Institutions of Law

An Essay in Legal Theory

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Preface

This book sets out my version of the institutional theory of law. This theory has been taking shape since my 1973 inaugural lecture, 'Law as Institutional Fact'. Many of the ideas in it have been put forward in more tentative or preliminary form in other papers and books, and in lectures over the past thirty-five years. The theory has evolved beyond the legal positivist tenets to which I subscribed in 1973. In response to the debates of these decades, my position has changed to one of post-positivism. Law as institutional normative order is, of course, dependent on human customs and on authoritative decisions, and is in this sense a 'posited' or 'positive' phenomenon. As such it is conceptually distinct from morality, according to any moral theory in which the autonomous moral agent plays a central role in determining moral obligations. This distinctiveness however does not entail that there are no moral limits to what it is conceptually reasonable to acknowledge as 'law' in the sense of 'institutional normative order'. There are such limits. Extremes of injustice are incompatible with law.

Two great thinkers dominated legal theory in the twentieth century, Hans Kelsen and H L A Hart. Their work, more than that of any other near-contemporaries, established for me the model of what a legal theorist must try to do. But neither, for all his genius, fully succeeded in the attempt. Kelsen's *Pure Theory of Law* and Hart's *The Concept of Law* have come under telling criticism. Their place in history is unchallengeable, but for the present and for the future fresh work remains to be done.

That work still needs to address the issues of general jurisprudence using an approach grounded in philosophical analysis. One who seeks to follow these great thinkers must, however, attend to things at which they neither could, nor would have been inclined to, look closely. A rounded philosophical view of the character of law and legal systems must take well into account the huge recent flowering in sociology of law and other social-scientific studies of law and legal institutions. Such studies do not answer philosophical questions—but they certainly help in framing them.

If this book succeeds in the task I set for myself in writing it, it will substantially enhance its readers' understanding of law. I hope to achieve this for students, for lawyers both in practice and in academia, and for philosophers and social scientists concerned about law as a fundamental element in human social existence. I have written this book in Scotland, and am mindful of the inspiration to be drawn from the great writers of our Enlightenment. Like their work, this ought to be accessible and interesting also to the thoughtful citizen, of any profession or none, for whom the place of law in human life is a matter of interest and concern.

My task so described is a daunting one. Such a bold self-promotion will expose me to deserved derision if the work 'falls dead-born from the press'. However that may be, and whatever faults remain here to be found, there would have been many more but for great help from colleagues. I give heartfelt thanks to Garrett Barden for a penetrating but friendly-critical reading of the whole text in a near-final draft, and to Sundram Soosay, a superb research associate whose insightful suggestions brought about countless improvements. Without the backing and assistance of Flora MacCormick, I would never have finished the job at all. Parts of the draft were read by Emilios Christodoulidis, Wojciech Sadurski, Victor Tadros, Gillian Black, and Zenon Bankowski, and John Cairns, Hector MacQueen, and Burkhard Schäfer helped me with many references. Early in the project, William Twining read chapters 1 and 2 prior to their publication in an earlier form. During 2005, I was Freehills Visitor at the University of New South Wales, where Martin Krygier, Kevin Walton, and Dean Leon Trakman and colleagues were helpfully critical of chapters 1 and 2 at a seminar presentation. I am also very grateful to the Freehills law partnership of Sydney NSW for its support of my visit, and the opportunity to air some ideas about intellectual property to a staff seminar. A lecture to the Australian Legal Philosophy Students Association organized by Max del Mar in Brisbane gave an opportunity to put chapter 4 into at least preliminary form. As Pedrick Lecturer in Arizona State University, hosted by Jim Weinstein, Jim Nickel, and Dean Patricia White, I received great help from the members of a faculty seminar in putting chapter 16 into improved shape. In the early development of various parts of the text, I incurred particular debts to Joe Thomson, T B Smith, Nils Jareborg, Zenon Bankowski, Joseph Raz, Robert Alexy, Heike Jung, Jes Bjarup, and Stuart Midgley. Several visits to the Law School of the University of Texas at Austin, but especially one during 1998, gave opportunities to work out important points, and to learn much from Bill Powers, Sandy Levinson, Brian Leiter and others. My colleagues and students over many years have been sources of inspiration too numerous to name, but not forgotten as creditors of my obligation of gratitude. I have tried to ensure that my footnotes to the main text acknowledge intellectual debts wherever I remain conscious of these.

This is the third volume to appear in the quartet on *Law, State, and Practical Reason* but it ought to be considered as thematically the first, given its foundational character for the others. The whole project has received outstandingly generous support from the Leverhulme Trust, which granted me a personal research professorship in 1997–99, and permitted me to continue it from 2004 after a period of absence as a Member of the European Parliament. I cannot sufficiently express my appreciation of the Trustees' support, but hope the work I have produced will be seen as worthy of it. The final volume in the series, on practical reasoning in morality and law, is currently commencing preparation.

Edinburgh
July 2006

Neil MacCormick

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Chapter 4, section 2 appeared in preliminary form as 'Does Law Really Matter?' (2005) Australian Legal Philosophy Students Association, Annual Publication 5–23.

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An earlier version of chapter 6 appeared under the name 'Wrongs and Duties' in M Friedman, L May, K Parsons, and J Stiff (eds), *Rights and Reason: Essays in honor of Carl Wellman* (Dordrecht: Kluwer Academic Publishers, 2000) 139–155; with kind permission of Springer Science and Business Media.

An earlier version of chapter 9 appeared under the name 'Powers and Power-Conferring Norms' in Stanley Paulson (ed), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford: Oxford University Press, 1999), chapter 26.

All of chapters 5 to 9 in an earlier form constituted the entry 'General Legal Concepts' in T B Smith and R Black (eds), *The Laws of Scotland: Stair Memorial Encyclopaedia* (Edinburgh: Law Society of Scotland/Butterworths, vol 11, 1990) paragraphs 1001–1200.

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Parts of chapters 8 and 13 originate from 'On the Very Idea of Intellectual Property: An Essay according to the Institutionalist Theory of Law' Intellectual Property Quarterly (2002) 228–239.

Chapter 14, in an earlier version, appeared as 'The Relative Heteronomy of Law' in European Journal of Philosophy 3 (1995) 69–85; with thanks to Blackwell Publishing.

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Introduction

Institutions of Law is a statement of the institutional theory of law. This theory aims to develop a better understanding of law than other current legal theories offer. It starts from a definition of law, namely this: *Law is institutional normative order.* This is not an exercise in conventional semantics that attempts to capture the conventional sense of the term 'law' as used by competent English speakers. It is what might be called an 'explanatory definition', for to explain the elements of the definition is to explain significant aspects of what all competent speakers already recognize as law. (That is, recognize as 'law' in one important sense of the term. There are other senses of the term which this definition leaves out, but these will be noted in due course.)

In explaining the elements of the definition, it is first necessary to explain 'norms', and then to follow that by explaining 'normative order'. Finally, by discussing the institutionalization of normative order, one reaches a grasp of the whole defining phrase 'institutional normative order'. At the outset, in discussing norms, the primary perspective adopted is that of the norm-user, not of the norm-giver. It is one of the fundamental aspects of our nature that we human beings are norm-users, for this is built in to that most quintessential human quality, our ability to speak to each other and communicate by writing and otherwise—to engage in linguistic communication in all its forms. Languages have a structure—grammar, syntax and semantics—that depends on highly complex norms that were never consciously made by anybody. Their complexity is so challenging that grammarians and linguistics experts still struggle to express (or rationally reconstruct) clearly and comprehensively the norms implicit in each of the very large number of extant languages in the world.

A much simpler example of norms that most of us use every day and unreflectively is provided by the example of the practice of queuing, which is the subject matter of chapter 1. One kind of orderliness that we sometimes discern in human behaviour occurs when people follow common norms of conduct. We line up to wait for the bus, and when it arrives we get on in order without pushing or shoving (sometimes!). Where there is order or orderliness of this kind, I call it 'normative order'.

It can happen that orderliness of this kind depends on some kind of prearrangement. For example, the main railway station in Edinburgh has a system for advance booking of rail tickets that requires intending purchasers to take a numbered ticket from a ticket-dispenser. Then the purchaser waits in the waiting area—or, when the line is long, goes out for a coffee, and returns later to wait near the

counter. Numbers are electronically displayed in sequence, and when one's own number is called, one goes to the currently vacant counter-stand and makes one's booking.

This involves 'institutionalization' of the queuing practice in this particular context (as is discussed more fully in chapter 2). For we do not only have norm-users, but also norm-givers, who regulate how the numbered roll is to be dispensed, and how staff are to treat purchasers in that light. There are also norm-implementers, the counter clerks and the duty manager who see to it that the rules are implemented as designed and in an orderly way. This explains how 'normative order' can take the special form of 'institutional normative order'. 'Rules' is a useful specialist term by which to refer to norms thus given and applied by persons in some kind of authority.

Taken in a grander way, the constitutional structure of the modern state in its wide variety of manifestations can be understood as an especially complex example of 'institutionalization' in this sense. Chapter 3 explores this theme in some detail, discussing the character of states and of constitutions, and related matters such as the separation of powers. But the very institutionalization of rules and their application gives rise both to wide scope for argument about interpretation and to scope for scepticism about the extent to which the official rules truly account for how people conduct themselves in real life. The issue of the potential 'gap' between law as enacted and law as acted out is the theme of chapter 4.

The exploration of the explanatory definition 'law is institutional normative order' occupies part 1 of the book. Law taken in this sense is obviously a centrally important feature of states as such and, in particular, of constitutionalist states or 'law-states'. The law of the state is for many people, particularly for most legal professionals and law-students, the law that matters most to them. But it is not the only kind of law. International sporting organizations, confederations like the European Union, treaty-based inter-state entities like the Council of Europe, or NATO, and many others, exhibit institutional normative order in their own way too. So do churches and various kinds of religious and charitable organizations. So does the international community as such, certainly since at least the establishment of the Permanent Court of International Justice (whose Statute was adopted by the General Assembly of the League of Nations in 1920) and all the more so since the foundation of the United Nations, the adoption of the UN Charter, and the establishment of the International Court of Justice.

'Law' is also, of course, often used in a wider sense, to include also non-institutionalized forms of order, such as 'the moral law' or 'customary law', and even cases of order that is not normative, as in the 'laws of motion' or 'laws of thermodynamics'. I intend no imperialism against these other kinds of law or usages of the term 'law', which most people can negotiate quite happily in their ordinary discourse and conversation. Also, however, I make no apology for giving priority to expounding a theory about law in its state and state-like contexts. This has been, quite properly, the principal focus of my attention in the thirty-five years

I have spent as Regius Professor of Public Law and the Law of Nature and Nations in the University of Edinburgh.

In part 2 of the book, attention turns to the kinds of relationships that law constitutes and regulates. Law is, in a very old phrase, about 'persons, things and actions'. So what does law constitute as a person, and how does it enable us to interpret the quality of 'personateness' in the legal setting? How does law regulate action and activity through concepts like 'wrong' ('offence', 'crime', 'tort', 'delict', etc) and 'duty'? To what sorts of relations between persons—'obligations', 'rights', 'liberties', 'powers', 'immunities', for example—does it give rise, and how does it regulate persons and things—rights of use, rights of ownership, and all the other such rights—in a word, 'property'?

There has been a lot of recent and current writing about rights and related concepts, but surprisingly little that seeks to integrate this with a sustained theoretical account of the law that gives rise to them. The legal context ought not, however, to be taken for granted. It is a specific virtue of part 2 that it properly contextualizes rights as relations or positions arising within institutional normative order, and appreciated by an interpretation of specific situations read against general rules and principles.

Not merely should legal relationships be contextualized within a theoretically satisfactory elucidation of the character of law, but that elucidation must include consideration of law in its context within the state and civil society, to each of which it is essential as a constitutive element. This is the task of part 3. Moving on from the somewhat abstract consideration of legal power that concludes the previous part, chapter 10 discusses powers in public law, and the distinctive character of public as against private power, leading into a discussion of the interface between public law and politics. The distinction between politics and public law is an important one to maintain, but not in ways that ignore or underestimate their crucial mutual interaction. This has much to do with sustaining the character of a state as a law-state. ('Law-state' is here used to refer to a state-under-law, or a constitutionalist state, in which the exercise of power is subjected to effective constitutional constraints and the rule of law obtains; it is equivalent to the German term '*Rechtsstaat*'.[1])

A critical problem since the emergence of states in their modern form has been guarding against excess of, and abuse of, public power while also ensuring the adequacy of the governing authorities' powers to the proper tasks of governance. Constitutionally entrenched rights have been one basis for a solution to this problem and, since 1945, this has been increasingly backed-up through

[1] See also N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) 9–11.

international guarantees of 'fundamental' or 'human' rights, and indeed their institutionalization in various forms. This is the topic of chapter 11.

States can be, though they have not always been, theatres for the development of 'civil society', in which relations of civility subsist between strangers who extend to each other a kind of impersonal trust. Individuals within civil society, even when they are strangers to each other, do not view each other as presumptive threats to their safety or to the security of their property. Sadly, that presumption can be displaced, sometimes all too readily. But the law, and in particular a fairly administered body of criminal law within a satisfactory criminal justice system, is one essential underpinning of civility, or social peace, in this sense. Chapter 12 reviews the role of criminal law in this light. Chapter 13 looks finally at the interface of law and economy, focused on the rules and institutions of private law. This again presupposes a high degree of civility in civil society, within which institutions of private property, contract and all the ancillary elements of a market economy can flourish.

Finally, part 4 deals with certain fundamental conceptual issues concerning law and morality, and concerning method in legal theory. Much discussion of 'law and morality' assumes a rather unexamined form of moral realism or an equally unexamined moral relativism. What cannot be stressed too strongly is that any question about the conceptual or other linkages between law and morality (or, if you wish, between 'state law' and 'the moral law') is as much an issue about the true character of morality as one about the true character of law. One vision of the moral life and of moral obligation stresses its essentially non-institutional character. Moral agents are autonomous, self-governing individuals whose moral commitments derive from their own discursive appreciation of the requirements of a life well and decently lived alongside other autonomous moral agents in a human community. To one who holds this view, there are no moral authorities and no institutionalized moral rules or relations. In that case, since state law according to the present theory is defined in terms of its institutionalized character, there is a deep conceptual distinction between them. Both concern normative order, but one concerns the normative order upheld by autonomous individuals, the other the institutionalized order sustained by states and their authorities. Chapter 14 expounds this view.

Chapter 15 acknowledges, however, that establishing this distinction does not close the question whether law has to have any essential moral element in it. The answer suggested is that some minimum of justice is essential. There is nothing in the character of institutional normative order that requires us to acknowledge as law practices or rules or ordinances that any reasonably statable moral position acceptable to any autonomous agent would characterize as serious violations of basic demands of justice. Some minimum requirement of the avoidance of grave injustice can properly be accepted as setting a limit to the validity of laws. In the contemporary world, such limits have indeed to some extent been institutionalized