

CHAPTER 3

LEGAL RULES

1. Particular and Abstract Legal Judgments

Hitherto, the analysis was restricted to particular legal judgments. Analogously to Wittgenstein's conception of elementary propositions, particular legal judgments were conceived of as pictures of singular situations. Extending the analogy would seem to require a conception of abstract legal judgments as concatenations of particular legal judgments.

However, one of the recurrent points of criticism of the picture theory is that it conveys the impression that truth and falsity would be values that must, in the final analysis, be reserved for propositions presenting *singular* situations.

This picture engendered by the correspondence theory, the picture that facts are complex objects or events and that truth consists of a kind of matching or isomorphism between the elements of the statements and the elements of the fact is absurd.¹

Today, the supporters of a correspondence criterion of truth also accept this point. This need not bother us, however, for adoption of a weaker conception of correspondence does not mean that the distinctions made between legal judgments, institutional legal facts, and socially accepted facts must be abandoned. Rather, such a weaker conception makes it possible to conceive of *perfect legal rules as projecting general conditions that obtain in the legal system*. I shall demonstrate this with the help of the weak conception of correspondence proposed by Searle.

According to Searle, the absurdity of picturing truth as some kind of isomorphism does not disprove the correspondence theory, for this picture is not a logical consequence of the theory properly understood. The confusion is caused by our failing to understand the use of words.

We think that since "fact" is a noun and since nouns name objects, then facts must be complicated kinds of objects; we think that correspondence must imply some kind of isomorphism, and then we are puzzled about negative facts, hypothetical facts etc. But once we understand the logic of the words involved, we see

¹ Searle (1995), 205.

that facts are not complicated objects, and that there is no necessary isomorphism between the syntactical structure of true statements and the structure of facts.²

We need, grammatically, a word for describing the relations between the statements and the facts when the statements are true. This word must be empty and vague enough to allow for all the different kinds of ways in which statements can be made true. 'Correspond' is one of the words that meet this criterion.³

"Correspond to the facts" is just a shorthand for the variety of ways in which statements can accurately represent how things are.⁴

I shall investigate the consequences of abandoning, with respect to the legal system, the strict (dis)agreement criterion inspired by the picture theory of the proposition in favour of a weak correspondence criterion analogous to the one proposed by Searle. In Searle's conception, statements are true if they correspond to the facts. Facts, in turn, are not complex objects but conditions in the world that satisfy the truth conditions expressed by statements.⁵

The statement determines a truth condition as requirement, and if satisfied there will be something in the world as the thing required. For example, the statement that the cat is on the mat expresses the truth condition as requirement. If the statement is true, there will be a condition in the world that meets the requirement, and that condition is the fact that the cat is on the mat. On this account we do not have or need a thick metaphysical notion of "fact". Anything sufficient to make a statement true is a fact.⁶

Transposing this weak conception of correspondence to the legal system means that institutional legal facts must no longer be conceived of as singular situations existing within the framework of the legal system but as conditions *obtaining* in the legal system. 'To be valid' then becomes an analogue of 'to obtain in reality' rather than of 'to exist in reality'. It makes no sense to state that the general condition expressed by the true abstract

² Searle (1995), 214.

³ Searle (1995), 213.

⁴ Searle (1995), 213.

⁵ Searle (1995), 211.

⁶ Searle (1995), 211-212.

proposition “Jet is black.” *exists* in reality. On the other hand, there is nothing wrong with stating that the general condition expressed by the true abstract proposition “Jet is black.” *obtains* in reality. In the same way, if validity is conceived of as ‘existence within the legal system’, it makes no sense to state that the general legal condition expressed by the constitutional provision “The dignity of man shall be inviolable.” is valid within the German legal system.⁷ However, if validity is conceived of as ‘obtaining in the legal system’, there is nothing objectionable in stating that it is a valid general condition within the German legal system that the dignity of man shall be inviolable.

A conception of the legal system as a framework in which not only singular situations but also general conditions can enjoy validity, makes it possible to conceptualise perfect legal rules as abstract legal judgments projecting valid general conditions.

2. Empirical Laws and Legal Rules

In order to make clear how legal rules can be conceived of as abstract legal judgments projecting general conditions, I shall first pay attention to the descriptive counterparts of legal rules, namely, empirical laws.

An empirical law presents as a possible general condition that occurrences of singular conditions of a certain category cause occurrences of singular conditions of another category. For example, the empirical law stated by “A body tends to expand when it is heated.” presents as a possible general condition that the heating of bodies causes their expansion.⁸ A general condition of this kind I term an ‘empirico-causal relationship’. From empirical laws, particular empirical explanations and predictions can be derived. For example, from the empirical law “A body tends to expand when it is heated.”, it is possible to derive empirical explanations such as “This piece of metal has become larger because it was heated.”, as well as predictions such as “This piece of metal will become larger once it is heated.” Singular conditions presented by empirical explanations and predictions I term ‘empirico-causal connections’. Although empirical laws do not picture possible singular situations, on Searle’s view they can nevertheless take the value ‘true’. An empirical law is true if, and only if, the truth condition it determines is met by a general condition obtaining in reality. For example, the empirical law stated by “A body tends to expand when it is heated.” is true

⁷ Art. 1(1) Basic Law Federal Republic of Germany.

⁸ Alfred Ayer, *Language, Truth and Logic* (London: Penguin, 1990), 18

if, and only if, the general condition that heated bodies tend to expand obtains in reality. We can say that a true empirical law represents a general causal regularity obtaining in reality.

I shall apply the analysis given above analogously to the legal system. A legal rule can then be said to project as a possible general condition of the legal system that occurrences of singular conditions of a certain category cause the validity of singular conditions of another category. For example, the legal rule expressed by the provision "All road-users must keep to the right." projects as a possible general condition of the legal system that being road-user causes the obligation to keep to the right. A general condition of this kind I term a 'juridico-causal relationship'. From legal rules particular legal judgments can be derived. For example, from the legal rule expressed by "All road-users must keep to the right.", the particular legal judgment expressed by "When driving on the road from A to B on the evening of 24 January 2000, Johnson ought to have kept to the right." can be derived. Singular conditions of the legal system as presented by particular legal judgments that are derived from legal rules I term 'juridico-causal connections'. Although juridico-causal relationships are general conditions instead of legal situations, it is indeed possible to think of them as being valid in the sense of obtaining in the legal system. A juridico-causal relationship obtains in the legal system if, and only if, it is projected by a perfect legal rule. For example, the juridico-causal relationship between the category of properties designated by 'road-user' and the category of singular legal situations designated by 'obligation to keep to the right' obtains in the legal system if, and only if, the legal rule expressed by "All road-keepers must keep to the right." is perfect.

A perfect legal rule projects into the legal system a valid general causal regularity purporting to bring about a social practice that can be interpreted as resting on a common belief that it is a general causal regularity obtaining in reality. As far as their social acceptance is concerned, there is, ideally spoken, no difference between the general empirical fact that heated bodies tend to expand and the general institutional legal fact that road-users have obligations to keep to the right. In an ideal world, social behaviour is such that it can be interpreted as resting on a common belief that both the empirical and the legal causal regularities obtain in reality.

3. Juridico-Causal Relationships

The analogous application of the analysis of empirical laws to the legal system makes it possible to conceive of the legal system as an imaginary world

that is structured by valid juridico-causal relationships projected by perfect legal rules. These valid juridico-causal relationships purport to be generally accepted as empirico-causal relationships on which socially recognised causal connections between singular conditions are founded. To make this clear, I shall first pay attention to the way in which a valid juridico-causal relationship purports to be generally accepted as an empirico-causal relationship between a category of singular conditions *in reality* on the one hand and a category of singular conditions *in the legal system* on the other.

Let us assume that the legal rule expressed by the provision "At low tide ships shall not sail out." is perfect. This means that the rule projects a valid juridico-causal relationship on the basis of which particular occurrences of low tide have valid juridico-causal connections with obligations of ships not to sail out, in consequence of which the obligations in question gain validity. For example, the present occurrence of low tide has a valid juridico-causal connection with the obligation of the good ship 'Pandora', laid up in the harbour, not to sail out, in consequence of which connection this obligation becomes valid. The juridico-causal connection purports to effectuate a social practice that can be interpreted as resting on a common belief that it is an empirico-causal connection. General acceptance of the juridico-causal connection means that the obligation also meets with general acceptance. In other words, the valid juridico-causal connection together with the valid obligation following from it purport to effectuate a social practice that can be interpreted as resting on a common belief that the Pandora is under an obligation not to sail out *because* it is low tide.

The foregoing example was concerned with a juridico-causal relationship between a category of singular *real* conditions (occurrences of low tide) on the one hand and a category of singular *legal* conditions (obligations of ships not to sail out) on the other. However, legal rules may also lay such relationships between two different categories of singular *legal* conditions. An example is provided by the rule "The executive power shall be vested in a President of the United States of America."⁹ Perfection of the rule means that in the legal system of the USA a general juridico-causal relationship obtains on the basis of which the singular legal condition of being US President causes the incumbent to have the executive power. For example, George W. Bush's presidency stands in a juridico-causal connection with his executive power, and it is by virtue of this connection that he has this power within the legal system of the USA. The juridico-causal connection in ques-

⁹ Art. 1 (1) US Constitution.



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