

FORM AND
FUNCTION
IN A LEGAL SYSTEM
A General Study

ROBERT S. SUMMERS

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FORM AND FUNCTION IN A LEGAL SYSTEM – A GENERAL STUDY

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**FORM AND FUNCTION IN A LEGAL SYSTEM —
A GENERAL STUDY**

This book addresses three major questions about law and legal systems: (1) What are the defining and organizing forms of legal institutions, legal rules, interpretive methodologies, and other legal phenomena? (2) How does frontal and systematic focus on these forms advance understanding of such phenomena? (3) What credit should the functions of forms have when such phenomena serve policy and related purposes, rule of law values, and fundamental political values, such as democracy, liberty, and justice? This is the first book that seeks to offer general answers to these questions and thus give form in the law its due. The answers not only provide articulate conversancy with the subject, but also reveal insights into the nature of law itself, the oldest and foremost problem in legal theory and allied subjects.

Robert S. Summers is the William G. McRoberts Professor of Research in the Administration of Law at Cornell Law School. He has won international acclaim for his work in contracts, commercial law, jurisprudence, and legal theory. He has authored and coauthored multiple works in these fields for which he has received honorary degrees and other recognition. His treatise on the Uniform Commercial Code, coauthored with James White, is the most widely cited on the subject by courts and scholars. Professor Summers has served as official advisor both to the Drafting Commission for the Russian Civil Code and to the Drafting Commission for the Egyptian Civil Code. He lectures annually on jurisprudence and legal theory in the United States, Britain, Scandinavia, and Europe.

A SELECTION OF OTHER BOOKS BY THE AUTHOR

Form and Substance in Anglo-American Law, coauthored with Patrick S. Atiyah (Oxford University Press, third reprinting with minor revisions, 2002).

Contract and Related Obligation: Theory, Doctrine and Practice (4th ed.), coauthored and coedited with Robert A. Hillman (West Group, 2001).

La Naturaleza Formal del Derecho (Mexico City, Fontamara, 2001, in Spanish).

Collected Essays in Legal Theory (Amsterdam, Kluwer Academic Publishers, 2000).

The Uniform Commercial Code, coauthored with James J. White (West Group, 5th ed. of 1 vol. ed. of multi-volume treatise, 2000).

Interpreting Precedent – A Comparative Study, coedited and coauthored with members of the Bielefelder Kreis (Dartmouth Press, 1997).

The Uniform Commercial Code, 4 vols., coauthored with James J. White (West Group, 4th ed., 1995, with annual supplement).

Essays on the Nature of Law and Legal Reasoning (Berlin, Duncker and Humblot, 1992).

Interpreting Statutes – A Comparative Study, coedited and coauthored with members of the Bielefelder Kreis (Dartmouth Press, 1991).

Law: Its Nature, Functions, and Limits (3rd ed.), coauthored and coedited with several others (West Pub. Co., 1986).

Lon L. Fuller (Stanford University Press, 1984).

Pragmatischer Instrumentalismus (Karl Alber, Freiburg, 1983, German translation of next item below).

Instrumentalism and American Legal Theory (Cornell University Press, 1982).

Collective Bargaining and Public Benefit Conferral – A Jurisprudential Critique (Cornell University, ILR Monograph Series, 1976).

More Essays in Legal Philosophy (University of California Press, and Blackwells, Oxford, 1971).

Essays in Legal Philosophy (University of California Press, and Blackwells, Oxford, 1968).

PREFACE

I first lectured on themes here while I was the Arthur L. Goodhart Visiting Professor of Legal Science at Cambridge University in 1991–2, and began the book a number of years later.¹ I have written it not only for those with academic interests in law and legal systems, such as law students, professors of law, legal theorists, and other scholars, but for lawyers and judges as well.² The scope of the book is not confined to Anglo-American systems. It is addressed more generally to the forms and functions of legal phenomena in developed Western societies, and its central themes apply still more widely. I now offer the book as an ambitious yet unhurried attempt to develop systematic ways of giving form in law its due, both as an avenue of understanding and as a means of serving a variety of purposes: policy and related ends, rule of law values, and fundamental political values.

I focus here on paradigms of the forms of a varied selection of functional legal units: legislatures and courts; statutory and other rules; species of law besides rules, such as contracts and property interests; legal methodologies, such as those for interpreting statutes; and enforceive devices, such as sanctions and remedies. In addressing the make-up, unity, instrumental capacity, distinct identity, and other attributes of these functional legal units with focus on their forms, the book provides a new way of viewing the familiar. These functional units, and the system as a whole, are subjected to a special mode of analysis that I introduce here and call “form-oriented.” It is so named because it focuses frontally, systematically, and holistically on how paradigms of the overall forms of such units are generally defined and organized, and also on how a paradigmatic version of the overall form of a developed Western legal system is generally defined and organized, all to serve

¹ See R. S. Summers, “The Formal Character of Law,” 51 *Cambridge L. J.* 242 (1992).

² Many American lawyers and judges will recognize this work as highly compatible with a treatise that I coauthored: J. White and R. Summers, *The Uniform Commercial Code*, 4 vols. (4th ed., West Group, St. Paul, Minn. 1995, with annual supplements). Indeed, Chapter Seven of the present book applies the theory of form set forth here to the fields of contract and commercial law.

purposes. Readers so disposed can make this form-oriented mode of analysis part of their own general intellectual equipment and will find they can apply it to any functional legal unit and not merely to those selected for analysis here. Form-oriented analysis goes beyond analysis of functional legal units in terms of the contents of those legal rules that are reinforcing or constitutive of such units, analysis prominent in the works of major legal thinkers, such as H. L. A. Hart and Hans Kelsen.

Here, each paradigm of an overall form of a functional legal unit is defined and differentiated from the complementary material and other components of the unit. These overall forms and their constituent features are then analyzed to advance understanding of the whole. In this way, we can see that well-designed forms of functional legal units are not formalistic or bare and thin; instead, they are intrinsically purposive and value-laden and can, along with the complementary material and other components of such units, even be highly efficacious. We can also see how formal devices systematize the various functional legal units into a coherent and effective operational system.

This study also enables the reader to see how well-designed form can merit much credit for purposes served through the functioning of the various legal units within an operational system. Indeed, it is a central thesis of this book that significant credit for purposes served through deployment of functional legal units should go to well-designed form and not merely to the material or other components of these units, such as physical facilities and trained personnel. The frontal and systematic study of form is important, as well, for those who would construct functional legal units anew or improve upon existing units within particular systems, all the better to serve various ends.

There are still further reasons to study legal form. The subject itself is conceptually rich, wide-ranging, and absorbing. Also, because law is of great social importance, and form is intrinsic to law, legal form, too, is of great importance. Yet the subject has been neglected. Indeed, the subject has not yet been fully recognized as a discrete subject, let alone one for systematic study. Some American legal scholars and theorists have even treated aspects of form in law in unqualifiedly pejorative and dismissive terms. If I am right, this makes the need for such a book as this all the more pressing, although it is certain to be controversial in those quarters.

Robert S. Summers
February 17, 2005

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I wish to thank first my diligent research assistants, and the students in my annual seminars on American Legal Theory at Cornell Law School. All of these have contributed in various ways to the final version of this book.

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I wish to record a special debt to an earlier coauthor, Professor Patrick S. Atiyah with whom, in the 1980s, I had many productive discussions of the related subject “form and substance” in law and legal reasoning.¹ The present book is a very different book from the one we coauthored; however, it is unlikely that I would have written the present one had the earlier one not preceded it.

Of my former teachers, I single out two for their tutelage, insight, and inspiration: the late H. L. A. Hart of Oxford University and the late Lon L. Fuller of Harvard University. Only the work of the great nineteenth-century German jurist, Rudolf von Jhering, has been more of a source of inspiration in the writing of this book.

I wish to thank numerous colleagues and friends who read part or all of the manuscript and made numerous helpful comments: Professor Okko Behrends of the University of Göttingen, Professor D. Neil MacCormick of the University of Edinburgh, Professor Philip Soper of the University of Michigan, Professor William Ewald of the University of Pennsylvania, the late Dr. Geoffrey Marshall formerly Provost of the Queen’s College, Oxford University, Professor Pedro Alemán Láin of the University Complutense in Madrid, Professor Manuel Atienza of the University of Alicante, Professor Glenn Altschuler of Cornell

¹ P. S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law* (Clarendon Press, Oxford, 1987).

University, and Mr. Paul Markwick. I am also indebted to an anonymous reviewer of the manuscript for Cambridge University Press for various helpful suggestions.

I am grateful as well to numerous hosts and audiences at various universities in the United States and in Europe for comments and discussions following lectures I was invited to present over the years on the various themes I take up in this book. In the United States, I am indebted to hosts and lecture audiences at the Universities of Chicago, Cornell, Florida, Georgia, and Oregon. Abroad, I am indebted to hosts and lecture audiences at the Universities of Cambridge, Oxford, London, and Bristol in England; the Universities of Edinburgh and St. Andrews in Scotland; the Universities of Göttingen, Hamburg, Heidelberg, Münster, Bielefeld, Freiburg, Tübingen, and Kiel in Germany; the Universities of Bologna, Ferrara, and Pavia in Italy; the Universities of Helsinki and Tampere in Finland; the Universities of Madrid, Alicante, and Mallorca in Spain; the Universities of Groningen and Utrecht in the Netherlands; the University of Paris (Sorbonne and also Nanterre), the University of Brussels, the University of Lund, and the University of Vienna.

I am also grateful to several deans of the Cornell Law School: Russell Osgood, the late Lee Teitelbaum, and Stewart Schwab, for research and other support.

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Robert S. Summers
Cornell Law School
Ithaca, New York
February 17, 2005

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PART ONE ∞

Introduction, Basic Concepts
and Definitions, and A
General Approach

1 ∞ INTRODUCTION

“Theory is the most important part of...the law, as the architect is the most important...in the building of a house.”
— O. W. Holmes, Jr.¹

“[Die Form]...ist im innersten Wesen des Rechts begründet.”

“Form is rooted in the innermost essence of law.”
— Rudolf von Jhering²

SECTION ONE: PRELIMINARY OVERVIEW

Given the unfamiliar nature of this study, an extended preliminary overview is called for. The most fundamental question of law and legal theory is: What is the nature of a legal system? Many leading scholars and theorists of law in the twentieth century, including H. L. A. Hart³ and Hans Kelsen,⁴ viewed a legal system as essentially a system of rules. In developed Western societies, however, a legal system is far more than this. It is made up of diverse functional units only one major variety of which consists of rules. These diverse units are, in turn, duly organized in complex ways to form a system. To grasp the nature of a legal system, it is first necessary to understand the diverse functional units of the system. These include institutions, such as legislatures and courts,⁵ legal precepts, such as rules and principles,⁶ nonpreceptual species of law, such as contracts and

¹ Oliver Wendell Holmes, Jr., *Collected Legal Papers*, 200 (Harcourt Brace and Co., New York, 1921).

² R. Jhering, *Geist des Römischen Rechts: auf den verschiedenen Stufen seiner Entwicklung*, vol. 2, at 479 (Scientia Verlag, Aalen, 1993) and see also R. Jhering, *Zweck im Recht*, (Breitkopf and Hartel, Wiesbaden, 1970) translated as *Law As a Means to an End* (I. Husik trans., The Boston Book Co., Boston, 1913). I am also indebted to Professor Okko Behrends here.

³ H. L. A. Hart, *The Concept of Law*, 8 (2nd ed., Clarendon Press, Oxford, 1994). See further *infra* n. 60 and accompanying text. See also Chapter Three at 72.

⁴ H. Kelsen, *Introduction to the Problems of Legal Theory*, 55–6 (B. Paulson and S. Paulson trans., Clarendon Press, Oxford, 1992). See also Chapter Three, at 72.

⁵ See *infra* Chapter Four.

⁶ See *infra* Chapters Five and Six.