

CHAPTER 2

KINDS OF LEGAL JUDGMENTS AND LEGAL SITUATIONS

1. From Legal Acts to Legal Judgments

The new conceptual apparatus makes it possible to transform the classification of legal acts given in *Institutional Legal Facts* and summarised in the preceding chapter into a classification of legal judgments.¹

To underline the distinction between the imaginary world of the legal system and reality, I shall from now on speak of legal situations projected by perfect legal judgments as being *valid* rather than as being existent within the legal system.

I begin with an overview of categories of legal judgments and corresponding categories of legal situations. Following on this, I shall give more detailed analyses of the different categories.

Categories of Legal Judgments

- (1) *Declarative Legal Judgments*
Perfect declarative legal judgments project valid legal situations.
- (2) *Prescriptive Legal Judgments*
Perfect prescriptive legal judgments project valid *legal obligations*.
- (3) *Directive Legal Judgments*
Perfect directive legal judgments project valid *non-binding individual norms of conduct*.
- (4) *Assertory Legal Judgments*
Perfect assertory legal judgments project valid *legally granted situations*.
- (5) *Expressive Legal Judgments*
Perfect expressive legal judgments project valid *states of mind*.

The original classification of legal acts consisting of seven categories is thus reduced to a classification of legal judgments consisting of only five categories. The reduction is a consequence of the fact that there are two pairs of categories of legal acts that are directed at creating institutional legal facts of one single category. First, both commissive and imperative legal acts are directed at creating legal obligations. The difference is that commissive legal acts are directed at creating obligations for the persons performing

¹ See also the supplement.

them, whereas imperative legal acts are directed at creating obligations for others. Likewise, both purposive and hortatory legal acts are directed at creating non-binding individual norms of conduct. The difference is that purposive legal acts are directed at creating non-binding individual norms of conduct for their performers, whereas hortatory legal acts are directed at creating norms of this kind for others.

All legal judgments distinguished in the overview are declarative in character. This means that all of them project legal situations that purport to effectuate social practices that can be interpreted as resting on a common belief in their existence. However, where valid legal situations projected by exclusively *declarative* legal judgments solely purport to be generally accepted, valid legal situations projected by perfect legal judgments of the other categories purport to *more* than that. Valid obligations purport to be fulfilled, valid non-binding individual norms of conduct purport to be followed, and valid legally granted situations, as well as valid states of mind purport to be correct. Below, I shall successively analyse the distinctive features of legal situations of the categories projected by prescriptive, directive, assertory, and expressive legal judgments, respectively.

2. Prescriptive Legal Judgments

The category of prescriptive legal judgments consists of four subcategories, which I term 'prescriptions', 'proscriptions', 'licences', and 'exemptions', respectively.² Prescriptions and proscriptions are legal judgments projecting an obligation of an individual. A prescription projects a certain individual's obligation to take a certain course of conduct. A proscription projects a certain individual's obligation *not* to take a certain course of conduct. Licences and exemptions are negative prescriptive legal judgments projecting, so to say, the absence of an obligation. A licence projects a certain individual's permission to take a certain course of conduct. An exemption projects a certain individual's permission *not* to take a certain course of conduct. I shall first analyse prescriptions and proscriptions.

² Christiane and Ota Weinberger. *Logik, Semantik, Hermeneutik* (Munich: Verlag C.H. Beck, 1979), 121-122. Stanley L. Paulson, 'An Empowerment Theory of Legal Norms', *Ratio Juris* 1 (1988), 58-72, at 61. Ruiter (1993), 147. The terms 'licence' and 'exemption' are borrowed from Christopher Forsyth, 'The Metaphysics of Nullity—Invalidity, Conceptual Reasoning and the Rule of Law' in: Christopher Forsyth and Ivan Hare (eds.), *The Golden Metwand and the Crooked Cord. Essays on Public Law in Honour of Sir William Wade QC* (Oxford: Clarendon Press, 1998), 141-160 at 154.

2.1. Prescriptions and Proscriptions

Perfect prescriptions and proscriptions project valid individual obligations. A valid individual obligation purports to effectuate a social practice that puts the individual having the obligation under pressure to fulfil it. What is the content of a common belief that can be interpreted as underlying a social practice putting a certain individual under pressure to fulfil a certain obligation? Two interpretations present themselves.

The first interpretation is that general acceptance of a certain individual's obligation amounts to a social practice that can be interpreted as resting on a common belief that the individual is *forced* to fulfil it. On this interpretation, prescriptions and proscriptions project individuals as being *obliged* (not) to take a certain course of conduct. This is the conception of obligations as orders backed up by threats, Hart ascribes to John Austin.³

The second interpretation is that general acceptance of a certain individual's legal obligation amounts to a social practice that can be interpreted as resting on a common belief that the individual is *bound* to fulfil it. On this interpretation, prescriptions and proscriptions project individuals as being under a *bond* (not) to take a certain course of conduct. This is the interpretation of obligations defended by Hart himself.⁴

On Hart's view, the action of the gunman who says to the bank clerk: "Hand over the money or I will shoot.", can be characterised as giving an coercive order to the clerk but not as putting him under an obligation.⁵ Obligations are imposed by rules.

Rules are conceived of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. Such rules may be wholly customary in origin: there may be no centrally organized system of punishments for breach of the rules; the social pressure may take only the form of general diffused hostile or critical reaction which may stop short of physical sanctions. It may be limited to verbal manifestations of disapproval or of appeals to the individuals' respect for the rules violated; it may depend heavily on the operation of feelings of shame, remorse and guilt. When the pressure is of the last-mentioned kind we may be inclined to classify the rules as part of the morality of a social group and the obligation under the rules as moral obligation. Conversely, when physical sanctions

³ H.L.A. Hart, *The Concept of Law*. 2nd edition with a Postscript edited by P.A. Bulloch and J. Raz (Oxford: Oxford UP, 1994), 19.

⁴ Hart (1994), 82-91.

⁵ Hart (1994), 19 and 82.

are prominent or usual among the forms of pressure, even though these are neither closely defined nor administered by officials but are left to the community at large, we shall be inclined to classify the rules as a primitive or rudimentary form of law.⁶

On this account, a social practice that can be interpreted as resting on a common belief that a certain individual has a certain obligation may consist of a diversity of forms of social conduct. Such forms include critical reactions, verbal manifestations of disapproval, appeals to respect for rules, the operation of feelings of shame, remorse and guilt, and the exercise of physical sanctions.

The distinction between being forced and being bound to take a certain course of conduct draws attention to the general problem of what categories of legal situations lend themselves to being generally accepted. We can choose between two options.

The first option is based on the idea that only situations that are conceived of as belonging to an empirical category lend themselves to being *believed* to exist. For example, we are capable of believing in the existence of a particular person because 'persons' make up an empirical category. When this option is embraced, a social practice that can be interpreted as resting on a common belief that a certain valid legal situation exists is only possible provided that the legal situation in question is conceived of as belonging to an empirical category. For instance, a social practice that can be interpreted as resting on a common belief in the existence of the legal person *European Community* is possible because legal persons are conceived of as belonging to the empirical category of persons. Accordingly, legal persons are socially dealt with as if they were natural persons. When 'having an obligation' is conceptualised as 'being forced', obligations are conceived of as legal situations belonging to an empirical category. A social practice that can be interpreted as resting on a common belief that a certain individual has a certain obligation is, then, possible because the category 'being forced' is empirical in character. Obligations are then socially dealt with as if they were manifestations of physical force.

The second option is based on the idea that also situations that are conceived of as not belonging to an empirical category lend themselves to being believed to exist. For example, notwithstanding the fact that hippogriffs are not conceived of as belonging to an empirical category, Ariosto makes us

⁶ Hart (1994), 86.

believe in their existence.⁷ When this option is chosen, a social practice that can be interpreted as resting on a common belief that a certain valid legal situation exists is also possible if the legal situation in question is conceived of as not belonging to an empirical category. For instance, an ecclesiastical practice that can be interpreted as resting on a common belief that the Pope is infallible is indeed possible, even if infallibility is considered to be unattainable for any mortal human being. When 'having an obligation' is conceptualised as 'being bound', obligations are conceived of as legal situations that belong to a normative category. This does not stand in the way, however, of social practices that can be interpreted as resting on a common belief that a certain person *is* actually bound (not) to take a certain course of conduct.

A clue for making a choice between the two options is given by Hart. Any one of the forms of social conduct listed in his catalogue of reactions to breaches of legal obligations can only be considered to be fit to express general acceptance of the obligations in question on condition that the latter be conceived of as *binding*. Critical reactions, manifestations of disapproval, and appeals to respect for the rules are all typically prompted by forms of disobedience, rather than by forms of resistance to force. The operation of feelings of shame, remorse and guilt is directly connected with normative ideas. Finally, even the exercise of physical sanctions presupposes violations of normative restrictions, for how else could we discriminate between sanctions and other forms of coercion? The choice turns out to be a simple one: legal obligations purport to *bind* individuals by effectuating social practices of holding the individuals in question *accountable* for fulfilling them.

'Accountability' is used here in the sense suggested by Hart's 'practice theory' of mandatory rules. According to Raz's summary of Hart's views, a certain mandatory rule exists in a legal community if, and only if, the following conditions obtain:

1. The rule is regularly complied with by members of the legal community.
2. Deviations from the rule are the occasion for critical reactions by members of the legal community.
3. Critical reactions to deviations from the rule are not in turn subjected to criticism by members of the legal community.

⁷ Ludovico Ariosto, *Orlando Furioso*, canto iv, 18 and 19.



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Legal Institutions

Ruiter, D.W.

2001, XII, 228 p., Hardcover

ISBN: 978-1-4020-0186-4