
Is the Rule of Recognition a Purely Constitutive Convention?

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Professor Morigiwa instructed me to pick up questions from chapters 4–6 of Professor Marmor’s *Philosophy of Law*.¹ But I am fully persuaded by his arguments in these chapters, in particular his argument that Ronald Dworkin’s idea of interpretation is incoherent, that is, interpretation is parasitic and exceptional practice if human communication is possible at all.²

Therefore, I have decided to pose a question of whether the rule of recognition is a purely constitutive convention, which Professor Marmor discussed in chapter 3 of his book. He argues that not all conventions are co-ordination conventions, the function of which is to solve co-ordination problems; a lot of important conventions are constitutive conventions, which constitute social practices.³ The rules of chess, football, haiku, and opera are examples of constitutive conventions. They are still arbitrary in the sense that their contents can be otherwise (there is other possible course of action which can equally work as a rule), and people follow them because people actually follow them. But their point is not to solve some co-ordination problems. People do not play football, not to solve some co-ordination problems but football is a good practice involving mental and physical abilities. To play football, you have to follow the rules of football. You cannot play football otherwise. And the rule of recognition is also a constitutive convention.⁴ Its point is to constitute a specific kind of social practice, that is, law. Public officials follow the rule because law is a valuable social practice. Its point is not to solve co-ordination problems.

Although Professor Marmor’s argument is convincing enough, I have some small questions. First, are these two kinds of conventions clearly distinguishable? If the rule of recognition is a constitutive convention, people may say that the main function of law is nothing but solving various co-ordination problems. Professor Marmor says that ‘[t]he idea that law’s main functions in society can be reduced to the solution of coordination problems is all too easy to refute’.⁵ It seems that he uses the term ‘coordination problem’ here in its narrow sense, distinguished from prisoners’ dilemma and assurance problems and so on. But he once said that the situation where law solves co-ordination problems is the typical case where law’s authority is justified.⁶ He seems to use the

1 Princeton University Press, 2011.

2 See my ‘The Rule of Law and Its Predicament’, *Ratio Juris*, Vol. 17. No. 4 (2004).

3 See also Marmor, *Social Conventions* (Princeton University Press, 2009), p. 36; Marmor, ‘Constitutive Convention’, in his *Positive Law and Objective Values* (Clarendon Press, 2001), pp. 1–24.

4 Marmor, *Social Conventions*, chapter 2; ‘Constitutive Convention’, pp. 19–24.

5 Marmor, *Philosophy of Law*, p. 80.

6 Marmor, *Interpretation and Legal Theory* (Clarendon Press, 1992), p. 177. Thomas Nagel also uses the term in its wider sense in his *Equality and Partiality* (Oxford University Press, 1991), pp. 29–30.

term there in its wider sense, including prisoners' dilemma or other collective action problems.

It seems that to use the term in its wider sense is not always unjustified. There is no one right answer to the question of what is an appropriate system of imposing taxes to citizens. But there must be some system of taxes to run governmental services. Thus if the government sets up a certain tax system which is not manifestly unjust, you have a reason to obey it as long as your fellow citizens also obey it, even if it is not the uniquely right system every citizen should accept as such. There are some elements which enable you to call it a solution to a co-ordination problem, though it is not a pure co-ordination problem. And if great many collective action problems can be characterised as co-ordination problems, you may also say that the point of law is to solve co-ordination problems. At least, you may say it is one of its main functions.

I assume that Professor Marmor will rightly reply that even if my guess is sound, the rule of recognition is still a constitutive convention; to solve co-ordination problems is at most one of the merits of having law at all, which should be distinguished from the main function of the rule of recognition. But I think in that case the rule of recognition is not a purely constitutive convention. It is partly a co-ordination convention because one of its ultimate main purposes is to solve co-ordination problems.

Finally, I would like to describe a situation where the rule of recognition seems to become a nearly pure co-ordination convention. When Japan surrendered to the allied powers at the end of world war two, Japanese people including public officials were not sure what exactly the rule of recognition was at the time. Some typically oppressive laws were deemed ineffectual just after the surrender, but generally speaking, the transition to the new regime was slow and step by step. And because the fundamental value, the sovereignty of emperor, was denied, people could not tell which positive norms were morally valid. In this anomic situation, public officials followed whatever was dictated by the occupying forces not because they regarded it as morally good or valuable, but because it was the only guide available as to what they should do. For them, the legal system was arbitrary not only in the sense that their contents could be otherwise, but also in the sense that officials only wanted to know what their fellow officials tended to obey. In this situation, the main function of law was to solve various co-ordination problems in Japanese society. Here the rule of recognition—what the occupying forces dictate is the law to be obeyed—was nearly pure co-ordination convention for public officials, too. At least in such an exceptional circumstance, the rule of recognition can be a pure co-ordination convention.