

Legal Knowledge about What?

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Abstract. We assume—in contrast to many “legal realists”—that law is a part of reality. Law exists because people believe in law, but law is not identical with beliefs. Law supervenes on human beliefs, preferences, actions, dispositions and artefacts. Moreover, the morally binding personal interpretation of the law supervenes on two things together: on the individual’s knowledge of legal institutions and on moral obligation. The first supervenes in its turn on mutual beliefs; the second supervenes on motivations and dispositions of the individual, provided that she is morally sensitive and rational. Personal interpretation of law converts into social law, if other persons on the basis of overriding reasons do not contest it. Morally binding social law supervenes on moral motivation that is triggered by institutions that supervene on mutual beliefs.

1. Supervenience of the Law on Brute Facts

One of the central questions of the ontology of law is, do legal rules exist at all? Participants in legal practices obviously believe that there is a legal system and that some rules belong to this system. It would be a strange theory, indeed, which holds that all these participants are wrong. And yet, the question whether legal rules exist is philosophically interesting. Some philosophers, including Axel Hägerström, regarded such beliefs as false. Among other things, the state and the law are, according to Hägerström, merely products of the imagination. Hägerström’s views have been popularised among Swedish lawyers by his pupils, among others Karl Olivecrona.

A generation later, a professor of law, Tore Strömberg, elaborated a theory of law based on Olivecrona’s ideas but also including some points that are especially interesting in our context. Strömberg pointed out that the concept of Swedish legal order, valid Swedish law, is conventional. If one tries to verify, e.g., the proposition that the Real Property Act of 1970 is a valid Swedish statute, one finds ultimately no ground for this proposition but the common belief that this is the case. Strömberg called this belief a social convention (cf. Strömberg 1980, 39f.). According to Strömberg, the content of

legal rules partly corresponds to the facts, that is, human actions and situations, and partly it does not. The non-real part of this content consists of imaginary legal qualities and competencies together with the idea of legal validity (*ibid.*, 63f.). Strömberg thus claimed that the concept “valid law” does not refer to anything extant. The reason is that valid legal rules would disappear had people not thought about legal rules.

Let us assume for a while that Strömberg was wrong and that what exists is not only the fact that people believe in the law, but also the law itself. The law exists because these beliefs exist, but the law is not identical with them. Law supervenes on human beliefs, preferences, actions, dispositions and artefacts.

As a preliminary analysis of the mode of existence of the law we want to point out that:

- There are non-legal entities (i.e., beliefs, preferences, actions, dispositions and artefacts) on which the law supervenes.
- These entities have some non-legal properties on which legal properties supervene.
- It is necessarily the case that if one entity has a legal property L and is similar to another entity in sharing with it the relevant non-legal properties, then both these entities have L.¹
- Legal entities, i.e., the (valid) law itself, legal rules, legal principles, legal values and legal actions, supervene on these non-legal entities (i.e., beliefs, preferences, actions, dispositions and artefacts).
- It is necessarily the case that if a legal entity supervenes on a non-legal entity and this non-legal entity is (relevantly) similar to another non-legal entity, then there also is a legal entity that supervenes on this other non-legal one. For example, if a certain procedure counts as legislation and this procedure is relevantly similar to another procedure, this other procedure also counts as legislation.

In the following section of this paper we first elaborate this preliminary analysis into what we will call the conventionalist *cum* institutional (CI) theory of the law. This theory explains how immaterial things such as rules and principles can exist. However, we will argue that this theory is only a suitable starting point for the development of an adequate theory of the law. An even better theory is a coherence theory, which incorporates the CI theory as part of a coherent theory of everything, including the law. According to the coherence theory, the law exists as a rational reconstruction based upon, among others things, the law according to the CI theory, and the personal morality of the person who

¹ This is analogous to the main point of Caj Strandberg's (1999) theory of supervenience of moral properties. See also Kim 1994; and Teller 1995. The present analysis presupposes that the entities exist in the context of the same legal system.

conducts the reconstruction. We also discuss some objections to this coherence theory.

2. A Theory of Legal Conventions and Institutions

2.1. *Introductory Remarks on Ontology*

Unfortunately, a supervenience theory of the law seems to introduce entities with an ontological foundation that is less firm than that of purely physical entities. Ernest Sosa (1998) nicely points out the problems with supervenience theories:

Suppose a world with just three individuals x_1 , x_2 , x_3 . Such a world is held by some "mereologists" to have in it a total of seven things or entities or objects, namely, x_1 , x_2 , x_3 , $x_1 + x_2$, $x_1 + x_3$, $x_2 + x_3$, $x_1 + x_2 + x_3$. Antimereologists by contrast prefer the more austere ontology that recognizes only the three individuals as objects that really exist in that world. (Sosa 1998, 399)

Analogously, antimereologists believe—like Strömberg—that what exists are human beliefs in the law, not the law itself. Thus they advocate a disappearance or elimination theory that refuses to admit the existence of supervenient objects. Mereologists believe, on the other hand, that also the law itself exists, namely that it supervenes on the beliefs in the law. Both views have their problems. As Sosa pointed out, the elimination theory implies that "most if not all of ordinary reality will be lost," while the supervenience theory may lead to the "explosion of reality." Can we accept the existence of everything that people happen to believe in?

One way to avoid problems is to relativise the controversy to the choice of language. Following Sosa again:

[...] the question is one of the choice of language. On some days it may be convenient to use [antimereological language]; [...] on other days it may be convenient to use [mereological language]. (Ibid.)

However,

existence *relative* to a conceptual scheme is *not* equivalent to existence *in virtue* of that conceptual scheme [...]. Each of us acquires and develops a view of things that includes criteria of existence and perdurance for categories of objects. When we consider whether an object of a certain sort exists, the specification of the sort will entail the relevant criteria of existence and perdurance. And when we correctly recognize that an object of that sort does exist, our claim is elliptical for "exists relative to our conceptual scheme." (Ibid., 404)

Applied to the existence of the law, this boils down to the following: The participants in legal practices use a mereological language, thus permitting existence of the law itself, not only the existence of beliefs in the law. This conceptual scheme determines the criteria for existence and perdurance of the law that we acquire in our social practice.

Are this language and this practice a sufficient reason to conclude that the law exists? In general, is the only existence we can make sense of, an existence relative to our conceptual scheme and the practices connected with this scheme? Sosa shows sympathy with this view, albeit he recognises the following problem:

[...] is there not much that is very small, or far away, or long ago, or yet to come, which surpasses our present acuity and acumen? How can we allow the existence of such sorts at present unrecognized by our conceptual scheme? (Ibid., 406).

Never mind. Let us state that the law exists relative to our conceptual scheme, though not by virtue of it. Simply speaking, the way we talk about law in ordinary life, not least the way lawyers talk about the law, reveals something about what the law is. Surely, we can choose another way of speaking, and some philosophers opted for an elimination theory. But they have notorious difficulties convincing others that their way of talking is the best one.

2.2. Lagerspetz's Theory on Conventions and Rules

Having chosen a "rich" ontology that allows the existence of legal entities next to the "brute" entities on which they supervene, we have to make such ontology plausible. For illustrative purposes, we summarily describe Eerik Lagerspetz's theory of conventional facts and rules, which takes its starting point in mutual beliefs. Lagerspetz (1999) gives the following definitions.

(MB) It is mutually believed in a population *S* that *p* iff

- (1) everyone in *S* believes that *p*;
- (2) everyone in *S* believes that everyone in *S* believes that *p*;

and so on ad infinitum. (Ibid., 201)

(CF) "*a* is *F*" expresses a conventional fact iff it is a necessary and a sufficient condition for *a*'s being *F* that

- (1) it is a mutual belief (of at least the second order) in the relevant population *S* that *a* is *F*, and
- (2) in the situations of the relevant type, (1) is at least partly a reason for the members of *S* to perform actions which are meaningful because *a* is *F*. (Ibid., 203)

(R) *R* is a regulative rule in *S* if

- (1) the members of *S* generally comply with *R*;
- (2) there is a mutual belief in *S* that *R* is a regulative rule in *S*, and
- (3) (2) is at least partly a reason for (1).

(DR) *R* is a definition rule in *S* if

- (1) the members of *S* generally count *a*'s as *F*'s;
- (2) it is a mutual belief in *S* that there is a definition rule *R* in *S* which defines *a*'s as *F*'s, and
- (3) (2) is at least partly a reason for (1).

(RR) *R* is a rule in *S* if there is a definition rule *R'* which defines *R* as a rule in *S*. (Ibid., 211)

Lagerspetz explained these definitions as follows:

(R), (DR) and (RR) are special cases of my description of conventional facts. (RR), however, shows how the existence of a rule is not necessarily a conventional fact. A rule can exist because it is defined as a rule by another rule. But because the chain produced by the reapplications of (RR) cannot go on indefinitely, the ultimate rules which define other rules must exist conventionally. The conjunction of (R), (DR) and (RR) gives the necessary and sufficient conditions for something's being a conventionally existing rule in *S* [...]. The point of the recursive clause (RR) is this. Social rules may form *systems*. An individual member rule of a rule-system need not exist by the virtue of mutual belief concerning its existence—consider some more esoteric parts of law which are only known by a small circle of legal specialists. It is enough if a rule belongs to a chain or net of rules which ultimately can be traced back to rules which exist in the relevant community as conventional facts. To put it in more familiar terms, the rules exist if they are recognized by a rule (or rules) of recognition which is efficacious. (Ibid., 211–12)

Lagerspetz regards his theory as an improvement on Searle's well-known theory of institutional facts. According to Searle, rules create institutional facts. Lagerspetz asked:

But what kind of fact, then, is the fact that these rules do exist in relevant communities? Obviously, a fact about the existence of a rule cannot be a brute fact in Searle's sense: it is not a fact on the furniture of the physical world, neither are the statements expressing it subjects of direct perceptual control. If Searle's classification is meant to be an exhaustive one, facts about rules must themselves be institutional facts. Therefore, they are inherently dependent on the existence of further rules. Something is a rule only if there is a rule with the effect that it is counted as a rule. We are in an infinite regress. This might be called as the logical regress of rules. (Ibid., 199. See also a more comprehensive presentation in Lagerspetz 1995)

Lagerspetz's

solution to these problems is to develop a notion of non-brute fact which is not inherently rule-dependent. The basic idea behind the solution is the following: There are things which exist and facts which hold only if the relevant individuals believe that they exist or hold and act according to these beliefs. (Lagerspetz 1999, 199)

These facts are created by mutual beliefs. In Lagerspetz's words:

We can have beliefs about other people's beliefs, while they have at the same time beliefs about our beliefs. This gives rise to the phenomenon called mutual or shared belief, or common or mutual knowledge (the terminology is not well established). (Ibid., 200)

Yet, there are some problems. Sometimes, if one succeeds in convincing others that some rule or a conventional fact is part of a legal system, this rule or fact thereby turns out to have been part of the legal system. This phenomenon is both crucial and hard to understand.

It is hard to understand because normally a strict distinction is made between what is the case (the facts) and what is our knowledge of what is the case (justified beliefs). The facts are traditionally assumed to be independent of our beliefs. We can have reasons to believe that some facts

obtain, but whether the facts actually obtain is independent of these reasons. E.g., mountains exist independently of our reasons to believe in their existence.

This distinction does not work very well for social reality. If we all believe that these pieces of paper are money and that they can be exchanged for goods, they *are* money that can be exchanged for goods. If everybody believes that Clinton is the president of the US and that he has the power to veto laws, he is the president and has that power. If everybody believes that it is legally forbidden to kill, it is legally forbidden to kill.

This has the consequence that if I produce a convincing (effective) argument to the effect that some rule is a valid legal rule, the rule is *ipso facto* a valid legal rule, because the argument has produced the relevant belief.

Thus, it is no surprise that Lagerspetz expresses an “ontological worry” concerning “the problem of circularity”:

Conventional facts are like natural facts in the sense that they are not dependent on the beliefs and actions of *any* particular individual. They are unlike natural facts in the sense that they are dependent on the beliefs and actions of *all* relevant individuals [...]. An objection raised against conventionalism is that it seems to move in circles. [...] This theory is, indeed, circular. The mutual belief about the existence of a social fact is a kind of self-fulfilling prophecy which necessarily makes itself true. The only alternative seems to be that social facts exist independently and before the beliefs. (Ibid., 204, 206, 209)

Lagerspetz thus assumes that conventional facts, such as the law, are dependent on the beliefs and actions of all relevant individuals. The law is the law because everybody is convinced that it is the law. But this reference to “everybody” is too strong. A legal rule/principle can exist even if not “everybody” is convinced it exists. For example, if the argument is presented by authoritative legal experts and convinces the majority of the relevant legal community, it makes its conclusion true. To deal with this complication, we will elaborate somewhat on Lagerspetz’s theory.

2.3. Conventional Facts and Institutional Facts

Lagerspetz rightly distinguished two ways in which a rule can exist, that is, on the basis of mutual belief (R and DR) and on the basis of some other rule (RR). This distinction may be generalised into a general distinction between conventional entities and institutional entities. Analogising the definitions CF and RR of Lagerspetz’s we define:

(CE) *a* is a conventional entity if it is a necessary and sufficient condition for the existence of *a* that:

- (1) it is a mutual belief (of at least the second order) in a sufficiently large part of the relevant population *S* that *a* exists, and
- (2) in the situations of the relevant type, (1) is at least partly a reason for the members of *S* to perform actions that are meaningful because *a* exists.

This definition deviates from definition CF of Lagerspetz in two ways. First it deals with entities rather than facts. And second, it weakens the demand that something is believed by the whole population *S* to the demand that it is believed by a sufficiently large part of the population. This second step already explains to some extent why something may conventionally be the case if it is only believed by a select part of the population.

(IE) *a* is an institutional entity if it is a necessary and sufficient condition for the existence of *a* that:

- (1) there exists a rule *R* in *S*, such that
- (2) the conditions of *R* are satisfied, and
- (3) there is no exception to *R*, and
- (4) the conclusion of *R* is that *a* exists.

It should be noted that rules themselves might be conventional or institutional entities, so that the definition of institutional entities is recursive. In fact, it gives the recursion that explains the *Stufenbau* in the legal system as it occurs (in different versions) in Kelsenian and Hartian legal theory (see also Ruiter 1993, 20f.).

Institutional entities exist because they are the conclusion of some rule that exists in a community. It is not strictly necessary for the members of the community to believe their existence. There are, however, two amendments to be made to this observation. First, if an entity is the conclusion of some existing rule, but the members of the population do not believe in its existence, its existence is nevertheless somewhat dubious. It is like when a statute has been passed and nobody recognises its contents as valid law.

Second, a rule that defines institutional facts may itself refer to the opinions of (a part of) the community. In that case, there is a kind of duplication between conventional and institutional entities. For instance, the definition CE may be a definition rule that exists in a population *S*. Entities that exist according to this rule are then both conventional and institutional entities. The more interesting case is the one pointed out at the end of the previous section, when only a small part of the community believes in the existence of an entity. In this case, the entity does not exist as a conventional entity, but only as an institutional one. This is typically the case if the legal authorities believe in the existence of some legal rule or principle, while most of the legal subjects do not yet believe in its existence. Then the rule may be said to exist, even though its existence is not yet generally recognised.

3. Legal Dogmatics

Let us call the theory, sketched above, according to which the law consists of a mixture of conventional and institutional entities, the conventional *cum* institutional theory of the law; in short the CI theory of the law. One may be

tempted to regard this CI theory of law as the final result in ontology of law. Alas, it is only the beginning. The theory must be amended to incorporate the idea that the law must be coherent. This is accomplished in legal dogmatics (LD). LD (*Rechtswissenschaft*, *Rechtsdogmatik*, “science of law,” legal doctrine) consists of professional legal writing, whose task is to systematise and interpret valid law. LD orders the law under over-reaching principles.² Its work is almost always value-laden. To be sure, the jurists make a distinction between a cognitive inquiry into the law as it is (*de lege lata*), and justified recommendations for the lawgiver, *de lege ferenda*. But as every legal scholar knows, the distinction between *de lege lata* and *de lege ferenda* is not clear-cut. The LD is a good example of a practice of argumentation, pursuing knowledge of the existing law, yet in many cases leading to a change of the law (Peczenik 1995, 312ff.).

Consider the following example. For a long time, one is liable in torts in many legal orders for negligently causing damage. Yet, a German legal scholar, J. von Kries, invented a doctrine in about 1880, according to which one is not liable when the causation was not “adequate.” Consider the following example: A negligent coachman falls asleep. The horse takes the wrong turning. The coach is struck by lightning, which kills a passenger. The coachman’s negligence is a cause of the passenger’s death, but the cause is not adequate. It would, however, be adequate in another case, for instance when the chain of causation from falling asleep to the passenger’s death does not involve lightning but a driving into a ditch instead. In the latter case—but not in the former—we are dealing with a generalisable causation. The negligence of the coachman was generally apt to bring about such an accident and to increase the possibility or probability of it. In fact, von Kries had two ideas; first, that an adequate cause is generally apt to bring about a given kind of a harm and, secondly, that an adequate cause *relevantly increases the probability* of a given kind of a harm. Thus, an unwritten principle of the law of torts was discovered that stipulates that one has to compensate damage only if it has been an “adequate” result of the action for which one is liable. But when is the causal connection “adequate”? The concept of adequacy has been extensively discussed in the legal research.

Later on, different doctrines of “adequacy” evolved (see Peczenik 1979, 153ff.), *inter alia*, the following ones: The causal connection between an action and a damage is adequate if, and only if, any action of this kind is apt to bring about (or relevantly increases probability of) a damage of this type. The causal connection between an action and damage is adequate if, and only if, this action makes a damage of this type foreseeable for a very cautious and well-informed person (a cautious expert, a *vir optimus*). The

² Savigny 1840, XXXVI: “I regard cognition and presentation of inner relations or resemblances, connecting legal concepts and legal rules into a great unity, as the essence of the systematical method. Such resemblances are often concealed at the beginning, and our insight becomes richer when we discover them.”

causal connection between an action and damage is adequate if, and only if, this action is a not too remote cause of the damage. The causal connection between an action and damage is adequate if, and only if, this action is a substantial (important) factor in producing the damage. Generally speaking, the juristic activity, consisting in "picking up" a precise interpretation of the concept of adequate causation is to some extent similar to a moral activity, consisting in "picking up" some facts as reasons for the conclusion that an action or a person is morally good.

A closer look at LD reveals that it consists of several interrelated pursuits, such as

- analysis of particular cases; mapping of possibilities, e.g., listing of possible interpretations of a statute;
- systematisation of law under abstract principles provided by general doctrines, such as the above-mentioned doctrine of "adequate" causation, negligence, intent, *rebus sic stantibus* in contract law, doctrines stating the goal of punishment (treatment, deterrence, retribution etc.);
- development of jurisprudence (legal theory) with normative consequences, e.g., various doctrines of statutory interpretation; doctrines of the internal system of the law etc.; doctrines about the sources of the law;
- development of moral-philosophical doctrines; e.g., philosophy of justice behind the doctrine of "adequate" causation and, finally,
- explication of basic philosophical positions behind jurisprudence and moral philosophy.

These different pursuits aim at obtaining a coherent totality (cf. Peczenik 1998, *passim*, on epistemological problems concerning coherence in the law). The system of law that is described in LD should not only be internally coherent, but should also be harmonised with its background in the form of morality and (political) philosophy. As a consequence, the description of the law as a coherent whole must be descriptive as far as the conventional and the institutional aspects of the law are concerned and evaluative where the background of the law in morality and political philosophy is concerned.

4. Legal Coherence

It is possible to mention a number of demands that must be met, at least to some extent, by a coherent theory (Alexy and Peczenik 1990 list a number of criteria). Among these demands are both consistency and comprehensiveness. Comprehensiveness means that a theory cannot be evaluated in isolation, but should be considered in combination with other views that are held. For instance, if one believes that morally one ought to refrain from all warfare, while believing at the same time that legally one ought to partake in some particular war, one's views are incoherent, at least if one also believes

that both morals and the law determine what one ought, all things considered, to do.

Such incoherence can be removed by developing a theory about what one should do in case one's moral and legal views collide. A theory to that purpose might take different forms. One might change one's moral views in order to accomplish that one never believes that one ought morally to refrain from what ought legally to be done. Analogously one might change one's legal views to accomplish that one never believes that one ought legally to do what ought morally to be refrained from. An even more complex variant would be to incorporate one's moral views into the law, by allowing exceptions on moral grounds to legal rules (see Hage and Peczenik 2000), and then adopt the moral view that one should never act against the so-modified law. Obviously, similar moves would be both possible and necessary to harmonise one's politico-philosophical views and one's legal views.

The process in which one's views are mutually adapted and thus organised into a coherent whole must have a number of starting points. In the case of the law, such starting points can be found in legal norms, which exist according to the CI theory described in section 2. In the case of morality, starting points can be found in one's dispositions (to be motivated) to act. These dispositions should be filtered to exclude irrational ones. Thus, Michael Smith points out

that we can analyse our concept of a normative reason quite generally in congenial, radically anti-Humean, categorical imperative terms. To say that we have a normative reason to ϕ in certain circumstances C is to say that we would want ourselves to ϕ in C if we were fully rational. If there is a normative reason for some agent to ϕ in certain circumstances C then there is a like normative reason for all those who find themselves in circumstances C to ϕ . Such an analysis thus already captures platitudes about objectivity, practicality, supervenience, and procedure [...]. My suggestion [...] in schematic form at least, is that our ϕ -ing in circumstances C is right, if and only if we would desire that we ϕ in C if we were fully rational, *where ϕ -ing in C is an act of appropriate substantive kind*: that is, it is an act of the kind picked out in the platitudes about substance. (Smith 1994, 182 and 184)

Notice, by the way, that the exclusion of irrational dispositions to act is an adaptation of one's motivations to one's beliefs in the way required by the demands of coherence.

What does all this mean for the object of legal knowledge? The best theory of what the law is, is that part of the most coherent theory of everything that deals with the contents and the nature of the law. If the above-sketched CI theory of the law is right, the most coherent theory includes this theory of the law. But the most coherent theory must then also harmonise the legal rules of the CI theory with morality, with political philosophy, with the legal solutions to concrete cases, and with much more. The endeavours of LD are a part of this comprehensive attempt at harmonisation.

Despite its apparent attractiveness, this view about the best theory of the law has some implications that seem rather dubious. We discuss two of them, namely that the contents of the law seem to be relative to personal morality, and that, because of the complexity of constructing a coherent theory of everything, it is impossible to determine what the law is.

5. The Relativity of the Law?

Law and morality are closely connected with practical reason. In our *Law, Morality and Defeasibility* and in the previous section, we exploited this connection to argue why law and morality are essentially interconnected. Another implication of this connection is that law and morality are relativised to one's personal dispositions to act. For someone who takes the internal perspective towards the law, it is less consistent, to say the least, to hold that she ought legally to engage in warfare and yet be not motivated at all to do so. *A fortiori*, the same holds for one's moral views: If one sincerely believes some action to be morally right, one is normally motivated to perform this action if the occasion is there.

This can also be turned around. If one is not motivated to act in a particular way, one does not sincerely believe that either morally or legally one ought to act in that way. This turned around connection between motivation and legal and moral beliefs implies that one's moral and legal beliefs depend on one's motivation. Since one's motivation is a personal matter, one's moral and legal beliefs turn out to be a personal matter, too. This may be an acceptable view concerning personal morality, but many will frown at the idea that the contents of the law depend on one's personal motivations. If such dependence were to exist, the contents of the law would be relativised to the views and dispositions of individual persons. This is objectionable, or is it not?

Well, it is just as acceptable as the view that one's personal morality is a personal matter, and precisely for the same reasons. In fact, if one considers personal morality to be partly determinative for the contents of the law, it is only a natural consequence that the law shares the subjectivity of personal morality.

6. Interdependence and Tension between Law and Morality

This interdependence of the law and personal morality is reflected in the practice of legal argumentation. In order to argue and justify his standpoints in hard cases, a jurist has his personal interpretation of the law. This personal interpretation is presented as statements about the (existing) law, yet it mirrors the jurist's evaluative opinion as to what is the best interpretation of the law. The jurist's statements about valid law (*de lege lata*)

are then neither purely descriptive, nor purely normative. They are “fused” statements in Svein Eng’s sense (see Eng 2000).

Thus, the personal interpretation is something peculiar. One can place it between propositions about the law in the sense of the CI theory, value judgements about the right interpretation of the law and genuine normative statements expressing the law.

If the personal interpretation of the law is as perfectly justified as possible, the jurist can justifiably say that this interpretation *is* the law.

Nevertheless many will feel resistance against views that make the law relative to individual preferences. It is precisely one of the purposes of the law, in contrast to personal morality, that it is the same for everybody, and independent of merely personal preferences. This tension, between on the one hand the intersubjective nature of the law as a social phenomenon and, on the other hand, the personal and subjective nature of one’s motivation to act, is one of the most difficult and, at the same time, one of the most fascinating aspects of the law.

This tension is lessened, although not completely dissolved, by the mutual adaptation of the law and morality. Morality takes the content of the law into account, and *vice versa*.³ One’s personal view of the law determines what is to be done with the remainder of the tension. If one emphasises the social nature of the law, one will be prepared to consider some norms as representing the law, without being prepared to act in accordance with them. If one emphasises the practical nature of the law, one will only recognise those norms as legal ones on which one is prepared to act.⁴

This view leads to a form of relativised relativism. Whether the content of the law depends, among other things, on one’s personal preferences and is therefore to some extent relativistic, depends on one’s view of the relation between the social and the practical nature of the law. S/he who focuses on the social nature will be more inclined to accept norms as legal which are generally accepted as such, but which s/he nevertheless is not prepared to act upon. S/he who focuses on the practical nature of the law will be more inclined only to accept norms as legal ones if s/he is prepared to act upon them. In both cases, what the law is for somebody depends not only on objective or intersubjective facts, but also on the criteria that one uses to identify legal norms as such. In this limited sense the judgement as to what is law is personal.

The step from personal legal judgement to the law is analogous to the step in epistemology from what is personally justified to what is justified (interpersonally). An individual makes this step by virtue of self-trust (Lehrer 1997, 1f.). I claim that I possess knowledge, not only beliefs. And I claim that my ultimate legal ought-judgements express the right, best-interpreted law, and not only my legal opinion. Surely, I express my own

³ This theme is developed in Hage and Peczenik 2000.

⁴ Remember, however, that one will often be prepared to act on norms *because* they are legal ones.

opinion, but I think that others ought to join my views, not morally, but epistemically, because my view of the law is—I believe—in accordance with the law as it is in itself. The step of this kind is not logically necessary. Not even solipsism can be refuted on purely logical grounds. But the step is a general condition of knowledge. It may be metaphysical, but it is inevitable if one is not a solipsist.

7. Procedural Law

According to the coherence theory of the law exposed in section 4, the best theory of the law is the legal part of the most coherent theory of everything. In legal decision-making, when one must determine the contents of the law, one cannot do better than come up with the best available theory of the law. For practical purposes, the law may be identified with the best available theory of it, although it must be admitted that even this theory may be wrong in the light of the coherent theory of everything. Moreover, the best theory available at a certain moment, t_1 , can turn out to be wrong later, at t_2 . But the conclusion that the best available theory was wrong must be based on the observation that a better theory has been devised. There is no way to compare a theory about the law with the law as it “really” is. The human condition confines us to theories, as to which we can only hope that they correspond to reality.

Two observations are important in this connection. The first is that the replacement of a theory by a better one is often the consequence of new data that must be fitted into the coherent theory. A theory may also be improved by a better arrangement of the data that were already available, but most frequently new data play a role. The best theory of everything is a function of the time at which the theory is held. One reason for this is that the world with which the theory deals changes itself. Another reason is that our data about this world in the form of sensory perception increase in the course of time.

The second observation is that the ideal of a coherent theory of everything is unattainable. The best we can do is construct partial theories that are coherent, and develop these theories by taking additional data into consideration. These additional data are not necessarily the result of new observations, but may also be data that were already available, and yet not taken into consideration while building the theory. Very often the inclusion of new data is the result of (self-)criticism in the form of objections to the old theory.

Let us illustrate this by means of a very simple example: At t_1 the theory T_1 consists of two beliefs only. One is that thieves are punishable; the other that John is a thief. This theory is incoherent, since it does not include the belief that John is punishable. When one realises this at t_2 , the consequence will probably be that one replaces the incoherent theory by theory T_2 , which also includes the belief that John is punishable.

Suppose, now, that the holder of this theory comes to realise that John is a minor. He already held this belief, but somehow he did not combine it with his other beliefs. But now he has come to realise that John is a minor and that minors are not punishable, and that this is relevant for his other beliefs. If these additional beliefs are also taken into consideration, the total belief set now includes that John is a thief, that thieves are punishable, that John is punishable, that John is a minor, that minors are not punishable, and that John is not punishable. In short, the resulting belief set is inconsistent and therefore not coherent. Notice, by the way, that the belief set T_2 was not coherent either, because of its lack of comprehensiveness.

If the believer realises that his beliefs are inconsistent, he will be motivated to restore consistency. One way to do so is to assume that there is an exception to the rule that thieves are punishable in case of minors. This assumption amounts to the introduction of a new rule to the belief set, namely the rule that in case of minors there is an exception to the rule that thieves are punishable (or to all rules of penal law, for that matter).⁵

This example illustrates how a belief set can evolve in time, not only by adding new data to the total set of one's beliefs, but also by taking more beliefs into consideration in the development of a coherent theory. Although such a development can take place in the beliefs of only one person, very often the exchange of arguments catalyses such a development. It is not necessary to that purpose for the exchange to introduce new information; it suffices if arguments adduced by one party in a dialogue force the other party to update her old theory by taking beliefs into account, which she already held, but had not yet assimilated. It is possible to have a constructive dialogue in which all parties change their opinions, without there being one piece of new information introduced. All that is needed is for the parties to induce each other to look at the matter from a different angle.

What does this imply for legal reasoning? The best theory of the law, the thing that matters for legal decision-making, is a part of the most coherent theory of everything. In practice, this most coherent theory is not available. The best thing that can be achieved is an approximation, a consistent theory that is as comprehensive as possible. Legal dialogues belong to the best means, presently available, to construct such partial coherent theories, especially since they can guarantee that the resulting partial theory answers the questions for which the theory was meant.⁶ Especially, this is the case if the parties involved in the dialogue have conflicting interests.⁷

⁵ Notice that this way to restore consistency presumes that consistency can be restored by addition to the belief set. In general it holds in theories of defeasible reasoning that inconsistent sets can be made consistent by adding information, and not only by removing it.

⁶ A more comprehensive, but still incomplete, theory that does not answer the questions one is interested in, is not very interesting.

⁷ Then, the chances are biggest that as much as possible of the potentially relevant information is introduced in the discourse and, as a consequence, is assimilated by the partial theory that is the outcome of the dialogue.

If such a dialogue is conducted under ideal circumstances (see Habermas 1973; and Alexy 1978), the resulting partial theory is the best that is attainable in practice. The theory of the law that is a part of it is also the best theory of the law that is attainable in practice. The individual legal beliefs that are part of it are therefore the best possible approximation of legal truth. Real life dialogues are never conducted under ideal circumstances, and their outcomes will therefore fall short of the ideal theory. Nevertheless, they may form the best attainable approximation of the ideal, be it that there always is a possibility that the dialogue is continued, with the result that the best available partial theory is improved even more. In connection with the law, the improvement can take place as a result of an appeal to a higher court, or as a result of a discussion in the legal literature.⁸

As the best available theory of the law evolves in time, the set of legal beliefs in it changes. A belief that is justified at one time, because it was a part of the best then available theory, may become unjustified at a later time, because it is no longer a part of the best available theory.⁹ Remember that, for such a change, it is not necessary for new information to have become available. All that is necessary is a change in the best partial theory, regardless of whether that change was accomplished by removing inconsistencies, by taking old information into account, or by the introduction of new information.

This line of reasoning underpins views that have been already fashionable in legal theory for some time, namely that legal justification can suitably be analysed in terms of procedures.¹⁰ Here, we want to point out two additions to these views. First, that dialogues, or—more generally—procedures, are not only a suitable means to avoid the Münchhausen trilemma (see Alexy 1978, 223), but that they are a natural component of coherence theories of the law.¹¹ And—second—that procedures are not only means to obtain knowledge of the law, but that, in a restricted sense, they contribute to what the law is. The law is what the most coherent theory of everything says it is. Argumentative procedures are a means to obtain this most coherent theory, albeit imperfect means. Only dialogues under ideal circumstances constitute the law, by creating the most comprehensive theory of the law. Actual dialogues at best approach the ideal.

8. Discovering or Creating Law?

To conclude this paper, we will apply the theory on the nature of law to an issue in legal theory that has raised a considerable amount of discussion.

⁸ One way to look at legal dogmatics is to see it as a procedure that attempts to realise the ideal dialogue.

⁹ This relativisation of justified beliefs to stages in a process of argumentation is emphasised in Verheij 1996.

¹⁰ A recent argument to this effect can be found in Lodder 1998.

¹¹ It shall be reminded that Aulis Aarnio links legal correctness to the concept of audience. Cf. Aarnio 1987, 221ff.

Namely, we will discuss the question whether a legal decision-maker or a legal scientist can discover a pre-existing law by means of giving a convincing argument for it.

Consider, for instance, a legal scholar, Dr. Hercules, who reads the law and derives, at the time t_1 , the conclusion, that one legally is not liable in torts for some causal results of one's negligence. Assume that Dr. Hercules works perfectly and that his reasoning involves his personal morality. What is the character of the conclusion? We consider two alternatives:

Alternative 1: The derived legal statement is true with respect to the law, as it existed already before t_1 .

Then, the following questions arise:

- Can reasoning based on personal morality in order to systematise the law guarantee the truth of the statements about the pre-existent law?
- What does it mean that the norm—derived on the basis of personal morality and in order to systematise the law—already existed at t_1 ?

Alternative 2: What is derived is a new valid legal norm. The norm has come into existence at t_1 through derivation, not through legislation. LD changed (developed, the German word is *Weiterentwicklung*) the law.

Then the question arises whether norms can come into existence due to derivation, or whether they are a kind of social reality that cannot originate from derivation?

We will start our discussion with alternative 1 that seems to be the closest approximation of the self-understanding of the classical LD of the 19th century. If the derived norm was already valid law at t_1 , Hercules was right from the beginning. His argument, we assume that it was perfect, leads to the most coherent theory of the law. Presumably, this theory includes the belief that most conventional rules and institutional rules are valid legal rules, and the belief that most of the rules that are valid are conventional or institutional rules. But some of the conventional and institutional rules may have dropped out in order to maximise coherence. Moreover, some rules may have been added to enhance coherence, for instance rules that point out exceptions to other included rules that conflict in some cases. (Remember the example about the thief who was also a minor.)

It does not matter, then, for the truth of Hercules' conclusions whether they meet with consensus amongst his professional colleagues or society at large. The only consensus that is constitutive for the law at t_1 is the consensus regarding the underlying conventional and institutional rules and principles, etc. that Hercules used at t_1 . If it turns out that Hercules' views are not accepted at t_2 , namely that LD has consistently held the opposite view and that the judicial decisions have ignored Hercules, then the law changed between t_1 (when Hercules was right) and t_2 . Then, at t_2 ,

Hercules might reach different conclusions, since the basis of the coherent theory, that is, the set of conventional and institutional rules, has changed.¹²

The two questions related to this first alternative are answered as follows: It is not the reasoning on the basis of personal morality that guarantees the truth of statements about the pre-existing law, but rather the truth of the premises that went into the reasoning. Hercules' argument, assuming that it was perfect, only discovered the law that pre-existed given the truth of the premises of the theory construction. To state that the norm discovered by Hercules' reasoning already existed, means that this norm is a part of the legal system described by (part of) the most coherent theory of everything. Hercules' reasoning constructed this theory and the law is by definition that which corresponds to the legal part of this theory.¹³

Alternative 2 may appear more attractive to (some) lawyers, for instance because it is more down to the earth and less "metaphysical," but it confronts some problems. *Ex hypothesi*, Hercules has derived the most coherent, and therefore best theory of the law at t_1 . But even if Hercules's theory is the best one, the derived norm is not yet valid law at t_1 according to alternative 2. First, after a kind of consensus appears, it converts into what is valid law. The law changes at t_2 . It is not the case, then, that the law changes directly as a consequence of Hercules's arguments. Only if his arguments have as a consequence that social reality changes, for instance because people's mutual beliefs regarding the law change, has the law changed. The conclusion of his argument may be a self-fulfilling prophecy, but first it is a prophecy, and second, there is no guarantee that it is self-fulfilling.

The attractiveness of alternative 2 is that it is closer to the CI of the law. It emphasises the basis of the law in social reality, and this emphasis goes at the cost of the rational reconstruction that is made in coherence theories. But this version amounts to an error theory, namely that Hercules was wrong at t_1 . Hercules talked as if he talked about what already was valid law, but in reality he said what ought to be valid law. Some find this distinction between what the law is and what it ought to be a useful one (see Hart 1983), but it is doubtful whether the sharp distinction is maintained in legal practice. In our opinion, legal practice takes its starting point in something like the CI theory, but does not stick to it. Rational reconstruction actually takes place, and it is a matter of time and place how much freedom is taken in the reconstruction with respect to the law that exists according to the CI theory.¹⁴

¹² Another possibility is, of course, that the beliefs at t_2 as incorporated in the most coherent theory at t_2 still lead to the views Hercules held at t_1 . In this case the legal community just has not sufficiently reasoning and imaginative powers to follow Hercules' correct line of reasoning. Then the prevalent view of the law would, in our opinion, be incorrect, despite its CI support.

¹³ Brouwer 1998 discusses a number of complications concerning retrospective effects of the "discovery" of already existing law and draws the conclusion that the Dworkinian conception of the law, according to which judges must discover the law, cannot be right all of the times.

¹⁴ Cf. the passage on relativised relativism in section 6.

These differences in time and place are a kind of inference rules that are also a part of the law, and they must be taken into account in the construction of the most coherent theory. Thus, even if the law is in a legalistic, positivist period, the rational reconstruction takes place. But in such times, the reconstruction hardly deviates from what the law would be according to the CI theory. Nowadays, since human rights have come to influence the contents of many western legal systems, the reconstruction of the law into a coherent theory leads to much wider deviations. However, these differences in legal culture do not make the difference between the correctness of the CI theory and the correctness of the coherence theory. The coherence theory takes these differences into account and leads to different conclusions regarding the contents of the law, according to the legal culture of the moment. Only in legalistic times does it correspond to the CI theory, which is—then—also a good approximation of the law. But even then it is only a good approximation, but not a good theory.

9. Ontological Conclusion

What is then the object of the best theory of law according to alternative 1? The theoretically best answer is easy to give, but hard to specify: The law is what the most coherent theory of everything says it is. To be more specific, we must formulate the most coherent theory of everything, which is clearly too much asked. We must therefore confine ourselves to formulate what we expect to be the best approximation presently available. According to this approximation, the morally binding law must be characterised in a way that is coherent with the following observations.

- The morally binding law is necessarily connected to normative motivation according to the scheme: This is the law; hence I ought to follow it.
- There is no necessary link between the knowledge of law as an institution (according to CI theory) and a normative motivation.
- Rational moral deliberation converts knowledge of law as an institution (according to CI theory) into the law that is a normative reason for action. This conversion does not mean that all CI law ought to be followed, but merely that CI law is one starting point in the construction of a coherent theory. Another starting point is the idea that the law ought to be followed. In combination with one's moral views these starting points lead, through a process of mutual adaptation, to a theory of what legally ought to be done.

Ontological conclusions are the following.

- The morally binding social law supervenes on two things together: on legal institutions and on moral obligation. The first supervene in their turn on mutual beliefs, the second supervenes on motivations and

dispositions of rational (that is, coherently arguing) human beings. In this manner, the right (binding) law supervenes on moral motivation that is triggered by institutions that supervene on mutual beliefs.

- The morally binding personal (interpretation of) law supervenes on two things together: on the individual's knowledge of legal institutions and on moral obligation. The first supervenes in its turn on mutual beliefs; the second supervenes on motivations and dispositions of the individual, provided that she is morally sensitive and rational. Again, the right (binding) personal law supervenes on moral motivation that is triggered by institutions that supervene on mutual beliefs.
- Personal (interpretation of) law converts into social law, if other persons on the basis of overriding reasons do not contest it.

Let us end with practical consequences. The ontology of law is tricky. To construe it consistently, one must deal with difficult philosophical matters. Such matters are not proper for the everyday practice of lawyers. Lawyers must use a simpler terminology. But they must be aware that simplicity, though useful, is deceptive. One never knows when a more profound analysis will be indispensable.

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