

CHAPTER 4

LEGAL INSTITUTIONS

1. Institutional Legal Concepts and Legal Institutions

Legal institutions can be roughly characterised as distinct legal systems governing specific forms of social conduct within the overall legal system. The hallmark of legal institutions is that they can be dealt with as independent social phenomena.

MacCormick makes a distinction between:

(T)he institution itself (contract, trust, or whatever) and instances of the institution (*a* contract, *a* trust, and so on). This involves a certain clumsiness of speech but is quite essential, for there is an important difference between the existence of an institution and the existence of any instance of it. To show what I mean, let me cite the true proposition that the trust is an institution which does not exist in French law. That does not simply mean that nobody ever got round to establishing a trust in France. It means that nobody can, because French law does not contain provisions by which any act can bring about the sort of legal consequences which are essential features of our 'trust'.¹

According to MacCormick, the concept of a legal institution is prior to any of its instances, for there inevitably lies a certain space of time between the moment at which a certain institutional legal concept is admitted to the legal system and the moment of creation of its first instance.

Just because we are dealing with abstract institutional concepts and facts, the institutional concept must be logically prior to any factual instance of the concept. If my understanding is correct, Plato thought that the idea of beds was logically prior to the existence of any particular bed; that has always seemed to me a singularly implausible view in relation to brute facts; but at least the world of legal institutions is a world safe for Platonists; whether that is good or bad publicity for the world of legal institutions I should not care to say, but it is clear that the institution as a concept is logically prior to the existence of any instance of.²

A sharp distinction must be drawn between extra-legal concepts used in legal rules on the one hand and institutional legal concepts on the other. Extra-legal concepts are concepts that are generally used in non-legal judgments.

¹ Neil MacCormick and Ota Weinberger. *An Institutional Theory of Law. New Approaches to Legal Positivism*. (Dordrecht: Kluwer Academic Publishers, 1986), 54

² MacCormick and Weinberger (1986), 55.

In principle, any extra-legal concept can be part of a legal rule. Its function in a legal rule is not fundamentally different from the one it has in non-legal judgments. In particular, the existence of the states of affairs denoted by an extra-legal concept appearing in a legal rule remains independent of that rule. For instance, individuals do not become road-users in consequence of the legal rule determining that members of the class identified by the concept 'road-user' must keep to the right. By contrast, an institutional legal concept denotes institutions whose validity depends on the concept's being part of a legal rule. Trusts are valid in consequence of a legal rule determining that members of the category identified by the concept 'trust' can achieve validity.

The legal rules of which institutional legal concepts must be part in order that institutions of the category identified by them may become valid, are of the kind John Searle has termed 'constitutive rules'. Following Searle, a constitutive rule has the form '*x* counts as *y* in context *c*'.³ Searle presents the rule for checkmate as an example of a constitutive rule: "A checkmate is made when the king is attacked in such a way that no move will leave it un-attacked."⁴ In the same manner as the concept 'checkmate' is included in the game of chess, namely, by means of the constitutive rule of checkmate, institutional legal concepts are included in a legal system by means of constitutive legal rules. There is, however, a complication. Whereas the constitutive rule of checkmate introduces a category of conditions into the game of chess—conditions of checkmate—, the constitutive rule of an institutional legal concept introduces a category of legal institutions, that is to say, contexts in which legal conditions can enjoy validity. Legal institutions are conceivable as complex legal conditions but they are, first and foremost, systems of legal conditions.

A perfect constitutive rule of an institutional legal concept projects as a valid general legal condition a category of institutional legal systems that are capable of achieving validity within the overall legal system. To that end the generic name of the institutional legal systems is used to designate the institutional legal concept thus admitted to the overall legal system. Mostly, such a generic name is already in use in the legal community ahead of its use as the designation of an institutional legal concept. Most institutional legal concepts are, originally, social notions that have subsequently received legal recognition. However, some institutional legal concepts are the results not of

³ Searle (1969), 36; Searle (1995), 43-51.

⁴ Searle (1969), 34.

legal reception but of legal design. Partly owing to the varied origins of institutional legal concepts, the ways in which their constitutive rules are included in the legal system differ. The presence of the constitutive rules of some institutional legal concepts can be conjectured only from the fact that their generic name is actually used in the legal system. For instance, the Dutch Civil Code does not provide an explicit constitutive rule of marriage but simply uses the term. Other institutional concepts are included in legal rules that explicitly acknowledge them but fail to specify what they stand for. For example, art. 123 of the Dutch Constitution provides that local communities can be established and dissolved, but the Dutch legal system does not include a specification of 'local community'. Still other institutional legal concepts are included in constitutive rules defining them. An example is offered by the constitutive rule of 'public limited company': "The public limited company is a legal person with an authorised capital that is divided into transferable shares."⁵

2. Constitutive and Institutive Rules: Functional Distinction

Given Searle's account of constitutive rules in general, it would seem that the constitutive rule of an institutional legal concept must have the form of a specification of the act whose performance brings about instances of the concept. In Searle's example: "To make a promise is to undertake an obligation.", the constitutive rule of the institutional concept 'promise' is actually a specification of the act of promising.⁶ With respect to those institutional legal concepts whose instances can only be created by performing one single legal act, one can say that constituting such concepts is identical with specifying the manner in which their instances are brought about. In such cases the *institutive* rules in the sense proposed by MacCormick, that is, as rules laying down that the occurrence of a certain act or event triggers a specific instance of an institutional legal concept, coincide with the *constitutive* rules.⁷

A major objection to this view, namely, that the two types of rule coincide in this manner and can, therefore, be identified with each other, is that instances of many institutional legal concepts can become valid in different ways. Of course, this objection can be met by introducing constitutive rules that include disjunctive enumerations of institutive acts and events. This

⁵ Art. 2: 64 Dutch Civil Code.

⁶ Searle (1969), 63 and 179; Conte (1986), 46.

⁷ MacCormick and Weinberger (1986); Ruiter (1993), 208.

solution, however, discards the pragmatic advantages of differentiating between constitutive rules of institutional legal concepts and institutive rules of their instances. These advantages can be illustrated with the help of the famous Tû-Tû allegory presented by the Danish legal theorist Alf Ross. Ross begins by recording the account given by the imaginary Illyrian anthropologist Ydobon of the way of life of the utterly primitive Noît-cif tribe inhabiting the Noïsulli Islands in the South Pacific.

This tribe, according to Mr. Ydobon, holds the belief that in the case of an infringement of certain taboos—for example, if a man encounters his mother-in-law, or if a totem animal is killed, or if someone has eaten of the food prepared for the chief—there arises what is called *tû-tû*. The members of the tribe also say that the person who committed the infringement has become *tû-tû*. It is very difficult to explain what is meant by this. Perhaps the nearest one can get to an explanation is to say that *tû-tû* is conceived of as a kind of dangerous force or infection which attaches to the guilty person and threatens the whole community with disaster. For this reason a person who has become *tû-tû* must be subjected to a special ceremony of purification.⁸

Ross labels the talk about *tû-tû* as pure nonsense, for *tû-tû* does not refer to any state of affairs at all.⁹ To Ross it is, therefore, obvious that the Noît-cif tribe dwells in a state of darkest superstition. Ross goes on to show, however, that the way in which the members of the Noît-cif tribe use *tû-tû* is in no way different from that in which we use the institutions ‘ownership’, ‘claim’, ‘territory’, ‘body corporate’, and even ‘state’.¹⁰ Below Ross’s analysis will be presented in the form of a simplified example.

Suppose that a certain community recognises two ways in which property can be acquired: conveyance and succession. Moreover, there are two consequences of such an acquisition: exclusive right of use and right of reclamation. The systematic connections between the two operative facts and the two consequences can then be represented as follows (the symbol ‘→’ means ‘if ... then’):

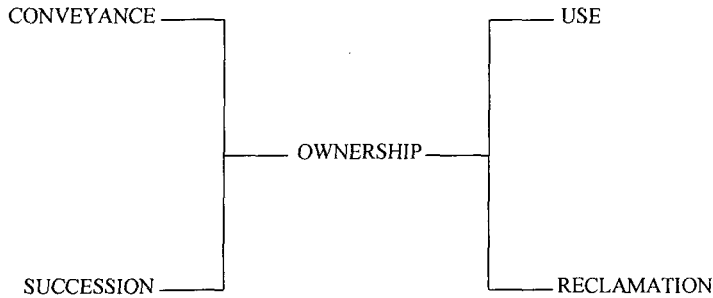
- | | |
|-----------------------------|-----------------------------|
| 1) CONVEYANCE → USE | 2) SUCCESSION → USE |
| 3) CONVEYANCE → RECLAMATION | 4) SUCCESSION → RECLAMATION |

⁸ Alf Ross. ‘Tû-Tû’ 70 (1957) *Harvard Law Review*. 812-825, at 812.

⁹ Ross (1957), 812, 820.

¹⁰ Ross (1957), 817-821; Alf Ross, ‘Definition in Legal Language’. *Logique et Analyse*, 1 (1958b), 139-149, at 145.

Even with respect to a small set of rules like this one, a systematisation with the help of 'ownership' is considerably less complex:



Plainly, ownership plays a similar role to that of *tû-tû* in Ross's allegory. Just as infringements of the three taboos are considered to render individuals committing such infringements *tû-tû*, conveyance and succession are considered to make buyers and successors, respectively, owners of the property at issue. And just as a person's being *tû-tû* implies that he shall be subjected to a ceremony of purification, a person's being owner of property implies that he may use and reclaim it. According to Ross, an institution is a mere tool of presentation standing for a set of systematic connections to the effect that each of a set of operative facts $F_1 \dots F_p$ (conveyance, succession) entails a totality of consequences $C_1 \dots C_n$ (use, reclamation).¹¹

To Ross institutions are no more than systems of rules with the status of fictitious entities. Such entities are identified by singular terms (John's property, John and Mary's marriage).¹² Since 'institutional' singular terms do not stand for anything existing in physical reality, Ross considers them to be meaningless. Here Ross fails to distinguish between 'meaning' and 'referring'. Plainly, the statement "Little Red Riding Hood entered the forest."

¹¹ Ross (1957), 820; Ross (1958a), 170-172; Ruiter (1993), 210. Dick W.P. Ruiter. 'Normative and Real Institutions' in: Bernard Steunenberg and Frans van Vught, *Political Institutions and Public Policy. Perspectives on European Decision Making*. (Dordrecht: Kluwer Academic Publishers, 1997c), 67-81, at 73-74.

¹² See on the problems associated with singular terms, definite descriptions, proper names, denoting and referring Danny D. Steinberg and Leon A. Jakobovits. *Semantics. An Interdisciplinary Reader in Philosophy, Linguistics and Psychology*. (Cambridge: Cambridge UP, 1971); Leonard Linksy, 'Reference and Referents', 76-85; P.F. Strawson, 'Identifying Reference and Truth-values', 86-99; Keith Donellan, 'Reference and Definite Descriptions', 100-114; Zeno Vendler, 'Singular terms', 115-113. All contributions are reprinted papers.



<http://www.springer.com/978-1-4020-0186-4>

Legal Institutions

Ruiter, D.W.

2001, XII, 228 p., Hardcover

ISBN: 978-1-4020-0186-4