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Legal Powers and their Effects

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To my parents

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PREFACE

The standard textbook examples of legal norms are obligations to do or to refrain from doing some act in certain circumstances. The examples are usually followed by accounts of the ways in which such *norms of conduct* attain legal validity. One of the accepted ways is based on the idea that legal validity derives from *power-conferring* norms. This category comprises norms empowering certain agents to issue norms of conduct, norms empowering certain agents to empower other agents to issue norms of conduct and so on, until a case, such as Kelsen's basic norm[1] or Hart's rule of recognition[2] is reached. Accounts of legal systems in this vein rest on a sound common sense notion of law as one of the phenomena regulating human conduct by means of prescriptions (others are, for example, custom and morals).

The approach has the advantage of immediately confronting us with the core of any legal system: obligations, rights, liberties and their relations. Its disadvantage is that many factors that have come to play an increasingly important role within modern legal systems appear to resist analysis. For instance, problems arise in classifying norms that serve as the foundations of various organizational units. Traditional accounts are prone to cast such norms into an ill-fitting analytical mould, since they are neither norms of conduct nor power-conferring norms. Legal norms at the basis of organizational units are indeed the most salient counter-examples to the contention that law consists merely of two types of norm. This does not mean, however, that the riddle can be solved by simply introducing a third type.

Any close inspection of modern legal systems will yield a diversity of counter-examples: norms assigning qualities to persons or things ('conscientious objector', 'nature reserve'); norms consisting of standards for measuring or calculating space, time, or value ('db(A)', 'pollution equivalents', 'study vouchers'); norms subsuming various aspects of reality under one legal concept ('the Environment', 'Social Security', 'Health Care'). From a traditional point of view this by no means exhaustive presentation of unclassified norms is highly embarrassing. For in spite of their similarity to norms of the canonical type with regard to their legal

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[1] Cf. H. Kelsen, *Pure Theory of Law*, transl. from the second German edition (1960), Berkeley, 1967 (repr. 1978), 8.

[2] H.L.A. Hart, *The Concept of Law*, Oxford, 1961, 92.

functions, they are plainly different from the latter. Understood from the standpoint of the classical approach, they are rendered innocuous by treating them as ancillary legal devices - legal definitions, fragments of norms or dependent norms - or they are reduced to the canonical types by means that amount to misrepresentation.

Both strategies rest on the *a priori* assumption that law ultimately consists of mandatory norms. This assumption, however, does not hold when it is confronted with the actual content of the legal systems surrounding us. Hence, it appears appropriate to choose a different point of view for analysing legal systems. The new analytic point of departure involves an inversion of the problem at hand. Since the classical approach focuses on norms of conduct, legal validity is primarily conceived of as a notion regarding their status. In the approach we propose to take, the primary question is what phenomena can attain legal validity in general. On this account, norms of conduct are but one class of all phenomena to be investigated--to be sure, an important class.

An important clue for solving the inverted problem is the distinction between 'brute facts' and 'institutional facts'--first observed in analytic linguistic philosophy and subsequently adopted by legal scientists.[3] Most of the 'facts' of modern society are no longer physical phenomena, such as tables, seats, rain and hunger, but abstract, socially defined entities or events, such as museums, soccer games, speed limits, borders, counties, money, government grants and social security. It is true that such entities and events have physical substrates. However, their essence is not crudely physical but above all the result of human qualification.[4] We are able to say that a certain soccer competition consists of a number of games in the same way that we say, for example, that cats have four legs--for a certain combination of physical entities and events, the combination *counts as* a soccer game.

One of the fundamental questions of modern society is how groups of human beings perform the conjuring trick of creating facts and what limits they must observe here. One notion in particular makes it likely that some

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[3] J.R Searle, *Speech Acts*, Cambridge, 1969, p. 50-53 Cf. D. N. MacCormick and O. Weinberger, *An Institutional Theory of Law*, Dordrecht, 1986, 9, 49-76, 78-84.

[4] O. Weinberger, *Law, Institution and Legal Politics*, Dordrecht, 1991, 4: 'The objects of our experience have their place in our image of the world not only according to their physical properties; they are also defined according to their institutional attributes, depending on their function in our environment. In other words: ontology perceives objects not merely in their brute-fact-relations, but it represents a world view comprising among its elements institutional facts, too.'

answers will be found within the realm of the law. I have in mind the notion that an 'institutional' fact *exists* only if it is *valid* as an instance of some valid fact-type. One can introduce the fact that a particular soccer game is being played, provided that the physical event that takes place is valid owing to its being an instance of the valid fact-type 'soccer'. Of course, further questions arise concerning the validity of such fact-types. Answers to such questions can be given on the basis of the notion of 'constitutive rules'.[5] Modern societies are founded on the basis of several kinds of constitutive rules. They make it possible to treat forms of behaviour of human beings and relations between them as distinct entities with their own names. Using these names we are able to perform operations on them, as if they were physical objects. We can count them, subject them to arithmetic calculations, make valuations of them and so on.

One of the basic contentions of this study is that most societal facts are institutional in character, meaning, in J.R. Searle's words, that their existence presupposes the existence of certain human institutions, such institutions being in turn (systems of) constitutive rule(s) 'of the form "X counts as Y in context C".'[6]

By no means all constitutive rules that underlie institutional facts are legal in nature. But legally valid phenomena for their part are institutional facts, for their existence can be recognized only on the basis of some legal norm warranting their validity. On this view, legal norms of conduct are institutional facts of a special type. Important as this type may be within the domain of the law, it is only one type among others. Moreover, the various types of institutional legal facts appear to be interrelated in ways deserving of closer scrutiny.

These observations, and the puzzles they give rise to, dictate the programme of this study.

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[5] Searle (1969), 51-52; Alf Ross, *Directives and Norms*, London, 1968, 53-54.

[6] Searle (1969), 51-52.