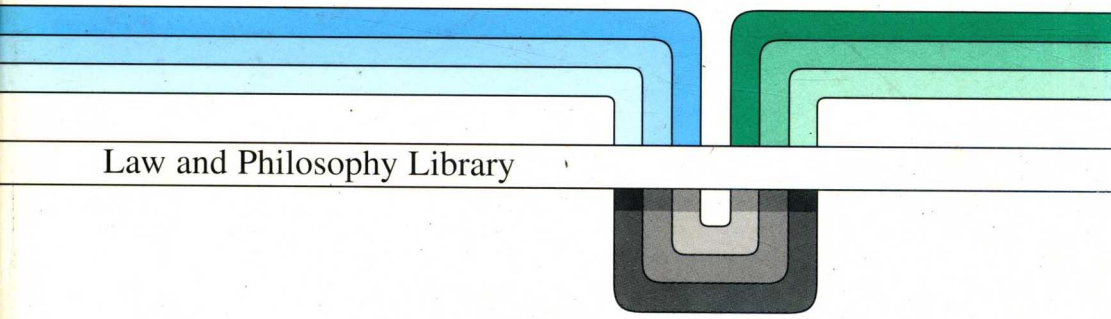

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LEGAL REDUCTIONISM AND FREEDOM

by

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CONTENTS

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INTRODUCTION

In the earlier days of its development, two important spokesmen for what is known as the new institutional approach to the study of social and political phenomena said that this approach 'is far from coherent or consistent; it is not completely legitimate; but neither can it be entirely ignored' (March and Olsen 1984, p. 734). These words still seem to be highly relevant. New institutionalism cannot be ignored. It purports to reshape our thinking about topics as divergent as local governments, legislative processes, public law, the origins of the state, international co-operation, bureaucratic policy making, etc. The approach has influenced the study of law, the study of politics and public administration, organisation theory, economics and sociology. Furthermore, the stream of new institutional publications reveals that the number of scholars adopting this approach is still increasing. However, although new institutionalism cannot be ignored, speaking of *the* new institutional approach would suggest a greater consensus among its followers than can in fact be found. There is not only a wide diversity of opinions about the essentials of one of the central notions (if not the central notion) of the paradigm, namely that of an institution, but also with respect to the appropriate way of conducting institutional analyses (DiMaggio and Powell 1991).

The picture must not be drawn too pessimistically, though. The existence of common themes is evident. It is almost trivial to say that new institutionalists are first and foremost interested in the role that institutions play in our understanding of legal, social and political events. Broadly speaking, this interest in institutions can be seen to result in two lines of research. The *first* research line is one in which institutions are described and analysed in increasing detail. Since institutions affect the way in which individuals act, the detailed specification of the characteristics of the institutional context leads to a better understanding of human behaviour. An example of the importance of such a more sophisticated analysis of institutional settings can be found in the context of legislative processes. The existing theory of voting has revealed the fundamental instability of the majority rule (McKelvey 1976). Kenneth Shepsle, however, has argued convincingly that the abstract model of the decision-making process on which this negative result rests contradicts the actual practice of legislative decision making in which the outcome is to a large extent determined by rules of jurisdiction and amendment control (Shepsle 1979; 1986). Taking account of these rules yields a more detailed description of the legislative process. Such a more detailed model of the institutional context may provide an explanation for the existence of political stability, that is, it may

show that under particular institutional arrangements individuals will adopt strategies that do form an equilibrium.[1] This type of new institutionalism is supplementary to conventional theories – supplementary to the existing theory of voting, for instance. It provides a more detailed description of the context in which the behaviour of individuals takes place. However, the institutional arrangements are still defined *exogenously*, i.e., they form the given setting in which individuals perform actions.

A *second* line of research within new institutionalism emphasises the importance of *endogenous* treatments of institutions. In this view, institutional arrangements should not only be seen as forming the context of the individual behaviour that is to be explained; the institutional context itself should be the subject of explanation. The emphasis on the need to explain the existence of institutions is sometimes accompanied by a rejection of the idea that these institutions can be explained in terms of the outcomes of processes of individual decision making. The actions, goals, preferences, beliefs of individuals are themselves characteristics of the institutional setting and, according to some of the theorists working in this second line of new institutionalism, one should therefore depart from those conceptions of life which are, for instance, 'inclined to see political phenomena as the aggregate consequences of individual behavior, less inclined to ascribe the outcomes of politics to organizational structures and rules of appropriate behavior' (March and Olsen 1989, p. 3). In particular, new institutionalism must in this view go 'beyond' reductionist explanations (Scharpf 1983, p. 11; March and Olsen 1984, p. 738; Smith 1988, p. 95; Thelen and Steinmo 1992, pp 7-10).

Within the confines of legal theory, an important contribution to new institutionalism is formed by the institutional theory of law as developed by Neil MacCormick and Ota Weinberger (1986). Their theory corresponds with both institutional research lines distinguished above: their programme is aimed at providing a better understanding of the way legal institutions work by giving more accurate *descriptions* of it as well as by offering *an explanation* of the existence of legal norms and legal institutions. The starting point of the institutional programme is the idea that legal and social facts are facts indeed, but facts of a peculiar kind. They do not refer exclusively to material objects of which the spatio-temporal dimensions can be pointed out, nor do they refer solely to the causal relations existing between such material objects; they are not *brute facts* but *institutional facts*. They are true in virtue of an interpretation of what happens in the world and this interpretation in turn depends on the existence of specific rules and institutions. Suppose that my bank has lent me

[1] See also (Riker 1980; Ordeshook 1980).

some money on the condition that I pay the money (plus some interest) back at some later point in time, say time t_1. Now consider the proposition that I have to pay this money back at time t_1. Although this proposition is true, its truth cannot be easily established in the 'world out there'. Any analysis of the truth (or falsity) of the proposition would have to refer to such institutional concepts as 'bank', 'contract', 'interest rate', etc. Without committing oneself to some form of Platonist idealism, it is difficult to maintain that these concepts refer to entities that exist in the same way as, say, a cup of coffee, a book, or a building. Yet they do exist: their existence is an institutional fact. Furthermore, my interactions with the bank not only presuppose these institutional facts, but also presuppose the existence of certain rules and conventions that regulate them. The truth of the proposition stating that I have to return the money implies, for instance, the existence of a set of legal rules according to which I was entitled to enter into a contract with my bank; it implies that the bank was authorised to lend me money; it implies the existence of some form of common understanding between the bank and me concerning these consequences, etc. Hence, norms – say the norm 'I should pay this money back' – cannot be analysed properly without referring to the institutions that regulate them. Conversely, institutions cannot be analysed in isolation from the norms and rules in the context of which they exist, or more generally, in isolation from the social context of which they form a part. The concept of lending money and the obligations concomitant to lending money are presupposed in the use of an institutional concept like 'bank'.

This conception of the relation between norms and institutions leads to two main points of attention in the institutional theory of law. First of all, it is emphasised that, to be able to take account of the *normativity* of law, one needs to adopt a 'hermeneutic approach' (MacCormick and Weinberger, 1986, pp. 14-15). In this view, we should adopt an approach in which norms are analysed as they are interpreted, understood and used by human subjects. In other words, the normativity of law can only be understood from an 'internal point of view'. Secondly, norms should always be reducible to possible human actions or to the objectives of human action. Hence, a proper analysis of norms can only be conducted within the framework of a general theory of action. According to MacCormick and Weinberger, the reducibility of norm expressions to expressions about human actions does not imply that the institutional theory of law can be called reductionist in the sense that norms can be reduced to facts. On the contrary, such forms of reductionism are rejected on the ground that they fail to take account of the normativity of law, that other main point of attention in the programme of the institutional theory of law. In the view of MacCormick and Weinberger, the reduction of law to facts would yield a

'sociology of law' which does not contain any reference to norms or to the normative nature of law and which would therefore form a grossly distorted picture of the nature of legal institutions.

Although the institutional theory of law therefore discredits at least one type of reductionism, it is not exactly clear whether its concern about *explaining* the existence of institutions – a concern which it shares with those working in the second line of new institutional research distinguished above – is accompanied by a rejection of theories that purport to explain institutions in terms of processes of individual decision making. In other words, it is less clear whether the new institutional theory of law agrees with the rejection of reductionism, a rejection that – as we saw – some of the new institutionalists have argued for.

I shall argue in this monograph that a rejection of reductionism is not needed. On the contrary, the existence of legal institutions, or even institutions in general, can be explained quite appropriately within a reductionist framework. Since I shall also argue that reductionism is very helpful in obtaining better descriptions and more sophisticated analyses of exogenously given institutions, it becomes clear that a reductionist approach enables us to combine the two lines of research of new institutionalism that were distinguished above – describing and analysing on the one hand, and explaining on the other. Furthermore, I shall argue that, in the context of the study of law, reductionism is perfectly compatible with the institutional theory of law. The reductionism that I propose not only presupposes a hermeneutic approach but is also embedded within a general theory of action. It is for these reasons that I claim that the approach that I develop in the first part of this study, which I call *legal reductionism*, forms a contribution to new institutionalism in general, and to the institutional theory of law in particular.

The aim of the analysis of the second part of the study is to substantiate this claim in the form of an application of the legal reductionist approach to a particular aspect of legal systems, viz., to the analysis of the *freedom* they can be said to offer individuals. I hope to show not only that legal reductionism does indeed enable us to gain a better understanding of legal systems, but I also hope to make it clear that this better understanding is obtained in an interplay with results and insights developed within the social sciences. Furthermore, by showing that the approach enables us to analyse questions concerning *value*, in our case the value of freedom, I hope to make it clear that the study of law can be fruitfully embedded in the study of moral and political philosophy.

The structure of this book is as follows. The first part of the study – Chapters 1 through 4 – contains the derivation of the legal reductionism that I propose. In Chapters 1 and 2 I discuss the way legal reductionism can be seen to evolve out of the legal positivist approach to the study of law. On the one hand, it adopts

some fundamental insights on the nature of legal systems from legal positivism. However, it also departs in some crucial respects from legal positivism. It argues for a revision of some of the key tenets of legal positivism, in particular those pertaining to the relation between law and facts, and those concerning the relation between law and morality. This discussion already reveals some of the major characteristics of the position that I shall be defending, in particular my methodological rather than ontological approach to the study of law. Chapter 3 takes up the issue of reductionism, and contains a presentation and defence of methodological reductionism. It thereby also presents the outlines of the theory of action that I shall use, i.e., the theory of rational choice. Chapter 4 then describes in more detail how legal reductionism can be used to *describe* legal institutions as well as to *explain* their existence.

The second part of the study applies the legal reductionist approach to the analysis of the *freedom* that legal systems can be said to offer individuals. To do so I introduce, in Chapter 5, the notion of 'legal freedom' and discuss the relation between legal institutions and individual freedom. In Chapter 6 I draw on recent literature on the measurement of freedom of choice and discuss to what extent it is possible to say that an individual has more or less freedom of choice. Chapter 7 continues the discussion of measuring freedom, but does so in the context of measuring a person's legal freedom. In Chapter 8, finally, the analysis of legal freedom is used to examine the possible *value* of particular legal systems.

The application of legal reductionism to the analysis of legal freedom illustrates the contributions of legal reductionism to our thinking about legal arrangements. First, in combination with the game-theoretic tools that are adopted, it offers a framework whereby we can obtain a *better insight* into the functioning of liberal legal arrangements. Secondly, the increased insight into the functioning of liberal institutions may form an important contribution to the *explanation* of the existence of those institutions. Finally, it is helpful in our thinking about the possible *justification* of liberal institutions.

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PART 1

LEGAL REDUCTIONISM

CHAPTER 1

LEGAL POSITIVISM AND THE NORMATIVITY THESIS

1. INTRODUCTION

The basic idea underlying those philosophies of law that are usually grouped together under the label of legal positivism can best be explained in terms of the theories they stand in contrast to. Indeed, one of the reasons for legal positivism's popularity in the beginning and middle of this century is without any doubt the way it seemed to circumvent the difficulties posed by earlier philosophies of law. As was argued repeatedly by the father of legal positivism, Hans Kelsen, legal positivism enabled the philosophy of law to break with ideological approaches to the study of law without necessarily ending up in a purely sociological perspective on law.

Traditionally, natural law theory and empirico-positivism were not only supposed to be mutually exclusive but also jointly exhaustive of the set of possibilities in legal philosophy. They are mutually exclusive because they express opposite views on the separability of law from morality: natural law theory states that morality cannot be separated from law whereas empirico-positivism believes it can. The theories are exhaustive because there is no room for a third position: either law *can* or law *cannot* be separated from morality. Moreover, since, as Kelsen argued, both natural law theory and empirico-positivism give an unsatisfactory account of the nature of legal orders, we not only lack a middle way, but we unavoidably end up with an unsatisfactory theory of law. This is the essence of what later came to be called *the jurisprudential antinomy* and it was Kelsen's contribution to show that a solution to the antinomy exists.[1]

According to Stanley Paulson, on whose description of the jurisprudential antinomy and Kelsen's solution to it I shall draw, Kelsen's solution consists of showing that natural law theory and empirico-positivism do not exhaust the set

[1] See Paulson (1992) and also Paulson's introduction to the English translation of the first edition of the *Reine Rechtslehre* (Kelsen 1992)).

of possibilities. It is true that the *separability or inseparability of law and morality* is an important dimension on the basis of which theories of law can be distinguished. Kelsen argued, however, that there is another dimension, and that is the one concerning *the separability or inseparability of law and fact*. The two theories of law differ not only with respect to their accounts of the relation between law and morality but also with respect to their views on the relation between law and facts. According to natural law theorists, law necessarily embraces moral standards which cannot be described exclusively in factual terms. Hence, law is taken to be inseparable from morality but separable from facts. The traditional forms of empirico-positivism, on the other hand, reduce all statements about law to factual statements without any reference to morality. Kelsen's solution to the antinomy consists in showing that there is a middle way between the two positions. Kelsen's legal positivism, the Pure Theory of Law, accepts the separation between law and morality (*contra* natural law theory), while rejecting the reduction of law to facts (*contra* empirico-positivism).

It may be helpful to display the various positions schematically. With respect to each dimension, two positions are possible. The first dimension concerns the question of whether law can be separated from morality. The position that they cannot be separated is referred to as the *morality thesis*, whereas the *separability thesis* forms the contrary position. The second dimension describes the relation between law and facts. The two positions there are the *normativity thesis* (separability of law and fact) and the *reductive thesis* (inseparability of law and fact). This leads to the following scheme (cf. Paulson 1992, p. 320):

law and fact / law and morality	Normativity thesis (separability of law and fact)	Reductive thesis (inseparability of law and fact)
Morality thesis (inseparability of law and morality)	Natural Law Theory	
Separability thesis (separability of law and morality)	Legal Positivism	Empirico-Positivism

Matrix 1.1

Paulson argues that the cell that remains empty *cannot* be filled (Paulson 1992, p. 320). Conceiving morality in non-naturalistic terms, he rightly argues that the morality thesis cannot be combined consistently with the reductive thesis according to which law can be reduced to facts and thus can be defined in

naturalistic terms. However, as will be made clear in the next chapter, the morality thesis formulated in terms of *positive morality* is compatible with the reductive thesis.

Furthermore, Paulson emphasises that this scheme should not be taken too seriously. First of all, it should not be suggested that Kelsen's theory is somehow equidistant from the two theories between which it is said to form a middle way. For instance, Kelsen's rejection of natural law theory is often much more passionate than his rejection of empirico-positivism, thereby suggesting that he has less affinity with natural law theory than with empirico-positivism. Moreover, the scheme may form a suitable way of illustrating Kelsen's resolution of the antinomy – or at least of the way Kelsen conceived of it himself – but it does not form a complete description of the various positions that are possible. The various theses can be interpreted in different ways and there are thus in fact many more possibilities than only these four.[2]

Whereas natural law theory thus embraces both the morality thesis and the normativity thesis, empirico-positivism encompasses the reductive as well as the separability thesis. Kelsen's pure theory of law forms a middle way between natural law theory and empirico-positivism: it accepts the separability thesis but rejects the reductive thesis. It is a *pure* theory of law since it is 'free of the "foreign elements" of both natural law theory and the empirico-positivist theory; it hinges, in other words, neither on considerations of morality nor on matters of fact' (Paulson 1992, p. 315).

In this chapter and the next I shall critically examine Kelsen's presumed solution to the antinomy. I do so on the basis of a detailed examination of the two fundamental tenets of legal positivism. In the next chapter I turn to the separability thesis, in this chapter to the normativity thesis. I should emphasise thereby that I will not be trying to present a complete account of all of Kelsen's thoughts on these issues – given the enormous quantity and richness of Kelsen's work, such an enterprise would without any doubt require a separate study. Instead, I shall be focusing mainly on his most influential work: his *Pure Theory of Law* and, in particular, the second edition of it.[3] Furthermore, I shall

[2] Cf. Alexy (1989), who distinguishes 64 different theses concerning the relation between law and morality.

[3] The references used are as follows:
PT1: Paulson and Paulson's translation (Kelsen 1992) of the first edition, published in 1934, of the *Reine Rechtslehre* (Pure Theory of Law);
PT2: The translation (Kelsen 1967) of Kelsen's second, completely rewritten edition of the *Reine Rechtslehre* (published in 1960);
GTN: The *General Theory of Norms* (Kelsen 1991), which forms the translation of the posthumously published (in 1979) *Allgemeine Theorie der Normen*.

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