The Nature of Law and Constructivist Facts

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ABSTRACT
Historically, there has been a close connection between law and reason. At the same time, law has a firm foundation in what people do, in social practices. A heavily debated question is what the law is if our social practices appear to be unreasonable. Legal positivists have argued that our social practices are decisive for what the law is. If these practices are unreasonable, we have unreasonable or bad law. Non-positivists, including adherents of natural law, have claimed that unjust (unreasonable) law is not law at all, or at best a defective kind of law.
This contribution aims to show how the opposition between positivists and non-positivists can be explained from a difference in views about social reality, which in its turn depends on different views of how our minds shape social reality. The sections 2 and 3 focus on the question of how law can have an independent existence, independent of what is rational, while at the same time legal reasoning seems to assign an important role to reason. The second part, sections 4 and 5, argues for an answer to this question.
This answer is that law is a part of social reality that consists of what will be called *constructivist facts* and that this characteristic explains the ambiguous nature of law. To justify this answer, it is explained how social reality and constructivist facts exist.

KEYWORDS
constructivist facts, (non-)positivism, reason, social reality

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The Nature of Law and Constructivist Facts

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1. *Introduction*

The cognitive sciences are not only relevant for understanding the mental processes in individual persons; they also provide insight in how minds play a role in the construction of social reality and, as a special case, of law. Law is based on events such as legislation and judicial decisions. Even where law has grown 'spontaneously' in social interactions, such as the technical standards for the Internet (CALLIESS & ZUMBANSEN 2010), it only has become law in the full sense because it was adopted in legislation, court decisions, or both. At the same time, values and reason have always played some role in legal reasoning. In the 13th century, the theologian and philosopher Thomas Aquinas had defined natural law as a prescript of reason. Human legislation would only be binding if it is in accordance with this natural law. An important 20th century legal philosopher argued that 'law' that does not even aspire to be just, is not law at all (ALEXY 1992; ALEXY 2002).

Historically, there has been a close connection between law and reason, often in the shape of morality and justice. At the same time, law has a firm foundation in what people do, in social practices. A heavily debated question is what the law is if our social practices appear to be unreasonable or unjust. As we will see, some authors—for instance HART 2012—have argued that our social practices are decisive for what the law is. If these practices are unjust, we have unjust or bad law. Just like a bad car is still a car, unjust law would still be law. These authors are sometimes called *legal positivists* (GREEN & ADAMS 2019). Others have claimed that (very) unjust law is not law at all (RADBRUCH 1945; ALEXY 1992; ALEXY 2002), or at best a defective kind of law (FINNIS 1980, 364). The latter authors call themselves *non-positivists*, or—if they also believe that there is a natural law to which the positive law must conform—*natural law theorists*.

The debate between positivists and non-positivists may seem to be merely verbal. Why not stipulate that the word *law* will only be used for rules that are reasonable, or that the word will be used for social phenomena of a particular kind, whether they are reasonable or not? However, if the debate were merely verbal, it is difficult to understand why it has continued for such a long time. There must be more to it than a mere disagreement about the use of a word. From a jurisprudential perspective, the central question of this contribution is *why there can be an ongoing debate about the role of reason in law*. An answer to this question will also increase our insight into the nature of law.

The first part of this contribution, sections 2 and 3, focuses on a question that has been central in legal philosophy since the 20th century. It is the question of how law can have an

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independent existence, next to morality, while at the same time legal reasoning seems to have moral aspects.

The second part, sections 4 and 5, argues for an answer to this question. This answer is that law is a part of social reality that consists of what will be called *constructivist facts* and that this characteristic explains the ambiguous nature of law. To justify this answer, it will be necessary to explain how social reality and constructivist facts exist. Here, it will become clear how minds play a crucial role in the construction of social reality and law.

This contribution contains advanced teaching materials. Therefore, it provides many links to debates in the philosophy of law of the 20th century and to the growing theory of how social reality exists (social ontology). At the same time, this contribution strives for a clear overview of what is at stake. This means that its argument must sometimes remain on the surface, sacrificing scientific precision to clarity of exposition.

2. *The background of the debate*

2.1. *Hume's guillotine*

For a proper understanding of many debates in legal philosophy, including the debate about the nature of law, it is necessary to understand *Hume's guillotine*. Simply stated, this guillotine boils down to the thesis that it is impossible to derive judgments about what ought to be done from only statements about the facts (HUME 1978, 469). For example, it is not possible to derive that John ought to be punished from the statement that John is a thief. The metaphorical guillotine separates what ought to be done from the facts. To connect the two, a premise needs to be added. In the example, this premise might be that thieves ought to be punished. However—and this is important—the additional premise is an ought judgment and not an ordinary statement of fact.

Hume's guillotine is a central element of an elaborate theory about the world. According to this theory, the world consists of a large collection of facts, but these facts only concern what is the case, not what ought to be done. In the world itself, there is no ought. What ought to be done is added to the world by human beings—or, for some, by God. Moreover, this addition does not depend on what the facts in the world are. Suppose that the world contains the fact that John is a thief. Humans can add both that John ought to be punished, or that John ought not to be punished, or nothing at all. What ought to be done is logically independent of what is the case. Any ought can be combined with any set of facts. And therefore, a description of the world, however elaborate, cannot determine what ought to be done.

The impossibility to derive Ought from Is—because that is what we are talking about—is the necessary consequence of a particular view of the world. According to this view, the world may contain many facts, but it does not determine what ought to be done. What ought to be done is a human addition. In an argument, this human addition takes the form of an ought judgment, such as the judgment that thieves ought to be punished (RAILTON 2006).

2.2. *The open question argument*

A similar story can be told about value judgments. The world may contain many facts, but these facts do not include any evaluation. So, it may be a fact in the world that this is a football match with many goals, but it cannot be a fact that this is a good match. The world contains facts, but not the valuations thereof. What is good or what is bad, is not given with the world. Just like what ought, or ought not to be done, valuations are human additions, and these additions are not determined by the facts.

The addition of value to the world sometimes takes the shape of accepting standards. In the case of football matches, a simplistic standard may be that matches with many goals are good. If this standard is adopted, matches with many goals are also good matches. However, any standard is only provisional, or—to state it with different words—contestable (GALLIE 1956), or open to debate. The standard for good football matches does not define what 'a good football match' means. In contrast, the meaning of a word is a matter of convention. If people agree on what a word means, the word has this meaning. If somebody contests that this kind of animal is a horse, he[1] thereby shows that he does not know what horses are, or—which boils down to the same thing— what the word 'horse' stands for. If a football lover does not wish to count matches with many goals as good ones, he does not exhibit a lack of knowledge of what 'good football match' means; he merely disagrees with the standard in use.

This insight—that the standards for valuation do not give the meanings of evaluative words—underlies the so-called *open question argument* (MOORE 1903, sections 6-17; RIDGE 2019). An open question is a question that may sensibly be asked without showing a misunderstanding of the topic at stake. It makes sense to ask whether a football match with many goals is 'really' good. However, it makes no sense to ask whether this kind of animal, a typical horse, really is a horse.

An open question, in the technical sense at issue here, shows possible disagreement with a standard for evaluation. Similar open questions are also possible regarding ought judgments: any concrete ought judgment based on a general rule can be questioned by someone who disagrees with the rule. Later, we will see that some also consider questions about the content of law as open questions in this sense.

2.3. *Objective facts and objective knowledge*

For a proper understanding of the debates in legal philosophy, the stories about Hume's guillotine and the open question argument need to be supplemented by a story about objective knowledge. This third story starts from a philosophical doctrine about the world and our knowledge of it. According to this doctrine, the world exists independent of what we believe about it. The world is, to state it with a technical term, *mind-independent*. For instance, the world contains the fact that Mount Everest is more than 8,000 metres high, and this is a fact whether people believe it or not. The mind-independence of the world and the facts in it explains why the world does not contain an ought or valuation, as what ought to be done or what is good or bad depends on human minds.

The philosophical doctrine at issue is called *ontological realism*.[2] This is the doctrine that the facts do not depend on what we believe them to be. It is the natural way to think about physical objects and their characteristics. That is the reason why most people are ontological realists about the physical facts. We consider physical facts to be objective, where 'objective' stands for the same mind-independence that ontological realism advocates.

Assuming that there are objective facts in the world, we would like to have objective knowledge about them. Objective knowledge is knowledge that depicts the facts as they really are, without distortion (REISS & SPRENGER 2020). Distortion can easily occur, for example if we 'look' at the universe by means of a radio telescope. Such a telescope provides us with data which need to be processed, to become meaningful to human beings. Such processing is nowadays performed by a computer. If it takes place in a wrong way, the result is distorted, and our knowledge is not objective.

[1] To avoid cumbersome formulations such as 'he/she' or 'her/him', I will use pronouns that reflect the gender of the author, in my case therefore the male form. I can only encourage female authors to use female pronouns.

[2] An accessible, although also contestable, description of ontological realism can be found in SEARLE 1995, 149-157. See also MILLER 2021.

Another example of knowledge that is not objective is knowledge about the social world. If we follow the famous sociologist Max Weber, true knowledge of the social world presupposes a recognition—*Verstehen*—of the meanings that social events have (WEBER 1921-22). For example, you can only understand why people dress in black when they visit a place on the border of a town if you know that they attend a funeral and that the colour black symbolizes mourning. However, this meaning of dressing in black is not mind-independent and our meaning-based understanding of a funeral cannot be a mind-independent representation of the facts. If Weber was right, objective knowledge is not possible in the social sciences.

This example about a funeral also illustrates that there are some facts for which ontological realism seems less attractive. Facts with meaning in the social world are a case in point, but perhaps also mathematical and moral 'facts', or facts about the law. The very idea of objective knowledge, knowledge that represents the facts as they really are, only makes sense if it is presupposed that this knowledge concerns objective, mind-independent facts (HAGE 2022b). If such facts are not available, objective knowledge is impossible. On the assumption that ought judgments do not express facts, it is not possible to have objective knowledge of what ought to be done. Not because our knowledge of what ought to be done is distorted, but because there is not even a fact to obtain knowledge about.

Facts that are not objective are often called 'subjective'. In section 4, we will see that the opposition between what is objective and what is subjective is not as simple as suggested by the picture sketched in the present section.

3. *The debate in the 20th century*

With the doctrines about the separation of Is and Ought (Hume's guillotine), the open question argument, and the objectivity of the world and our knowledge of it in place, we can have a look at the work of four important 20th century legal philosophers.

3.1. *Kelsen and the Grundnorm*

At the beginning of the 20th century, Hans Kelsen developed a view of law, the *Pure Theory of Law*, in which he tried to set out the proper domain of legal science in contrast to ethics and to the social sciences (KELSEN 1934). The contrast with ethics lies in the fact that legal norms express a special kind of 'ought', namely a legal ought. Ethics, which studies morality, would deal with norms that express a moral ought.

The contrast with the social sciences is, according to Kelsen, that law consists of norms. Norms are not the proper domain of the social sciences, which—as sciences—can only deal with facts. Legal facts, such as the fact that John's act is a case of theft, are not objective. These facts have a legal meaning which does not exist in the objective world. The meaning stems from the classificatory norm that taking away a good that belongs to somebody else has the legal meaning of being theft.

Some actions, such as legislation, or—in the common law—issuing a court decision, have the meaning of creating a legal norm. They derive this meaning from a 'higher' norm, which gives the law creating actions their specific meaning. For instance, the norm that the municipality council can issue norms for the municipality gives some actions of the council the legal meaning of creating norms. If the council has created a norm, the norm exists. However, this legal meaning can only exist because of another norm which gave the decision of the community council the meaning of creating a norm. Legal meaning does not exist in the objective world.

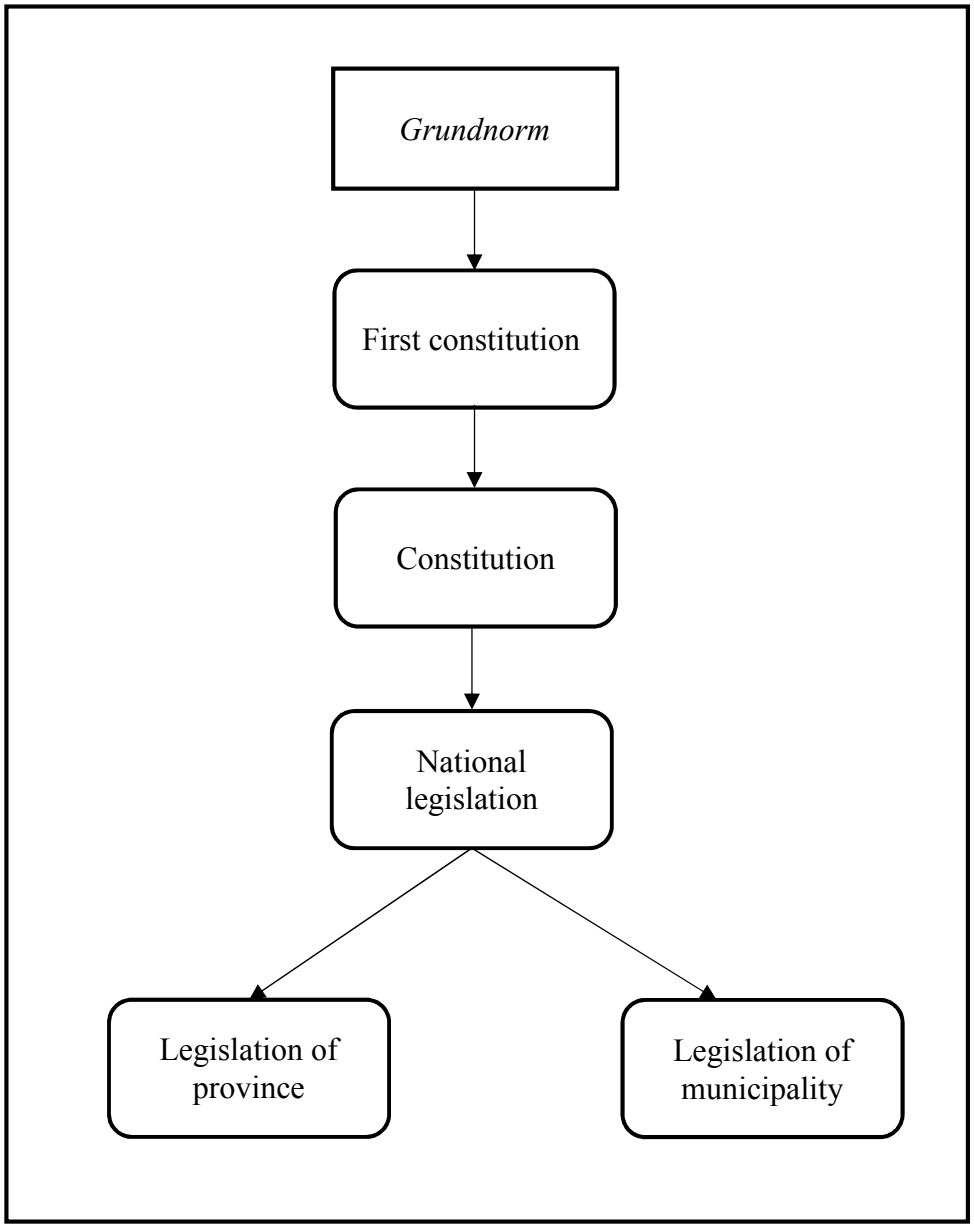

Figure 1: A legal system, based on a Grundnorm

According to Kelsen, created norms can only exist because of a 'higher' norm which attributes actions the meaning of creating a new norm. All legal norms have been created in this way. In other words, the existence of every legal norm presupposes the existence of a 'higher' norm.

All norms that stem from one and the same 'higher' norm belong to the same legal system. For instance, all norms that were created by the community council belong in this way to the same legal system. The norm that attributes the community council the power to create new norms may itself be based on a norm from the national legislator which attributes legislative powers to 'lower' legislative bodies. The latter norm was created by legislation of the national legislator. Moreover, the national legislator derived its power to create this norm from the constitution. The maker of the constitution derived his power from an earlier constitution, the maker of which in turn derived her power from an earlier constitution, and so on... All the norms that stem from the same constitution belong to the same legal system. See figure 1.

In the Kelsenian picture of a legal system, all norms were made on the basis of some other norm. It is easy to see that this picture has a problem: who created the 'highest' norm of the system and which norm gave this action the legal meaning of norm creation? The first of these two questions can still be answered: the 'highest' norm was formulated in the first constitution and was therefore created by the makers of this first constitution. However, which norm gave these makers the legal power to make the constitution?

Kelsen's answer to this question was original, but also controversial. According to Kelsen, the norm that empowered the makers of the first constitution was not created at all. It is a presupposition of the whole legal system. A legal system can only exist if there is a 'highest' empowering norm which makes the creation of the other norms of the system possible. Kelsen called this 'highest' norm the *Grundnorm* of the system. No legal system can exist that does not have such a *Grundnorm*. If the people of a country take it that they have a legal system, they are committed to the existence of a *Grundnorm* which validated the creation of all other norms of the system. The legal system then consists of precisely those norms that stem from this *Grundnorm*.

According to Kelsen, legal systems consist of norms. These norms are not facts, and all the facts in the world by themselves cannot determine what the norms are. To have norms, it is necessary to add normativity to the world of facts. The function of the *Grundnorm* in Kelsen's theory is to add this normativity to the world of facts. However, Kelsen did not really answer the question how this addition took place. He only stated that if people assume that there are norms, they are committed to some normative input. In a hierarchical legal system, this input can only be provided by a 'highest' norm that provides all the norm creating actions with their status of norm creation. Such a *Grundnorm* cannot really exists as a matter of objective fact. Still, according to Kelsen, there cannot be legal norms without a *Grundnorm*. Therefore, the belief that there are legal norms commits to the belief that there is such a *Grundnorm*.

We see that Kelsen's distinction between facts and norms becomes a separation. All the facts in the world cannot determine what the norms are. This reflects Hume's guillotine and its underlying picture of the world. Because the facts nevertheless seem to determine the norms, the question what the norms are remains open. Kelsen does not answer the question what normativity is, and neither does he explain where normativity stems from.

3.2. *Alf Ross*

Alf Ross, a student of Kelsen, found the Kelsenian construction of a *Grundnorm* that adds normativity to the world of facts but which itself does not exist as a matter of fact, problematic. In several books (Ross 1946, 1959), he criticised Kelsen's view. Ross adopted Kelsen's view that legal norms provide facts with a specific legal meaning. However, where Kelsen considered this meaning as something that lies outside the world of facts, Ross gave it a firm position inside the world of facts. In a central passage of his book *On Law and Justice*, Ross wrote: «A national law system, considered as a valid system of norms, can accordingly be defined as the norms which actually are *operative in the mind of the judge*, because they are *felt* by him to be socially binding and therefore obeyed» (Ross 1959, 34; italics added).

This emphasis on what goes on in the mind of a judge, and on what a judge feels about norms, is a major step away from Kelsen. Kelsen would emphasize that mental events and feelings are facts in the world—with which Ross would agree—and can therefore not provide the meaning which characterizes legal facts. This latter step is exactly what Ross rejects. In Ross' view, the meaning of legal facts precisely *is* what goes on in the minds of judges.

The facts do have meanings in the real world, be it that the meanings lie in the psychological states of human beings, which are then projected onto the external world. If this sounds as a strange doctrine, a parallel with colours may elucidate Ross' view. The objective—in the sense of mind-independent—world does not contain colours, but 'only' electro-magnetic waves of frequencies

within a specific range. These waves, if they impinge on our eyes, cause our experiences of colour. Moreover, we ascribe these colours to the objects that reflected the waves to our eyes. Colours are the result of the interaction between our minds and the objective world and are in that sense mind-dependent. Nevertheless, we ascribe the colours to the objects in the world. Ross can be interpreted as claiming the same for legal meaning: it is mind-dependent, but nevertheless ascribed to—projected onto—the world. He refused to subscribe to the world view according to which the world consists of meaningless facts. This is a crucial step towards recognising the role of the cognitive sciences in understanding what law is. *I will return to it in the second part of this contribution, when recognition is discussed as a condition for the existence of basic social facts.*

3.3. *Hart's rule of recognition*

Another step was taken by Hart. In his book *The Concept of Law*, he reacted to both Kelsen's theory about the *Grundnorm* and Ross' psychological alternative. First, he criticised the psychological theory for ignoring the normative aspect of legal rules. To this purpose, Hart introduced the example of a gunman threatening a passer-by: give me your money, or I will shoot you! Because of this threat, the passer-by is obliged to hand over the money. However, as Hart emphasizes, she is not under an obligation to hand over the money. The threat creates a psychological necessity (obliged), not a duty or obligation. Similarly, if a judge feels bound by a set of rules, or knows that legal subjects feel bound, this does not suffice for the legal validity of these rules. Law is not the gunman situation writ large (HART 2012, 83 f.).

However, the Kelsenian account, with a presupposed *Grundnorm*, would not be realistic either. Law has a foundation in social reality, even though this foundation is not that judges or legal subjects feel obliged to comply with legal rules. Hart's alternative is a two-step test (HART 2012, 100-109):

1. Legal rules are identified by means of a rule of recognition, which points out what the sources of law are. Rules that stem from a thus identified source are legal rules; other rules are not.
2. The rule of recognition is itself not a valid legal rule and does not stem from a source of law. Instead, it is a *social rule*.

The first step is familiar to all lawyers. Legal rules stem from a source of law, such as legislation, conventions (treaties), or judicial decisions. The second step addresses the question of why precisely those are the sources of law. Hart claims that it depends on the legal system at issue what the sources are. Every legal system is defined by its own rule or recognition. This rule exists because the officials of the system—read: the courts—use it to identify the sources of law. This use involves both application of the rule, as well as a critical reflective attitude towards the behaviour of all officials including oneself. The user of a social rule is motivated to use the rule, encourages relevant others to use the rule, and criticizes himself and these others in the case of unjustified non-use. This normative social practice distinguishes Hart's rule of recognition from the individual psychology of judges proposed by Ross. *It will return to it in the second part of this contribution, in the discussion of rule-based social facts.*

3.4. *Dworkin's criticism*

In the 1970s, Dworkin criticized Hart's views by arguing that there is more law than what is identified by the rule of recognition (DWORKIN 1978, 14-45). To this purpose he used a case that was decided by a New York court (*Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889)). The case was about a young man called Elmer, who murdered his grandfather to prevent the grandfather

from changing his last will and disinheriting Elmer. The question in law was whether Elmer could still inherit from the grandfather he murdered.

At the end of the 19th century, New York law had no rules that specifically dealt with such situations. The rules that could be based on the local rule of recognition only indicated that Elmer could inherit because of his grandfather's last will, which obviously had not been modified. Nevertheless, the New York court refused Elmer his inheritance. This decision was justified by invoking the principle that nobody should benefit from his own wrong. As Dworkin pointed out, legal principles such as the principle used by the New York court, are not identified as law by a rule of recognition. So, it seems that Elmer's case empirically refuted Hart's theory.

However, that conclusion can only be drawn if the principle invoked by the court was law indeed. An alternative interpretation of the event is that the New York court refused to apply the law, as the law would be wrong. The court itself adopted the former interpretation of what it did: it was applying New York law and the principle was part of the law that was then valid in New York. However, the self-interpretation of the court is not necessarily decisive for what happened.

Both the 'empirical' refutation of Hart's theory that all law stems from a rule of recognition which exists as a social rule, and the alternative interpretation that the court only refused to apply valid law because it was unjust will return in the second part of this contribution, in the discussion of constructivist social facts.

4. *Law as a part of social reality*

4.1. *Intermezzo*

The 20th century debate that was described in section 3 deals with a central question: to what extent can law be a social phenomenon and to what extent is an infusion of 'normativity' (morality) necessary. Kelsen claimed that the normativity of law could not stem from the world of facts, but that the infusion of normativity could not be an input from morality either, because the legal ought differs from the moral ought. The input of normativity could only stem from a presupposed *Grundnorm*. Ross, on the contrary claimed, that the normativity of law is nothing other than mental phenomena projected onto the external world. The world of facts includes the normativity of law, be it that this normativity is in the end nothing other than mental facts. Hart amended Ross' view by replacing the role of mental facts by a social practice of rule following. However, if law is a social practice of rule following, the question remains how this social practice can be contested. How can the social practice of identifying law by means of a rule or recognition be criticized as being against the law? Apparently, the view that law is a rule-based social practice is contradicted by this practice itself. Dworkin rejected Hart's view for ignoring this insight.

In the second part of this contribution, the debate of the 20th century will be considered from the perspective of what is presently called *social ontology*. Social ontology deals with the question of how social reality exists[3]. If law is a part of social reality, social ontology should provide us with answers to at least some of the questions that legal theorists raised.

The following account of social ontology starts from basic social facts, building up to basic rule-based facts and facts based on rule-based rules. The account ends with the introduction of constructivist facts, which are fundamentally open to questioning. The jurisprudential debate about the role of morality in law can to a large extent be interpreted as a debate on whether legal facts are constructivist facts.

[3] Important general work on social ontology comprises the studies of the great classical sociologists (a.o. Marx, Weber, Durkheim, Mead, Parsons and Luhmann), BERGER & LUCKMANN 1966, GILBERT 1989, SEARLE 1995 and SEARLE 2010, TUOMELA 2002. Especially relevant from a legal perspective are a.o. RUITER 1993 and 2001, LAGERSPETZ 1995, RAZ 1979 and RAZ 1986, MARMOR 2009.

4.2. *Objective, subjective, and social facts*

As a first indication of what social facts are, it is useful to contrast them to objective facts and subjective 'facts'. Objective facts are facts that exist independent of whether people believe in their existence. Examples of objective facts are the facts that the Pacific Ocean contains water, that 3+5 equals 8, or that most human beings have lungs. Because objective facts do not depend on what people believe, they are the same for everybody, even if people have different beliefs about them.

Subjective 'facts' are completely personal. Many people would not even want to call them 'facts', because of their personal nature. Examples are that Carla is a pretty woman, that chocolate tastes good, or that Johann Sebastian Bach was a better composer than Paul Hindemith. Subjective facts depend completely on what individual people believe or find, and in this sense, everybody has her own subjective 'reality'.

Social facts take an intermediate position between objective and subjective facts. They depend on what people recognise, but not on individual recognition. For every individual person, social facts are like objective facts: they exist whether they recognise them or not. If a single Belgian would not recognise Philippe as the king, he would be wrong if almost all other Belgians recognise Philippe. However, for a whole group, social facts are like subjective facts: it depends on what the members of the group believe these facts are. So, if (almost) all Belgians would change their minds about their king, Philippe would not be the king of the Belgians anymore.

This means that different groups of people may disagree on what the social facts are, for instance on whether international law allows the Russians to claim the Ukraine as belonging to Russia. Different countries may have different systems of positive law. Somebody who is guilty of the crime of 'unnatural sexual behaviour' in one country, may be innocent of a crime in another country.

A brief digression is in place here. It may be argued that something is objectively a crime according to the law of country A, but not a crime according to the law of B. Facts that are relative to a social group become objective by mentioning that group in the description of the fact ('a crime according to French law').[4] On this line of thinking, social and even subjective facts may be made objective by including the standard on which they are based in the description of the facts. However, if this approach is taken, a useful distinction for understanding the world collapses. Here, this approach will only be mentioned, but not explored any further.

4.3. *Basic social facts*

Many social facts are the products of rules—they are rule-based, or institutional facts (MacCormick & Weinberger 1986)—but for a proper understanding of social reality it is better to start with *basic social facts*. As a first approximation, basic social facts exist in a group if sufficiently many members of that group believe that they exist. For instance, Henrike is the leader of the Maastricht Cycling Club (MCC) if most members of that club believe that Henrike is their leader.

For some kinds of basic social facts, it does not suffice if sufficiently many members of a group *believe* them. Suppose, for instance, that all members of MCC believe that Henrike is their leader, but do not attach any consequences to this belief. If Henrike proposes to take a break during a cycling trip, this proposal is treated like the proposal of any other club member. To have a leader for a club means not only that sufficiently many club members believe that she is the leader, but also that they attach the relevant consequences to this believed leadership. What these consequences are, depends on how the notion of leadership is given content in the

[4] Thanks to Manuel Atienza, who emphasized the relevance of this point for me.

group, but there cannot be leadership without any consequences. If a person is to be the leader of a social group, the members of the group must accept her leadership. We find that for some kinds of basic social facts mere belief satisfies, while other kinds of basic social facts can only exist if their consequences are accepted. It is convenient to introduce a technical term that stands for belief if that is all that is required for the existence of a basic social fact, but that includes acceptance if that is an additional requirement. I propose to use the words 'recognise' and 'recognition' to this purpose.

Suppose that all members of MCC recognise that Henrike is the leader of the club but are not aware that the other members do the same. Individually, they are all disposed to follow the directives of Henrike about destinations, breaks, or departure times, but at the same time they are surprised that the others also follow Henrike's suggestions. In such a case, we cannot say that Henrike is (already) the leader of the group. More is needed, and this more includes that the group members should be aware that Henrike fulfils the same function for most other members that Henrike fulfils for them personally. It should not only be the case that the members of MCC recognise Henrike as their leader, they should also believe that the other members also recognise Henrike as leader of the group, and that these other members have the same beliefs about their fellow cyclists. In other words, a group member P should not only have beliefs about Henrike, but also about what her fellow group members recognise, including what her fellow group members believe about the beliefs of P herself. The beliefs of P should include indirectly—namely via the beliefs of her group fellows—meta-beliefs about her own beliefs. I will call these beliefs *reflexive meta-beliefs*; reflexive because these meta-beliefs are also about the believer's own beliefs (Lewis 1969, 52-57; Ruben 1985, 105-119; Lagerspetz 1995; Tuomela 2010, 66).

These reflexive meta-beliefs mark the difference between the views of Ross and Hart about the existence of rules. Ross focused on the beliefs and feelings of individual persons, while Hart emphasized the importance of a social practice. Part of what defines such a social practice is the existence of reflexive meta-beliefs, which represent the step from individual mental states and individual psychology to social practices, institutional reality, and sociology.

Reflexive meta-beliefs are crucial for the existence of basic social facts, but there are other important meta-beliefs. Imagine we are in the early Middle-Ages, a time at which most people believed Earth to be flat. Moreover, these people not only believed Earth to be flat, but also that others believed both that Earth is flat and that all others believed the same. In other words, sufficiently many members of the group consisting of all humanity believed Earth to be flat and also entertained the reflexive meta-beliefs necessary for Earth's being flat to exist as a basic social fact. Nevertheless, we cannot say that in the early Middle-Ages, Earth was flat as a matter of basic social fact. The reason is that another important meta-belief was lacking. Most likely, also in the early Middle-Ages, people believed that whether Earth is flat is a matter of objective fact. In those days, people would not only believe that Earth was flat, but also that if in a different society people would believe that Earth was round, those people would be wrong, objectively wrong. People who thought that the flatness of Earth was something to be established by shared recognition in a group would not understand what kind of fact the shape of Earth was.

Something similar would hold if one member of MCC claimed that, even though all other members recognise Henrike as their leader, Henrike was objectively speaking not their leader. This single person would show by his claim that he did not understand that being the leader of an informal club is a matter of basic social fact and that it does not make sense to talk about 'objective leadership'.

The point that these examples are meant to illustrate is that something can only exist as a particular kind of fact (objective, social, or subjective) *if it is a social fact that it belongs to this kind of fact*. So, Henrike can only be the leader of MCC if sufficiently many members of MCC recognise her as the leader *and* if they consider leadership to be a matter of social fact.

4.4. *Rule-based rules and their consequences*

Rules attach 'new' facts to existing facts or to events[5]. For instance, they attach the fact that Biden is commander-in-chief of the USA army to the fact that he is the president of that country. They attach the fact that Meryl owns a book to the event that this book was validly transferred to her. Or they attach the obligation that Kristin pays €150 to Ove to the event that Kristin broke Ove's vase. I will call these new facts 'rule-based facts'.

There are two kinds of rule-based facts, namely facts based on social rules and facts based on rule-based rules. The most basic form of existence for rules is existence as a social rule.[6] A social rule exists in a group if sufficiently many members of the group are disposed to recognise the rule consequence if they believe the facts of the rule conditions. For instance, if most people in Belgium are disposed to recognise the person to whom a property was validly transferred as the (new) owner of the property, then the social rule exists in Belgium that the person to whom a property was validly transferred has become the (new) owner of this property. Another example deals with a duty-imposing (mandatory) rule. If most members of the Maastricht Cycling Club normally recognise the duty to do what the leader of the club told them to, the social rule exists in MCC that if the leader says that you must do something, you have a duty to do it.

Notice that this definition of when a social rule exist applies to both mandatory rules, which prescribe behaviour, and other rules, such as classificatory rules, or competence conferring rules. Notice also that the definition does not mention anything about the way the rule came into existence. It may have been created in a legislative procedure and then the rule is both a social rule and a rule-based rule; these two do not exclude each other. The rule may also have grown in a social practice with the rise of dispositions to associate facts and the rise of mutual expectations.

A direct consequence of this characterisation of social rules and their existence is that members of a group who do not recognise the consequences of social rules make a mistake. Rationally speaking, they ought to recognise these rule-based facts. For example, somebody makes a mistake if he answers 8 to the question what the sum of 4 and 2 is. Or somebody who greets another person by taking off her shoes makes a mistake, at least in Europe. Such a perceived mistake may lead to social pressure to recognise the rule-consequences, and to (self)criticism (HART 2012, 88 f.). On one hand, social rules depend for their existence on the recognition of their consequences, but on the other hand they determine for individual group members what they ought to recognise.

This is a second aspect of the transition from mental states and individual psychology to social practices and sociology that marks the difference between the views of Ross and Hart. Ross emphasized individual dispositions to act in a particular way, while Hart focused on the social interactions that characterize social rules.

One special kind of rule-based fact are the facts which involve that a particular thing exists. The things that exist because their existence is a rule-based fact, will be called 'rule-based things'. Let us assume that in football the rule exists that the team that has scored the most goals is the winner of the football match. On the assumption that Team A scored more goals than Team B, this rule brings about that Team A is the winner of the football match. The winner exists because of the mentioned rule, and the winner is, therefore, a rule-based 'thing'.

There are many rule-based things, such as the Dean of the Law School, a bank note, a property right, a legal obligation, and the United Nations. However, for our present purpose,

[5] A more elaborate account of rule-based facts and rules can be found in HAGE 2022c.

[6] The present characterisation of social rules deviates substantially from the classic circumscription in HART 2012, 55-61.

the most relevant rule-based things are rules that exist because they were created. Rule-based (or institutional) rules can exist anywhere in a society where there are rules that specify how new rules can come about. For instance, MCC may have the rule that the finance committee of the club can make rules on the yearly contribution. If the finance committee uses this power, it makes rule-based rules. However, most rule-based rules exist in law.

In contrast to social rules, rule-based rules can generate consequences which are not broadly recognised. In the Netherlands such a rule arguably exists regarding traffic lights for pedestrians. If a traffic light for pedestrians is red, pedestrians are not allowed to cross the street. However, many pedestrians ignore the rule. They do not even feel bound by it and make their crossing behaviour dependent on the intensity of the traffic, or the presence of a police officer. Despite this massive lack of recognition, the rule about traffic lights does create legal duties and a pedestrian who crosses the street while the traffic light is red violates the law and becomes liable to be punished. This liability can exist without being recognised.

More in general, facts based on rule-based rules can exist without being recognised, although this is a relatively exceptional phenomenon. The phenomenon is theoretically important, however, because it illustrates how facts in social reality can exist without being recognised.

4.5. *Ought-facts*

Objective facts are, by definition, mind-independent. In contrast, social facts depend on the minds of the members of a social group. Of course, it is possible to define facts in a narrow way, to allow only objective facts as 'real' facts, but that would also exclude the existence of the United Nations as a fact, as well as the facts that John the thief is *punishable* (a disposition), that it is *certain* that the train will be late, or that Harry *cannot* play chess (both modalities). Many more kinds of fact than we may initially think are mind-dependent, including the existence of all dispositions and all modalities[7]. These facts are not objective, and if we disallow them to be facts, the notion of a fact will become much narrower than our present use of it.

As soon as it is recognised that facts do not need to be objective, but that they can also be mind-dependent, it should become easier to accept the idea that some facts are about what ought to be done. Ought-facts are mind-dependent, but they are nevertheless facts. Perhaps some ought-facts are purely subjective, for instance if I impose some duties on myself. However, most ought-facts exist independent of whether you personally recognise them. Those facts are social facts; they exist in social reality (HAGE 2022a).

The refusal to recognise ought-facts as facts in the world is characteristic for Kelsen's view on law and distinguishes his view from the views of Ross and Hart. Ross recognised projected mental states as parts of reality, while Hart did the same for social practices. Because of his refusal, Kelsen was forced to adopt the view that the normativity of law is only presupposed. Both Ross and Hart could account for the existence of law as a normative practice, by recognising mind-dependent elements in the world.

However, if some facts depend on what people recognise as existing, how is it possible to seriously question these facts? If you know that practically all members of MCC recognise Henrike as their leader, you cannot seriously question whether Henrike is the leader. However, in law this seems to be different. Even if there is a social practice according to which Meryl owns this copy of *Pride and Prejudice*, it seems still possible to question whether Meryl really owns the book. Perhaps the legal practice is wrong, but how is that possible if law exists as a social practice? Here constructivist facts enter the picture.

[7] On modalities and their mode of existence, see WHITE 1975.

5. *Constructivist facts*

5.1. *Introducing constructivist facts*

Suppose that the members of MCC take a vote on what was the best cycling trip they made this year and that they decide unanimously that the trip to the castle gardens in Arcen was the best trip. Does this mean that the Arcen trip really was the best trip? No, even if all club members agree on what was the best trip, this does not mean that it *really* was the best trip. Perhaps all club members mistakenly felt that the trip with the best weather was the best trip, while some reflection would have made them prefer the trip with the largest number of flat tires, because that trip created the strongest personal ties between the members.

There seems to be a difference between what most or even all members of the group accept as the best trip and what really was the best trip. It is interesting to compare this with the leadership of the club. Suppose that MCC does not have a leader that was designated by a rule, but that all members of the club recognise Henrike as their informal leader. In this case, Henrike *is* their informal leader, independent of the quality of the reasons why she is recognised as the leader. In this case of informal leadership, bad reasons bring about that Henrike is the leader for bad reasons. In the case of the best cycling trip, bad reasons for preferring one trip over another mean that the preferred trip was not really the best one. Such facts, which depend on the best reasons rather than on broad recognition, are called *constructivist facts*[8].

5.2. *The possibility of questioning*

Constructivist facts are social facts that exist because they are recognised as existing or are based on a rule-based rule, but which are nevertheless open to questioning[9]. How is this combination possible? The answer is easy: the social practice of a group does not only recognise the existence of these facts, but also the possibility to question them. The possibility of questioning is a social fact, just as much as the questionable fact itself. If the possibility of questioning a particular kind of fact does not exist in social reality, facts of that kind are perhaps social facts, but not constructivist facts.

This is quite abstract, and it may be useful to consider some examples. Let us start with the best cycling trip and assume that, if interviewed about it, all members of MCC would mention the trip to the castle gardens of Arcen as last year's best trip. Moreover, they do not believe this to be an objective matter, because it depends on their appreciation of the trip, but neither do they believe the issue is purely subjective. And, finally, they do not only consider this trip the best one of the year but they also believe that the other club members feel the same and also know that their feelings are shared by the others. In short, it is a basic social fact in MCC that the trip to the castle gardens of Arcen was the best trip of the year. That is: in first instance, because they also agree and know that the others also agree that, theoretically speaking, everybody might be mistaken. If somebody came up with convincing reasons why another trip was even better, this other trip would turn out to be even better and their original judgment would turn out wrong. The value judgment about the best cycling trip expresses a constructivist fact.

A second example deals with rule-based duties. Assume that the legal system of France has the rule that car drivers must halt at red traffic lights. This rule was created by means of a statute and exists as a matter of rule-based fact. Zala drives her car and approaches a red traffic

[8] The idea of constructivist facts has mainly been developed in the philosophy of mathematics (IEMHOF 2020), moral theory (BAGNOLI 2021), and legal philosophy (DWORKIN 1986; SOETEMAN 2009).

[9] This definition captures most constructivist facts, but not all. In theory, a constructivist fact also exists if it logically ought to be recognised. Implicitly, this will be explained at the end of this subsection.

light. The rule imposes on her a duty to halt; at least that would be the normal situation. However, Zala brings a severely injured person to the hospital, and it is important that they arrive there as soon as possible. This is a reason to make an exception to the general traffic rule and to conclude that Zala should not stop for the traffic light (assuming, of course, that she does not cause a collision by driving on)[10]. This example differs in two respects from the former one about the best cycling trip. First, it deals with a normative judgment—what should Zala do?—rather than with a value judgment. And second, the normal social fact, namely that Zala should stop, would be a rule-based fact, rather than a basic social fact. However, these two differences do not make a difference; it is still possible to argue that the normal situation does not occur, by adducing convincing reasons to this effect.

Let us abstract from these examples. Constructivist facts are characterized by the possibility to have a *serious* debate about them. 'Serious' means in this connection that the participants in the debate believe that it is possible to disagree about these facts without thereby showing a misunderstanding of what the debate is about. For instance, if Joanna and Frédéric disagree whether red wine is better than white wine, while they also believe it is just a matter of taste, they consider the issue at stake to be a merely subjective one and their difference of opinion not to be serious. If two members of MCC disagree about whether Henrike is their leader, while both know that practically all members of the club accept Henrike as their leader, their disagreement is not serious either. The reason is that not believing that Henrike is the leader while also believing that 'everybody' recognises Henrike as the leader, shows misunderstanding of the conditions for leadership. The seriousness of the debate becomes manifest in the assumption of all participants that there is a right answer to some question, even though it is not a matter of objective fact, and that this does not change if people disagree about the right answer.

The reasons that can be adduced in a debate about a constructivist fact determine what the fact is. A slightly too simple way of stating the point is that the facts are what the best possible argument claims they are. This constructive role for arguments in determining what the constructivist facts are justifies their name as being *constructivist* facts. By adducing arguments for why the trip that everybody initially thought to be the best one was not really the best one, it turned out to be possible to 'change' the facts about the best cycling trip.

This 'change' can be interpreted in at least two different ways. First, it may be claimed that because of the arguments that were adduced, (almost) everybody changed her mind, and now the other trip has become the best one because 'everybody' recognises it as the best one. This interpretation has the advantage that it does not need the introduction of constructivist facts as a separate category. It suffices to see that adducing reasons may change what people recognise and thereby also what the social facts are. However, this interpretation has a serious drawback. If people adduce reasons why a claim that was broadly recognised is not correct, they do not merely want to change the social facts; they claim that the social facts already were different from what 'everybody' believed. Interpreting the event as a mere change of opinions does not do justice to what occurred, namely that people came to see that they were wrong from the start.

That is the reason why the second interpretation should be preferred. Given what the group members already recognise and given what the objective facts are, it is shown why another trip is 'really' the best one. The possibility to do this suffices for making the other trip the best one from the beginning. If this second interpretation is adopted, constructivist facts depend, not on what is actually recognised in a group, but on what *ought to be recognised* given the objective facts and what already is (or ought to be) recognised in the group.

[10] This is an example of so-called *defeasible reasoning*. More about defeasible reasoning in Prakken & Sartor 1997 and Ferrer Beltrán & Ratti 2012, and more about exceptions to rules in Bartels & Paddeu 2020.

Dworkin's criticism of Hart can be understood from the view that Dworkin was a constructivist with regard to legal facts. He claimed, in one phase of his career, that legal questions have one right answer. However, at the same time he criticised the view that the law is a purely conventional matter (as Hart claimed). The latter criticism is a special case of the view that constructivist facts are always open to questioning. The former view can be explained from the fact that a debate about constructivist facts is serious: the debate is conducted as if there were a correct answer to the issue at stake which is the same for everybody.

5.3. *Meta-constructivism and legal theory*

Finally, an important complication deserves mentioning. I wrote that whether a kind of fact is constructivist depends on the social practice in a group. This needs to be amended: it is not only a social fact whether a particular kind of fact is constructivist; it is even a constructivist fact. For instance, it is possible to seriously question whether ought-judgments are constructivist. Alternative views would be that they are purely conventional (non-constructivist social facts), or that they are objective, or purely subjective. The debates in ethical theory about the nature of moral judgments illustrate this very phenomenon. Some believe that moral judgments are objective, and that there are objective moral facts (SAYRE-MCCORD 2021). Others believe that they are expressions of individual preferences and that they are merely subjective or that the moral facts are relative to social groups and that what is a moral fact in one group is no such a fact in another group (GOWANS 2021). And, finally, there are those who believe that the moral facts are the conclusions of the best possible moral arguments (BAGNOLI 2021). The debates between the ethical theorists expressing these views are serious, and apparently the fact of the matter in this debate is constructivist. So, if legal judgments are considered to describe constructivist facts, this is itself a constructivist fact.

Constructivism bites its own tail: whether facts of some kind are constructivist, is itself a matter of constructivist fact. This explains the existence of *meta-constructivism*: constructivism about the issue of whether a particular kind of facts is constructivist. In legal theory there is a debate between hard (exclusive) positivists, soft (inclusive) positivists and non-positivists. Hard positivists claim that the law is a matter of social convention (basic social fact) and that the convention cannot refer to morality or anything other which is not objective or conventional (RAZ 1996; GARDNER 2001; MARMOR 2002). Soft positivists defend the view that the law is a matter of social convention but that the convention can refer to morality or to some other standard that is not conventional (HIMMA 2002). Non-positivists, finally, argue that law is not conventional in the first place, although there may be rational grounds for using conventions for the purpose of legal certainty (HAGE 2019). This debate has dominated much of 20th century legal philosophy, and it is not expected to end soon. The reason why the debate is so persistent is that it is a meta-constructivist debate about whether law is a matter of constructivist fact.

6. *Cognitive sciences and the nature of law*

Cognitive sciences deal with cognition in a broad sense. Cognition includes having true descriptions of the world. It also includes the possession of tools for making good inferences, and for giving useful explanations. The same holds for mechanisms for evaluating the world in a manner that is adequate to the ends of the evaluator. On the side of the entity that performs cognitive tasks, the scope of the cognitive sciences ranges from human beings, over other animals, to robots and immaterial cognitive agents such as organisations and artificially intelligent software.

This contribution has focused on a role of cognition that is seldom emphasized[11], namely its role in producing the social world. In contrast to the objective world, which is assumed to be mind-independent, the social world depends in a complex manner on minds. Moreover, the mental processes that create the social world are cognitive processes in the broad sense outlined above. This makes the mental creation of the social world a research topic for the cognitive sciences.

One important part of the social world is law. There are many legal facts which are, in a sense, brought about by legal rules. There are also many legal 'things' such as judges, courts, tax inspectors, property rights, criminal suspects, competences, and seizures, which are also rule-based. For a good understanding of how these legal facts and things have entered existence, the cognitive sciences play an important role.

However, this contribution has focused on a different topic concerning law and the cognitive sciences. Not only legal facts and things are products of cognitive activities, the same holds also for theories about the nature of law. In this contribution it was shown how jurisprudence has turned different aspects of social reality into different theories about the nature of law. Of course, the legal theorists of the 20th century—and they are who we are talking about—did not formulate their views in the terminology of social ontology or cognitive science. That terminology was not available yet. However, it is possible to translate the jurisprudential debate into the terminology of the cognitive sciences. And that opens new insights, such as the insight that the ongoing debate about the role of morality in law illustrates that the nature of law is a matter of constructivist fact.

[11] An exception is BERGER & LUCKMANN 1966. See also HEIDEMANN 2021, 2-22.

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