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The Empty Wheelbarrow of Law. A short commentary to Robert S. Summers, 'Form and function in discrete legal units and in a legal system as whole'

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Professor Summers has presented a very stimulating and thought-provoking paper. At the same time, it is a courageous effort to recapture a domain that is traditionally occupied by legal positivism, namely that of legal form, and to make it accessible again for natural law thinking. But how successful is this effort? In this commentary, I will raise some questions from a classical positivist perspective, not necessarily because I endorse this view but because I consider the paper, as it stands, an easy prey to positivist objections.

To begin with, it may be disputed whether Summers is right in claiming that H.L.A. Hart and Hans Kelsen conceived a legal system as 'a system of discrete functional legal units that consists only of units taking the overall form of rules' (cf. thesis 2, p. 6). Surely, neither author denies that a legal system also consists of legal units other than rules, such as legislatures and courts, canons of interpretation, sanctions and remedies, and other so-called enforcive units. In their view, there need to be authorities that produce rules and apply rules according to specific interpretive methods and, by definition, these rules have to be backed up by sanctions. They would also grant that principles, contracts and property interests are part of a legal system if the norms contained in them can be traced back to some higher, competence-conferring legal norm and, ultimately, to the basic norm or *Grundnorm* (in Kelsen), or to a secondary rule (in Hart). Kelsen and Hart gave priority to the study of rules on methodological grounds, because they both considered – rightly or wrongly – rules to be the defining characteristic of a legal system. In their view, rules are what make this system a *legal* system. This does not mean that they claim that other aspects of a legal system, such as the institutional setting in which law is produced and applied or the social working of law, cannot or should not be studied. According to them, however, these aspects fall outside the scope of a distinctively legal study of law – a *reine Rechtslehre* in Kelsen's terms. Therefore, I do not think, as Summers does, that 'Hart might have answered that he ade-

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quately takes account of all other functional units through the study of the contents of special rules "reinforcive" or "constitutive" of those units' (note on p. 8). Hart does not pretend to provide a grand theory of law in all its dimensions, but he deliberately concentrates on those aspects that he deems, again rightly or wrongly, to be essential to law.

It is not my purpose to revive here the old battle on the meaning and essence of law. The question does arise, however, how, in Summers' view, all the different aspects of a legal system can be studied and integrated within one overall theory. A theoretical focus must be selective and reductive if it is to produce interesting and cohesive insights. In order to see, one must also, first and foremost, be able *not* to see. The danger of the 'frontal focus on form' advocated by Summers (p. 8) is that we, confronted with so many and so many heterogeneous data, end up either perceiving only very general and superficial similarities and dissimilarities between the legal units involved, or – which amounts to the same thing – perceiving nothing at all. What is thus gained by widening the focus?

Subsequently, the relation between form and substance, and especially between law and morality, requires further clarification. In common understanding, substance and form are distinguished in terms of value: whereas substance is supposed to be value laden, form is often conceived as value neutral or value free. Summers denies that form never has any connection to value. On the contrary, '[a]ll well-designed forms must be value-laden and cannot be value-neutral or value free' (cf. thesis 3, under B.2, p. 18). His line of reasoning seems to be that, since a legal form is a 'purposive systematic arrangement' (p. 9), it is, if designed in a proper way, connected to the purposes of the functional legal unit and therefore it is necessarily value laden. I fail to see, however, why this argument does not apply to badly designed forms as well. On the very ground that all forms are, according to Summers' definition, purposive systematic arrangements, badly designed forms still entertain a relation with the purposes of the functional legal unit of which they are part, albeit in a questionable way. The fact that they can be criticized for not serving, or not serving properly, the overall purposes only proves that forms, regardless of the quality of their design, necessarily are value laden. Therefore, my suggestion is to generalize Summers' claim on the value-ladenness of forms so that it includes every kind of form. Anyway, it would be quite helpful if Summers, since he relies so heavily on the distinction, could give some indication of how well-designed forms are to be distinguished from bad ones.

Moreover, in defending his claim Summers refers to an intriguing passage from a work by Lon F. Fuller, entitled *The Law in Quest of Itself*. In this work, consisting of three lectures delivered at the beginning of World War II, Fuller articulates his objections against legal positivism and, especially,

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against its separation of law and morality. One of his main targets is Kelsen's pure theory of law. In the passage referred to by Summers, Fuller reacts on Kelsen's dismissal of natural law theory as a static theory of law and turns the table on him: 'As for the alleged "dynamic" quality of Kelsen's own view, it seems to me to be about as "dynamic" as an empty wheelbarrow. To be sure, you can dump anything you wish into it, and you can push it in any direction you like. But there is absolutely nothing to make it go.'[1] Moving beyond a mere critique on Kelsen, Summers takes these words as a general statement on the nature of law. According to him, Fuller suggests in the passage quoted that 'the form of a legal unit is not an empty wheelbarrow that can simply be filled with any content and pushed in any direction' (p. 18). By invoking Fuller, perhaps not in his exact words but certainly in spirit, Summers argues that the form of law is, in its very nature, not neutral to substance. Contrary to what legal positivism seems to assert, content does matter in law. Apparently, both in Summers and in Fuller, there are limitations to what can be ascribed to law. Because these limitations are formulated within the context of a critique on the separation of law and morality, they have to be of a moral nature. But what are those limitations of a moral nature exactly? 'Purpose' seems to be the key word here for both authors. Despite its functionalist and instrumental connotations, the concept of purpose has to set moral limits to the content that can be attributed to law. As soon as a functional legal unit is connected to a purpose, it will be no longer indifferent which legal forms are selected.

How convincing is this view? Although purpose may significantly reduce the options available (which are virtually infinite), the range of possibilities still remains enormous. To take Summers' own example: if a legislative institution has to have a procedurally formal feature providing for democratic participation in law-making, there are many ways in which this feature may be organized – from a dictatorship that claims to represent the people's will to a plenum in which all people participate actively, and everything in between. Of course, everyone will have his or her own individual preferences, but *there is nothing in the form itself, nor in the purposes associated with it, that dictates which means have to be chosen in order to achieve certain ends*. In the example given, morality may rule out a dictatorship beforehand, but it cannot decisively and unequivocally settle which of the remaining possibilities have to be favoured when organizing democratic participation. It is not the case that morality has nothing to say about the content of law; rather, it says too much and too many conflicting things. Moral disputes, lacking a mechanism to resolve them authoritatively, are essentially endless – a focus on purpose cannot change that. Besides, contro-

1 Lon F. Fuller, The Law in Quest of Itself, Boston: Beacon Press 1940, p. 114-115.

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versies may also arise on the question which purposes a given functional legal unit is supposed to serve. Therefore, a focus on purpose not only limits the options available, it also multiplies them. Although the wheelbarrow of law may not be entirely empty, it is still capable of carrying a lot of things, independent of their moral value. Ultimately, it is not a morality fixed on purpose, or any other morality, that determines the content of law; it is a legal authority's decision.

Finally, if the previous points are taken together, doubts may arise whether Summers' proposal, in its present form, really is a step forward in the study of legal form. What does it add to the detailed and refined enquiries into legal form that are offered by Kelsen and his followers or, to give another example, by system theory approaches in the line of Luhmann and Teubner? To be sure, I do consider Summers' pursuit to move beyond the sterile formalism that often goes along with legal positivism and to relocate the study of legal form in its institutional, social and normative context to be very valuable and promising. What in my opinion is still needed, however, is a sharpening of its focus as well as a clarification of its normative presuppositions.