SOCIAL RULES AT THE FOUNDATIONS OF LAW
- Rule of Recognition -

Literature:
A. Marmor, *Philosophy of Law*
SOCIAL RULES

- pre-legal world
  - primary rules (rules of obligations)
  - no system → a set of separate standards, without any identifying or common mark (resembling our rules of etiquette)
  
  a) uncertainty
     • What are the rules and their precise scope?
  
  b) static character
     • How to change old or enact new rules?
  
  c) inefficiency of the diffuse social pressure
     • How to solve disputes as to whether an admitted rule has been violated?
SOCIAL RULES

➢ remedy: secondary rules
1. rule of recognition
   ✓ specifies some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group
2. rule of change
   ✓ empowers an x to introduce new rules and to eliminate old (+ defines the procedure)
3. rule of adjudication
   ✓ empowers an x to make authoritative determinations on whether a primary rule has been broken
   ✓ defines the procedure + power to apply sanctions
SOCIAL RULES

- secondary rules
  - rules *about* primary rules (*cf.* commands)
  - specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined
  - power-conferring rules
- primary + secondary rules = legal system
- secondary rules constitute legal institutions (sources of law, legislature, court ...) (*cf.* Austin)
SOCIAL RULES

- rule of recognition
  - constitutes what *counts as* sources of legally valid norms in a given community
  - ontic and epistemic function (two senses of recognition)
  - source of legal validity
  - typically regulates the ranking list of sources (prevents conflicts) → hierarchical structure of the legal system
  - *social rule* (convention, custom; noninstitutional origin + efficency) (*cf.* Kelsen)
  - practice of officials
A social rule $R$ exists in a population $S$ iff the following conditions obtain:

1. Most members of $S$ regularly conform their behaviour to the content of $R$, and
2. Most members of $S$ accept $R$ as a rule:
   a. For most members of $S$, the existence of $R$ constitutes a reason for action in accordance to $R$
   b. And members of $S$ tend to employ $R$ and refer to it as grounds for exerting pressure on other members to conform to $R$ and as grounds for criticizing deviations from conformity to $R$. 

practice theory of rules
the existence of a social rule consists of actual patterns of conduct, beliefs, and attitudes (reductive explanation)

– regularity of conduct + acceptance (a belief shared by the population that $R$ provides them with a reason for action + a shared attitude that $R$ represents a standard)

RoR as a social rule

– officials’ practice of identifying primary rules by referring to specified criteria

– officials’ acceptance of their practice as a public standard for identifying rules of their legal system
SOCIAL RULES

- internal and external aspects of rules
- 3 ways in which one can account for social rules:
  - internal point of view
    - observer is a member of the group who accepts and uses the rules as guides to conduct
  - external point of view
    - observer who merely records the regularities of observable behaviour (cf. Austin)
    - observer who does not himself accept the rules, but reports on the way in which the members of the group are concerned with them from the internal point of view
SOCIAL RULES

- we do not need to *presuppose* anything when we explain law’s normativity
- rule of recognition vs. basic norm
- we need a sociological account that explains the complex social fact that people follow certain rules
- this account can be given in terms of observing people’s actual modes of conduct, the beliefs they have about their conduct, and their accompanying attitudes
SOCIAL RULES

- problems:
  - chicken-egg problem: What was first, RoR or officials?
  - How to explain that secondary rules are rules of the system?
  - What are the reasons for following a rule?, What makes it rational for people to regard the relevant social norms as obligatory?
    - gunman situation: ‘being obliged’ or ‘having an obligation or a duty’?
  - Why should officials be bound by the RoR?
Thank you for your attention!