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Is the Rule of Recognition Really a Conventional Rule?

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Abstract—In this article I examine the view, common amongst several contemporary legal positivists, that rules of recognition are to be understood as conventional rules of some kind. The article opens with a discussion of H.L.A. Hart's original account of the rule of recognition in the 1st edn of *The Concept of Law* and argues that Hart did not view the rule of recognition as a conventional rule in that account. I then discuss Hart's apparent turn towards a conventionalist understanding of the rule of recognition in the 'Postscript' to the 2nd edn of *The Concept of Law*, and attempt to cast doubt on the strength of Hart's commitment to such a turn, and on the reasons prompting him to make it. Finally, I consider one of the most interesting contemporary conventionalist accounts of rules of recognition, namely Andrei Marmor's view that such rules should be understood as the constitutive conventions of partly autonomous social practices. My aim in this part of the article is to compare Marmor's account with my earlier interpretation of Hart's views, and to consider whether Marmor's account truly is conventionalist in character and whether it provides us with a persuasive conventionalist understanding of rules of recognition.

1. *Introduction*

All contemporary positivists accept that the criteria of legality are conventional ...[1]

... it should have been clear from the start that the rules of recognition are conventions ...[2]

These statements, drawn from the recent work of two prominent legal positivists, are indicative of the 'conventionalist turn'[3] taken by some within that tradition in recent years. Such theorists claim that conventions of

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[1] J.L. Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford University Press, 2001), 68 (internal footnote omitted).

[2] A. Marmor, *Positive Law and Objective Values* (Oxford University Press, 2001), 4–5.

[3] I borrow this term from Leslie Green (one of the turn's few critics) in L. Green, 'Positivism and Conventionalism' (1999) 12 *Canadian Journal of Law and Jurisprudence* 35, at 35–52.

some kind have an important role to play in explaining the nature of law: in particular, that conventions are the key to a proper understanding of H.L.A. Hart's doctrine of the rule of recognition.[4] As Marmor's above statement indicates, some theorists adopting this view do not regard themselves as having taken a conventionalist 'turn' at all, and claim that it should always have been obvious that rules of recognition are to be given a conventionalist explanation. In my view, however, the matter is not as obvious as it seems to some contemporary legal positivists. In this article, I attempt to subject the assumption that the rule of recognition is to be understood as a conventional rule to careful and somewhat sceptical further consideration. The discussion focuses on the original account of the rule of recognition given by H.L.A. Hart in the first edition of *The Concept of Law* and the modifications to that account offered in the 'Postscript' to the 2nd edn of that work,[5] and on Andrei Marmor's understanding of rules of recognition in *Positive Law and Objective Values*.[6] Briefly, my argument is that we should not be too quick to assume that the rule of recognition is to be understood as a conventional rule, and that closer examination of the nuances of this issue can deepen our understanding of the foundations of contemporary legal positivism, and can assist in clarifying our thinking regarding why and how legal officials identify law in the way that they do.

2. *Hart's Original Account of the Rule of Recognition*

What would it mean to accept that the criteria of legality are conventional, or to view the rule of recognition as a conventional rule? A working definition of conventional rules seems useful here as a starting point from which discussion can proceed. As I am concerned here with the explanations of the rule of

[4] See e.g. Marmor, *Positive Law and Objective Values*, above n 2, Ch. 1 and 2; J.L. Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis' (1998) 4 *Legal Theory* 381; Coleman, *The Practice of Principle*, above n 1, Ch. 7 and 11; G. Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 *Journal of Legal Studies* 165; S. Shapiro, 'Law, Plans, and Practical Reason' (2002) 4 *Legal Theory* 387 (although n.b. Shapiro urges caution as regards the use of the term 'conventionalist' in characterizing the position he advocates, and emphasizes that the conventionalist aspects of his account do not play a central explanatory role in it). Some of this work in legal philosophy may have been originally inspired by David Lewis' analysis of conventions in D. Lewis, *Convention: A Philosophical Study* (Harvard University Press, 1969). Lewis' account features in the discussion of Andrei Marmor's work later in this article.

[5] H.L.A. Hart, *The Concept of Law* (Clarendon Press, 1961); H.L.A. Hart, *The Concept of Law* (2nd edn. with a postscript ed. P.A. Bulloch and J. Raz, Clarendon Press, 1994). All page references in this article are given according to the pagination in the 2nd edition.

[6] Above n 2. Although I regard Jules Coleman's work on this topic as interesting and important, I mention it here only in passing. The reason for this, in addition to the usual constraints of space, is that certain aspects of Marmor's views are especially relevant in terms of the particular issues which I wish to address here. It should also be noted that the present article is largely concerned with offering an interpretation and critical analysis of Hart and Marmor's respective positions. Addressing the work of other theorists writing on these issues, as well as developing and defending more extensively my own position on this topic, is a task for future work.

recognition offered by H.L.A. Hart and Andrei Marmor, it is helpful to turn to these theorists' views in this regard:

> Rules are conventional social practices if the general conformity of a group to them is part of the reasons which its individual members have for acceptance;[7]

> a necessary *reason* for following a rule which is a social convention consists in the fact that others follow it too.[8]

According to these statements, to hold that the rule of recognition is a conventional rule is to make a claim about the reasons why it is accepted and followed. If the rule is conventional, the reasons for accepting and following it must include the fact that others follow it too, i.e. there must be a common practice of following the rule which is reason-giving. Is this how Hart views the rule of recognition in his original account of it in the 1st edn of *The Concept of Law*?

In Hart's original account, the rule of recognition plays a vitally important role in the union of primary and secondary rules which forms the explanatory core of his account of a legal system.[9] Hart presents the rule of recognition as remedying the uncertainty which would bedevil the social organization of a community whose affairs were governed solely by what Hart refers to as 'primary rules of obligation',[10] i.e. rules which require members of the community to do or forbear from doing certain things. Hart contends that the rules of such a community would not form a system, in the sense that there would be no common mark which identifies all and only those rules which count as the rules of the group. The rule of recognition of a legal system remedies this, and provides the criteria of legal validity in that system, identifying those features a rule must possess if it is to count as a legal rule of the system in question. According to Hart, legal officials must accept as binding and follow this rule of recognition in identifying valid law in order for a legal system to exist. For a rule of recognition to be accepted and followed, a common practice must exist amongst officials of identifying certain things as constituting valid law, and officials must exhibit an attitude of acceptance or an internal point of view with regard to what they are doing, i.e. they must treat the rule requiring them to recognize certain things as constituting valid law as binding upon themselves and upon other officials, criticize deviations from it and use normative terminology in making such critical appraisals.[11] The common practice of officials of recognizing certain things and not others as constituting valid law is thus necessary in order for the rule of recognition to exist, and is a vitally important aspect of that rule.[12]

[7] Hart, 'Postscript' to *The Concept of Law*, above n 5 at 255.
[8] Marmor, *Positive Law and Objective Values*, above n 2 at 5 (emphasis in original).
[9] Hart, *The Concept of Law*, above n 5, Ch. V and VI.
[10] Ibid at 91.
[11] Ibid at 55–7; 83–91; 102–3; 116–17.
[12] Ibid at 109–10; 111.

While the importance for the doctrine of the rule of recognition of a common practice amongst officials is thus not in doubt, something more needs to be demonstrated in order to establish that the rule of recognition is a conventional rule. According to the working definitions drawn from the work of Hart and Marmor at the outset of this discussion, in order for a rule to be a conventional rule, the fact that there is a common practice of following the rule must form part of the reasons why any given individual accepts it as binding and adheres to it. In terms of Hart's doctrine of the rule of recognition, this means that the existence of a common official practice of recognizing certain things as constituting valid law must be reason-giving, i.e. it must contribute to the reasons why each official accepts as binding and follows the rule of recognition.

So how does Hart characterize the reasons which legal officials have for accepting the rule of recognition in the original edition of *The Concept of Law*? The next two subsections split the discussion of this issue into two: I will first of all consider Hart's position as regards legal reasons to accept the rule of recognition, before investigating his views regarding non-legal reasons to accept it.

A. *Legal Reasons for Accepting the Rule of Recognition*

A useful starting point in this discussion is Hart's treatment of the relationship between legal validity and legal reasons. In chapter 6 of *The Concept of Law*, Hart elaborates upon his view of legal validity by differentiating it from law's efficacy.[13] Although the general efficacy of the legal system in question is normally presupposed by anyone stating that a particular rule of that system is legally valid,[14] statements of legal validity cannot be reduced to statements about law's efficacy, such as a prediction that the rule in question will reliably be enforced by the courts. Such a reduction fails to take adequate account of the internal point of view of judges and other actors in the legal system who accept and follow the rules of that system. A judge who identifies a legal rule as valid and applies it in a case before him does not regard himself as making a prediction that the rule will be enforced by himself and by other judges (although in normal circumstances he presupposes that it will), but is treating that rule as a *reason* for his decision, and will regard his decision as legally justified because it is made according to a legally valid rule.[15] The role which the rule plays in the judge's practical reasoning processes and the attitude which he adopts towards that rule are grossly misrepresented by reducing

[13] Ibid at 103–5.

[14] Hart at allows for possible exceptions, for example in cases where, perhaps for teaching purposes, it would be useful and meaningful to use the terminology of validity even when speaking of a legal system long since defunct, such as Roman law; see Hart, *The Concept of Law*, above n 5 at 104.

[15] Ibid at 105.

claims of legal validity to predictions about what will and will not be enforced by legal officials.

According to Hart, then, if a rule is legally valid, this supplies a judge with a legal reason or a legal justification to follow it and apply it in cases coming before him. Hart further explains that a legal rule is valid if it conforms to a criterion of validity provided by another rule of the system. He gives as an example a by-law of Oxfordshire county council which will be valid if it was made in accordance with the procedure specified by the relevant statutory order made by a government Minister.[16] If we then ask why this statutory order is itself valid, or why it is legally justified for a judge to take it, and the by-laws created in accordance with it, as part of the reason for his decision, we will be directed to another rule further up the hierarchy, i.e. to the statute empowering the relevant minister to make such statutory orders. Likewise, the validity of that statute, or the reasons why, legally speaking, a judge ought to apply it, can be traced to the rule that, in the English legal system, what the Queen in Parliament enacts is law. This rule, however, forms part of the rule of recognition of the English legal system.[17] If, therefore, we ask why the rule that what the Queen in Parliament enacts is law is valid, then, according to Hart:

> ... we are brought to a stop in inquiries concerning validity: for we have reached a rule which, like the intermediary statutory order and statute, provides criteria for the assessment of other rules; but it is also unlike them in that there is no rule providing criteria for the assessment of its own legal validity.[18]

In the original edition of *The Concept of Law*, Hart is very clear on this issue. The rule of recognition provides the criteria of validity of other legal rules, but there is no rule in virtue of which the rule of recognition itself can be accounted as valid. The rule of recognition is therefore the ultimate rule of a legal system,[19] and, as such, there are no criteria providing for its validity:

> No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way.[20]

As was discussed earlier, according to Hart, if a rule is legally valid, then judges and other legal officials have a legal reason, or a legal justification, for treating as binding and applying that rule. In the case of legal rules other than the rule of recognition, a legal official should treat a purported legal rule as

[16] Ibid at 107.
[17] I refer to the English and not UK legal system in order to avoid the complications which arise from the fact that the UK is a multi-legal system state.
[18] Hart, *The Concept of Law*, above n 5 at 107.
[19] Ibid at 107.
[20] Ibid at 109.

valid and has legal reasons to apply it if it conforms to criteria of validity laid down in the rule of recognition, or in one of the legal rules which is valid according to the rule of recognition of that legal system. However, there are no further rules providing validity criteria for the rule of recognition itself; that is what it means for this rule to be the ultimate rule within a given legal system. If, therefore, no further questions can arise as to the legal validity of the rule of recognition, then it is evident that, according to Hart's original account of it, there are no further legal reasons, and no further legal justification, for accepting it and treating it as binding. In claiming that there are no *further* legal reasons for accepting the rule of recognition, I am not denying that, for those who do accept the rule of recognition, that rule provides them with legal reasons for doing that which it requires, in the sense that, in specifying the criteria of validity which other rules of the system must meet in order to qualify as legal rules of that system, it thereby provides officials with legal reasons for identifying as law and applying those other legal rules of the system. However, because there are no validity criteria for that ultimate rule itself, no further justification of it is provided by law, and, in this sense, there are no further legal reasons justifying legal officials accepting and treating as binding the rule of recognition itself. If a legal official asks why he ought to accept a statute as valid law, he can be referred to the criteria of validity specified by the rule of recognition accepted by officials of that legal system which hence furnishes him with legal reasons to apply the statute. However, if that official asks why he ought to accept and treat as binding the rule of recognition itself, no legal grounds can be given establishing the validity of this rule. There are no criteria of validity pertaining to the rule of recognition itself, and, in that sense, there are no further legal grounds justifying its acceptance. This is what is intended throughout this article by the claim that there are no further legal reasons for accepting the rule of recognition.[21]

In order for the rule of recognition to be a conventional rule, the fact that there is a common official practice of recognizing certain things as constituting valid law must form part of the reasons why each official accepts the rule of recognition and treats it as binding. However, if, as has been argued earlier, Hart contends that there are no criteria of legal validity for the rule of recognition, and hence no further legal reasons justifying accepting and treating as binding that rule itself, then clearly he cannot view the common official practice of recognizing certain things as valid law as supplying legal reasons for accepting the rule of recognition as binding. It is important to note, however, that in contending that, for Hart, the common official practice of recognizing certain things as constituting valid law does not give judges legal reasons for accepting the rule of recognition as binding; I am not denying the central role

[21] On this point, see also J. Raz, *The Authority of Law* (Clarendon Press, 1979), at 68–9.

which this practice has in terms of that rule. As was discussed earlier, the rule of recognition only exists if there is a common official practice of identifying certain things as constituting valid law.[22] Moreover, according to Hart, if doubts arise as to what the rule of recognition of a given system is, then these doubts are to be settled: '... by reference to actual practice: to the way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications'.[23] This practice hence plays an important identifying role: it is that to which officials and others must look at verifying the existence and identifying the content of a rule of recognition of a given legal system in cases of doubt. However, although this common practice is necessary in order for the rule of recognition to exist and is that to which we should look in identifying that rule, as the rule of recognition is the ultimate rule in a legal system, there are no further legal rules providing criteria for its validity, and there are no further legal reasons for accepting it as binding. If there are no such legal reasons, then common official recognition practices can hardly contribute to them. In Hart's original account of the rule of recognition the common official practice of recognising certain things as constituting valid law is hence an existence condition of the rule of recognition and can play an identifying role with regard to it, but does not contribute to the legal reasons which officials have for accepting that rule as binding.

B. *Non-Legal Reasons for Accepting the Rule of Recognition*

Of course, to say that there are no further *legal* reasons for accepting the rule of recognition as binding is not to say that there are no further reasons, *tout court*, for accepting it. Indeed, Hart himself poses some questions we may want to ask of a given recognition rule which, if investigated, could point the way towards some answers in this regard:

> We can ask whether it is a satisfactory form of legal system which has such a rule at its root. Does it produce more good than evil? Are there prudential reasons for supporting it? Is there a moral obligation to do so? These are plainly very important questions; but ...[24]

The 'but' is significant here; for Hart goes on to make the point that once we have moved to asking such questions, we are no longer

[22] Hart, *The Concept of Law*, above n 5 at 109–11. This point, and its relevance for the issue of whether Hart should be understood as espousing a conventionalist interpretation of the rule of recognition in the 1st edn of *The Concept of Law* is also discussed by L. Green, 'Positivism and Conventionalism', above n 3 at 39.

[23] Hart, *The Concept of Law*, above n 5 at 108.

[24] Ibid at 107.

concerned with *legal* validity, or with *legal* reasons for adhering to the rule of recognition:

> So too when we move from the statement that a particular enactment is valid, to the statement that the rule of recognition of the system is an excellent one and the system based on it worthy of support, we have moved from a statement of legal validity to a statement of value.[25]

In the 1st edn of *The Concept of Law*, questions concerning the non-legal reasons judges might have for treating the rule of recognition as binding are largely left open. Hart regards his remit in the book as being to explain the distinctive structure of municipal legal systems,[26] and he contends that such systems can be analysed in terms of a union of primary and secondary rules, wherein the primary rules are by and large obeyed by the bulk of the population, and the officials of the system accept and follow the secondary rules including the rule of recognition. Hart's view seems to be that these features of law can be explained adequately without delving into the issue of what, if any, further non-legal reasons officials have for such acceptance.[27] As a result, practically the only remarks which Hart makes in the 1st edn of the book concerning non-legal reasons for accepting the rule of recognition are negative ones: he is at pains to point out that such acceptance need not entail regarding the law as morally justified:

> ... it is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so. In fact, their allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, and yet for a variety of reasons continue to do so.[28]

It seems that, for Hart, these various possible reasons for treating the rule of recognition as binding (including the belief that the system is morally justified), interesting though they may be, do not need to be investigated in order to elucidate the distinctive structure of legal systems and hence further discussion of them does not feature amongst his principal tasks in *The Concept of Law.* Moreover, in the few suggestive remarks he makes in the passage quoted above, none of the possible reasons for accepting the rule of recognition mooted are presented as necessary reasons, and nor does Hart claim that one of those possible reasons has primacy over the others. So long as the bulk of the

[25] Ibid at 108.
[26] Ibid at 17.
[27] Of course, Hart discusses far more in *The Concept of Law* than is mentioned above. My point is merely that there are some questions which he does not believe it is necessary to engage with in order to explain those important features of law elucidated in the book.
[28] Hart, *The Concept of Law*, above n 5 at 203.

population obey the primary rules, and officials of the system accept and treat as binding the rule of recognition and other secondary rules for *some* reason—and such reasons may vary considerably from official to official—then we have a legal system on our hands, which is what Hart is seeking to explain.[29] Indeed, Hart may have regarded the fact that his account of law does not attribute to legal officials an unrealistic level of self-reflection concerning the further reasons why they accept the rule of recognition ('... an unreflecting inherited or traditional attitude'[30]), and that it allows for the possibility that officials in a legal system may accept the same rule of recognition, but for significantly different reasons, as strengths of his account.[31]

None of this lends support to the idea that Hart understood the rule of recognition as a conventional rule in the 1st edn of *The Concept of Law*. In order for that rule to be a conventional rule, the existence of a common official practice of recognizing certain things as constituting valid law must form part of the reasons which each official has for accepting the rule of recognition. However, as the earlier discussion indicates, in the original book, Hart believes that those aspects of law which he takes as his subject matter can be explained without delving into questions concerning what non-legal reasons officials have for accepting the rule of recognition. This being so, he is content merely to suggest some possibilities in this regard whilst claiming that none of them has primacy or is a necessary such reason, and whilst emphasizing that acceptance of a rule of recognition need not be for moral reasons.[32] As Hart does not believe it necessary to engage with this question further in the original edition of *The Concept of Law*, there is no claim in this account that common official practice must necessarily have a role to play in answering it.[33]

C. *Hart's Original Account of the Rule of Recognition: Conclusion*

The discussion in the last two subsections is intended to establish that there is no evidence in Hart's original account of the rule of recognition to support the conclusion that he regards this rule as a conventional rule. In order for it to be such a rule, the existence of a common official practice of recognizing certain things as constituting valid law must form part of the reasons which each official has for accepting the rule of recognition as binding. I have argued that

[29] Cf. J. Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980), Ch. 1 who takes Hart to task for failing to identify one such reason as primary and elucidate law in terms of it.

[30] Hart, *The Concept of Law*, above n 5 at 203.

[31] I am grateful to Leslie Green, Dori Kimel and Joseph Raz for comments on the above points which (I hope) have clarified my understanding of them.

[32] N.b. I am not denying that Hart conceives of the rule of recognition as binding on judges, or that he views it as a duty-imposing rule (on this latter point, see Raz, *The Authority of Law*, above n 21 at 96–7 and 178–9). My point is rather that, in the original edition of *The Concept of Law*, he does not appear to explain, and does not deem it necessary to explain, what reasons judges have for accepting it as binding, beyond the brief remarks discussed above.

[33] This point is also discussed in L. Green, 'Positivism and Conventionalism', above n 3 at 39.

a common official recognition practice is necessary in order for the rule of recognition to exist, and is that to which we must look in identifying the content of the rule in cases of doubt. However, common official practice cannot constitute a *legal* reason for accepting and treating as binding the rule of recognition itself, because the rule of recognition is an ultimate legal rule to which questions regarding what make it legally valid, or questions regarding what further legal reasons there are for accepting it, do not apply. Moreover, in the 1st edn of *The Concept of Law*, Hart does not claim that official practice is a necessary constituent of the *non-legal* reasons officials have for adhering to the rule of recognition either. He does not regard the elucidation of those reasons as necessary to his project of analysing the distinctive structure of municipal legal systems, and he thus leaves open the question of what non-legal reasons officials may have for accepting the rule of recognition, being content merely to point out that such reasons may be various, and need not entail moral acceptance of the legal system in question. My contention, then, is that nothing in Hart's original account of the rule of recognition should lead us to conclude that he regards this rule as a conventional rule wherein common official practice constitutes part of the reasons which each judge has for treating it as binding.

3. *Hart's 'Postscript' and a Revisionist History of 'The Concept of Law'?*

In the 'Postscript' to the 2nd edn of *The Concept of Law*, Hart sometimes appears to adopt a new position regarding the relationship between common official practice and the reasons which judges and other legal officials have for accepting the rule of recognition as binding. Hart discusses this issue at two main points in the 'Postscript': in his discussion of the nature of rules in section 3;[34] and in considering whether Dworkin's account of law implicitly relies on something very similar to the rule of recognition in section 4.[35] I will address each of these discussions in turn.

In section 3 of the 'Postscript', in responding to some of Dworkin's criticisms of the account of social rules given in the 1st edn of the book—an account which has been dubbed 'the practice theory of rules'[36]—Hart accepts as important Dworkin's distinction between rules which are conventional social practices, wherein 'the general conformity of a group to them is part of the reasons which individual members have for acceptance',[37] and concurrent practices, wherein 'members of the group have and generally act on the same

[34] Hart, *The Concept of Law*, above n 5 at 254–9.
[35] Ibid at 263–8.
[36] Ibid at 255; J. Raz, *Practical Reason and Norms*, *Norms* (2nd edn., Princeton University Press, 1990), 50–8.
[37] Hart, *The Concept of Law*, above n 5 at 255.

but independent reasons for behaving in certain specific ways'.[38] Hart then goes on to state that, having accepted the importance of this distinction, he now views his account of social rules as applying only to rules which are conventional in the sense mentioned earlier, and that he regards the rule of recognition as such a conventional rule.[39] This being so, it may appear from a first reading of the 'Postscript' that Hart has changed or at least significantly qualified his original position, and that he is now unequivocal in his support for the view that the rule of recognition is a conventional social rule wherein the common practice of officials in recognizing certain things as constituting valid law forms part of the reasons which each official has for accepting that rule as binding. On closer examination, however, Hart is not as unequivocal in his support for a conventionalist interpretation of the rule of recognition as at first he might seem. Immediately after his concession that his account of social rules applies only to conventional rules, Hart makes the following remark concerning the consequences of this concession in terms of his explanation of the rule of recognition:

> But the theory remains as a faithful account of conventional social rules ... including the rule of recognition, which is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts.[40]

There seems to be an important mismatch between the first part of this sentence in which Hart states that the rule of recognition is a conventional rule, and the gloss on that statement which immediately follows it and which is presumably supposed to explain Hart's point further by expanding upon the rule of recognition's conventional nature. In this gloss, Hart tells us that the rule of recognition *exists* only if it is accepted and practised by the courts. As was discussed in section 2, however, this claim is distinct from the claim that the rule of recognition is a conventional rule. A common official practice of recognizing certain things as constituting valid law is indeed necessary in order for a rule of recognition to *exist* in a given legal system, and is that to which we should look in establishing the content of the rule in cases of doubt. All of this can be granted, however, without making the further claim that this common official practice contributes to the *reasons* which each official has for accepting the rule of recognition as binding. Hart's initial discussion of this issue in the 'Postscript' is thus a curious one, because although he states that he regards the rule of recognition as a conventional rule, the gloss in the sentence quoted earlier which seems to expand upon what he means by this commits him only to the position which I have attributed to him in the 1st edn of

[38] Ibid at 256.
[39] Ibid at 256.
[40] Ibid at 256.

The Concept of Law, namely that official practice is necessary in order for the rule of recognition to exist.

Hart continues the passage quoted above as follows:

> Enacted legal rules, by contrast [with the rule of recognition], though they are identifiable as valid legal rules by the criteria provided by the rule of recognition, may exist as legal rules from the moment of their enactment before any occasion for their practice has arisen and the practice theory is not applicable to them.'[41]

In this part of the passage, Hart points out an important difference between the rule of recognition and those legal rules which it identifies as valid. The difference in question is that whereas other legal rules come into existence as soon as they emanate from a legal source recognized by the rule of recognition, the rule of recognition itself can only be said to exist if there is a common official practice of recognizing certain things as constituting valid law. The fact of being practised hence plays a different role with regard to the rule of recognition as compared with other legal rules. However, as Hart states it in the passage above, the difference lies with what is necessary in order for one or other type of rule to *exist*: for an ordinary legal rule to exist, it must emanate from a source recognized by the rule of recognition as constituting valid law; for the rule of recognition to exist there must be a common official practice of recognizing certain things as valid law. Once again, Hart does not claim in this passage that the common official recognition practice which is required in order for the rule of recognition (but not other legal rules) to exist necessarily constitutes part of the reasons why it is accepted as binding.

The passage discussed above provides practically the only positive explanatory gloss in section 3 of the 'Postscript' on Hart's view of the conventional nature of the rule of recognition. The rest of this section is given over to a discussion of some of Dworkin's criticisms of the practice theory of rules, rather than to further explanation of what, in Hart's view, it means for the rule of recognition to be a conventional rule. In his initial discussion of the conventional nature of the rule of recognition in section 3 of the 'Postscript', then, there appears to be an important ambiguity in Hart's position. On the one hand, he states that he now regards the rule of recognition as a conventional rule. But in expanding upon what he means by that statement, he claims merely that a common official practice is necessary in order for the rule of recognition to *exist*, and does not characterize that practice as reason-giving.

In a later section of the 'Postscript', however, Hart makes a further brief reference to the conventional nature of the rule of recognition, and this time his view seems less ambiguous:

> Certainly the rule of recognition is treated in my book as resting on a conventional form of judicial consensus. That it does so rest seems quite clear at least in English

[41] Ibid at 256.

> and American law for surely an English judge's reason for treating Parliament's legislation (or an American judge's reason for treating the Constitution) as a source of law having supremacy over other sources includes the fact that his judicial colleagues concur in this as their predecessors have done.[42]

In this passage, Hart does appear to characterize the relationship between common official practice and the rule of recognition in a way which amounts to a conventionalist interpretation of that rule.[43] There are, however, a number of puzzles which this raises. First of all, Hart claims in this passage that he has always treated the rule of recognition as a conventional rule. However, as the discussion in section 2 demonstrates, this does not ring true with what Hart actually said in the original edition of *The Concept of Law*, where he makes it clear that the ultimacy of the rule of recognition means that there are no further legal reasons for accepting it as binding, and where he contends that the nature of legal systems can be adequately explained without investigating what non-legal reasons judges might have for accepting that rule. As the discussion in the present section indicates, even in the 'Postscript' to the 2nd edn of the book, there is an apparent ambiguity in Hart's understanding of what it means for the rule of recognition to be a conventional rule: an ambiguity between understanding the common official practice of recognizing certain things as valid law as a necessary existence condition of the rule on the one hand, and understanding that practice as a necessary reason why each judge follows it on the other. The passage above is also puzzling because as well as representing an apparent significant change of position whilst explicitly denying this, it offers no argument for this change, and does not explain why we should understand the rule of recognition as a conventional rule. No further argument in favour of this position, or indeed any further explanation of what Hart takes the position to be, is given in the rest of the 'Postscript' either. Moreover, in the quotation above, Hart tells us that an English's judge's reason for treating Parliament's legislation as a source of law, '*includes the fact* that his judicial colleagues concur in this',[44] thus implying that the existence of a common judicial practice constitutes a necessary but not sufficient reason for each judge to follow the rule of recognition. This leaves open the question of what other reasons

[42] Ibid at 267.

[43] It has been suggested to me by both John Gardner and Wil Waluchow that there may be ways to read these remarks such that they do not amount to a 'conventionalist turn' on Hart's part. Unfortunately, the constraints of space prevent me from discussing their valuable suggestions here. In the present section, then, I take Hart's self-proclaimed conventionalist turn—at least in the above passage—at face value, but attempt to contrast this with his views in the 1st edn of *The Concept of Law*, and to point to some ambiguities as regards his views on this issue in the 'Postscript'. However, one interesting possibility which may assist in interpreting such remarks is taken up in sections 7 and 8 below where I discuss the idea that common official practice identifies for each judge what they have reason to do, assuming that they have further reasons to do that. If this is the role of common official practice envisaged by Hart in the passage quoted above then in my view, as I also discuss in sections 7 and 8, there are doubts regarding whether this is best viewed as a conventionalist position.

[44] Hart, *The Concept of Law*, above n 5 at 267 (emphasis added).

Hart believes must combine with the reason allegedly engendered by the existence of a common recognition practice in order for judges to have sufficient reasons to follow the rule of recognition. All in all, then, Hart's apparent conventionalist turn at some points in the 'Postscript' represents more of a series of puzzles than an explanation of his views on this issue, and it is very unfortunate in terms of attaining an adequate understanding of this aspect of Hart's stance that no further elaboration of his position, or of his reasons for holding it, features in his final work.

4. *Hart's Conventionalist Turn: Roots and Reasons*

One of my aims so far has been to urge greater caution as regards assuming that the rule of recognition is to be understood as a conventional rule, and as regards attributing this view to Hart in either his earlier or later work on this topic.[45] However, insofar as we can detect—at least at some points in the 'Postscript'—shades of a 'conventionalist turn', it is interesting to consider what appears to have prompted Hart to move in this direction. As was noted in the last section, Hart first mentions this issue in the part of the 'Postscript' where he is responding to certain of Dworkin's criticisms of what has become known as the practice theory of rules.[46] According to Hart, the practice theory of rules:

> ... treats the social rules of a group as constituted by a form of social practice comprising both patterns of conduct regularly followed by most members of the group, and a distinctive normative attitude to such patterns of conduct which I have called 'acceptance?'[47]

Hart takes Dworkin's central criticism of this account to be that it does not yield an adequate explanation of the normativity of rules. He presents Dworkin as contending that the elements which constitute rules according to the practice theory cannot, in general, adequately explain how rules can establish reasons

[45] Other legal philosophers have also been wary of understanding the rule of recognition as a conventional rule and of attributing this view to Hart. For example, Leslie Green has expressed doubts that Hart understood the rule of recognition as a conventional rule in the original edition of *The Concept of Law* view (see Green, 'Positivism and Conventionalism', above n 3, 37–9), and has further contended that it is possible to interpret the account of the rule of recognition offered in the 'Postscript' as not being a conventionalist view (ibid at 40–1); and Joseph Raz has claimed that, *contra* Hart's remarks in the 'Postscript', the rule of recognition, '... cannot be sensibly regarded as a conventional rule—that is, we cannot assume it to be a necessary truth that when a judge follows the practice of, let us say, applying acts passed by the Queen in Parliament as binding, he does so because all the courts do so, or because they all hold themselves duty-bound to do so (even though they do)... The rule of recognition constitutes a normative practice, but not a conventional practice.' in J. Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries', in L. Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 1998), 161–2.

[46] Hart, *The Concept of Law*, above n 5 at 254–9. For Dworkin's criticisms, see R.M. Dworkin, 'Social Rules and Legal Theory' (1972) 81 *Yale Law Journal*, 855, section I reprinted as 'The Model of Rules II' in R. M. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) at 46.

[47] Hart, *The Concept of Law*, above n 5 at 255. See also ibid at 55–7, 86–91, 101–10 for Hart's account of the theory.

for action and duties to follow them.[48] In the course of his criticisms, however, Dworkin makes a point which Hart appears to perceive as something of a lifeline, namely that there are *some* rules where the factors which constitute Hartian social rules can at least partially contribute to an explanation of how rules can establish reasons for action and duties. The rules in question are conventional rules, wherein the fact that others follow the rule, i.e. the fact that there is a common practice of adhering to it, furnishes part of the reasons which each person has for following it.[49]

In the 'Postscript' discussion of the practice theory of rules,[50] Hart appears to have been influenced by this line of reasoning, and to accept what he perceives as the lifeline which Dworkin throws him. However, the discussion in section 2 above casts doubt on whether Hart should have been so accepting. In criticizing Hart's account of social rules, Dworkin seems to assume that the factors which Hart identifies and explains in the 1st edn of *The Concept of Law* as *existence conditions* of social rules are also intended to provide an explanation of how there can be *reasons* for following those rules, and of how those rules can impose duties:

> Under what circumstances do duties and obligations arise?
> Hart's answer may be summarized in this way. Duties exist when social rules exist providing for such duties. Such social rules exist when the practice-conditions for such rules are met. These practice-conditions are met when the members of a community behave in a certain way; this behaviour *constitutes* a social rule and imposes a duty.[51]

> The existence of the social rule, and therefore the existence of the duty, is simply a matter of fact.[52]

If we apply this analysis to Hart's account of the rule of recognition, however, Dworkin would appear to have misunderstood Hart's intentions. As I argued in section 2, Hart does not seem to have, nor to intend to have, an explanation of the reasons or duties which judges have for accepting the rule of recognition as binding in his original account of it. As it is Hart's view that there are no legal grounds for the validity of the rule of recognition, he is committed to the position that there are no further legal reasons for accepting it as binding. Moreover, because he does not believe that he needs to do so in order to explain the distinctive structure of legal systems, Hart does not discuss or explain the non-legal reasons judges might have for accepting the rule of

[48] Ibid at 256–7.
[49] See Dworkin, 'Social Rules and Legal Theory', above n 46 at 862–3. Ultimately, Dworkin claims that Hart's account fails even as an account of conventional social rules, ibid 863–8.
[50] Hart, *The Concept of Law*, above n 5 at 254–9.
[51] Dworkin, 'Social Rules and Legal Theory', above n 46 at 858–9 (emphasis in original, internal footnote omitted).
[52] Ibid at 859.

recognition beyond a few brief remarks to the effect that they may be various, and need not be moral reasons. As Hart does not attempt to provide an explanation of the reasons judges have for accepting the rule of recognition in his original account, he does not appear to claim that the existence of a practice in common amongst judges of following that rule constitutes part of those reasons, or that such a practice imposes a duty to follow it. Insofar as Hart did accept in the 'Postscript' Dworkin's criticism that the practice theory of rules cannot explain how rules establish reasons for action or duties, then,[53] it would thus seem to have been more in keeping with his position in the 1st edn of *The Concept of Law* if, in response, he had acknowledged that he did not seek to explain the reasons judges have for accepting the rule of recognition as binding, and had made it clear that the elements which he regards as necessary existence conditions of that rule were never intended to supply such an explanation. If he had gone down this route, then, again to the extent that he accepted Dworkin's criticisms, Hart could have moved forward by looking afresh for such an adequate explanation, rather than claiming in the face of evidence to the contrary that he *did* have at least a partial explanation of what reasons judges have for accepting the rule of recognition in the original book, and that it is to be found amongst the existence conditions of that rule, namely in the existence of a common judicial recognition practice.[54] In my view, then, Hart may have jumped too quickly, and jumped in the wrong direction in adopting some sort of conventionalist interpretation of the rule of recognition as he appears to at some points in the 'Postscript', and his being too ready to accept the line of reasoning inherent in Dworkin's criticisms of the practice theory of rules seems to have played a large part in his doing so.

Irrespective of whether his intellectual motivations were sound, or whether he was true to his own previous convictions in so doing, the question remains whether there are good reasons to adopt, as Hart sometimes seems to, a conventionalist explanation of the rule of recognition. The difficulty with trying to assess Hart's 'Postscript' views in this regard has already been touched on at the end of section 3, namely that Hart's few brief remarks on this issue in the 'Postscript' simply do not give us enough in the way of an adequate explanation and defence of his stance. Some contemporary legal positivists have, however, been willing to take on Hart's mantle in this respect. In the remainder of this article, I will discuss one of the most interesting of these, namely Andrei Marmor's account of rules of recognition as constitutive conventions of autonomous social practices. The central question motivating

[53] In my view, the precise extent to which Hart did accept this criticism is not entirely clear from section 3 (i) of the 'Postscript'.

[54] Joseph Raz also criticizes the practice theory of rules along similar lines to Dworkin, i.e. that it does not offer an explanation of how rules can be reasons for action, in Raz, *Practical Reason and Norms*, above n 36 at 56–8. Raz, however, does not believe that Hart intended to offer a conventionalist explanation of social rules in his original account of the practice theory (ibid at 57–8), and does not believe that this is a promising route to go down in terms of providing a general explanation of the normativity of rules (ibid at 57).

this discussion is: Does Marmor make a convincing case for understanding the rule of recognition as a conventional rule?

5. *Marmor's Account of Rules of Recognition as Constitutive Conventions*

In *Positive Law and Objective Values* Marmor defends Hart's apparent turn toward conventionalism in the 'Postscript', and attempts to demonstrate that understanding the rule of recognition as a 'constitutive convention' can help illuminate the nature and role of that rule, and, more generally, the nature of law.[55] Marmor does not share my view that there are ambiguities regarding Hart's apparent conventionalist turn in the 'Postscript' and squarely attributes to Hart the view that the existence of a common judicial recognition practice constitutes a necessary reason for each judge to follow the rule of recognition.[56] In explaining the particular sense in which he regards the rule of recognition as a conventional rule, Marmor takes as his starting point David Lewis' analysis of conventions as solutions to recurrent co-ordination problems.[57] According to this analysis a co-ordination problem arises when a set of circumstances has given rise to the possibility of several alternative courses of action for agents, but each agent in the situation in question has a stronger preference to act in the same way as the other agents than to act on any one of the individual alternatives open to him. Where such a co-ordination problem is recurrent, a conventional social rule might emerge in order to provide a solution to it, and in such a case, the fact that others have a practice in common of following the rule provides a reason for each of them to follow it. For example, if a rule has evolved whereby the receiver of the call is expected to call back if a mobile phone call is unexpectedly cut off, and this rule is adhered to by mobile phone users, then each such user has a reason to follow this rule that stems from the fact that there is a common practice amongst his fellow mobile phone users of following it.[58] They have such a reason because each agent has a stronger preference for uniformity of action which will facilitate the speedy resumption of interrupted conversations than for acting on any one of the particular alternatives (calling back or waiting to be called back) open to them.

According to Marmor, Lewis' account successfully explains two important intuitions which we have regarding social conventions: (1) that conventional rules are regarded as arbitrary in some sense, i.e. that in situations giving rise to co-ordination problems there are several possible rules which might

[55] Marmor, *Positive Law and Objective Values*, above n 2. The following discussion focuses on the first two chapters of this book.

[56] Ibid at 5.

[57] Ibid at 7–14. For Lewis' original account, see D. Lewis, *Convention: A Philosophical Study* (Harvard University Press, 1969).

[58] Marmor, *Positive Law and Objective Values*, above n 2 at 11.

emerge to solve them, and, (2) that the reasons for following a conventional rule are strongly linked to the fact that others follow it too.[59] Although Marmor thus regards Lewis as having provided a successful explanation of conventional rules in situations where they emerge as solutions to co-ordination problems, he is quick to note that there are difficulties with using this account in order to provide a conventionalist explanation of the rule of recognition.[60] First of all, recognition rules of legal systems do not seem to be arbitrary. The recognition rule that identifies statutes emanating from the Westminster Parliament in the UK as law is not merely one arbitrary rule selected from many potential candidates for the sake of securing uniformity of practice as regards identifying law, but has emerged from hundreds of years of constitutional history to reflect important political values regarding the nature of democracy and the role of the people's representatives in the law-making process. The content of this rule matters, not merely the fact that some such rule exists ensuring co-ordination in law recognition, which seems to set it miles apart from rules about which side of the road to drive on or who should call back if a phone call is interrupted. Second, Marmor contends, there are difficulties with understanding the rule of recognition as the solution to a recurrent co-ordination problem. In a co-ordination problem, there is a particular problem, and a particular set of preferences which agents have as regards the solution to that problem, which can be specified antecedent to the emergence of the conventional rule which solves it. According to Marmor, to understand the situation in which a rule of recognition emerges along these lines distorts the complexity of and rationale behind the circumstances in which rules of recognition emerge. In his view, 'Let's have a just Constitution[61] is not a co-ordination problem of the kind which sits well with Lewis' account, and, for example, the Federal structure of the US legal system has a complexity to it and a historical-political rationale behind it which are ill-understood as a solution to any such problem.[62]

In Marmor's view, Lewis' account can, with some minor modifications, provide us with the tools to deal with the difficulties raised by the first problem mentioned earlier, namely the arbitrariness condition of conventional rules, and the fact that rules of recognition do not seem to be arbitrary. This point turns on Marmor's claim that conventional rules can be arbitrary in a certain sense,

[59] Ibid at 7.
[60] Ibid at 9–10.
[61] Ibid at 13.
[62] Ibid at 11–12. Jules Coleman voices similar doubts about understanding the rule of recognition as a co-ordination convention in Coleman, *The Practice of Principle*, above n 1 at 94–5, as does Scott Shapiro in Shapiro, 'Law, Plans, and Practical Reason', above n 4 at 387, sections I–III. On the general issue of whether legal positivists need or should adopt a co-ordination conventionalist account of law, see Green, 'Positivism and Conventionalism', above n 3.

without those who use such rules being indifferent to their content.[63] However, the second point, that rules of recognition cannot be adequately understood as solutions to recurrent co-ordination problems, prompts Marmor to contend that co-ordination conventions are not the only kind of conventional rules there are. In addition to those co-ordination conventions explained by Lewis, there are constitutive conventions of autonomous social practices, of which the rule of recognition is one.[64]

As Marmor's comments on Lewis' account imply, one important difference between constitutive conventions and co-ordination conventions is that in the case of the former, there need not be a specific co-ordination problem, and a specific set of agents' preferences with regard to that problem which exist and can be described prior to the emergence of a conventional rule to solve it.[65] Marmor gives as an example the game of chess, and contends that it seems awkward to think in terms of there being a pre-existing co-ordination problem which chess was invented to solve. He further claims that even if—despite the awkwardness of so doing—we could somehow describe the emergence of chess as the solution to some sort of problem, we would form a poor understanding of the function and value of the conventional rules of a social practice such as chess if we tried to analyse them as Lewisian co-ordination conventions:

> In the case of a coordination convention, such as the telephone-call-resuming convention, the whole point of the rule consists in the solution of the coordination problem which engendered it. The reason for having this convention is the same reason people would have for following it in each particular instance. On the other hand, it would be ridiculous to maintain that the whole point of playing chess consists in the solution of a coordination problem between the players. People who play chess follow the rules of the game because by doing so they can engage in an activity they regard as, say, intellectually rewarding. Whatever the reason for having the game might be, or whatever 'problem' it was invented to solve, would have little bearing on the reasons people have for playing it. Once the game is there to play, it establishes, as it were, its own point.[66]

This passage begins to reveal why Marmor refers to those conventions he wishes to explicate as 'constitutive conventions'. The idea which he is trying to capture is that there are some social practices which are partly constituted by the conventional social rules of those practices. Besides chess, Marmor lists etiquette, fashion and artistic genres, such as opera, or contemporary theatre, as amongst those social practices constituted by conventional rules.[67] He claims that the function that social conventions play with regard to these practices

[63] This point is not directly relevant to my discussion of Marmor's position, but see Marmor, *Positive Law and Objective Values*, above n 2 at 10–12, and 21 for further discussion of it.
[64] Ibid at 12.
[65] Ibid at 13–14.
[66] Ibid at 13.
[67] Ibid at 14–15.

is that they partly constitute their point or value; they play a role in defining what is distinctive about the social practice in question, and what counts as valuable within it:

> The point of the conventions constituting, for example, the genre of opera, is not to solve a co-ordination problem (whose problem would that be, anyway?), but it is precisely the point of constituting a distinct, partly autonomous genre.[68]

Marmor refers to such social practices as *partly* autonomous because only *some* of the value or point of the practice concerned is constituted by those conventional rules intrinsic to them. Once again, Marmor's opera example may help to illustrate:

> Operas instantiate general musical and dramatic values, which are themselves related to more general artistic human concerns. In this respect, the autonomy of operas is rather limited and partial. Nonetheless, there are certain values, standards of appraisal, and concerns which are distinctly operatic, so to speak. The conventions which establish the genre of opera also define, to some extent, its own intrinsic values, and a considerable extent of its grammar; they define a great deal of what it makes sense to say about operas.[69]

Marmor identifies other features of constitutive conventions which distinguish them from co-ordination conventions[70] but the core idea is that described earlier, namely that constitutive conventions partly constitute the point or value of the social practice to which they pertain. This core idea is important as regards Marmor's view of the role which the practice of following rules in common plays with regard to rules which are constitutive conventions. In the case of co-ordination conventions, the fact that a given rule is followed in common is necessary in order for that rule to be capable of fulfilling its function of solving the relevant co-ordination problem.[71] The function of constitutive conventions is different, however, namely to partly constitute the point or value of the partly autonomous social practices to which they pertain. Once again, however, according to Marmor, a practice of following the rule in common is essential if such constitutive conventional rules are to be capable of fulfilling their function: 'Conventional rules can constitute a social practice only if the rules are actually followed ... Only practised conventions are conventions'.[72] Marmor believes that the above analysis can fruitfully be applied to rules of recognition which, in his view, 'are (by and large)

[68] Ibid at 14.
[69] Ibid at 15.
[70] Ibid at 14–17.
[71] Ibid at 17–18.
[72] Ibid at 18.

constitutive conventions, establishing partly autonomous practices of identifying the sources of law'.[73] He gives as an example the doctrine of precedent which is a recognized source of law according to the rules of recognition of common law legal systems such as the English legal system, but not according to the rules of recognition of some civil law-based legal systems such as those of France and Germany. Marmor points out that although the rules of recognition of the French and German legal systems do not formally recognize precedent as a source of law, there is inevitably a certain amount of precedent-like behaviour in the French and German courts owing to the hierarchical court systems and structure of appeals in those jurisdictions. He believes that these differences in law-recognition practices in common law *vers.* civil law-based legal systems can be explained using the idea of rules of recognition as constitutive conventions of partly autonomous social practices. In both common law and civil law-based legal systems there is a need for precedent-like behaviour, and a pressure towards that behaviour stemming from the existence of a hierarchy of courts and an appeals structure. However, this need and these pressures underdetermine what form recognition rules responding to them must take, as the differences in the legal situation with regard to precedent in England and Germany reveals. The rules of recognition of those jurisdictions institute particular recognition practices which, although they are responding to more general needs and values, also have their own particular points and values associated with them. Different rules of recognition are thus understood by Marmor as constituting different partly autonomous social practices of recognizing certain things as sources of law.[74]

6. *Reason-Giving vs Identifying Practices: A Tale of Two Marmors?*

In developing his account of rules of recognition as constitutive conventions, Marmor regards himself as elaborating upon and defending Hart's 'Postscript' view of the rule of recognition.[75] He takes that view to be that rules of recognition are conventions wherein 'a necessary *reason* for following a rule which is a social convention consists in the fact that others follow it too'.[76] In the course of explaining further the character of constitutive conventions, he contends that their conventionality, 'consists in the essential link between the reasons for following the relevant rules and the fact that those are the rules which are actually practiced in the community.[77] So far so straightforward: Marmor seems unequivocally to endorse a conventionalist interpretation of the

[73] Ibid at 19.
[74] Ibid at 19–21.
[75] Ibid at Ch. 1, *passim*, but see especially 5 and 24.
[76] Ibid at 5 (emphasis in original).
[77] Ibid at 22.

rule of recognition. Despite these apparently clear statements of his views, however, at other points in the opening chapter of *Positive Law and Objective Values*, Marmor makes some remarks which cast doubt on whether he truly is offering a conventionalist interpretation of the rule of recognition:

> Whether judges, or anybody else, should or should not respect the rules of recognition of a legal system is purely a moral issue that can only be resolved by moral arguments (concerning the age-old issue of political obligation). And this is more generally so: the existence of a social practice, in itself, does not provide anyone with an obligation to engage in the practice. The rules of recognition only define what the practice is, and they can say nothing on the question of whether one should or should not engage in it.[78]

> ...the rules of recognition cannot settle for the judge, or anyone else for that matter, whether they should play by the rules of law or not. They only tell judges what the law *is*.[79]

In these passages, Marmor appears to contend that rules of recognition, understood as the constitutive conventions of partly autonomous social practices, do not supply judges with reasons for following those rules. Rather, the function of rules of recognition is to identify what the law is in a given jurisdiction. As was discussed previously, Marmor agrees with Hart that a judicial practice of following the rule in common is an essential feature of rules of recognition, and allows them to fulfil their function of establishing partly autonomous practices of law-recognition. This being so, in contending that rules of recognition do not of themselves supply anyone with reasons to follow them, Marmor would appear to commit himself to the view that the common judicial practice which is a necessary constituent element of rules of recognition does not supply judges with reasons to accept those rules as binding. As he notes, any such reasons must be found not by looking to the rules of recognition themselves and the elements of which they are comprised, but by looking to moral arguments regarding the character of political obligation. However, if rules of recognition and the elements of which they are comprised, including the fact of being practised in common, do not supply judges with reasons for following those rules, then in what sense are we to regard those rules—as Marmor claims we should—as *conventional* rules? There thus appears to be an ambiguity in Marmor's position between his statements that rules of recognition are conventional rules, wherein a necessary reason for following them consists in the fact that others follow them too, and his claims in the passages quoted earlier, that those rules, and hence the elements of which they are comprised, do not supply judges with reasons to accept and follow them, but rather merely allow judges to identify what law is.

[78] Ibid at 22.
[79] Ibid at 22 (emphasis in original).

Doubts as to whether Marmor's views really do amount to a conventionalist interpretation of the rule of recognition also emerge from his discussion concerning the judicial practice in some jurisdictions but not others of recognizing precedent as a source of law.[80] In this context, Marmor claims that:

> The crucial question is not whether the rules of recognition reflect political convictions, but whether those same convictions provide sufficient reasons for acting in accordance with the rule, even if the rule in question is not followed by others. By saying that the rule is conventional, we suggest a negative answer only to this last question. Suppose that a German judge genuinely believes that the doctrine of precedent, for example, is superior to any other conceivable alternative, morally, politically, or otherwise. Would it not be rather absurd to maintain that she has to abide by this doctrine even if it is not practiced by her fellow judges in Germany?[81]

In my view, however, we need not adopt a conventionalist interpretation of the rule of recognition in order to answer the first question Marmor poses in the negative, or in order to agree with his concluding point. It would indeed be absurd for a German judge in the scenario Marmor outlines to follow precedent in the absence of a common recognition practice identifying precedent as a source of valid law amongst the judges in her country, for in so acting, she would not have properly identified or be following the rule of recognition of the German legal system. According to Hart's view of the necessary and sufficient conditions required for a legal system to exist, the primary rules of obligation must be by and large obeyed, and the secondary rules of change, adjudication and recognition must be followed and accepted as binding by the officials of the legal system in question. On this view, if judges in a given jurisdiction merely adhere to their personal political convictions regarding what ought to be recognized as valid sources of law instead of following and upholding as binding a shared recognition rule practised in common in that jurisdiction, then we do not have a legal system on our hands. The situation described by Marmor would be absurd, then, and a German judge would be mistaken in acting in this way, because in so acting she would be failing to correctly identify and follow the shared rule practised in common which actually *is* the rule of recognition of her legal system, and which is necessary in order for that system to exist.

To explain further: Marmor seems to claim that it is because the rule of recognition is a conventional rule that judges should not follow their own personal political convictions in recognizing sources of law. This would entail that the existence of a common judicial practice of recognizing certain things and not others as sources of law must form part of the reasons why each judge must accept and follow the shared rule of recognition rather than their own personal political convictions regarding how to identify the law of their

[80] Ibid at 19–21, discussed in section 5 above.
[81] Ibid at 21.

legal system. But this does not necessarily follow from the point Marmor makes about the absurdity of the German judge following her moral and political conscience in the circumstances he describes. As I noted earlier, judges must follow and uphold a shared rule of recognition in order for a legal system to exist. This is what makes it necessary that they adhere to a common set of recognition practices, rather than merely following their own political convictions in this regard. Moreover, as Hart reminds us, and as has been discussed in section 2, judges must look to those common recognition practices in order to identify the content of the recognition rule that they must follow.[82] This being so, there must be a common practice amongst legal officials of recognizing certain things and not others as sources of valid law in order for that system to exist, and judges must look to this common practice (rather than to, for example, their own political convictions) in order to *identify* the rule of recognition of their legal system. If they do not do so, then they will not be following the rule of recognition of their legal system at all. The fact that other judges adopt a given set of recognition practices in common is thus indeed relevant to Marmor's German judge's deliberations about what she should do in order to identify the law in her jurisdiction, but it is relevant in allowing her to *identify* what is the rule of recognition in that legal system, rather than in giving her reasons why she should accept and follow that rule so identified. As was discussed in section 2A, understanding common official practice as a necessary existence condition of the rule of recognition, and as playing an identifying role with regard to it, does not necessarily commit a legal theorist to the view that the rule of recognition is a conventional rule. If I am correct in my interpretation of his views, in the 1st edn of *The Concept of Law*, Hart maintained that common official practice is necessary in order for the rule of recognition to exist, and plays an identifying role in respect of it, without claiming that such a practice features amongst the reasons why officials accept this rule as binding. Similarly, it seems possible to interpret Marmor's example concerning the absurdity of a judge departing from the rule of recognition actually practised in common by officials in her jurisdiction as illustrating the important role of common official practice in *identifying* for each judge *what* it is that they must follow in order to adhere to the rule of recognition of their legal system, rather than as supporting the conventionalist view that such a practice supplies them with reasons why they ought to accept and follow that rule.

7. *Constitutive Conventions and Reasons for Action*

More light is shed on whether Marmor truly is espousing a conventionalist interpretation of the rule of recognition in chapter 2 of *Positive Law and*

[82] See the discussion in section 2A, and Hart, *The Concept of Law*, above n 5 at 108.

Objective Values, where he addresses directly the question of whether and how constitutive conventions can engender reasons for action. According to Marmor, 'conventions can never constitute a *complete* reason for action.'[83] Rather, he endorses a distinction between underlying primary reasons for action, which are not created by the existence of a convention, and auxiliary reasons for action, which are engendered by conventions.[84] In the case of conventions which emerge as the solution to co-ordination problems, such as which side of the road to drive on, or who should call back if a mobile telephone call is interrupted, the underlying primary reasons for action are the reasons why we need co-ordination in the relevant situation in the first place, for example, to increase road safety, or to facilitate reliable communication. If we have road safety reasons to co-ordinate which side of the road we drive on, then the fact that a convention has emerged of everyone driving on the left means that complying with that convention—doing what others do in common—will allow us to do that which we have an underlying reason to do, i.e. improve road safety. We thus have reason to do as everyone else does, to follow the convention, but this reason is an auxiliary reason, i.e. it is a reason which is dependent on the existence of an underlying primary reason to co-ordinate in the first place. Marmor claims that, with some minor modifications, this kind of analysis can be applied to constitutive conventions as well:

> ... in both types of conventions, we should distinguish between the primary reasons for action, which are not, by themselves, created by the existence of the conventions, and the auxiliary reasons which are engendered by the conventional rules ... In the case of constitutive conventions, the primary reasons are those which would render the participation in the relevant practice desirable, intelligible, etc. Generally speaking, conventions would have little bearing on answering such a question as 'why should I do it?'; conventions typically determine the ways in which something is done, answering the 'how', rather than the 'why' question.[85]

When this analysis is applied to rules of recognition understood as constitutive conventions, Marmor puts the matter as follows:

> ... the rules of recognition, like any other type of constitutive conventions, only define what the practice is. They only tell us what counts as law in our society. As such, namely as constitutive rules, they also define the legal validity of norms; which is simply to say that they define the rules of the game. This leaves open the question of why people should practise the law of their country; of why they should play the game as it were ... Whether judges, other practitioners, or laymen, have any moral or other reasons to play the game or not, is a totally separate question ... those reasons cannot be prescribed by the social conventions themselves.[86]

[83] Marmor, *Positive Law and Objective Values*, above n 2 at 26 (emphasis in original).
[84] Ibid at 26–33 and 47–8.
[85] Ibid at 26–7.
[86] Ibid at 33.

In this passage, Marmor seems to contend that the existence of a rule of recognition, understood as a constitutive convention, does not answer the question of what underlying primary reasons judges have for 'playing the legal game' and for accepting the rules of their legal system, including the rule of recognition, as binding.[87] Rather, assuming that they have underlying primary reasons of some kind to continue to play the legal game, and accept and follow the rule of recognition, then the constitutive convention of judges recognizing in common that certain things constitute valid law defines and identifies what it is that they should do in order to follow it, and hence defines what counts as valid law in their jurisdiction. Marmor also points out that his brand of legal conventionalism is not directly concerned with the question of what underlying primary reasons judges and others should have for following the rule of recognition,[88] and that judges may do so for a variety of different reasons stemming from, for example, morality, religious belief or self-interest.[89]

In terms of the present discussion, it is interesting to note that this appears to bring Marmor extremely close to the interpretation of Hart's position in the 1st edn of *The Concept of Law* which I offered in section 2 above. In that section I claimed that, because it is an ultimate legal rule, there can be no further legal reasons for accepting the rule of recognition itself, and that, in the 1st edn of the book, Hart does not believe he need concern himself with investigating what non-legal reasons there might be for following that rule, beyond pointing out that judges may do so for a variety of reasons, moral or otherwise. This being so, I argued, the explanation which Hart gives of the rule of recognition, including the requirement that there be a practice in common amongst judges of recognizing certain things as constituting valid law, is not intended to answer the question of what reasons judges have for following that rule. Rather, a common judicial practice is necessary in order for the rule of recognition to exist, and identifies what judges must do in order to follow it. Likewise, in Marmor's clarified account of the relationship between constitutive conventions and reasons for action, he claims that such conventions do not of themselves provide judges with reasons to 'play the legal game' and accept and follow the rule of recognition. Rather, assuming that they have underlying reasons of whatever kind to do so, constitutive conventions define what the rule of recognition of a given legal system is, and hence define what is recognized as law in a given society.

As has been emphasized throughout this article, the crucial question in all of this is whether the practice in common amongst judges of recognizing certain things as valid law is reason-giving. In examining Hart and Marmor's views, I have sought to make clear a distinction which, in my view, is sometimes under-attended to in discussions of the rule of recognition, namely the

[87] See also ibid at 22.
[88] Ibid at 22, 32–3.
[89] Ibid at 32–3.

distinction between common judicial practice as an existence condition of that rule, and as playing an identifying role with regard to it on the one hand, and that practice playing a reason-giving role with regard to it on the other. In my view, it is important to draw this distinction in order better to understand Hart's doctrine of the rule of recognition, and the questions it was intended to answer. In explaining the character of the rule of recognition, including the role of common judicial practice with regard to that rule, Hart was undertaking the explanatory task of giving an account of some of law's essential properties. He was not attempting to justify or explain what is valuable about the social institution of law, and he was not attempting to give an account of the reasons why and the conditions under which the rules of a legal system including the rule of recognition ought to be accepted and adhered to.[90] In order to answer these latter sorts of questions, we must move beyond the kind of explanatory account Hart was offering in *The Concept of Law*, and address moral questions regarding the justifiability of practical authorities in the political domain, and the character of political obligation. This latter task, unlike the primary task Hart sought to undertake in *The Concept of Law*, will necessarily involve a legal theorist making moral value judgments about the moral value and justifiability of aspects of the social institution he seeks to characterize.

I have argued elsewhere that we should preserve the relative autonomy of this latter task from the non-morally evaluative task of identifying and explaining law's essential properties, and that there is important explanatory work for theories of law to undertake in explaining the distinctive character of law, and the distinctive means by which it operates, before going on to consider questions of its moral justifiability, and the conditions under which we ought to accept and adhere to it.[91] Drawing attention to and understanding the distinction between understanding common judicial practice as an existence condition of the rule of recognition, and as playing an identifying role with regard to it on the one hand, and understanding that practice as playing a reason-giving role on the other helps to clarify these important methodological demarcation lines, and differentiates those questions which Hart was attempting to answer with his account of the rule of recognition from those which he was not.

Marmor's account also recognizes the importance of these points. In explaining the methodological ambitions of his brand of legal conventionalism, he makes the following remarks:

> A complete philosophical account of the normativity of law comprises both an explanatory and a normative-justificatory task ... Conventionalism, as I understand it,

[90] Hart, *The Concept of Law*, above n 5, see e.g. 107–8, 202–3, 239–44. See also the discussion in section 2B above.

[91] I cannot defend these views here, but see J. Dickson, *Evaluation and Legal Theory* (Hart Publishing, 2001), *passim*, but especially chapters 2, 3, 6 and 7.

> plays an important role in the explanatory aspect of the normativity of law. It has little bearing on the task of justifying the normativity of law. The reasons for acknowledging the authority of law cannot derive from social conventions.[92]

> ... the truth is that conventionalism is not even an initially plausible answer to the question of what makes the law morally or otherwise legitimate. Whenever people follow a conventional rule, it always makes sense to ask them why they should follow the rule. Questions about the legitimacy of law pertain to this 'why' question, and they cannot be answered by pointing to the fact that there are social conventions determining what the law is.[93]

All of this would seem to indicate that Marmor and I understand Hart's doctrine of the rule of recognition along very similar lines. The point remains, however, that although Marmor regards constitutive conventions as answering questions concerning *how* judges are to go about identifying law using the rule of recognition of their legal system, rather than as supplying answers to the question of *why* they should accept and adhere to that rule of recognition in the first place, he does contend that the rule of recognition is best understood as a constitutive *convention*, which connotes that the fact that other judges do something in common constitutes a reason—albeit an auxiliary and not a primary reason—for each judge to follow the rule. Does this reveal an important difference in terms of our respective understandings of the rule of recognition, and of the role of common judicial recognition practices with respect to that rule? Although I still harbour some doubts on this issue—which are partially revealed by my critical discussion of aspects of Marmor's position in section 6 above—one possibility is that the difference is largely a terminological one.[94] Marmor's account of rules of recognition as constitutive conventions, and my interpretation of Hart's original views on the rule of recognition both emphasize that the existence of a common judicial practice of identifying certain things as constituting valid law cannot answer the question of what (in Marmor's terminology, 'primary' or 'underlying') reasons judges ultimately have for accepting the rule of recognition as binding and adhering to it. Although that common practice can identify for judges *what* they have reason to do, it cannot of itself supply them with a justification of why they ought to do it. On this view, whether we make this point by saying that common judicial recognition practices play an identifying rather than reason-giving role with regard to the rule of recognition, or by saying that, given the existence of primary underlying reasons to follow that rule, the constitutive conventions defining the law recognition practices of a given jurisdiction can be viewed as supplying auxiliary reasons to do that which counts as accepting

[92] Marmor, *Positive Law and Objective Values*, above n 2 at 32.
[93] Ibid at 47.
[94] This is not to say, however, that the difference in terminology is insignificant. I return to this point briefly in the concluding section.

and following the rule of recognition of that jurisdiction, seems largely to be a terminological issue, rather than marking an important difference in the respective ways in which Marmor and I understand rules of recognition. However, if common judicial practice is restricted to this identifying role—identifying for legal officials exactly what they have reason to do, assuming the existence of underlying primary reasons for doing that—then in my view, a question remains regarding whether it is appropriate to term this kind of understanding of the rule of recognition a conventionalist account.

8. *Conclusion: Is the Rule of Recognition Really a Conventional Rule?*

In this article, I have sought to identify and explain the importance of the distinction between understanding the common official practice of recognizing certain things as constituting valid law as an existence condition of the rule of recognition, and as that to which judges must look in identifying the rule on the one hand, and understanding that practice as reason-giving, and as supplying judges with reasons for accepting and adhering to the rule of recognition on the other. I argued that Hart's original account of the rule of recognition is not best understood as a conventionalist account, and that although he appears at points to make some sort of 'conventionalist turn' in the 'Postscript' to the 2nd edn of *The Concept of Law*, on closer examination, the ambiguities in Hart's remarks on this issue, and the under-developed discussion of it which he offers cast doubt on the extent to which, and the sense in which he does make such a turn.

Marmor takes over Hart's mantle in this regard, and presents us with a thought-provoking account of rules of recognition as the constitutive conventions of relatively autonomous social practices. Marmor views Hart as offering an account of the rule of recognition wherein common judicial recognition practices do not supply judges with primary or operative reasons for following that rule, but rather identify for them *what* they have reason to follow, assuming the existence of underlying primary reasons for following it. Marmor terms his account a form of legal conventionalism, but, as my analysis of his position is intended to demonstrate, his work does preserve the distinction between understanding common official recognition practices as an existence condition of the rule of recognition, and as that to which judges must look in identifying its content on the one hand, and understanding those practices as supplying judges with underlying reasons for accepting the rule of recognition as binding on the other. This being so, my instinct is that it may be better not to refer to such an account as a conventionalist one. In my view, Marmor could make all of the important points which he seeks to make in his account without

employing the terminology of conventionalism.[95] We need theories concerning the justifiability of legal authority, and the character of political obligation in order to answer questions such as whether and under what conditions law has legitimate authority over judges, and whether and under what conditions judges ought to accept as binding and follow the rule of recognition of their legal system. The existence of a practice in common amongst judges of recognizing certain things as valid law does not answer such questions; rather, assuming that there are reasons for a judge to follow a given recognition rule, that practice merely identifies what it is that he should follow, and is necessary in order for the recognition rule, and the legal system in which it plays a vital role, to come into and be sustained in existence. Using the term 'conventionalism', however, may seem to indicate a role for common official practice going beyond this, and may lead some erroneously to believe that the account in question is designed to explain the reasons why judges should accept as binding and adhere to the rule of recognition, and that the explanation is largely to be found in the fact that their fellow judges behave in a certain way in common. In light of these points, in our jurisprudential investigations of this topic, it may be better just to attempt to clarify and explain the character and function of rules of recognition, and the role of common official practice with regard to them, and to let the terminology of conventionalism drop out of the picture.

[95] N.b. in Marmor's view his account of rules of recognition as constitutive conventions is also valuable in explaining other aspects of the rule of recognition which I have not focussed on here, such as the fact that rules of recognition are—in a certain sense—arbitrary, i.e. that in a given jurisdiction an alternative rule could have emerged fulfilling the same needs and functions, and that thus the content of those rules is under-determined by the needs and reasons giving rise to them. Marmor's work on the character of constitutive conventions continues in A. Marmor, 'Deep Conventions' (forthcoming in *Philosophy & Phenomenological Research*) and A. Marmor, 'How Law is Like Chess' (forthcoming in *Legal Theory*).