

Reaction to Robert S. Summers

Dick W.P. Ruiter*

Introduction

The basic tenets of Summers' analyses are (i) that a legal system consists of functional legal units of different kinds, and (ii) that such functional legal units have 'overall forms' that can be distinguished from their contents. One category of functional legal units are legal institutions. Other categories include principles, maxims, general orders, contracts, property interests, methodologies, sanctions, and remedies. I endorse Summers' characterization of legal institutions as functional legal units. However, without more detailed knowledge of the theory he expounds in the book announced in his article, it is difficult to judge whether I could agree with his characterization of members of all other categories as 'legal units' as well. With respect to general orders, contracts, property interests, sanctions and remedies, my spontaneous reaction is that it will probably pose no great problems to conceptualize them as functional legal units. However, it would not surprise me, when, qua functional units, they would have the form of legal institutions of different kinds. As far as principles, maxims, and methodologies are concerned, I have more difficulties in visualizing them as functional legal units. Here more information is needed. In the meantime I restrict my reaction to those functional legal units in which I have specialized: legal institutions.

Like Summers, I am in favour of making a distinction between the form and content of legal institutions. What is not clear to me, however, is whether his and my distinction are the same. To make a comparison possible, I present my own ideas briefly. They rest on the thesis that the distinction between the content and the form of a legal institution is a distinction between

- the *range of behaviour* regulated by the institution, and
- the *pattern* along which individuals finding themselves within this range of behaviour are related by the institution.

* Dick W.P. Ruiter is hoogleraar staats- en bestuursrecht, Faculteit Bedrijf, Bestuur en Technologie, Universiteit van Twente.

As far as the idea of 'form' is concerned, I recognize in Summers' contribution many elements with which I feel a certain affinity. However, I could not find an explanation of what Summers regards as the content of an institution. From some of his remarks, I got the impression that he sees 'content' as 'policy', but this would be all too easy, since 'policy' really is a container concept that does not help us much further. To summarize, I would be grateful if Summers could be more explicit about his concept of 'institutional content' as contrasted to that of 'institutional form.' Below, I will elaborate my own conceptualization of the distinction.

Basic Forms of Legal Institutions

Legal institutions have this in common, that they constitute distinct systems of legal rules within the overall legal system that purport to meet with general acceptance.¹ General acceptance of a legal institution amounts to its existence being socially taken into account *as a factual situation*.² This means that those accepting a legal institution take it into account as a constant factor in all their communications, actions and dealings in which they consider it relevant.

The common purport of legal institutions, that their existence be socially dealt with as factual situations, provides a clue to distinguishing five basic forms of legal institutions. This clue is the idea that any factual situation and, therefore, any legal institution is representable either (i) by a predicate with one argument, as an entity having a certain characteristic or (ii) by a predicate with two or more arguments, as entities having certain relations. When we additionally conceive of reality as comprising entities that can act (persons) and entities that are fit to be acted upon (objects), the following set of basic forms of factual situations derives:

- 1 A *person* having a certain *characteristic* (John is tall).
- 2 An *object* having a certain *characteristic* (The Eiffel Tower is made of steel).
- 3 Two *persons* having a certain *relation* (John loves Mary).
- 4 A *person* and an *object* having a certain *relation* (John loves his Volkswagen Beetle).
- 5 Two *objects* having a certain *relation* (The Louvre is near the Eiffel Tower).

1 N. MacCormick & O. Weinberger, *An Institutional Theory of Law. Approaches to Legal Positivism*, Dordrecht: Kluwer Academic Publishers 1986, p. 51.

2 D.W.P. Ruiter, *Institutional Legal Facts. Legal Powers and their Effects*, Dordrecht: Kluwer Academic Publishers 1993, p. 205-225. D.W.P. Ruiter, *Legal Institutions*, Dordrecht: Kluwer Academic Publishers 2001, p. 21-24.

In order that their existence can be socially taken into account as a factual situation, legal institutions must take these basic forms as well.³ This yields a corresponding classification of legal institutions.

- 1 Legal institutions taking the form of a characteristic of a person: *legal qualities* (e.g., minority).
- 2 Legal institutions taking the form of a characteristic of an object: *legal status* (e.g., public highway).
- 3 Legal institutions taking the form of a relation between two persons: *personal legal relations* (e.g., marriage).
- 4 Legal institutions taking the form of a relation between a person and an object: *objective legal relations* (e.g., ownership).
- 5 Legal institutions taking the form of a relation between two or more objects: *legal configurations* (e.g., servitude).

These distinctions are all distinctions of form. A legal institution also has a content, that is, the behaviour it regulates. The specific behaviour regulated by a legal institution I term its 'range of behaviour'. This range makes up the institution's content as distinguished from its *form*.

Institutional Form and Content

A few examples will give an impression of how I see the distinction between legal content and legal form. The first example comes from the field of animal rights. Currently, animals are legally considered to be objects receiving protection against cruel treatment. Proposals are regularly put forward to introduce rights of the animals themselves not to be treated cruelly, exercisable on their behalf by representatives. This would mean a change in institutional form, namely from the legal status 'protected against cruel treatment' of the animal qua object, into a legal quality 'entitled not to be treated cruelly' of the animal qua subject. Meanwhile, the range of behaviour ('cruel treatment') would remain unchanged. This simple example shows how the law can choose among different forms in order to regulate the same range of behaviour. On the other hand, the law can also reach uniformity by using the same form to regulate different ranges of behaviour. For example, the institutional form of the personal relationship is characteristic of the institution 'international treaty' in public international law, the institution 'contract' in national private law, and of certain political institutions in national public law. The diversity of institutions found in the

3 Dick W.P. Ruiter, A Basic Classification of Legal Institutions, *Ratio Juris* 10 (1997), p. 357-371. See also Ruiter, *Legal Institutions*, p. 97-99. Dick W.P. Ruiter, *Types of Institutions as Patterns of Regulated Behaviour*, *Res Publica* 10 (2004), p. 207-231.

world can be seen as resulting from clever games of varying and combining contents and forms of institutions. Comparative analysis of different legal systems can teach us much about the number of available possibilities.

Legal Persons and Legal Objects

The legal systems of modern societies are rendered more complex by two additional operations on legal institutions, namely, personification and reification.

Personification

The legal category of persons comprises, first of all, humans: *physical persons*. However, mature legal systems also recognize moral persons. An important subcategory of moral persons are *legal persons*, that is, personified legal institutions. The legal operation of personification can generally be illustrated with the example of the personification of physical objects in 'the law of deodands'. Posner explains that in ancient times a deodand was a lifeless physical object that had caused somebody's death, for example a cartwheel that had run over a person and that, therefore, had to be destroyed. The ground for its destruction was that the deodand's evil will had caused it to kill.⁴ This lays bare the basis of any legal operation of personification, namely, the imputation of a will to a non-human entity. The imputation serves as a justification for holding the non-human entity responsible towards other persons for such effects that were produced as if they followed from its conscious behaviour. 'Legal personality' has the purport that objects having it will be socially treated as persons. In modern systems of law, legal personality is generally no longer imputed to lifeless physical objects but to legal institutions, that is to say, to incorporeal objects. The standard forms of legal persons are that of:

- 1 the *association*, which is a personified contractual legal relation between participants;
- 2 the *corporation*, which is a personified legal relation between a set of objects (assets) and a group of persons; and
- 3 the *foundation*, which is a personified legal relation between a set of objects (fund) and an objective.

The choice between the association, the corporation, and the foundation is a choice in favour of a certain institutional form in order to regulate a certain range of behaviour. The European trend towards privatization of basic public services, such as the provision of gas, water and electricity, as well as

4 R.A. Posner, *The Problems of Jurisprudence*, Cambridge (Mass.)/London: Harvard University Press 1990 (1993), p. 168. Ruiter, *Types of Institutions as Patterns of Regulated Behaviour*, p. 214.

public transport or telecommunications, is associated with major changes in institutional form. In fact, transaction costs, which play such a central role in neo-institutionalist economic thought inspired by Ronald Coase, can to a large extent be interpreted as the different levels of waste connected with various institutional forms among which can be chosen in order to regulate certain sets of transactions.⁵

Reification

The legal category of objects comprises, in the first place, *physical* objects. However, mature legal systems also recognize *incorporeal* objects. An important subcategory of incorporeal objects are legal objects, that is, reified legal institutions. A legal institution is reified by assigning to it the legal status 'transferable'. The legal status 'transferable' has the purport that legal institutions having it can be socially treated as tradeable assets. A physical object becomes a tradeable asset if a person's exclusive control over it enables him to use it to gain benefits that could be gained by any other person if he had exclusive control over the object. The use value of the physical object then turns into an exchange value. Likewise, if a person's position in a legal institution enables him to use it to gain benefits that could be gained by any other person if he occupied that position, the legal institution's use value also turns into an exchange value. Since transferability is a fixed feature of the legal institution, any new holder can allow his position to be taken over by yet another person, without putting an end to the legal institution's identity. The operation of transfer is indefinitely repeatable. All this amounts to the legal institution's reification, that is, its being turned into an independent *res*.⁶

5 Ronald H. Coase. The Problem of Social Cost, 3 J.Law & Econ. 1 (1960).

6 Ruiter, Types of Institutions as Patterns of Regulated Behaviour, p. 222.