CONVENTIONAL FOUNDATIONS OF LAW

Literature:
A. Marmor, *Philosophy of Law*
CONVENTIONAL FOUNDATIONS OF LAW

- legal norms as *authoritative* instructions or directives (Raz)

- who counts as a *legal* authority?
  - determined by social rules (rules of change and adjudication) (Hart)

- does Hart’s practice theory of rules explain why officials are bound to follow the rules of recognition?
  - obliged because they *take themselves to be bound* by those rules?
  - what makes it rational for them to do so?
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● social rules as conventions?
● conventions are normative solutions to recurrent large-scale coordination problems (D. Lewis, 1968)
  – alternative to simple agreements between the agents to act upon one, more or less arbitrarily chosen, alternative, which secures concerted action among them
  – conventions emerge in cases of large-scale recurrent coordination problems, where agreements are difficult or impossible to obtain

➢ account of how the RoR’s emerge and the rationale of following them
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- rationale of the rules of recognition (Hart):
  - the need for certainty regarding the valid sources of law
  - coordination (a judge follows the RoR because his colleagues follow it too)

- Marmor’s critique: those reasons have a secondary role (they are not the main rationale for having secondary rules)
  - first we have to *identify* judges qua judges
  - basic role of the RoR is to constitute ‘the rules of the game’ and institutional roles
  - secondary rules are constitutive rules
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- Marmor’s explanation of conventions
  - 2 features of conventional rules:
    a) arbitrariness (alternative rules)
    b) lose their purpose if they are not actually followed (compliance dependent)

- secondary rules as conventions:
  a) arbitrariness: different legal systems, different RoR’s
  b) rule-following: compliance dependent
Green’s critique of the RoR as a purely conventional rule
- having an obligation to eat with a knife in the right hand only because it is conventional to do so?
- if RoR’s are purely conventional, then how to explain their normative character?
- officials regularly have moral views about the propriety of legislative power
- RoR’s are not purely conventional
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- Marmor: one should distinguish between
  a) legal obligation to follow the RoR’s and
  b) moral or political question whether judges have reasons to engage in the practice that is constituted by those rules
- RoR’s (as constitutive rules) determine: a) what constitutes the practice and b) modes of conduct within it
- legal obligation to follow the RoR’s is prescribed by those same rules
- obligation to follow the law, if there is one, can only be of moral or political character
According to Marmor:

1) In every society that has a functioning legal system, there are some social conventions that determine who counts as legal authority in that society and how its authority is to be exercised.

2) Legal norms consist of the directives or instructions of legal authorities – those authorities that are identified and constituted by the social conventions of (1).
Thank you for your attention!