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Norms, Institutions, and Institutional Facts

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NEIL MACCORMICK

NORMS, INSTITUTIONS, AND INSTITUTIONAL FACTS

ABSTRACT. Norms explained as grounds of practical judgment, using example of queue. Some norms informal, inexact, depend on common understanding ('conventions'); some articulated in context of two-tier normative order: 'rules', explicit or implicit. Logical structure of rules displayed. Informal and formal normative order explained, 'institutional facts' depend on acts and events interpreted in the light of normative order. Practical force of rules differentiated; either 'absolute application' or 'strict application' or 'discretionary application', depending on second-tier empowerment. Discretion can be guided by values, principles standards. Pervasiveness of institutions and institutional facts, especially but not only in relation to institutions of state-law, including constitution and state-institutions. Searle's and Ruiter's theories of institution, institutional fact, considered: 'constitutive rule' rejected in favour of 'underlying principle', structure of 'institutive, consequential and terminative' rules explained and defended. Ruiter's conception of 'institutional 'régime' considered and adopted, validity of norms and normative 'régimes' considered and differentiated from truth of statements of institutional fact.

KEY WORDS: norms, queues, conventions, rules, informal and formal normative order, institutional facts, practical force (of rules), values, principles, standards, institutions of state-law, constitution, Searle, Ruiter, 'constitutive rule', 'underlying principle', validity, truth

The idea that the world around us, our human world as well as our planetary environment, includes not just sheer physical facts and realities, but also institutional facts, has had a powerful impact ever since it first came to life in the in the work of Elizabeth Anscombe[1] and John Searle.[2] For those concerned with law, the idea of institu-

[1] G. E. M. Anscombe, "On Brute Facts", *Analysis* 18 (1958), 69–72.

[2] J. R. Searle, *Speech Acts* (Cambridge: Cambridge University Press, 1969); Searle's work continues through *Expression and Meaning: Studies in the Theory of Speech Acts* (Cambridge, Cambridge University Press, 1979); with D. Vanderveken, *Foundations of Illocutionary Logic* (Cambridge, Cambridge University Press 1985), and *The Construction of Social Reality* (Harmondsworth: Allen Lane, 1995).

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tional facts links up easily with the idea that an important element in Western law is formed by 'institutions' (a commonly used word in this context) like contract, property, marriage, trust, foundation (*Stiftung*), and the like. It also connects with the idea that law is 'institutional' in the sense of being administered through 'institutions' like courts, legislatures, public prosecution agencies, police forces, and the like. Reflection on these ideas casts light on many questions that have preoccupied legal thinkers over the centuries. On the other hand, reflection about the normative character of law in its turn helps to clarify much about all sorts of institutions and the institutional facts that are connected with them.

In 1973 my inaugural lecture Law at the University of Edinburgh was on the theme 'Law as Institutional Fact',[3] and subsequently I became acquainted both personally and professionally with Ota Weinberger of the University of Graz in Austria, discovering that he had been working along similar lines. At his suggestion, we brought out a joint collection of papers, published both in German and in English, advancing an 'institutional theory of law';[4] in recent years, Weinberger has added very substantially to this original statement,[5] and other very significant contributions have been made, among which I would wish to refer particularly to work by Dick Ruiter,[6]

[3] See N. MacCormick, "Law as Institutional Fact", *Law Quarterly Review* 90 (1974), 102–129; also Edinburgh University Inaugural Lecture, No 52 (Edinburgh: Constable & Co for University of Edinburgh, 1973). See also in N. MacCormick and O. Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Dordrecht: D. Reidel, 1986), chapter 3.

[4] See N. MacCormick and O. Weinberger, *Grundlagen des Institutionalistischen Rechtspositivismus* (Schriften zur Rechtstheorie, Heft 113), Berlin: Duncker und Humblot 1985: *An Institutional Theory of Law*, Dordrecht: D. Reidel. 1986; (translated by Massimo La Torre) *Il Diritto Come Istituzione*, Milan: Dott. A. Giuffré, 1990); *Pour une theorie institutionelle du droit* (trans Odile Nerhot and Philippe Coppens), Brussels: Story Scientia L.G.D.G., 1992.

[5] See, in particular, O Weinberger, *Law, Institution, and Legal Politics: Fundamental Problems of Legal and Social Philosophy* (Dordrecht, Kluwer Acadaemic Publishers, 1991).

[6] D. W. P. Ruiter *Institutional Legal Facts* (Dordrecht: Kluwer Academic Publishers, 1993), and other works including 'Structuring Legal Institutions' in this issue of *Law and Philosophy*, and works cited therein.

The present collection of papers derives from a symposium in the University of Twente on 7 November 1997, celebrating Professor Ruiter's twenty one years as

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Joxerramon Bengoetxea,[7] and Eerik Lagerspetz.[8] The present paper aims to develop some thoughts in response to challenges raised by Ruiter. It seems most fruitful to do so in the context of a preliminary attempt to clarify concepts of 'norm', 'normative order' and 'institutional normative order'. These are fundamental ideas for a philosophy of law, and it is in their context that we can make progress with elucidating the nature and character of institutions in the sense in which Ruiter and I and other colleagues, both in the present special issue of this journal and elsewhere, have tried to advance understanding of them, and, through them of law and other elements in human and social experience.

1. LINING UP NORMS

What are rules, conventions, standards, principles? How formal or informal can they or need they be? Let us start by saying that, in the sense relevant to the present purpose, they are all normative. That is, they enter essentially into judgment of what it is right or wrong to do, what ought or ought not to be done. Such judgments may in turn be a basis of action by oneself, or of response to someone else's action. Here, the term 'norm' will be used as a general catch-all term to cover any explicit or implicit 'ought-proposition' that is supposed to play this judgmental role in somebody's practical thought. Norms come in a variety of kinds, and there are some vital distinctions and

professor in the University. It gives me pleasure to pay respect to his work on 'Institutional Legal Facts' and other aspects of an institutional approach to law and legal theory. I greatly admire the rigour and care of his analyses, in particular the way in which he has taken the work of Searle and Vanderveken on Speech Acts and both purified and extended it for the purposes of application to legal contexts. I also very particularly admire his always-present vigilance to find apt legal examples both to test and to illustrate the theories he advances, and to show their relevance to and importance for a coherent exposition of legal systems, and theories of legal system. Since what I say mirrors the approval he has kindly expressed of some of my own writing, there is a danger that this will end up as no more than an exercise in mutual admiration, but I hope not.

[7] See J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford: Clarendon Press, 1993).

[8] See E. Lagerspetz, *The Opposite Mirrors* (Dordrecht: Kluwer Academic Publishers, 1995).

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clarifications that need to be made right from the outset of a work like this. I proceed now to set out the most fundamental ones.

Throughout the earlier sections of this paper, illustrations will be drawn from a mundane example, that of standing in line, or 'forming a queue', whether at a supermarket checkout or at a bus-stop, or when approaching a hold-up or bottleneck in a busy road, or in any of the myriad other places where queuing happens, either quite spontaneously and without any official intervention or direction, or in some more organized and directed way. The practice of 'queuing', or 'standing in line', is a well-known practice. Probably everyone who reads this will have in some way at some time taken part in it, I dare say very often indeed.

To the extent that people 'take their turn', there is an orderly movement through the checkout, or on to the bus, to the limit of places available on board, and then on to the next bus that calls at the stop; an orderly procession of vehicles through the traffic bottleneck. Weaker or less forceful individuals are not forced out or 'jumped over' till nobody else is left trying to get through. From nearly everybody's point of view a kind of fairness and efficiency prevails. Nor does this have to work perfectly. There may always be somebody around who jumps the queue, or who speeds up the fast lane to the very last point then edges into the slow lane through the bottleneck, effectively by challenging other drivers to put up with a pretty severe bump to their car (at least) or let him (usually 'him', I am sorry to say) cut in.

Most people allow that going to the head of the line without waiting your turn is sometimes acceptable. (You have a medical emergency at home and have dashed out to the supermarket for urgent supplies; you are desperate to get to college in time to sit your exam; you are a doctor hurrying to a desperately sick patient.) But there are some people who always or often try to cut in or queue-jump with flimsy or no justification, and perhaps everybody occasionally lapses. Clearly, there can be a successful practice, even a kind of socio-moral institution of queuing or waiting in line, without perfect conformity to the practice. But there must be some minimum threshold of compliance below which the practice would be unsustainable. It would be literally impossible to be the only person that 'takes her turn' because 'turns' require a mutually

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co-ordinated practice of two or more. When a substantial majority of those affected fail to acknowledge turn-taking, it amounts to pointless self-abnegation if one or a few act as though everybody were ready to take their turn.

Turn-taking or queuing is then normative. For where there is a queue for something you want, you ought to take your turn in it. This does not mean that there is a single quite specific or explicit norm that everybody cites when queuing. People know how to queue, and can tell cases of queue-jumping, and protest about them, even if they have never articulated exactly what their governing norm is. But even in an informal situation unregulated by any authority, it is always possible to try and articulate explicitly what one regards as the implicit governing norm. For example, I might try. Here is my attempt: *'In cases where people seek a service or opportunity that cannot be supplied to everybody simultaneously, each ought to defer to any one and all those who arrived earlier at the point of service or place of opportunity, and each is entitled to go ahead of any who arrived later, and entitled to expect others to observe this, and to respond critically or even obstructively towards people who flout this priority-norm.'* This now-articulated norm might help to make intelligible the queuing practices I take part in. For me, it makes sense of how I try to direct myself, and to influence others wherever there is a relevant situation in which others seem to display a similar propensity or a similar self-directing and other-influencing regard for the kind of ordered conduct I have in mind.

Quite likely, my articulation of the queuing norm will differ from what you might offer in an attempt make explicit what is implicit in a common way of acting. Maybe we could work out a formulation that would seem right to us two, but then what about a third person, and a fourth, and everybody in this queue or that one or in all the lines you ever stood in? The problem is that queuing is an intrinsically interpersonal activity aimed at a common point. At the very least, it is aimed both at attaining a service or opportunity that others seek at the same time, and at facilitating its attainment in mutual civility rather than through open conflict. This activity involves a practice which has an element of mutual understanding built into it, where we seem able to interpret our understandings of each other as in

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some way actually or potentially common or substantially shared understandings.

Thus queuing, like many grander and farther reaching parts of our individual and collective life, belongs in its own humble way to what Ronald Dworkin[9] has labelled 'interpretive' practices, and the concept 'queue' seems to fall in the class of what he calls 'interpretive concepts'. Characteristically here, community of practice cannot be imputed to *a priori* identity of understanding or of articulation or explicit conceptualization. But there can be adequate community of practice to engender a measure of orderliness. This very orderliness seems explicable by reference to an implicit queuing norm whose articulate understanding would be a matter of interpretative debate among those who acknowledge the practice as an essentially shared or common one and try to 'play fair' within it.

2. NORMATIVE ORDER

Let the queue or line also serve as example of 'order' in a sense that is decisively important to the present topic. The 'order' is not only an actual and predictable pattern that could be studied 'externally'[10] and reported statistically. It is a 'normative order' because or to the extent that it can and should be accounted for in a certain way. The externally observable order in a case of this kind is accounted for by imputing it to result from common action by mutually aware participants acting on the understanding that each is oriented towards more or less the same idea of the right thing to do. This idea of the right thing to do, dependent on what Eerik Lagerspetz has characterized as 'mutual beliefs',[11] is an implicit norm that we might make explicit along the lines suggested above.

Let us suppose, then, that queuing practices give us a satisfactory illustration of orderly conduct, where the order is imputable to a

[9] See R. Dworkin, *Law's Empire* (Cambridge, Ma: Harvard University Press, 1986), pp. 45–86, esp. pp. 46–53.

[10] This makes a deliberate allusion to H.L.A. Hart's discussion of the 'external' and 'internal' aspects of human conduct under the governance of rules. See Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 44–88, and for a fuller statement of my interpretation of Hart, see N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978, revised ed. 1994), pp. 275–292.

[11] Lagerspetz, *Opposite Mirrors*, pp. 30–50.

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common sense that there is a right thing to do, commonly shared, but not necessarily universal, among those who engage in the practice. Common or co-ordinated action under a common sense of the right thing to do is exactly what I mean by 'normative order'. But this 'common sense of the right thing to do' is clearly not dependent on there being one single canonically formulated rule that we could all recite to each other. As we said, the practice is an interpretative one, in which each of us 'reads' the situation as s/he thinks others are reading it.

For such a practice to be viable despite an absence of perfect agreement on its meaning or its governing norm(s), there must perhaps be some quite deep community of underlying ideas. In the contemporary world, there is a practice of turn-taking. Perhaps this has its deep foundations in a contemporary egalitarianism. This supports the idea that the provision of a service or opportunity should be based on some ground that is universalistic rather than personally discriminatory. The very arbitrariness of making priority depend on temporal order of arrival at the point of service or of opportunity is usually satisfactory from this point of view. In more hierarchical societies or social contexts, priority according to rank will perhaps prevail, with 'first come, first served' applying only among peers within a hierarchy. Even in our relatively egalitarian times there are doubtless many situations where hierarchical orders of precedence still have some bite, or even a taken-for-granted rightness.[12]

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[12] William Twining has pointed out to me that the requirement to wait in line is often an imposed one, for example when adults in authority, such as school-teachers, direct children in their charge to line up for some treatment or service of some kind, or even, indeed, to await a punishment. It may well be that as individuals we first internalize norms about queuing in such hierarchical situations where the equality of those standing in line is only an equality of equal subjection. 'Queuing under authority' belongs at a later point in my present order of presentation, but this order is chosen for analytical purposes, and should not be taken to be an account of the way anyone or everyone initially acquires a sense of or a disposition towards, the practice of queuing as a normative practice. It is a general truth that heteronomy precedes autonomy, and views or practices that we come to endorse autonomously usually emerge through processes of socialization. It is enough for my present purposes that, however we have come to it, many of us have come to a sense of rightness about taking our turn that we are willing to

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Certainly, queuing is a generic practice with many variants, not a single invariant thing. A supermarket line in Texas is not exactly like a railway ticket line in Italy, or a motorway bottleneck in England, or a queue for taxis at Toronto airport, or a queue to buy stamps in a Swedish post office, or a queue for lunch at the lunch-break in a colloquium in the Netherlands. We all try to pick up local nuance as we move around, and attempts to make explicit an implicit norm would be considerably complicated by the need to relativize the articulation to the kind of queue and the relevant cultural context.

We can surely be confident that the so-called 'first come first served principle' has many differences of nuance, and of detail, or has exceptions ('children first', 'children after adults' 'special consideration for very old people', 'special consideration for disabled war veterans', for example) in different places, different cultural milieux, different kinds of services or opportunities, different providers of services, and so on. Different people trying to articulate a more concrete version of the underlying idea for a particular setting would come up with different formulations, all quite reasonable. For, as we know, there is in all probability no single normative formulation that will be the subject of universal agreement, and no special reason to suppose that among a range of reasonable interpretations just one has to be the right one. The reason why there does not have to be a single right one is that for a practice like this to work satisfactorily, there only has to be overlapping consensus, or broad commonality of attitude, among the participants. Exact answers to vague questions can be illuminating, helpful, reasonable, and can have any of a number of such virtues; but not that of being uniquely right.

We can nevertheless with reasonable confidence identify a general or generic practice that most people understand and are reasonably comfortable with. The common intelligibility of the example of queuing among the diverse band of ultimate readers of this paper (assuming it is read and is intelligible) is itself a sort of evidence for the claim that there is a widespread practice with many local and specific sub-types of the generic form. Thus the queue belongs to a form of normative order that exists because there is

act on without intervention by any supervising authority, so long as others seem ready to do so as well, in a situation of ostensibly satisfied mutual beliefs.

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an overlapping, largely shared, common understanding of the right way to behave. Because the practice need not have a single exactly formulated understanding among the practitioners, any given articulation of a governing norm will be a more or less tendentious interpretation of it.

We conclude: there can be normative order without explicitly formulated norms. The implicit norms are in fact largely observed and respected, quite often with no element of supervision, direction or enforcement other than that of a pressure of common (not necessarily universal), opinion among those who have arrived around the same time at the same point of opportunity or service.

3. INFORMAL PRACTICES: CONVENTIONS

The account so far has indeed given primacy to the cases of implicit norms and absence of external regulation. Queuing does have the character that it seems quite often to happen in this way, perhaps more in some cultures than in others – the British are said to have a special genius for queuing, and I may be betraying a deep cultural bias in using this example. But I doubt if this matters, for we must directly proceed to acknowledge that there are also queuing practices that are by no means informal in the way the running illustration has so far tended to assume. Before that, though, let us give a name to the case we have been contemplating, where there is a normative social practice ordered through implicit norms and upheld without authoritative supervision, direction, or enforcement measures. Let us call such practices 'informal normative practices', and let us now refine our earlier remarks on normative order to note that sometimes normative order is, or is in part, 'informal normative order' in the same sense of 'informal'.

The idea of a 'convention' seems to be explicable in just this context. Conventions are the implicit norms of informal normative order, and although in many cases of importance efforts are made to bring them to an explicit formulation, it is always a discussable question which articulation of a convention best captures its content and point.[13] Apart from such obvious cases as constitutional

[13] Compare G. Marshall, *Constitutional Conventions: the Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1984). It is worth remarking

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conventions, I take it that a large part of our ideas about etiquette and good manners, and many other important elements of social usage, as well as the grammatical and semantic norms of natural languages, are conventions in this sense.

4. FORMALIZING PRACTICES

Convention is not all. Once upon a time I travelled in mid-March from warm sunny Miami to ice-cold Toronto. Many Canadians were returning lightly clad from a pleasant Spring break that Sunday evening, and there were huge numbers waiting to get a taxi. The taxis were arriving and picking up passengers with great expeditiousness and regularity, but there were still more people arriving to seek a taxi than the taxis could quickly serve. I discovered, not without relief, that there was a system of consecutively numbered tickets available from a dispenser at the taxi point; so each person on arriving at the 'Taxis' exit point took a number, and then waited till the number came up in order. There was no need to stand in the frigid, sub-zero, air of the sidewalk. You could remain in the warmth until your turn was more or less ready to come up, and then go out for the few remaining minutes or moments to await your cab. But the hour was late, and I felt some concern, as probably others did too, about getting to my hotel to check in before too late.

I was therefore pleased to discover that outside in the taxi concourse, there was a heavily garbed and fur-hatted functionary of the airport appointed to marshal the taxis and the passengers, calling forward the numbers, hurrying travellers into their cabs and generally keeping the lines moving as fast as possible. His task included deciding how long to wait after calling a number before deeming it a 'no-show' and continuing down the numerical order to the next available one. So resisting the temptation to remain too long in the

that constitutional conventions, though themselves implicit norms and informal ones in the sense of lacking any single authoritative formulation, nevertheless regulate the conduct of officers and agencies of state which for the most part are defined in a highly formalized and institutionalized way. Citing Sir Kenneth Wheare, Marshall referes to conventions as 'binding rules' (p. 7), but in a context (pp. 7–13) in which it is clear that these are norms that lack any single authoritative formulation, hence do not count as 'rules' in the terminology used here.

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warmth within was prudent. If you were not there when your number came up, you lost your place and would have to start again with a new number.

Subsequently, when working in Uppsala, I found in Swedish public offices, Post Office, Tax Office, and others I had to visit, as well as in several private establishments a similar practice of taking a numbered ticket, there being displayed an electronic indicator that estimated the probable waiting time for numbers in the current series. This had the convenient effect of enabling a person to go off about other activities in the way of shopping, or repairing to a coffee shop to do some reading, or whatever.

These experiences reminded me that although queuing may be in many situations an informal normative practice, it is not so everywhere. In Toronto Airport, for example, if I understood the situation rightly, there was an appointed official whom I have privately dubbed the 'taxi-marshal' who had the role of deciding who was effectively in line and had the right to the next arriving taxi on account of having the highest-numbered ticket present, in the event of a no-show by the person whose number was called in strict order. The number-roll created a strict line-order; and somebody was appointed to see to it that the strict order was kept or a proper substitution made if the strict order failed. A procedure had been established to fix an order, and an official was appointed to administer the order and interpret its proper working and its substitute working in a case of breakdown. Similarly, in Swedish public offices, as at the delicatessen counter of Edinburgh supermarkets, the official or employee in charge operates a formalized system of queue-formation such that people need not remain in line physically; but it is a matter for decision how to operate the priority order if a gap occurs in the presentation of tickets in order.

In an informal normative practice of queuing, it is itself a relatively vague issue to be sure when a line has formed, who is in it, in what exact order, and subject to what legitimacy of holding a place for an absentee, for example one who has gone to answer a call of nature in the nearest lavatory. But when the practice is transposed into an official or commercial setting, somebody can be given the task of deciding these things, and a system, such as the numbered ticket-roll, can be set up to render precise what in the informal

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setting is vague. And the official or employee in charge usually has or assumes authority to determine how to settle disputed or unclear or unforeseen conundrums in the arrangements that have been set up. All the more is this so when a situation is one in which some form of standing authority or power is held by one person (or a group) over others, and where this power is used to direct the subject-group to line up for meals, or for a work-rota, or whatever. Adults, e.g., schoolteachers, in relation to schoolchildren, or prison guards in relation to prisoners, could be cases in point – here, the forming of a line is perhaps entirely heteronomous. It is an imposed requirement, not at all attributable to voluntary mutual co-operation and mutual beliefs. It is important to acknowledge that such situations exist, and that they show how attitudes to queuing may be far removed from those of mutual voluntary co-operation.

Thus have we moved from the informal and inexact norm(s) of the informal practice to a setting in which recourse to the concept of a 'rule' seems right and useful. Authority is achieved through appointment to be taxi-marshal, head clerk or manager of the post office, or whatever. We can say with some exactness who it is that decides, and over what issues his/her decision is final. Those who establish the arrangement are likely make reasonably explicit and determinate provisions about how the queuing system is to operate. They confer upon a chosen person the appointment and the authority that goes with it. When problems turn up, the appointee has to decide, to make a ruling at least on the particular problem that has arisen. Maybe the ruling is then adopted as a general rule, maybe the problem is referred to management with a request for a decision on what has to be done whenever that (type of) problem recurs.

There is now a two-tier normative practice. There remains a practice of queuing, and it remains a normative practice, statable in terms of norms about what ought to be done, what is the right thing to do, who has the right to be served next, and so forth. But there is now the connected normative practice of authorizing a supervisory person to monitor the queue, ensure that each person who gets into the line in the appropriate way gets served in the right order, and that no one breaks the order by jumping ahead or suffers a loss of entitlement by being jumped over. Equally, the supervisor will have to decide about forfeiture of turns if a person fails to appear when appropriately

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called, and so on. There are, we may say, deciding-about-queuing norms, as well as the queuing norms themselves.

In this two-tier setting, there can be an authoritative statement of the first-tier queuing norm. What the supervisor says determines what is the operative priority-rule when a problem comes up about who is properly to be deemed at the head of the queue now, and so on. And the management can to a considerable degree clarify matters by making ever more exact provision about how the arrangement is to work, if it turns out that there are difficulties of interpretation that are (for example) causing annoyance among customers, who might take their business elsewhere.

In such a setting, it is characteristically the case that somewhat vague implicit norms give way to expressly articulated ones, making explicit what is to be done or decided in expressly foreseen circumstances, the very effect of the explicitness being to diminish vagueness. Imagine this example: *'If a person's number is called and the bearer of the ticket with that number does not come forward, the supervisor should make two further calls in a clear, loud voice, and make a quick visual check of the waiting area to check if there are any apparently deaf people or physically handicapped people struggling to get into position; if there is still no show, the next number in serial order should be called, and so on.'* If matters have come to this point of clarity, it seems easy to imagine the need for a new ruling by somebody, if only the supervisor, how to handle the case if a person turns up after the call, having missed her or his call, the first time. Do they get placed back in the line, now at the front of it because in possession of the lowest number now current; or is their prior entitlement now cancelled, leaving them to either abandon the attempt or take a new numbered ticket from the ticket dispenser, and start again at the back of the line? In the latter case, is the supervisor to have any discretion to waive the strict rule in cases of special hardship?

A problem of this kind is bound to arise once there is clear provision about what counts as a failure to show up (missing three calls), for there is now a dilemma about how to treat the 'no show' who eventually appears from the lavatory, or from a reverie, or from the coffee shop, or from wherever. There can only be: either pure discretion on the supervisor's part, with no fixed rule, or a 'new

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head of the queue' rule or a 'back to the end again' rule, with or without discretion on the supervisor's part in special hardship cases. (Niklas Luhmann points out that every attempt to reduce complexity by articulating an explicit provision of this sort is apt to generate a new complexity as dilemmas appear in relation to the new provision, calling for some new explicit provision, and so on.[14])

5. EXPRESSLY ARTICULATED NORMS – 'RULES'

What this brings to the fore is the idea of an explicitly articulated norm (no longer a purely implicit one). Further, we are dealing with a case in which the explicit articulation is made by a person who has a position of authority, either authority to decide how to apply first-tier norms, both implicit and explicit, or authority to lay down explicit norms that clarify or vary what was previously implicit and therefore also vague. In short, we have a situation in which, for a certain bounded sphere of activity, special authority attaches to a particular articulation of a norm. The type of articulation that is important here is one which does two things: it specifies a kind of situation that may arise, and it lays down what has to be done, or to come about, or to be deemed the case, whenever that situation arises. Let us call the specified situation the 'operative facts' or '*OF*', and let us call what has to be done, or to come about, or to be deemed the case in that situation, the 'normative consequence', '*NC*'. The kind of explicitly articulated norm we are considering thus has this general form:

'Whenever *OF*, then *NC*'

One common usage of the term 'rule' is with reference to explicitly articulated norms in that exhibit or can be recast in this form, where some kind of authority attaches to the process by which and/or the agency by which the explicit articulation was made. In the present work, the word 'rule' when used unqualifiedly will have exclusively this connotation.

Here are some examples, invented in relation to the running example of the queue, which seem plausible instances of potential

[14] See N. Luhmann, *A Sociological Theory of Law* (trans. E. King, ed. M. Albrow) (London: Routledge and Kegan Paul, 1985), pp. 193–199.

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rules. To be real ones, they would require the backing of a kind of authority different from that of the author of a philosophical theory.

> *'Whenever a transaction is concluded, the counter-clerk should check which is the next number in the series awaiting call, and call for the holder of that number'*
>
> *'Whenever a ticket holder fails to come forward after three calls, and after a check for deaf or physically handicapped people has been sufficiently carried out, the ticket is [to be deemed] cancelled, and the next number should be called.'*
>
> *'Whenever a ticket has been cancelled, the holder may take a fresh ticket from the dispenser; but may only be called for service when the number of the fresh ticket comes up in due order.'*

Is the idea of an 'implicit rule' of any value here, or should we restrict the term 'rule' only to such explicit formulations? I think it is important to allow for a category of 'implicit rules'. One aspect of authority in the situation we are discussing is simply authority to direct and regulate the queue, guided by relevant rules as one interprets and applies them. Often this will be done by simple decision, such as 'It's not your turn, you'll have to wait'. But where an explanation is attached to such a decision, this may amount to a kind of partly explicit ruling on a point of doubt in interpreting the rules. For example, 'I am sorry, since you weren't here when your number was called, you have to get a new ticket and go to the back of the queue now, please'. Here, even if no such rule has hitherto been articulated, there is an implicit decision that whenever a person's number has been called unsuccessfully, the ticket is cancelled. We shall use the term 'implicit rule' to refer to the norm that can be derived form a ruling of this kind. (The implicit rule is so derivable, as will be seen, to the extent that we hold such rulings to be universalizable.[15])

This seems straightforward enough, but there is a problem about rules that we need to confront. What is their practical force? Some people have a notion if you have articulated a rule in the 'Whenever *OF*, then *NC*' form, you must either give it absolute and invariant

[15] See MacCormick, "Why Cases have *Rationes* and What These Are", in *Precedent in Law* ed. L. Goldstein (Oxford: Clarendon Press, 1987), pp. 155–182.

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application, or be convicted of mere pretence and hypocrisy. Some people think you can take a much more flexible approach and still have a genuine enough rule. On any view, the link between operative facts and normative consequence is indeed a normative one, guiding judgment and action in the way we have noted. But it seems that there can be disagreement about the practical force that attaches to this normative nexus. This should not be interpreted as a conceptual disagreement in which somebody is correct and somebody else in error. The truth is that this is itself a practical question: what force ought to attach to rules? Let me suggest a schema for appreciating this, involving one of three possibilities.

6. THE PRACTICAL FORCE OF RULES: 'EXCLUSION' OR 'ENTRENCHMENT'?

Rules can have variable practical force,[16] for they can be treated as being rules of absolute application, as being rules of strict application, or as being rules of discretionary application.

> A rule is of **absolute application** if it is to be understood and applied on the footing that each and every occasion of the occurrence of *OF* must be attended unfailingly by *NC*, and *NC* may not be put into effect except when either *OF* obtains or some other rule independently providing for *NC* is satisfied by virtue of the ascertained presence of its operative facts. Typical examples of rules of absolute application are those of the rules of essentially mathematical and closed-ended games like chess.
>
> A rule is of **strict application** if it is to be understood and applied on the footing that circumstances bearing on the values secured by it may occasionally arise such that there will be very considerable derogation from those values if on a particular occasion *NC* is invoked just because of

[16] Frederick Schauer makes a somewhat similar point in *Playing by the Rules: a Philosophical Examination of Rule-based Decision-Making in Law and Life* (Oxford, The Clarendon Press, 1991), in his chapter 6 on "the force of rules", but I think the present account is both significantly different from his, and preferable to it, partly because I have had the opportunity to reflect on his vastly stimulating argument.

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the presence of *OF*. By its spirit, the rule should not be applied, but by its letter it should. The person charged with applying the rule and managing the activity within which the rule has application is given some degree of guided discretion to make exceptions, or to override the rule, in special, or very special, cases.

A rule is of **discretionary application** if the decision-maker is expected to consider every case in the light of all factors that appear relevant given the values and goals of the relevant activity or enterprise, and to decide in accordance with the clear balance of factors, but when all things are equal, or when the balance of factors is rather fine and difficult to judge, the decision maker is expected to use the rule as a fall-back way of deciding the case.

It will be seen that rules of absolute application are at one end of a spectrum whereof rules of discretionary application belong at the opposite end. Between, rules of strict application represent a variable quantity to the extent that there can be different degrees of strictness.

What then determines to which class, or where on the spectrum, a particular rule or set of rules belongs? Since it has been stipulated that explicitly formulated rules all have the same canonical form, the difference we seek is not to be found in the content of rules themselves. Where then? The answer is obvious – it depends not on the content of the first-tier rules about a practice, but on second-tier norms laying down the terms of authorization or empowerment of the decision-maker. '*Here are the rules you have to apply; you are treat them as being of absolute application/of strict application/of discretionary application.*'

Where rules are of strict application, that leaves the decision maker a bounded discretion in special cases, and here, as *a fortiori* in the case of rules that are of discretionary application, there ought to be some effort made to secure that the decision maker has an adequate understanding of the factors or kinds of consideration that are appropriate to guiding the exercise of discretion.

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Where rules are either of absolute application or of strict application, they will belong to the category called by Joseph Raz[17] 'exclusionary reasons' or (in more recent work) 'protected reasons'. Even more aptly, Frederick Schauer[18] has used the closely similar concept of 'entrenched generalizations'. What 'entrenches' a rule in the relevant sense, according to the present thesis, is the terms of authorization of the decision-maker. What renders it exclusionary is the absolute or strict character of the application demanded by terms of authorization. If a rule is of absolute application, the only issue that arises for the person bound to apply it in this way is whether *OF* obtains or not. Other factors that might ordinarily have a bearing on whether *NC* is appropriate to the present case, all things considered, are not to be considered by this decision maker in respect of the decision she or he must make. For all things are not to be considered, not by this decision maker, not in relation to the decision-making task, anyway. If a rule is of strict application, it remains all-important to decide whether or not *OF* obtains. All things are still not to be considered in a completely open-ended way. But there are certain factors that must also be considered if they are present, and they have to be evaluated with some care to see whether a special or very special case exists, justifying implementation of *NC* though *OF* is not fully satisfied, or non-implementation, or qualified or incomplete implementation, of *NC* even though *OF* is fully satisfied. A rule of discretionary application is not itself exclusionary or entrenched, but it is a tie-breaker where the other relevant factors fail to give clear or conclusive guidance. So it would be by no means correct to say that rules of discretionary force count for nothing or are merely a pretence or facade.

7. DISCRETION: VALUES AND PRINCIPLES

Nevertheless, it will be well to say a little about discretion, and the idea that there can be a 'guided' discretion. Discretion involves an appeal to a person's judgment in a way that merely applying a rule

[17] See J. Raz, *Practical Reason and Norms* (London: Hutchinson, 1975), pp. 193–199.

[18] See F. Schauer, *Playing by the Rules*, pp. 47–52.

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provided its operative facts are satisfied does not.[19] If in a situation of decision, I wonder what is the wisest or the fairest or the most reasonable or the most efficient thing to do, there may be many aspects of the situation to be taken into account. If I am the taxi marshal, and if my view of the job is, or my instructions are, that I have to run the taxi-queue as efficiently as possible, I shall focus on whatever tends to maximize the speed with which taxis identify hires, get them loaded, and get away, leaving space at the pick-up point for the next cab to come in. That would lead me to judge that there should be no very great delay after my calling a number to await the ticket-holder. Moreover, to avoid confusion and prevent inattentiveness on the part of those waiting for a taxi, it would seem best from this point of view to treat a number as cancelled once it has been called and there is a no-show. This could also be considered more fair to those who do wait attentively, than if I allow somebody to show up later than the calling of the number, when I am now ten or twenty farther into the series. What is more, the circumstances militate against my entering into elaborate discussions with people who feel aggrieved by my decisions. So in this case considerations of fairness take second place to considerations of efficiency.

If it is not efficiency but fairness a decision-maker has mainly to consider, different factors predominate in properly weighing up what to do. Then one has to ponder the interests and expectations of all those affected, and consider the impact over time of one rather than another way of handling a problem. If charged with deciding 'reasonably', the balancing task one would face becomes even more complicated, since here one has to consider the relative demands of efficiency and fairness, and perhaps other salient values, and apply common sense to working out a satisfactory course of action.

Since it is good to be fair, good to be wise, good to be efficient, good to be reasonable, we can recognize these concepts as naming 'values'. They are different values, and thus a judgment oriented primarily to one is different from a judgment oriented primarily to another. Being values, they permit of satisfaction to a greater or less degree; hence situations can be better or worse, not simply right

[19] My discussion here does not follow, but is, as so many others, influenced by and indebted to the seminal account in R. Dworkin, *Taking Rights Seriously* (London, Duckworth: 1977), pp. 31–32, 68–71.

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or wrong judged in terms of a certain value. This aspect of such concepts is sometimes captured by referring to them as 'standards', for in applying any one of them, a decision-maker is envisaged as having to be sure that it is satisfied at least up to a certain point, or to an adequate standard.

Unlike rules, whose operative facts delineate specific circumstances of application, values are pervasive. It is not just good to be fair in administering a queue, it is good to be fair in almost all circumstances of life, and likewise with efficiency, wisdom ('prudence'), reasonableness and rationality, kindness and humanity, and so on. The list of pervasive values is quite a long one, though some have claimed that all can be brought within some one or a few broad headings.[20] Around each we are able to cluster some normative generalizations whose observance helps to secure the value in question. 'One ought to hear both sides of a story in any case of dispute', 'one ought not to upset a person's reasonable expectations', 'one ought to consider the impact of a decision on the well-being of everyone with a legitimate interest in the matter', are examples relevant to fairness. Since they are, like the values in question, pervasive, we do not normally find it helpful to structure them in accordance with the formula 'Whenever *OF*, then *NC*'. These are norms that bear on decision-making in almost any circumstances, so there is no point in singling out particular circumstances of application. They are what we commonly call 'principles', or indeed 'general principles'. Principles can be excluded from consideration by a decision-maker who is charged with applying rules of absolute application, or limited in effect to a greater or lesser degree in the case of rules of strict application, but we do not on that account trouble to qualify our principles with some such formula as 'Except where this principle is excluded, one ought to ... ' That simply goes without saying. But when we say,

[20] See J. Bentham, *An Introduction to the Principles of Morals and Legislation* (ed. J. H. Burns and H. L. A. Hart, London, Athlone Press, 1970), chapter 1, for a discussion of 'happiness' as the single basic value of human experience, understood in terms of a surplus of pleasure over pain. John Finnis, in *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), suggests that there are seven basic goods, namely, life, knowledge, aesthetic experience, friendship, play, religion, and practical reasonableness, and that these are not reducible to each other, not substitutable, and not mere instances of a single *summum bonum*.

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cautiously, 'As a matter of principle, the right thing to do here is probably thus and so ... ', we draw attention to the possibility that there may be some rule that will block out the answer derived from general principles alone.

8. STANDARDS IN RULES

It is possible that explicitly formulated rules themselves incorporate standards in their operative facts or in their normative consequences. This is indeed very common in many domains of law, especially private and commercial law, and in non-criminal branches of public law. The Uniform Commercial Code (like the Sale of Goods Act in the UK) is replete with illustrations of this – here is an example:

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
(2) Where the buyer rejects a non-conforming tender which the seller has reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

Here, a decision-maker, including a business executive deciding what to do, or a lawyer deciding what to advise, or a court deciding a litigated dispute over a sale in relation to which the other operative facts appear to be satisfied, has to evaluate the situation – seasonable or not? reasonable or not? This involves judgment of a bounded kind, for what is in issue is only the seasonable or the reasonable in a quite specific context of a sale of goods by description or by sample, where there are probably known usages of trade in a given market.

The advantage of articulating rules with such built-in standards is that the rule in question can then be treated as a rule of strict or even of absolute application without the risk of decisions that depart vastly from those that would be satisfactory to a person of informed common sense. Of course, this requires that those who exercise

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discretion be themselves persons of good discretion and judgment. To the extent that they are, a compromise is struck between the merits of clarity and predictability engendered by the strict or absolute use of rules to regulate a situation, and the merits of flexibility and common sense that emerge where one can pass a free judgment in terms of relevant principles unhampered by the exclusionary effect of such rules.

From the point of view of the present attempt to provide an analytical framework for the following discussion, we need not enter further into the question of the advantages and disadvantages of different approaches to rule-formulation and the use of standards, and the quantum of discretion that it may be wise to allow a decision maker to have in one context or another. Suffice it to note that when rules are articulated so as to incorporate standards, their operative facts include what we may call 'operative values' as well.

9. INSTITUTION AND ORDER

Returning briefly to the example of the queue, we can remind ourselves that many instances of forming a line and taking one's turn arise in quite informal settings, without taxi-marshals or post office managers administering them in terms of some established system, from which comes the decision-making authority of marshal or manager. Queues frequently form as a matter of informal normative order. This has an interesting bearing on the kind of information we derive from observation. I do not just see a dozen people standing in a certain spatial interrelationship, say on the verge of a narrow lake, although I do indeed see that. I see what I infer is a queue of people waiting for a boat to ferry them to the other side. My factual information is infused with a normative understanding. I assume that they are doing something which each of them understands as norm-governed in a reciprocal way, even though the norm may be wholly implicit and taken-for-granted.

According to the usage under discussion in the present collection of papers, we may say that the existence of a queue is a matter of 'institutional fact', not simply one of 'brute fact'. Our judgment of the state of the world is not simply in terms of pure physical facts and relationships, but in terms of an understanding of such facts and

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relationships as humanly meaningful because imputable to shared human norms of conduct.[21] We know why this is so. Observance of norms leads people into patterns of behaviour. Our own human interests make us ready to look out for patterns of the kind that connect to the expectations and judgments of our fellow humans rather than other kinds, when we are engaging in ordinary practical life rather than abstract scientific inquiry about it. We do not merely observe, but join in – for example, if ourselves hoping to cross the lake.

Recurrent instances of ordered practice imputable to the same or generically similar norms bear names, such as 'standing in line', or 'queuing', or again, 'promising', or 'praying', or 'running a race' (as distinct from simply 'running'), or 'dancing', or 'giving a lecture', or ... the list is endless. According to a common usage, that will be adopted here, these can all be deemed 'institutions', just as judgments about instance of them are judgments of institutional fact. But of course they may be very informal institutions indeed, just as normative practices may be wholly informal and dependent on convention rather than any articulated rule.

But order can become formalized. We might even say that it can be institutionalized. We have already seen how this can happen, as when there is a taxi marshal as well as a taxi queue, or a manager who administers the queuing arrangements in the post office. The existence of the second tier of the practice leads to or is accompanied by an increasingly explicit articulation of the first tier. There are explicit rules, not mere conventions. And indeed the position held by marshal or manager is almost certainly itself an expressly created job, perhaps with a formal job-description set up within an organization with a quite elaborate structure of interrelated roles or jobs and with officers or employees appointed to carry them out. In such a context there is clearly what we may call 'institutional normative order', not mere informal normative order, with informal institutions.

[21] Peter Hulsen rightly criticizes an earlier formulation by me of this point, on the ground that I suggested there have to be formally articulated rules before there can be institutional facts – see Hulsen "Back to Basics: A Theory of the Emergence of Institutional Facts", pp. 284–285, Section 3.2, in this issue. See likewise M. de Groot and M. Oude Vrielink, "Legal Theory and Sociological Facts", also in this issue, at pp. 261–263.

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A consequential feature of the formalized institution is worth mentioning. Where the formation of a line or queue is not simply a largely spontaneous response by particular people to a problem of co-ordination, but is organized in the context of the airport taxis or the post office or the railway ticket counter or the supermarket checkout, avoiding the queue or jumping it becomes very much harder, almost impossible. For those in charge of the service are most likely simply to refuse service to someone who has not waited his/her turn according to the rules that have been established. Let us imagine a person who conceives his or her status (albeit not recognized by the service providers) to be so exalted that ordinary folks should give way to them. Even such a one, who refuses to recognize the legitimacy or fairness or even the existence of the queuing rule in relation to himself or herself, is faced with a disagreeable fact. He or she cannot get the service sought except by acting in accordance with that very rule, that is to say, cannot do so unless prepared to take some kind of forceful action that goes the length of a breach of the peace, or even theft, or assault, or, in an extreme, murder. Many who might cheerfully enough jump queues draw the line at engaging in such relatively serious wrongdoing, hence they are constrained even by rules they would otherwise set at naught. In this way, institutional facts become hard realities, facts that constrain us, not merely norms that guide our autonomous judgment.

10. ON LEGAL INSTITUTIONS AND LEGAL RULES

The constraining quality of the queue as an organized social institution is replicated even more clearly in the even more formalized case of institutions that are subject to regulation under state-law. In the case of the railway ticket-counter, the queue organized by the local manager is, of course, a queue for railway tickets. Buying a railway ticket is entering into a contract of carriage, governed not only by the general law of contract but by a considerable volume of detailed regulations special to carriage of persons by rail. One can say the same in relation to carriage by air or by sea, and the same again of the contract for travel insurance acquired by the prudent person before embarking on a journey attended by greater or different risks than those affecting ordinary everyday life.

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So far as concerns the normativity of state-law, all this falls in the realm of the 'ought'. You ought to acquire a ticket to gain the right to a seat in the train or on the plane. If you are a rightful ticket-holder, the railway or airline company has a duty to, and thus ought to, carry you in accordance with all the conditions of carriage to which you and it have agreed in the contract concluded with purchase of the ticket. The company must also conform with all the other regulatory obligations governing the relevant mode of carriage.

On the other hand, it is to all intents and purposes totally impossible to effect entry on to a regular service flight run by a commercial airline unless you have a ticket, and have checked in, and gone through the whole institutional ritual so familiar to contemporary travellers. Rail travel differs only in degree; and travel on many underground commuter lines is now controlled by turnstiles that will open only on insertion of a valid ticket. It is physically impossible (or at least difficult) to gain access to the service without satisfying the rules of the institution. Normative forms turn out to be impenetrable practical constraints, except for the violent hijacker or the cunning and desperate stowaway.

Property likewise is ultimately dependent on norms, indeed on highly detailed, formally articulated rules, often of seemingly labyrinthine complexity. Having rights of property in some physical object, or over some (normatively demarcated) piece of land entails being protected by rules that require others to leave you unimpeded in possession and use of the thing or the plot of land, and presupposes that you acquired the rights in normatively regulated ways, by gift, purchase, or first or adverse possession. All this is ordinarily overshadowed by the social-facticity of physical control over the thing or land and access to it, the sense of psychological security and easy familiarity, the unreflective acceptance by others, at any rate others who also have some things to call their own, that this is yours and you have the say about what goes on here, how this car or computer is used and by whom.

Our perception of the space around us is of land parcelled into plots with houses or shops or factories or farm fields and hill pastures, interspersed with public parks, open highways, and so forth. On the land are things that belong to people. Well-to-do people own stocks and shares and other intangible assets, and these

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actually presuppose the whole normative fabric of laws governing government debts and private corporations, yet ordinarily we contemplate simply these abstract entities (represented often through pieces of specially printed paper) just as so many other 'things' that may be owned. Next year's not-yet-sown crop of oats can 'change hands' as readily as a bag of oatmeal from last year's now harvested one. Rights to 'futures' are as real 'institutional things' as bags of oats are physical ones – the right of property in the bag of oatmeal being in legal truth no more tangible or less institutional than the right over the future crops, or over stock options, or any other such bizarre imaginary entity over which fortunes may be won or lost. The fortune that is won or lost is itself only money, a medium of exchange that exists purely through the faith humans have in the norms, mostly indeed explicit legal rules, governing the exchange process and the character of legal tender and the right to mint coins or to print and issue bank notes.

The law of a modern state is indeed an institutional order of great and bewildering complexity, so much so that no one can become truly expert in more than a relatively small domain within it. Yet behind the complexity, it is possible to discern simplicity. A state has, as such, a constitution. This is a complex of explicit rules, implicit rules, and conventions, that essentially establish three types of institutional agencies, namely, of course, judiciary, legislature, and executive. For each, three types of provision must be made: (1) how is a person validly appointed or elected to office as a judge of the higher courts expressly regulated by the constitution, or to membership of the supreme legislative body, or to office as the chief executive or membership of the higher echelons of the executive branch of government? Then (2) what is a person empowered to do and what obligated to do in virtue of holding office, and what commitment by way of solemn oath must he or she give; and what powers are corporately invested in courts acting as such, the legislature acting as such, the executive acting as such, either chief executive as 'corporation sole' or the executive branch viewed corporately? Finally, (3) how does one who has validly held office come to lose office, and what is the process of transfer of authority to a successor?

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A further element that is so common in present-day constitutions as to have become in some views essential to the very concept of 'a constitution' concerns a specific sort of limit imposed on the exercise of the powers of governance envisaged in (2) above, a limit that gives body to the obligations of office also envisaged under (2). That is, a bill or charter of fundamental rights. These are rights either conferred or authenticated by the constitution that cannot be validly derogated from by legislation except to some extent in defined situations of emergency; rights that must be upheld by the courts in the face even of contrary legislation or executive action; rights that the executive is obligated to respect in its use of constitutional power to carry out its tasks of governance and of public protection from internal crime or insurrection or external military threat.

It is also essential that a constitution define the personal and physical sphere over which the state (through its constitutional organs) exercises or purports to exercise its authority. The state territory is explicitly or implicitly defined, citizenship conferred, and jurisdiction asserted over all citizens, and all persons from time to time in the state territory. Commonly state symbols, like the flag and a national anthem are also defined, with explicit or implicit obligations of respect toward these.

The viability of constitutional arrangements of this kind depends on effective interlocking of the several powers and obligations envisaged in (2). The legislature's power to enact binding rules of law is effective only to the extent that the courts acknowledge an obligation to apply the legislature's enacted rules as rules with the force either of absolute or at least of strict application. The courts' power to apply law is ineffectual unless the executive acknowledges an obligation to organize adequate enforcement processes to ensure general observance; in turn, this requires that the courts and legislature recognize the executive as either explicitly or implicitly empowered to act effectively; and this in turn has bearing on the interpretation of the charter of rights. Whatever the explicit rules may be that a constitution lays down to fill the slot indicated above under (2), it is almost inevitable that these will have to be further amplified both by conventions and by rules, at least implicit rules, emerging from precedents, particularly those of the highest court.

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A constitution defines a state as a legal entity. But it is not only a legal entity. In an important sense it is a political and social entity before it is a legal one; or at least it is an effective legal-institutional reality only to the extent that it is also a politico-social reality. Politics is about the exercise and the control of power in its factual sense. Power concerns what people can be made or induced to do. Political power includes and requires ultimately the ability to use physical force to overwhelm direct opposition, but, short of that, and much more visibly most of the time, it depends on much else, including popular support and endorsement, democratic legitimacy, psychological pressure, economic inducements (dependent in the last resort on ability actually to control those physical things and spaces that are the basis of any system of use-and-exchange), rhetorical mastery, skill in the media of communication, exploitation of public pomp and ceremony, personal charisma, traditional respect, and (through all the others) control of public agendas.

A constitutional state achieves institutional actuality to the extent that power is actually exercised largely in conformity with the provisions of the constitution. The norms explicitly and implicitly laid down in the constitution have to become actually operative rules and conventions of conduct observed and respected by those who claim to hold office as defined by it, having acquired office in the stipulated way, or having achieved a confirmation in the stipulated way of an office initially acquired de facto.

Further, the constitutional obligations of the courts must extend to an obligation to uphold and apply an adequate body of private law, commercial law, and criminal law, in addition to explicit constitutional law and other subordinate public law regulating agencies of state, including nowadays agencies of the welfare state implementing rights to and discretionary schemes concerning social security and health services. That is to say, there must be in some form a corpus of articulated and express rules (supplemented or not by precedents and the partly implicit rules of case-law) concerning persons, things (property rights and succession rights), obligations among private persons, and forms of action whereby to enforce private obligations and vindicate private rights. There must be a corpus of rules defining the forms of criminal wrongdoing, and generally prohibiting wilful commission of crimes, with authoriza-

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tion of public officers to instigate appropriate judicial intervention and trial in the event of alleged breaches of criminal law. In commercial law must be handled the specialties of corporate personality and the rights and obligations arising thereunder, as well as employment rights and powers, and powers and obligations involved in commercial transactions must be defined, and connected again to provisions for regulated litigation before the courts, or before arbitrators with powers partly defined by general commercial law, partly by private commercial agreements.

To the extent that the courts and other official agencies do actually respect and uphold these bodies of law, as well as, and in the spirit of, the constitution, state law acquires that institutional reality of which we have spoken. The particular institutions of private and commercial law (briefly alluded to earlier) acquire constraining actuality as a counterpart to their valid normativity. Those individuals and groups who themselves autonomously endorse and acknowledge the binding character of the legal norms involved find their mutual expectations, and their other-directed normative expectations, reinforced by official action, and this confers a further sense of legitimacy on the norms endorsed and the expectations and judgments founded on the norms.

It is true indeed that without effective political power, and effective political co-ordination among power-holders, a state cannot be kept in existence. It is likewise true that a constitution and a constitutional state cannot exist without power that upholds the norms both of the constitution itself and of the whole legal system that the constitution validates as binding law for officials and citizens alike. Yet popular legitimacy is a powerful source of political power. Human beings are led by opinion more than by force, and the opinion that power is being exercised under law is a notable inducement to accept as legitimately in authority those who do in fact exercise effective political power over the state's claimed territory. So law can contribute to power perhaps almost as much as power contributes to law, wherever there is an ideology that proclaims the value of rational government under law. For then even the most cynical and deviously motivated public official has a strong motivation to act out the public observances of commitment to law however

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little these may truly express an inward motivation of the private will.

How then shall we summarize the character of legal order? Where this is taken to be the legal order of a constitutional state, or *Rechtsstaat*, it requires a systematic interrelation of norms that empower the necessary public agencies. One agency must have judicial power under 'rules of adjudication' stated in or made under the constitution, and with that must go the obligation to recognize and uphold the constitution itself and all the rules of public law, private law, and commercial law that are validly established and binding under the constitution, in accordance with a ranking of 'sources of law' that the constitution recognizes. As has been said, there must be 'criteria of recognition' of binding law, and these must be respected by those on whom a power of adjudication is conferred. Another agency, constituted or elected in a regulated way, must have power to enact general norms of law by stipulated processes, subject to any constraining disabilities explicit or implicit in the constitutional order itself, in particular with respect to charter rights. This power of enactment of general rules (or 'rule of change') has to match quite exactly the 'criteria of recognition' as interpreted and implemented by the judiciary, this being one point on which constitutional coherence requires observance of constitutional convention. The executive, and the civilian executive departments and the defence forces, must be empowered to implement constitutional norms and to carry on government as empowered and mandated under constitution and law.

Conceived in the abstract, this amounts to a schema of norms, descending in the well-known pyramidal structure from the relatively concise set in the constitution itself, through the various tiers validated below that. The norms at the highest level exhibit a notorious self-referential character – the court holds power by the constitution, but the court has power to interpret the constitution and thereby determine what its own constitutional power is, and so on. The logically problematic character of this self-referential quality from the point of view of an abstract and descriptive account of the norms and their contents is overridden in practice as political decision making in the light of acknowledged convention keeps the whole in dynamic operation. The dynamic character of law-making

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and law-deciding, interacting with the whole range of institutional activities of officials and citizens and all engaged in practical activity in the territory, creates an ever-present possibility of conflict and incoherence between norms on different tiers and among norms on the same tier, these tiers being determined by reference to the hierarchical ranking of criteria of recognition. The conception of law as 'legal system' implies the always ongoing use of powers of interpretation and decision to resolve conflict and incoherence by interpretation and by declaring null, or quashing, or overruling norms that cannot by any reasonable interpretation be reconciled with governing higher or weightier norms of the 'system'. The legal order of a viable constitutional state is the organized institutional normative order so constituted, comprising a nested set of more or less formal institutional orders structured with reference to legal norms of all relevant kinds.[22]

This highly articulated, strongly centralized, and often overwhelmingly powerful, institutional normative order is by no means the only manifestation of organized institutional normative order in the contemporary world, or in the past. There were city-states and empires and feudal kingdoms before ever there were either enlightened despotisms or constitutional states, and all are instances of institutional normative order. So are contemporary churches and entities of contested character such as the European Union or (in respect of human rights) the Council of Europe, or the United Nations. So again are schools and universities and private corporations. The claim of states to be the sole ultimate validating bodies for all other forms of normative order are not to be taken as true at their face value. A pluralistic conception of law and legal order is fully compatible with a recognition that any account of the character of law must start, even if it does not finish, with the law of the contemporary constitutional state.

[22] The overall picture of a state legal system sketched here is, of course, very greatly indebted to Hart's *Concept of Law.* The discussion of self-referentiality is owed to G. Teubner *Law as an Autopoietic System* (trans A. Bankowska and R. Adler, ed. Z. Bankowski) (Oxford: Blackwell, 1993), pp. 19–24.

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11. A RECAPITULATION ON INSTITUTIONS

The practices or institutions that we recognize, whether these be purely informal or formally institutionalized, seem to have a broad range. Sometimes, activity or practice is dominant, as when we focus on the practice of queuing, or of ballroom dancing, or managing a government office or governing a country. Sometimes the roles of those who recurrently play a key part in relation to a practice are at the forefront of attention, as when we focus on the taxi-marshal, the office manager, the dancer, the President, the King or the Prime Minister. Sometimes primary focus is on the institutional structure which we conceive to be the framework for or the product of the practice, as when we direct attention to the queue, the office, the slow foxtrot, the ballroom dancing competition, the headship of state, or indeed the state or the constitution. Sometimes an institutional entity is a collective agency within which actions of persons in given roles count as or amount to an act of a kind that can only be imputed to the collective agency. The National Assembly cannot pass Acts except if its members vote in sufficient numbers for a Bill at all its readings; but when they do so, it is the National Assembly, not the individual members, that enacts the law. An appellate court passes judgment in accordance with the view of a majority of the judges sitting; but it is the Court, not the judges, that decides the appeal. My team cannot score a goal unless I or one of my team mates kicks or heads the ball into the net from a non-offside position. But it is the team that wins the game, not the goal scoring individual. It is the orchestra, not its members, that plays the symphony.

In all cases, there is a question that may be asked, in terms suggested by John Searle's notion of a 'constitutive rule'.[23] 'What makes something count institutionally?' 'When does bodily gyration count as dancing?', 'When does a line of people count as a queue?', 'When does a group of judges count as ["constitute"] a court?', 'When does a Parliamentary leader count as a Prime Minister?' The general lines for an answer are already clear. That

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[23] Searle, *Speech Acts*, pp. 34–51; the point is also discussed by Ruiter in Sections 1 and 2 of his paper 'Structuring Legal Institutions' in the present volume.

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the one counts as the other depends on the possibility of interpreting what occurs in the light of a norm or norms, that may range from the most informal implicit norm or convention to the most highly formalized and articulated rule. We should stress here a 'possibility' of interpretation, for often in reality we have a simple and unmediated understanding of what is going on. I just see a couple dancing round the dance floor; I do not see curious movements, then consult my mental registers to work out that this is a foxtrot. Nevertheless, even when my understanding is direct and unmediated, it can be interrogated and justified; if a doubt arises, I check it by discovering whether what was being done was oriented towards norms and was sufficiently in conformity with them to count as what was intended by the actors.

Moreover, practices and institutions always have a context and a 'point'. The context might be of family life, or of leisure activities, or of work, or of business, or of commerce, or of religion, or of public affairs, or of administering public justice, or the like. The point lies in some structured pursuit of aims or ends or some structured realization of value in the given context. Practices evolve or develop as people find ways of articulating or realizing aims, ends, or values. Once particular ways achieve recognition, the norms that evolve with the practice can come to be conceptualized in terms of roles that people play and frameworks within which they play them. The more exactly articulated the relevant norms become, the more exact becomes the definition of who counts as a judge, or an orchestral conductor, or the first violinist, or the centre forward, or President of the Republic, or Prime Minister. And the framework within which action takes place comes to be recognized as a social reality without losing its essentially normative quality.

As this becomes formally articulated, or if we seek to clarify a particular institution by articulating it, the tripartite division of rule-types that I have suggested elsewhere seems useful and natural: How is a person appointed to or recognized in a certain role? What obligations and powers and general responsibilities attach to the person in virtue of holding the role? And how can a person lose or demit or be dismissed from the position that carries the role? In the case of an institution-framework or an institution-agency, we ask how any particular instance gets set up or instituted in the first place, what

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the consequences are in view of the general governing rules and the particular contents of the particular régime or agency established in any given case, and how it can be terminated so as to cease to have effect. This conceptual approach seems preferable to Searle's suggestion about 'constitutive and regulative rules',[24] for the following reason. Searle's schema tells us that making a promise counts as incurring an obligation. But this is a curious 'rule'. It leaves us in the dark as to how one actually incurs an obligation by promising[25] – what must I do to incur a promissory obligation? Just as important: when will things that I have said or done be correctly held by others to count as promises that incurred obligations? These are preparatory matters to the centrally regulatory norm, that says one who has promised has an obligation to fulfil whatever was undertaken, and must do so unless exceptional circumstances prevail. How if at all one can be discharged from a promissory obligation is also a point

[24] *Speech Acts*, pp. 34–51; Ruiter argus in the present volume, at sections 1 and 2 of his paper, that 'constitutive rules' are essential to clarifying the concept of 'institutions'; with respect, I disagree, and think the point he rightly wishes to make is better formulated as stated here.

[25] With all the respect that is due to one whose intellectual leadership has been decisively important, I have to say that Searle's canonical '*x* counts as *y* in circumstances *c*' seems unhelpfully overbroad, for almost anything can count as almost anything else in apt circumstances. A bottle can count as a weapon in a pub brawl without any of these concepts having to be considered a a social institution, or a legal institution, or a cultural one either. On the other hand, it is true that a glass vessel with a narrow neck used for storing liquids counts as a bottle. This may indeed tell me something about the noun 'bottle' or even the concept 'bottle' within the English language. If there is anything we should call an institutional element here, this would relate to the sense in which nouns or concepts might be characterized as institutions within languages; but this would not give helpful information about institutions in the wider practical sense that Dick Ruiter and I are concerned to explore.

The significant, though not great, difference in our two approaches to the theory of legal institutions lies in these two points: first, he has in some respects adhered more closely to a Searlian version of institutions than I have, even though he has also extended Searle's account well beyond Searle's own limits. Secondly, he has been much bolder than I in stipulating specialist usages for terms like 'judgment', 'presentation', 'representation' and others. This lends his work its characteristic rigour, but sometimes has the effect in my respectful opinion of making it difficult on account of the strain between his special, stipulated sense of the terms and their more common usages in jurisprudential and legal discourse.

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on which one would expect to find at least some implicit norm or norms. The 'constitutive rule' as Searle envisages it includes part of both 'institutive' and 'consequential' elements as I account for these. And it fails to convince as a 'rule' in the normative sense, that is, as a guide to judgment and conduct. For the boundary between regulative and constitutive is unclear in Searle's schema. In fact, the full panoply of institutive, consequential, and terminative rules in my schema is 'regulative' in the sense of regulating (or at any rate authoritatively guiding) how people are to undertake commitments when they think fit to do so, in what spirit they must honour their commitments made, and how they are in the end to wind them up or be released from them.

Yet, as I have said, there is value in trying to answer the question that the so-called 'constitutive rule' answers. Effectively, as I have suggested, the question is about the point or general aim, or end, that is, the 'final cause', of any particular practice or institution. The mere fact of being statable in terms of a triad of institutive, consequential, and terminative rules is after all something that all institutions have in common. It is in their final causes, reflected, of course, in the content of the triadic rules, that they differ. Thus for each it is possible to formulate some guiding principle or principles that express the underlying final cause. Here are some examples: *Promises are ways of voluntarily subjecting oneself to obligations in favour of others. Contracts in law have the same end under more narrowly defined conditions and with particular regard to bilateral obligations undertaken in business settings. Trusts are arrangements under which property is granted to persons who are to manage its use and/or profits not for their own benefit or for their own purposes but for the benefit of determinate or determinable persons or the pursuit of specified purposes. Corporations are associations of individuals to which a separate legal personality attaches for the purpose of holding property and bearing and discharging legal obligations and responsibilities*. And so on.

Unless you know the underlying principle or final cause of a given institution, it profits you nothing to know how an instance of it can be established. When Searle and Ruiter speak of 'constitutive rules', they make an important point, but one that is, I submit, better expressed in the present terminology of 'underlying principle', or

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'final cause'. A further utility of so conceptualizing matters is to facilitate comparisons across cultural contexts and legal traditions. The same norm-formulations are unlikely to fit exactly two different cultural practices, and where different legal systems articulate formal rules about contracts, marriages, trusts, or corporations, they seldom do so in identical terms. To the extent that different norm-complexes or rule-complexes amount to different ways of achieving the same or a similar general aim or end, that is, as different concretizations of the same or a similar underlying principle, there is a basis for intelligent comparison from culture to culture, legal system to legal system.

Underlying principles are thus essential to the comparative task, for comparatists have to formulate what they take to be a relevant governing principle, and then ask what if any institutions satisfy this principle in different social and legal settings, being relevantly comparable variants of essentially the same institution exactly to the extent that the stipulated principle is satisfied in one case or another. They are also of great importance in interpreting and applying or implementing particular instances of given institutions. Without some broad conception of what contracts or trusts are for, it is impossible to achieve an intelligent interpretation of contract law or the law of trusts, or therefore, of any particular contract-régime or trust-régime.

12. TAKING RUITER SERIOUSLY

Already I have borrowed the term 'régime', and indeed the idea of a régime, from Dick Ruiter. This is indeed one of the most exciting ideas in his recent work, exemplified in the present collection of papers by his discussion of a 'Treaty Régime' with particular reference to that contained in the Sea-Bed Treaty. Since we are working within the same family of ideas, and always with reference to each other's work, it is incumbent on me to see how this and related ideas mesh with the framework I have proposed above.

A 'régime' in this sense comprises a set of norms which are contained in or derivable from the text of the Treaty in question, taken together with any general norms of international law applicable wherever a treaty exists. On account of the *pacta sunt servanda*

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principle, the norms laid down in a Treaty are binding on all the states that are parties to it. In the same way, one might speak in private law of a 'contract régime', or a 'trust régime', or a 'foundation régime' with reference to the duties laid upon the parties by the terms of their own contract read together with the general law, or the duties of the trustees and rights of the beneficiaries under a particular trust, or the duties of the officers and legitimate uses of the funds dedicated within a particular foundation (*Stiftung*) established by some individual or individuals. Each contains provisions properly interpreted as laying down norms that are to govern in various ways the doings of relevant parties, in supplementation of and/or perhaps partial derogation from other general provisions of the law.

In all such cases, we are dealing with a particular 'arrangement' (to repeat a term I have used elsewhere[26]) that people have made within the framework of the abstract institution recognised by law. A specific arrangement is a concrete instance of an abstract institution, a concrete institutional case of an abstract 'framework-institution'. The abstract institution belongs in some normative order as one of its organising concepts. It has a place within a particular normative order wherever we can articulate norms regulating the establishment of arrangements that fall within the framework, and further norms that govern the types of consequences that flow from such arrangements, and also norms indicating when and how such concrete arrangements can be brought to an end. In such cases as treaties, contracts, trusts, or foundations, the party or parties who make the arrangement are left with a considerable range of choice as to what shall be the exact arrangement they make, with what normative implications for each of them and for third parties. This is never a totally free choice of course, for almost always there are some standard consequences determined by 'consequential rules' of the institution that are not open to derogation or variation by the choice of the parties. Ruiter suggests that the typology of rules needs to be expanded to include, as well as 'consequential rules', what he calls 'content rules', to allow for the way the general background law may stipulate what can and cannot be included in a particular régime that instantiates a certain (abstract) institution. He is certainly correct

[26] See MacCormick, "Institutions, Arrangements, and Practical Information", *Ratio Juris* 1 (1988), pp. 73–82.

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in the point he makes, though for simplicity's sake I should be inclined to reformulate the definition of 'consequential rules' so as to accommodate this point.

So let it be said again: the general law of treaties, or of contract, or of trusts, or of foundations indicates what is the class of persons who can enter into arrangements of the relevant type, and what steps they must take in order to do so ('institutive rules', as noted above). Further, the general law indicates what consequences are to follow in the normative system ('consequential rules') from entering into just such an arrangement. The arrangement is recorded in some agreed text (or, less usually nowadays, in an exchange of spoken utterances). The text indicates what has been arranged, usually by stating who has to engage in or abstain from what courses of conduct or particular acts, what powers are conferred and by whom they may be exercised, affecting what things or other arrangements.

Such a text is interpretable as comprising or at least including a set of relatively concrete, often individual, norms of conduct, applicable in relevant circumstances as criteria for proper conduct, or competent action, by one or more parties. What exactly anyone is required permitted or enabled to do or not do, and at what time, may depend upon contingent events as these unfold. The régime is the normative order that we interpret the text as laying down, taken together with any general consequential norms of the institution that likewise become applicable in the events that occur. To ascertain when such a régime comes to an end, one has to consult the 'terminative' rules of the institution.

Normative régimes of this kind have an obvious pervasiveness and importance in contemporary society, with particular reference to economic activity. Closely connected are the ideas introduced earlier of institutional roles and institution-agencies. Dick Ruiter has drawn our attention to constitutional provisions governing the institutions of 'kingship', or 'presidency of the republic' in respectively the Netherlands and the French Constitution; in these and similar constitutions, we can all think of characteristic types of provisions about appointment to judicial office, election to membership of the legislature, appointment as a minister of state, or to a post in the civil service or in the armed forces. In all these cases, there may be more than a few articulated norms requiring certain

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conduct, or conferring powers consequential on (valid) appointment to the office in question, but rarely are these exhaustive of all that is understood to go with occupancy of such a post. Ruiter assigns these to his class of 'unique legal institutions', and suggests that in these cases state constitutions tend to omit any form of 'constitutive rule' according to the typology I discussed above in relation to Searle and Ruiter. Again, it seems that we should have regard to what I call the 'underlying principle' or 'final cause', rather than look for 'rules' of the kind stipulated by Searle or Ruiter. A theory of the constitution, or of democratic (including limited-monarchical) constitutions in general, guided by some version of the separation of powers doctrine, indicates the point or principle of such offices of state, and this is in turn relevant to 'filling in the blanks' in the written constitution, where it is silent on duties and powers implicit in the office.

In contracts of employment, we find people being appointed to posts such as 'professor of law', 'general manager', 'personal assistant to the managing director', 'shop assistant', and the like. The contract of appointment may specify duties of the post in a broad way, and this may be further detailed in a 'job description', but this is never exhaustive. It seems that always in context our understanding of such appointments depends also on a conception of the relevant role based in current custom and usage in the relevant sphere of life. In cases of difficulty or dispute, certainly, a hitherto inarticulate aspect of the role may be made explicit for the given case through an individual norm competently created by some process that is itself envisaged within the overall régime in question, or imposed through determinations of other institution-agencies operating within the surrounding order. But the full normative meaning of the arrangement that was made depends on an understanding of the role in question derived from the social and commercial or constitutional context.

In this connection, I should like to intimate a minor disagreement with one view of Ruiter's. In *Institutional Legal Facts*, he suggests that appointments and such like acts are 'declarative' acts. As such, in the first instance they take effect with a 'world to word' direction of fit. For in being named a 'Leverhulme Professor' by the competent authority, I become one. The world changes to match what was

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said. But then, Ruiter adds, there is a second phase where the act of appointment exercises pressure for recognition in the surrounding world of utterance.[27] The appointment actually takes effect and counts as valid only if there is ultimately 'word to world' fit; that is, only if everybody behaves towards me as a Leverhulme Professor ought to be treated. I doubt this. I think one needs to differentiate the issue of valid appointment to an office or a job from that of due performance by relevant parties of duties owed to the appointee. A valid appointment by a competent authority is indeed sufficient to make it the case that the appointee holds the appointment. Consequentially upon holding any appointment, the appointee has the right to be admitted in a properly effective way to performing the role in actual practice, with the opportunities and facilities expressly or customarily accorded to holders of the post or job in question. Certainly, an appointment takes full effect only when the appointee takes up office and is able to perform the institutional role in a normal way. This is to say that institutional arrangements take full effect only given respect for the normative consequences the surrounding system attaches to them. We should not conflate acknowledging the rights incidental to valid appointment with the conditions of there being a valid appointment to acknowledge.

However that may be, it is clear that we need to reflect further on the concept of 'validity'. Again, I applaud the huge contribution Ruiter has made to clarifying it. We have seen how a contractual or treaty régime may be encapsulated in the relevant contractual or treaty text agreed by parties, a text that, in the case of a treaty, has to be duly ratified by signatory states. The régime consists in a set of particular or general provisions whose normativity is underpinned by a consequential rule such as that implicit in the *pacta sunt servanda* brocard, and perhaps supplemented by other general consequential rules. But we have so far glossed over the issue of validity of the contract or treaty itself. What makes 'valid' the *pactum* that is thus *servandum*? Here we need to repeat that it belongs to the general normative order itself to prescribe the conditions for validly establishing an arrangement of the relevant type.

[27] See Ruiter, *Institutional Legal Facts*, pp. 52–54.

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Validity is a concept special to institutional normative orders, since it is the conceptual tool for distinguishing between that which is operative within such an order and that which is not. Valid exercises of power are effective in changing the legal situation in some way, and indeed they often bring about complex sets or series of changes. Whatever reason one has for bringing about such changes, these are reasons to observe the law's requirements for validity; hence such requirements are in the Kantian sense hypothetical in character. A complete understanding of any particular power (and, generalising, an adequate understanding of the concept 'legal power' in its institutional setting) therefore depends on adequate awareness of the whole range of circumstances required for validly exercising power. The conditions of legal enablement characteristically cover the following points:

(a) Which person or persons, having
(b) What general capacity or particular position
(c) Subject to what required circumstances, and
(d) In the absence of what vitiating circumstances
(e) By what special procedures or formalities, and
(f) By what act
(g) In respect of what if any other persons
(h) Having what general capacity
(i) In respect of what thing or activity
Can bring about the designed legal outcome.

Powers are thus elements built in to institutive rules, and a purported exercise of power can be defective on the ground of being exercised by the wrong person, or by a person lacking the required capacity or position, or for the absence of a required circumstance or the presence of a vitiating circumstance or for some defect in form or procedure or on the ground of material error about or incapacity in the other party (where a bilateral transaction is involved), or on the ground that the thing over which the power is to be exercised is not within the power of the actor. But where all goes well, the designed outcome is achieved, that is to say a valid arrangement, a valid instance of the institution in question is achieved, having the specific content determined by the parties so far as they are enabled to insert specific terms within such an institutional régime. A new 'contract

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régime' or 'trust régime' or a new 'Act of Parliament' exists, that is, 'is valid'. But what is this specific mode of existence, this validity?

Normative validity in the context of normative systems means system-membership. Normative systems are systems that guide the judgements and actions of rational agents. A rational agent concerned to observe the norms of a particular system needs to have means of discovering which norms belong within it at any given time, hence needs to know what purport to be its norms, and which of the purported norms are genuinely valid and have not (yet) been terminated. The creation of a new institutional régime adds new individual norms to the system, or affects the applicability to specific individuals and contexts of general norms ('consequential rules' of the institution) that belong to the system.

This certainly indicates that it is only too likely that conflicts will be discovered from time to time between norms that have been validly created. If separate acts introduce new valid arrangements or régimes into an existing system, there can be no guarantee of mutual compatibility. Validity in this understanding is in no way analogous with truth. Ruiter and Kelsen have shown this in a completely convincing way. Nevertheless, it is rationally unacceptable to conclude that conflicts of valid norms simply have to be acknowledged. Here, Ruiter is entirely correct in what I take to be his fundamental point. Normative systems belong within the domain of practical reasoning, or, perhaps, *vice versa*. (Perhaps we should understand practical reasoning as the kind of reasoning that belongs within normative systems). This means that it is an essential feature of normative systems that rational agents can use them as providing guidance what to do. But norm-conflicts of the kinds Ruiter has analysed are totally incompatible with rationally intelligible guidance. Therefore it is a necessary, not an accidental, feature of such systems that they include internally to themselves normative methods for eliminating conflicts whenever a conflict becomes apparent to one who is judging what he/she is now or in the early future required to do, as one who seeks to act with fidelity to the system. If you want to respect the rights of individuals that a system institutes, you have to find a coherent and non-contradictory sense in the norms that are applicable. This is achieved through a mixture of the following three methods: interpretation, aimed at finding non-conflicting readings

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of relevant norm-texts; application of ranking criteria like *posterior derogat priori* (later acts impliedly repeal earlier inconsistent acts to the extent of the inconsistency); and resort to substitute performance arrangements such as damages or renegotiated delivery dates or the like.

I wonder how far we could press here an analogy with descriptive utterances. Let us take an academic paper or a book by Ruiter or Kelsen or myself. Let us conceptualize this for the moment as an aggregation of written sentences. In the act of composition, it feels like that. One writes a sentence, then one thinks of another to carry on the argument or to give expression to the broad idea one has. One is interrupted, one puts aside the work for a while, then returns to it, and reads through the sentences and paragraphs so far accomplished, correcting them, even re-ordering them; and then one presses on with some further sentences, and so on.

From the point of view of the question: 'what sentences belong in Ruiter's paper?' we have a simple criterion of membership: what sentences did he write or compose on the computer with the intention to include them in the paper. If at page three we find something that looks like a shopping list, we shall suspect that this turned up by mistake, and may discount it from the start. In a printed and published version, we may be on the lookout for printer's errors introducing inauthentic material, and so on. The task of scholarly editors trying to produce satisfactory versions of historically important novels or plays or works of philosophy is an example of a process that tries to apply judgment to the task of settling what belongs, what is a valid part of the text in issue.

Even if all the sentences in the final text are purely constative or descriptive, the validity or membership test carries with it no guarantee at all that all the sentences found to belong (to be valid elements of the text) are themselves mutually consistent logically, or constitute a coherent argument or story or history. The test of belonging is not itself a test of internal logical consistency nor one of narrative or argumentative coherence. These are critical tests we apply once we have authenticated the text. If we do want to read a text for the argument it contains, we must take it to be subject to the constraints of logic. Contradictions will have to be discounted by eliminating one or other of the pair of contradictory elements or

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re-interpreting either or both, and so on. In this sense, as Ronald Dworkin has usefully reminded us,[28] the processes of interpreting narratives are not so very sharply distinct from those of interpreting normative materials.

In the context of discussing validity as existence, it seems unnecessary to follow a suggestion of Ruiter's by postulating 'Invalidating Rules' among those that structure institutions. When we look, as I did above, at the details potentially involved in those institutive rules of institutions that confer powers (powers to set up arrangements of the kind in question), we see that attempts to exercise power may be defective in more than one way. That certain conditions, including the absence of vitiating factors, are necessary for validity entails, I suggest, the converse: failure to satisfy the conditions involves failure to achieve validity. In a legal system, law courts are agencies (institutional agencies) with power to declare the nullity of defective arrangements (declaring them 'void *ab initio*'), eliminating doubt or dispute about particular contested cases. This is different from the kind of provisional validity that ensues upon certain types of minor or curable defect. Here, there may indeed be terminative rules that can be invoked to quash or nullify an arrangement, terminating its effects from that date but without prejudice to consequences already in force, especially those affecting third parties.

However that may be, a final conclusion of some importance emerges from the discussion of validity-as-existence. This is not itself the same as truth, but it does not preclude the use of notions like truth and contradiction, and the application of logical processes in an interpretative framework, either in relation to descriptive or in relation to normative texts, nor, therefore, in relation to normative régimes. To see why this is so, let us reflect again on 'institutional facts'. Not all facts are sheer physical facts, and when we think of acts and events in the framework of normative order, we discover many judgments of fact – of institutional fact – that are true so long as we assume the validity of appropriate norms within some normative order. That I hold a contract of employment with Edinburgh University is one such truth. But my holding such a contract entails ('consequentially') that I am subject to certain duties connected with research and teaching, and when someone has certain duties as a

[28] R. Dworkin, *Law's Empire*, pp. 228–232.

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matter of law, it is true, also as a matter of law, that he or she ought to carry them out, and will become liable for breach of contract in the event of failure. And persons in breach of contract may be sued, and remedies may be awarded, and these must (normatively 'must') be made good by the person against whom they are awarded. These are not 'oughts' derived from an 'is' only. They are individual 'oughts' that derive from the universalized or universalizable 'oughts' of the normative framework. But within that framework, they can be true or false, or undetermined as to truth or falsity. This has an important bearing on the logical and rational character of legal reasoning and legal justification, both in the context of litigation and judgment and in the context of doctrinal legal scholarship. A part of the importance of the theory of law as institutional normative order is its relevance in this way to a true understanding of legal reasoning and other forms of practical reasoning.

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