

# 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

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- 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

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- 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!