Can There Be an Artifact Theory of Law?

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Abstract. The idea that particular legal institutions are artifacts is not new. However, the idea that the "law" or "legal system" is itself an artifact has seldom been directly put forward, due perhaps to the ambiguities surrounding philosophical inquiries into law. Nevertheless, such an idea has recently been invoked more often, though not always developed in detail in terms of what the characterization of the "law" or "legal system" as an artifact entails ontologically, and what consequences, if any, this has for philosophical accounts of law. As a result, the primary aim of this paper is to attempt an inquiry into what the claim that "law" by its nature or character is an artifact entails, and what an artifact theory of law might look like.

1. Introduction

The idea that particular legal institutions are artifacts is not new. It seems intuitively correct to say that a particular legal institution, e.g., a mortgage or a leasing contract, could not exist unless somebody intentionally created it. However, due perhaps to the ambiguities surrounding philosophical inquiries into law, the idea that "law" itself is an artifact has seldom been directly expressed, with some notable exceptions that have emerged in the recent debate. An example of the formulation of such an idea is to be found in a recent paper by Leiter:

The concept of law is the concept of an artefact, that is, something that necessarily owes its existence to human activities intended to create that artefact. Even John Finnis, our leading natural law theorist, does not deny this point. I certainly do not understand Kelsen, Hart, Raz, Dickson or Shapiro to deny this claim. Those who might want to deny that law is an artefact concept are not my concern here; the extravagance of their metaphysical commitments would, I suspect, be a subject for psychological, not philosophical investigation. (Leiter 2011, 666; footnotes omitted)

Despite the fact that the idea of "law" as an artifact has recently been invoked in the legal-philosophical literature (Ehrenberg 2009, 91–113; Gardner 2004, 168–81; Leiter 2011, 663–77; Schauer 2012, 457–67), this idea was not always developed in

detail with regard to the questions of what the claim of the "law" or "legal system" as an artifact entails ontologically and what consequences, if any, this claim has for philosophical accounts of law.

As a brief preliminary remark I should point out that the artifact theory I develop in this paper takes as its object "law" in the sense of the legal system. Thus I circumvent the usual vagueness and confusion relating to the subject matter of various philosophical inquires into "law," since they sometimes aim at "law" qua idea, sometimes qua social institution, sometimes qua social practice, and sometimes qua legal norms. The working definition of legal systems adopted for the purposes of this paper conceptualizes legal systems as systems of legal norms (in the sense of the meanings of norms), and as systems that are by and large efficacious.

Broadly speaking, there are natural kinds and human (or social) kinds. Artifact kinds, no doubt, belong to the latter group. Natural kinds are groups of objects (things, entities) naturally brought into existence, the grouping (sorting, ordering) of which does not depend on humans, but on their natural common properties (e.g., the atomic structure, DNA types). It may thus be assumed that natural objects have essences and that it is possible to identify a set of necessary and sufficient conditions for natural-kind membership. In contrast, artifact kinds are groups of objects (artifacts) intentionally produced for some purpose, and the grouping of these objects is not fixed by nature, but depends on human understanding and agency. It may thus be said that artifacts do not have "real," ontologically objective essences,[1] but that their "nature" is constituted by the concepts and intentions of artifact authors (creators, makers) and that these, in turn, determine what features are relevant for an artifact to be a member of a certain artifact kind.[2]

If one is to accept the claim that the "legal system" is an artifact kind, one has to answer several important ontological, semantic, epistemological, psychological, and methodological questions: concerning the nature of the legal system viewed as an artifact kind, those of determining the reference of legal systems as artifact kinds and our epistemic relationship to them, concerning the ways of classifying them in kinds, and concerning the appropriate methodology for theorizing about them. These questions will be discussed within the scope of a broader project I pursue, which I refer to as the "artifact theory of law."

Since this is a preliminary investigation, this paper aims at attempting an inquiry into what the claim that "law" by its nature or character is an artifact would entail and what, in the end, an artifact theory of law might look like. Before embarking on such an inquiry, I will, however, first try to indicate at least some potential pay-offs of the artifactual understanding of law (Section 2). In order to be able to answer certain ontological questions concerning legal systems as artifact kinds, I will outline in the following a general theory of artifacts (Section 3). I will do this by exploring several theories of artifacts developed in general philosophy, drawing

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[1] The term *real* (ontologically objective essence) is understood as "real according to the criteria for existence suitable for members of natural kinds."

[2] For such a view, which nevertheless defends the reality of artifacts (and so their place in the ontological inventory), see, e.g., Thomasson 2007. For the opposite view, according to which at least some artifacts (those which are "copied kinds") are "real" because they have mind-independent natures just like natural kinds, see, e.g., Elder 2007.

mostly on those of R. Hilpinen, A. L. Thomasson, L. R. Baker, and P. Bloom, since their theories are presented as general theories of artifacts, capable of being applied to any artifact kind. Furthermore, since I take legal systems to be institutional in character, and thus different from "ordinary" artifacts, I will introduce certain elements of social (institutional) ontology and outline the ontological grounds for "institutional artifacts" as a distinct artifact type (Section 4). This will form the basis of an outlline of what an artifact theory of law might look like and what the challenges for such a theory might be (Section 5).

2. Why Have an Artifact Theory of Law?

Clearly, it is no easy task to explain why a legal-philosophical theory that is yet to be developed should be adopted or, more precisely, what difference such a theory, if developed, might make both for our descriptions and explanations of law and for our understanding of it. However, at the outset of such a project it is necessary to have at least some idea of what this difference might be, in order to set about examining the prospects of the proposed theory.

Some possible payoffs of the artifact theory of law are to be found in the inferences drawn from the general "law is an artifact" claim. On the basis of this claim, Leiter and Schauer, for example, justify their rejection of the essentialist approach to defining law (Leiter 2011, 666, 669–70; 2013; Schauer 2012, 458). If law is an artifact, a human-made entity, then all our endeavours (and there surely are many) to discover the necessary or essential features of law are seemingly doomed to failure. What we should do instead is give an adequate account of the important but necessarily contingent features of law. For Gardner, the "law is an artifact" claim lays the ground for his analysis of the relationship between law as a genre of artifacts, on the one hand, and legal systems (basic units) and laws (sub-units) as artifacts belonging to this genre, on the other (Gardner 2004, 171). Such an approach may be fruitful for making our structural explanations of law more intelligible. Finally, MacCormick (2007, 305) and Ehrenberg (2009) make use of the "law is an artifact" claim to advocate the functional analysis of law since, in the case of artifacts, functions seem to play an important role. If an artifact theory of law were indeed to reveal that functions are essential in regarding something as law, this would undoubtedly benefit our views on the appropriate methodology in legal philosophy.

Let me add here a few of my own preliminary insights in favour of examining the prospects of an artifact theory of law. The first such insight also relates to the issue of the appropriate legal-philosophical methodology. On the prominent theory of artifacts, one I call intentional-conceptual theory of artifacts and which I endorse in the exposition of my artifact theory of law, human concepts play a vital role in determining the "natures" or characters of artifact kinds (see Sections 3 and 4). This insight might provide additional support for and justify the use of conceptual analysis when theorising about the nature of law. Furthermore, given the nature of the concepts that determine the "nature" of law on that theory of artifacts, it might prove useful to combine some type of conceptual analysis with experimental philosophy, i.e., to engage in what I elsewhere dubbed the so-called modest methodological naturalism (Burazin 2014, 57–9). The second insight is that the intentional-conceptual theory of institutional artifacts, with its emphasis on the roles of the

relevant community and constitutive rules in the emergence of an instance of the legal system (see Section 4), might provide us with more plausible answers to objections sometimes levelled against Hart's account of the rule of recognition (i.e., that the rule of recognition alone is not sufficient to fully account for its member-ship or indeed the other secondary legal rules' membership of a legal system, or for the status of legal officials, or for why acceptance by officials is sufficient for its emergence, or for why ordinary citizens have a duty to obey the law). Finally, the fact that the intentional-conceptual theory of artifacts allows for historically and culturally dependent changes to concepts that are constitutive of artifacts, facili-tates legal-philosophical explanations of why the concept of law cannot be static in character.

It is for these reasons, all pointing to a potentially useful explanatory tool for the-orising about the "nature" of legal systems, that I believe we should concern our-selves as to whether the artifact theory of law can be made to work. To this effect, in the following section, to begin with I will outline a general theory of what arti-facts are.

3. Artifacts

According to Hilpinen's standard definition, an artifact is "an object that has been intentionally made for a certain purpose" (Hilpinen 2011, chap. 1; see also Baker 2004, 99). As an object, it can take various forms. It can manifest itself as a concrete, unique object, or a type object, or a token object (an instance of a type), or an abstract object (Hilpinen 2011, chap. 2). Since it is an intentionally made object, an artifact necessarily has an author, i.e., the maker or creator of the artifact (Baker 2004, 102; Hilpinen 2011, chap. 1; 1993, 156). The author of an artifact can be a sin-gle person, but it can also be a group of persons, in which case we can speak of a collective author and of its product as a "collectively produced artifact" (Hilpinen 2011, chap. 1; 1993, 156–7; 1992, 66–7). Apart from the author, the existence of an artifact in the strict sense also requires the artifact to be a product of its author intentions, i.e., that it be an intended product (Baker 2006, 133; 2008, 2–3; Hilpinen 1992, 59–60; 1993, 157 and 159; 2011, chap. 4; Thomasson 2007, 52).

However, it is not just any kind of intention that is involved in the creation of an artifact. The relevant intention, one on which an artifact depends causally (Hilpinen 1992, 60–61; 1993, 57; 2011, chap. 4), but also existentially or ontologically (Baker 2004, 103; 2008, 3; 2010, 4; Thomasson 2007, 53; 2009a), has to be the intention to pro-duce an object of a certain artifact kind (Bloom 1996, 10). It is claimed that by taking intention to mean one that has to be specifically directed to the kind to which the created object should belong, the relevant intention is specific enough not to include objects other than those intended to be produced (ibid.). This helps circumvent the problem of excessively general and overinclusive intentions, such as those solely related to the object's functions, which besides the intended object include all other objects serving the same function (ibid., 10–11).[3] Additionally, according to some, this makes it possible to include both functionally and nonfunctionally based

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[3] For the view according to which the proper function, the one intended by the maker, "determines what the artifact most fundamentally is" and that "the nature of an artifact lies in its proper function," see Baker 2004, 102.

artifacts into a single artifact kind (Thomasson 2003a, 595). Thus function can still be a possible essential feature of an artifact if the author intends it as such. However, there is room for other features such as an artifact's form (e.g., shape, constitution, or process of making) or way of functioning that can be intended by the author as essential for an object to be of a certain artifact kind.

Yet there are different views regarding what exactly this intention entails. According to Bloom's historical-intentional theory of artifact kinds, the intention to produce an artifact object *X* consists in the intention that it belongs "to the same kind as current and previous *X*s" (Bloom 1996, 10). This, it seems, entails that the author should intend similarity to occur between the artifact he is creating and previous members of the kind to which the artifact is intended to belong, and should intend the occurrence of similarity to be relevant to why the artifact was created in the first place.[4] Furthermore, it seems that this entails the author having some understanding, or a conceptual scheme, or a concept of the kind to which his artifact is intended to belong, a concept that is to a large extent consistent with, as Bloom (ibid., 20) says, "our" concept, or, to interpret this somewhat, that which is common for the kind in question. Nevertheless, on Bloom's intentional-historical account, this concept has to be informed by the author's experience with previous instances of the same kind (ibid.). However, the historical component of the author's intention does not seem to leave much space for prototypes or same objects independently created by separate cultures to be members of their respective artifact kinds, for in such cases there is no "one of these" to which the author could point (Thomasson 2003a, 595–6). As a result, according to Thomasson's intentional-conceptual theory of artifacts, which seems a more plausible view, the relevant intention should involve "a substantive intensional concept of the *nature* of things of kind K" (emphasis added), rather than a simple reference to historical instances (ibid., 597). The author's intention to produce an object of a certain artifact kind thus has to be grounded in his "substantive (and substantively correct) concept" of what that kind is, "including an understanding of what sorts of properties are K-relevant," i.e., a "conception of what features are relevant to being a member of the kind" (Thomasson 2007, 59).[5] Furthermore, it has to include the intention to realize many of these properties (features) in the object produced (ibid.). In the case of prototype artifact creation, the substantive (and substantively correct) concept of the kind is based purely on the author's (inventor's) stipulation of what is relevant to being the artifact he intends to create (ibid., 60). Thus the author (inventor) establishes a new artifact kind, "complete with normative success conditions for creating something of that kind" (ibid., 60). However, the author's (inventor's) concept need not amount to some clear and well-elaborated plan for creating "that very sort of thing." As Thomasson (2007, 60 n. 7) points out, the requirement that the author have a substantive concept about the object he intends to create "does not

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[4] I draw this conclusion from Bloom's account of the criteria for classifying artifacts in kinds, from which it is possible to derive his ontological view on the contents of the intentions of the author of the artifact (Bloom 1996, 13).

[5] For the view that in the case of artworks there is no need for a *substantive* concept, but only for some conceptions about art, see Levinson 2007, 80–1. For the view that Thomasson's requirement for the maker to have a "substantive concept" is much too strong, see Kornblith 2007, 145.

preclude the plan beginning quite vaguely, and evolving or changing in the creative process." Nevertheless, despite allowing for a certain degree of vagueness regarding the plan, it seems that, according to Thomasson, some plan, however indeterminate, must exist. In the case of creating only tokens of existing artifact kinds, the artifact-author's substantive (and substantively correct) concept of the kind has to be such that it matches at least substantially or largely the prior concept of the kind (i.e., that of some prior maker of the kind), since author-inventors' "concepts were originally definitive of what counts as relevant to kind membership" (ibid., 62; 2003a, 600–1).[6] Clearly, since artifacts are human products, dependent on human interests and intentions, they are strongly susceptible to historical and cultural developments. This, then, is the reason why concepts as held by their subsequent makers are necessarily susceptible to some (gradual) change (Thomasson 2007, 62–3). So, what in the case of creation of tokens of existing artifact kinds determines kind membership is—for the reason of their malleability to change in human societies—the diachronical concept of tokens, i.e., concepts informed by the "intentions of a great number of makers over an extended period of time" (ibid., 63). As Thomasson (ibid., 65) observes, insightfully in my view, it is not only artifact-makers' concepts that matter, but also the concepts of those who *sustain* artifact kinds. This is similar to Grandy's claim that in many cases artifacts have multiple designers, as well as multiple *creative users* whose recognition of some new function of an existing artifact then plays a role in the identification of the kind of artifact it is (Grandy 2007, 27–8). In this view, it is possible to deal with prototype artifacts and artifacts created independently by separate cultures, for if their authors have a substantive concept of the nature of the kind to which their artifacts should belong as well as an understanding of K-relevant properties, it is not necessary for their intentions to be informed by preexisting historical instances of the given kind (Thomasson 2003a, 597; 2007, 60–2). A similar accent on the conceptual component of the author's intentions is also to be found in the work of Hilpinen.[7] According to his intentional-descriptional theory of artifacts, the content of the intention to make an artifact object is "some description of an object or some 'concept' under which the intended object is conceived. [...] The intention 'ties' to the object a number of descriptions (concepts or predicates)" (Hilpinen 1993, 157; 1992, 60). These descriptions, in turn, "define its intended properties" (Hilpinen 1993, 157; 1992, 60–1).

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[6] The condition that the new artifact-maker's concept needs only be substantively correct, i.e., the fact that it needs only substantially correspond to the concept of the inventor, reflects "the fact that some vagueness is essentially built into artifactual kind concepts" (Thomasson 2007, 62 n. 8).

[7] The "conceptual component" requirement, however, gives rise to concerns that the "substantive-concept" view does not leave room for a serendipitously or fortuitously produced object to be of a new artifact kind. (I thank Lynne Rudder Baker for this comment.) This objection might, of course, be dealt with by endorsing a strong reading of the (stipulative) definition of artifacts, according to which only objects produced intentionally, i.e., with a *particular* intention, may be regarded as proper artifacts, while all the other objects that do not meet this condition need to be excluded from artifact kinds. However, I think that this objection should be taken seriously. One should either provide an account of such objects within the current theories of artifacts, or change the existence conditions for something to be of an artifact kind.

Since concepts seem to be the essential elements of the author's intentions, defining the relevant properties of the intended object, it has been argued that artifact objects are "causally dependent on their authors' conceptual schemes" (Hilpinen 1993, 166), that "the metaphysical natures of artifactual kinds are *constituted by* the concepts and intentions of the makers" and of those who sustain the created artifacts, and that this very feature is what "sets them crucially apart from natural kinds" (Thomasson 2007, 53 and 65; see also Hilpinen 1993, 166). But how exactly do these concepts (of those who create and sustain artifacts) determine the actual natures or characters of artifacts? In order to answer this question, we should first consider the relationship between these concepts and the intended natures or characters of artifact kinds.

The concept or description involved in the author's intention determines, it is claimed, an artifact's *intended* character (Hilpinen 2011, chap. 1). According to Hilpinen (1992, 61; 1993, 158), the intended character of an artifact always includes at least a sortal or "substantival" description (or type description). By pointing to a certain kind of which an intended object purports to be an instance, the sortal description "determines the identity of the object and the criteria by which it can be distinguished from other objects" (Hilpinen 1992, 61; 1993, 158). In addition to the sortal description indicating the kind (K) to which an intended object should belong, in the case of more complex intentions, there can be "various 'adjectival' descriptions (G, H, . . .), which together determine the intended character of the artifact" (ibid.).

However, in order for an artifact to be created and to acquire its *actual* nature, it is also necessary, apart from the above-mentioned conditions (i.e., the author's intention involving a substantive concept—or a sortal description—of a relevant artifact kind, his understanding of the kind-relevant properties, and his intention to realize them), for the author's intention to be realized in practice. From this it follows that the author's *substantive concept* (or a *sortal description*) alone is not sufficient for determining the actual nature or properties of an artifact. What matters is whether this concept or description is successfully realized. Though the relevant intention need not be realized in its entirety, some degree of success is necessary (ibid., 160–1). It has been suggested that the author's intention should at least be "largely successfully realized" (Thomasson 2007, 59; 2003a, 598).[8] For, as it has rightly been noted, "if an author fails in every respect, he does not produce a genuine artifact, but only 'scrap'" (Hilpinen 1993, 161). Whether or not the minimum success conditions have been properly met depends on the conceptions competent speakers have regarding the artifact in question, i.e., on whether, according to the conception they endorse, they regard a certain object as a successful product of its author's intentions (Levinson 2007, 78). The intended properties that the author successfully embeds in the artifact he has created are part of the artifact's actual properties. Of course, an artifact can also have other properties, those not intended by its author, but acquired through its use in practice. Both successfully realized and in other ways acquired properties are called its actual properties. These properties constitute the artifact's actual nature or

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[8] For a reference, although implicit, to this minimal success condition, see also Bloom 1996, 10 and 12. For an interpretation of Bloom's view, see Levinson 2007, 78.

character (Hilpinen 2011, chap. 4). Whether it may be said that the author has successfully created the intended artifact "depends on the degree of fit or agreement between the intended and the actual character of the object" (ibid.). In order for the artifact to fit the intentions of its author, its actual character, it is claimed, must include the intended one (ibid.). Following Bloom (1996, 12), we can infer that the fit exists if the "appearance and potential use" of the object created "are best explained as resulting from the intention to create a member of artifact kind X". Since a largely successful realization of the author's intentions is an essential condition for an artifact to be created, we may say that an artifact's actual nature is the "embodiment of these intentions" (Hilpinen 2011, chap. 5). This is where a possible answer to the above-mentioned question lies: Since the relevant intentions necessarily have to be grounded in the author's substantive (and substantively correct) concept of the relevant artifact kind, it may be claimed that it is this very concept (or sortal description) that is eventually constitutive of an artifact's actual nature. Along these lines, it is therefore claimed that an object is an artifact "only if it is intentionally produced by an agent under some description of the object" (Hilpinen 1992, 60).

Given all of the above, the existence requirements for artifacts can be summarized by the following Dependence Principle as laid out by Thomasson (where K represents artifact kind):

Necessarily, for all x and all artifactual kinds K, x is a K *only if* x is the product of a largely successful intention that (Kx), where one intends (Kx) *only if* one has a substantive concept of the nature of Ks that *largely* matches that *of some group* of prior makers of Ks (if there are any) and intends to realize that concept by imposing K-relevant features on the object. (Thomasson 2003a, 600)

4. Institutional Artifacts

While all of what has been said so far seems applicable to "ordinary" artifacts, such as chairs, clocks, hammers, screwdrivers, and tables, it does not seem to give an appropriate account of all the objects intentionally created for a certain purpose. Some entities, institutional objects (e.g., money, boundaries, citizens, elections, private property, legislatures, governments, presidents, laws, corporations, universities, nation-states), may be claimed to be objects intentionally created for a certain purpose with a certain description, and thus artifacts, according to the standard definition.[9] I call these entities institutional artifacts.[10] However, as opposed to

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[9] For the claim that some artifacts can be institutional, see Thomasson 2003aa, 592. For the claim that institutions are artifacts, but of a peculiar sort (because they are made up of rules), see Roversi 2012, 199. For the claim that some institutions (like schools and corporations) are man-made and, thus, artifacts, see Weinberger 1991, 161.

[10] Shortly before submitting this paper for publication, I found out in personal communication with Corrado Roversi that he, Anna M. Borghi, and Luca Tummolini had reached the same conclusion on "institutional artifacts" as one type of artifacts. They base their conclusion on the experimental study of the conceptualization of standard and institutional artifacts which they conducted and which showed that "institutional objects are represented similarly to standard artefacts and thus could be understood as artefacts in a proper sense." See Roversi, Borghi, and Tummolini 2013, 527–42.

"ordinary" artifacts, to which only the individual intentions of their authors are relevant,[11] institutional artifacts require collective intentionality for their existence (both their creation and their continued existence). Collective intentionality is here understood in the sense of collective mental states that are of or about something, thus including not only (collective) intentions in the strict sense of the word, but also other mental states such as (collective) beliefs and desires.[12]

According to Searle's institutional theory, institutional objects could be defined as objects created by collective recognition of constitutive rules on the basis of which humans either impose status functions on existing persons or material objects (Searle 1995, 41–51), or bring into existence new entities by simply making it the case that certain entities with certain status functions exist, thus not ascribing a status function to any preexisting entity (Searle 2010, 22 and 97–102). Those institutional objects that are created by imposing status functions on existing persons or objects may be called "concrete institutional objects" and those created by making it the case that they exist may be called "abstract institutional objects" (Thomasson 2003a, 587–8). The importance of distinguishing between them lies in the fact that different types of constitutive rules apply to each of them. Under Thomasson's view of constitutive rules, concrete institutional objects are created on the basis of either a singular constitutive rule (when they are created on a token-by-token basis) or a universal constitutive rule (when they are created on a type basis), while abstract institutional objects are created on the basis of an existential constitutive rule (Thomasson 2003b, 280–3). A singular constitutive rule has the following form (where "S" stands for a social feature):[13] "of a particular (preexisting) object *a*, we (collectively) accept (*Sa*); e.g. of this river, we accept that it counts as the boundary of our territory" (Thomasson 2009b, 548). A universal constitutive rule is of the following form: "for any *x*, we accept that if *x* meets certain conditions *C*, then *Sx*" (ibid.), e.g., for any piece of paper we accept that, if it meets conditions *C*, it counts as money. Finally, an existential rule reads as follows: We collectively accept that, "if certain conditions obtain, then *there is some (new) entity x such that Sx*"; e.g.,

> we accept that if congress votes with a majority in favor of a bill and the president signs it, then a new law is created. That law, however, is not identical with any piece of paper the president signs (it may continue to exist even if that paper is destroyed), nor with any member of congress or action of any such member. (Ibid., 548–9)

In all these cases, what is collectively recognized (accepted) is constitutive rules laying down certain conditions, "such that anything that fulfills them is (counts as being) of

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[11] *Pace* Searle (1995, 126), who claims that even such artifacts as hammers or screwdrivers are created by imposing on them a certain function by collective intentionality. Also, in her 2014 paper Thomasson, it seems, weakens her claim that artifacts (or at least those she calls public artifacts) only depend on the intentions of their makers. She now thinks public artifacts also depend on the actual public norms of use of the public artifact in question which, in turn, presuppose "widespread intentional states within the relevant society, of people who accept, recognize, or consider things like these as things that are to be treated, used, or regarded in certain characteristic ways" (Thomasson 2014, 55).

[12] For an account of different views about when some mental state may be regarded as *collective*, see Thomasson 2009b, 547.

[13] The term *social feature* is taken here to signify the feature that is causally and conceptually dependent on its collective recognition by the relevant community.

the relevant institutional kind," and not institutional objects themselves (Thomasson 2003a, 586). Thus, it may be said that constitutive rules only "create the possibility" of institutional objects (Searle 1995, 28). Nevertheless, the important fact is that institutional objects can initially be created only if there is collective recognition of relevant constitutive rules and can continue to exist only for the time this recognition is maintained (ibid., 44–5). However, since particular institutional objects are created only after the application of constitutive rules, such rules alone are not sufficient to fully account for the conditions for the existence of institutional objects. According to Thomasson, these principles may be outlined by two Dependence Principles, one for concrete and the other for abstract institutional objects. In the case of concrete institutional objects, the Dependence Principle reads as follows (where K represents an institutional kind): "Necessarily, for all x, x is K if and only if there is a set C of conditions such that it is collectively accepted that (for all y, if y meets all conditions in C, then y is K), and x meets all conditions in C" (Thomasson 2003a, 587). In the case of abstract institutional objects, where a new (institutional) object is created "by allowing that under certain conditions," something (e.g., the undertaking of certain activities) "counts as creating a new entity," Thomasson states the following Dependence Principle:

Necessarily, there is some x that is K, if and only if there is some set of conditions C such that it is collectively accepted that (if all conditions in C are fulfilled, there is something that is K) and all conditions in C are fulfilled. (Ibid., 587–8)

From both these principles it follows that institutional objects are those that are "dependent on the acceptance of certain constitutive rules laying out (at least) sufficient conditions for their existence, and existing provided something fulfills these conditions" (ibid., 589). Since existence conditions amount to a concept of a K, one may say that, in the case of institutional kinds, the concepts of a community play a stipulative role in establishing the nature of the kinds (ibid., 591–2). According to Thomasson, there are two ways in which dependence principles in the case of institutional objects differ from the dependence principle given for artifacts. First, they require collective acceptance of K-relevant conditions, while in the case of artifacts it is sufficient for each artifact-maker to accept them individually (ibid., 599).[14] Second, they are far more close-ended, since they specify a simple set of sufficient conditions for being a K, while the dependence principle for artifacts "may involve concepts of K-relevant features of all kinds" (ibid., 599).

What are the existence conditions in the case of institutional objects? For Thomasson, as we have seen, these conditions represent a simple set of sufficient conditions for something to be an institutional kind K, or for there to be something of institutional kind K. By means of their collective recognition, i.e., through the collective recognition of constitutive rules laying out the existence conditions, the relevant community determines what conditions suffice for being a K (or, in the case of existential rules, for there being a K) (ibid., 588–9). However, what exactly would these existence conditions amount to in the case of institutional objects that are at the same time artifacts, i.e., in the case of institutional artifacts? The rule condition for the existence of institutional objects (in connection with collective recognition) is undoubtedly something that distinguishes them from "ordinary" artifacts and

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[14] However, for the most recent change in Thomasson's views see note 11.

thus makes institutional artifacts a distinct type of artifact. Apart from that, it seems plausible to claim that institutional artifacts qua artifacts should also meet the conditions for being artifacts. They should have an author with a particular intention to create an institutional artifact kind K, based on the author's substantive and substantively correct concept of what a K is, and this intention should be largely successfully realized. As a result, in the case of institutional artifacts, the simple set of existence conditions C seems to be precisely the set of conditions for being an artifact. If we accept this claim, the dependence principle for institutional artifacts could be formulated as follows (where K represents an institutional artifact kind): There is some x that is K, if and only if there is a set of conditions C (that x has an author, that the nature of x is determined by the author's intentions to make a Kx, that the author has a substantive and substantively correct concept of a Kx, and that the author's intentions are largely successfully realized) such that it is collectively recognized that (if all conditions in C are fulfilled, there is something that is K) and all conditions in C are fulfilled.

Of course, the dependence principle for institutional artifacts seems to be adequate for those (institutionalized) institutional artifacts (e.g., a newly invented game or legal institution) that have distinct authors, i.e., a particular group of persons with a particular intention to create a particular institutional artifact under the relevant concept of this institutional artifact, who lay down the institutional artifact's constitutive rule which is then collectively recognized by the relevant community. However, an objection to the dependence principle thus formulated may be raised by giving an example of an institutional artifact kind K that has emerged gradually from a standing practice. In this case, the objection would go, there is no identifiable author, let alone any particular intention to create that very K, based on a substantive (and substantively correct) concept of K. What happens is that K emerges by a gradual process through patterns of participant behaviour (behavioural regularities) and their collective beliefs so that K's founding moment cannot be identified. However, I do not see how patterns of behaviour or behavioural regularities alone can constitute institutional artifacts. Even in the case of institutional artifacts gradually emerging from a standing practice, there is, as Roversi (2012, 193) correctly emphasizes, "a point at which the institution will be considered to exist and be established." This is the point at which patterns of behaviour settle "into an established and hence recognizable form" (ibid.). Eventually there has to be someone who will say that some x (a pattern of behaviour that has settled into an established and recognizable form) now constitutes a particular institutional artifact kind K. This "someone" can be a single person or a group of persons with particular authority, but it can also be, as is often the case with institutional artifacts, the relevant community participating in the practice that has evolved to the institutional level. Some pattern of behaviour x cannot be an institutional artifact kind K unless someone with a substantive concept of K intentionally gives to x the recognizable form of the institutional artifact kind K and unless the relevant community collectively recognizes K's constitutive rule. Here we may differentiate between two possible types of institutional artifacts gradually emerging from a standing practice: institutionalized or formal institutional artifacts and informal institutional artifacts.[15] Since institutionalized

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[15] This distinction is based on MacCormick's (2007, 11–37) distinction between informal normative orders and formal or institutional (or, better still, institutionalized, *L. B.*) normative orders.

or formal institutional artifacts, regardless of whether they gradually emerge from a standing practice or are invented by a distinct author or authors, involve a certain element of organization under a certain authority and since they are constituted of certain explicitly expressed rules, the dependence principle, it seems, withstands the test. It is therefore not hard to identify both some kind of authority as the institutional artifact's author, and explicitly expressed rules as its constitutive rules. By contrast, informal institutional artifacts (e.g., noninstitutionalized queuing or promising) seem to present a greater challenge to the dependence principle as formulated above. Nevertheless, even in the case of informal institutional artifacts, behavioural regularities alone do not suffice. What is needed for there to be an informal institutional artifact is the existence of implicit norms and mutual normative beliefs of those participating in the informal institutional artifact in question. We can therefore say that the true authors of informal institutional artifacts are the participants themselves and that informal institutional artifacts cannot emerge as artifacts of their respective kinds K if, first, the authors-participants do not have the relevant intention informed by at least a substantive concept of what they are creating; second, they do not lay down an implicit constitutive rule (created by their mutual beliefs); and, third, the relevant community does not collectively recognize this rule. Of course, at the moment of artifact creation the relevant community collectively recognizing an artifact will overlap with the authors-participants who created it. Since the existence of institutional artifacts is subject to continuing collective recognition, over time the two groups will become differentiated.

However, there is yet another important consequence of framing the dependence principle for institutional artifact kinds in the above-formulated way that brings to light the different ways in which the nature of "ordinary" artifacts and institutional artifacts is determined. It is true that collective recognition of constitutive rules is one of the features that differentiates institutional artifacts from noninstitutional artifacts. It is also true that the relevant community's concept of a certain institutional artifact plays a stipulative role in establishing its nature. However, given the above-formulated dependence principle for institutional artifact kinds, from which it follows that authors' concepts also play a part in stipulating the natures of institutional artifacts, what seems relevant to me is to determine to what degree and at which level collective, i.e., the community's, concepts are stipulative of the natures of institutional artifacts. It seems that our collective concept of the nature of a Kx (institutional artifact) is what determines, at the first level only, the nature of the Kx. We collectively recognize that if something is created with the intention that it be a proper member of a certain institutional artifact kind K, then it is that K. To achieve that, no doubt, requires of us to have at least some (however general) concept of what the K is. However, since a Kx is an artifact after all, it must have an author. The author must have particular intentions, and must also have a substantive (and substantively correct) concept of what the Kx is. The correctness of this concept is then judged by the fit between our collective concept and the author's concept of the Kx. For the author's concept to be correct, it should at least substantively match the relevant community's concept of K. However, since the author needs only have a substantive (and substantively correct) concept, and since this concept needs to be realized only largely successfully, it may be said that the final real nature (character) of a produced institutional artifact is, at the second level, nevertheless shaped by its author's intentions (and the intentions of those who sustain it). Clearly, apart from being relevant to the making of a Kx, our collective

concept is relevant to its continued existence. An artifact Kx exists only insofar as we collectively recognize it as being a Kx or only insofar as the author's intentions at least largely match our collective concept of the Kx.

5. An Outline of the Artifact Theory of Law

The general theory of artifacts, and of their particular subclass "institutional artifacts," which I elaborated in Sections 3 and 4, makes it possible now to present an outline of how this theory might be applied in giving a jurisprudential account of the legal system.

According to the artifact theory of law, legal systems are abstract institutional artifacts. They are artifacts since they are created by authors who have a particular intention to create the institutional artifact "legal system," based on the author's substantive and substantively correct concept of what the legal system is, under the condition that this intention be largely successfully realized. By being institutional by nature, they differ from "ordinary" artifacts (such as chairs, hammers, or clocks) in that they are rule-based and require collective recognition (acceptance). This means that they can initially be created only if there is collective recognition of the relevant constitutive rules and can continue to exist only for as long as this recognition is maintained. Finally, they are abstract in the sense that they are not created by imposing the status function "legal system" to any existing physical object or person but by making it the case that they exist provided certain conditions are fulfilled. The existence of a legal system is clearly ascertained by means of collective recognition of the existential constitutive rule laying out a set of conditions for there to be a legal system.

The rule through the collective recognition of which the relevant community ascertains the existence of a legal system creates the context in which an instance of the legal system can emerge. This rule may be formulated as follows:

> We (collectively) recognize that, if conditions *C* obtain, then there is a legal system.

The set of conditions *C* laid out in a legal system's constitutive rule represents sufficient existence conditions for there to be a legal system. Since a legal system is an artifact kind, this set of existence conditions seems to include at least the set of conditions for being an artifact. It thus includes the conditions of both authorship and intention. The authorship condition requires that there be an author, collectively recognized as such by the relevant community, creating a legal system. The intention condition requires that the author have a particular intention to create the institutional artifact kind "legal system," that this intention be based on the author's substantive concept of the legal system, and that eventually this intention be at least largely successfully realized. Since these conditions define the artifactual character of the legal system, it may be said that they amount to the initial concept of the legal system. Moreover, the conditions laid down in a legal system's constitutive rule usually include further conditions. These additional conditions may vary from the simple requirement that whatever a group of people that the community (collectively) recognizes as the authors of the legal system counts as a legal system is a legal system, to more detailed and informed existence conditions of a legal system (e.g., that the totality of rules authors count as belonging to a legal system is a legal system, or that a legal system is whatever authors count as a legal

system as long as they themselves are also legally limited by it, or provided that the legal system upholds human rights, expresses the rule-of-law principle, and so on). The concept of law is, after all, the concept of an artifact, and since artifacts are susceptible to change (depending on human interests), their concepts can also change. This further means that through collective recognition of a legal system's constitutive rule, the relevant community's concept of the legal system plays a stipulative role in establishing the "nature" of the legal system.

However, this is a first-level stipulation only. The relevant community thus sets out the initial general idea of its legal system but does not as yet create an instantiation of it. For an instantiation of a legal system to emerge, someone has to instantiate or implement the general idea (i.e., someone has to bring about that conditions *C* from the legal system's constitutive rule obtain). Taking Hart's theory of legal systems as adequate in explanatory terms, a legal system acquires its main feature (i.e., that of being a system of rules) through the rule of recognition, that is, a rule constituted by the practices of legal officials; then arguably legal officials are the true authors of a particular instantiation or token of the legal system. If legal officials are indeed the authors of a legal system, collectively recognized by the relevant community as having the status function "legal officials" (a function which implies the corresponding deontic powers of identifying, creating, modifying, and applying law), it seems justified to assume that their practices are intended by them as practices exercised in view of fulfilling their official role. The manifestation of their intention to act in such a way is most discernible in their regarding their patterns of behaviour as a rule—a rule (of recognition) which, according to Hart (1994, 100), forms the foundations of a legal system. It may thus be said that their intention is to create a legal system. According to the artifact theory of law, the intention of legal officials to create an instantiation of the legal system is based on their substantive concept of the legal system. If one remains within the framework of Hart's theory, it is reasonable to assume that the concept adopted by the officials of the legal system includes at least the following two features: that the legal system is a system of valid legal rules, i.e., rules that are members of one and the same system of rules, and that the legal system is structured as a union of primary and secondary legal rules. What the relevant community's constitutive rule of a legal system does is to create the context in which the practice of legal officials as authors of a legal system, resulting in the rule of recognition and other secondary rules, can be understood as instantiating or implementing the community's general concept of a legal system and stipulating the "nature" of the legal system at the second level. As Finnis (1984, 284) says, "the making of the artefact is controlled but not fully determined by the basic idea (say, the client's order), and until it is fully determinate the artefact is non-existent or incomplete."

Clearly, apart from being relevant to the making of a legal system, the community's (collective) concept is relevant to its continued existence. A legal system exists only insofar as the relevant community collectively recognizes it as being a legal system or only insofar as the author's intentions at least largely match the relevant community's (collective) concept of the legal system. This is in tune with Hart's claim that where there is a general disregard for the rules of a system, one should say that "in the case of a new system, that it had never established itself as the legal system of a given group, or, in the case of a once-established system, that it had ceased to be the legal system of the group" (Hart 1994, 103). It follows that some person or group of persons could create a new system of rules which would have its rule of recognition but which would not amount to a particular community's

legal system since there would be a general disregard for its rules. According to the artifact theory of law, the authors and their intentions would no doubt exist but since collective recognition by the relevant community would be lacking, there would be no institutional artifact.

The above account of the artifact theory of law is clearly only a rough outline of what this theory might look like. In order to grasp its full potential, its elements would have to be elaborated in more detail. However, even at this stage, it is highly likely that some parts of the theory would give rise to challenges. Moreover, the objections could well be raised against precisely those elements of the theory which constitute its foundations. For example, one might expect an objection to be made against the authorship condition. Since in principle no one person creates a legal system from scratch, since usually a legal system has no precisely identifiable authors, and since it seems that many people with different roles over a long period of time contribute to the emergence and continuous existence of a legal system, it seems that the artifact theory of law should adopt a very broad concept of authorship. And indeed it seems to do so. The artifact theory of law does not preclude collective authorship and accepts as authors a wide range of persons, including those who sustain the artifact in question and its active users. The other possible objection might go in the direction of rebutting the intention condition. It may seem too constraining for a theory of law to limit itself a priori to those instances of a legal system that were intentionally created. However, since legal systems are undoubtedly highly complex institutional artifacts, it seems strange to claim that such complex entities could emerge (wholly) unintentionally, as is sometimes the case with ordinary artifacts (e.g., a fortuitously created medicine). It is not as if someone by means of experimentation produced an entity x, and later realized that it was an instance of a legal system. Furthermore, as argued in Section 4, the intention condition does not imply that a part (or even the greater part) of the coming into existence of an institutional artifact precludes its gradual emergence from a standing practice. Additionally, if it is true that legal officials are the authors of a legal system, then it seems plausible to assume that they act with the intention that what they produce is to belong to the kind "legal system" and not some other system of rules. The third objection might be levelled against the substantive-concept requirement, i.e., that it is much too strong. This objection was pointed out in the debate on the general theory of artifacts. Yet both the broad understanding of "substantiveness" of the required concept, which allows for a certain degree of vagueness, and my example of what that concept would be if we took legal officials to be the authors (or the most important among the authors) of a legal system, withstand this objection at least prima facie. However, it is not until the artifact theory of law is further developed and objections refined that one can evaluate to what degree any of these objections (and perhaps some other) could diminish the prospects of making the artifact theory of law work.

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