 RAZ, Joseph. *Engaging Reason*. Oxford: Oxford University Press, 1999. p. 67.
- 5 The notion of paradigm follows the idea of core-resemblance that is defended in my article 'Is Finnis Wrong?' (2007) 13 *Legal Theory*, 257.

inevitably undermines our autonomy. We are then faced with two irreconcilable options: if we recognise that the State can have authority on us, then we need to give up the idea that we are autonomous agents, but we cannot give up this idea because it will involve the absurd view that we are not responsible. We, therefore, give up the idea that is least threatening to our self-understanding, i.e. that the State has authority over us. In §1.I show that the view of authoritative commands as advanced by Wolff is implausible, but the details of this argument depend on the account of intentional action and practical reason that I defend in §1.2. At the heart of the matter is the idea that the structure of practical reason and the structure of intentional action run parallel and that we cannot access the latter without accessing the former. If we fail to understand the form or structure of intentional action, intentions and reasons in action, then we fail to identify the form of practical reason.

But this is still very cryptic. Are we saying that we aim to reveal the form or structure of practical reason *via* the form or structure of intentional action? The difficulty is that we do not understand how the form or structure of intentional action is able to reveal the form or structure of practical reason.

We need to dig deeper into Aristotelian metaphysics to scrutinise practical reason. The Aristotelian metaphysical view is that we are creatures of a certain nature who possess a power or capacity and that among these powers practical reasoning is the most important. We are structured by powers or capacities, but we are unable to either 'observe' this key feature of our constitution by empirical methods or to rationalise it. Capacities or powers can only be grasped when we are active. But what does it mean to say that these capacities are 'active' or are *actuality*⁶? The core argument is that the Aristotelian distinction between actuality and potentiality provides the general framework for understanding the idea of

capacity-change that underlies the view of practical reason as a capacity or power that changes and manifests itself in different ways.⁷ What is required, therefore, is an understanding of the actuality/potentiality distinction to grasp *how* practical reason as a capacity is able to work, operate, manifest itself and shape our intentional actions. In §I.2 I scrutinise the conception of intentional action as advanced by Elisabeth Anscombe in *Intention*. In § 1.3 I explain the actuality/potentiality distinction and how it illuminates the notion of practical reasoning capacity and capacity change. In §1.4 I analyse the implications of this view for the central inquiry of the article which is an explanation of the legal-rule compliance phenomenon.

1.1 THE IMPLAUSIBILITY OF PERFORMING A COMPLEX ACTION: BECAUSE AN AUTHORITY HAS SAID SO

Let us imagine the following two scenarios:

Scenario 1 (REGISTRATION): you are asked by a legal authority to fill in a form that will register you on the electorate roll.

Scenario 2 (ASSISTANCE AT A CAR ACCIDENT): you are asked by an official to assist the paramedics at the scene of a serious traffic incident (i.e. by helping injured parties into the ambulance and by providing reassurance and basic first aid).

The scenario in REGISTRATION involves the performance of a simple action, i.e. completing a form as clearly instructed. The scenario in ASSISTANCE AT THE CAR ACCIDENT involves performance of a more complex series of actions: it requires awareness of the situation and the possible dangers of moving the injured in one way rather than another and it requires providing emotional and physical assistance to others. It also requires to overcome obstacles in order to succeed in the purpose of saving the lives of the victims and therefore complying with the command.

According to Wolff the model of authority (in both scenarios) can be formulated as follows:

⁷ This interpretation is also advanced by FREDE, M., 'Aristotle's Notion of Potentiality in *Metaphysics* Θ', *Unity, Identity and Explanation in Aristotle's Metaphysics* (Oxford: Clarendon Press, 1994, Scaltsas, T, Charles D. and Gill, M. eds.). See also Makin commentaries on Aristotle in *Aristotle, Metaphysics Book Θ*. Oxford: Clarendon Press, Clarendon Aristotle Series, 2006. p. 133), cf. ROSS, W.D., *Aristotle's Physics: A Revised Text with Introduction and Commentary*. Oxford: Oxford University Press, 1995.

⁶ I use these terms as KOSMAN and COOPE interpret it from Aristotle's *Physics, Books III and IV* (translated by Hussey, E., Oxford: Clarendon Press, Clarendon Aristotle Series, 1983). This means, the change that acts upon something else so that this something else becomes F, i.e. the fulfillment of a potentiality. For example, the building of a house by a builder so that the house becomes built. See KOSMAN, L.A., 'Aristotle's Definition of Motion', *Phronesis* (1969): 40 and Coope, U., 'Change and its Relation to Actuality and Potentiality' In: *A Companion to Aristotle* (Anagnostopoulos, G. ed.; Oxford: Wiley-Blackwell, 2009): 277.

X performs an action ϕ -ing because
Y has said so.⁸

In the case of REGISTRATION we could say that the agent has filled in the form because the legal authority has said so; in the case of ASSISTANCE AT THE CAR ACCIDENT, the agent has also performed a series of action, because the legal official or authority has said so.

At first glance this seems to be a sound characterisation of ‘authority’ but closer inspection reveals discrepancies. That an agent acts in a particular way because they are directed to do so by a legal authority is, I will argue, an implausible formulation that does not grasp the depth and richness of what is truly happening in cases like ASSISTANCE AT A CAR ACCIDENT which involves the performance of a complex series of actions. It might explain simple cases such as REGISTRATION but it cannot account for complex ones. To act ‘because someone has said you should do so’ means that you are acting because of an empirical fact that is presented to you. But we have previously noted that to perform that action requires awareness of the situation and its dangers; it involves engaging and directing the will towards the action; and it involves making judgments about how to succeed in the action. The question that arises is how a mere empirical fact, i.e. the order or command to do something, can engage the will in the complex performance of the action.

A first (and charitable) reading of the empirical account will suggest something like the following: the legal command or directive is an empirical fact that causes the agent to act in a certain way by virtue of the agent having certain beliefs and desires. Sanctions or threats, in particular, cause an impulse or desire in the agent to act in a certain way. I consider this view, however, to be implausible because it entails that for each movement there is a compulsive desire or impulse in the agent that causes each of the actions and series of actions. I argue that legal commands as merely empirical and contingent cannot guarantee the continuity and direction that characterises the performance of complex actions. The diachronic structure of future-directed intentions in action requires rational governance within discrete times and simple empirical causation cannot guarantee such continuity. A second, more interesting, reading is that the

⁸ WOLFF, R.P. *In Defense of Anarchism*. New York and London: Harper Torchbooks, 1970. p. 9.

intention of the official is grasped by the agent’s mental state and the agent’s mental state causes performance of the action. In this case we also have a notion of causation between a mental state and the complex action and again the appearance of deviation in the causal connection cannot be avoided. This account is more promising because it directs our attention to the role that intention plays in practical reasoning, but it is limited because it conceives intention within the restricted model of mental states and empirical causation.⁹

With these preliminaries clarified, we can now formulate Wolff’s anarchist account and the antagonism between authority and autonomy.

The argument that Wolff presents us with is the following:

1. If I perform an action because someone says so, then I am not acting according to my own will.
2. If I do not act according to my own will, then I do not act autonomously.
3. Most cases involving the authority of a State involve 1).
4. I cannot act according to 1) because the authority of the State undermines my autonomy.
5. Therefore the authority of the State cannot be legitimate.

In this article, we will concentrate on undermining premise 2).

1.2 UNDERSTANDING ENERGEIA: AN INTERPRETATION OF THE WHY-QUESTION METHODOLOGY

1.2.1 THE KEY FEATURES OF INTENTIONAL ACTION

In her book *Intention*, Elisabeth Anscombe engages with the task of explaining intentional action along the lines of the philosophical tradition of Aristotle and Aquinas and identifies a number of key features that characterise intentional action. These features include:

- a. *The former stages of an intentional action are ‘swallowed up’ by later stages*

Intentional action is composed of a number of stages or series of actions. For example, if I in-

⁹ A full criticism of this view cannot be presented in this article, but see my article “

tend to make a cup of tea, I first put on the kettle *in order* to boil water, I boil water *in order* to pour it into a cup of tea. While I am making tea, however, there are many other things that I am doing that are irrelevant to my intentional action and to what is happening as intentional. For example, I sneeze, I look through the window, I sing, and so on. Similarly, many other things are happening in the world that are irrelevant to what I do and that happen as a result of what I do intentionally. Thus, the kitchen has a specific location, the flowers in the garden are in bloom, the wind is blowing and blows open the window, and so on. Because my action of making tea is intentional, I impose an order on the chaos of the world and this order is the order of reasons. Thus I put on the kettle *in order* to boil water and I boil water *in order* to pour it into a cup. This is how I understand the sequence of happenings in the world that I, as an agent, *produce or make happen*. But, arguably, there could be an infinite number of series of actions; there could be a continuous infinite, or ceaseless, seamless web of actions. The question ‘Why?’ can always be prompted: ‘Why are you making tea?’ and the agent might reply, ‘Because it gives me comfort in the morning’. There is, however, an end to the ‘Why?’ series of questions and the end comes when the agent provides a characterization of the end or *telos* as a good-making characteristic. The action becomes intelligible and there is no need to ask ‘Why?’ again. The end as the last stage of the ‘Why?’ series of questions swallows up the former stages of the action and makes a complete unity of the action. Intentional actions are not fine-grained, they are not divisible into parts. Thus, parts of series of actions are only intelligible because they belong to an order that finds unity in the whole.

b. Intentional action is something actually done, brought about according to the order conceived or imagined by the agent

Intentional action is not an action that is done in a certain way, mood or style.¹⁰ Thus, it is not an action plus ‘something else’, i.e. a will or desire that is directed towards an action. Intention is not an additional element; e.g. an interior thought or state of mind, it is rather something that is *done or brought about* according to the order of reasons that has been conceived by the agent. Consequently, if the question ‘Why?’ has

¹⁰ ANSCOMBE, E., *Intention*. Cambridge, Mass.: Harvard University Press, 2000. §20.

application to the action in question, we can assert that the action is intentional. The prompting of the question ‘Why?’ is the mechanism that enables us to identify whether there is an intentional action. Intentional action is neither the mere movements of our body nor the simple result of transformations of the basic materials upon which agency is exercised, e.g. the tea leaves, kettle, boiling water. It is a doing or bringing about that is manifested by the expression of a future state of affairs and the fact that the agent is *actually* doing something or bringing it about according to the order of reasons as conceived or imagined by the agent.¹¹

c. Intentional action involves knowledge that is non-observational, but it might be aided by observation

If I am an agent that acts in an intentional way, I know that I am bringing about something and I know this without the need to observe every single step of my series of actions to verify that (effectively) I am acting.¹² In performing my action I might be aided by observation, but I know *what* is the order of the series of actions and *why*. This is the essence of practical knowledge. You do not need a theoretical stance towards yourself, a verification and observation of the movements of your body to know that you are performing an intentional action and bringing about *something*. Following the previous example, you do not need to observe that ‘you are making tea’ to know that you intend to ‘make tea’ and that you are bringing this about. You put on the kettle and boil the water, you do not ask yourself, ‘let me see what my body is up to, let me observe what I am doing’, and then infer from the movements of your body that you are actually bringing about ‘making tea’. Of course you can be aided by observation, you need your sight to put the kettle in the right position and to pour the boiling water without spilling it. But you do not use your observation and inferences from the observational data to know that you are making tea. On the contrary, the more you need this verification or theoretical stance towards yourself, the more likely it is that your action is not intentional, you are not controlling the action and you are not guided by the order of reasons. You are not an agent on this occasion, rather something is happening to you.

The state of affairs that you intend to bring about is at a distance, it might not be within your

¹¹ *Ibid.*, §21-22.

¹² *Ibid.*, §28-29.

sight.¹³ Imagine a painter who intends to make a painting. He has an idea about what the painting will look like, e.g. how the colours will be distributed across the canvas, and what topics and concepts will be at work in the painting. The painting is at a distance and the painter does not need to observe the movements of his body and the motion of the brushes to know *what* he is painting and *why* he is painting what he is painting. Certainly, his sight will help him to find the adequate colour at the correct time and to shape the figures at the right angle, but his intentional action is not what he observes; it is not the result of his painting but what he is actually doing. We do what happens.

d. In acting intentionally, we exercise our practical knowledge. We can understand practical knowledge if we understand the structure of practical reasoning

Intentional action is not in the mind, it is not primarily a mental state, it is not an internal thought.¹⁴ Rather it manifests itself publicly and within the public reasons that we share as creatures with certain constitutions and belonging to a particular time and place. For example, we eat healthy food because it is good to survive, we look after our family because we love them, we avoid harm because we aim to enjoy pleasant things and so on. Similarly, we know that to make a cake you need flour, sugar, eggs and milk. If I see you mixing grass and earth and you tell me that you are making a cake, then I can assert, if I consider that you are in sound mind (your full capacities), that there might be a mistake in your performance or that you do not understand what it is 'to make a cake'.

According to Anscombe, Aristotle establishes a strong analogy between practical and theoretical syllogism and this has led to misinterpretations about what practical syllogism is.¹⁵ Like theoretical syllogism, practical syllogism is often systematized by Aristotelian interpreters as having two premises, i.e. major and minor, and a conclusion. It is said that, as in the case of theoretical syllogism, the practical syllogism is a proof or demonstration. The typical form might be as follows:

Vitamin X is good for all men over 60
 Pigs' trotters are full of vitamin X
 I am a man over 60
 Here are pig's tripes

¹³ Ibid., §29-30.

¹⁴ Ibid., §21-22, §25, §27-28.

¹⁵ Ibid., §33, §33-34.

But in this case nothing seems to follow about doing anything. Furthermore, the practical syllogism is sometimes interpreted as having an ethical or moral character and establishing a way to prove what we ought to do. Following the previous example, the conclusion might be 'I should eat pigs' tripes'. Anscombe rejects this view since Aristotle's examples are not in ethical contexts, i.e. 'dried food is healthy', 'tasting things that are sweet' that are pleasant. Additionally the word 'should' (*dei*) as it appears in the Aristotelian texts has an unlimited number of applications and does not necessarily refer to the ethical or moral context.¹⁶

Aristotle insists that the starting point of any intentional action is the state of affairs or something that the agent wants and is wanted because it is presented to the agent as having good-making characteristics or as being valuable. For example, the man wants to have vitamin X because it is healthy. Furthermore, the practical syllogism is not limited to two premises and a conclusion, there can be many intermediate instances that are part of the syllogism. After a close analysis, the analogy between practical and theoretical syllogism breaks. Unlike theoretical syllogism, practical syllogism is not a proof or demonstration of a true proposition, nor is it a proof or demonstration of what ought to be done or what we ought to do. It is a form of *how* and *why* we are bringing something about when we are *actually* bringing it about.

Anscombe presents us with an alternative analysis to the practical syllogism and a different way to understand practical reasoning. Thus, the series of responses to the question 'Why?' manifests or reveals the practical reasoning of the agent and enables us to identify whether the action that the agent is performing is intentional or not. However, she warns us, the why-question methodology is as 'artificial' as the Aristotelian methodology of practical syllogism.¹⁷ When we act intentionally, we are exercising a kind of reasoning which is not theoretical and which is grounded on a desire for that which seems to the agent to be constituted by good-making characteristics. You know the thing or state of affairs that you are bringing about because you desire the thing or state of affairs that you are bringing about, and you are able to desire the thing or state of affairs that you are bringing about because you know *practically* the state of affairs. Your desire arises because you represent the thing or the state

¹⁶ Ibid., §35.

¹⁷ Ibid., §41-42.

of affairs to be brought about as valuable or good. Volition and knowledge do not fall apart.¹⁸ For example, if you are a painter, you know how and why the shapes and colours on the canvass are what they are, it is because you desire and value the painting you will produce that it should be such and such a colour and shape. But it is also true that because you desire and value *this* and *not that* arrangement of colours and shapes, that you are able to know it *practically*. Consequently, moral approbation is irrelevant for practical reasoning and for our practical engagement with the world.¹⁹ This does not mean that there are no instances of objectively justified reasons for actions.

Whatever strategy we follow to show the structure of intentional action, whether we take the Aristotelian practical syllogism or the Anscombian series of actions revealed by the question ‘Why?’, we are able to grasp the mechanism of practical reasoning in its different manifestations.

In this section I will argue that if Anscombe is right and both strategies are ‘artificial’ ways of understanding,²⁰ then a deeper and more ‘natural’ way of understanding practical reasoning is by grasping the nature of the capacity that is exercised by the agent. *In other words, the answers to the ‘Why?’ questions show a capacity that the agent is exercising when acting.* In the next section, I will show that the Aristotelian potentiality/actuality distinction sheds light on understanding the exercise and nature of our practical reasoning capacities. Furthermore, the potentiality/actuality distinction illuminates each of the key features of intentional action (a, b, c and d) and their interplay as identified by Anscombe.

1.3 ARISTOTLE’S DISTINCTION BETWEEN ACTUALITY AND POTENTIALITY

Contra Parmenides who has argued that motion is impossible since something cannot come from nothing, Aristotle advances the idea that motion or change is possible if there is an underlying nature or constant feature that does not change. To explain this, Aristotle resorts to the distinction between potentiality and actuality. In *Metaphysics*, book Θ, Aristotle uses the analogical method to show that particular instances of the scheme or idea of potentiality and actuality

have a pattern.²¹ Thus he begins with the particular instances of capacity/change and matter/form to explain the common patterns that will illuminate the general scheme of potentiality/actuality. However, since our purpose is to elucidate the character of practical reasoning which is a power or capacity, and I have argued that the general scheme of potentiality/actuality will help us to clarify the nature of practical reason, it is circular to resort now to the particular instance of capacity/change to explain potentiality/actuality. I will, therefore amend the Aristotelian argumentative strategy and explain the general scheme of potentiality/actuality. I will then proceed to explain the particular instance of exercising our practical capacities as the actuality of a potentiality.

Capturing what ‘motion’ is, is difficult and many definitions of ‘motion’ tend to use terms that presuppose motion (for example, “a going-out from potency to act which is not sudden”, but ‘going-out’ presupposes motion and ‘sudden’²² is defined in terms of time which is also defined in terms of motion). Therefore, this kind of definition is discarded by Aristotle for being circular and unhelpful. Nor can we define motion in terms of pure potency, because if we say that ‘bronze is potentially a statue’, we are merely referring to the piece of bronze which has not yet been changed and therefore there is no motion. You can neither refer to motion nor to change as what is actual. For instance you cannot refer to what has been built or transformed, e.g. a building or statue, because it is not being moved, but has *already* moved. In the example of a building, the bricks, wood, clay, cement of the building have been already moved; and in the case of a statue, the bronze has already been transformed. Thus, Aristotle defines motion as a kind of actuality which is hard to grasp. In other words, *the actuality of what exists potentially, in so far as it exists potentially.*²³ Motion is an actuality that is incomplete. It is hard to grasp and the tendency is to say that motion is the actuality. In the example of the house, it is the house that has been built. The other tendency is to say that motion is the privation of something, i.e. the going from nothing to something; from not being a house to being a house. Finally, the tendency is also to think that motion is what exists before -potentiality- e.g. the bricks, steel, wood, cement

18 Ibid. §36.

19 Ibid. §37-38.

20 Ibid., §41-42.

21 I follow the interpretation of Aristotle’s *Metaphysics*, book Θ advanced by Frede and Makin, see (n 2).

22 Aristotle’s *Physics* (n 1), 284.

23 Ibid., III.1.201a9-11.

and so on. Contrary to these tendencies, Aristotle insists that motion is what happens exactly at the *midpoint*, neither *before* when nothing has been moved and is mere potentiality, and neither *after*, when something *has* been moved. Furthermore, motion is not privation, it is rather constitutive actuality. For example, if the baby has not learned to speak English, we say that the baby is potentially a speaker of English, when a man knows how to speak English and is in silence, he is also potentially a speaker of English, and finally when the man is speaking English, we say that he is actually an English speaker speaking English. However, the potentiality of the baby (p1) is different from the potentiality of the man in silence (p2), and motion is located in the second potentiality (p2), when the man is in silence, but begins to pronounce a sentence to speak English. Motion is midway and is not privative, but rather constitutive. We do not say that the man speaking English went from being a non-speaker of English to a speaker of English, we say that he spoke English from being in silence (he knew how to speak English, but did not exercise his capacities).

The previous example locates us in the domain of the particular instance of capacity and change as exemplified by the potentiality/actuality distinction. Aristotle argues that there are many different types of capacity, i.e. active/passive, non-rational/rational, innate/acquired, acquired by learning/acquired by practice, and one way/two way capacities. Two way capacities are connected to rational capacities, whereas one way capacities are linked to non-rational capacities. For example, bees have a natural capacity to pollinate a foxglove flower in normal circumstances,²⁴ ('normal' circumstances might include a healthy bee in an adequate foxglove, and the absence of preventive circumstances). In the case of two way capacities there ought to be an element of *choice or desire* to act, and the rational being can exercise her capacity by producing or bringing about 'p'. Furthermore, she also knows how to produce or bring about 'non-p'. The paradigmatic example used by Aristotle is medical skill. The doctor knows how to make the patient healthy (p) and how to eliminate disease or illness (non-p). Therefore the doctor can bring about two opposite effects²⁵. For Aristotle, to have a rational capacity is to have an intellectual understanding of the form that will be transmitted to the object of change

²⁴ See Makin (n 2), 43.

²⁵ Aristotle's *Metaphysics* (n. 2), 1046b, 4-5, 6-7.

or motion. Thus, the doctor will have an understanding of what it means to be healthy and without illness. Let us suppose that a chef is making a cake. He needs to understand the order of the series of actions that will result in a cake and he needs to possess knowledge about the necessary ingredients and temperature of the oven. The chef also needs to understand how to avoid producing non-cakes, e.g. crepes. His action will be directed to making a cake and to not making a non-cake.

In the exercise of practical reason we choose to act²⁶ and this choosing activates the action and directs the capacity towards the series of actions that will be performed. By contrast, a non-rational capacity is non self-activating, its acts are necessary. If the bee is in good health and there are no obstacles, it will pollinate the foxglove flower. By contrast, rational agents need to *choose or decide* to act to produce a result.

When we say that the medical doctor has the rational capacity to change the unwell patient into a healthy human being, we say that she has the 'origin of change'. She is curing the patient and therefore she is in motion because she actualises her practical reasoning capacities to bring about the result as she understands it. She has an order of reasons that connects a series of actions and knowledge of how to produce changes.

She is the origin of change because her medical knowhow explains why certain changes occur in situations involving that object, e.g. the patient who suffers chickenpox has fewer spots and less fever. For example, when a teacher intends to teach and starts to say some sentences on the topic of 'Jurisprudence' to her pupils, we say that she is teaching. She is the origin of change in the pupils who are the objects of change. Thus, the students begin to understand the topic and have a grasp of the basic concepts.²⁷ Similarly, when legislators create the law and judges decide cases, they establish rules, directives and principles and these rules, directives and principles can be found in statutes and case reports. Can we say that legislators and judges have reached the end of the process? No, we cannot: statutes and case reports do not represent the end of the process since citizens need to comply with the legal rules and directives and perform the actions as intended by the legislators and judges. We say that legis-

²⁶ Aristotle, *Metaphysics* (n. 2) book Θ 5, 1048 a10-11.

²⁷ Makin argues that the teacher analogy is intended to show that the teleological perspective is equally appropriate for other-directed capacities and self-directed capacity (n. 2) 198.

lators and judges are the origin of change because they know how and have an order of reasons that enables citizens to comply with legal rules and directives. The order or reasons as good-making characteristics ground the rules, decisions and legal directives. In parallel to the situation of the teacher, I cannot say that I am teaching unless my pupils begin to understand the topic that I am teaching. Thus, the legislator cannot say that she is legislating and the judge cannot say that she is judging, in paradigmatic cases, unless there is some performance of their actions by the addressees as they intend.

The distinction between potentiality/actuality clarifies the structure of practical reason as a capacity that is actualised when we act intentionally. We can now understand that the features of an intentional action identified by Anscombe can be illuminated by the potentiality/actuality distinction. The idea that the former stages of an intentional action are swallowed up by the later stages is explained by the idea that motion is constitutive and not privative. It is not that when I begin to act I do so as an irrational or arational being, and that when I finish acting I am a rational being, or that I go from non-intentional to intentional action, but rather that I go from being a rational being and *potentially* intentional action to being a rational being and *actual* intentional action. Later stages begin to actualise something that was potentially there. My practical reason was always there *potentially* and the intentional action actualises an order of ideas provided by my practical reason. For Anscombe, intentional action is something *actually* done, brought about according to the order conceived or imagined by the agent. If practical capacity is understood in the light of the general scheme of actuality/potentiality, then intentional action involves knowledge that is non-observational, but it might be aided by observation. In acting intentionally, I am exercising my practical reasoning capacity and this capacity is in motion. This motion is represented at the midpoint; *after* I potentially have an intention to act and *before* I have reached the result of my intentional action. It is not that the forming of an intention from nothing to something is a *magical* process. *It is rather that I potentially have the power to intend which in appropriate circumstances can be exercised.* As being in motion, I am the agent who knows *what* she is doing and *why* she is doing what she is doing, but if I ob-

serve myself doing the action, then I have stopped the action.²⁸ There is no action. There is no more motion and no exercise of my capacities. Finally, Anscombe asserts that in acting intentionally, we exercise our practical knowledge. Because we are the kind of creatures that we are, we can *choose* or *decide to bring about* a state of affairs in the world and we do this according to our order of reasons. Practical knowledge is potentially in all human beings and when we decide to bring about a situation or do certain things, then we actualise this potentiality. We can direct our actions to produce either of two opposing results, e.g. health or illness, ignorance or knowledge, as opposed to non-rational creatures who can only produce one result under normal circumstances and with no impeding conditions e.g. the bee pollinating the foxglove. It should be noted that to have an actual capacity, such as practical reasoning and the capacity to act intentionally, does not mean that A can Φ , nor that A will Φ if there are normal conditions and no impending elements. Instead it means that *A will Φ unless she is stopped or prevented.* Thus, once our practical reasoning capacity begins to be actualised, it will strive to produce or do what A (she) has conceived. Once A (she) decides or chooses to act, then a certain state of affairs will be produced unless she is prevented or stopped. Intentional action and practical reasoning are not dispositions like being fragile or elastic, nor are they possibilities that something will be done. They are powers.

Now that we have grasped the idea of potentiality/actuality as the general scheme for explaining the structure of practical reason, we can turn to the rule-compliance phenomenon which raises a different set of difficulties that will be dealt with in the next section.

1.4 LAW AND ENERGEIA: HOW CITIZENS COMPLY WITH LEGAL RULES?

So far we have argued that an intentional action is the bringing about of things or states of affairs in the world. We can argue, too, that there are different kinds of bringing about. Human beings can produce houses, clocks, tables, tea cups and so on, but we can also produce rules of etiquette, rules for games, and legal directives, rules, and principles. Legislators create legal rules and

²⁸ See VELLEMAN, R. *Practical Reflection*. Princeton: PUP, 1989.

directives and judges create decisions according to underlying principles and rules. These legal rules and directives are directed to citizens for them to comply with. They are meant to be used in specific ways. When a legislator creates a rule or a judge reaches a decision that involves rules and principles, she creates them exercising her practical capacities with the intention that the citizens comply with them. But how is this compliance possible? How do legislators and judges create legal rules and directives that have the core purpose of directing others' intentional actions and of enabling them to engage in bringing about things and states of affairs in the world? In other words, how do other-directed capacities operate? This is the question that we aim to explore in this section.

In §I.2, I gave two examples of authoritative commands to highlight the distinction between different kinds of authoritative rules:

Scenario 1 (REGISTRATION): you are asked by a legal authority to fill in a form that will register you on the electorate roll.

Scenario 2 (ASSISTANCE AT A CAR ACCIDENT): you are asked by an official to assist the paramedics in a car accident, e.g. to help by transporting the injured from the site of the accident to the ambulance, to assist by putting bandages on the victims, to keep the injured calm and so on.

We have asserted that the performance required by the addressee is more complex in the latter example than in the former since the latter requires the engagement of the will and the performance of a series of actions over a certain period of time, and it requires that the addressee should circumvent obstacles to achieve the result according to what has been ordered. It requires that the addressee exercises her rational capacity in choosing *this way* rather than *that way* of proceeding. While the addressee executes the order she needs to make judgments about how to do *this or that*. Successful performance as intended entails knowledge about how to proceed at each step in order to perform the series of actions that are constitutive of what has been commanded. This cannot be done unless our practical reasoning and intentional action are involved in the performance. In other words, the successful execution of the order requires the engagement of practical reasoning and therefore of our intentions. Furthermore, it requires an understanding of the *telos* or end as a good-making characteristic of what has been commanded. In the case

of ASSISTANCE AT A CAR ACCIDENT, it requires engagement with the health and well-being of the victims of the accident. Thus, the addressee needs to know that the bandage ought to be applied in *this way* and not *that way in order* to stop the bleeding, and she knows that she needs to stop the bleeding *in order* for the victim to have the right volume of blood in his body. The victim needs a certain volume of blood in his body in order to be healthy and being 'healthy' is something good and to be secured.

Because our practical reasoning capacity is a two way capacity (§I.3) the agent needs to *decide or choose* to actualise this capacity which, prior to actuality, is mere potentiality. As in our previous example (§I.3) the speaker needs to *decide or choose* to speak in order to actualise her potentiality of speaking English. Then the exercise of her capacity to speak actualises according to a certain underlying practical knowledge, e.g. the order of the sentences, grammar, style and so on. It is not the case that as a bee pollinates a foxglove without any decision or choice by the bee, the agent will speak English and actualise her potential capacity to speak. In the case of legal rules, the question that emerges is how a legislator or judge can produce or bring about something that will engage the citizens' intentions so that they comply with legal rules or directives that are constituted by a complex series of actions. The core argument is that legislators and judges intend that citizens comply with legal directives and rules, and this intention is not merely a mental state that represents a way of cooperating and laying plans to achieve an aim.²⁹ On the contrary, for the legislators' and judges' intentions (i.e. to engage the citizens' practical reasoning,) to be successful, they need to exercise their own practical reason. It is not that they interpret or construct the citizens' mental states and interior thoughts so that their values and desires can constitute the ground that enables legislators, judges and officials to construct the best possible rules, directives or legal decisions according to the citizens' values as represented in their beliefs. On the contrary, they will look outward to *what* is of value and *why* certain states of affairs and doings are valuable. Reasons for actions as values and goods that are the grounds of legal rules and directives

²⁹ See SHAPIRO, S. *Legality*. Cambridge, Mass.: Harvard University Press, 2011, for an attempt to show that legal systems are created by collective intentions of planners (legislators and judges).

will engage others' practical reason therefore the citizens' practical reasoning power or capacity become an *actuality*. If, as I have argued, our intentional actions become *actuality* by an order of reasons in actions and for actions that are ultimately grounded on good-making characteristics, then legislators and judges need to conceive the order of reasons as good-making characteristics that will ground their legal rules, legal directives and decisions. Judges and legislators would hence take the first-person deliberative stance as the privileged position of practical reasoning to disentangle *what* good is required and *why* it is required. In other words, if as judge or legislator you intend that your legal rule or directive is to be followed by the addressees and, *arguendo*, because these legal rules and directives are grounded on an order of reasons, then you cannot bring about this state of affairs, i.e. rule-compliance, without thinking and representing to yourself the underlying order of reasons. Let me give a simple example. You are writing an instruction manual on how to operate a coffee machine. You need to represent to yourself a series of actions and the underlying order of reasons to guide the manual's users. If you are a person of certain expertise, e.g. a manufacturer of coffee machines, then the practical knowledge that entails the underlying order of reasons is actualised without much learning and thinking. The required operating instructions are actualised as a native English speaker speaks English, after being in silence. By contrast, if you have only just learned to write instruction manuals for coffee machines, then you need to ask yourself 'Why do it this way?' at each required action to make the machine to function. This process guarantees understanding of the *know how* to operate the machine, and the success of the manual is measured by the fact that future buyers of the coffee machine are able to operate it. When legislators and judges create legal directives and legal rules they operate like the writers of instruction manuals, though at a more complex level. They need to ensure that the addressees will decide or choose to act intentionally to comply with the legal rules or directives and thereby bring about the intended state of affairs. But they also need to ensure that the order of reasons is the correct one so that the intended state of affairs will be brought about by the addressees. We have learned that the early stages of an intentional action are 'swallowed up' by the later stages

and ultimately by the reason as a good-making characteristic that unifies the series of actions. Thus, for addressees with certain rational capacities and in paradigmatic cases, understanding the grounding reasons as good-making characteristics of the legal rules and legal directives will enable them to decide or choose to comply with the rule and will guide them through the different series of actions that are required for compliance with the rules and directives.

Legal rules and directives do not exist like houses, chairs, tables or cups of tea. We need to follow them for them to exist. But we create legal rules and directives as we create houses, chairs, tables. We bring these things about by exercising our practical capacity and we are responsive to an order of reasons as good-making characteristics that we, as creators, formulate and understand. Thus, builders create houses that are either majestic or simple, elegant or practical, affordable or luxurious. To achieve the intended features of a house, builders need to select specific materials and designs, hire skilled workers, and so on. Similarly, legislators, officials and judges create legal directives and rules to pursue a variety of goods, e.g. to achieve safety, justice, the protection of rights and so on. Legislators, officials and judges actualise their practical reasoning by creating an order of reasons in actions that will ground rules so that we are able to comply with them because we actualise our practical reasoning. Like builders, legislators, officials and judges need to choose values, goods and rights that will be fostered or protected by their rules or directives. Likewise, they need to formulate legal rules and directives that will have appropriate sanctions, are clearly phrased and follow procedures for their publicity. In this way, they make the addressee of a directive choose or decide to actualise their potential practical reasoning capacity to comply with legal rules and directives. The addressees of a legal directive or rule are not like bees, who without decision and, given normal conditions and the absence of impediments, will pollinate the foxglove. As addressees of legal directive and legal rules, we need to choose or decide to bring about a state of affairs or things which are intended by the legislator, official or judge.

We now see that the model of authority formulated by Wolff is implausible. The model is as follows (§ 1.1.):

X performs an action p-ing because
Y has said so

As rational creatures, we are responsive to reasons as grounded in good-making characteristics, but if this is truly the case, then how do mere expressions of doings as brute facts such as ‘because I said so’ make *actual* our practical reason? In fact this is only possible if ‘because I said so’ involves reasons in action that are grounded in good-making characteristics, e.g. “I am the authority and compliance with the authority has good-making characteristics”. For example, compliance with authority is a secure way that some goods –apparent or genuine - will be achieved. The potentiality/actuality and capacity/change discussion shows that as intellectual and rational beings, we need to apprehend the ‘form’ that underlies the brute fact ‘because I said so’ in order to be able to comply with legal directives and rules. The ‘form’ takes the shape of goods and values that are intended to be achieved by legislators, officials and judges. If it were a matter of facts, and we were able to apprehend the brute fact of ‘because I said so’ by our senses, then how could we control and direct the doings and bringing about that are intended by legislators and judges? Some stages of the action will *seem* this and other stages will *seem* that. There is no way to bring about *this* and not *that*. Let us take the example of ASSISTANCE AT THE CAR ACCIDENT. I assist the official at the car accident *because he has said so*. I have no reason to assist him at the car accident; my action is only *caused* by my fear of sanction, i.e. a psychological impulse in me. But now as I am merely guided by my senses, it *seems* to me that I need to put the bandage on in this way rather than that way, but my sight says that *not* it is rather *that* way, or better this. Since I am guided by my eyes and other senses, I do not know *why* I should apply the bandage or *how* I should apply the bandage. Furthermore, how can we attribute responsibility as we cannot be blamed for not ‘seeing’ or ‘hearing’ appropriately? By analogy, mere scribbles on the board by the teacher cannot make the pupil understand the topic that the teacher is teaching. The teacher needs to make transparent the premises and conclusions of her arguments so that the pupils can ‘grasp’ the form of the argument and can *themselves* infer its conclusion.

There is an alternative strategy to showing how ‘because I said so’ operates as a fact. This view is that the legal authority - by positing legal rules and directives and by saying ‘because I said

so’ - triggers a dormant reason for action which is represented by a belief in the agent who will comply with the rule because there is a causal nexus between the agent’s belief and the action. I reject this view. But we have also learned that the causal nexus is not how we primarily understand how intentional actions operate and work.³⁰

The classical model of practical reasoning and intentional action also laid out the view that for an action to be controlled and guided by the agent, the reasons need to be in the action and therefore transparent to the agent. The answers to the question ‘Why?’ provide the order of reasons that guarantees successful compliance with the legal rules and directives by the agent. They are the *reasons in action* that the agent has. But if the order of reasons is opaque, how there can be an action as intended by the legislator or judge as an order of reasons? If the reasons are opaque and you do something ‘because someone says so’ you do not know under which description you are performing the action. Therefore, the action is non-intentional. Furthermore, one might assert, the legislator, judge or official is not the origin of change and the origins of change is in external empirical factors, e.g. the fear *mechanism* that acts within the agent, psychological processes in the agent and so on.

Aquinas³¹ tells us that when you command, it is an act of reason for something to be *done*. He also adds that an act of will can be commanded. In the intra-personal case, you are able to command yourself to do x-ing, but you need to command it to yourself, *to will it*. In other words, you need to engage in thinking about why x-ing is good or to be pursued. Why is this not the same for inter-personal cases? Legal authorities command as an act of reason a command to do x-ing, but legal authorities command it to will it. Therefore, legal authorities ought to present legal rules and directives as grounded on good-making characteristics.

30 For a criticism of the causal nexus, see for example CHISHOLM, R, ‘Freedom and Action’. In: LEHRER, K. (ed.) *Freedom and Determinism*. New York: Random House, 1976, and Stout, R., *Action*. Bucks: Acumen, 2005.

31 AQUINAS, *Summa Theologiae*. Translated by Thomas Gilby, Latin and English text, paperback edition, Cambridge: Cambridge University Press, 2006, Q17, 5.

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O direito real: razão prática, anarquismo e o fenômeno da conformidade legal

RESUMO

O Direito transforma nossas vidas do modo mais importante: ele altera como nós agimos e, por causa disso, exsurtem uma série de questões fundamentais. Uma dessas questões se relaciona à autoridade do Direito e à liberdade individual, fazendo surgir a pergunta: se nós somos dotados de autonomia como indivíduos, como os legisladores, juizes e agentes públicos possuem autoridade legítima para mudar nossas ações e indiretamente alterar o modo como conduzimos nossas vidas? O objetivo deste artigo é focar no indivíduo, isto é, no destinatário do comando legal que pratica a ação requisitada pelo agente da lei. A estratégia, dessa forma, partir de baixo para cima, do nível do agente e da razão prática até o quadro justificador de autoridade.

Palavras-chave: Autonomia individual. Autoridade legal. Fenômeno de Compliance.

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