Normative Regulation and de facto Organisation. Two Alternative Techniques of Socio-legal Ordering

By *Peter Sack*

I.

Law is conventionally perceived as a system of norms which are typically the product of legislation. These legal norms establish rights and duties and are distinguished from other, in particular moral norms by their enforceability - the enforcement being the task of courts of law. This normativistic perception confines law exclusively to the realm of the ought. There are therefore, strictly speaking, no legal facts, although there are legally relevant non-legal facts which determine whether or not a legal norm is applicable and although there are (so-called?) legal institutions and processes which provide the factual basis for the production and application of legal norms.

This normativism has deep historical roots - at least in Western culture. They are linked with the belief that the entire universe is governed by laws which regularise and rationalise the operation of all forces within it. As a result normativism (or legalism) dominates not only the perception of law and nature (think of the laws of nature!) but also of society. But society is seen as differing from law as well as nature by being constituted as a curious mixture of prescriptive and descriptive laws. The assumed co-existence of two different types of laws in the social realm prevented the development of a convention which denies - in analogy to law - the existence of social facts outright as well as that of a convention denying - in analogy to the natural sciences - the existence of prescriptive social norms. Instead it produced a state of schizophrenia which tacitly accepts the existence of both but which encourages sociologists to dismiss social norms as "mere ideology" and lawyers to dismiss them as non-legal, thus making it impossible for everybody to arrive at a better understanding of the mixed "as well as" nature of social facts and, more broadly, social reality.[1]

1 The same applies, I should add, to the non-normative aspects of law, which lawyers dismiss as non-legal and which sociologists decline to study in a systematic fashion.

We therefore find ourselves in a position shaped by a misguided division of labour, which not merely hampers theoretical progress but makes it increasingly difficult for law and society to function adequately in practice - and which makes it wellnigh impossible to design and implement a strategy of constructive cooperation between them.

Rather than embarking on a survey of this regrettable situation, I shall focus on the technique of de facto organisation which plays an important role in society as well as law, although it has been almost totally disregarded by legal theorists under their self-induced normativistic spell. My aim is to show that organisation provides a powerful alternative to the familiar legal technique of normative regulation which will repay intensive study by lawyers - and which may also shed unexpected light on the relations between law, the state, society and the individual.

II.

My interest in organisation as a form of de facto sociolegal ordering was awakened some years ago when I decided to take seriously the persistent claim of Melanesians that their law was not a normative order but their actual way of life - instead of adopting the comforting view that Melanesian law was, naturally, a normative order which Melanesians themselves were merely unable to recognise or articulate.

There is no need to repeat my preliminary findings,[2] but it may be helpful if I use a single illustration as a concrete starting point for our discussion.

The Tolai, the Melanesian "tribe" with which I am expecially concerned, are matrilineal. That is to say children belong (and belong only) to the group of their mother and not (or not also) to that of their father. It is tempting to assume, from a Western perspective, that the Tolai have therefore a norm according to which children belong to their mother's group - but is this normative interpretation appropriate?

Do Tolai only have a legal obligation to belong to their mother's group? Do they have the possibility of disobeying the commands of matrilineality? To raise these questions is to recognise that a normative interpretation of the position is arbitrary as well as misleading. Instead of contributing to our unprejudiced understanding of Tolai social reality it represents itself a covert normative dicision which introduces perhaps completely allien normative consequences - for example the possiblity of a court declaring that the rights of a particular individual have been violated because he or she has been wrongly denied membership

2 See *Sack*, *'Bobotoi* and *Pulu*. Melanesian Law: Normative Order or Way of Life, Journal de la Société des Océanistes, vol. 41: 15-23.

of a certain matrilineal group. Moreover, even in this hypothetical case (which is absurd from the traditional Tolai perspective) the issue is one of fact and not of law. We can only hope to appreciate the actual position if we accept that to be a member of a matrilineal group among the Tolai is a social fact and not a legal obligation and that this difference has far-reaching theoretical and practical consequences.

To say this does not imply that something which might be called "rights" or "duties" could not be attached to social facts, or that Tolai society could not be ordered in a different manner, it simply demonstrates that social facts of the matrilineality kind are organisational rather than normative principles. The principle of matrilineality - or at least the Tolai counterpart of this Western conceptualisation - does not tell Tolai how they ought to behave or how their society should ideally look like but - without the need for any kind of enforcement - actually shapes their society at this particual point in time. A Tolai can no more deny the fact that he is - socially - a member of his mother's group than he can deny the biological fact that a particular woman gave birth to him.

As I have already hinted such social facts are not peculiar to melanesian societies but to be found everywhere. Indeed once we open our mind, we see that we are surrounded by them on all sides: marriages and contracts are social facts and even crimes, like murder or theft. The law does not establish these social facts, nor can it disestablish them; it can only recognise them or not recognise them and attach legal consequences to this decision as the case of the so-called de facto marriages illustrates: the law has not only proved unable to abolish them but has been forced to recognise them partially so that it can deal with them normatively - for instance by granting the right of a widow pension to a de facto wife, or by making rules about the division of property when a de facto mariage has broken up.

But I had better call myself to order at this point, so that we can take stock, before getting lost in the wilderness of social facts and their resistance to normative regulation.What is important for our purposes is the recognition that society has the capacity to create such social facts, that they play a key role in the organisation of society and that this de facto organisation is a viable alternative to normative regulation.

The question to which I now want to turn is not whether society uses, in addition, the technique of normative regulation but whether the law - in the conventional sense defined at the beginning of this paper - uses the technique of de facto organisation to constitute the state - and that involves us in a sudden move from de facto marriages and stateless societies to the heartland of constitutional law.

III.

The main task of constitutional law - the current emphasis on human rights notwithstanding - is to constitute the state as a machinery of government. Many constitutions approach it in a decidedly normative manner. The Indian Constitution, for example, while just stopping short of proclaiming: There shall be an Indian State[3] - does declare in Article 52: "There shall be a President of India". What does this normative language really mean? Is it any more appropriate in this case than in the case of Tolai matrilineality? Does Article 52 stipulate that there *ought* to be a President of India? Does it establish a legal obligation for somebody to produce such a creature? Does it give anybody the right to become President of India? Certainly not. Regardless of its Terminology, Article 52 is not concerned with normative regulation but creates the office of the President of India as a political fact, just as other constitutional provisions create other offices, institutions and processes, from which legal rights and duties may follow, but which are themselves facts not norms.

It thus appears that the state shares the mysterious power of society (and individuals) to create such strange non-material but nevertheless real facts. This raises a number of questions. The first two I wish to mention relate to the nature of these facts and to the nature of the power to create them. The other two are more specific: why is the organisation of the state couched in a normative language and why does the state not use the technique of organisation more widely?

As regards the first two questions, I suggest that we simply do not worry about them, since the days of antimetaphysical witchhunts are fortunately over. It may be helpful, however, to draw attention to one particular point - and to mention in passing that the power of the state to create political facts is not more mysterious than its ability to create legal obligations which we all take for granted. The point I want to emphasise concerns a difference in the fact-creating powers of individuals, on the one hand, and society and the state, on the other. While the latter can create institutions, the individual, it would seem, can only produce individual instances of such institutions. For example, it is beyond an individual to create a social institution such as marriage, but it can, by getting married, create a particular marriage as a social fact. This suggests that we are observing a process of application rather than creation, so that the pre-existence of a social institution may be a necessary basis for the successful exercise of the creative powers of an individual in the social realm - just as the creation of individual legal obligations through the conclusion of a contract presupposes the existence of contract as a legal institution.

Besides, it may be more than coincidence that in both these cases the social facts or legal obligations are created by a cooperation between individuals rather than by unilateral acts. I

3 It does proclaim in Article 1, however, that "India shall be a union of States".

will come back to this point from a different direction, but we do well to keep it already in mind, since it will remind us that the position is bound to be more complex than I have so far indicated.

Turning to the second pair of questions, we must appreciate first of all the force of convention and the fact that lawyers tend to regard normative regulation as the only possible legal technique and that they perceive it as being superior to all possible non-legal alternatives - although they are gradually becoming aware of its own, practical limitations. Hence normative language comes naturally to lawyers and most of them, I submit, are not only unaware of the organisational aspects of constitutional law but quite unprepared to acquire that awareness. Lawyers prefer to hide organisation under a layer of secondary (of fictitious) normativity and to pretend that everything is consequently "law as usual".

To be sure, there are also other, more substantial reasons. For example, constitutional law is not satisfied with actually organising the machinery of government but also wants to control its operation - and it is in this context where normative regulation comes into its own.

There is no time to consider here the control function (or other additional functions) of constitutions or the respective roles which normative regulation, organisation (and other additional techniques) should play within them - and it is, perhaps, at any rate better if I move from further general considerations to a few concrete (if typified) examples.

IV.

I shall begin with a comparatively unproblematic and successful application of the technique of normative regulation: the field of vehicular traffic on the roads. It may therefore come as a surprise to realise that it is patently not the aim of the state to establish a body of enforceable legal obligations but an actually functioning order. The flow of traffic is to be "regulated" like the flow of an untamed river; it is to be made - in fact - smooth, safe and efficient; in short: it is to be organised.

But the state, it appears, cannot do this, at least not directly, and has settled for the technique of normative regulation as an alternative, although it is incapable of performing the task at hand, since normative regulation cannot establish an actual order. However sensible and comprehensive the regulations, each driver is free at any given time to disobey the law, to drive on the wrong side of the road, to drive faster than the permitted speed, to drive an uninsured vehicle under the influence of liquor and without the required license. Why does the regulatory approach work nevertheless by and large? Not because of the threat of punishment as the ideology of normative regulation will have it, but because it is

patently sensible and not too onerous to stick to the "right" side of the road if this means that the drivers of oncoming cars will do the same.

If we move from vehicular traffic to the economy - and there is no reason why we should not - the position appears to be the same, at least in the famous market economy. The state tries to regulate the market by outlawing unfair competition and monopolies, by protecting the consumer and so on. Upon closer inspection, however, things turn out to be essentially different.

Firstly, it is not the aim of the state, in a market economy, to organise the economy but merely to control abuses of the market forces - which are otherwise to be given free rein (those exercising them - in stark contrast to drivers of vehicles - being expected to use their initiative and drive).

Secondly, the state has the option of actually organising the economy by running it itself - a pointless exercise as far as vehicular traffic is concerned. The state can, at least in theory, totally replace the free play of market forces with a plan and, in the extreme case, take over the entire production, distribution and consumption of all goods and services so that all its subjects will have been integrated into the actual state machinery, all producers, distributors, consumers, planners and administrators having become employees and functionaries of the state.

This suggests that it is only by physically swallowing the economy that the state acquires the ability to organise it. On the other hand, we must not forget that the planning of the economy appears to be a crucial instrument - and a plan would be no more than the proverbial paper tiger if it did not have some kind of normative effect, if it did not oblige the functionaries of the state to pursue a certain course of action - and it is obviously possible to reinforce this obligation by sanctions or rewards.

Such a quasi-normative plan, it is true, relates to what things are to be done rather than to how they are to be achieved. That is to say, the plan determines what the organisation should do but not how it is to be organised; it instructs the organisation from the outside rather than shaping its internal structure. But normativism, in the form of the rule of law - which means law-governed, bureaucratic administration - penetrates even this inner sanctum. However it does so as it were, only procedurally; and while it must be admitted that procedure - as organised action - is part of organisation, it is not its core, which is institutional. It is this institutional core, organisation as a structured body, as an actor rather than its actions, as an operational system rather than the operations it carries out, which appears to be immune from the onslaught of normative regulation.

The duty statement of the manager of a state enterprise is no more part of the actual organisational structure than the legal rights and duties attached to a (legal) marriage constitute this marriage as a social fact - both are merely potentially useful but unnecessary normative decorations.

The resistance of institutional facts to normative regulation and the hubris of normativism are best illustrated with a negative example. Take the brave attempt of the Indian Constitution to abolish Untouchability (Article 17), that is to say to eliminate Untouchability as a social fact not merely to declare its practice to be illegal and punishable. Howevermuch we may agree with the constitution makers' motives and with their view that a simple outlawing of Untouchability is neither appropriate nor sufficient, the result they achieved is no more than normative make-belief. It simply cannot be done - or, rather, it cannot be done in that manner.

Why? The impossiblity can be either due to the specific means employed or to the fact that the state the constitution constitutes lacks, in principle, the powers necessary to achieve the desired end.

V.

To get a better appreciation of the position we must return to the office of President of India and to Article 52 of the Indian Constitution.

I have already pointed out that this provision is, irrespective of the normative language used, not a normative regulation but a self-executing command which instantaneously created the office of President of India as a political fact. Put differently, it is a performative utterance in the sense of J.L. Austin, but of a particularly strong kind in that it creates an institution instead of merely reproducing an individual instance of a pre-existing institution - like the "I do" uttered during a marriage ceremony. Article 52 is part of a system-creating enterprise whereas the creation of the social fact of a particular marriage shows such a system in operation and utilieses its existence.

So far, so good. But if the Indian Constitution can, by means of a verbal command, create the office of President, why can it then not also abolish the institution of Untouchability in the same manner? Why indeed, since it can obviously abolish the office of President by a verbal counter-command.

The reason, I submit, is at the same time embarrassingly simple and of the utmost theoretical and practical importance. The institution of Untouchability remains outside the system

of the state which the constitution organises - and each and every system can only organise itself.

Before I attempt to draw some general conclusions from this startling fact, let me briefly indicate what it means in the case of Untouchability.

Untouchability is a social institution which can only be abolished by Indian society[4], since it is presently part of the organisation of that system - and I have no intention of getting involved, in this paper, in a discussion of the means or techniques Indian society can use to accomplish this task.

As far as the Indian State is concerned, it can only influence this process indirectly, either by assisting Indian society positively in its task - and that means, in particular, by trying to strengthen society's organisational capacity - or by using the essentially negative technique of normative regulation to prohibit its individual subjects to engage in that practice and to punish them individually if they disobey its commands.

However, there is also an extreme third possibility: the Indian State can try to swallow Indian society altogether, integrating it totally into its own system and thus bringing it - warts and all - under its direct, organisational sway.

The problems of Untouchability are but one manifestation of a much broader dilemma we are all facing, one way or the other, in every part of the world. The state which has, for better or for worse, come to dominate social and political life everywhere, can only organise itself; it cannot organise society - and it can apply the technique of normative regulation only to its individual subjects but not to society as a whole, nor to any of its constituent social groups, since only individual human beings can have obligations and since obligations can, at any rate, only be actually enforced against individuals.

I cannot substantiate this last claim in detail as this would break the flow of my argument. But I should at least confess 1) that we are, in my view, labouring under a counter-productive illusion if we assume that the state is - in any real (and that means, inter alia, exploitable) sense - under an obligation to look after the welfare of its citizens or that society owes any of its members anything, and 2) that we are at best submitting to a necessary evil if we try to tackle the serious social problems we are facing by means of an essentially individualistic and negativistic rights-enforcement technology (which is just another name for normative regulation).

4 I am aware that the concept of "Indian society" is itself highly problematic, but I am confident that these problems do not interfere with my general line of argument.

Having said this - and having probably alienated most of you in the process - I hasten to return to the alternative technique of organisation which is my immediate concern today.

VI.

Since I have so far stressed the advantages of de facto organisation and the limitations of normative regulation, I may have created the impression that I was advocating the former technique and attacking the latter, especially because of its close identification with the legal system of the state with which I am obviously not exactly enamoured. Before illustrating the dark side of de facto organisation with a final example, it may therefore be appropriate to clarify my own position.

I am a conviced pluralist, in the field of law as well as the other areas of human life. I am therefore not against anything - apart from dogmatism - and subscribe to the motto: the more the merrier. I am concerned to enrich the arsenal of law, not to reduce it. I am equally opposed to living in a stateless society as in a state which has succeeded in destroying society as a viable partner. My ideal is balance, although I accept that there can never be an ideal balance in practice - so that it is therefore also somewhat futile to strive for an ideal theoretical blueprint.

My reason for drawing attention to the technique of de facto organisation is not that I would like to see it replace normative regulation; and my reason for stressing the limitations of normative regulation is not that I regard this technique as worthless or harmful - on the contrary: I admire its strengths and potential and am anxious to see it nurtured instead of being squandered by misusing it for purposes for which it is neither designed nor suitable.

In addition, I am, to put it mildly, worried because a self-satisfied and baseless intellectual arrogance on the part of the legal profession, including its judicial and academic limbs (which can be as strong among radical activists as among conservative money-grabbers) permits this deplorable state of affairs to continue and to worsen, instead of lawyers rushing to the assistance of the law whose guardian they proudly claim to be.

We only need to compare the position of law and medicine to see the shocking depth of our shame as lawyers. Where are the legal equivalents of chemotherapy, physiotherapy, social or preventive medicine, laser surgery or in vitrofertilisation? Where are the legal equivalents to attempts to utilise and integrate traditional techniques, like acupuncture, or unorthodox techniques, like chiropractic? Law seems to have petrified at the stage medicine had reached when it refused, for a time, to accept the lessions of modern hygiene. We are satisfied if we teach the next generation of lawyers to sharpen their surgical saws properly,

feel liberal if we encourage them to sniff into the social sciences and humanities and daring if we suggest the computerisation of our stone age legal technology.

But enough of preaching, it is time to get on with my final example.

General adult suffrage is said to be one of the main pillars of democracy. It is often equated with a fundamental right to vote. I do not wish to deny the existence of such a right, but I do insist that it is, at best, secondary; that it is, by itself, quite meaningless; and that it acts - perhaps not quite by chance - like a screen which deflects our attention and prevents us from appreciating the actual position.

What would happen if a constitution granted explicitly every sane, adult citizen of the state it constitutes, a fundamental right to vote and left it at that? Precisely nothing. In order to give meaning to such a right, the constitution must switch from a normative to an organisational approach: the state must be made to organise an actual system of elections of which all eligible elector become part.

This, in turn, means, however, that we no longer exercise any right to vote if we cast our vote in an election, but act as functionaries of the state carrying out our electoral responsibilities - responsibilites moreover which we owe not to ourselves or our fellow citizens but to the electoral system. Nor do we have any original freedom of choice; we have only the options which the system cares to offer us. In addition, our responsibilities as electors are purely formal, in the sense that we are expected to cast our vote in the prescribed manner. How we cast our vote or what the results of the election are does not matter in the slightest.

Instead of being citizens proud and free, taking part in democratic decision as to who should govern our country, we are, to use a derogatory German term, in the organisational sense all "voting beasts" (Stimmvieh), pushed by the system to turn the millstone to which we are chained. And there is no escape; for we are "voting beasts" even if we refuse to vote, as long as our names are on the electoral role, which defines who is part of the system and for which we are not persons but anonymous names and crosses on the ballot sheet.

A right to vote - in the sense of a liberty - we can only have if we are not on the electoral roll - and then we cannot vote. And if we successfully enforce our right to vote, because we have been wrongly omitted from the role, our right instantly evaporates: we will be admitted, but only at the cost of becoming yet another "voting beast".

This is obviously only part of the story but a significant one which is usually swept under the carpet of self-righteous democratic rhetoric. It is also the dark side of the organisational coin: organisation permits no freedom of action - it does not need to be enforced because it cannot be disobeyed.

It may thus be just as well that the state is still structurally incapable of organising society into a totalitarian nightmare - although this may be a small consolation as long as lawyers refuse to leave their cosy normativistic prison, refuse to understand the nature of de facto organisation, refuse to study, utilise and develop the much needed alternatives to both de facto organisation and normative regulation - and persist in hitting society as well as the state and individuals indiscriminately with the familiar whip of legislation and rights-enforcement.

VII.

Although I hold this last criticism to be fully justified, I am under no illusion as to its effectiveness, precisely for the reasons I have tried to indicate in this paper. As an individual I can only remind other lawyers of their obligations, but I cannot create such obligations for them; and as an individual, I am even less able to reorganise "the legal profession", I can only suggest how it might be constructively reorganised. It would thus be strategically most unwise to close on such a polemical note - hence the following summary of what appears to me to be the main substantive results of our discussion:

1. There are at least two distinct techniques of sociolegal ordering: normative regulation and de facto organisation.
2. The crucial difference between them is that the former works through creating individual obligations, the latter through creating mysterious non-material, in particular institutional, facts.
3. Only individual human beings can be the target of normative regulation.
4. Only "systems" - but not individuals as such - can be organised. (Individuals can only be "organised" by being incorporated into a system - at least in certain capacities.)
5. Systems can only organise themselves; they can only create or abolish their own "institutional" facts.
6. At least the state, seen as an operational system, can create "institutional" facts by unilateral verbal commands which can have the form but not the effects of normative regulation.
7. Because of the need to control the actual operation of its organisation the state can and does create quasinormative procedural regulations which can be and are backed by negative or positive sanctions.

If all or only some of these theses are correct, a large number of far-reaching consequences follow. I do not wish to pursue them here, but cannot resist the temptation to close by drawing our attention to one of them. It has to do with the fact-creating power of words, on the one hand, and with the apparent limitation of this power to the boundaries of the system which generates this power.

Systems, it seems, are not merely necessarily "autopoietical" but self-creating. And not only Niklas Luhmann is on the right track but so was Axel Hägerström when he became overwhelmed by the magical quality of law, and Herbert Hart when he argued that Hägerström's difficulties dissolved - at one level - if law was seen as a system rather than as an accumulation of individual rights and duties. It is also true that facts, provided that they are institutionalised, can have a quasinormative force; and the list could go on - if only because it is equally impossible to be totally wrong than it is to be totally right. Hence we must continue to try to reinvent the wheel of law in the hope that one of these attempts may produce, perhaps inadvertently, a brand new rocket. But in doing so, we must overcome our embarrassment over the fact that law, whether we like it or not, is something which is both real and metaphysical. Psychological or linguistic or any other kind of reductionism will simply not do under these circumstances; it can only make matters worse, in theory as well as in practice. We may look ridiculous if we preach about law, but we are either dishonest or ignorant if we do not - and we are absurd if we cling to the rationalised pseudo-religion of legal positivism; for law is essentially not a system, certainly not a single one - and if it is artificially reduced to such a single system we can only lose our freedom as well as our sense of obligation.[5]

5 It hardly needs saying that the purpose of this paper is not a critique of Scandinavian legal realism, British analytical jurisprudence or German theories of social systems, let alone a review of the vast literature which is potentially relevant for the argument it tries to develop. On the contrary, it proceeds as if this literature did not exist. This reflects the view that the tradition which treats the social sciences as an enterprise engaged in the production of secondary or, better still, tertiary literature is, if not misguided, at best one of several alternative approaches. For this reason there are no specific literary references in this paper. The general acknowlegement of *Luhmann, Hägerström* and *Hart* is simply meant to indicate that I am aware that I do not operate in a vacuum and that I make no claim whatever to originality.