

Legal Consciousness and the Internal Aspect of Rules



Jaap Hage

Abstract This contribution starts from the assumption that law exists in legal consciousness, that is: in the beliefs and attitudes of people who jointly guide their lives by law. It aims to give an account of legal consciousness that combines Haidt's ideas about the origin of moral judgements, Berger and Luckman's ideas about the social origin of knowledge (very loosely), and Popper's idea that scientific knowledge is a collective product (epistemology without a knowing subject). According to Haidt, (moral) judgments originate when intuitive judgments, which are still inarticulate, are rendered in a language. Only when this has happened can the judgments be evaluated critically by the person whose intuition and judgement are concerned, but also by others. Such a critical evaluation seldom leads to a change of judgement; critical 'evaluation' is often post hoc justification. If it does lead to a modification of the initial judgement, this is most often the result of social interaction (criticism from others). When people interact, they develop standards for the evaluation of judgments, and when these standards become broadly accepted and seem almost objective, the justification of judgments depends on these social standards. In this way a body of knowledge grows which finds its justification in broadly shared standards. In the case of social reality (as opposed to objective reality), the facts are what justified judgments about these facts say they are. Technically stated: social ontology depends on social epistemology. The standards for justified belief that people develop in their social interaction thereby also become standards for what the social facts are. If law is a matter of social fact, this also applies to law. As Dworkin stated it: the law is what the best theory of law says it is. This best theory is true because the law corresponds to this theory. This is a correspondence theory of truth with a reversed direction of correspondence (direction of fit).

J. Hage (✉)
University of Maastricht Emeritus, Maastricht, The Netherlands
e-mail: jaap.hage@outlook.com

1 Prelude: Kelsen's Normativism

This chapter deals with Ross' theory of legal consciousness and Hart's alternative, legal internalism, and will try to shed a light on these 70 year old theories by discussing them from the perspective of modern psychology and social ontology. However, for a proper understanding of the debate, it is necessary to go even a little further back in time, to the first part of the twentieth century, when Kelsen developed his normativist theory of law.¹ According to Kelsen, there are two modes of existence: the mode of nature, which is governed by causal laws, and the mode of norms. Where in nature things exist in the traditional sense of the word, in the normative world they are valid. So Kelsen can write:

To speak [...] of the 'validity' of a norm is to express first of all simply the specific existence of the norm, the particular way in which the norm is given, in contradistinction to natural reality, existing in space and time.²

These norms cannot be based on social reality alone, as social reality is a matter of IS and from only an IS it is not possible to derive an OUGHT.³

In the 1940s and 1950s, the Scandinavian legal philosopher Alf Ross developed a theory of law in which he tried to liberate legal philosophy from metaphysical elements.⁴ A central element of this theory concerned the validity of law. Validity as an alternative mode of existence for norms—the view defended by Kelsen—might be considered as a rather mysterious characteristic and Ross tried to replace it with something that is more down to earth. In modern terminology, we would say that Ross aimed to 'naturalize' the validity of law.⁵ Very briefly stated, Ross' view was that valid law is law that legal decision makers feel bound by. So, the binding nature that Kelsen emphasized⁶ was replaced by a *feeling* of being bound, and a metaphysical theory of validity—because that is how Ross saw Kelsen's theory—was replaced by a psychological theory.

The English legal philosopher Herbert Hart criticised Ross' theory of legal validity for ignoring law's normative nature.⁷ To support this criticism without returning to the seemingly metaphysical theory of Kelsen, Hart developed the view that legal rules have an 'internal aspect'. This internal aspect would consist in a social practice.

The purpose of this chapter is to use insights from modern psychology and social ontology to gain a better understanding of the debate between Ross and Hart. The

¹ For an even better understanding, it may be useful to go still further back in time, for instance to Lotze, Kant, Hume or even Aristotle, but one has to start somewhere. For more knowledge about the Kantian and Neo-Kantian background of Kelsen's views, the reader may consult (Heidemann 2022).

² Kelsen (1992, p. 12).

³ Kelsen (1992, pp. 8–10) and Heidemann (2022, Section 3.2.4).

⁴ Ross (1946) and Ross (1959).

⁵ Papineau (2021) and Leiter and Etchemendy (2021).

⁶ Kelsen (1992, pp. 42–43).

⁷ Hart (1983, pp. 161–169).

emphasis will be on the analysis of the relation between individual psychology and social ontology in relation to legal validity, rather than on the description of the historical debate.

2 Alf Ross' Theory of Legal Consciousness

Law can only exist if it is grounded in human society and if it has some impact on human behaviour. A view of law according to which law consists of immaterial norms which create immaterial legal consequences, without relation to what people actually believe or recognise, does not only lack practical import but is also incorrect.^{8,9} This insight does not necessarily lead to a realist theory of law such as that of Ross, but it was no doubt an important source of inspiration.

Ross (1959) found the ground of law in the decisions of courts:

[...] a system of norms is "valid" if it is able to serve as a scheme of interpretation for a corresponding set of social actions in such a way that it becomes possible for us to comprehend this set of actions as a coherent whole of meaning *and motivation*, and within certain limits to predict them.¹⁰

and

A national law system [...] can accordingly be defined as the norms which are actually operative in the mind of the judge, because they are *felt* by him to be socially binding and therefore obeyed.¹¹

and

[...] law presupposes, not only regularity in the judge's mode of action, but also his *experience of being bound* by the rules. In the concept of validity two points are involved: partially the outward observable and regular compliance with a pattern of action, and partly the experience of this pattern of action as being a socially binding norm.¹²

This analysis of what (valid) law is, led Ross to the introduction of the notion of legal consciousness:

To my mind it must be assumed beyond a doubt [...] that it would never be possible to build up a functioning legal order, unless *a lively and disinterested feeling of respect for and obedience to traditional legal ideology existed within the judiciary*.¹³

⁸ Honesty commands to say that according to Kelsen human actions, such as legislation or judicial decisions, do influence the law. However, they can only exercise this influence because of immaterial norms that give these actions their meaning. Moreover, the meaning of the actions consists in creating new immaterial norms.

⁹ For a more recent elaboration of this view of law as a mostly self-contained system, see Hage (2013a) and Hage (2018, pp. 240–242).

¹⁰ Ross (1959, p. 34 (italics JH)).

¹¹ Ross (1959, p. 35 (italics JH)).

¹² Ross (1959, p. 37 (italics JH)).

¹³ Ross (1959, p. 54 (italics JH)).

and

The attitude we have in mind [...] is as a general rule of a formal character; it is directed towards the institutions with recognition of their “validity” as such, irrespective of whether the demands in which they manifest themselves can be approved as “morally right” or “just”. Law is law and law must be kept, people say, and they apply this maxim even to those cases where the demands of law are in conflict with their ideas of right and justice. To distinguish this attitude from the genuine “moral” attitude the term “formal” or “institutional” legal consciousness will be used here for the former [...].¹⁴

These quotations show that, according to Ross, the validity of the norms of a legal system consists in these norms being used by the judiciary and that legal consciousness is an attitude of judges to apply law for the very reason that it is law. This attitude creates an outward observable and regular compliance with a pattern of action and is itself the experience of this pattern as being a socially binding norm. These characteristics, taken together, make it possible to use legal norms as a scheme of interpretation of social actions (read: norm application) and to comprehend these actions as a coherent whole of meaning and motivation.

3 The Internal Aspect of Rules

In a paper from 1959, Hart criticised Ross’ project of naturalizing law.¹⁵ Hart’s

[...] main objection to this reduction of propositions of law which suppresses their normative aspect is that it fails to mark and explain the crucial distinction that there is between mere regularities of human behaviour and rule-governed behaviour. [...] what is needed is a “hermeneutic” method which involves portraying rule-governed behaviour as it appears to its participants, who see it as conforming or failing to conform to certain shared standards. My explanation of the distinction ... is in terms of the “acceptance” of preferred patterns of conduct as guides and standards of criticism, and so of an attitude to conduct which I call an ‘internal point of view’.¹⁶

and

Ross is right in thinking that we must distinguish an *internal* as well as an external aspect of the phenomenon presented by the existence of social rules. But unfortunately he [...] misrepresents the internal aspect of rules as a matter of “emotion” or “feeling” – as a special psychological “experience”. Only by doing this is he able to create the impression that what Kelsen terms “ought-propositions” may be dispensed with in the analysis of legal thinking. In fact the elucidation of the internal aspect of any normative discourse requires such propositions, and if we carefully study them we shall see that there is nothing ‘metaphysical’ about them [...].¹⁷

and

¹⁴ Ross (1959, p. 55).

¹⁵ Hart (1983, in particular pp. 164–169).

¹⁶ Hart (1983, pp. 13–14).

¹⁷ Hart (1983, pp. 165–166 (italics in the original)).

[...] if the group really has rules and not merely a set of convergent habits, members of the group display this by use of expressions of a different kind. These expressions do not state that they follow or will follow regular patterns of behaviour; but members of the group use these expressions in the *criticism* of their own and each other's conduct by reference to the regular patterns of behaviour which they accept as a *standard*. They do not merely react to deviations from the regular pattern in a predictably adverse manner, but treat deviations as a *reason* for such reaction and demands for conformity as *justified*.¹⁸

There seem to be two aspects to Hart's criticism of Ross theory of legal consciousness, one more explicit than the other. The most explicit aspect is the seeming return to Kelsen's normativism. Hart claims that the internal aspect of rules is important for a proper understanding of normative discourse and that this is only possible by using ought-propositions. The same point is also made in different terminology by claiming that the regular patterns in behaviour reflect the use of standards, that deviations from what these standards prescribe are reasons for criticism, and that demands for conformity are deemed justified. According to Hart, this normative aspect of social rules, if studied carefully, has nothing metaphysical about it. Perhaps not, but then it is not the same normativity that Kelsen had in mind, as Kelsen emphasized that norms cannot be based on facts alone, while the social practice that Hart seemingly had in mind is purely a matter of fact, and for that reason not metaphysical.

Less explicit is the reference to group behaviour. The standards by means of which behaviour is evaluated are *shared* by the members of a *group*. In the following sections, I will argue that this second aspect of group behaviour is actually more important than the normativity which Hart claims makes a crucial difference between his (and Kelsen's) view and the theory of Ross.¹⁹

4 Haidt's Social Intuitionist Model of Judgments

In his paper 'The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment' Haidt (2001) described the 'social intuitionist model' of judgments.²⁰ The model is easiest explained by means of the diagram that Haidt presented for this purpose. See Fig. 1.

If a person, let us call her Alice, is presented with a fact situation (the eliciting situation), this causes in first instance an *unconscious intuition* in her. This happens very fast. The intuition may lead to an action of Alice, without even becoming conscious. For instance, if the fact situation is the presence of a snake, Alice's preconscious intuition of a dangerous situation may make her withdraw her hand.

¹⁸ Hart (1983, p. 166 (italics in the original)). A similar argument can be found in Hart (2012, p. 56).

¹⁹ It might be argued at this point that my opposition between normativity and group behaviour is misguided, and that Hart would analyse normativity in terms of group behaviour. I am not sure that this is the correct reading of Hart, but if it is, I agree with Hart.

²⁰ The addition that it concerns moral judgment is not very relevant as there is little reason why the model should not be applicable to other kinds of judgments about concrete fact situations, including legal judgments.

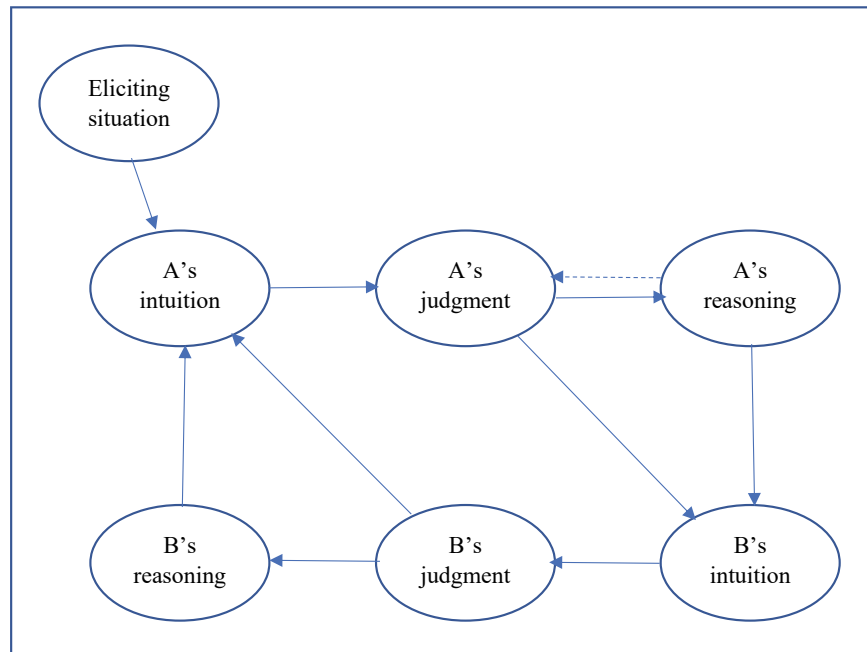


Fig. 1 The social intuitionist model of judgments

However, the intuition may also lead to a *conscious judgment*: there is a snake over there and the situation is dangerous. If this happens, there are two changes. First, the judgment is conscious, in contrast to the unconscious intuition. And second, the judgment is articulated in language. This articulation in a language already introduces a social aspect into the judgment, as languages are social phenomena.

Only if the intuition has become a judgment can it become the object of critical reasoning. If that happens, the reasoning process may lead to a change of judgment (the dotted line in Fig. 1). For instance: there is a snake, but it is not poisonous, so there is no danger. However, according to Haidt, the reasoning process is often not critical at all. Typically, it provides the judgment with a justification. For instance: perhaps the snake is not poisonous, but better safe than sorry.

People do not operate in a vacuum: they communicate with each other. Alice may inform Bernadette about her judgment: ‘Be careful. The snake may be dangerous’. And she may present reasons to convince Bernadette that the snake may be dangerous (it is poisonous), or that this is unlikely (this kind of snake never bites). As Mercier and Sperber²¹ argued extensively, reason-giving is first and foremost a means of convincing others or oneself and not a way to show that a particular thesis—e.g.

²¹ Mercier and Sperber (2007).

that the snake is dangerous—is right or wrong. In doing so, these cognitive scientists continue the causal—as opposed to rule-based—approach of Stevenson,²² who claimed that the point of value judgements was to bring the audience to accept the valuation of the speaker. Here we see a step in which the normative aspect of reasoning is analysed in terms of, or replaced by, a causal-psychological process.²³ Giving reasons is in first instance a means of persuasion, not of justification.

Bernadette processes communications from Alice in the first place unconsciously and this leads to an intuition. The intuition may lead to a conscious judgment and Bernadette may formulate her own reasons why this judgment is correct. Both this judgment and this justification may be communicated back to Alice and influence Alice's intuition. Possibly, this restarts the whole process again.

Haidt emphasized that the chance that the intuition of A will be modified is greater if B communicates a contrary view to A than if only A's reasoning process provides the feedback. Argumentation as a means of modifying opinions is in the first place a social, not a solipsistic, process. In this process—but now we are leaving the work of Haidt—the judgments of interacting people influence each other, and sometimes the process will give rise to a shared pool of judgments. A nice example is provided by the work of Karl Popper on 'epistemology without a knowing subject'.

5 Epistemology Without a Knowing Subject

In 1967, Karl Popper gave an address that was published under the title 'Epistemology Without a Knowing Subject',²⁴ Popper's main message was that epistemology should not deal with persons holding beliefs, but with knowledge that is abstracted from the persons having it.

To make his point, Popper distinguished between three 'Worlds'. World 1 would consist of physical objects or states, World 2 of mental states of individual persons and perhaps also their dispositions to act, and World 3 of knowledge that is abstracted from knowing subjects. World 3 would not only contain theoretical systems or problems, but—importantly—also critical arguments. Although Popper did not mention it, World 3 would certainly also contain legal science, its claims, its doctrines, and its arguments. See Fig. 2.

There are two important messages in Popper's theory that will be taken along in the following argument. One is that there are facts that are mind-dependent, but which can be studied independent of the minds that gave rise to them. These are the facts of what Popper called 'World 3', but which in the rest of this chapter will be

²² Stevenson (1944).

²³ For a critical analysis from a period in which causal analyses got out of vogue and came to be replaced by analyses in terms of norms and rules, see Urmson (1968). Hart's criticism of Ross, which has the same purport, stems from the same period.

²⁴ Popper (1979, pp. 106–152).

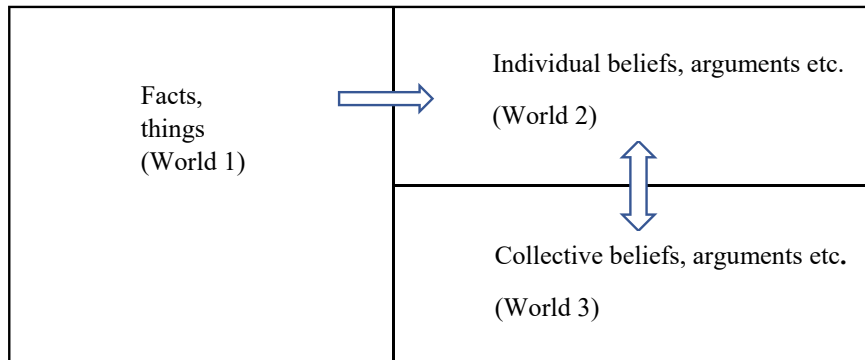


Fig. 2 The World and our knowledge of it, according to Popper

referred to as facts in the social world.²⁵ The second important message is that the social world also contains standards for good reasoning, indicating what facts can and rationally ought to be recognised given other facts that were already recognised.²⁶ These standards include methodological rules, for instance on the conditions under which inductive arguments are acceptable, or on what theorems can be deduced from a set of axioms. They also include, as we will see later, legal rules, specifying what legal conclusions ought to be drawn from fact situations. If, as is claimed here, rules of inference, methodological rules and legal rules are all part of the social world, this means that these rules are the products of human minds in social interaction. They can be ‘discovered’ by analysing our social practices.

Having made the step from individual judgments to collective knowledge and having announced the step from collective knowledge to the social world and the inclusion in it of rules, it is time to explore the social world with an eye to gaining a better understanding of legal consciousness and the internal aspect of rules.

6 Objective, Subjective and Social

Traditionally, people distinguish between what is objective and what is subjective. For instance, the Cambridge Dictionary describes subjectivity as “the influence of personal beliefs or feelings, rather than facts”²⁷ and objectivity as “being based

²⁵ To avoid misunderstandings, it is necessary to point out that World 3 would, according to Popper, contain theories and not the facts these theories are about. Although World 3 would exist on its own, it consists of entities which are essentially theoretical. The step from World 3 in the Popperian sense to a social reality which also contains non-theoretical facts and objects has a Neo-Kantian flavour which Popper most likely would have rejected.

²⁶ The used terminology precludes on the terminology that will be used later.

²⁷ Subjectivity. In: Cambridge Dictionary (2023).

on facts and not influenced by personal beliefs or feelings”.²⁸ According to these descriptions, subjectivity and objectivity are both seen as representations of something external to a person’s beliefs and attitudes and as opposites. However, it is also possible to apply the distinction between objective and subjective to the external thing that is represented. For example, does the law exist objectively, or is its mode of existence subjective?²⁹ Moreover, it is possible—even important—to distinguish an intersubjective, or social, mode of existence next to objective or subjective existence. To explain this, we need first a definition of facts and of states of affairs. A state of affairs is what is expressed by a descriptive sentence. If the sentence is true, the state of affairs is also a fact. Examples of states of affairs are that it is raining, that the Eiffel tower is in Berlin and that Big Ben is in London. At the moment this is being written, only the latter state of affairs is also a fact.

Notice that this definition makes states of affairs and therefore also facts, dependent on descriptive sentences and therefore on a language. This does not mean that facts depend *only* on language; the only claim is that a language is necessary to carve out facts from an unconceptualized reality that we need to explain the existence of facts. This opposition between an unconceptualized reality and facts which are by necessity formulated in some language mirrors the contrast that Haidt emphasized between unconscious intuitions and judgments that are by definition cast in language.

States of affairs are objective, subjective, or social. The distinction between these three kinds of states of affairs is based on two underlying characteristics which may be present or not. The two characteristics are whether the state of affairs is:

1. mind-dependent in the sense that it depends on what people believe, desire, or fear³⁰; and
2. the same for everybody.

*Objective facts*³¹ are (1) not mind-dependent and are (2) the same for everybody. An example would be the fact that Mount Everest is a higher mountain than the Vaalserberg (the highest ‘mountain’ of the Netherlands).³²

Subjective ‘facts’ (1) depend on what individual persons think they are and are therefore mind-dependent, and (2) are not the same for everybody. That is why their status as facts is contested; many people would not call subjective facts ‘facts’ at all. An example would be the ‘fact’ that Mozart was a better composer than Salieri.

²⁸ Objectivity. In: Cambridge Dictionary (2023).

²⁹ Hage (2022c).

³⁰ In Sect. 7, the technical term ‘recognise’ will be introduced to cover this amalgam of belief, desire, and fear.

³¹ I will write about objective, subjective, and social facts, but strictly speaking it would be better to write about objective, subjective and social states of affairs. My expectation is that many readers will find the former terminology easier to follow.

³² Because all facts depend on language and because languages are social phenomena, it may be questioned whether there are any objective facts. However, most people believe that some kinds of facts are objective, and the example would be a case in point.

Social facts are somehow in between objective and subjective facts: (1) they depend on what the members of a social group recognise and are in that sense mind-dependent, and (2a) they are the same for the members of a group, but (2b) not necessarily the same between groups. A prominent example is the law of a country. The law depends, in a complicated manner, on what the legal subjects of a country recognise as law and is the same for these legal subjects. However, different countries may have different laws, and what is the law for a Frenchman may not be the law for somebody in China.

Whether a particular kind of state of affairs is objective, subjective, or social, is itself a matter of social fact. For example, for Italian people with a refined taste, the quality of a wine may be an objective matter, while it is merely a matter of subjective taste for people like the present author. For moral realists,³³ moral states of affairs are objective, while for moral constructivists they are social.³⁴

To distinguish the collection of all facts from the unconceptualized reality, the collection of facts will be called the ‘World’. The World consists of three kinds of facts: objective, subjective and social (or two, if one rejects subjective facts). A subset of the World is the social world, which consists of all social facts.

7 Conventional Social Facts

Social facts are either conventional or constructivist.³⁵ Conventional social facts only exist in a group if most members of that group *recognise* that they exist. For instance, Helena is the leader of the Maastricht Cycling Club (MCC) if sufficient members of that club recognise Helena as their leader. Amsterdam is the capital of The Netherlands because sufficient inhabitants of The Netherlands recognise Amsterdam as the capital of their country.

‘Recognition’ is a central notion in the theory of social reality. A person recognises a state of affairs as a fact if he believes that the state of affairs is a fact and if he is disposed to attach the behavioural consequences to this fact which the members of his group typically attach to it. For instance, Francis recognises Jane as the chairwoman of his chess club if he believes that Jane is the chairwoman and if he tends to attach the behavioural consequences which the other members of the club also tend to attach to this role. For instance, just like his club fellows, Francis recognises the duty to pay the yearly contribution that was determined by Jane. Recognition of the duty in turn involves a belief that the duty exists and a disposition to comply with it.

³³ Sayre-McCord (2021).

³⁴ Bagnoli (2021).

³⁵ The following descriptions of conventional and constructivist facts are perhaps too summary. More elaborate descriptions can be found in Hage (2022a, b). The description of what recognition involves is more elaborate in the present chapter, though.

The two consequences of recognition—belief and a disposition to act—may seem to be two independent things which are combined in recognition. However, the opposite is the case. Mentally speaking, recognition is the primary notion, and belief and a disposition to act can only artificially be constructed out of recognition.³⁶ This is an essential assumption, which requires some elucidation. Suppose that Joanna sees a car approaching. Both Joanna and the car are physical entities and when Joanna sees the car, the car interacts with Joanna by reflecting electromagnetic waves (read: light) which impinge on the retinas of Joanna's eyes. The cells in the retinas transform the waves into electric pulses which are propagated by nerve cells into Joanna's brain. As a result of these pulses and the already existing state of the brain, the state of Joanna's brain changes.³⁷ After the change, Joanna is disposed to step aside (to avoid a collision with the car) and to answer the question whether she sees a car in the affirmative. Together these dispositions, most likely in combination with many more, reflect Joanna's new brain state, which can now be said to contain a representation of the approaching car. The representation itself is not conscious, but it plays a role in initiating responses to stimuli, such as stepping aside and answering questions in a particular way.³⁸ These responses can themselves be conscious events, but that is not necessary. If Joanna steps aside, she will typically be conscious of what she does, but the rise of the adrenaline level in her blood will perhaps go unnoticed.

I propose to use the word 'recognition' for the mental representation of a state of affairs, which can lead to conscious mental states or events. One of these events is becoming motivated to act (step aside). One of the states is belief, which in turn makes Joanna answer the question whether she sees the car in the affirmative. Recognition will very often lead to beliefs and quite often to behaviour, but it is not the sum of these two, but a single bodily state which plays a role in generating dispositions to act.

Sometimes the task of recognition is delegated to one or more specific persons or institutions. A well-known legal example is that the recognition of rules as legal rules is delegated to courts and other 'officials'.³⁹ Delegated recognition presupposes that the persons to whom the recognition is delegated (the representatives) are recognised as such, which involves—amongst others—that people tend to recognise what their representatives recognised on their behalf. So, if legal subjects delegated the task to

³⁶ Seitz and Angel (2020) describe a psychological/neurological approach to belief formation with a notion of belief which, similar to my notion of recognition, includes what philosophers used to call belief or attitude. More principally, the idea to treat recognition as something that has both purely cognitive and action-oriented aspects, where these two are not separate, fits in the so-called 'enactivist' approach to knowledge. See Gallagher (2017).

³⁷ For the purpose of this chapter, I ignore the insights from the theory of embodied cognition (Shapiro and Spaulding 2021) that the brain is only one part of the body that performs cognitive tasks.

³⁸ On representation, see Egan (2012) and Pitt (2022).

³⁹ Hart (2012, pp. 113–117).

recognise rules as law to the courts, they should recognise courts as their representatives for this purpose, which in turn involves that they should normally recognise rules as law for the reason that the courts recognised them.⁴⁰

There is more to the existence of conventional facts than mere recognition. For instance, it should not only be the case that sufficient members of MCC recognise Helena as their leader; the club members should also believe that sufficient other members also recognise Helena as leader of the group, and that these other members have the same beliefs about their fellow cyclists. In other words, Petra as a member of MCC should not only have beliefs about Helena, but also about what her fellow group members recognise, including what her fellow group members believe about the beliefs of Petra herself.

If we apply this to legal facts, we find that there is a close connection between recognition of conventional facts and legal consciousness. If a judge recognises that a caravan which is connected to the sewage system is immovable, she will believe that the caravan is immovable, she will be disposed to attach the relevant consequences to this fact (e.g. hold the mortgage on the caravan to be valid), and she will believe that other judges will do the same. This can well be described as the judges having legal consciousness of the caravan legally being immovable. If legal facts were conventional, the immovability of the caravan would require broad recognition amongst judges (direct or indirect, via representatives) and therefore also the appropriate legal consciousness.

A third condition for the existence of conventional social facts is that something can only be a conventional fact if states of affairs of that kind are not considered to be objective, subjective, or constructivist. For instance, even if everybody believes that the Earth is flat, and also believes that everybody else believes this, it is still not a social fact. The reason is that the shape of the Earth is (usually) considered to be an objective state of affairs. For types of states of affairs that are considered to be objective, such as the nature of physical phenomena, the existence of a consensus is not decisive for what the facts are.

So, the existence of a conventional social fact requires recognition on two levels: a particular type of state of affairs must be considered social—not objective or subjective—and not constructivist, and a concrete instance of this type must be broadly recognised as existing. For instance, the members of MCC must (1) consider the leadership of their club to be a matter of conventional social fact and (2) they must recognise Helena as their leader.

Social facts are the same for all members of a social group, even for those members who do not recognise them. If Petra does not recognise Helena as the leader of MCC, she makes a mistake, and other members of MCC may criticise or even sanction her for this mistake. This comes very close to the internal aspect of rules as described by Hart. Notice, however, that Hart ascribed this internal aspect to rules and not to facts.

⁴⁰ In case people delegate recognition to some specialists, the indirect recognition by the people themselves can be delayed if the transfer of information about what the specialists have recognised to the people takes time. Here I only mention this issue, without exploring it any further.

8 Constructivist Facts

Not all social facts are conventional. There is a second category, constructivist facts, where an existing broad consensus is not the final word on what the facts are. Suppose that the members of MCC agree that the trip to the castle gardens in Arcen was the best cycling trip they made this year. This does not mean that the Arcen trip really was the best trip. It remains possible to raise the question of whether all members of the club were mistaken about the best trip. There is a difference between what most members of the group recognise as the best trip and what really was the best trip. Facts such as the fact about what was the best cycling trip of the year are *constructivist facts*.

Constructivist facts are social facts, which are characterized by the possibility to have a *serious* debate about them. In this connection, ‘serious’ means 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 and believe that there is a correct answer to the question what the facts are, independent of what people actually believe. The example about the best cycling trip of the year illustrates that it is possible to disagree seriously about what was the best trip. 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 right answer does not change if people merely change their minds about what the right answer is.

The social practice of a group determines which social facts count as constructivist and which ones as conventional. If a broadly shared recognition may seriously be questioned, the social fact is considered to be constructivist; if not, it is conventional. Moreover, it seems that this categorization as conventional or constructivist is itself a matter of constructivist fact. People can seriously disagree on whether a particular kind of fact is conventional or constructivist. In legal philosophy, for example, there is a serious debate—in different terminology—between exclusive (hard) legal positivists on the one hand and, on the other hand, inclusive legal positivist or non-positivists about whether law is conventional or constructivist.⁴¹

If a fact is constructivist, the correct answer to the question of what the fact is, is the rational answer. There are two cases. The first is when a fact is already broadly recognised. Then it exists as a constructivist fact if it is not the case that rationally speaking it ought not to be recognised. The second case is that the fact rationally ought to be recognised, independent of whether it is actually recognised. Suppose that it is a matter of constructivist fact whether a particular caravan is immovable. The right answer to this question is determined as follows. First it is established whether the fact is broadly recognised. If so, then the caravan is immovable unless rationally speaking the caravan should be considered to be movable. If the immovable nature of the caravan is not already recognised, the question becomes whether rationally speaking the caravan ought to be recognised as being immovable. Only if that is the case is the caravan immovable as a matter of constructivist fact. It is beyond the scope

⁴¹ Cf. Dworkin (1986), Hart (2012, p. 270), and Gardner (2001).

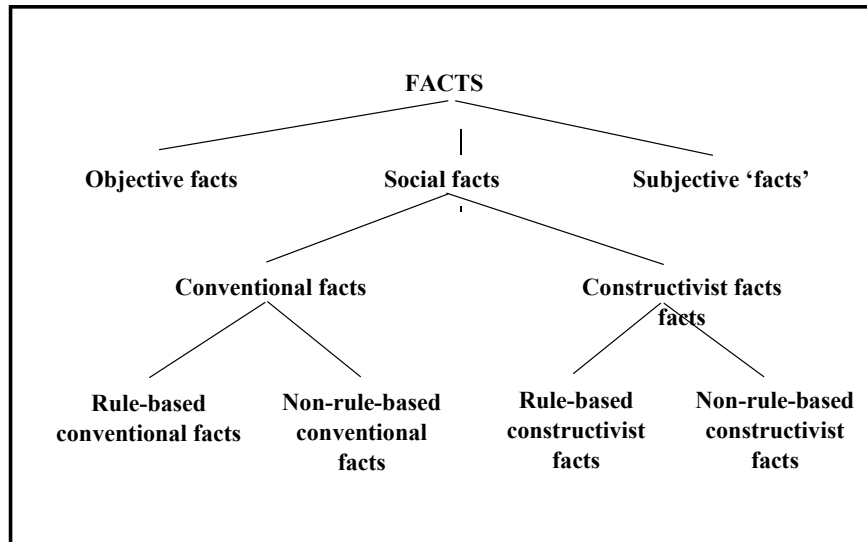


Fig. 3 Kinds of facts

of this chapter to explain what ought rationally (not) to be recognised. I will only claim the answer is based on the coherent reconstruction of the initially recognised sets of objective and social facts.⁴² The essential point to keep in mind is that *in the case of constructivist facts, the questions of what the facts are, and which facts rationally ought to be recognised as existing, coincide.*

9 Rules and Rule-Based Facts

Social facts can be based on rules. Some of these rules exist merely by being broadly recognised as existing; other rules have been created, typically by a legislator or by the judiciary. In the latter case, there must be another rule which connects the existence of the former rule to the occurrence of a rule-creating action. Let us call these latter rules ‘rule-based rules’. Rules that exist merely by being recognised will be called ‘conventional rules’. A rule-based rule can also exist if it is not broadly recognised, but then its existence must be a matter of constructivist fact and it should be the case that legal subjects rationally ought to recognise the existence of the rule, even if they do not actually do so (see Sect. 11). Figure 3 offers an overview of the different kinds of facts and their relations (if any) to rules.

A conventional rule exists in a group if the members of the group tend to recognise the rule conclusion if they believe that the rule conditions are met. Moreover, they should mention the rule or the rule condition as the reason for recognising the rule

⁴² Hage (2013b, 2016, 2022a).

conclusion, and they should believe that the other group members do the same. For example, the rule that a person who unlawfully damaged somebody else's property must compensate the damage exists in a social group if the group members tend to recognise Peter's obligation to compensate Iris for the damage if they believe that Peter unlawfully damaged Iris' property. Moreover, they should mention Peter's unlawful behaviour (and/or the rule) as the reason why Peter has this obligation, and they should believe that other group members would do the same thing.

A rule-based rule exists in a group if there is a rule in the group, conventional or rule-based, that mentions some events—typically legislation or judicial decisions—as reasons for the existence of the rule-based rule. This definition of when a rule-based rule exists mentions rule-based rules itself and is therefore recursive.⁴³ A rule-based rule can only exist if this recursion 'bottoms out' on a conventional rule.

The function of all rules is to connect the fact of the rule conclusion to the facts of the rule conditions. For example, the rule that electric mopeds count as vehicles connects the fact that something is a vehicle to the fact that it is an electric moped. This function characterizes all rules, both classificatory rules and mandatory rules (e.g. 'Stealing is forbidden') and both legal rules and epistemic rules ('Smoke means fire'). The latter rule does not connect the fact that there is fire to the presence of smoke, but the fact that it is rationally possible or even required to recognise the presence of fire if there is smoke. So there is a difference between legal rules and epistemic rules, but they have in common that they connect facts to one another.

10 The Deontic Ought

Hart criticised Ross for failing to mark and explain the crucial distinction between mere regularities of human behaviour and rule-governed behaviour. Formulated this way, Hart's criticism is unfair, as Ross explicitly mentions the judge's experience of being bound by rules. However, Hart acknowledged this aspect of Ross' theory, but found it unsatisfactory as Ross depicted the 'internal' aspect of rules as a psychological experience. According to Hart, the elucidation of the internal aspect of normative discourse requires ought-propositions. Moreover, otherwise than Ross seems to have assumed, there is nothing metaphysical about these ought-propositions.

This criticism of Hart confuses the operation of rules and the deontic aspect of the conclusions of some, namely mandatory, rules. Not all rules are mandatory. As a matter of fact, Hart himself emphasized the role in law of power-conferring rules, and their difference from mandatory rules. For reasons that cannot be discussed here, the notion of a power-conferring rule itself suffers from some obscurity,⁴⁴ so I prefer to use a classificatory rule as an example of a rule that is not mandatory. The example is the rule that, for the purpose of the Traffic Act, electric mopeds count as vehicles. This rule can be contrasted to the mandatory rule that nobody is allowed to steal.

⁴³ A good introduction to recursion in connection to law is Ruiter (1993, pp. 23–26).

⁴⁴ Hage (2018, p. 200).

The former rule has as its conclusion that something is a vehicle; the latter rule has as its conclusion that a particular agent has the duty not steal. There are two kinds of normativity.⁴⁵ One is attached to the operation of rules and requires that if the rule conditions are satisfied, the rule conclusion ought *pro tanto* be recognised. I will call this kind of ought the *ought of reason* and I will discuss it in the next section. The second kind of ought is attached to deontic facts such as (the existence of) duties or obligations and requires that *pro tanto* the duties or obligations are obeyed. I will call this kind of ought the *deontic ought* and the rest of this section deals with it.

If an agent, say Arnold, ought not to steal, the best way to describe this situation is by means of the proposition that Arnold ought not to steal. To the extent that this is what Hart meant to say with his claim that we need ought-propositions, he was right. Notice, however, that this has nothing to do with rules. A deontic ought-fact may be the result of the application of a rule, but this is not necessarily the case. Ought-facts can very well be conventional facts, existing in a group because they are broadly recognised by the members of the group.⁴⁶ An example would be the fact that the owner of a supermarket ought to make sure that the floor of the supermarket is not slippery. More generally, duties of care are often not based on rules, but exist because either they are broadly recognised (conventional duties), or rationally speaking ought to be recognised without there being a rule underlying this ought (non-rule-based constructivist duties).

Hart was also right when he claimed that this deontic ought has nothing ‘metaphysical’ about it. It can exist in a social practice where people recognise ought-facts. The analysis that Hart gave of the internal aspects of rules is a good approximation of what this recognition of deontic ought-facts involves. However, when Hart referred in this connection to Kelsen, he assumed too easily that the deontic ought that Kelsen wrote about is the same kind of ought that Hart adequately analysed. Hart’s deontic ought is a matter of social fact, while the way in which Kelsen wrote about the ought—in particular the way he separated legal science as a normative science from physical and social sciences—suggests that he had an objective kind of fact in mind.⁴⁷ Hart’s project was as naturalist as Ross’ project,⁴⁸ and their difference was, if not merely a matter presentation, at most a matter of how social reality is conceptualised. Where Ross emphasized the individual psychology of judges who recognised ought-facts, Hart emphasized the social practice in which ought-facts exist. There is no reason why Ross and Hart should not both be right.

⁴⁵ Hage (2020).

⁴⁶ For the purpose of a readable text, I will ignore the additional conditions for conventional facts in the rest of my argument.

⁴⁷ The view of Kelsen in his ‘Neo-Kantian’ period—the first edition of the *Reine Rechtslehre* (1934)—does not neatly fit in the proposed trichotomy objective-social-subjective, but I think that the claim that Kelsen treated norms as if they were objective can well be defended.

⁴⁸ Marmor (2021).

11 The Ought of Reason

Some social facts are purely conventional; they exist in a group because they are broadly accepted within the group. Such conventional facts can at the same time also be rule-based. An example of a conventional rule-based fact would be the fact that if the chair of the Maastricht Cycling Club resigns, the secretary will be the temporary chair until a new chair has been elected. If this is a conventional rule, the members tend to recognise the secretary as the temporary chair if they believe that the old chair has resigned. If some member of the club does not recognise the temporary new chair even though he believes that the old chair resigned, he makes a mistake by not recognising the new chair. Moreover, the mistake was avoidable because he already believed that the old chair resigned. This is irrational, as he ought to have recognised the new temporary chair. This ought is not deontic. The person in question had no duty or obligation to recognise the new chair, but rationally speaking he ought to have recognised the new chair. This is the *ought of reason*, which should be distinguished from the deontic ought which is connected to duties or obligations.

In the case of rule-based conventional facts, reason is not essential for their existence; recognition suffices. This is different for constructivist facts because in the end these facts exist if either they rationally ought to be recognised as existing, or if they are broadly recognised and it is not the case that, rationally speaking, they ought not to be recognised. If legal conclusions are drawn by applying a rule, the rational ought plays a crucial role. If the facts of a legal case satisfy the conditions of a rule, we can say that the rule is applicable to this case. Moreover, if a rule is applicable to a case, this is a reason why the rule applies to the case, that is: why the rule connects its consequence to the case. Take, for instance, the rule that electric mopeds count as vehicles for the Traffic Act. If in some case we have an electric moped, the rule is applicable to this case. This is a reason why the moped counts as a vehicle. Normally, if there are no counter-reasons, this means that rationally speaking the moped ought to be recognised as a vehicle. In turn, this would mean that, for the purpose of the Traffic Act, the moped *is* a vehicle.

The ought of reason also plays a particularly important role for the existence of rule-based rules, that is: for the existence of most legal rules. Lawyers tend to use legal sources to determine whether a rule is legally valid. These sources are themselves pointed out by rules stating that rules stemming from these sources are legally valid. If a rule can be traced back to a recognised source, this is a reason why it is a valid legal rule. Usually, this is decisive, but there may be reasons why a rule that stems from a source is nevertheless invalid. For instance, because it contradicts a 'higher' rule. Whether a rule is a valid legal rule is a matter of rule-based constructivist fact. This means that such a rule is valid if it rationally ought to be recognised as valid, or if it is actually recognised—for instance because it stems from a source—and it is not the case that rationally speaking it ought not to be recognised.

12 Ross' View Updated

The question of whether legal rules exist (are valid) can be seen as dealing with a kind of objective fact (Kelsen) or a kind of social fact (Ross and Hart). If such facts about law are objective, they must be objective in a different manner than the physical facts that are typically considered as paradigmatic for objective facts. The charge that these facts are objective in a metaphysical manner is understandable. For the rest of this chapter, this objective view of law will therefore be left out of consideration, and we will continue with the view that legal facts, including facts about the validity of legal rules, are social facts.

How does Ross' theory of legal consciousness fit into this picture? We have seen that Ross introduced the phenomenon of legal consciousness as a necessary addition to the view that legal rules are valid if they are regularly used by courts. Mere regular use does not suffice; court should also feel bound by the rules they use. In the terminology that was introduced above in the analysis of social reality, we might identify the regular use of legal rules with the existence of these rules as conventional rules. The agents in question, the courts, tend to recognise the consequences of the rules if they believe that the rule conditions are satisfied. Because recognition both implies that the recognised facts are believed and that the usual motivational consequences are attached to these beliefs, both the regularity aspect and the legal consciousness aspect of legal validity as Ross saw it are covered.

Let us see what this means for a concrete example.⁴⁹ A court must answer the question whether a particular object counts as a vehicle for the purpose of the Traffic Act. The object is an electric moped, no doubt or debate about it. So the court believes it is an electric moped. Practically all courts tend to classify electric mopeds as vehicles, and they know that other courts do the same. Moreover, they consider the issue as a matter of conventional fact. Therefore, they know that legally speaking, the object is a moped and that they themselves should also consider it as a vehicle if they are not to act irrationally. The rational and correct court decision therefore is that the moped is a vehicle for the purpose of the Traffic Act. The same holds for all other courts (in the same group / legal system).

We see that if legal rules are seen as conventional rules, many aspects of Ross' views of legal validity and legal consciousness can be accounted for. However, one thing does not fit. According to Ross, legal consciousness means the disposition of courts to recognise rule consequences *for the reason that they are based on a legal rule*. It is not the content of the rules that motivates court to recognise the rule consequences, but their status as legal rules. This means that the status of a valid legal rule is not the side-product of recognising the rule consequences on the basis of the rule conditions; it is a pre-condition for this recognition. Does this also fit in the view of law as a part of social reality?

It does, but the validity of a legal rule cannot be based any longer on the recognition of the consequences of the rule when it is applicable. These consequences only follow

⁴⁹ The chosen example on purpose uses a classificatory rule and not a mandatory rule, to avoid confusion of the deontic and the rational ought.

because the rule is independently valid. The validity of legal rules must, also on Ross' view, be based on some other rule. This other rule (of recognition) connects the legal validity of rules to the facts that the rules stem from a source of law, such as legislation or court decisions. If a court believes that a rule stems from such a source, and if the court tends to apply the rule of recognition if applicable, the court will normally recognize the rule as legally valid. This recognition, in turn, will create a disposition in the court to recognise the legal consequences of the source-based rule if the court believes that the rule is applicable.

In terms of our example: A court, like other courts in the same legal system, uses the rule of recognition that rules that stem from legislation are valid legal rules. The court believes that the rules of the Traffic Act stem from legislation. As a result, rationally speaking the court ought to recognise the legal validity of the rules that stem from the Traffic Act. If the court believes that the rule that electric mopeds count as vehicles was created by means of the Traffic Act, the court ought, rationally speaking, to recognise this rule as a valid legal rule. This recognition, in turn, will bring about that the court tends to apply the rule when it is applicable and will also feel bound to do so. This is the phenomenon that Ross identified as legal consciousness: courts tend to feel obligated (rationally) to apply valid legal rules and to recognise their consequences.

If this analysis is correct, Ross considered the consequences of valid legal rules to be constructivist legal facts. Obviously without using this terminology.

13 Why a Social Group Is Essential

The best way to explain why Ross considered legal consciousness to be a disinterested disposition to apply legal rules is to assume that in his view legal rules can be identified on the basis of their origin, rather than the quality of their content. This is at least close to the view of Hart that legal rules derive their validity from (one or more) rules of recognition which are, in the end, social rules and which do not need to refer to the content of the rules they declare valid law. Still, Hart criticised Ross for overlooking (or ignoring) the normative aspect of rule application and for misrepresenting the obligations that legal rules create as merely the feeling of being bound. It is true that Ross considered legal consciousness to be a feeling, but this feeling is according to Ross disinterested, that is: attached to the recognition of rules as valid legal rules. Why would Hart lay so much emphasis on what seems mainly a difference in presentation between Ross' view of legal validity and his own?

A possible explanation is that Hart blamed Ross for insufficiently recognising that the use of rules is only possible in social groups. The application of rules leads to new facts, which either are actually broadly recognised in a social group (conventional facts) or ought to be recognised by the members of a social group on the basis of what they already recognised (constructivist facts). If an applicable rule is, without a good reason, not applied or misapplied, this leads to drawing a wrong conclusion or to not drawing the correct conclusion. This is, in turn, a reason for criticising the

non- or mis-application. Notice that such a mistake is only possible if there is such a thing as the correct application of a rule, which can only be the case if there is a social group in which the rule exists.⁵⁰ As Wittgenstein⁵¹ and Kripke⁵² pointed out, there cannot be private rules.

Ross did not deny this, but neither did he mention it explicitly, thereby perhaps suggesting that mere converging habits are all that is required for a rule-following praxis.

14 Conclusion

As criticism of what he regarded as a metaphysical element in Kelsen's theory of law, Alf Ross developed a naturalistic theory of law, according to which the validity of legal rules consists in regular patterns of court behaviour in combination with legal consciousness. Hart immediately criticised Ross' theory for neglecting the internal aspect of law which, according to Hart, could not be reduced to a mere feeling of being obliged. It is not at all obvious that Hart's criticism of Ross was justified, but in formulating his criticism Hart pointed towards an important characteristic of rules, namely their internal aspect. It is possible to make mistakes in applying legal rules, and these mistakes can be evaluated as wrongs. As Wittgenstein pointed out, rules can only exist if it is possible to evaluate their use as right or wrong, and such an evaluation can only be possible if the use of rules is a public, rather than a private affair.

Recent research in cognitive science seems to support this view. Haidt emphasized that justification is only possible if unconscious intuitions have been transformed in conscious judgments which are formulated in language. Language is a public phenomenon. Moreover, the reasons that a person gives for her judgments are typically supportive: they justify that person's judgments, rather than attack them. Only if judgments have been communicated to others, the probability increases that there will also be reasons against a judgment and that a first judgment will be modified under the influence of reasons. Mercier and Sperber recently argued that the role of reasons is to convince others, thereby reviving Stevenson's insights from the 1950s as to the primarily psychological role rather than logical role of reasons.

As Karl Popper had already suggested in the 1960s, the exchange of reasons and arguments can lead to a body of theories, including the reasons on which they are based, that exists independent of the authors who created the theories. Popper formulated his 'epistemology without a knowing subject' with scientific theories in

⁵⁰ It is quite natural to assume that the social group in question is a group of human beings. However, this is not necessary. If the human mind consists of a number of interacting modules (Fodor 1983; Minsky 1985), the group may also be a group on mental modules, where some modules 'control' other modules.

⁵¹ Wittgenstein (1953).

⁵² Kripke (1982).

mind. Arguably, however, something similar exists in law, where the argued opinions of learned jurists together build a body of legal knowledge.⁵³ To the extent that this is the best possible knowledge of law, the content of the knowledge *is* the law.

This view, which may at first sight seem somewhat strange—how can there be knowledge of something where this something is adapted to the knowledge about it?—becomes understandable if legal facts are recognised as constructivist facts. Constructivist facts are an important subset of social facts, facts which exist because the members of a social group (ought to) recognise them. Just like scientific knowledge builds on, but does not coincide with, the views and beliefs of individual scientists, social reality builds on, but does not coincide with what the participants in a legal system recognise. Only by understanding how this ‘works’, can we understand how law can be normative and have an internal aspect, without resorting to a metaphysical foundation of law in something like a Kelsenian *Grundnorm*.

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⁵³ Hage (2016).

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Jaap Hage (1956) studied law and philosophy at Leyden University and defended his PhD-dissertation on Facts and their Meaning (*Feiten en betekenis*) in 1987. From 1989 to 2022 he was attached to Maastricht University, since 2011 as a full Professor of Jurisprudence. He has published on law, artificial intelligence and logic, as well as basic legal concepts, ontology and methodology of law, and law and the cognitive sciences. His monographs include *Reasoning with Rules* (Kluwer 1997), *Studies in Legal Logic* (Springer 2005), and *Foundations and Building Blocks of Law* (Eleven 2018).