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Dick W.P. Ruiter

Legal Institutions

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LEGAL INSTITUTIONS

by

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To Christ!

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TABLE OF CONTENTS

CHAPTER 1. A New Conceptual Framework

1.	Occam's Razor	1
2.	Legal Acts and Institutional Legal Facts	1
3.	Revocatory and Invalidating Legal Acts	6
4.	How to Preserve Logic?	8
5.	Elementary Propositions and Situations	9
6.	Legal Judgments and Legal Situations	13
7.	Recapitulation of Problems	18
8.	Distinction between Revoking and Invalidating	18
9.	Founding the Principle of Contradiction	19
10.	General Acceptance	21
11.	Conflicts of Obligations	24
12.	Conclusions	25
	<i>Conceptual Recapitulation</i>	26

CHAPTER 2. Kinds of Legal Judgments and Legal Situations

1.	From Legal Acts to Legal Judgments	29
2.	Prescriptive Legal Judgments	30
2.1	Prescriptions and Proscriptions	31
2.2	Licences and Exemptions	35
3.	Directive Legal Judgments	42
4.	Assertory Legal Judgments	49
5.	Expressive Legal Judgments	51
	<i>Conceptual Recapitulation</i>	53

CHAPTER 3. Legal Rules

1.	Particular and Abstract Legal Judgments	57
2.	Empirical Laws and Legal Rules	59
3.	Juridico-Causal Relationships	60
4.	Legal Rules: Types of Legal Consequences	62
5.	Legal Rules: Domains of Operative Facts	65
	<i>Conceptual Recapitulation</i>	68

CHAPTER 4. Legal Institutions

1. Institutional Legal Concepts and Legal Institutions	71
2. Constitutive and Institutive Rules: Functional Distinction	73
3. Constitutive and Institutive Rules: Analytic Distinction	76
4. Categorisation	81
5. An Example: Treaties	83
<i>Conceptual Recapitulation</i>	94

CHAPTER 5. Categories of Legal Institutions

1. Classification of Particular Propositions and Legal Judgments	97
2. Kinds of Institutional Legal Concepts	99
3. Legal Persons	102
4. Legal Objects	106
5. Legal Qualities	110
6. Legal Status	111
7. Personal Legal Relationships	112
8. Legal Configurations	114
9. Objective Legal Relationships	115
<i>Conceptual Recapitulation</i>	116

CHAPTER 6. Unwritten Law

1. Categories of Unwritten Law	119
2. Custom, Habit, Acceptance and Social Morality	122
3. Legal Principles and Morally Grounded Customary Law	127
4. Customary Legal Institutions	131
<i>Conceptual Recapitulation</i>	134

CHAPTER 7. Perfection and Legal Validity

1. Explicit and Implicit Criteria of Perfection	137
2. Criteria of Perfection and Legal Principles	142
3. Suspension and Voidability	146
4. Nullity	154
<i>Conceptual Recapitulation</i>	168

CHAPTER 8. Recapitulation of the Conceptual Framework

1. Introduction	171
2. Recapitulation	171

CHAPTER 9. Applying the Conceptual Framework

1. Introduction	187
2. Constitutive Rule and Institutive Rules	187
3. Personal, Procedural and Substantive Institutive Rules	192
4. Consequential Rules	200
5. Terminative Rules	201
6. Voidance	202
7. Summary in Terms of Conceptual Framework	203

SUPPLEMENT	207
-------------------	-----

BIBLIOGRAPHY	213
---------------------	-----

INDEX OF AUTHORS	219
-------------------------	-----

INDEX OF SUBJECTS	221
--------------------------	-----

CHAPTER 1

A NEW CONCEPTUAL FRAMEWORK

1. Occam's Razor

In *Institutional Legal Facts* of 1993 I used John Searle's theory of speech acts to develop a theory of legal acts (acts-in-the-law) and institutional legal facts.¹ Significant conclusions were that:

- legal acts are declarative speech acts;
- correct performances of legal acts yield institutional facts within the legal system that in turn exert pressure on the legal community to be transformed into social facts by their general recognition.²

Further consideration has brought me to the view that the analysis of *Institutional Legal Facts*, though still fruitful, has shortcomings that must be corrected by invoking the exception to Occam's razor. This exception allows for an increase of the number of classes of entities taken into account in a theory, provided that it remain within the boundaries dictated by necessity.³ In order to demonstrate what further distinctions are necessary for correcting the indicated shortcomings, I must first briefly explicate the manner in which I transformed insights taken from Searle's theory of speech acts into a theory of legal acts and institutional legal facts.

2. Legal Acts and Institutional Legal Facts

With respect to speech acts a distinction must be made between act-types and their instances. For example, 'to promise' designates a commissive act-type, whereas "John promises Mary to come tomorrow." designates an individual speech act forming a instance of the act-type of promising. The term

¹ Dick W.P. Ruiter, *Institutional Legal Facts, Legal Powers and their Effects* (Dordrecht: Kluwer Academic Publishers, 1993). John R. Searle, *Speech Acts. An Essay in the Philosophy of Language* (Cambridge: Cambridge UP, 1969). John R. Searle, *Expression and Meaning. Studies in the Theory of Speech Acts*. (Cambridge: Cambridge UP 1979). John R. Searle and Daniel Vanderveken, *Foundations of Illocutionary Logic* (Cambridge: Cambridge UP, 1985). See more recently: John R. Searle, *The Construction of Social Reality* (Harmondsworth: Allan Lane, and New York: Free Press, 1995).

² For readers who are not familiar with Searle's theory of speech acts and the manner in which I have applied this theory in *Institutional Legal Facts* a summary is given in a supplement to this study.

³ *Entia non sunt multiplicanda praeter necessitatem.*

'speech act' will be employed to designate act-types. Instances of act-types will be termed 'individual speech acts' or 'performances of speech acts'.⁴

According to Searle, any individual speech act has two constituent parts, namely, an *illocutionary force* and a *propositional content*.⁵ This stage of the analysis is restricted to individual speech acts with elementary propositional contents. An elementary propositional content consists of a reference to a single entity and the ascription of a property to that entity (predication). For example, utterance of Searle's famous sentence "Sam smokes habitually." is an individual speech act with an elementary propositional content. In it Sam appears as the entity to which reference is made and the dangerous habit of smoking as the property ascribed to Sam. Utterance of "Sam smokes habitually." is an individual speech act of the assertive act-type, which means that it has the assertive illocutionary force. The assertive illocutionary force can be articulated with the help of the phrase "It is the case that ...". If in an individual speech act a certain propositional content *p* is combined with the assertive illocutionary force, the speech act represents the state of affairs that *p* as being the case. Utterance of "Sam smokes habitually." represents the state of affairs that Sam smokes habitually as being the case.⁶ Assertive individual speech acts have a word-to-world direction of fit, which means that 'success of fit' consists in the truth and 'failure of fit' in the falsity of their propositional contents. The conclusion is that the propositional content of an assertive individual speech act purports to *re-present*, in the specific sense of reflect, an existing state of affairs. In *Institutional Legal Facts* this conclusion served as the foundation of the following general characteristic of assertive speech acts.

A successful performance of an *assertive* speech act yields a representation of a state of affairs (assertive illocutionary point); the representation is true if the state of affairs is as represented ('word-to-world' success of fit).⁷

⁴ G. H. von Wright, *Norm and Action* (London: Routledge & Kegan Paul, 1963), 37. Amedeo G. Conte, 'Fenomeni di fenomeni'. *Rivista internazionale di filosofia del diritto*, 63 (1986), 29-57.

⁵ Searle (1969), 22-24; Ruiter (1993), 40.

⁶ Searle (1969), 22. Searle and Vanderveken (1985), 105.

⁷ Ruiter (1993), 51. The assertive illocutionary point is the purpose internal to speech acts having the assertive illocutionary force, namely, the purpose of faithfully representing an existing state of affairs. Searle and Vanderveken (1985), 13-14.

As was already mentioned above, one of the most significant conclusions in *Institutional Legal Facts* was that legal acts are declarative speech acts. If in a successful individual declarative speech act a certain propositional content *p* is combined with the declarative illocutionary force, the speech act makes the state of affairs that *p* the case precisely by presenting that state of affairs as becoming the case. The successful individual declarative speech act "I appoint you chairman." makes you chairman by presenting you as becoming chairman. Declarative individual speech acts have, what Searle and Vanderveken call, the double direction of fit, which means that:

In achieving success of fit the world is altered to fit the propositional content by representing the world as being so altered.⁸

The conclusion is that the propositional content of a declarative individual speech act purports to bring a state of affairs into being by presenting it. In *Institutional Legal Facts* this conclusion served as the foundation of the following initial general characteristic of declarative speech acts.

A successful performance of a *declarative* speech act yields a state of affairs (declarative illocutionary point and 'double' success of fit).⁹

A comparison of this characteristic with the characteristic of assertive speech acts given above leaves us with a puzzle. Whereas an assertive individual speech act yields a *representation* of a state of affairs, a declarative individual speech act yields a *state of affairs*. How is this miracle accomplished? Searle and Vanderveken give the following explication:

Declarative forces have the declarative point. The illocutionary point of a declaration is to bring about changes in the world, so that the world matches the propositional content solely in virtue of the successful performance of the speech act. Normally, this is achieved by invoking some extralinguistic institution in such a way that within the institution the performance of the utterance act counts as bringing about the change in the world. Thus, when one adjourns a meeting, pronounces a couple man and wife, gives or bequeaths one's watch, or appoints a chairman, an extralinguistic institution empowers an appropriately situated speaker to bring about a word-world match solely in virtue of his speech act.¹⁰

⁸ Searle and Vanderveken (1985), 52 and 92-98.

⁹ Ruiter (1993), 51. The declarative illocutionary point is the purpose internal to speech acts having the declarative illocutionary force, namely, the purpose of bringing states of affairs into existence. Searle and Vanderveken (1985), 56-57.

¹⁰ Searle and Vanderveken (1985), 56-57.

In *Institutional Legal Facts* I concluded that states of affairs resulting from declarative individual speech acts enjoy existence as part of some extralinguistic institution. Where individual *legal* acts are concerned, the extralinguistic institution in question is known as the *legal system*. The question arises what the exact nature is of a state of affairs brought into existence by a successful declarative individual speech act. In *Institutional Legal Facts* I put forward the view that it is the propositional content of the individual speech act that is promoted to the position of a state of affairs. However, such a propositional content is a state of affairs of a very special kind, namely a *presentation* of a state of affairs. Outside the extralinguistic institution in which it enjoys existence it is nothing but a presentation, which, like all presentations, may or may not correspond with the world. Declarative presentations of states of affairs, not the states of affairs they present, are the institutional facts resulting from successful declarative individual speech acts. This means that the initial general characteristic of declarative speech acts must be adjusted as follows:

A successful performance of a declarative speech act yields as an institutional state of affairs a presentation of a state of affairs (initial 'double' success of fit).¹¹

An institutional fact consisting in a presentation of a certain state of affairs is in turn considered to have success of fit when it receives general recognition in the surrounding world.

The idea that institutional legal facts are essentially presentations of states of affairs that enjoy existence within the framework of the legal system while it depends on their meeting with general acceptance whether they are at the same time social facts is the foundation of the entire further analysis given in *Institutional Legal Facts*. It made it possible to distinguish the following seven main classes of legal acts and corresponding classes of institutional legal facts.¹²

Declarative Legal Acts

A successful performance of a declarative legal act brings about a presentation of a state of affairs.

¹¹ Ruiter (1993), 54.

¹² Ruiter (1993), 52-90. See also: Dick W.P. Ruiter, 'Legal Powers', in: Stanley L. Paulson and Bonnie Litschewski-Paulson (eds.), *Normativity and Norms, Critical Perspectives on Kelsenian Themes*. (Oxford: Clarendon Press, 1998c), 469-491.

Example: "The Judges shall elect the President of the Court of Justice from among their number for a term of three years."¹³

Commissive Legal Acts

A successful performance of a commissive legal act brings about a presentation of an order to the performer to take a certain course of conduct.

Example: "The French people solemnly proclaim their commitment to the Rights of Man and the principles of human sovereignty as defined by the Declaration of 1789, reaffirmed and completed by the Preamble to the Constitution of 1946."¹⁴

Purposive Legal Acts

A successful performance of a purposive legal act brings about a presentation of the performer's purpose to take a certain course of conduct.

Example: "We the Peoples of the United Nations, determined to save succeeding generations from the scourge of war have resolved to combine our efforts to accomplish these aims."¹⁵

Imperative Legal Acts

A successful performance of an imperative legal act brings about a presentation of an order to another person to take a certain course of conduct..

Example: "The Federal Chancellor may not hold any other salaried office."¹⁶

Hortatory Legal Acts

A successful performance of a hortatory legal act brings about a presentation of a non-binding exhortation to another person to take a certain course of conduct.

Example: "The Council of the European Communities ..., hereby recommends that the Governments of the Member States should allow the persons referred to above to take up and pursue regulated professions within the

¹³ Art. 223, fifth indent, EC Treaty.

¹⁴ Preamble to the Constitution of the Fifth French Republic of 4 October 1958. The translation is taken from S.E. Finer, Vernon Bogdanor, and Bernard Rudden, *Comparing Constitutions* (Oxford: Clarendon Press, 1995), 213.

¹⁵ Preamble to the Charter of the United Nations.

¹⁶ Art. 66 Basic Law of the Federal Republic of Germany. Finer *et al.* (1995), 156.

Community by recognising these diplomas, certificates and other evidences of formal qualifications in their territories"¹⁷

Expressive Legal Acts

A successful performance of an expressive legal act brings about a presentation of an attitude about something.

Example: "The Security Council welcomes the prompt and vigorous support which governments and peoples have given to its Resolution ..." "¹⁸

Assertive Legal Acts

A successful performance of an assertive legal act brings about a representation of a state of affairs.

Example: "Convinced that the contribution which an organised and vital Europe can make to civilisation is indispensable to the maintenance of peaceful relations."¹⁹

3. Revocatory and Invalidating Legal Acts

The idea that institutional legal facts are presentations that have achieved the position of states of affairs in the legal system because they were created by successful individual legal acts did not lead to severe problems as long as the analysis in *Institutional Legal Facts* was restricted to presentations of states of affairs in the world surrounding the legal system. Problems arose, however, when the analysis was extended to presentations of states of affairs, not in the surrounding world, but in the legal system *itself*. Presentations of this kind are created by performances of revocatory and invalidating

¹⁷ Council Recommendation 21 December 1988 concerning nationals of the Member States who hold a diploma conferred in a third state (89/49 EEC). Bernard Rudden and Derrick Wyatt (eds.), *Basic Community Laws* (Oxford: Clarendon Press, 1994), 318.

¹⁸ Security Council Resolution 7 July 1950.

¹⁹ Preamble to the Treaty Establishing the European Coal and Steel Community of 18 April 1951 (ECSC). See for other applications of the classification to European law, Wouter G. Werner, 'Valid White Lies. The European Court of Justice and Human Rights.' In Joel Levin and Roberta Kevelson (eds), *Revolutions, Institutions, Law, Eleventh Round Table on Law and Semiotics* (New York: Peter Lang, 1997), 241-270, Ramses A. Wessel. *The European Union's Foreign and Security Policy. A Legal Institutional Perspective*. (The Hague: Kluwer Law International, 1999), 24-25, and Ige F. Dekker and Ramses A. Wessel 'The European Union and the Concept of Flexibility: Proliferation of Legal Systems within International Organizations' in: N.M. Blok and H.G. Schermers (eds.), *Proliferation of International Organizations*. (The Hague: Kluwer Law International, 2001), 381-414.

legal acts.²⁰ A successful performance of a revocatory legal act removes a certain state of affairs from the legal system by creating a presentation of its absence. A successful performance of an invalidating legal act retroactively deprives a certain presentation of the position of a state of affairs in the legal system because the underlying individual legal act turns out to have been unsuccessful. In *Institutional Legal Facts* I concluded that the given characterisation of invalidating legal acts expresses a paradox, for when a certain state of affairs of the legal system is identified for the purpose of invalidating it, this would imply that the state of affairs in question must first be considered existent in order to be pronounced inexistent. It would seem that in order to resolve the paradox, we must accept that states of affairs resulting from unsuccessful performances of legal acts are initially existent within the legal system, while invalidating them amounts to denying them future existence. This is the position taken by Hans Kelsen.²¹ According to him, all individual legal acts are successful, irrespective of their defects. Even when the states of affairs in the legal system created by them are subsequently invalidated, it does not mean that the individual legal acts creating them prove, in retrospect, to have had no results, but only that the resulting states of affairs in the legal system are rendered henceforth non-existent by the invalidating individual legal acts. Kelsen's account of the matter has puzzling implications. The significant distinction between successful and unsuccessful individual legal acts is thus abolished. Moreover, invalidating legal acts thereby become a special kind of revocatory legal acts. This is a high price to be paid for resolving the paradox, which I was not prepared to pay in *Institutional Legal Facts*.²²

I, therefore, tried to find a way out. This attempt led to the following characteristic of invalidating legal acts:

A successful performance of an invalidating legal act yields a legally valid representation of a certain presentation in conjunction with a legally valid presentation of the latter presentation as legally invalid.²³

²⁰ Ruiter (1993), 118-126.

²¹ Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967). Transl. by Max Knight of *Reine Rechtslehre*, 2nd edn. (1960). 277-278. See for a similar opinion Manuel Atienza and Juan Ruiz Manero, *A Theory of Legal Sentences*. (Dordrecht: Kluwer Academic Publishers, 1998), 48.

²² Ruiter (1993), 122-126.

²³ Ruiter (1993), 126.