Schriften zur Rechtstheorie

Heft 151

Essays on the Nature of Law and Legal Reasoning

By

Prof. Dr. Robert S. Summers

Duncker & Humblot · Berlin

ROBERT S. SUMMERS

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Duncker & Humblot · Berlin

Die Deutsche Bibliothek – CIP-Einheitsaufnahme

Summers, Robert S.:
Essays on the nature of law and legal reasoning / by Robert S. Summers. – Berlin : Duncker und Humblot, 1992
(Schriften zur Rechtstheorie ; H. 151)
ISBN 3-428-07427-0
NE: Summers, Robert S.: [Sammlung]; GT

Satz: Klaus-Dieter Voigt, Berlin 21
Druck: Color-Druck Dorfi GmbH, Berlin 49
Printed in Germany

ISSN 0582-0472
ISBN 3-428-07427-0

To Dorothy

Forward

The essays I have selected for inclusion in this volume consist for the most part of relatively concise treatments of central issues in jurisprudence, legal theory, and legal philosophy that I have written and published over the last twenty years. Many of these essays set forth core ideas that I have subsequently developed or elaborated in books or extended articles. For example, the first essay here, "The Technique Element in Law," which was a contribution to a Festschrift for Hans Kelsen, first appeared in Volume 59 of the California Law Review in 1971, and became the basis for a book of my own,[1] and for large parts of books by others.[2] The fourth essay, first published in a Festschrift for H. L. A. Hart, is an embryonic version of a large part of a book I wrote on instrumentalist legal theory.[3] The sixth essay, on the legal philosophy of Lon L. Fuller (which appeared in Volume 92 of the Harvard Law Review in 1978) was a forerunner of my book on Fuller in the "Jurists" series published by Stanford University Press in 1984. The seventh essay, "Working Conceptions of the Law" adumbrated some of the central ideas that figure in a book that I co-authored with Professor *Patrick Atiyah* on Form and Substance in Anglo-American Law published in 1987 by Oxford University Press. And the article, "Two Types of Substantive Reasons," the eighth essay here, was followed by a much longer version in the Cornell Law Review.[4] The ninth essay, on resolving conflicts between substantive reasons, is an outgrowth of this larger essay. I am pleased that these essays will now be much more readily available to Europeans through publication here. The essays have proved fertile bases for my own further work. Others might find that they can build on them more effectively than I have been able to do. If so, I should be especially gratified.

A few of the essays here grew out of earlier and larger works of mine, usually in book form. Thus, the fifth essay, on pragmatic instrumentalism, summarizes the central tenets of America's dominant philosophy of law, a subject

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[1] *Robert S. Summers* and *Charles G. Howard,* Law: Its Nature, Functions, and Limits (Prentice Hall, Inc. 1971).

[2] See, e.g., *John Farrar,* Introduction to Legal Method (Sweet and Maxwell 2nd ed. 1985). See also *Joseph Raz,* "On the Functions of Law" in: Oxford Essays in Jurisprudence, A. W. B. Simpson, ed. (Oxford U. Press 1972).

[3] *Robert S. Summers,* Instrumentalism and American Legal Theory (Cornell U. Press 1982).

[4] "Two Types of Substantive Reasons – The Core of a Theory of Common Law Justification," 63 Cornell L. Rev. 707 (1978).

I had treated earlier in book form.[5] The tenth essay, on form and substance in legal reasoning, provides a succinct account of central theses in the book, referred to above, that I co-authored with Professor Atiyah. These two short essays, then, provide readers with ready access to most of the main conceptual ideas in two books, and seem worthy of inclusion here on that ground alone.

Six of the essays reflect my current research interests in the essentially formal character of law, a relatively neglected topic in contemporary Anglo-American legal theory. This is true of the tenth essay on the formal nature of legal reasons (a Festschrift essay for Professor Torstein Eckhoff), part of the second essay on formal legal validity, the eleventh on the criticism of legal phenomena for overformality, the twelfth also on formal reasoning (a Festschrift essay for Professor Atiyah), and the thirteenth and fourteenth on formality and the rule of law. In my opinion, the character of law manifests itself much more fully in its formal attributes than in any substantive essence it may have, and I predict before long there will be great and growing interest in legal formality in all its varieties.[6] In the German system, there has long been considerable interest in the interactions of form and substance in the law.

Robert S. Summers
Goodhart Lodge
Cambridge, England
October 1991

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[5] See note 3 above.

[6] See further, *Summers,* Judge Richard Posner's Jurisprudence, 89 Michigan L. Rev. 1302 (1991).

Acknowledgments

I wish to thank several publishers for kindly granting permission to reprint essays here: Oxford University Press for essays Four and Twelve; D. Reidel Publishing Company of Dordrecht for essay Seven; A Giuffrê of Milan for essay Nine; Tano Press of Oslo for essay Ten; and J. C. B. Mohr (Paul Siebeck) Tübingen for essay Thirteen.

The eleventh article is a revised version of the Special Hamlyn Lecture delivered on August 22, 1989 at the close of the 14th World Congress of the International Association for Philosophy of Law and Social Philosophy, Edinburgh. The lecture is republished here with the permission of the Hamlyn Trust.

Professor Dr. Dr. h.c. Werner Krawietz was instrumental in this publication, and I wish to record my gratitude to him. The Cornell Law School provided material support and I thank Dean Russell Osgood for this. Lisa Murphy, Cornell Law School Class of 1993, as my research assistant, cheerfully performed various chores in connection with the manuscript, and I thank her. It has also been a pleasure for me to work with Mr. Norbert Simon and his distinguished publishing house in this venture.

R. S. S.

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Part One

The Nature of Law

Chapter One

The Technique Element in Law

In giving accounts of the nature of law, legal philosophers have, in the fashion of scientists,[1] broken law down into elements, such as legal authority, legal rules, moral aspects of law, and law's coercive features. In the vast literature of legal philosophy, all these elements have been subjected to intensive and illuminating analysis. But the "technique element in law"[2] remains neglected to this day. *How* does law do what it does? Does the law's methodology consist merely of criminal and civil techniques? Professor Hans Kelsen is one of the few legal philosophers interested in these questions, and his essay, The Law As a Specific Social Technique,[3] is a classic on the subject. That essay, which I first read several years ago, initially inspired me to think about these questions. It is especially fitting, then, that the thoughts I offer as a kind of progress report should appear in a special issue of the California Law Review honoring Professor Kelsen.

To characterize the technique element in law faithfully and fully would be to write at least one book and perhaps several. My aim here must be far less ambitious. I hope merely to sketch a general theory of law's basic techniques and then indicate how this theory might be of value. This effort is intended only to be suggestive and not at all definitive.[4] Along the way, and often by footnote, I will describe how the theory I offer draws upon and differs from the general views Professor Kelsen put forth in his classic essay.[5]

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[1] *R. Pound,* Fashions in Juristic Thinking (1937).

[2] A phrase adapted from Dean Pound. See 1. *R. Pound,* Jurisprudence 73 (1959).

[3] 9 U. Chi. L. Rev. 75 (1941). Professor Kelsen has dealt with the same ideas elsewhere in his writings, too. See, e.g., *H. Kelsen,* General Theory of Law and State 15 - 29 (1961). Two works by other authors should also be noted: *R. von Jhering,* Law as a Means to an End (1924); *Hocking,* The Relation of Law to Social Ends, 10 J. Phil. 512 (1913).

[4] Thus, this will be a sketch in several senses. First, it will be devoid of some of the usual detail. Second, it will, at points, rest rather more on assertion than on developed argument. Third, certain key concepts, such as primary thrust and variants, will be left more or less unanalyzed.

I. Social Techniques Distinguished from Social Functions

Preliminarily, it is necessary to distinguish social techniques for the discharge of social functions from those functions themselves.[6] Different social functions are discharged in different societies in different degrees and by different techniques. There is no accepted framework for characterizing and differentiating possible social functions. For present purposes, the following is a useful, though inexhaustive listing:

Reinforcement of the family;
promotion of human health and a healthful environment;
maintenance of community peace;
provision for redress of wrongs;
facilitation of exchange relationships;
recognition and ordering of property ownership;
preservation of basic freedoms;
protection of privacy;
surveillance of private and official law-using activities.

The degree to which any of these social functions is discharged in a particular society will be determined not only by the effectiveness or ineffectiveness of its deployment of social techniques, but also by the nature and extent of private, noncollective efforts, and by such relatively uncontrollable factors as population density, the spirit of the populace, and the inherent limitations of social techniques of any kind.[7]

Social techniques – collective ways of discharging social functions – may be subdivided into the nonlegal[8] and the legal.[9] Professor Kelsen cites morality and religion as examples of nonlegal techniques.[10] And doubtless morality and religion may figure prominently in the extent a specific social function is discharged in a given society. Consider, for example, the social function here called reinforcement of the family. The prospect of severe moral condemnation for marital infidelity might induce husband and wife to remain faithful to one another. And most Western religions purport to support family life.[11] But

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[5] A subsidiary purpose of this Article will be to draw together some of the more significant literature as it relates to facets of the theory presented here.

[6] The use of the word "function" here is, of course, metaphorical, and not without risk of distortion. But for present purposes, this risk can be incurred. On the ways in which it may materialize, see Functionalism in the Social Sciences (D. Martindale ed. 1965).

[7] It is sobering to be reminded that society *really* cannot have any social engineers. See *Rhees,* Social Engineering, 56 Mind 317 (1947). So, too, that the unanticipated consequences of social action are common and can be of great importance. See, e.g., *Merton,* The Unanticipated Consequences of Purposive Social Action, 1 Am. Soc. Rev. 894 (1936).

[8] The role of essentially nonlegal factors in the discharge of social functions is, doubtless, very great; it is a subject that awaits systematic study.

[9] Of course this, like all such distinctions, loses its sharpness at the borderlines.

[10] *Kelsen,* Law as a Specific Social Technique, 9 U. Chi. L. Rev. 75, 79 - 80 (1941).

law can be brought to bear to help reinforce the family, too. To cite examples at random, criminal law may prohibit bigamy, adultery, and other conduct likely to disrupt the family; tort law may provide redress for interferences with husband-wife relationships; property laws may give the wife an interest in the husband's property and thereby encourage man and wife to view themselves as working together; tax laws may favor the family by allowing husband and wife lower rates of tax on income than unmarried persons pay and by permitting deductions for dependents; compulsory military service laws may exempt certain married persons; other laws may impose duties to support family members; and so on.

In one of its aspects, then, the law is a source of techniques that may be marshalled to help discharge social functions. Professor Kelsen sometimes writes as if the law were just one single technique rather than a set of techniques:

> The social technique that we call "law" consists in inducing the individual, by a specific means, to refrain from forcible interference in the spheres of interests of others: in case of such interference, the legal community itself reacts with a like interference in the spheres of interests of the individual responsible for the previous interference.[12]

At other times, Professor Kelsen differentiates penal, civil (compensatory), and administrative legal techniques.[13] In my view, a still more refined analysis is needed.

II. Social Techniques of a Legal Nature

An account of law's basic techniques, then, is a response to the question of *how* law can help discharge social functions, rather than to the question of *what* social functions law can help perform. The account of law's techniques to be offered here will not be a description of the basic techniques of law that a particular society uses. Rather, is will be a description of the basic techniques of law that societies might possibly use.

To most laymen, there are only two basic possibilites: the criminal law and the civil law. Professor Kelsen adds a third, which he calls "administrative."[14] It is my own thesis that an adequate theory must make an independent place for five basic techniques:

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[11] It must be admitted that conceptual difficulties plague any effort such as Professor Kelsen's to characterize morality and religion as techniques.

[12] *Kelsen,* supra note 10, at 81.

[13] Id. at 89 - 93, 96 - 97. This apparent fluctuation can be readily explained. Professor Kelsen really considers two separate questions more or less at the same time: First, how do legal techniques as a whole differ from other social techniques such as morality and religion? Second, what different legal techniques are there? My main interest here is in the latter question.

[14] Id. at 96 - 97.