

Is Law an Artefact?

*¿Es el derecho un artefacto?*¹

Imer Flores

 <https://orcid.org/0000-0003-2744-3461>

Universidad Nacional Autónoma de México. Mexico
Email: imer@unam.mx

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Abstract: This article examines whether law is an artefact and, if so, what kind of artefact it is. Drawing on the general theory of artefacts—particularly Hilpinen’s canonical account—the author argues that while law is undeniably a human creation with a function and a purpose, it cannot be adequately characterized as a mere (social) artefact. The article revisits the standard conditions for artefacthood (Dependence, Success, Acceptance, and Evaluative conditions) and shows that they must be amended and extended to account for law’s distinctive features. In particular, the author argues that law’s artefac-

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tual nature derives not primarily from productive authorial intention but from collective reproductive intention—that is, from its recognition as institutionally and authoritatively binding. Building on Searle’s theory of institutional facts and the distinction between functions performed through brute physical features and those performed through collective acceptance, the article advances the thesis that law is best understood as the authoritative institutionalization of morality: a complex institution comprising multiple sub-institutions, characterized not only by production and reproduction but by collective recognition, which enables it to impose further institutional status upon other entities. The article concludes that, unlike simpler artefacts, law has an evolving, interpretive nature that requires ongoing evaluation, revaluation, interpretation, and reinterpretation.

Keywords: artefact; authoritative institutionalization; collective recognition; constructive interpretation; law; legal authority.

Resumen: Este artículo examina si el derecho es un artefacto y, de ser así, qué tipo de artefacto es. A partir de la teoría general de los artefactos —en particular, la formulación canónica de Hilpinen— el autor sostiene que, si bien el derecho es indudablemente una creación humana con una función y un propósito, no puede caracterizarse adecuadamente como un mero artefacto (social). El artículo revisita las condiciones estandarizadas de un artefacto (Dependencia, Éxito, Aceptación y Evaluación) y muestra que estas deben ser enmendadas y ampliadas para dar cuenta de los rasgos distintivos del derecho. En particular, el autor argumenta que la naturaleza artefactual del derecho no deriva principalmente de una intención productiva autorial, sino de una intención reproductiva colectiva —esto es, de su reconocimiento como institucional y autoritativamente vinculante. Apoyado en la teoría de los hechos institucionales de Searle y en la distinción entre funciones desempeñadas en virtud de características físicas brutas y funciones desempeñadas mediante la aceptación colectiva, el artículo sostiene la tesis de que el derecho se comprende mejor como la institucionalización autoritativa de la moralidad: una institución compleja que comprende múltiples subinsti-

tuciones, caracterizada no solo por la producción y la reproducción, sino por el reconocimiento colectivo, lo que le permite imponer un estatus institucional adicional sobre otras entidades. El artículo concluye que, a diferencia de los artefactos más simples, el derecho posee una naturaleza evolutiva e interpretativa que exige una evaluación y reevaluación, así como una interpretación y reinterpretación continuas.

Palabras clave: artefacto; institucionalización autoritativa; reconocimiento colectivo; interpretación constructiva; derecho; autoridad jurídica.

You are my creator, but I am your master;—Obey!

Mary Shelley (1818/1831/1969)

Summary: I. *Introduction: The Nature of Law.* II. *The General Theory of Artefacts.* III. *The Problem of the “Artefactual” Nature of Law.* IV. *One Step Beyond: The Institutional and Authoritative Nature of Law.* V. *References.*

I. Introduction: The Nature of Law

Creating—and recreating—humankind by animating a figure made of clay and by bringing the fire from the sun to spark life in human beings and even in human creations are both at the centre of Prometheus’ classical myth and at the core of Frankenstein’s modern parable. Bear in mind that the former created—and recreated—humankind, and the latter created a human-like creature. The metaphor reinforces my central claim, which embodies two interconnected parts: (1) law is a human creation—and recreation—and has a function, purpose or use; and (2) law has a human creator and has a life of its own. In sum, law is a human creation—and recreation—with a function, purpose or use, and has a human creator, but once created—and recreated—it is a living thing and has a life of its own (somehow independent of its human creator). Accord-

ingly, law is an artefact, but behind this truism a much more complex institutional and authoritative nature remains hidden.

I will argue that law due to its artificial nature is obviously an artefact, but it is much more than a mere (social) artefact. It is rather a complex institution and its institutional practice, comprising different sub-institutions, has an institutional and authoritative nature which fits much better with our understanding of law and its practices. Law's life is not just a matter of production and reproduction, but of recognition, by human agency. More specifically, I would like to suggest that law is the authoritative institutionalization of morality, which constitutes the basis of legal authority. In other words, the moral practice of justifying or legitimising authoritative institutional decisions, both good and bad ones, with better and worse arguments, regarding the binding and public use of coercion or its threat in case of non-compliance by legal authorities (Dworkin, 1986, p. 110).²

Although my claim appears to be conceptual and ontological, since it is somehow responding to the questions: What law is? Which is its nature and essence? But it is an interpretive thesis about our practices related to law as the authoritative institutionalization of morality. By this I mean that law is not a mere artefact, but a complex institution and institutional practice, comprising different sub-institutions, characterised not only for their production and reproduction, but also for their recognition as such, which enables it to impose further institutional status in other entities. In my opinion, this understanding better accounts for law's distinctive features than treating it merely as an artefact.

Let me advance that John Finnis (2017) opened the entry on "The nature of law" for the *Cambridge Companion to Philosophy of Law* by acknowledging:

² Dworkin (1977/1978, p. 9): "[O]nce the law is passed everyone has a moral obligation to obey it".

Recent work in philosophy of law includes many discussions of law's "nature or essence", understood as those properties of law that are necessary, or at least important and typical or characteristic of "law as such, wherever it may be found" [...] Some hold that law has no nature; only natural objects have a nature, and law is artefactual, not natural. Other reply that there are *kinds* of artefacts: paper clips differ in nature from printer drivers. [...] Attention is shifting promisingly to paradigms of artefact more relevant to law than paper clips.³

In short, following Aristotle's *tertium non datur* (1941a: IV, 6, 1011b, p. 23-29) and Finnis' (2017) previous quotation: (1) law is not a natural object, but has a "nature" or "essence";⁴ (2) law's nature or essence is not and cannot be (merely) "natural", and so it is and must be "artificial"; and (3) law's "artificial" nature, suggests that law is a human artefact, i.e., "artefactual".⁵ However, if law is an artefactual kind, of what sub-kind it is? Clearly "paper clips" are different from "printer drivers", and most notably from "borders" or "boundary markers", "money" and "law". Hence, I intend to re-consider the complex nature of law.

For that purpose, I aim: in section II, to re-evaluate the general theory of artefacts; in section III, to re-examine the problem(s) of the "artefactual" nature of law; in section IV, to take the argument one step beyond and consider the "institutional" and "authoritative" nature of law; and, in section V, to reassess as a way of conclusion my claims *re* law as a human creation and as a matter

³ Finnis (2017) quotes Gardner (2012, pp. 270, 279, 301) and refers to Raz (1983, 1996, 2003), Leiter (2011), Schauer (2012), Flores (2013), Marmor (2013), Murphy (2013, 2015), and Burazin (2016).

⁴ According to the *Webster's Encyclopedic Unabridged Dictionary of the English Language* "nature" is a noun—with several meanings but among them: "the particular combination of qualities belonging to a person, animal, thing or class by birth, origin or constitution; native or inherent character"; and, "essence" is also a noun: "the basic, real, and invariable nature of a thing or its significant individual feature or features"; and, more specifically in philosophy: "the inward nature, true substance, or constitution of anything, as opposed to what is accidental, phenomenal, illusory, etcetera".

⁵ Hart (1982, p. 26): "Law is something men add to the world, not find within it"; and Unger (1987, p. 1): "[A] society is made and imagined, it is a human artefact rather than the expression of an underlying natural order".

not of production but of reproduction, and as such not merely as an artefactual kind but as an institutional and authoritative one, due to its recognition as law and as having—or at least claiming to have—legal authority to create and even recreate new institutions and institutional status.

II. The General Theory of Artefacts

According to dictionaries—such as the *Webster's Encyclopedic Unabridged Dictionary of the English Language*—"artefact" (or "artifact" in US English) is a noun: "any object made by human beings, especially with a view to subsequent use", and more specifically "a handmade or mass-produced object", which derives from the Latin words *arte*, ablative of *ars* (art), and *factum*, the past participle of the verb *facere* (to make), i.e., literally means "made with art";⁶ and "artefactual" (or "artifactual" in US English) is its adjective and qualifies "something made with skill by human beings". Analogously, "artificial", also an adjective, refers to "something made by human skill or produced by humans, as opposed to natural", and so it is used to distinguish "artificial" objects from "natural" ones.

Actually, the dichotomy natural-artificial can be traced all the way back to Aristotle, who affirmed: "Of things that exist... some exist by nature", i.e. "animals... plants and the simple bodies (earth, fire, air, water)", and "some exist from other causes", i.e. "a bed and a coat". He added that the latter are "artificial products" and "products of art" (Aristotle, 1941b, II, 1, 192b, pp. 8-32). Although both terms, i.e. "artefactual" and "artificial", are closely related in its reference to objects made or produced by human beings, they are not coextensive: All artefacts are artificial objects, but not all artificial objects are artefacts.

⁶ According to the Real Academia Española (n.d.), the word "*artefacto*" (in Spanish) not only derives from the same etymology but also is an "object, especially a machine or an apparatus, built or constructed with certain technique for a determined end".

In short, some objects can owe their existence to either natural or artificial causes, but others can only owe it to artificial ones. A *flower* or a *lake* can be either a natural object, i.e., a (natural) flower or a (natural) lake, or an artificial one, i.e., an artificial flower or an artificial lake. On the contrary, a *chair* or a *hammer* can only be an artificial object, since it cannot be a natural one, and so it is clearly an artefact. In the former, the artificial object is a recreation of the natural one, which serves as its archetype; whereas, in the latter, the artificial object, i.e., the first artefact of a class, is a new creation since it does not exist beforehand in a natural form and becomes a prototype for the subsequent (re)creation of future members of the class.

Within the artificial kind, there are sub-kinds. Certainly artefacts, which are *per definitio* artificial objects created *ex profeso* for a purpose or use, due to its design-intention, are among them. Moreover, some natural objects can serve a purpose or use, which is an artificial one, and so in those cases it can also be considered as an artefact, due to its use-intention. For instance, a *river*, which is a natural object, i.e., a large natural stream of water, can also serve an additional purpose or use, which is clearly an artificial one, as a *border* or *boundary marker*, to divide say Mexico and the United States of America, as in the case of the Rio Grande aka Río Bravo del Norte.

In what follows, I will review the general theory of artefacts, by focusing on Risto Hilpinen's account (2011). He provides what appears to be the canonical definition: "An artifact may be defined as an object that has been intentionally made or produced for a certain purpose". Although he acknowledges: "in the anthropological and archaeological literature the word artifact is used in a wider sense for all objects produced by human activities... either intentionally or unintentionally", he opts for a narrower sense, associated with the scientific usage, restricting its use only to those produced "intentionally". And so, applies the term artefact to "the intentional (or intended) product of an agent's actions" (Hilpinen, 1993, p. 156). What's more, he developed what seems to be the orthodox formu-

lation of the general theory of artefacts, by affirming that an artefact has necessarily an author; and thus, *artefact* and *author* can be regarded as correlative concepts.

The correlation between artefact and author is indeed very strong to the extent not only that an authorless artefact appears to be a contradiction in terms but also that any artificial object, including artefacts, as a “human creation” is a continuation of the author and sometimes can be even equated with its author. Let me recall that in Mary Shelley’s *Frankenstein, or the Modern Prometheus*, the nameless monster has been identified with the name of his maker, i.e., creator and creature (Shelley 1818/1831/1969).⁷

Furthermore, Hilpinen clarified that the “authorship” can be of an *individual* author or *several* authors, including not only those who designed the artefact and those who produced it, but also those who use and reproduce it (Burazin, 2016, p. 390). So, there can be “individually produced artefacts” or “collectively produced artefacts”. In any case, produced artefacts—regardless of whether individually or collectively produced—can be either *intended* (products) or *unintended* (by-products). For instance, a *path* through a forest can be considered not only as a natural object, but also as an artefact, once it has a purpose or use, as a *road*, regardless of whether an intended product, which was created for that specific reason, or an unintended by-product, which resulted from the habit of following the same route when walking through the forest or the intention of doing commerce with those in the other side.

Artefacts are most of the times *concrete* or *physical objects* (a *wall*), and sometimes *abstract* or *non-physical objects* (a *border* or a *boundary marker*) (Searle, 1995, pp. 39-40). Likewise, artefacts can be *simple objects*: a *statue* made from some pre-existing material or object, such as marble; or *complex objects*: a *knife* made by attaching a *wooden handle* to a *metal blade*; a *bicycle* made by linking different artefacts designed to be parts of a whole, such

⁷ For a recent depiction, see *Frankenstein* (Guillermo del Toro, 2025 film, screen play based upon the novel by Mary Shelley).

as a *brake, chain, frame, pedals, seat and wheels*; or a *violin* by joining two or more distinct artefacts in an intended way, such as a *violin body* and a *violin bow*, with their respective sub-parts.

What's more it is possible to distinguish between the *intended* character of the artefact, conforming to the author's productive intentions, and its *actual* character, corresponding to its (real) properties. For example, I intended to produce a *bench*, but what I produced is a *chair*. Also, all artefacts have been created and recreated for a certain *function*. The "intended proper functions" are consistent with a "sortal" or "substantial" description, which determines the identity of the object and the criteria by which it can be classified and distinguished. It is worth mentioning that artefacts can serve very concrete functions, which are usually its "proper" functions, but they can serve other "improper" functions as well. For instance, a *hammer* is intended properly to drive nails into a surface, say into a wall to hang a painting, and improperly to hit someone in the head, say as a means of self-defence. Additionally, an artefact has at least one proper function, but nothing precludes that it has a more than one. For instance, a *recreational vehicle* is a motor vehicle that enables travelling around but that includes living quarters designed for accommodation.

Hilpinen continues by accentuating some conditions, which he characterized as: 1) *Dependence Condition* (DEP), i.e., the existence of an artefact is due to an author's intention; 2) *Success Condition* (SUC), i.e., the artefact has to satisfy some sortal description; and 3) *Acceptance Condition* (ACC), i.e., the artefact has to be recognisable as such. These conditions focus too much on the author's productive intentions and hence appear to miss—or at least to undermine—the importance of a reproductive intention, which is also authoritative; and, thus, seem not straightforwardly applicable to law and other legal entities, and will have to be re-characterized and even re-elaborated to be applicable to them (Crowe, 2015, p. 737). For this reason, *DEP* must be amended to leave room for a more complex *Intention Condition* (INT), which comprises both productive and reproductive intentions (Crowe, 2015,

p. 741; Flores, 2019, p. 155). This move is necessary to provide a better account of law: not only of its production by law-creating or law-making—and even law reforming—institutions, but also of its reproduction by law-applying or law-finding—and even law-interpreting—institutions.

Before proceeding, it is essential to clarify what I mean by “production” and “reproduction” *vis-à-vis* “recognition”. By *production*, I refer to the intentional creation of an artefact by an author or authors who design and make it for a specific purpose. By *reproduction*, I mean the continued instantiation of an artefact through its use and acceptance by subsequent agents who may not be the original creators. Crucially, production and reproduction involve not merely creation and recreation but *recognition* of the artefact as having a certain status and function. In the case of law, production and reproduction is characteristically authoritative institutional status because whatever is produced and reproduced must “fit” with the rest of the preexisting legal institutions. It is important to distinguish between an artefact being *recognisable* (capable of being recognised, having the features that would allow recognition) and being *recognised* (being accepted and acknowledged as having a certain status). For institutional artefacts like law, being merely recognisable is insufficient, since its actual acceptance and recognition is necessary.

Remember my previous example of intending to (re)produce a *bench* but actually (re)producing a *chair* and hence something that is not going to be recognised as what I intended but as something else, which will have either to be reformed or reinterpreted to be recognised as what I originally intended. In addition, some artefacts acquire a life of their own once they are created and become independent of their creator. Please recall that in *Frankenstein* the creator despises, disowns and even rejects his creature, but the creature is nevertheless the result of the creator’s productive intention. Recollect also that the creature has a life of his own, turns against his creator, and even demands obedience: “You are my cre-

ator, but I am your master;—Obey!” (Shelley, 1818/1831/1969, p. 167).

As Hiipinen points out “An author’s productive activity may be *evaluated* on the basis of the relationships among the intended character of an artefact, its actual character, and a purpose *F*”. Therefore, “The study of artifacts (qua artifacts) is intrinsically evaluative, since viewing an object as an artifact means viewing it in the light of intentions and purposes” (Hiipinen, 2011, p. 5, 1995, p. 140). In that sense, we always evaluate, whether an artefact is a successful embodiment of the author’s intentions to produce it (E1); whether it is suitable for the purpose intended (E2); and whether the author has succeeded in making an object that is suitable for that purpose (E3). Since artefacts are and can be evaluated, let me call this *Evaluative* (EVA) condition.

Let me suggest that some artefacts have a clearly defined nature to the extent that there is a settled—once and for all—criterion *re* their nature and cannot be or become something else: A chair will always be a chair... Unless it is completely destroyed or burned to ashes, if an actual chair becomes disassembled it still is a potential chair; once we put the pieces back together it will be a chair again, suitable for its proper function. In that sense, artefacts might appear to be static and rigid. Moreover, other artefacts do not have a clearly defined nature to the extent that they are interpretive and tend to be dynamic and malleable (Schauer 2018). As I said, they acquire a life of their own once they are created or made and become to some extent independent of their creator or maker. Something comes into existence as an artefact in virtue of its being created by an author to serve some purpose(s). However, its purpose(s) can change over time depending on how the author or others use it. Thus, a successful account of the nature of artefacts, including law, will have to explain not only its existence and persistence through time, but also to explain its continuity/stability, i.e., fixity, on one side, and its adaptability/flexibility, on the other (Waluchow, 2007; Flores, 2009b; Ehrenberg, 2016).

Finally, although this ontological heterogeneity leaves room open for considering law as an artefact, my fear is that its use is too open to be meaningful. On the one hand, I cannot contest that law is a human creation and has a function or purpose. Artefacts usually denote concrete physical objects, and whenever they appear to be abstract, they designate physical objects and even persons. On the other hand, I can completely understand why some people are attracted by the idea of considering law as an artefact completely dependent on the underlying convention *re* its nature, i.e., the criteria by which it can be classified and distinguished. Notwithstanding, I would like to advance the claim that law is not merely artefactual but institutional and authoritative, due to its recognition as law and as having—or at least claiming to have—legal authority. What’s more, in addition to being evaluative it is also interpretive (Dworkin, 1977/1978, 1985, 1986, 1996).

III. The Problem of the “Artefactual” Nature of Law

After revising the general theory of artefacts, I will proceed to reviewing the artefactual nature of law. As H.L.A. Hart points out, Jeremy Bentham’s demystification of the law as natural, but artefactual instead was fundamental (Hart, 1982, p. 26). Since then, it has been taken for granted and even invoked, as something obvious or even self-evident, that “law is an artefact”, but only recently have philosophers like late John Gardner and Brian Leiter begun to make explicit some of the applications and implications of the claim. Hence, I applaud the idea of assessing the artefactual nature of law.

Gardner (2004) described the relationship of law, as a genre (of artefacts), with legal systems as basic units and laws as sub-units, as species (of artefacts belonging to that genre), and its practice (pp. 169-174, 174-178). Firstly, he affirmed: “Law, understood as a genre of artefacts, is a genre made up of systems of norms together with the norms that belong to those systems... legal systems are the basic units of law, and laws are essential (but not the only) sub-

units" (Gardner, 2004, p. 171). Secondly, he added: "The abstract noun "law" can be used to refer to a practice as well as [to a] genre of artefacts"; and clarified: "A practice is made up not of artefacts, but of actions and activities. Many practices are practices of engaging with a certain, often eponymous, genre of artefacts" (Gardner, 2004, p. 174). In sum, law is both a genre of artefacts, including its species, and a practice of engaging with them, i.e., the genre and its species. Leiter (2011), for his part, asserted:

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

He was adamant: (1) in accounting for the claim that law is an artefact; (2) in announcing that even natural law theorists do not deny the claim; (3) in averring that legal positivists do accept the claim; and (4) in avowing that anyone who might wish to deny the claim is not of his concern. Nevertheless, I fear that underneath this apparent convergence there are still some divergences and so that there is too much room left for analysis and criticism, as Leiter (2018) himself acknowledged later.

As advanced, I am very sympathetic of Jonathan Crowe's quest for bringing to a closer examination the claim that law is an artefact and its implications for our understanding of law. I agree with him "that law is not straightforwardly covered by the most common definition of an artefact" and "that it is possible to extend the definition to include it". However, I disagree with him that it is because "not all laws have authors", for example "customary laws", and that it is necessary to cover "other unintentionally created artifacts" (Crowe, 2015, p. 737).

Keep in mind that *per definitio* an artefact has an author and so there cannot be an authorless artefact; and, similarly, an artefact is the product or result of a direct or indirect human intention and thus there cannot be an unintentional artefact. As we said before: artefacts necessarily have an author and are the product of a human intention, individually or collectively, but as we will see, law is necessarily a collectively created—or more precisely recreated—product. Regardless of whether it has an identifiable author, law is the result of human agency. In that sense, law’s artefactual nature follows neither from an individual nor a collective authorial intention, i.e., production but from an institutional and authoritative collective reproduction, i.e., recognition (Searle 1995, 2006, 2010; Tuomela, 2002, 2013; Flores, 2019).

Moreover, I would like to insist that the law and at least some laws, such as customary ones, do not have an identifiable author. Whilst other laws, including all sorts of legal documents, from judicial decisions to reports, certainly have identifiable drafters or framers, including a committee, legislature, judiciary, and so on. In both cases, what makes law, in general, and laws, in particular, artefacts are not its authorial—individual or collective—production but its collective reproduction, i.e., recognition as institutional and authoritative. In that sense, an artefact can result not only from human’s productive intention but also from human’s reproductive intention. Reproductive intention not merely in the sense of producing repeatedly, but of recognising it as law, i.e., as recognition.

On the one hand, what appears to be unintentional or unintended artefacts are fortuitous or serendipitous by-products deriving from an author’s productive intention, which do not correspond necessarily to the intentional or intended product, but are artefacts, nevertheless. Still, there is something to be said about Crowe’s (2015) “tree bench” example:

Tree Bench: A tree falls down in the middle of a village. Workers in the village begin to regularly use the tree as a place to sit while they eat their lunch.

They think and speak about the tree as they would (*sic*) a bench placed there

for their use. They say things to each other like “I’ll meet you on the bench at lunchtime”. (p. 740)

I accept that “[i]t seems at least plausible that the fallen tree in this example has become a bench”, but “its membership of the artefact kind *bench* cannot be traced to an authorial intention”. Certainly, if we focus on the *tree* itself or the fact that it is a *fallen tree*, we are talking of a natural object *per se* and not of a result of an author’s productive intention. However, if we emphasize its purpose or use as a *bench* it is indeed a “naturefact”, i.e., a natural object used as an artefact or a nature made artefact (Hiplinen, 2011, p. 1). But even if we cannot identify an author’s productive intention, individual or collective, it is possible to identify it—after all—as an artefact due to the collective recognition, of all those that use it or are willing to use it as a bench.

On the other hand, customary laws are not unintentional or unintended by-products, but intentional or intended products, deriving not from human authors’ productive intention, but from human agents’ reproductive intention. It is worth noting that the concept of “customary law” has two parts: (1) *inveterata consuetudo*, i.e., a reiterated practice or custom; and (2) *opinio iuris seu necessitatis*, i.e., a belief of it as legally binding or necessary. Thus, a customary law implies a long-standing binding practice, which results from the collective recognition: *mores sunt tacitus consensus populi longa consuetudine inveteratus* (i.e., customs are a tacit consensus of the people through a long inveterate practice). Customary laws are reiterated by the people themselves through their collective recognition of a long-standing binding practice and hence an intentional or intended product of them, which can be further reiterated either by the legislature or the judiciary, but at that point it will no longer be a customary law but a legislative act or statute, or a judicial decision or opinion, resulting from a different agent and its collective recognition as institutional and authoritative.

Therefore, Crowe’s strategy is unnecessary and will amount to sneaking law—laws, in general, and customary laws, in particu-

lar—as unintentional or unintended artefacts, through the back door as bastard siblings of the artefactual kind, when they deserve to enter in the front door as legitimate heirs of the kind to which they belong. Regardless of appearing to be unconscious, they are conscious and so intentional, especially if we focus not on its production but on its reproduction, i.e., recognition (Searle, 1991, p. 58).⁸

In any event, the authorial intention is coupled with the function or purpose of the artefact: all artefacts have a function, or purpose, and hence belong to the functional or purposive kind. Regarding the characteristic features of artefacts “functional properties seem to be particularly important”, to the extent that “[a] recent study showed that functional attributes are viewed as far more salient than physical and structural features in classifying objects as members of the artifact categories, while the opposite holds for natural kinds” (Crowe, 2015, p. 741).

In short, functional attributes are more important than other features in classifying artefacts and even some natural kinds, such as flying is of (almost all) birds, with the exceptions of cassowaries, emus, ostriches, penguins, rheas and kiwis (which are extant but threaten), as well as several extinct species such as dodos and moas, to the extent that the only flying non-bird vertebrates are bats (Schauer, 2012, 2013, p. 21; Flores, 2013, p. 103). An object that performs the function of a particular type of artefact while lacking most of its properties is still a member of that class. Certainly, *SUC* is necessary, but again it is not sufficient. Consider the following example:

⁸ Let me elaborate, certainly, if we accentuate their production, by drafters, framers, legislators, reformers and so on *most* laws are conscious and so intentional; but, if we emphasize their reproduction, by judges and other legal agents and subjects, both official and non-official, *all* “true” laws—including customary laws—are accepted and recognised as necessarily having binding force, i.e., legal authority. Therefore, legal agents must enforce them, even in case of non-compliance, and legal subjects must follow them willingly or not. The open question appears to be what should be accepted and recognised or not as “true” laws. Legal philosophers and theorists, including positivists and non-positivists, seem to be arguing for and against what counts as “true” laws. I am grateful to Ken Himma and the peer reviewers for pressing me to elucidate this point.

Shoe-Hammer: Someone had to hang a painting in a wall and had nails but not a hammer. That someone was wearing a pair of shoes, took off a shoe, used it as if it were a hammer to drive a nail on the wall to hang the painting, and put the shoe back on. The painting has been hanging on the wall for several years now.

It is clear that the *shoe* remains a shoe and is not a *hammer* since it lacks its qualities, i.e., hammer-hood: typically, a metal head and a wood handle, and so does not belong to that kind, regardless of the author's intention to use it as such and of having more or less *SUC* in doing it. Let me suggest that *SUC* does not rule out the possibility of defective members of a kind: "it rules out fundamental failures, as opposed to flawed examples" (Crowe, 2015, p. 743).

Certainly, something like *ACC* is required, but it will be necessary but not sufficient. Although artefacts can be produced "individually" or "collectively", some artificial objects, i.e., institutional ones, cannot be produced individually and will require a collective recognition, which will count as its production and reproduction (Searle, 1995, 2006, 2010; Tuomela, 2002, 2013). As pointed out, an artefact can be individually rejected by its author but still be collectively accepted. Similarly, an artefact can be individually recognised by its author, but collectively rejected, and hence not an artefact at all or at least not of a specific kind, unless it is reformed or reinterpreted.

In sum, since counting with an individual or collective authorial *INT* and having *SUC* in producing something are not enough in some cases; certainly, something like *ACC* and *EVA* are necessary. Although artefacts can be produced individually or collectively, some artificial objects, i.e., institutional kinds, cannot be produced individually and will require a collective recognition, which will count not as its production but as its reproduction, and therefore as securing a collective *ACC* as authoritative due to its institutional nature. Since artefacts are and will be constantly evaluated, we can "assess whether something is the right kind of thing to count as a member of the artifact kind" (Crowe, 2015, p. 748). As Crowe pointed

out: “an artifact’s function itself plays a particular causal role in both our *explanations* of the artifact’s kind membership and our *evaluations* of its success or failure as an example of its kind” (Crowe, 2015, p. 749).

The integration between being and value (ascribed to that being), i.e., explanation and evaluation, was captured by Lon L. Fuller’s (1940) reflection:

Common sense tells us that there must be a distinction between a *law* and a *good law*, and a first glance positivism seems amply justified in resting its whole case on the self-evident quality of this distinction. But we must remember that those distinctions which seem too obvious to require analysis are often precisely those which will not stand analysis. Common sense tells me that there is a clear distinction between a thing’s being a steam engine and its being a good steam engine. Yet if I have a dubious assemblage of wheels, gears, and pistons before me and I ask, “Is this a steam engine?” it is clear that this inquiry overlaps mightily with the question: “Is this a good steam engine?” In the field of purposive human activity, which includes both steam engines and the law, value and being are not two different things, but two aspects of an integral reality. (pp. 10-11)

Reconsider the “shoe-hammer” example, despite being used and somehow accepted at least once as a hammer to drive nails, by an individual author, the shoe is still just a shoe. Even if it becomes collectively—and widely—accepted as a hammer, and people start asking to borrow the “shoe-hammer” for hammering purposes it will always be a shoe, since it does not meet the criteria to be a hammer but does meet the one of a shoe. Or did it change its artefactual nature from a shoe to a hammer?

Consider the famous Hart-Fuller debate re “No vehicles in the park” provision, in which Fuller wonders whether a Second World War truck if the authorities intend to place it as a “memorial or monument” is prohibited in the park or not. In my opinion, it will be absurd to conclude that the truck, which is indeed a vehicle, is prohibited in the park. Clearly the truck did not change its artefac-

tual nature from a vehicle to a memorial or monument and will continue to be a vehicle. Nonetheless, its function or purpose shifted from a vehicle to a memorial or monument, suggesting that Second World War truck counts as a memorial or monument and no longer as a mere vehicle in this context. Somehow shifting its artefactual nature, its function or purpose (Hart, 1958; Fuller, 1958).

What does this tell us about artefacts? Some artefacts can perform their functions solely in virtue of causal and other brute facts, in this case as a “vehicle”, while others can perform their functions only by way of collective recognition, in this case as a “memorial or monument”. An artefact is completely dependent on the underlying convention *re* their concrete function or purpose its nature, i.e., the criteria by which it can be classified and distinguished or at least it can be exhausted by the application of such criteria, while there are other artificial objects which are not and will require something else: either a reform or an interpretation—and even a reinterpretation.

Therefore, institutions—including law and other legal entities—can be placed somewhere in a *continuum* ranging all the way from absolute failures to complete successes, from bad to good, from better/best to worse/worst, from corrupt to non-corrupt, from defective to non-defective, from imperfect to perfect, from impure to pure, and so on. For instance, the different forms of government have been classified according to the number of relevant agent(s) and their degree of success-failure, on one side, into good, non-corrupt, non-oppressive or pure forms—autocracy (one), aristocracy (few) and democracy (many/all)—and, on the other, into bad, corrupt, oppressive or impure forms—tyranny (one), oligarchy (few) and demagoguery (many/all) (Flores, 2010, pp. 76, 77). Relatedly, the different forms of governments can be placed in a *spectrum*, in which democracy is indeed the worst/worse of the good, non-corrupt, non-oppressive or pure ones and the best/better *re* the rest, i.e., the bad, corrupt, oppressive or impure ones.⁹

⁹ Churchill (1979, p. 150): “Many forms of Government have been tried and will be tried

IV. One Step Beyond: The Institutional and Authoritative Nature of Law

After reviewing the artefactual nature of law, I would like to take the argument of law's artefactual nature one step beyond to its institutional and authoritative nature, and for that purpose it is necessary to review John Searle's theory of institutional facts. On this regard, there are (at least) three distinctions made by Searle (1995, pp. 121-125) that are of the utmost importance.

The first is the distinction "between those features of the world that are totally independent of human feelings and attitudes" such as "force, mass, gravitational attraction, photosynthesis, the chemical bond, and tectonic plates" and "those features of the world that exist only relative [i.e., dependent] to human attitudes" such as "money, government, property, marriage, social clubs and presidential elections" (Searle, 2005, p. 3). Moreover, the reality created by many people is clearly observer dependent, but once it is collectively accepted, it becomes to some extent independent: it does not matter if someone does not longer accept it, as long as others do (Searle, 2005, pp. 3-4).

The second is the distinction between rules that regulate existing activities, such as driving, i.e., "regulative", and those that do not merely regulate, but that create the very possibility of certain activities, such as the game of chess, i.e., "constitutive". What's more the rules come in systems, individually or collectively, and have the form: "X counts as Y" or "X counts as Y in context C" (Searle, 1995, pp. 27-28).

The third and last is the distinction made (within the category of agentive functions) "between *functions performed solely in virtue of causal and other brute features of the phenomena and functions performed only by way of collective acceptance*". The key element in the development of agentive functions into institution-

in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that *democracy is the worst form of Government except all those other forms that have been tried from time to time...*" (the emphasis is added).

al facts comes when we collectively impose a function on a phenomenon whose physical composition is insufficient to guarantee the performance of the function, and therefore the function can only be performed as a matter of collective acceptance (Searle, 1995, p. 124). Consider one of Searle's most famous examples:

[A] wall gradually evolves from being a physical barrier to being a symbolic barrier. Imagine that the wall gradually decays so that the only thing left is a line of stones... But imagine that the inhabitants and their neighbors continue to *recognize* the line of stones as marking the boundary of the territory... The line of stones now has a function that is not performed in virtue of sheer physics but in virtue of collective intentionality... The line of stones performs the same *function* as a physical barrier but it does not do so in virtue of its physical construction, but because it has been collectively assigned a new *status*, the status of a boundary marker. (Searle, 1995, pp. 39-40)

Similarly, Searle emphasized the case of "money", where the physical composition of pieces of metal or paper are insufficient *per se* to guarantee the performance of its function, unless there is a collective recognition of them as money, especially since we abandoned the so called "gold standard". He added: "Institutional facts exist, so to speak on top of brute physical facts. Often, the brute facts will not be manifested as physical object but as sounds coming out of peoples' mouth or as marks on paper—even thoughts in their heads" (Searle, 1995, pp. 34-35).

The collective recognition creates an institutional and authoritative status that amends and even transcends the physical insufficiency. However, it cannot contradict completely the brute facts, since some form of correspondence to a physical realization is necessary. So, the collective recognition is and cannot be merely conventional but constitutive and hence constructive: "Something that is constitutively incapable of being a bench cannot become a bench through collective recognition. It does not matter if everyone thinks something is a bench, if it's the wrong basic type of thing to be one" (Crowe, 2015, p. 746).

Similarly, institutional objects require the collective acceptance of a constitutive rule of the form “X counts as Y” or “X counts as Y in C” to impose a status function on a phenomenon, either on existing entities, namely persons and objects, such as a “bankers” or a “cashiers” and “paper bills” or “coins”, i.e., “concrete institutions”, or by creating new entities, such as “money” itself, i.e., “abstract institutions” (Searle, 1995, pp. 43-51, 2006, pp. 52-53, 2010, pp. 96-97; Thomasson, 2003, pp. 587-588).

Sometimes a *status function* can only be imposed on a phenomenon, if there are some *status indicators*, such as “policemen’s uniforms, wedding rings, marriage certificates and passports” reinforcing the collective acceptance of them. Furthermore, as Searle acknowledges—following Hernando de Soto: “Sometimes the status indicators acquire a kind of life of their own” (Searle, 2006, p. 63). As we will see, this is also true of some concrete and abstract institutional objects. Consider, for instance, the case of the civil institution of marriage, which was created or made originally to protect different-sexes couples only and nowadays has been extended to protect same-sex couples as well. As Searle clarifies, collective acceptance does not imply “approval”. Furthermore: “Acceptance... goes all the way from enthusiastic endorsement to grudging acknowledgment, even the acknowledgment that one is simply helpless to do anything about, or reject, the institutions in which one finds oneself... Hatred, apathy, and even despair are consistent with the recognition of that which one hates, is apathetic toward, and despairs of changing” (Searle, 2010, p. 8).

What’s more as Raimo Tuomela (2013) has suggested: “Collective construction is conventional in the sense that one can imagine alternative constructions that could be taken to be true. However, collective construction is not unconstrained as to its content” (p. 8). Certainly, both physical laws of the universe and our human culture constrain what can be feasibly rationally constructed and determines much of what our social constructions such as institutions are and not. Hence the importance of our constant evaluation and reevaluation, interpretation and reinterpretation of them. It is worth to men-

tion that the Scandinavian Legal Realists, particularly Karl Olivecrona (1939/1971), approached institutional phenomena from a complementary perspective, emphasizing law's operation as social and psychological fact rather than as abstract normative entity. From my point of view, Olivecrona's emphasis on the factual basis of collective recognition aligns with and reinforces the institutional account defended here.¹⁰

The difference between an artefact—as a genre—and an institution—as one of its species—must be clear by now. But let me be more explicit: (1) artefacts existence depends upon its design-intention and institutions in their use-intention; (2) artefacts can be “individually” or “collectively” produced and reproduced, where institutions must be recognised collectively; (3) an artefact can perform a function in virtue of its pure physical structure, i.e., a knife, while an institution can amend or even transcend a physical insufficiency through the (collective) assignment of a status function, i.e., money; and (4) artefacts are evaluative and can be exhausted by the application of a fixed criteria, whilst institutions have an evolving nature and are—in addition to evaluative—interpretive and will require a constant evaluation and revaluation, interpretation and reinterpretation.

Before concluding, let me bring your attention to John Rawls' opening line in *A Theory of Justice*: “Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust” (Rawls, 1971, p. 3, 1999, p. 3). From my perspective, law is not a mere artefact, but a complex institution and institutional practice, comprising different sub-institutions, characterised not only for their production and reproduction, but also for their recognition as such,

¹⁰ A comprehensive engagement with Scandinavian Legal Realism and its implications for the artefact/institution debate, as well as the revision of other authors who discuss how (moral) facts make law, as Greenberg (2004), would require substantial additional analysis beyond the scope of this article.

which enables it to impose further institutional status in other entities. However, some of its institutions and sub-institutions will have to be reformed—or even abolished, as slavery—or interpreted and even reinterpreted, as part of their recognition. Following not only Rawls' key notion of "reflective equilibrium"¹¹ but also Dworkin's "constructive interpretation".¹² In Dworkin's (2006) words: "We try to generate principles of some general scope and to match those general principles to the concrete judgements about what is just and unjust with which we begin, shifting our views about either principles or concrete judgements, or both, as becomes necessary to achieve an interpretive fit" (p. 246).¹³

V. Conclusion: Law as a Complex Institution with a Distinctively Authoritative Status

To conclude let me turn briefly to the case of law. Law as an institution or as an institutional system includes not only institutions themselves, but also norm-creating and norm-recreating—or applying—institutions, i.e., legal authorities (Raz, 1975, p. 491, 1979, p. 105; MacCormick & Weinberger, 1986; MacCormick, 2007; Flores, 2005, 2007, 2009a). These institutions require the collective acceptance of a constitutive rule of the form "X counts as Y" or "X counts as Y in C" to impose an authoritative status function on a phenomenon, either on existing entities, namely persons and ob-

¹¹ Rawls (1971, p. 20, 1999, p. 18): "It is an equilibrium because at last our principles and judgements coincide, and it is reflective since we know to what principles our judgements conform and the premises of its derivation".

¹² Dworkin (1986, p. 52): "[C]onstructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the genre to which it is taken to belong"; (1986, p. 90): "[C]onstructive interpretations... try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice"; and, (1986, 111): "We can only inspect and reform our settled views the ways sailors repair a boat at sea one plank at a time, in Otto Neurath's happy image".

¹³ See Dworkin (1977/1978, 1985, 1986, 1996, 2006, 2011), Hart (1994, pp. 274-275), Waluchow (2007), and Flores (2010, 2011, 2013, 2015, 2017, 2023, 2024a, 2024b, 2025).

jects, including buildings, i.e., “concrete institutions”, or by creating and recreating (new) entities, such as law, legal norms and legal systems, as well as sub-entities such as legal concepts and legal fictions, i.e., “abstract institutions” (Searle, 1995, pp. 43-51, 2006, pp. 52-53, 2010, pp. 96-97; Thomasson, 2003, pp. 587-588; Burazin, 2018). On the one hand, persons are transformed into legislators, judges, justices, attorneys, esquires, lawyers, legal officials and even legal enforcers, including the police and other legal or regulatory agencies. On the other hand, objects are transmuted into legal gavels and judicial robes, laws, codes, decrees, legal bills or statutes, customary laws, judicial opinions and rulings, and other legally binding documents, written and unwritten, and even buildings into court houses, congress or parliaments, town halls and so on.

Therefore, authoritative institutions are creating and recreating—and even reforming—other institutions and thus evaluating and interpreting them all time. Law is not only a complex institution comprising sub-institutions but also an institution that authoritatively imposes institutional status in other entities. Law is institutional all the way... down and up, left and right, back and forth. By the by, that is the relation and difference with morality. As Dworkin (2006) puts it:

[W]e might treat law not separate from but as a department of morality. We understand political theory that way: as part of morality more generally understood but distinguished, with its own distinct substance, because applicable to distinct institutional structures. We might treat legal theory as a special part of political morality distinguished by a further refinement of institutional structures. (pp. 34-35)

Accordingly, law and morality can be distinguished by a further refinement of institutional structures. Somehow both are authoritative and might be considered as institutional, but the further refinement of institutional structures allows room for a distinct substance. Law and morality, separated, but connected. Law as the part of morality that is already—or should be—binding and enforceable, even

in the case of non-compliance, by legal authorities, i.e., those authoritative institutions recognised as having legal authority.

Finally, consider Aquinas' comment: *Non lex, sed legis corruptio*, to Augustine's dictum: *Lex iniusta non est lex*. Although Augustine (1993) was willing to neglect any law-hood or legal-hood to unjust laws: "an unjust law is not law at all" (I, pp. 5, 8). Aquinas does not or not necessarily seem to do so. Instead of saying "it is not law due to its corrupt form" or "it is so corrupt to be law", he is suggesting "it is not law, but a corrupt law": "[A] human law diverging in any way from the natural law will be a perversion of law and no longer a law" (Aquinas, 2002, Question 95, Second Article, p. 54). In Finnis' voice: "It is thus law only in a sense that should be judged—especially when law is regarded, as by Hart himself, as a kind of reason or purported reason for action—to be a distorted and secondary, non-central sense" (Finnis, 2020, p. 14).

Regardless of whether this interpretation is right or not, I would like to invite the reader to consider it—from an artefactual and institutional perspective—as a possibility: "it is not law (properly called), but a corrupt law (improperly called)". However, it is necessary to evaluate and interpret: Is it still law? If so, how bad, corrupt, defective or impure? Does it still serve adequately its function or purpose? Does it still count or not? Is this authoritative or not? And so on.

Clearly there still is and will be room for disagreement; easy and hard cases of what counts as law and legal entities: central or focal cases, on one side, and peripheral or secondary cases, i.e., "watered-down, immature, or defective way", and, on the other (Hart, 1961/1994; Finnis, 2011; Flores, 2011). To the extent that it makes perfect sense that someone might say "This is law; but too iniquitous to be applied or obeyed" (Hart 1961, p. 203, 1994, p. 208), or someone else "It is valid law, but too unjust to be enforced" or even "It is too unjust to count as valid law" (Dworkin, 2011, p. 411).

Similarly, some authors will be willing to consider some cases within the central or focal cases, whereas others within the peripheral or secondary ones, and the other way around. Consider

the institution of “marriage” (Dworkin, 2006, pp. 9-10), for some it is reserved for heterosexual couples, while for others it integrates homosexual ones as well. The right answer to the question on whether it counts or not as a marriage requires not only the collective recognition of a constitutive rule but also the evaluation and interpretation, reevaluation and reinterpretation of what is constitutive from the institutional point of view: “the union of a man and a woman”, “the procreation and the raising of children”, “the community of life and mutual care and affection between husband and wife” (Finnis, 1994, p. 1062) or simply “the possibility of a family, i.e. a community of life, based upon the mutual care and affection between two persons, i.e. the spouses, regardless of their sexes” (Flores, 2012).

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