

LEGAL REASONING AND THE CONSTRUCTION OF LAW

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Abstract

There are two competing views on what makes propositions of law true. The one, legal realism, takes it that propositions of law are true because they reflect an independently existing reality of legal facts. These facts would be generated by legal rules which would operate autonomously, without need for human intervention. The institutional theory of law illustrates this view. On this view it is the function of legal arguments to reconstruct the results of the autonomous rule application.

The other view is legal constructivism, according to which propositions of law are true because they are the conclusion of the best (possible) legal argument. On this view the function of legal argumentation is constitutive: argumentation determines the contents of the law.

This paper argues that legal realism is not very plausible because it is based on metaphysical assumptions which cannot be verified or falsified. Legal constructivism would be more plausible, in particular in the variant where the law is determined by the best actual legal argument. This position is defended by means of a brief exposition of the so-called 'Erlanger-approach' to legal justification.

Keywords

legal reasoning, legal realism, ontological realism, anti-realism, constructivism, institutional theory of law, theories of truth, right answer, pure procedures, perfect procedures, imperfect procedures, Erlanger Schule

1. Introduction

On a winter's day, the rich but somewhat eccentric spinster Harriet Stapleton died at the blessed age of 92 years in her cabin on the moor. In her last will she bequeathed all her wordly goods to her niece Deniece Stapleton, of whom Harriet was very fond. Deniece, however, was not even aware of the existence of Harriet. Moreover, not any family member of Harriet did even know whether Harriet was still alive and where she might live. The inhabitants of the little village where Harriet

did her exceptional shopping had not seen Harriet for quite a while, but that was not unusual. Under these circumstances it was not surprising that the passing away of Harriet was only discovered many weeks after it occurred.

This brief story does not only raise questions about all the lonely people in the world, but also introduces an issue of some relevance for legal theory and the theory of legal reasoning in particular. To whom, one may ask, belonged the possessions of Harriet during the period after she died and before her death was discovered? The answer that seems obvious is that they belonged to Harriet's niece Deniece, even though neither Deniece, nor anybody else in the world was aware of Harriet's death and the transition of ownership of Harriet's possessions. The rules of inheritance operate, even if nobody is aware of it, and through them, Deniece became the owner of Harriet's belongings at the moment that Harriet died.¹

That Deniece has become the owner at the moment that Harriet passed away is also the outcome of a sound legal argument, starting from the rules of inheritance law and the fact that Harriet died while having bequeathed everything to Deniece. For the purpose of the present discussion it is crucial that this argument apparently *reconstructs* what happened independently through the application of inheritance law. Deniece has become owner of Harriet's belongings as a result of the facts of the case and the valid legal rules, and the argument is a means to obtain knowledge of what was independently the case.

Not all cases are like this. In 2010 the Dutch politician Geert Wilders was prosecuted for hate speech against Muslims. The issues at stake were both legal-technical and fundamental. The legal-technical issue was whether hate speech against the Islam counts as hate speech against Muslims. The fundamental issue 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, even if they do so in a manner that may be considered as insulting and may very well evoke hatred. Neither one of these issues has an easy answer and the case might well be considered to be a hard one. Several arguments were adduced, pleading in different directions and the court of first instance discharged Geert Wilders (Rechtbank Amsterdam 13-1-2011).

¹ I assume here that the law of inheritance which governs this case does not require acceptance of the inheritance.

What matters for the present purposes is that 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. In such a hard case, 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 a case would then be what the best (possible²) legal argument says they are.

The two cases illustrate the attractions of two incompatible views of the nature of law and the function of legal reasoning. The one view is that the law consists of rules (including principles and eventually rights) which are self-applying in the sense that they attach legal consequences to concrete cases without the need of human intervention. Let us call this view, for reasons that will become more clear in section 3, *legal realism*.³ According to this form of realism, legal reasoning is not necessary to bring about the legal consequences of concrete cases, but at best to obtain knowledge about the consequences which already existed independently. Legal reasoning is there to *reconstruct* the legal consequences, not to construct them. Moreover, it is possible to evaluate the quality of methods of legal reasoning by finding out whether they lead to the correct outcomes. Methods which tend to lead to wrong outcomes are for that reason inferior to methods which usually lead to correct outcomes.

The other view is that legal rules etc. are tools which are used in legal argumentation to *construct* the legal consequences of cases. These consequences are not already there; they only exist as the result of legal arguments. Legal argumentation is on this view constructive. Let us therefore call this view *legal constructivism*. According to legal constructivism, the quality of legal arguments determines the truth of legal propositions, and not the other way round. For instance, Geert Wilders would be punishable if that is the outcome of the best (possible) legal argument. Legal constructivism must presuppose that there is an independent standard for determining the quality of legal arguments. This standard cannot be found in the truth-conduciveness of the arguments, because the truth of the conclusions of the arguments depends on the quality of the arguments.

² The relevancy of this insertion of 'possible' will become clear in section 6.

³ Legal realism in this sense should be distinguished from American and Scandinavian realism, which are altogether different views.

Amongst others through the influence of Dworkin, who proposed a theory of law according to which legal judgments are the result of constructive interpretation (Dworkin 1986, chapters 2 and 7), constructivist views of the law have become quite popular.⁴ And yet, the precise nature of legal constructivism has, to the present author's knowledge, not been spelled out yet.⁵ It is the purpose of this paper to fill this gap in legal theory and to answer the question what legal constructivism is. The answer to this question is partly given by contrasting legal constructivism with its main competitor, legal realism.

2. What makes legal propositions true?

The distinction between legal realism and legal constructivism has everything to do with the question what makes legal propositions true. Legal propositions are what is expressed by sentences such as 'Deniece is the owner of what used to be the worldly possessions of Harriet' and 'Geert Wilders is not punishable because of his hate speech against the Islam'. Theories about the nature of truth can be subdivided into three main categories: correspondence theories, coherence theories and deflationist theories.⁶ Deflationist theories by and large hold that the notion of truth can be eliminated. An example would be Ramsey's view that the sentence "'P' is true" does not state anything else than 'P'. (Ramsey 1927). Coherence theories of truth by and large hold that a sentence is true if the sentence fits within a coherent set of sentences.

The most traditional theory of truth is the correspondence theory, which holds, by and large, that a sentence is true if it corresponds with reality, or with 'the facts'. There has been a lot of discussion, in particular about the ontological status of facts (Strawson 1950), but for our present purposes this is not relevant. What matters is the basic idea behind the coherence theory that there can be a relation of match, correspondence, between on the one hand declarative sentences, and on the other hand reality.

The correspondence theory is easily interpreted as presupposing that somehow there is a reality 'outside', given independently of language or human knowledge or recognition, and that a true sentence is true

⁴ Cf. for the Netherlands Smith 2009 and Soeteman 2010. Patterson 1996 arrives at conclusions regarding the desirability of constructivism which are similar to mine, but on rather different (post-modernist) grounds.

⁵ An earlier attempt to deal with the nature and viability of legal constructivism is Hage forthcoming. In that paper, the emphasis lies on the viability of legal constructivism, while the focus of the present paper is on the ontological aspects of constructivism.

⁶ Walker 1997 also distinguishes pragmatic and semantic truth theories.

because it accurately describes part of this reality.⁷ Of course, that would be *one* interpretation of the correspondence theory of truth, and even the most viable one, but it is not the only possible one.

According to a different interpretation, it is only necessary that a true sentence corresponds to reality, without making any assumption about what comes ontologically first, the truth of the sentence or reality. On this interpretation the contents of descriptive sentences may aim to reflect the content of an independently existing reality, in which case the underlying ontology is a realist one.⁸ It may also be the other way round: reality is such and so because the sentence that says such and so is true. For instance it is the case that John is obligated to repay the loan from Jane, because the sentence 'John is obligated to repay the loan from Jane' is true. In this case the truth of sentence is determined by something else than by its correspondence to a pre-given reality.⁹ An attractive version of this view is that the sentence is true because it is the conclusion of the best (possible or actual) argument.¹⁰ Such a constructivist view is compatible with a correspondence theory of truth by assuming that reality corresponds to the true sentences.

3. Knowledge, truth, and justification

The contrast between legal realism and legal constructivism is closely related to the distinctions between knowledge, truth and justification. According to a realist account (Devitt 1991), truth is independent of knowledge and of justified beliefs. Whether a sentence is true depends only on whether it corresponds to an independently existing reality. Traditionally knowledge was taken to be justified true belief (Steup 2008).¹¹ A person P knows that s, if and only if 'S' is true and P is

⁷ Cf. Walker 1997, referring to the 'picture theory' of language of Wittgenstein's Tractatus.

⁸ Cf. Devitt 1991, 13-17.

⁹ An example of this opposite direction of fit, world-to-mind to be precise, is to be found in Aquinas' Summa Theologica Ia, q. 21 a.2: 'Truth consists in the equation of mind and thing, as said above. Now the mind, that is the cause of the thing, is related to it as its rule and measure; whereas the converse is the case with the mind that receives its knowledge from things. When therefore things are the measure and rule of the mind, truth consists in the equation of the mind to the thing, as happens in ourselves. For according as a thing is, or is not, our thoughts or our words about it are true or false. But when the mind is the rule or measure of things, truth consists in the equation of the thing to the mind; just as the work of an artist is said to be true, when it is in accordance with his art.'

¹⁰ Cf. Hage forthcoming.

¹¹ I will ignore here the complications raised by the Gettier problem (Gettier 1963).

justified in believing that P (for the right reasons). Whether P is justified in believing that s does not depend on the truth of 'S'. This truth only depends on reality, which in its turn does not depend on P, or anybody else, being justified in believing that s. So we have two independent strands:

1. the truth of 'S', which depends only on reality, while reality does not depend on either the truth of 'S' or on anybody's justification for believing that s;
2. P's being justified in believing that s, which depends on P's other internal states (or something else, depending on one's epistemological views), but *not* on reality (apart from the mentioned internal states), or the truth of 'S'.

These two strands are joined in the traditional definition of knowledge, which requires both truth and justification. For the definition of knowledge it may be attractive to include the demand that the object of knowledge is a true belief. For a test whether somebody actually has knowledge, this demand of truth is irrelevant, however. The only way to test whether a justified belief is also true is to form another justified belief about the same matter. For instance, if we want to know whether Pamela has knowledge when she believes that it is raining outside, we must establish whether Pamela was justified in believing that it is raining, and we must establish whether it is actually raining. The latter will for all practical purposes boil down to forming a justified belief on the issue whether it is raining.¹²

Should we then conclude that truth is irrelevant for whether somebody is justified in believing something? The following example shows that this is not the case. John holds, amongst others, two beliefs. One belief is that Gisella, the girl he met yesterday, is not married. The other belief is that Jan Steen was the best painter ever. Suppose, moreover, that in both beliefs John does not receive much support from other people. Everybody who knows Gisella tells John that she is married with a guy called Stephen. Moreover, everybody with whom John talks about painters disagrees with John that Jan Steen was the best ever, although they also disagree amongst each other who the best painter was. John believes that whether Gisella is married is a matter of independent fact, and that his belief that she is unmarried is therefore true or false, independent of what he himself believes. John also

¹² There is a small complication here, however. The truth of the sentence that it is raining is established by means of *our* belief whether it is raining, while the other issue is whether Pamela is justified in *her* belief. For the present purposes this complication can be ignored.

believes that who was the best painter in the world is a matter of taste and that if there is truth to be had on this issue, this truth will be relativized to the person who holds the belief. So, John believes, Jan Steen may be the best painter in the world for John, but that does not mean that he is also the best painter for everybody else, or – for that matter- objectively the best painter.

John holds meta-beliefs about his first-order beliefs that Gisella is unmarried and that Jan Steen was the best painter ever. These meta-beliefs are relevant for the issue whether John is justified in holding his first-order beliefs. Given that he believes that the marital status of Gisella is a matter of objective fact, and that therefore his belief is objectively true or false, John should attach value to the opinions of other persons who know Gisella. If they all believe that Gisella is married, this should be a reason for John to have at least some doubts about his first-order belief. For the question who was the best painter this is different. Even if everybody disagrees with him, this does not need to bother John. Given his-meta-belief that this issue is merely a matter of taste, the contrary opinions of the others only signal that they have a different taste. So what?

For the issue whether a particular belief is true, the best result that one can get is to be justified in having this belief and in having the meta-belief that the first-order belief is true with regard to an independently existing external world. A legal realist will assume that first-order legal beliefs can be true about an independently existing external legal reality. The precise nature of this will be discussed in the following section. A consequence of this view is that legal questions will have one rights answer. Dworkin's thesis that this is the case (Dworkin 1977) may very well be interpreted as an expression of legal realism in the sense used here.

A legal constructivist on the contrary will not adopt the meta-belief that first-order legal beliefs are about an independently existing external reality. Such beliefs can be true, but that is because the facts fit the beliefs, rather than the other way round.¹³

4. Realist and anti-realist domains

Realism is a belief about what makes true sentences true. It can be adopted wholesale – every true sentence is true because it corresponds to an independently existing reality – but also piecemeal. In the latter

¹³ There is an obvious relation here to the more general topic of directions of fit. More on this issue in Searle 1979 and http://en.wikipedia.org/wiki/Direction_of_fit (last consulted on March 11, 2012).

case it will typically be adopted for some domains of beliefs, and be rejected for other domains. Before entering in detail into the discussion whether the domain of law should be approached realistically or not, it may be useful to have a brief look at some other domains.

Apart from some philosophers, most people take a realist stance towards the domain of medium- and large-sized physical objects, such as tables, chairs, mountains, seas, solar systems, and even galaxies. However, even in the case of these things it is possible to relativize. Arguably, even tables and chairs exist relative to a conceptual system which includes the concepts 'table' and 'chair' (Sosa 1990).

The realist stance becomes already more doubtful in the case of so-called 'theoretical entities', which play a role in scientific theories, but which cannot be perceived as such. Do entities such as electrons and neutrinos exist because they figure in broadly accepted physical theories, or do they also exist independent of all theories?¹⁴

Doubts may also exist concerning immaterial entities such as numbers, causal connections, partnerships, countries, and facts (as an ontological category). Do countries and facts really exist, or are they merely 'projected'?

Evaluative 'facts', such as moral and aesthetic qualities, are the object of lengthy discussions concerning their 'realness' (Mackie 1977, 39; Blackburn 1984, 181-220). Is it a real fact that murder is wrong, or that Bach's Mattheus Passion is a beautiful piece of music?

There are also things about which many people take a definite anti-realist stance, such as the tastefulness of particular kinds of food. It is not 'really' the case that crème brulée tastes better than Brussels sprouts; it is only that somebody likes the former better than the latter.

For some doubtful categories, such as partnerships and countries, it is possible to make the realism/anti-realism issue somewhat clearer. These categories belong to the so-called 'social reality'. Social reality consists of those facts and things which supervene on the beliefs, attitudes and behaviour of the members of a social group. Without these the facts and things would not have existed and in this sense they are not 'real'. However, from the perspective of individual persons, social facts and entities can be very real. The leader of an informal group can only exist if she is recognised as the leader by sufficiently many group members. An individual who is given an order by the leader has little choice, however, in deciding whether to treat this as an order of the leader.

¹⁴ Cf. the editors' introduction to the chapter on 'Empiricism and Scientific Realism', in Curd and Cover 1998, 1049-1051.

Existence through being recognised or accepted is one, the most fundamental, way of existing in social reality. We will call this mode of existing existence as a basic social fact. A particular fact F obtains as a basic social fact within a particular social group G if and only if sufficiently many members of G:

- recognise that F obtains;
- believe that sufficiently many other members of G recognise that F obtains; and
- believe that sufficiently many other members have the same beliefs.¹⁵

A very similar characterisation holds for existence as a basic social 'thing', in a very broad sense which includes persons, roles, and institutions. A particular thing T exists as a basic social thing within a particular social group G if and only if sufficiently many members of G:

- recognise that T exists¹⁶;
- believe that sufficiently many other members of G recognise that T exists; and
- believe that sufficiently many other members have the same beliefs.

Basic social facts and things are not all that exists in social reality. Arguably what 'follows' from facts in social reality belongs to social reality too.¹⁷ These facts are called institutional facts. Institutional facts are facts that exist because they were attached to some event of fact by means of a rule which exists in social reality.

Analogous to institutional facts it is possible to define institutional 'things'. Institutional things are things that exist because they called into existence by some event and a rule which exists in social reality. Examples are contracts, crimes (in the legal sense), provinces, and police officers.

Institutional facts exist if the 'follow' from social reality. It is as yet not specified what this 'follow' means, but it certainly does not include that they have to recognised by (sufficiently many) members of the

¹⁵ This analysis was inspired by analyses in Searle 1995, chapter 1, Searle 2010, chapter 3 and Tuomela 2007, chapter 3.

¹⁶ In case of mandatory rules, recognition as existing involves being normally motivated to act in accordance with the rule. This means that a rule which exists as a basic social thing will by and large be effective.

¹⁷ Notice that this informal definition is recursive. The social reality from which facts can 'follow' may itself 'follow' from other social facts. This recursion has to bottom out, however, on basic social facts, and that is the reason why the latter are called 'basic'.

social group. The very idea of institutional facts is that such recognition is not necessary.

Since by far the most important category of institutional facts are facts in the world of law, the discussion of institutional facts will be continued as a discussion about those facts.

5. The institutional theory of law

The theory of law which offers the best account of this seemingly dual nature of the law – mind-dependent from the perspective of a social group; ‘objective’ from the perspective of individual legal subjects – is the so-called ‘institutional theory of law’, important foundations for which were laid by Hart (1994), and MacCormick and Weinberger (1986). The basic idea is that the law exists as a matter of social fact, and more in particular as a matter of institutional fact.

Hart’s view about the nature of a legal system as a union of primary and secondary rules neatly illustrates this. According to this view the law consists of primary rules which regulate behaviour and secondary rules which, amongst others, define which rules count as legal rules. These counts as-rules¹⁸ are paired with power-conferring rules which make it possible to bring about intentional changes in the world of law by means of juridical acts, for instance by undertaking obligations by means of contracts, by transferring property rights, by granting licenses, and by making new rules or derogating old ones. According to Hart, all legal rules would exist as a result of applying a counts as-rule, which declares particular potential rules to be actual legal rules. Only at the apex of a pyramid-like system of rules there would be a rule that exists as a basic social entity, the so-called ‘ultimate rule of recognition’.

DYNAMIC AND STATIC RULES

The precise nature of the relation between institutional things and facts, and the events, things and facts on which they are based can be seen best by distinguishing between three kinds of rules which take care of the relation. There are dynamic rules, which bring about changes in social reality, and two kinds of static rules, which attach the presence of facts and things to other facts and things.

A simplified example of a dynamic rule would be the rule that somebody who commits a crime is punishable. This rule makes that a particular state of affairs (P is punishable) obtains, after some event

¹⁸ Counts as-rules is the terminology which is nowadays fashionable under the influence of Searle 1969, 36 and 1995, 28. Hart (1994, 94) used the term ‘rules of recognition’.

took place (P committed a crime). It is also dynamic rules which make juridical acts possible by attaching the intended legal consequences to particular kinds of acts by competent persons.

One kind of static rule attaches a fact to the presence of some other fact. I will call them *fact-to-fact rules*. Examples are the rule which attaches to the fact that P owns O the fact that P is competent to alienate O, and the rule that attaches to the fact that somebody is the mayor of a city that this person is competent to issue emergency regulations if there is an emergency.

The second kind of static rule consists of the earlier-mentioned *counts-as rules*. They have the following structure: Things of type 1 count as things of type 2. Often, the 'things' that count as another kind of thing are events. For instance, under particular circumstances, causing a car accident counts as committing a tort, or offering money to another person counts as attempting to bribe an official.

It is these dynamic, fact-to-fact and counts as-rules which make that institutional facts 'follow' from other facts.

If this institutional theory of the law is to be a form of legal realism, it is crucial that the rules which attach facts and things to events, things and facts do so automatically. The legal consequences which these rules attach to events and facts must obtain independent of whether anybody recognizes them or derived them from the occurrence of the operative facts and events and the rules which attached the legal consequences. For example, Deniece Stapleton should have become the owner of her aunt Harriet's possessions at the moment the latter died, without anybody knowing it. The 'world of law' which is brought about through the operation of legal rules, functions autonomously, without the need of any human intervention. The role of human beings is in this connection confined to two things:

1. to bring about events to which the legal rules attach legal consequences;
2. to recognize one or more rules, which can form the foundation of the system of institutional rules which make up the law.

In particular it is not the role of human beings to bring about that the legal consequences are attached to the events and facts to which the law attaches them. The legal arguments which human beings produce at best mirror the independent operation of the legal rules.

PERFECT, IMPERFECT AND PURE PROCEDURES

The question that must be answered now is whether this picture of self-applying rules is plausible. In my opinion it is not and to argue why I will draw a parallel with Rawls' distinction between pure, perfect and

imperfect procedures (Rawls 1972, 86). In all three cases there is a procedure which leads to a particular outcome. The question is how the correctness of the outcome relates to the nature of the procedure. In the case of perfect and imperfect procedures, the correctness of the possible outcome is given independently.

A perfect procedure is such that it is guaranteed to lead to this correct outcome. An example of such a perfect procedure is to divide a cake in equal pieces by using a well-functioning balance on which pieces of an equal weight are measured out. Whether the pieces are equal does not depend on weighing them, but weighing with a perfect balance, if properly conducted, is guaranteed to lead to equal pieces.

This guarantee of a correct outcome is lacking in the case of imperfect procedures. A criminal trial, set up to determine whether a suspect is guilty, is an example of such an imperfect procedure. Whether the suspect is guilty is a fact that does not depend on the procedure. The criminal procedure is defined – we may hope – in such a way that the chance of a correct outcome is optimized, but there is no guarantee that the verdict of the judge or jury will be true to the facts.

In case of a pure procedure, the correctness of the result depends on the proper execution of the procedure; it is not defined independent of the procedure. A good example is a lottery. Which ticket wins the prize is determined by the drawing. There is no independent standard for the rightness of the outcome (e.g. the poorest ticket holder should win the prize). As long as the drawing of the winning ticket was performed in accordance with the rules of the lottery, any outcome is correct, and it is correct *because* it is the outcome of the correctly performed drawing.

Clear as these distinctions may seem at first sight, there is still a complication to be overcome. In the case of perfect and imperfect procedures, we assume that there is a correct outcome which is defined independently of the procedures, and which the procedures aim to arrive at. The complication is that we need the procedures to arrive at the correct outcome. This is especially clear in the example about the criminal trial. Perhaps the best way to obtain the truth about whether the suspect committed the crime is to have the trial. In theory, the correct answer to the question whether the suspect is guilty is defined independently of the criminal trial, but there is no way to get to the right answer otherwise than by means of some procedure. This example shows that the difference between pure procedures on the one hand, and perfect and imperfect procedures on the other hand is not whether we need a procedure to arrive at the correct outcome. We need a procedure anyway. The difference is whether the correctness of the

outcome is defined in terms of the procedure. In the case of pure procedures it is, and otherwise it is not.

What does all of this matter if we need a procedure to arrive at the correct outcome anyway? The difference between pure procedures on the one hand, and perfect and imperfect procedures on the other hand is that in the former case there is no other possibility to arrive at the correct outcome than following the procedure, while in the latter case the possibility exists, at least in theory, that the correct outcome is arrived at in a different way. The perfect balance may be replaced by a procedure according to which one person must cut the cake and may choose his part as the last one. The criminal trial may be replaced by a suspect or another person who confesses spontaneously. The alternative procedures may be perfect or imperfect, but at least they aim to arrive at the same correct outcome as the original perfect or imperfect procedure. Such a replacement is impossible with pure procedures, because every alternative procedure either defines a new correct outcome if it is a procedure of the proper kind, such as a legitimate redraw in a lottery, or it is irrelevant because it can by definition not produce the right outcome.

In case of a pure procedure, even a repetition of the correct procedure will normally not lead to the correct outcome, because the first execution of the procedure defines the correct outcome. It would only be different if the procedure is defined in such a way that repeated executions are guaranteed to produce the same outcome. Then a second execution may have a function as a means to discover the correct outcome in case the original outcome was somehow lost. In that case, the second procedure is an example of a perfect procedure, however, and not anymore of a pure procedure.

IS THE INSTITUTIONAL THEORY OF LAW PLAUSIBLE?

If the institutional theory of law is correct, legal rules are self-applying, and create the legal consequences of cases autonomously. Legal argumentation has as its role to reconstruct the results of the rule application. It would therefore be an imperfect or perfect procedure. Is this picture correct? The answer lies, I would suggest, in the possibility to arrive at the correct outcome in a different way than through this argumentation. If legal argumentation is to be a perfect or an imperfect procedure there must be a possibility to arrive at the proper outcome of a case otherwise than through argumentation. This possibility may be merely theoretical, but it should exist at least theoretically.

If it is even in theory impossible to discover the outcome of the autonomous rule application, there are two possibilities. The first

possibility is that the outcome is defined in terms of the argumentation. The distinction between the autonomous application of the rules and the argumentation that reconstructs the outcome of this autonomous application is then merely make belief. The correct argumentation coincides with the operation of the rule, and the procedure consisting of the argumentation is in fact a pure one. This is the constructivist interpretation of legal argumentation, and we will return to it in section 6.

The second possibility is that the rules do really work autonomously, but that it is principally impossible to establish the outcomes, otherwise than through reconstruction of the rule application in legal argumentation. Theoretically this possibility cannot be excluded, but it lacks all practical relevance, because for practical purposes we will have to work with legal argumentation that aims to mimic the allegedly autonomous rule application.

So, if the institutional theory of law is to be plausible, there should be an independent way to establish the outcome of legal cases, apart from the legal argumentation which aims to mimic the application of the relevant rules. Moreover, the independent way should ideally arrive at the same outcome as the original argumentation, because the outcome arrived at is the correct one. If the original argumentation and the independent way to arrive at the outcome of the autonomous rule application lead to different outcomes, this should be because one of the two procedures failed in doing what it aimed to do. In that case, there should be an independent and realistic way to figure out which of the two procedures failed. If such a third procedure is lacking, the idea that the rules autonomously produced legal results is still a farce.

To cut a potentially long and long-winding discussion short: there is no independent way to establish the outcome of autonomous rule application. The best approach is to produce arguments in which the question is answered what the legal consequences of a case are. If these argument lead to the same conclusion, that makes the life of lawyers and legal subjects easier, but it is no evidence that the shared conclusion is the outcome of autonomous rule application. If the arguments do not lead to the same conclusion, there is no way to solve the conflict otherwise than producing still another argument. There are no good grounds for assuming that there is an independent correct outcome for a case, that is brought about through the autonomous application of legal rules. *There are no good grounds for assuming that the institutional theory of law is correct.*

Does this mean that the institutional theory of law can be abandoned completely? Not necessarily, because the implication of this theory that at least a number of cases have one correct outcome may be useful. We have seen that the meta-belief that a first order belief is about an independently existing reality has implications for the justification of these first-order beliefs. The one right answer thesis in law has the same function. It forces legal reasoners to reason as if every case has a single right answer. This may have implications for the kinds of arguments which can be adduced in legal argumentation, but it is beyond the scope of this article to investigate what these implications are.

The assumption that the law unequivocally attaches legal consequences to a case and that legal arguments are there to reconstruct these 'objective' legal consequences has more of a peculiarity of legal theory that stands in need of explication than of a firm characteristic of the law. I will offer one such explanation briefly in the concluding section of this paper. But first we will continue with a more promising view of the nature of law and the role of legal reasoning, namely the view that legal arguments are constitutive for the contents of the law. By means of these arguments, the law is constructed, rather than reconstructed. This view is legal constructivism.

6. Legal constructivism

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 1986, 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 (1986, 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.'

As we have seen above, the institutional theory of law has a number of unattractive implications such as legal consequences about which we can never be certain and legal rules which operate without anybody noticing it. These consequences should make us reluctant to accept the institutional theory of law, even for easy cases. So it may be worthwhile to have a closer look at legal constructivism, and see if and under which circumstances that might work. We will do so in two steps. First we will consider the theory that the law is what the best *possible* legal argument says it is. It will turn out that this version of constructivism implausibly presupposes that the law forms a closed domain. Therefore we will also pay attention to the view that the law is what the best *actual* argument says it is.

PROOF THEORY

If the law is what the best possible legal arguments says it is, two conditions must be met. First we must be able to identify all possible legal arguments, and second we must have a standard to compare these arguments in order to determine what is the best one. To find out whether the law meets these two conditions, it may be useful to have a brief look at a domain which actually does meet these conditions, namely the proof-theoretical approach to logic.

Nowadays, logical systems are typically characterized both semantically and syntactically. On the semantic characterization an argument is valid if and only if it is not possible that the conclusion of the argument is false, while the premises of the arguments are true. A complicated logical apparatus with so-called interpretation functions is used to make this semantic characterization precise, but these details need not bother us here. On the syntactic characterization an argument is valid if its conclusion can be arrived at by means of a proof from the argument's premises. A proof is defined in terms of syntactically defined operations on the well-formed formulas of the logical system. What these well-formed formulas are is also defined syntactically. The precise details need not bother us here either. Ideally, logical systems are both sound and complete. Soundness means that every conclusion that can be proven must be true if the premises of the proof are true. Completeness means that every sentence that must be true given the truth of a set of (other) sentences can be proven from these (other) sentences.

It is possible, though, to ignore the semantic aspect of a logical system and to focus only on the proof theory of the syntactical aspect. Then a logical system is characterised by a set of zero or more formulas

which function as axioms of the system, and a set of one or more inference rules which specify which sentences can be derived from which (other) sentences. The sentences which can be derived from the axioms of the system are called the theorems of the system. Because both the axioms and the inference rules of a logical system are precisely defined, it is uniquely determined what the theorems of the system are. They are defined as the outcomes of valid proofs within the system, and the axioms and the inference rules of the system determine which 'proofs' are valid, and therefore real proofs.

If we replace the notion of a proof by that of a valid argument, we see that in a logical system which is defined purely syntactically, the possible arguments are determined precisely. Moreover, all valid arguments are equally good, and all invalid arguments are equally bad, which means that the system also contains a standard for determining what the best arguments are, namely the valid ones.

THE BEST POSSIBLE ARGUMENT IN LAW

The phrase 'best possible argument' presupposes that it is possible to identify the 'possible arguments'. In the law, this is only a reasonable presupposition if the law is a closed system in the sense that the number of rules, rights and principles etc. that can be used in legal arguments is finite¹⁹, and if the number of facts that characterize a case is finite too.²⁰

However, the assumption that the law is a closed domain is rather controversial. It seems that it can only be defended on some variant of legal positivism according to which the law must exist as a matter of social fact. And even then the additional assumption must be made that there is only one correct interpretation of social reality, because if more interpretations are possible, the arguments concerning these interpretation can draw from an in principle unlimited set of premises, thereby opening the domain of arguments that seemed to be closed by the assumption that the law exists as a matter of social fact. Actually,

¹⁹ It is assumed here that legal arguments are arguments in which legal rules, principles, rights etc. are employed. Some support for this assumption can be found in, for instance, Alexy 1978, 283/4. What is needed for the finiteness of the number of legal arguments is that this test is exclusive, and that there are no other legal arguments. That is not what Alexy had in mind, though.

²⁰ This assumption also covers 'rules' by means of which case facts can be derived from other case facts, such as the 'rule' that if X takes away something that belongs to Y, and if X and Y are not the same person, then X takes away something that does not belong to him or her. In other words: so-called 'world knowledge' is taken to be included in the set of case facts, and is therefore also temporarily assumed to be finite.

there are many reasons why the law is not a closed domain, including that:

- there may be exceptions to rules which cannot be listed on beforehand;
- sometimes legal rules conflict without there being a clear standard for prioritizing the one above the other;
- the law sometimes contains 'gaps', where a gap is to be understood as a kind of case to which the law seems not to connect any legal consequences although it should have a legal consequence;²¹
- the terms used in legal rules have a fuzzy scope of application (actually a special case of a gap, because the law does not answer the question when a term is applicable);
- legal rules are sometimes 'open-ended' in the sense that they implicitly refer to evaluative standards (also a special case of a gap);
- the law contains standards (e.g. legal principles) which cannot be identified by means of their pedigree (Dworkin 1978, chapter 2).

Possibility can only exist in the presence of constraints which draw the borderline between what is possible and what is impossible. If the law is an open domain, in theory any argument might be presented as a legal argument. Therefore one cannot identify which arguments are possible, let alone which of the possible arguments is the best one. As a consequence, *the view that the law on an issue is what the best possible legal argument says it is, is not a viable view.*

THE BEST ACTUAL ARGUMENT IN LAW

Let us assume that the law is an open domain in the sense that the set of valid legal rules, principles etc. is not finite. Then it is not possible to identify the possible legal arguments. The constructivist approach to law can be rescued, however, by abandoning a static, a-temporal perspective on the law, which assumes that the possible legal arguments can be generated 'automatically'. Then it is possible to grant that the law is open in the sense that there is no finite, given set of true legal premises, and still to work with a finite set of arguments. The

²¹ This is only a reason why the law would be 'open' on the assumption that there is law where there is a gap, but that this law cannot be identified easily on the basis of, for instance, pedigree.

crucial step in this connection is not to work with all possible legal arguments, but with all *actual* legal arguments.

The inspiration for taking this step can be found in the ideas of the so-called Erlanger Schule, and in particular the work of Schwemmer and Lorenzen (1973). In this work, justificatory arguments – and this would apply to legal arguments as well as to other justificatory arguments – are not interpreted in a timeless way as structured sets of propositions, but as actual contributions to a discussion. Any such argument must have premises. Instead of assuming that these premises must be traced back to a given set of premises which are above criticism, Schwemmer and Lorenzen proposed the idea that these premises would merely be *assumed* to be true or justified, unless they were disputed. Notice that this assumption only holds for the premises of arguments that were somehow really produced; not to all possible arguments, however possibility might be defined in this connection. Moreover, the disputation of premises must be a real argument step too, and not merely a possible disputation.

Such an approach to arguments presupposes that there are rules that specify which arguments can be adduced, and how and under which circumstances arguments may be disputed. For instance, it may be forbidden to dispute the truth of premises which were also used in earlier arguments by the person disputing them.²² These rules only specify which argument ‘moves’ are *possible*, however. The defining characteristic of the ‘Erlanger approach’ is that the real argument moves have to be made in *actual* argumentation. That the argumentation must be ‘actual’ does not necessarily mean that the arguments must be formulated explicitly and communicated to another person or auditory than the person who made the argument. It is possible that arguments are merely mental, merely were thought of by a person who is wondering which conclusion to draw. The crucial point, however, is that the number and nature of the arguments is determined by events that *actually* took place, and not by a pre-given set of premises and rules that specify which arguments *can* be formulated on the basis of these premises.

The demand that arguments are somehow actually produced makes that for any legal question there will be a finite set of actual arguments that plead for or against a particular answer to that question. As a consequence, the ‘Erlanger approach’ resembles the assumption that the law forms a closed domain as far as the issue is concerned whether it is possible to identify all the arguments. It resembles the assumption that

²² Such rules, which govern legal ‘dialogues’, are discussed in Lodder 1999.

the law is open, however, by allowing the introduction in the argumentative process of any premise. On beforehand, there is no fixed and finite set of possible legal premises, but at any moment in time there is a fixed, limited set of valid arguments that were actually adduced. This set may be empty.

The version of legal constructivism that works with actual, rather than possible, arguments has an additional advantage, namely that it allows the comparison of arguments, even where the premises seem to be incommensurable. Rather than discussing this in abstract, I will give an example that illustrates how the comparison of arguments can be handled.²³ The example is the hate speech case about Geert Wilders, mentioned in the introduction. The issue is whether Geert Wilders should be punishable for his insulting utterances about the Islam. To simplify the issues at stake, I will assume that there are two reasons. One reason, pleading for punishability, is that the utterances insult Muslims through their religion and that they evoked hatred between groups within the Dutch population. The other reason, pleading against punishability is that Geert Wilders expressed his opinion, and that the freedom of expression is a fundamental right which deserves even extra protection in the case of politicians. So we have two arguments, one pleading for, and the other pleading against punishability. How can we decide which is the stronger?²⁴

It has been argued that in such cases there is no common scale on which the two values (on the one hand no conflicts between population groups and on the other hand freedom of expression) can be balanced (Chang 1997, 1). In a dialogical setting, in which parties can adduce arguments against each other's positions, there may be a way out however. It is for instance possible that the party arguing against punishability adduces the argument that freedom of expression is, in this particular case, more important than the avoidance of hate speech. If this argument is not attacked by the other party, it stands and a balance has been struck between the two values. If the other party does not immediately accept this additional premise, a dialogue about this premise may be started and it is not excluded on beforehand that this dialogue will end with a conclusion about the relative weight of the two values in this particular case. If that happens, the dialogue about the

²³ An abstract discussion can be found in in my paper *Dialectical Models in Artificial Intelligence and Law* (Hage 2000 and Hage 2005, chapter 8) and in the literature mentioned there.

²⁴ For the sake of easy exposition, I assume that these two arguments are the only relevant ones.

punishability of Wilders comes to an argued end. If that does not happen, the case remains undecided, and there is no 'best' argument.

The point of having the dialogue is that even where a common scale is originally lacking, the parties in the dialogue *may* come to an agreement about a criterion to determine which value prevails under the given circumstances. In other words, even where a common scale seemed to be lacking, it may come to be recognized. That is the advantage of real dialogues over the automatic generation of arguments on the basis of a fixed set of premises. In the course of a dialogue, the standard for determining what the best actual argument is can be introduced on the fly. If such a standard is already available, or can be introduced, for all the arguments that deal with the issue at stake, it is at least in theory possible to determine what the best actual argument is. If such a standard cannot be found, there is no best argument and there are – on a constructivist approach – no legal consequences.

A procedural approach to justification and to the determination of legal consequences has a major advantage. It is that the limitation to actually adduced arguments avoids the problem of potentially infinitely many arguments that is the consequence of the open nature of the law. There is a corresponding drawback however, and that has to do with the fact that there is no guarantee that all plausible arguments for or against a position will actually be adduced. This seems to be an unavoidable consequence of procedural constructivism. A mitigating circumstance is, however, that plausible arguments which were not produced remain unknown, because as soon as a plausible argument is recognised as such, it has been produced and should be counted as an actual argument.²⁵

7. Concluding observations

The central questions of this paper concerned the nature and the viability of legal constructivism, the view that the legal consequences of case are created, constructed in legal argumentation. The alternative for legal constructivism is legal realism, the view that the law exists in a mind-independent manner and attaches consequences to cases without human intervention.

²⁵ Things become different again if the production of arguments is confined to an official procedure, such as court proceedings. Then it is possible that somebody only comes to think of a plausible argument when the time to adduce it in court has passed. I will leave the question how to deal with complications like this to future research.

The problem with legal realism is that it seems only attractive in easy cases, where everybody with the appropriate knowledge of the law can easily 'see' the legal consequences which the legal rules allegedly attached to the case. In hard cases, legal realism seems far-fetched, even to the extent that a judge of superhuman powers, Hercules, is needed to discover the law (Dworkin 1978, chapter 4). On the assumption that the operation of legal rules is not fundamentally different in hard cases than in easy cases, a unified account of the operation of legal rules is asked for. This account should either adopt constructivism and explain why legal rules *appear* to operate automatically in easy cases, or adopt realism and explain why it only *seems* that they cannot operate automatically in hard cases. The former alternative is the more attractive one, because the latter can neither be verified nor falsified. Moreover, the seeming attractiveness of legal realism can be explained from the reifying view of law which has become the dominant approach in legal theory.

In Roman law, legal reasoning was less aimed at establishing legal positions such as owing an object, or being punishable, but more at the possibility to get things legally done. The question was less whether a particular person is under an obligation to pay an amount of money than whether an action aimed at making this person pay the money would succeed. This action-oriented style of thinking is still more prominent in the common law tradition than in the civil law tradition, but also in the common law tradition there is a tendency towards reification of the law and of legal consequences.

A consequence of this style of thinking is that the question 'Should we allow Deniece to take possession of Harriet Stapleton's worldly goods?', which is future-oriented, is easily transformed into 'Has Deniece become the owner of Harriet Stapleton's possessions?' which is past-oriented. Moreover, where the former question is easily interpreted in terms of decision making, which must be done by individual persons or bodies of persons, the latter question is more naturally interpreted as dealing with a matter of fact which must be the same for everybody. And if it is to be a matter of fact whether Deniece is the owner, this fact must have been brought about and then the rule which made Deniece the owner must have applied 'automatically'.

This reifying style of thinking may be useful to create a body of law which is intersubjective and can function as a social order that creates the same expectancies about future behaviour in most of its participants. It is less useful, and possibly even confusing, when it comes to thinking about the nature of law and the operation of legal

rules. It creates the appearance that rules operate 'automatically' and that legal arguments merely reconstruct legal consequences which were already there. This appearance is deceptive. Even in easy cases, legal rules are used by human reasoners to attach legal consequences to cases.²⁶ It is in actual legal arguments that the law is created, and it is only because of a reifying way to look at the law that the impression is created that the legal consequences were already there.

Mostly because of these problems of legal realism and this explanation of why legal realism may seem attractive despite these problems, legal constructivism appears as the more viable view. We have seen that the version of constructivism which focuses on the best possible legal arguments is unattractive because it cannot be combined with the open nature of law. Legal constructivism can deal with this open nature and can be made plausible by adopting the 'Erlanger approach' to legal justification. A remaining issue is that even this Erlanger approach cannot guarantee that the 'best' arguments for particular legal conclusions are actually produced. It remains a topic for future research how this issue is best dealt with.

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²⁶ This also explains the defeasibility of legal reasoning, a phenomenon that cannot well be accounted for on a reifying view of the law. See Hage 1997, 113f, where the application of a rule is treated as a kind of action to give a good account of defeasible reasoning in the law, and Hage 2005, 69f where the reifying perspective is adopted and the defeasibility of legal reasoning is down-played.

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