WHAT’S GOOD ABOUT LEGAL CONVENTIONALISM

ABSTRACT

According to the theory about the nature of law that has come to be called legal conventionalism, a legal system cannot come into existence and be sustained over time, unless legal officials see themselves as working together with their fellow-participants in the practice of law (who may include legal subjects) for the purpose of achieving coordination or, alternatively, realizing a joint endeavor. This thesis has traditionally been thought to support a positivist understanding of law, whereby law is ultimately a matter of social, not moral, fact. The paper challenges this piece of common wisdom. It aims to establish that the idea of cooperation among legal officials that figures so prominently in conventionalist accounts of law may in a suitable form be appropriated by a robust version of natural law theory, legal positivism’s adversary. To this effect it asks: Can participants in the practice of law be understood as having reasons of political morality to heed the acts and decisions of their fellow-participants and calibrate their own behavior accordingly, as legal conventionalists maintain? It argues that they can and takes the value of democracy to illustrate the point. Democracy furnishes a reason for courts to give effect to democratically reached decisions rather than work out on their own how best to adjudicate disputes before them. It thus provides a value-laden explanation of a salient aspect of legal practices, namely judicial deference to legislative decision-making.