PART ONE

Introduction, Basic Concepts and Definitions, and A General Approach

1 ~ INTRODUCTION

"Theory is the most important part of . . . the law, as the architect is the most important . . . in the building of a house." – O. W. Holmes, Jr.[1]

"[Die Form] . . . ist im innersten Wesen des Rechts begründet."

"Form is rooted in the innermost essence of law." – Rudolf von Jhering[2]

SECTION ONE: PRELIMINARY OVERVIEW

Given the unfamiliar nature of this study, an extended preliminary overview is called for. The most fundamental question of law and legal theory is: What is the nature of a legal system? Many leading scholars and theorists of law in the twentieth century, including H. L. A. Hart[3] and Hans Kelsen,[4] viewed a legal system as essentially a system of rules. In developed Western societies, however, a legal system is far more than this. It is made up of diverse functional units only one major variety of which consists of rules. These diverse units are, in turn, duly organized in complex ways to form a system. To grasp the nature of a legal system, it is first necessary to understand the diverse functional units of the system. These include institutions, such as legislatures and courts,[5] legal precepts, such as rules and principles,[6] nonpreceptual species of law, such as contracts and

[1] Oliver Wendell Holmes, Jr., *Collected Legal Papers*, 200 (Harcourt Brace and Co., New York, 1921).
[2] R. Jhering, *Geist des Römischen Rechts: auf den verschiedenen Stufen seiner Entwicklung*, vol. 2, at 479 (Scientia Verlag, Aalen, 1993) and see also R. Jhering, *Zweck im Recht*, (Breitkopf and Hartel, Wiesbaden, 1970) translated as *Law As a Means to an End* (I. Husik trans., The Boston Book Co., Boston, 1913). I am also indebted to Professor Okko Behrends here.
[3] H. L. A. Hart, *The Concept of Law*, 8 (2nd ed., Clarendon Press, Oxford, 1994). See further *infra* n. 60 and accompanying text. See also Chapter Three at 72.
[4] H. Kelsen, *Introduction to the Problems of Legal Theory*, 55–6 (B. Paulson and S. Paulson trans., Clarendon Press, Oxford, 1992). See also Chapter Three, at 72.
[5] See *infra* Chapter Four.
[6] See *infra* Chapters Five and Six.

property interests,[7] interpretive and other legal methodologies,[8] sanctions and remedies,[9] and more. A discrete legal unit does not function independently. It must be combined and integrated with other units.[10]

Although in developed Western societies, functional legal units of the same general variety vary somewhat from system to system and even within systems, those of a given variety do not, for the most part, differ fundamentally. Here, I address paradigms of a selection of major varieties. Each paradigmatic unit has its own attributes – its own purposes, makeup, unity, mode of operation, instrumental capacity, and distinct identity.

According to Hart, Kelsen, and their adherents, functional legal units are generally reducible to one variety, namely rules, although of various types. Some of these rules are what I call regulative. That is, they regulate primary conduct and thus, for example, proscribe crimes and rule out tortious behavior. There are many other rules, too. Many of these other rules do not regulate primary conduct, but rather are what I call "reinforcive." They prescribe and otherwise reinforce facets of the purposes, makeup, unity, instrumental capacity, and other attributes of what in my view are major functional legal units in no way reducible to rules or analyzable solely as rules. However, on a general view such as that of Hart, and to an extent also Kelsen, these other major functional units such as legislatures and courts, nonpreceptual species of law, such as contracts and property interests, interpretive and other legal methodologies, and sanctions and remedies, for example, are to be elucidated largely by "unpacking" the contents of those reinforcive rules that purport to prescribe facets of such units. For scholars and theorists, such as Hart and Kelsen, then, it may be said that a legal system is largely reducible to a system of regulative, reinforcive, or other rules.

For introductory purposes, one schematic example will suffice briefly to illustrate the most general version of what might be called the "Hart-Kelsen" mode of analysis in which, regulative rules aside, functional legal units are to be reduced to, and analyzed in accord with, the contents of reinforcive rules. I will call this mode of analysis "rule-oriented." Consider a functional legal unit that is institutional in nature, such as, a court. Important rules of a reinforcive nature (Hart's "rules of adjudication") prescribe, for example, facets of judicial makeup, unity, and mode of operation. Thus, we may study the contents of what Hart would call "rules of composition" and learn such things as how many judges there are to be and what qualifications they are to have. We may study "rules of jurisdiction" and learn about the powers of a court. We may also study "rules of procedure" and learn something about how the body is to function, and so on. Plainly, such rules

[7] See *infra* Chapter Seven.
[8] See *infra* Chapter Eight.
[9] See *infra* Chapter Nine.
[10] See *infra* Chapter Ten.

reinforce the functional legal unit of a court and are even necessary to its very existence.

Here, I do not seek to elucidate a court, a legislature, or any other functional unit mainly via an analysis of the contents of reinforcive rules, although I concede a significant role for such rules. Rather, I introduce and apply what I call a "form-oriented" mode of analysis as the main method for elucidating the nature of functional legal units and of the legal system as a whole. Each variety of unit is conceived in terms of its purposes, its overall form, constituent features thereof, and complementary material or other components. This overall form is defined here as the purposive systematic arrangement of the unit as a whole – its "organizational essence," and is to be further analyzed in terms of its constituent features, and their inter-relations. The overall form of a unit and its constituent formal features does not include, and is to be differentiated from, complementary material and other components, such as, in a court, physical facilities, the actual judges, support personnel, and various resources, although overall form does specify such complementary components as well.

It is true that the overall form of a functional legal unit as a whole, its constituent features, and the complementary material or other components of the unit are partly prescribed, though not explicitly in these terms, in the contents of reinforcive legal rules or other positive law. However, these rules could not even have been drafted in the first place without first formulating the purposes, desired form, features, and complementary components.

The overall form of a unit – its purposive systematic arrangement – has a reality of its own that, in varying degrees, is both explicit in general social agreement, such as "blueprints" and other sources, and implicit in existing practices, as well as prescribed to some extent, though seldom expressly in terms of form, in the contents of rules reinforcive of the functional unit. The organizational reality of a functional unit, such as a court or a legislature, is identifiable and describable apart from its actual complementary components, such as its personnel and material resources. The distinct organizational reality of the overall form of a functional unit, and the constituent features of this form, can be detailed, dense, and complex.

The constituent formal features of the overall form of a functional unit, such as a court or a legislature, are also inter-related and unified in various ways. Together, they coherently organize who is to do what, when, how, and by what means. As already noted, the overall form of a court and its constituent formal features are to be differentiated from material components of the whole, such as physical facilities, personnel, and technology.[11]

[11] The individuation of discrete units can be done on the basis of the distinctiveness of both the overall form of the whole, and the complementary components of each. Different varieties of units do not overlap very much.

The purposes, overall forms, and constituent features of units differ greatly as between different units. Thus, for example, the purposes, overall form, and the constituent features of a court are designed, defined, and organized very differently from those of a legislature. The purposes, overall form, and constituent features of a regulative rule are designed, defined, and organized very differently from a contract. The purposes and overall forms and constituent features of all the foregoing differ greatly from those of an interpretive methodology, and so on.

The overall form of any functional legal unit in a particular system is a response of responsible participants to perceived needs to serve a special cluster of purposes through definitive organization. First, a conception of the overall form of the whole of a functional unit is needed to serve the founding purpose of defining, specifying, and organizing the *makeup* of such a unit so that it can be brought into being and can fulfill its own distinctive role along with other units in serving ends. For example, as we have seen, the overall form of a court or a legislature must have such features as those defining, specifying, and organizing the composition of its membership, its jurisdiction, and its various procedures.

Secondly, a conception of the overall form of the whole is needed for the purpose of organizing the internal *unity* of relations between various formal features of a functional unit and between each formal feature and the complementary components of the whole unit. For example, the two chambers of a bicameral legislature each take a form and these chambers and their members must be organized to function together.

Thirdly, and relatedly, a conception of the overall form of the whole functional unit is needed to organize further the *mode of operation* and the *instrumental capacity* of the unit. For example, internal committee structures and operational procedures within a legislature must be designed and internally coordinated to facilitate the study, debate, and adoption or rejection of proposed statutes.

Fourthly, no legal unit is independently functional. That is, no unit can alone serve the ends and values in view. For example, a legislature can pass a regulatory statute, but without other implementive units in operation, the statute would become a dead letter. Even a simple rule, as signified by an isolated stop sign positioned along a roadway on a lonely prairie must, to be effective, operate together with other functional units, including the organized public facility of the roadway itself, other rules of the road, and an official agency of enforcement. A conception of the overall form of an operational technique (here, mainly what may be called the "administrative-regulatory") is required to combine, integrate, and coordinate the relations between different functional units so that together they can effectively create and implement law to serve the ends in view.

Once the overall form and the constituent features of a functional legal unit are duly defined, organized, and put in place, what keeps the unit "on track?" That is, what holds these organized realities in place so that they generally operate more or less as designed? The quality of the original formal design is a major

factor. For example, well-designed features of overall legislative form simply work better than ill-designed features, and what works tends to survive. The quality of training of the personnel responsible for the workings of the unit is another major factor. The evolution of well-defined customary practices supportive of the unit can be significant, too. Also, rule-minded theorists would stress the existence of legal rules the contents of which, in effect, reinforce features of overall form.

Where have all the numerous overall forms of functional legal units recognized today in Western legal systems come from? In part, they have been inherited from predecessor systems. In part, they have been borrowed from other systems. In part, they have evolved over time in response to felt needs. Few have been invented totally *de novo*, at least in modern times. Various factors have played roles in shaping these forms, but purposive and reasoned means-end analysis has doubtless been most prominent.

The overall forms of functional legal units, as manifest in duly constructed wholes, stand as tributes to the organizational inventiveness of developed Western societies. The realization of humanistic values of Western civilization, including justice, order, liberty, democracy, rationality, the rule of law, and more, has been heavily dependent on this inventiveness.

Surprising as it may seem, especially given the importance of law and the extensive study of forms, as forms, in other major fields of human learning and endeavor, the overall forms – purposive systematic arrangements – of most functional legal units have seldom in the course of Western legal theory been explicitly conceived as objects of frontal and systematic theoretical inquiry of the kind proferred here. As a result, these forms and their constituent features have not received their due either as avenues for advancing understanding of the nature of functional legal units or as contributing to the efficacy of such units as means to ends.

Even the overall form of that most common of all major varieties of functional legal units – that of a legal rule – has not yet received its due. Yet if rules are to be understood, the overall form of a rule and its constituent formal features, namely, prescriptiveness, completeness, definiteness, generality, internal structure, manner of expression, and mode of encapsulation, must be objects of concentrated attention. Complementary components of a rule include policy or other contents, and these must be studied as well. In all this, the effects of overall form, including the "imprints" of constituent formal features on each other and on components of content in a rule, must be a central focus.[12] As will be demonstrated, rules and all

[12] The word "imprint" may, to some, not seem strong enough here to do justice to the effects of well-designed form on material or other components of content. However, an imprint can be "deep" and "indelible." "Imprint" may, therefore, even be too strong in a particular use! Jhering used a different metaphor: he said that what I call the imprints of form on content, or on other nonformal elements of a legal unit, comprise the "most sharply etched characteristic of law" *supra* n. 2, *Geist*, vol. 2, at 470. The famed American judge, Benjamin N. Cardozo used still another metaphor when he said form can be "closely knit to substance" *Old Company's Lehigh, Inc. v. Meeker*, Receiver, et. al. 294 US 227, 230 (1935).

other varieties of functional legal units simply cannot be adequately understood without intensive focus on their forms, formal features, specifications of material and other components, and the effects and imprints of form on other formal features and on material components.

Without its overall form, a functional legal unit simply could not exist and serve ends.[13] Even if minimally organized in form sufficient to exist, such a unit could still be far less than optimally efficacious. Moreover, ill-designed form can itself wreak havoc via confusion, arbitrariness, and inefficacy. The credit due to well-designed form for purposes served can be considerable.

Furthermore, to grasp the nature of a legal system and the purposes it can serve, it is not enough to understand the functional units of the system. Even if these were all optimally designed, they could not, without more, constitute a legal system, and could not serve ends well, if at all. These units must also be combined and integrated within an operational system to be duly functional. Various systematizing devices are required for this. Some of these devices centralize and hierarchically order the relations between legal institutions as, for example, with the general prioritization of a legislature over a court in the making of law. Other such devices specify and order system-wide criteria for identifying valid rules and other species of law of the system in the first place. Hart and Kelsen sought to capture these in a "rule of recognition"[14] or "Grundnorm"[15] specifying criteria for identifying a valid law of the system. Other devices consist of basic operational techniques that integrate and coordinate institutions, precepts, methodologies, sanctions, and other functional units. As we will see, these techniques consist mainly of penal, grievance-remedial, private-ordering, administrative-regulatory, and public-benefit conferring techniques. Each technique is a formal organizational modality of wide-ranging significance.[16] Systematizing devices are in part formal, and the resulting organized system is a highly complex whole that is formal in a variety of important ways, also to be explained here.[17]

From systematic study of the nature and roles of legal form, form itself can be clarified, functional legal units and the legal system as a whole can be better understood, general credit can be given to form for serving ends, and the modeling of functional legal units and of the system as a whole can be improved.

In this book, I introduce and develop what may be called a general theory of legal form. In the next chapter, I clarify, analyze, and refine my general definition of the overall form of a functional legal unit as its purposive systematic arrangement.

[13] For a very different account of types of functional legal units, see the illuminating discussion of R. Alexy, "The Nature of Legal Philosophy," 7 *Associations* 63 (2003).
[14] H. L. A. Hart, *supra* n. 3, at 94.
[15] H. Kelsen, *supra* n. 4, at 55–64.
[16] See R. Summers, "The Technique Element in Law," 59 *Calif. L. Rev.* 733 (1971). The five main operational techniques of law are treated in Chapter Ten.
[17] See *infra* Chapter Ten.

The required conceptual analysis, clarification, and refinement is itself a major task of this book, given the complexities of form, and given that the word "form" has many meanings in Western languages, including various pejorative meanings at odds with my general definition and its refinements here. I seek to introduce a coherent vocabulary and terminology of form. Also, I seek to show that this vocabulary and terminology is not only felicitous, but is usually grounded in certain well-recognized English usages.

My general definition of the overall form of a functional legal unit is that this form is the purposive systematic arrangement of the unit as a whole. Later, I expound upon and provide major rationales for this general definition. I also refine and apply this definition to a *selection* of major functional legal units necessary to or salient within Western legal systems, including legislatures, rules, contracts, interpretive methodologies, and sanctions.

Also, I seek to advance and to render more articulate our general understanding of the distinctive nature of each selected functional legal unit as a whole through a frontal and systematic focus on its overall form, the constituent features of this form, and the complementary material or other components within the whole. The key questions here are these: What purposes is the unit designed to serve? What is its makeup? That is, what is its overall form, constituent features thereof, and complementary components within the whole? What is the unity of the whole? That is, how is it purposively and systematically arranged to unify the whole? What imprints or other effects does form leave? What is the mode of operation and the instrumental capacity of the unit? Its distinct identity? Its systematic integration with other functional units to serve ends? In what reinforcive rules, other species of positive law, or still other sources are the facets of the unit at least partially prescribed? Throughout I attempt to show how the overall form and constituent formal features of a functional legal unit should share credit with its material or other components for ends realized.

I also seek to show how focus on the form and formal features of a legal system as a whole advances understanding of its nature. I concentrate on how one of the general characteristics of a legal system can be said to be its overall formalness and on how this general characteristic has a claim to special primacy. I also attempt to demonstrate the credit due to formal systematizing devices and the resulting formal features of the system as a whole, insofar as these contribute to serving ends. At various intervals, I will also strive to explain how the frontal and systematic study of form casts light on certain traditional problems of law, jurisprudence, and legal theory in addition to the nature of functional legal units and the nature of a legal system as a whole.

The understanding I seek to advance in this book does not generally require discovery and presentation of new facts. Rather, it requires that we reconceive, reorder, and reclassify much of the subject matter of a legal system in terms of

a variety of functional legal units and that we focus on familiar yet frequently unnoticed formal facets of these units, as well as formulate felicitous concepts and terminology to portray these facets and render explicit and thus lay bare much that is often left implicit and so goes unnoticed. Such efforts can yield insights into each functional unit considered, provide a clearer view of the whole of each, and reveal important inter-relations between the units within a legal system as duly systematized.

Moreover, the attribution of general credit to overall form and to constituent features thereof for the ends realized through creation and deployment of individual functional units in the operations of a legal system, does not, as I treat the subject here, require empirical studies of a social scientific nature. As I later explain, it is usually sufficient for my purposes to rely on necessary truths, on general facts already known, on highly plausible supporting assumptions, and on tried and true modes of argument.[18]

This book seeks to shift the emphasis in one major tradition of Western legal scholarship and theory not only away from regulative rules, but also and more emphatically, away from analyses of the contents of those reinforcive rules that are taken to prescribe the facets of functional legal units generally. Instead, form-oriented analysis is introduced and is focused upon the overall forms of functional legal units, and on the overall form of a legal system as a whole, as major avenues for advancing understanding. "Form-oriented" analysis[19] is applied here to a wide range of selected functional legal units operative within a legal system. This fundamental shift in emphasis entails intensive concentration on the overall forms of such units and on the overall form of a legal system as a whole. Here we study a wide range of functional legal units in addition to rules, and we study these mainly via a direct and frontal focus on the overall forms of such units and their complementary components and not merely indirectly through the study of the contents of legal rules reinforcive of such units. Instead of, for example, studying the functional unit of a legislature or a court obliquely through the contents of any rules purportedly reinforcive of its composition, jurisdiction, structure, and procedure, as in the fashion of Hart, Kelsen, and others, we frontally address the features of the overall form of the institution.

Moreover, in stressing the credit due to form, this book introduces still another shift of emphasis. What law achieves is not to be credited solely to the policy or other contents of regulative rules. Nor is what law achieves to be credited solely to any rules the contents of which are purportedly reinforcive of functional units.

[18] See *infra* Chapter Three. See also Lon L. Fuller, *The Morality of Law* (Rev. ed., Yale University Press, New Haven, 1969).

[19] Form-oriented analysis is discussed in detail, *infra* Chapters Two and Three, and is systematically contrasted with rule-oriented analysis in Section Four of Chapter Three. As we will see, form-oriented analysis distinctively advances understanding of the rules themselves. Among other things, reinforcive rules purporting to prescribe facets of functional legal units are rarely explicit about form.