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Against the Conventionalist Turn in Legal Theory: Dickson on Hart on the Rule of Recognition

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Julie Dickson, *Is the Rule of Recognition Really a Conventional Rule?*, 27 *Oxford J. Legal Stud.* 373 (2007) .



[Michael Green](#)

Anglophone philosophy of law is remarkably focused on one book – *The Concept of Law* by H.L.A. Hart. This may be a mistake. It is hard to imagine a single book – much less an introductory work for undergraduates written almost fifty years ago – playing a comparable role in, say, the philosophy of language or mind. But given that *The Concept of Law* does occupy such an important place in the philosophy of law, it is all the more important to get what Hart said in the book *right*. Julie Dickson’s recent article does, in a way that has importance for the field more generally.

Hart argued that at the foundation of each legal system there is a practice among officials of enforcing norms only if they satisfy certain ultimate criteria. For example, in England officials enforce norms only if they can be traced back to the Queen-in-Parliament. Hart calls these enforcement criteria the *rule of recognition* for the legal system.

It is commonly said that the rule of recognition is a *conventional* rule. As Dickson defines it, a rule is conventional if the reasons that participants have for following the rule include the fact that others do so as well. The classic example of a conventional rule is driving on the right side of the road. An essential reason that we have for driving on the right side of the road is the fact that other people do so as well.

Dickson argues that in the first edition of *The Concept of Law* Hart did not claim that the rule of recognition is conventional. Although he thought it was important for the existence of a rule of recognition that officials accept the rule as binding upon them, he did not think that they had to have the same reasons for acceptance, and he was agnostic in general about what their reasons were and whether they were valid. Hart offers as possibilities “calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do.” One judge might accept the rule of recognition as binding because of his oath of judicial office. Another might do so because it is the best way of feeding her family. And so on.

Dickson concedes that in his “Postscript” to the second edition of *The Concept of Law*, Hart slips and suggests, at least at times, that the rule of recognition is indeed conventional. Much of the “Postscript” was written in response to Ronald Dworkin, who argued that Hart’s theory had failed to explain how judges have reasons for conforming to the rule of recognition. Dworkin offered, as a lifeline for Hart, those reasons for conformity (such as coordination) that apply in conventions. Hart took the bait, as have many philosophers of law who came after him.

Dickson argues that Hart shouldn’t have taken the bait. Under a rule of recognition approach, official conformity is needed solely to identify a norm as law. It need not be used to explain why officials have a reason, or think they have a reason, to treat the rule of recognition as binding. In support of her argument, she considers Andrei Marmor, who, in *Positive Law and Objective Values* (Oxford U. Press 2001), offered what he described as a conventionalist account of rules of recognition. She argues that even in Marmor’s account official practice simply identifies what is law. It does not explain the reasons officials have, as matter of political morality, to adjudicate in accordance with the law. Officials may play the “legal game” for any number of reasons – including very bad ones.

About all this, I think Dickson is clearly right. It is particularly important to emphasize, as Dickson does, that – except in the “Postscript” – it was not Hart’s goal to explain why there are in fact reasons for officials to conform to the rule of recognition. In refraining from offering such an explanation, Hart was wise, for it is probably false that the mere existence of a rule of recognition among officials necessarily gives each official a reason, even a *prima facie* reason, to conform to the rule.

But I have some questions about Dickson’s reading. Assume that English officials are so committed to enforcing only norms emanating from the Queen-in-Parliament that each would intransigently continue doing so even if the others did not. One way of describing these officials is that they do not care whether the norms they enforce are *law*, in Hart’s sense of the term. As Dickson describes his position, it appears that Hart would deny that the norms these officials enforce are law. The existence of a legal system requires that officials are constrained by their agreement when *identifying* norms that are candidates for enforcement, even if such agreement need not ultimately *justify* for these officials why they choose to enforce these norms. Dickson does not explain in her article why Hart took this stance. Furthermore, it appears, at least to me, that this role for official agreement means that there is a *weak* sense in which Hart’s theory is conventionalist.

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