OBJECTIVITY OF LAW AND OBJECTIVITY ABOUT LAW

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1. Introduction

The notion of objectivity derives its sense from the view that there is a reality that does not depend on beliefs or opinions, or on any operation of the mind, and that ideally our knowledge is a faithful reflection of parts of this reality. This view supports two notions of objectivity. One notion is the objectivity of a mind-independent world; the other notion is the objectivity of a faithful representation of this world. In connection to law, the first notion concerns the objectivity of law, while the second notion concerns the objectivity about law. The objectivity about law seems to depend on the objectivity of law, because if the law itself is not objective, it is doubtful whether objectivity about law is at all possible.

This article investigates whether, and to what extent, the distinction between objectivity about law and objectivity of law makes sense.[1] Section 2 starts with a discussion of the objectivity of knowledge and its desirability. Section 3 continues with an introduction of the conceptual framework for this contribution. Section 4 deals with rules. Section 5 addresses objective facts and 'things' (individuals), while the sections 6-9 focus on social facts, which are for law the most interesting category. Section 10 summarizes the argument and draws some conclusions.

2. Objectivity of knowledge

Reiss and Sprenger (2014) have offered an analysis of what they call 'objectivity as faithfulness to facts'.[2] They distinguish three variants or aspects of this epistemic version of objectivity.

Objectivity of knowledge, would mean that '(…) scientific claims are objective in so far as they faithfully describe facts about the world. The philosophical rationale underlying this conception of objectivity is the view that there are facts 'out there' in the world and that it is the task of a scientist to discover, to analyze and to systematize them. "Objective" then becomes a success word: if a claim is objective, it successfully captures some feature of the world.'

Objectivity as absence of normative commitments would boil down to the view 'that science should be value-free and that scientific claims or practices are objective to the extent that they are free of moral, political and social values.'

Objectivity as freedom from personal bias, finally, means that '(…) science is objective to the extent that personal biases are absent from scientific reasoning, or that they can be eliminated in a social process. (...) scientific results should certainly not depend on researchers' personal preferences or idiosyncratic experiences.'

The picture that arises from these quotes is that scientific objectivity has to do with our (scientific) knowledge faithfully representing the facts as they really (objectively) are. Such a realistic picture would be distorted if values played a role in gathering evidence, or in accepting theories on the basis

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1 Much of this article was adapted from my book 'Foundations and Building Blocks of Law' (Hage 2018).

2 Another overview of different notions of objectivity that are relevant for law and jurisprudence can be found in Van Hoecke 2013. See also Leiter 2002 and Mackor 2016.

of evidence. Not only values should be barred from influencing the results of science, but also personal preferences and idiosyncratic experiences. Implicit in this picture is the distinction between the facts on one hand, which are not as such tainted by distorting factors such as values, biases or preferences, and on the other hand, our knowledge of these facts, which is threatened by becoming tainted by these factors. The strife for scientific objectivity is nothing more than the attempt to make our knowledge reflect the untainted facts as faithfully as possible.

Elaborating on this metaphor of objectivity, subjectivity of knowledge would then be the distortion of our knowledge by the tainting effects of personal biases, preferences, or idiosyncratic experiences. The tainting effects of values do not necessarily stem from the person who claims to have particular knowledge (the knowing subject), and are not in that sense subjective. However, they nevertheless distort knowledge in a similar way, thereby spoiling the objectivity of the knowledge and making it subjective in the broader sense of being infected by factors that distort knowledge of the facts as they are.

An interesting addition to this view can be found in the work of Daston and Galison (2010). They describe the historical development of the notion of objectivity of knowledge in the period from the 18th to the 20th century. As example of the beginning of this development, Daston and Galison discuss the use of scientific atlases in the 17th and the 18th century. These atlases contained pictures of parts of reality, geographical, but also botanical. They were used to train the eye of the novice and calibrate that of more experienced observers to see what is essential in nature (Daston and Galison 2010, pp. 55-113). This implied that the pictures would not depict nature in all its contingent details, but rather emphasize what is universal and ideal. A picture of, for instance, a plant or flower would focus on the essential characteristics of the kind of plant, and leave out details that are peculiar to particular plants. No doubt that the producers of these atlases were to be experts in their fields, because they should be able to safeguard what is essential in their subjects, and filter away the merely contingent details.

In the course of the 19th century, this approach to the knowledge of nature became more and more the object of criticism. The pictures in atlases would be subjective and not reflect nature as it really is. We should strive for a way of producing knowledge that is to a large extent mechanical, with as little human interference as possible (Daston and Galison 2010, pp. 253-307). Taking photographs, but also measurement by technological means, would be an examples of this objective way of knowledge acquisition.

Remarkably, the 20th century took scientific ideals a step back from the mechanical reproduction of nature without human interference, back to more 'subjective' interpretations of mechanically created representations of nature. A good example in this connection is the interpretation of mechanically created images of galaxies (Daston and Galison 2010, pp. 309-361). This interpretation would be necessary to distinguish within the images between what is the object of knowledge and what are merely redundant data.

Summarizing, one might say that objective knowledge reflects the facts as they are independent of our knowledge. This knowledge is preferably produced in a purely mechanical manner, without interference of human judgment. Subjectivity spoils this objective knowledge by adding factors that either stem directly from the knowing subject (biases, preferences), or derive in some other way from factors that are outside the known facts (values). However, as the return in the 20th century to knowledgeable interpretation indicates, the move from subjective to objective knowledge also has drawbacks.

In the theory of legal decision making we can recognize a similar tension. On one hand we have the strive for impartial, mechanical, and therefore objective, application of the law. A computer as judge would from this perspective be ideal. On the other hand we recognize the need for creative, activist, and therefore subjective, interpretation and application of law. This approach seems desirable to adapt the law to new fact situations of changed societal conditions, or to make it more equitable. An experienced and well-balanced human being, with firm roots in society and political awareness would from this perspective be ideal. Much of the literature on legal decision making, including discussions of the appropriate methods of interpretation and forms of legal reasoning, about the defeasibility of legal reasoning, about coherence, and about the roles of legal principles and fundamental rights, can be read as dealing with the balance between the objectivist and the subjectivist approach to law application and interpretation.

It must be emphasized, however, that framing discussions of legal reasoning as dealing with the tension between objective and subjective modes of acquiring knowledge about the law presupposes that there is such a thing as law that is amenable to objective and subjective ways of knowledge acquisition. In other words: objectivity, as well as subjectivity, *about* law presupposes the objectivity *of* law. This is the o-metaphor again. In the following sections I will argue to what extent the law itself, as object of knowledge, is objective and to what extent the o-metaphor is fruitful.

3. Conceptual building blocks

To facilitate a clear and unambiguous discussion of the objectivity of law, I will introduce a conceptual framework. Unavoidable this framework makes ontological and epistemological presuppositions, and equally unavoidable these presuppositions must remain presupposed in an article that does not deal in the first place with ontology and epistemology in general. The same holds for the terminology that I will use. I will try to be explicit about the meanings in which I use words, but I am aware that others use the same words in different meanings, and that this may lead to confusions.

Sentences are the central elements of a natural language. They can be used to perform different kinds of speech acts, such as describing, creating, asking questions, and ordering. Notably, not all sentences are used to describe. In the order 'Open the door' there is some reference to the state of affairs that the door is open. However, in issuing this order, the person who gives it does not state that the door is open, but rather tries to induce the listener to open the door.

Propositions are the meanings of the descriptive aspect of sentences. They are language-neutral. For example, the English sentence 'It is raining' and the French sentence 'Il pleut' express the same proposition. However, propositions are language-dependent in the sense that they could not exist in the absence of any language. Every proposition is expressed by a sentence in some language, although it is possible that different sentences, from the same language of from different languages, express the same proposition. It is also possible that the same sentence of the same language, used in different circumstances, expresses different propositions.[3]

Strawson (1950b) rightly observed that all facts are 'the fact that …', where the dots express a proposition, such as 'it is raining'. Since propositions are language-dependent, languages are

[3] An example would be the sentence 'I am frustrated', uttered by Lillibeth and by Philip at different occasions.

ontologically speaking prior to facts. Facts depend on what is the case, but also on languages that allow us to express what is the case.

Propositions, states of affairs and facts can be defined in terms of each other. A fact is that part of the world that is expressed by a true proposition, while a proposition expresses that some state of affairs obtains in the world. If the proposition is true, this state of affair actually obtains, and then the state of affairs is also a fact.

The world can be defined as the set of all facts (Wittgenstein 1984, 1.1). Since facts are states of affairs and therefore language-dependent, the world is language-dependent too. This does not mean that with a language all the facts are given. All states of affairs are given with a language, but the world makes a selection of the states of affairs that actually obtain. For instance, given the English language, it is a state of affairs that all horses have wings. However, given the world this state of affairs does not obtain, and it is not a fact that all horses have wings.

Terms are also important elements of a language. Unlike propositions, terms are not true or false, but they stand for (denote) 'things' in the world. Logicians call these 'things' which are denoted by terms, 'individuals'. Examples of individuals are President Trump, Mount Kilimanjaro, the house in which I live, the piece of music to which I am listening, the smallest prime number, or the rule that car-drivers must carry a driver's license. An individual exists if there is a term in a true proposition that denotes it. The most obvious example is that Jaap exists if the proposition that Jaap exists is true. Since propositions are language-dependent, individuals are also language-dependent, in a way similar to how facts are language-dependent.

4. Rules[4]

Many facts are the result of rule-application, and if this is the case, this is crucial for their objectivity. Therefore it is important to have some understanding of the operation of rules. All rules are constitutive in the sense that they attach new facts to already existing facts. Dynamic rules attach new facts, or modify or take away existing facts, as the consequence of an event, such as John's promise to Richard to give him €100. Fact-to-fact rules attach a fact to the presence of some other fact. An example is the rule which attaches the fact that P is competent to alienate O to the fact that P owns O in a timeless manner. For example, if Smith owns Blackacre, she is competent to transfer her property right in this real estate to Jones. Counts as-rules have the following structure: Individuals of type 1 count as individuals of type 2. These 'individuals' may be human beings, as in the rule that the parents of a minor count as the minor's legal representatives. Often, however, the 'individuals' are events. For instance, under suitable circumstances, causing a car accident counts as committing a tort, or offering money to another person counts as attempting to bribe an official. All three kinds of constitutive rules, dynamic, fact-to-fact, and counts-as rules, affect the facts in the world. A dynamic rules generates new facts, modifies existing ones, or takes antecedingly existing facts away as the result of some event. Fact-to-fact rules make that facts of particular kinds go together with other facts in a timeless fashion. Counts as-rules, finally, make that some kinds of 'things', often events, are also 'things' of another kind.

Only rules that exist can attach new facts to existing facts. Rules can exist as brute social facts, or as rule-based facts. These two kinds of existence of facts in social reality are discussed in sections 7.

[4] This section was adapted from my article 'Separating Rules from Normativity' (Hage 2015).

Rules have a propositional content and they can in some sense 'correspond' to facts. For example, the rule that criminals are liable to be punished 'corresponds' to the fact that criminals are liable to be punished, just as the descriptive sentence 'Criminals are liable to be punished' corresponds to this fact. However, in this correspondence lies also a major difference with descriptive sentences. Descriptive sentences are 'successful' in the sense of 'true', if they match the facts. They have the 'word-to-world direction of fit (Searle, 1979). Constitutive rules are successful in the sense of 'valid', if the facts match the rule. With this match I do not mean that the rule is obeyed, but that the content of the rule is reflected in the world. For example, the rule that thieves are punishable is reflected in the world if (because of this rule) thieves are punishable. Valid constitutive rules - which I take to be the same as existing constitutive rules - impose themselves on the world. They have the world-to-word direction of fit, because they constrain the world in the sense that not all combinations of facts are possible. As a consequence, these rules create facts, and in this sense they are constitutive.

5. Objectivity of facts and individuals

Natural language does not distinguish between facts that are objective and those which include a subjective element. They are all represented by descriptive sentences which do not distinguish between more or less objective.[5] However, some facts seem to be objective in the sense that they are independent from anyone's beliefs, and not colored by any subjective 'additions'. These objective facts would include the facts that Mount Everest is a mountain and that it is higher than the *Zugspitze*, that there are lions and other kinds of animals, and that Siberia[6] borders on Mongolia.

Objective facts go hand in hand with objective entities. If it is an objective fact that the chair has a particular shape, then it must also be an objective fact that the chair exists. More in general, all objective facts that are facts regarding some entity such as a chair, a mountain, or a sea, presuppose that the entities they refer to exist objectively themselves. Objectivity is not only a characteristic of facts, but also of 'things'.

If objective facts are mind-independent, they are the same for everybody. Something is an objective fact or not, but it cannot be an objective fact for you but not for me.[7] This line of argument may be turned around: when we find that 'everybody' agrees about the presence of some fact, this fact is apparently the same for everybody, which may in turn be interpreted as evidence that the fact is objective. However, even then it is not certain that the fact is objective. When everybody looks at something through the same colored glass without knowing it, the spectators may very well agree on the color of what they are seeing. This would hardly be evidence of the objectivity of their perception.

If only for this reason, objective facts should not be defined as facts about which everybody - with a sane mind, under ideal epistemic circumstances, etc. - would agree. It may seem that the condition 'ideal epistemic circumstances' excludes the colored glass-example, and that with this condition

[5] However, there are indicators to signal that the speaker *considers* something as more or less objective. For example, by saying 'I find this picture more attractive than that one' the speaker signals that he considers his judgment to be subjective.

[6] Siberia as stretch of land, not the legal entity, because the latter is rule-based.

[7] Obviously, one person may believe a fact to be objective, and therefore the same for everybody, while somebody else believes it to be subjective, and therefore potentially different for different persons.

added, it is possible to define objective facts as those about which everybody - with a sane mind, under ideal epistemic circumstances, etc. - would agree. However, it is not possible to define 'ideal epistemic circumstances' in an independent way. If everybody always uses the same colored glass, nobody would ever notice the distortion caused by the glass and nobody would consider the objects of his perception as subjective. The same holds, more realistically, if everybody has the same cognitive apparatus which molds our sensory input into a worlds that contains objects, their characteristics, and causal relations.[8]

Apart from this epistemological point that it is hard to establish whether a fact is objective, there is a conceptual issue which raises doubt on whether objective facts can even exist. This conceptual issue results from the assumption that all facts are states of affairs and that states of affairs are language-dependent. Since languages are mind-dependent, states of affairs and facts are mind-dependent too. That would also hold for facts which are in all other respects objective. Therefore, the argument continues, there are no objective facts.

If objectivity is taken to mean complete mind-independency, there cannot be objective facts. However, that would mean that we lose the distinction between seemingly objective facts such as the fact that Mount Everest is a mountain and those facts which do not seem objective, such as the fact that ice-cream tastes better than cauliflower. Facing this dilemma, one can take two directions. One is to adhere to the strict definition of objectivity and take into the bargain that there are no objective facts or individuals. The other is to broaden the notion of objectivity and allow as objective those facts and individuals which are only mind-dependent because of their dependence on a language by means of which they are expressed, respectively denoted. For the present article I will adopt the second approach: the language-dependent nature of facts and individuals does not stand in the way of their objectivity.

6. The intersubjectivity of brute social facts

Some facts are purely subjective, in the sense that they depend on personal tastes and preferences only. Examples would be that chocolate tastes better than cauliflower, and that paintings by Miro are more beautiful than paintings by Mondriaan. For this reason, some prefer not to call these purely subjective 'facts' facts at all. Whether purely subjective 'facts' are facts at all is a semantic issue, and not very relevant for our present purposes.

Some other facts depend for their existence on what people think the facts are. I will call these facts 'social facts'. When we are satisfied with a very coarse categorization, social facts may be described as facts which exist because the members of some group collectively recognize or accept them as existing. Not all kinds of facts lend themselves to existence through collective recognition. Physical facts do not, because collective recognition as such does not influence physical reality.[9] However, many kinds of non-physical facts exist through being recognized. Law abounds with examples of non-physical facts, such as people having obligations, or the possession of a particular legal status such as that of the King of the Belgians. Also outside law there are non-physical facts, many of which exist

[8] This idea stems from Kant, but has found empirical support in the findings of modern cognitive science.

[9] This does not exclude that there is a social aspect to physical facts, that is reflected in the concepts that are used to categorize them. However there is more to physical facts than the concepts by means of which they are carved out, because otherwise they would not have counted as *physical* facts.

through collective recognition. These include that somebody is the leader of an informal group, that somebody is blameworthy, or that somebody is a hero.

There are two variants on collective recognition. In the case of what I will call 'brute social facts' the facts themselves are recognized by the members of a social group, while in the case of 'rule-based facts' the facts are the result of a rule. In the case of rule-based facts, the existence of the rule is *in last instance* based on collective recognition. These rule-based facts are perhaps better known as 'institutional facts' (Anscombe 1976; MacCormick 1986).

Important aspects of collective recognition are that sufficiently numerous and/or sufficiently important members of a social group believe the fact to be present, believe that sufficiently numerous and/or sufficiently important other members also believe the fact to be present, and believe that these mutual beliefs constitute the believed fact. Social facts depend on recognition, and this recognition will always exist within a group of people. The group ranges from two persons as one extreme, to everybody as the other extreme. This means that all brute social facts are facts within a group, and relative to a group.

A complicating factor is that recognition may be delegated to 'experts'. In legal theory, the classical example of this delegation of recognition is Hart's view that the ultimate rule of recognition of a legal system must be recognized by the 'officials' of the system (Hart 2012, pp. 113-117). Because recognition of brute social facts may be delegated to experts, it is not even necessary that a majority of a social group recognizes the existence of a particular social fact.

Brute social facts are mind-dependent in the strong sense that their existence depends on being recognized by the members of a social group. They are therefore not objective. However, they do not depend on the recognition of individuals persons either. Whether precedents count as law depends on their recognition as such by courts and other legal decision makers, but for every individual court in the common law tradition it is a given fact that precedents count as law. For this reason, brute social facts have an intermediate status as far as their objectivity is concerned: they are neither fully subjective nor fully objective. We can use the word 'intersubjective' to denote this intermediate status.

7. Rule-based facts

If the members of a social group normally recognize the duties imposed by the leader of the group, whoever that may be, it may be said that the group has the rule that the group leader has the competence to impose duties. This rule exists by being recognized and therefore as a matter of brute social fact. Such a rule is a social rule.

It is tempting, but wrong, to follow Hart (2012, p. 57) in assuming that the existence of a social rule involves the existence of a critical reflective attitude with regard to behavior covered by the rule. This characterization of social rules is quite adequate for rules that prescribe behavior, but less so for other kinds of rules such as power-conferring rules. A broader, and therefore more adequate, characterization of a social rule is that *a social rule exists within a group if sufficiently numerous (sufficiently important) members of the group recognize the consequences of the rule when the rule is applicable*. For a mandatory rule this means that sufficiently numerous group members assume the presence of a duty or obligation if the rule attaches this duty or obligation to a factual situation. If the duty or obligation applies to a specific group member, this recognition typically involves that the group member is motivated to comply with the rule. For a power-conferring rule this means that

sufficiently numerous group members recognize the power of a person to whom the rule gave the power. This recognition typically consists in the recognition of the effects of the exercise of the power.

Because not all rules are mandatory rules, a definition of the efficacy of a rule in terms of traditional compliance (doing what the rule prescribes) is not adequate. We should look for a definition that also captures the efficacy of non-mandatory rules, such as power-conferring rules, and counts-as rules. Such a definition might be that a rule is efficacious in a particular group if the consequences which the rule attaches to fact situations are recognized by sufficiently numerous and/or sufficiently important members of that group. The reader will immediately notice that this definition of the efficacy of a rule is identical to the definition of when a rule exists as a matter of a brute social fact. This identity is intentional: the efficacy of rules as defined here coincides with the existence of these rules as a matter of a brute social fact.

From the definition of what a social rule is and when a social rule exists, the facts that are generated by social rules will be broadly recognized within the group in which the rule exists. However, the existence of a social rule has more implications than the mere recognition of the facts generated by the rule. If Jack is a member of the group in which the rule exists that men should wear a hat, Jack is also required to wear a hat if he personally does not recognize the requirement. Although Jack will not be motivated to wear a hat, other group members still expect him to do so, and non-compliance may evoke admonishments, reproaches, and perhaps even informal sanctions.

This examples illustrate that social rules, like other rules, work 'automatically' in the sense that they attach their consequences to facts even where these consequences are not always recognized by everybody. Obligations and competences may also exist if not everybody affected by them also acts upon them. However, in the case of social rules there needs to be broad recognition, because if that would be lacking, the rule would not exist (anymore). If only Jack does not recognize the requirement to wear a hat, this does not affect his duty or the existence of the rule. However, if hardly any man would recognize the duty, neither the duty nor the rule underlying it would exist.

This is different for rule-based rules. Sometimes the new fact that a rule attaches to a fact situation is that another rule exists. Suppose that Henriette is the leader of ta social group and that, as such, she has certain competences, based on social rules which attach these competences to being the group leader. Let us assume that one of these competences is to make rules on who is to pay taxes. One day Henriette announces that group members who received an inheritance must pay taxes. Starting from the moment that Henriette announces the rule, the rule exists. Moreover, the rule creates duties for the group members who received an inheritance.

It is worthwhile to take a closer look at the duties based on the rules that Henriette makes, the recognition of these duties, and the existence of the rules. Since the rule-making competence of Henriette is based on a social rule, this competence does not need to be recognized by all group members. Let us assume that Violet received an inheritance, and is for this reason a duty holder. However, she neither recognizes the competence of Henriette to make rules or to make this rule in particular, nor her duty to pay taxes. As the rule is a social rule, Henriette still has the competence to make rules for the group, even if Violet does not recognize them. The rule about luggage-carrying that Henriette makes still exists within the group, and still creates consequences. Violet has therefore the duty to pay taxes, even if she is not at all motivated to do so and does not feel obligated either.

Assume now that Violet is not the only one who has problems with the inheritance rule, and that most group members think that Henriette should not have made this particular rule. In other words,

the rule that Henriette made is not broadly recognized. However, this rule is not a social rule, and it does not depend for its existence on recognition. Therefore the inheritance rule still exists, and the designated group members still have the duty to pay taxes.

Things would be different if the group members stop recognizing the rules that Henriette makes in general. That would mean that they no longer recognize the rule that gives the group leader the competence to create rules.[10] In this case the rule about inheritance taxes no longer exists as a rule-based rule. As can be seen from the example, the fact that some rule exists is an immaterial fact like many others, not principally different from – for example – the fact that a particular car is a vehicle. Like other immaterial facts, the existence of a rule can obtain as a brute social fact, or as a rule-based fact. In the former case, the existence of the rule is broadly accepted in a social group, where the acceptance of the rule consists in the acceptance of the rule's consequences if the rule is applicable. In the latter case, the existence of the rule is attached by some other rule to – typically – a legislative event.

8. Legal constructivism

The account of rule-based facts that was offered in the previous section not only assumes that some facts are the result of rule application, but also that rules are self-applying in the sense that they lead to new facts even if no human being is actively involved in the creation of these new facts. Lawyers often seem to make this assumption, as the following story illustrates.

On a winter's day, the rich but somewhat eccentric spinster Eloïse Lasoeur died in her cabin on the moor at the blessed age of 87 years. Eloïse was very fond of her niece Denise Lasoeur and in her last will she bequeathed all her worldly goods to her niece. Denise, however, was not even aware of the existence of Eloïse. Moreover, no family member of Eloïse even knew whether Eloïse was still alive and where she might live. The inhabitants of the little village where Eloïse did her occasional shopping had not seen Eloïse for quite a while, but that was not unusual. Under these circumstances it was not surprising that Eloïse's death was only discovered several months after it occurred.

It seems obvious that, during the period after Eloïse died and before her death was discovered, the estate belonged to Eloïse's niece Denise. This is the case, even though neither Denise, nor anybody else in the world, was aware of Eloïse's death and subsequent transition of Eloïse's estate. The rules of inheritance operate even if nobody is aware of their operation, and through these rules Denise became the owner of Eloïse's belongings at the moment that Eloïse died.

That Denise had become the owner at the moment that Eloïse passed away is also the outcome of a good legal argument. This argument has as its premises the rules of inheritance law and the fact that Eloïse died while having bequeathed everything to Denise. For the purpose of the present discussion it is crucial that this argument apparently reconstructs what happened independently, through the application of inheritance law. Denise became owner of Eloïse's belongings as a result of the facts of the case and the valid legal rules, and the argument is merely a means to obtain knowledge of what was independently the case.

In 2010 the Dutch politician Geert Wilders was prosecuted for hate speech against Muslims. The fundamental question at stake was whether some members of society, and in particular politicians, should be allowed to express their opinion about other members of this society or their religion,

[10] An alternative interpretation would be that they do not recognize Henriëtte as their leader anymore.

even if they do so in a manner that may be considered as insulting and may very well evoke hatred. This question has no easy answer and the case might well be considered to be a hard one, without obvious solution.[11] In this case it is less likely that the legal outcome was already there, only to be discovered by means of an argument that reconstructs the operation of legal rules. It seems that the outcome may go anywhere and depends strongly on the arguments that are actually adduced in the legal debate. It looks as if the legal consequences of the case are *constructed* by means of the arguments, and not merely reconstructed. The legal consequences of the case would then be what the best legal argument says they are.

Amongst others through the influence of Dworkin, who proposed a theory of law according to which legal judgments are the result of constructive interpretation, constructivist theories of the law have become quite popular. In Dworkin's constructivist theory of law, two aspects of constructivism can be distinguished. First, Dworkin offers an account of how to arrive at legal judgments. This is through constructing a theory of law which must on the one hand fit with existing legal materials such as case law and legislation and which must on the other hand be substantively right (Dworkin 1986b, chapter 7). Second, Dworkin considers the judgments thus arrived at as law, *for the reason that they are part of such a constructed theory*. Legal reasoning is in the view of Dworkin not a way to arrive at legal judgments which were true for some other reason such as correspondence with some kind of legal reality. It is precisely the other way round: legal judgments are true because they are the outcome of a correct construction. Dworkin (1986b, 225) states it as follows: 'According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.'

9. A complication

If this constructivist theory of law is correct, if only for hard cases, this has profound implications for the ontological objectivity of legal facts. Intersubjective facts depend on minds, and that is why they are not objective. Yet, for each individual person they are as 'real' as objective facts, and that is why they are not purely subjective. However, if legal facts are the result of construction, there is still a complication which sets off intersubjective facts from facts that are really objective.

In the process of constructing legal facts, the existence of social facts can always be disputed by adducing reasons why they *should* not exist. For example, if most people believe that a skate board is a toy, and therefore not a vehicle, it is a brute social fact that skate boards are not vehicles. However, it is still possible to argue that the fact that skate boards are toys is not decisive, that – for some reason – skate boards should also be regarded as vehicles, and that 'everybody' who believes differently is wrong. Such an argument is not only an argument why the existing social practice should be changed, although it is that too. The argument should be interpreted as being also an argument why this particular skate board already is a vehicle, even though most people do not 'see' it.[12] It depends on the successfulness of such an argument whether this concrete skate board will be

[11] The court of first instance discharged Geert Wilders (*Rechtbank* Amsterdam 13-1-2011)

[12] Although this is not an issue that I want to pursue here, I want to point out that disputation of the existence of social facts on the ground that they should not exist illustrates the dependence of what is on what should be. I discussed this phenomenon in Hage 1997, pp. 126-128 under the heading 'deontic collapse', and also in Hage forthcoming.

treated as a vehicle. In this connection it is crucially important that the rebuttal 'Everybody agrees that skate boards are not vehicles' is not a decisive argument in the discussion, even though it is an important argument.

This constructivism with regard to social facts has profound implications for the subjectivity of the judgment that this particular skate board is also a vehicle. The successfulness of an argument depends on the effectiveness of the argument in convincing an audience, which is *in the end* a purely subjective matter.[13] Because the judgment that a skateboard is not a vehicle is intersubjective, the outcome of a dispute on the question whether I skateboard is a vehicle will usually be conform the general opinion. However, for the fundamental question whether social facts that need to be constructed are objective, intersubjective, or purely subjective it does not matter which outcome of legal arguments is most likely. Somehow, social facts which need to be constructed seem to be more subjective than social facts for which the views of the majority are determinative.

10. Conclusions

The notion of objectivity, as contrasted to subjectivity, became prominent during the 19th century. Objective knowledge was opposed to subjective 'knowledge', and the characteristic that distinguished objective from subjective knowledge was that objective knowledge is an untainted, preferably mechanically produced representation of the facts. The attraction of this kind of objective knowledge rests on the assumption that there are facts which are themselves not tainted in the way subjective knowledge is.

The law - or to be more precise: the positive law – is a part of social reality. The facts in social reality can coarsely be divided into brute social facts and rule-based, or institutional, facts. Brute social facts exist because they are broadly recognized as existing. Rule-based facts are attached by existing rules to other facts. Rules exist in social reality either as a matter of brute social fact, or as rule-based fact. The definition of rule-based facts in terms of rules that may in turn exist as rule-based facts themselves threatens to lead to an infinite regress. This regress is avoided by the assumption, as it was made by Hart (2012, pp. 100-110), that in the end all rule-based facts are based on brute social facts.

Brute social facts are not purely subjective, but neither are they objective. They depend for their existence of recognition, and therefore on minds. However, for each individual person, they are withdrawn from their influence just like objective facts would be. For many a legal discussion, it is this characteristic of being withdrawn from subjective influence that matters for the 'objectivity' of law. In this, limited, sense, positive law may be said to be objective. In a deeper sense, however, positive law is not objective, but merely 'intersubjective'.

Even the limited sense in which positive law appears to be objective is amenable to criticism. This has to do with the phenomenon that legal judgments, certainly in hard cases, are constructivist. These judgements do not reflect independently existing facts, but they create, in a manner of speaking, these facts. Legal judgements are justified because they are the conclusions from good, if not the best possible legal arguments, and they are true because they correspond to the legal facts.

[13] The clause 'in the end' is very important here, because a psychologically convincing argument can be attacked for not satisfying standards of rationality. These standards and the judgements based upon them are intersubjective, and amenable to the same kind of constructivist criticism, and so on … In Hage forthcoming I argue why this possibility for constructivist criticism does not lead to an infinite regress.

However, the facts are not independent from these judgements; they exist because the judgements that truly describe them are justified. Stated in technical jargon: in the case of constructivist judgements, epistemology precedes ontology. Judgements are not justified because they certainly, or most likely, reflect independently existing facts. They are justified because they are the conclusions of good arguments, and if they are justified they are also true because they create the facts that they describe. This is step number one.

The second step leading to the criticism of law's objectivity is that the best possible arguments about what the law is do not only refer to the law as it exists in social reality, but also to what the law should, or should not, be. What the law is, depends – not exclusively, but still to some extent - on what the law should be.

Step number three is to point out that what the law should be is *in the end* a matter of which arguments are convincing. Convincingness is in this connection a psychological, not a logical, issue. Moreover, because it is a psychological issue, it is purely subjective.

If this three-step argument is correct, the law in a concrete case is, *in the end*, not objective, not even intersubjective, but purely subjective. This seems to be a dramatic conclusion. Not only our knowledge of law may be tainted by subjective factors, the very object of this knowledge is subjective. If the law itself is subjective, worrying about the possible subjectivity of knowledge about law seems a futile enterprise. It is even doubtful whether knowledge about law can sensibly be distinguished from its object, the law itself, because if constructivism is true, the law and justified knowledge thereof coincide.

This conclusion is in my opinion true, but not as dramatic as it may seem at first sight. Positive law is a social phenomenon, and social phenomena can only exist if the members of a social group, such as a legal community, tend to agree on what the facts are. Therefore, even if legal judgements and facts are in the end subjective, they can in general easily be predicted. The subjectivity of law goes hand in hand with the predictability of law, at least in most cases. had this been different, positive law could not have existed as a social phenomenon. Law is distinguishable from morality, amongst others because it is to a large extent – legal positivists would even say: completely – positive law. The existence of law as a separate phenomenon next to morality presupposes a central role for positive law. Therefore law must in general be predictable, because otherwise it would not have existed. This means that even if law is in the end subjective, there can still be legal certainty.

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