

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

Literature:

A. Marmor, *Philosophy of Law*

SOCIAL RULES

- H. L. A. Hart (1907-1992)
- 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.*

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 + efficacy) (*cf.* Kelsen)
 - practice of officials

SOCIAL RULES

- practice theory of rules

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 .

SOCIAL 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 ⁷

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!