

Handelingen

Some questions about professor Summers' paper, 'Form and function in discrete legal units and in a legal system as a whole'

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'Form and function in discrete legal units and in a legal system as a whole' is a paper of an unusual breath, which includes many striking observations and reflections. I have been asked to formulate some preliminary questions about this paper from the perspective of my field of professional expertise – legal sociology and anthropology. First, I want to raise two points about the notion of function (1 & 2); subsequently, I will discuss the following question: What is form? (3); finally, I wind up my contribution with some reflections on the problem of how the overall purpose of a legal unit, and the key elements of its structure, might be empirically established (4).

1 I am very much in favour of the art of a good design of legal units, and I am glad that Summers draws attention to this art in such a forceful manner. I take the liberty of offering a personal example. Policy making in the domains of environmental protection and regional planning (as well as the future of public health, et cetera) proceeds largely through a unofficial 'horizontal' or 'participatory' form of decision making. Sometimes this novel structure is called 'joint governance', sometimes 'public-private partnership'. The dominant structure of policy making, however, locates the centre of decision making in representative bodies, which have formal authority to take final decisions. This is a 'vertical' method of policy making, which contrasts with 'horizontal' policy making in participatory governance. How can these two quite different structures be reconciled? We have to design new legal forms – or rather amend old ones – to solve some of the tensions between the two institutions of governance.

Accordingly, while I endorse Summers' emphasis on the merits of well designed, purposive forms of legal units, I also want to draw attention to the

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risk of overlooking unintended or at least non-functional effects of such forms. Given the way Summers proposes to understand these units, the task or goal for which this form is designed seems to overshadow all other effects this form may have, particularly disintegrating effects. Take the example on p. 23, which deals with the case of a legislative procedure that is inadequately designed when it does not foresee committees to study proposed bills. The explicit task attached to this formal feature is 'to bring rational scrutiny [...] to bear on proposed statutes'. Yes, I can see that. But there are empirical indications suggesting that the committee structure tends to be the site in which the final decision about the merits of a statute is actually taken. Quite often, the general assembly ('parliament') merely ratifies the 'decision' of the committee. Obviously, this effect does not necessarily mean that the task of adequately scrutinizing the statute has been sufficiently fulfilled, but at least it shows the number of effects that a formal feature may have, and normally will have. Summers would probably deny nothing of this. We might agree that studying these other effects, particularly if they run counter to the functions supposed to be served by the formal feature, helps to constantly improve the overall design of the unit. Nevertheless, I am a bit worried that emphasising the design and functions of formal elements obscures all other social effects, not to speak of the possibility that the designed function itself is not met/fulfilled at all.

2 The same worry extends to what is said about the need to study the rationales that inform the overall form of, say, legislature. Here is an example. A procedurally formal feature of a parliamentary debate serves the purposes of improving statutory content, democratic participation, and so on. Yes, we need to take such a rationale into account. This point notwithstanding, we also need to keep an eye on the interaction of the elements of a legislature which curtail – or at least severely restrict – 'debate', or which smother 'democratic participation'.

In general, I am struck by the ease with which professor Summers refers to forms as having such and such a function, or about whole functional units having a specific function in some encompassing system. His is above all the language of a designer, who wants to draw attention to forgotten elements that make for good, stable design, rather than the language of the social sciences. The underlying rationale, namely that form matters in social life, is an insight that is of great importance to everyone.

3 These remarks suggest that it is necessary to clarify the concept of form. I begin with an introductory point. When thinking of the form of a functional legal unit, I was struck by Summers' correct remark that to understand a legal unit one should not concentrate on legal rules alone (he writes about

'the rules of positive law' p. 14). He offers the example of a legal rule that defines the make up of the personnel of a legislature. His claim is a good one: we need to do more than stick to this rule to properly understand the legislature we are studying. For instance, he notes, the way the legislature organises its personnel also depends on the role of political parties, and this role is not to be found in any formal legal rule. Indeed, I agree that we have to look at the 'actual purposive systematic arrangement' (p. 16). Here is another example: in the Netherlands, the authorities in charge of proposing and/or nominating members of the judiciary also follow tacit 'rules/principles' (rules of thumb) concerning a reasonable judicial representation of all major (non-extremist) political currents. In both examples, non-legal rules or principles (embodied in the institution we are scrutinizing) define the make-up of a unit, in addition to legal rules. So, some elements of form (structure?) are not (cannot be?) 'designed'; they just arise... but from what? From the 'needs' of an organization to maintain itself? From only dimly known 'needs' of a society to produce legitimacy for its judiciary?

Following up on this role of 'informal' rules, my main question would be the following: What is form? While the paper devotes a great deal of attention to this term, I am not quite clear about what it means. It seems that the author ultimately equates form with 'structure': a purposive systematic arrangement of the parts of a 'unit', as he puts it. Indeed, an early article dubs this latter arrangement a 'structure'.¹ It is very interesting that Summers associates structure and 'form', and form (or structure) with purposive, systematic arrangement. A form seems to refer in particular to the legal (or legal-political) task of organizing structures of cooperation in such a way e.g. that competences are clear, and well ordered in terms of the sort of human venture enterprise involved. A form is an abstraction from daily practices and, as such, it opens up opportunities for a wide variety of personal or institutional plans, actions and endeavours. This reminds me of Max Weber's concept of freedom. This defining competence is an important task indeed, and Summer does well to stress the need for explicit design of specific forms (and the need to consider how this affects outcomes).

This view deals a blow to 'symbolic interactionists' in the social sciences (and public administration): non-believers in the social relevance of form (among which: defining authority), believers in spontaneous coordination of actions and meeting of minds (frames of interpretation, culture). In the past, the idea of legal rules that have a fixed and clear meaning, and that are capable of being applied literally, was not taken seriously in the Netherlands. Defining 'formal competences' was perceived as asking for trouble with authoritarian

1 See his article 'How law is formal and why it matters', reproduced in Robert Summers, *The Jurisprudence of Form and Substance*, Ashgate: Dartmouth 2000, p. 49.

bosses; it killed spontaneity and solidarity. New meanings, e.g. of the concept of democracy, would evolve bottom-up, integrated patterns (of behaviour, of thoughts, meanings, and views) would consolidate themselves anew, after a period of unrest. This schism returns in definitions of 'institutions'. Although I cannot revisit this issue here, it concerns conflicting views about an institution as being either a complex of practices (the fluid, 'informal' notion) or a complex of competences, rules and roles, backed by formal (often legal) rules (sometimes called 'objective collective forms').

But I still harbour a question: What is form or structure? What does 'form' (structure) mean here? Is it the written enactment of a hierarchy of competences, such as when national law as well as university regulations establish that 'the dean decides' in case of conflict? But the formal (structural) element cannot be just written enactment by a competent rule-maker; if, as a matter of fact, it is widely believed that a dean has final authority, and most people live up to this, there is structure. So, structure does not necessarily require the written enactment of rules. Take for instance a typical topic from legal anthropology: the structure of institutions of communal land tenure in a non-Western setting. To determine the structure one has to delve into practices that are perceived as the embodiment of social rules, as these rules are not written, let alone 'positive' or 'enacted' rules.

This example makes clear, hopefully, that there can be structure without Western style legal rules. The practices I referred to, however, are not just fluid, or changing continuously, but hinge rather on definite authorities, procedures, conflict-solving mechanisms, procedures to select authorities, and so on. (Summers would presumably agree to this, given his clear account of the various sources one needs to study to grasp the organizational reality of a unit on p. 12).

So, to repeat: What is form? Sometimes, I tend to think of form in terms of an element of a structure, on the basis of which a higher authority has the competence to regulate (in specific matters), whereas lower authorities 'just apply' the regulations (supposing these are expressed in clear fixed terms). (I am indebted here to a paper by A.L. Stinchcombe, 'Legal formalism: a definition of the dependent variable').² Lower level authorities define the higher rule as 'formal', and define their task as applying it, rather than exploring the policy rationale that support it. This is a social construction that has great merits in terms of certainty, transparency, rule of law, et cetera (merits Summers emphasizes as well). It is true that for this formal feature to fulfil its task, it needs to be a written (and detailed) rule. I would like to know how this meaning of the term 'formal' fits in with Summers' account.

2 On file with the author. I obtained this paper at the Law and Society conference of 1991 in Amsterdam. I do not know if it has ever been published.

4 My last words concern the question about the source whence Summers derives his insights about the overall purpose or task of a unit, such as the legislature or a contract. Additionally, I am interested in understanding how he identifies the elements within such a unit that are really structural, that is, which are really important (formal) features that can indeed be supposed to do the things professor Summers says they do. He is certainly not suggesting that legislatures all over the world always show the same formal features. But, then, on what grounds can we reach conclusions about formal elements? The overall purpose of an institution is value-laden, he says, and I agree. The way Summers draws attention to Fuller's concept of the institution 'law' reveals the values which Fuller claims to be inherent in law. But it is rather obvious that these value-laden ways of identifying an institution and its structure are not uncontroversial among scholars. Hence, the Fuller example shows that statements regarding the overall purpose of an institution are contestable. Is this a problem? To some extent it is, as the identification of what is structural (formal) hinges on this overall concept of purpose. I am worried that the analyses take on a very personal character. Is this unavoidable? Yes, I think so, but for this very reason more clarification is required. Also the (empirical?) basis for suggesting that some elements are 'really structural', that is to say, key elements of the whole unit, is intriguing. We all know that life, including scholarly life, is full of personal choices that generalise from experience and broad insights – even feelings – about where (our) society is going. Only afterwards can we be certain about what formal/structural element is best preserved, and what is only of a secondary nature. I would appreciate it if professor Summers could tell us something about how to deal with this problem.