Law and Philosophy Library 97

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Law, Truth, and Reason

A Treatise on Legal Argumentation

Springer

Chapter 8
Legal Conventionalism: Law as an Expression of Collective Intentionality

8.1 Brute Facts and Institutional Facts

A *convention* refers to a well-settled societal practice or usage that is commonly observed by the members of a community and utilized as a criterion of normative judgment, because it is *accepted* or *recognized* as having such a status by them. David Lewis (1941–2001) laid down the philosophical grounds of conventionalism in his treatise *Convention. A Philosophical Study* in 1969.[1] Conventions are expressive of *collective intentionality*, i.e. common acceptance or recognition in a community to the effect that certain social phenomena are endowed with legal significance or, alternatively, there exist mutual expectations to the said effect in the community. That "A knows that B knows that A knows that B knows that A knows (and so on, *ad infinitum*) that *x*", where *x* is some contingent belief or conception, accounts for the structure and configuration of collective intentionality under philosophical conventionalism. Conventions entail common beliefs concerning e.g. the value and use of the common currency (euro, dollar, yen) in economic transactions; international agreements made on the time-zones and calendar; customs related to various kinds of social events, situations and festivities; the norms of customary law, like the *lex mercatoria*; and so on.

The "things", or states of affairs, that philosophical conventionalism deals with can be divided into two categories: *brute facts* and *institutional facts*.[2] Brute facts are facts, or states of affairs,[3] the existence of which is not dependent on the human mind, human community, human language, or human culture. Brute facts consist of various kinds of physical or mental facts. They include such incontestable truths as the fact that the distance between the sun and the earth is (according to John Searle) ca. 93 million miles, that water (H_2O) freezes at the temperature of 0°C and boils at

[1] Lewis' book to a great extent leans on the insights of mathematical game theory.

[2] On brute facts and institutional facts, Searle, *Speech Acts. An Essay in the Philosophy of Language*, pp. 50–53; Searle, *The Construction of Social Reality*, pp. 27–29; Anscombe, "On Brute Facts".

[3] Following Ludwig Wittgenstein's linguistic usage, facts are actually prevalent states of affairs in the world, while states of affairs are merely possible configurations of various objects, their qualities and mutual relations.

R. Siltala, *Law, Truth, and Reason*, Law and Philosophy Library 97,
DOI 10.1007/978-94-007-1872-2_8, © Springer Science+Business Media B.V. 2011

100°C at the sea level air pressure, and that the gravity of a heavenly body can be defined in proportion to its mass and in inverse proportion to its distance from the point of observation.

The units of measurement in Searle's example, *Celsius* and *mile*, are based on institutional, not brute facts. An account given in sole terms of brute facts would only delineate there being an undefined, relatively long distance between the sun and the earth or the phenomenon that water freezes in some cold circumstances and boils in some relatively hot circumstances.

> What happened in the world of brute facts and the world of institutional facts, respectively, when the c. 2.500 scientists gathered for the *International Astronomical Union* (IAU) meeting in Prague in 2006 reached the resolution that Pluto would no longer qualify as a planet? *Being a planet* is an institutional qualification of a "thing", defined by the following three criteria: it must be in orbit around the Sun; it must be large enough that it takes on a nearly round shape; and it has cleared its orbit of other objects.[4] Pluto was disqualified as a planet because its elliptical orbit overlaps with that of Neptune. While the world of *brute facts* was not affected by the astronomers' decision, the rock called Pluto still revolving the sun out there; the world of *institutional facts* is decisively different ever since. Without Pluto, the number of planets that circulate the sun is now eight, not nine as it used to be with Pluto among the planets.

Since brute facts do not lean on the workings of the human mind for their being in the world, they would not cease to exist, if no one believed in their existence, if no one ever devoted her thoughts or unshared attention at them, and if no one ever presented an argument in favour of their existence. The existence of planets and stars, magnetic fields and forces of gravity, and black holes, white dwarfs and red giants as objects of astronomy, or the existence of more common household items, such as tables and chairs or forks and knives, refers to such brute facts that are quite independent from the intentions of individual human will or socio-cultural conventions.[5] The same goes for the inexistence of unicorns, dragons, the Ministry of Magic, and the *Hogwarts School of Witchcraft and Wizardry* outside of the world of fiction by J. K. Rowling.

Institutional facts are facts, or states of affairs, the existence of which is conditional on the fulfilment of certain preconditions of societal, cultural, linguistic, or legal kind. Institutional facts comprise a wide array of phenomena in society, such as the fact that full house defeats flush and straight flush defeats four of a kind in the game of poker; that the rook moves orthogonally and the bishop diagonally in the game of chess; that according to Chapter 10, Article 1 of the Finnish Act of Inheritance, a valid will requires the signature of two qualified witnesses who were both present at the occasion of making the will; and that the Court of the European

[4] "Pluto loses status as a planet", http://news.bbc.co.uk/2/hi/5282440.stm; broadcast on 24th Aug., 2006; visited on 27th Nov., 2006.

[5] Of course, the *naming* of planets, stars, and so on, as e.g. Jupiter, Saturn, or Betelgeuze is based on linguistic and scientific conventions in the community of astronomers, but that will not affect the argument made.

Union has the legal power to give a preliminary ruling on the validity and interpretation of EU law according to Article 234 of the EU Treaty, when such a request has been submitted to the Court by some national court of an EU Member State.[6]

> Linguistic and social philosophers commonly speak of institutional *facts*, and not of institutional "things", objects, or other metaphysical entities in the world – but why? Such a manner of speech is not very intuitive or self-evident, and the "man in the Clapham omnibus" or some other coinage of an average person would find such a linguistic usage odd. The reason for the fact-based manner of speech may have something to do with Ludwig Wittgenstein's ontological stance in *Tractatus Logico-Philosophicus*. For Wittgenstein, the (actually existing) facts in the world and the (merely possible) states of affairs in the reality were the basic constitutive elements of ontology. Individual "things", objects, or the like entities may enter the world only as part of a possible state of affairs, and not as freestanding entities as such, taken in isolation.[7] Similarly, the combination of "objects", their inherent properties and mutual relations into states of affairs seems to be the basic ontological category for institutional or conventional philosophy.

Institutional facts can be divided into the two categories of general and abstract *institutions*, such as the institutions of marriage, contract, and last will and testament under the norms of some legal order; and individual and particular *instances* of the former, such as the marriage between A and B, a particular contract reached by X and Y, or the last will and testament made by Z.[8] The institutions/instances dichotomy corresponds to the *type/token* distinction in linguistic philosophy. It also matches with John Rawls' original distinction between the *concept* and different *conceptions* of some social phenomenon, like democracy, justice, or the rule of law ideology.[9]

The terminology adopted by John R. Searle is slightly different from the one adopted here. Searle draws the distinction between the *constitutive rules* of e.g. the

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[6] When the legislator makes use of some brute facts in an enactment or when a court of justice makes use of brute facts in a legal judgment, are we thereafter dealing with brute or institutional facts, when reference is made to the enactment or legal judgment concerned? Tables and chairs in someone's house and "tables" and "chairs" in legislation or legal judgment need not be the same thing.

[7] ". . . that objects and predicates enter into the world only as elements of facts, and that objects and predicates in isolation are unthinkable." Stenius, *Wittgenstein's* Tractatus, p. 25, 68. Cf. Wittgenstein, *Tractatus Logico-Philosophicus*, § 1.1.: "Die Welt ist die Gesamtheit der Tatsachen, nicht der Dinge."

[8] On the institutional character of law, MacCormick, *Rhetoric and the Rule of Law*, 63–68; MacCormick, *Institutions of Law*.

[9] Rawls wrote in "Two Concepts of Rules": "In this paper I want to show the importance of the distinction between justifying a practice and justifying a particular action falling under it. (. . .) one must distinguish between justifying a practice as a system of rules to be applied and enforced, and justifying a particular action which falls under these rules; utilitarian arguments are appropriate writh regard to to question about practices, while retributive arguments fit the application of particular rules to particular case." Rawls, *Collected Papers*, pp. 20, 22. – Rawls used the practice or institution of punishment as an example here. With the term "practice", he refers to "any sort of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which give the activity its structure". As examples thereof Rawls refers to games and rituals, trials, and parliaments. Rawls, "Two Concepts of Rules", p. 20, n. 1.

game of chess and the (mere) *conventions* of the game.[10] The constitutive rules of chess are, as the very term implies, constitutive of the game, defining its identity among the field of two-player games. The constitutive rules of chess incorporate e.g. the rule that the game ends in a checkmate or a draw. Moreover, the constitutive rules of chess qualify certain moves as legitimate in chess and certain pieces of the game as the king, the queen, a bishop, a rook, a knight, and a pawn, to be drawn apart from the legitimate moves and pieces of any other game, such as the checkers, mah jong, go, or the game of *quidditch* in Rowling's Harry Potter books. The conventions of chess, in turn, entail e.g. the fact that the king is usually larger in size than the pawn. Conventions are *arbitrary* in kind, whereas constitutive rules cannot be arbitrarily changed.[11] Regrettably Searle does not elaborate any further the distinction between the constitutive rules of a social practice and mere conventions in it.

Yet, the constitutive rules of chess or of any other game are or, at least, were at the time they were formed just as arbitrary and contingent in their substantive content as the mere conventions (in the sense suggested by Searle) of chess or of any other game are. The distinction between the constitutive rules and conventions of the game is therefore not watertight or intuitive as such. What is it that makes chess the game of chess? Would we still speak of the game of chess if it were played without the queen?, as Ludwig Wittgenstein notably pondered in his *Philosophical Investigations*. The idea of such logico-conceptual bonds that link social phenomena with certain constitutive rules is not entirely novel, though. In the 1920s, Hans Kelsen wrote that the concept of a *state* cannot be defined except by reference to the norms of (mainly) constitutional, administrative, and international law. The "state" is just a shorthand description for a set of legal norms, and there is no "organic" or otherwise "pre-existing" state outside the sphere of legal norms.[12]

A social *convention* can be defined as the outcome of an institutional fact and, in specific, the constitutive rules entailed in it. Social conventions are *institutional facts* defined by constitutive rules. According to Searle, the common form of an institutional fact is: "X counts as Y in context C".[13] Such constitutive rules define a *scheme* (or *frame*) of interpretation on how to construct and read certain social phenomena

[10] Alf Ross, too, made use of chess as an example of community-shared rules and the judge's internal point of view as to the law under the premises of Ross' analytical legal realism. Ross, *Om ret og retfærdighed*, pp. 22–28.

[11] "It is perhaps important to emphasize that I am discussing of *rules* and not *conventions*. It is a rule of chess that we win the game by checkmating the king. It is a *convention* of chess that the king is larger than a pawn. "Convention" implies arbitrariness, but constitutive rules in general are not in that sense arbitrary." Searle, *The Construction of Social Reality*, p. 28. (Italics in original.)

[12] Kelsen, *Der Soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht.*

[13] Searle, *Speech Acts*, pp. 51–52: "[Institutional facts] are indeed facts; but their existence, unlike the existence of brute facts, presupposes the existence of certain human institutions. It is only given the institution of marriage that certain forms of behavior constitute Mr. Smith marrying Miss Jones. (. . .) These 'institutions' are systems of constitutive rules. Every institutional facts is underlain by (a system of) rule(s) of the form 'X counts as Y in context C'". – Cf. Searle, *The Construction of Social Reality*, pp. 28, 43–51. Cf. also Lagerspetz, *A Conventionalist Theory of Institutions*, p. 13; den Hartogh, *Mutual Expectations. A Conventionalist Theory of Law*.

in a certain social setting. It is only in light of *some* such frame of interpretation that some brute facts can be ascribed the status of an institutional fact. Thus, it is only with reference to the Finnish constitution taken as a scheme of interpretation that the speeches given and the votes cast from the moment of time (t_1) to (t_2) in the Plenary Session Hall of the Parliament of Finland can be given the status of an institutional fact: the Finnish Parliament assembled for the reading of a legislative bill. The norms of the (Finnish) constitution function as the frame of interpretation here. In addition, some institutional fact may be qualified anew by another legal act, yielding a novel reading of the original institutional fact in question. Such is the case when the legal composition of some institution is redefined or requalified in either legislation or jurisdiction, giving it a novel legal meaning.

8.2 The Definitional Characteristics of Institutional Facts by John R. Searle, with Special Concern for Self-Referentiality

In his *The Construction of Social Reality*, John R. Searle depicts institutional facts with the following six tenets[14]:

(1) many, but not all, social concepts are *self-referential*;
(2) institutional facts are often, but not always, created by explicit *performative utterances*, i.e. *speech acts*;
(3) *brute facts* are logically primary vis-à-vis institutional facts;
(4) institutional facts cannot exist in isolation but are always *interrelated*, i.e. part of a larger systemic whole;
(5) social *acts* and *processes* have logical priority over social objects and products; and
(6) there is a *linguistic* component in many, but not all, institutional facts.
Moreover, I would still add:
(7) institutional facts are based on *constitutive rules*.

Most of Searle's points are fairly obvious, if the conventionalist premises of analysis are taken at their face value in configuring language and the world. Searle, moreover, makes use of the distinction between the *types* and *tokens*, or *institutions* and *instances*, where the former refers to the general idea of some institutional fact, such as money, marriage, or right of ownership *in abstracto*; while the latter refers to some particular example of an institutional fact *in concreto*, such as the 10 euro note in my wallet at present or the marriage of A and B.[15]

[14] Searle, *The Construction of Social Reality*, pp. 32–37 et seq.

[15] On the *type*/*token* distinction with reference to money as a general social institution (= *type*) and money as individual bank notes and coins (= *token*), cf. Searle, *The Construction of Social Reality*, pp. 32–34, 53.

I will first consider Searle's points 2–6, and then point 1. Though Searle speaks of institutional facts in more general terms, I will use legal phenomena as prime examples of institutional facts here.

Institutional facts both in the sense of institutions *in abstracto* and their instances *in concreto* can be *created*, *altered* in content, and *abolished* by institutional speech acts endowed with *perlocutionary* force (= Searle's point 2).

As Searle points out, the presence of an express linguistic utterance is not the only, or even a necessary, precondition for the creation of an institutional fact.[16] In the context of law, the *institutional* sources of law do follow the logic of such linguistic perlocutionary utterances, as expressed by the legislator, courts of justice, other legal authorities, or legal subjects in the context of private law transactions; while the array of *societal* sources of law, such as customary law and the standards of professional legal ethics, do not need to be so expressed in order to have legal bearing. Tacit consent will do for the rules and principles of a customary origin. Even some convention-bound gesture may produce legal or social effects.[17]

Institutional facts logico-conceptually presuppose the existence of brute facts (= Searle's point 3), due to their inherently socio-cultural and linguistic character. The world of institutional facts is a kind of ontological upper-layer that is built upon the world of brute facts. Institutional facts dwell in Karl Popper's *Third World*, or the world of socio-cultural objects, as differentiated from the physical and mental phenomena of Popper's *First World* and the *Second World*, respectively.

According to Searle, an institutional fact cannot exist in isolation but only in co-existence with other facts (= Searle's point 4), being part of a larger systemic whole. It seems that at least part of those other facts need to be institutional, as well. For instance, the social institution of money requires a system of commerce for the exchange of goods and services in monetary terms, which in turn requires a system (or, rather, a notion) of property and legal ownership. Similarly, marriage as an institutional fact signifies an interlocking system of contractual relations, promises, and obligations among the married couple.

Searle's institutional ontology underscores the significance of social *processes* and social *acts*, and downgrades the impact of social *things* and social *products* as outcomes of such social acts or processes (= Searle's point 5). In the legal context, priority is thus given to the *power-conferring* norms and the use of legal *power* at the cost of the duty-imposing norms and the resulting fact of norm-observance or norm-breaking by the members of the community. The *dynamic* element of norm-creation and of legal power in general is stressed at the cost of the *static* elements of law, i.e. the resulting legal rights and duties brought into effect by the acts of legal will-formation. Still, as underscored by Hans Kelsen in his *Pure Theory of Law*, the

[16]". . . a very large number, though by no means all of [institutional facts], can be created by explicit performative utterances." Searle, *The Construction of Social Reality*, p. 34.

[17]In the Roman Empire, the act of raising or lowering of the Emperor's thumb sealed the fate of a gladiator who had lost the fight in the arena. Such a gesture may be taken as a kind of institutional speech-act, as well, though there is no express linguistic utterance involved, but only the thumb gesture.

static and the dynamic approaches to the legal system are two equally legitimate points of view in legal analysis.

The inherently linguistic dimension of institutional facts (= Searle's point 6) is effortlessly incorporated in any conception of the legal institutions.[18]

It is only the *self-referential* character of social concepts and of institutional facts (= Searle's point 1) that is somewhat problematic in Searle's catalogue. By "self-referentiality" he refers to the fact that e.g. money as an institutional fact is based on the widely shared belief that certain objects, such as bank notes, coins, or their electronic substitutes, are commonly *believed to be,* or *used as,* or *regarded as* money by the members of the community.[19] A radical decrease in the common belief in the value of money, as in the hyperinflation in the Weimar Republic in the 1920s, would ultimately lead to the collapse of the whole monetary system and the withering away of the institutional character of bank notes and coins.[20] That is no doubt true, but I think we are not dealing with the phenomenon of self-referentiality now. Rather, the issue can better be explained as a set of *mutual expectations* among the members of the community vis-à-vis the monetary system and its specific manifestations.

In fact, Searle would seem to use the term *self-referentiality* in more or less the same sense as Eerik Lagerspetz uses the term *mutual expectations* and Govert den Hartogh the terms *mutual expectations* and *cooperative dispositions*.[21] At the back, there lies David Lewis' conventionalist philosophy.[22]

Viewed in light of Hans Kelsen's analytical jurisprudence, the notion of self-referentiality will find a more plausible field of application, but that will take us off the beaten track of Searle's philosophical conventionalism. As Kelsen wrote of the *self-constituting* character of modern positive law[23]:

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[18] Merely tacit contractual or other arrangements are an exception thereto.

[19] "Logically speaking, the statement "A certain type of substance, x, is money" implies an indefinite inclusive disjunction of the form "x is used as money or x is regarded as money or x is believed to be money, etc." But that seems to have the consequence that the concept of money, the very definition of the word "money", is *self-referential*, because in order that a type of thing should satisfy the definition, in order that it should fall under the concept of money, it must be believed to be, or used as, or regarded as, etc., satisfying the definition." Searle, *The Construction of Social Reality*, p. 32. (Italics added.) – Cf. Lagerspetz, *A Conventionalist Theory of Institutions*, pp. 45–51.

[20] "If everybody stops believing it is money, it ceases to function as money, and eventually ceases to be money. (...) And what goes for money goes for elections, private property, wars, voting, promises, marriages, buying and selling, political offices, and so on." Searle, *The Construction of Social Reality*, p. 32.

[21] Lagerspetz, *A Conventionalist Theory of Institutions*; Lagerspetz, *The Opposite Mirrors. An Essay on the Conventionalist Theory of Institutions*; den Hartogh, *Mutual Expectations. A Conventionalist Theory of Law.*

[22] Lewis, *Convention*, passim.

[23] Kelsen, *Pure Theory of Law*, p. 71. – Cf.: "Denn es ist eine höchts bedeutsame Eigentümlichkeit des Rechts, daß es seine eigene Erzeugung und Anwendung regelt. Die Erzeugung der generellen Rechtsnormen, das ist das Verfahren der Gesetzgebung, ist durch die Verfassung geregelt, und formale oder Prozessgesetze regeln die Anwendung der materiellen Gesetze durch die Gerichte und Verwaltungsbehörden. Daher die den Rechtsprozess darstellenden Akte der Rechtserzeugung und Rechtsanwendung (die, wie wir gesehen werden, selbst auch Rechtserzeugung ist) für die

> For it is a most significant peculiarity of law that it regulates its own creation and application. The creation of the general legal norms – the process of legislation – is regulated by the constitution; the formal or procedural statutes regulate the application of the material statutes by the courts and administrative authorities. Therefore, the acts of law creation and law application that constitute the legal process are considered by legal cognition only to the extent that they form the content of legal norms – that they are determined by legal norms; hence the dynamic theory of law is also directed toward legal norms, namely toward those that regulate the creation and application of the law.

According to Kelsen, the basic norm (*Grundnorm*) is the necessary transcendental-logical precondition for identifying the norms of valid law and for distinguishing them from anything that is not law, whether it be the norms of religion, etiquette, or political morality in society.[24]

Niklas Luhmann (1927–1998) and Gunther Teubner have insightfully analysed the self-constitution of modern law with the notion of legal *autopoiesis*.[25] An autopoietic theory of law approves Kelsen's notion of legal self-constitution but refuses to acknowledge the basic norm as the ultimate ground of legal validity. According to Luhmann and Teubner, modern law is indeed *self-referential*, i.e. reflexive and autopoietic in character: the law exerts normatively binding force on the judge or other official, because it is an inherently *self-constituting, self-defining*, *self-regulating*, *self-legitimating*, and *self-justifying* phenomenon. The dilemma affecting Kelsen's pure theory of law and Luhmann's and Teubner's autopoietic conception of law alike is the one met with by Baron von Münchhausen in the German folktale: having fallen deep into the swamp, von Münchhausen lifted himself back onto the solid ground by pulling from his own hair. The critique of a *vicious circle* strikes with equal force any consistent account of legal positivism, if the validity of law is justified by reference to the criteria found in that legal system itself.

Since there is no external reference that could provide for the ultimate validity ground of law under analytical legal positivism, the analysis of the ultimate premises of law ends up either in a *logico-conceptual circle* ("constitution C_n is normatively binding, since it is legally valid") or, alternatively, in an *endless regress* to ever higher grounds of justification ("constitution C_n is normatively binding, since it derives its validity from the historically prior constitution $C_{(n-1)}$, and so on, *ad infinitum*"), i.e. the two options that Kelsen sought to evade by means of the basic

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Rechtserkenntnis nur insofern in Betracht kommen, als sie den Inhalt von Rechtsnormen bilden, durch Rechtsnormen bestimmt sind; so daß auch die dynamische Rechtstheorie auf Rechtsnormen gerichtet is, und zwar auf jene, die die Erzeugung und Anwendung des Rechts regeln." Kelsen, *Reine Rechtslehre* (1960), p. 73.

[24]The idea of the legal *Stufenbau*, or the hierarchical structure of law, was initially suggested by Adolf Julius Merkl and then adopted by Kelsen. Cf. Merkl, "Das Recht im Lichte seiner Anwendung"; Merkl, "Das doppelte Rechtsanlitz. Eine Betrachtung aus der Erkenntnistheorie des Rechtes"; Merkl, "Prolegomena einer Theorie des rechtlichen Stufenbaues".

[25]Luhmann, *Das Recht der Gesellschaft*, p. 188 et seq.; Teubner, *Law as an Autopoietic System*, pp. 13–46; Teubner, "How the Law Thinks: Towards a Constructivist Epistemology in Law", passim.

norm[26] The price for such a move is paid in the *undefinability* of the basic norm itself on the *norm/fact* axis, and the same goes for Hart's rule of recognition or any other final reference of legal validity under self-referential, closed prerequisites of legal analysis.[27]

Nonetheless, legal conventionalism need not make a commitment to the criteria of semantic closure, self-referentiality, or self-constitution of social concepts and institutional facts, but mere common acceptance or recognition of certain social phenomena as legally significant will do. The issue is different as concerns the very *ultimate* criteria of such a closed, autonomous system of norms, values, or items of knowledge. The idea of law and social ethics based on the *a priori*, self-evident *basic values*, as argued by John Finnis in his *Natural Law and Natural Rights*,[28] need to be defined as closed vis-à-vis any external criteria of judgment, if they are taken as the ultimate reference for ethical or legal judgment. Similarly, a system of would-be knowledge in which epistemic uncertainty is ruled out by means of the postulated infallibility of some scientific or, say, religious authority may well fulfil the terms of systemic closure and inner consistency. The status of the ultimate premises of such a system of knowledge or values cannot be effectively questioned without falling victim to the two-horned dilemma of a vicious circle or endless regress (or both).

If the claimed self-referentiality of social concepts and institutional facts is left out of concern here, the other criteria specified by Searle would seem to suit well to the task.

8.3 Conventions as Mutual Expectations of the Members of a Community

The idea of conventions as a set of *mutual expectations* among the members of a community is grounded on David Lewis' widely influential book *Convention. A Philosophical Study*, published in 1969. In it, Lewis defined a convention as follows[29]:

> A regularity *R* in the behaviour of members of a population *P* when they are agents in a recurrent situation *S* is a *convention* if and only if it is true that, and it is common knowledge in *P* that, in almost any instance of *S* among members of *P*,
>
> (1) almost everyone conforms to *R*;
> (2) almost everyone expects almost everyone else to conform to *R*;
> (3) almost everyone has approximately the same preferences regarding all possible combinations of actions;

[26] Cf. Siltala, *A Theory of Precedent*, pp. 213–214.

[27] On the problematic ontology of the ultimate premises of law under (analytical) legal positivism, Siltala, *A Theory of Precedent*, pp. 229–231.

[28] Finnis, *Natural Law and Natural Rights*.

[29] Lewis, *Convention*, p. 78. That is the final definition of a convention. Preliminary versions are presented earlier in the book.

(4) almost everyone prefers that any one more conform to R, on condition that almost everyone conform to R;
(5) almost everyone would prefer that any one more conform to R', on condition that almost everyone conform to R',

where R' is some possible regularity in the behaviour of member of P in S, such that almost no one in almost any instance of S among members of P could conform both to R' and to R.

Lewis' idea of a convention set the pace for subsequent enquiries into the subject matter. In his treatise, Lewis contrasted the notion of convention with that of an agreement, social contracts, norms, rules, conformative behaviours, and mutual imitation. Lewis' approach is based on a *game-theoretical* model where the expectations of the other participants will affect the choices made by the one from whose point of view the issue is evaluated.

Later on, Eerik Lagerspetz has elaborated the concept of an institutional fact in explicit terms as a set of *mutual expectations* among the members of a community. In line with Searle's and Lewis' analysis above, he treats money, political legitimacy, and law as examples of conventional, institutional facts. According to Lagerspetz, the general form of mutual expectations or beliefs (= MB) is as follows[30]:

(MB′) It is mutually believed in a population S that p iff [i.e. if and only if]
(1) everyone in S believes that p;
(2) everyone in S believes that everyone in S believes that p; and so on i times, when i is the number of reiterations needed to describe the beliefs of the members in S ($2 \leq i < \infty$);
(i + 1) everyone in S believes that no one in S has any such beliefs of a higher order ($> i$) about the beliefs of the members of S which would have an effect on the behaviour of any member.

According to Lagerspetz, the general form of an institutional or conventional fact (= CF) is as follows[31]:

(CF) "a is F" expresses a conventional fact iff it is a necessary and a sufficient condition for a's being F that
(1) it is a mutual belief in the relevant population S that a is F, and
(2) in the situations of the relevant type, (1) is at least partial reason for the members of S to perform actions which are meaningful because a is F.

[30] Lagerspetz, *A Conventionalist Theory of Institutions*, p. 18. (Italics added.)
[31] Lagerspetz, *A Conventionalist Theory of Institutions*, p. 19. (Italics added.)

The general form of a regulative rule (= R) is as follows[32]:

(R) R is a regulative rule in S if
(1) the members of S generally comply with R;
(2) there is a mutual belief in S that R is a regulative rule in S, and
(3) [point] (2) is at least a partial reason for [point] (1).

According to Lagerspetz, the general form of a definition rule (= DR) is as follows[33]:

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

Instead of a definition rule, one might use the more familiar term *constitutive* rule.

In addition, Lagerspetz gives the following rule of inference or rule of reasoning (= RR)[34]:

(RR) R is a rule in S if there is a rule R′ in S which defines R as a rule in S."

The three rules (R), (DR), and (RR), taken together, are a *necessary* and *sufficient condition* for the existence – or, perhaps rather, validity – of a rule in S. The term "exists" (or, again, "is valid") in S is, however, ambiguous in the legal context, since the existence (or validity) of a legal rule is a contested issue. There is, in other words, a host of mutually exclusive theories of legal validity, based on the *systemic validity* of a norm under legal positivism, *empirical efficacy* of the "law in action" under legal realism, and *axiological justice* of any would-be legal norms under natural law philosophy.[35] For Lagerspetz, social institutions are systems of existing, interlocked rules.[36]

Like Lagerspetz but adopting a less formal frame of analysis, the Dutch scholar Govert den Hartogh has defined conventionalism by the two intertwined criteria of *mutual expectations* and *cooperative dispositions* among the members of a community. Adding the element of cooperative dispositions to the notion of conventionalism would seem to have the effect of excluding from the realm of law the

[32]Lagerspetz, *A Conventionalist Theory of Institutions*, p. 22.
[33]Lagerspetz, *A Conventionalist Theory of Institutions*, p. 23. (Italics added.)
[34]Lagerspetz, *A Conventionalist Theory of Institutions*, p. 23.
[35]Wróblewski, *The Judicial Application of Law*, pp. 75–85; Aarnio, *The Rational as Reasonable*, pp. 33–46.
[36]Lagerspetz, *A Conventionalist Theory of Institutions*, p. 23.

disinterested "bad man" under Holmes' prediction theory of law. Holmes' potential law-breaker might well share a set of mutual expectations with the judges as to the contents of the law in force, but he certainly is not committed to the same cooperative dispositions with the judges. Quite on the contrary, the bad man resolutely breaks down any illusions of abiding by the law, which deviates from the idea of cooperative dispositions.

According to den Hartogh, the two ingredients of social conventions lean on and presuppose each other[37]:

> The conventionalist theory of obligatory norms I propose has two main components: patterns of *mutual expectations*, and *cooperative dispositions*. (. . .) I will argue that they have an internal reference to each other. Cooperative dispositions consist in being prepared to honour each other's justified expectations, and those expectations are justified by the existence of the dispositions. An important corollary of this fact is that the mutual expectations of the people participating in a social norm cannot have developed independently of any pre-existing expectations. Only if the pattern of expectations already exists in a general way, is it possible to form concrete expectations of behaviour in any particular case. (. . .) If this corollary is accepted, it follows that the conventionalist theory can only explain the maintenance of either conventions or norms, not their emergence.

Some of the conventions analysed by den Hartogh are *formal*, such as statutes and judicial decisions, and some are *informal*, such as customary law and legal principles. He then defines a system of law with the following four tenets[38]:

(a) a system of conventions, i.e. transparent patterns of *mutual expectations* of higher and lower orders, governing a significant part of the interactions of a group of people;
(b) a mutually known commitment to the *avoidance of* certain specific *suboptimal outcomes* as the mutually recognized point of the system;
(c) mutually ascribed *cooperative dispositions*; and
(d) the existence of one or more *formal conventions*: the mutual recognition of the authority to specify what the system requires (legislative and adjudicating authority).

Legal conventionalism requires a link to the institutional and non-institutional sources of law, as now read in light of their common acceptance or recognition in the community or the presence of a set of mutual expectations and cooperative dispositions to the said effect. The weight of emphasis is therefore on the non-institutional, societal tenets of law.

[37] den Hartogh, *Mutual Expectations*, p. 20. (Italics added.)
[38] den Hartogh, *Mutual Expectations*, pp. 220–221. (Italics added.)

8.4 Nominalism *vs.* Realism: Are Intentions Attributable to a Collective Agent as a Whole or to Its Individual Members Only?

Based on John R. Searle's linguistic philosophy, Dick Ruiter has criticized Eerik Lagerspetz' idea of reducing the collective intentionality of a community to the intentions held by the individual members of the community.[39] Ruiter and, quite independently of him, John Searle have defended the argument that a complete reduction of collective intentionality to the plurality of individual intentionalities involved cannot capture the truly *collective* character of the will-formation in an assembly or other collection of individuals. The collective intentionality of a soccer team or a symphony orchestra is claimed to be something more than, and different from, the sum total of the individual intentions held by the members of the group concerned.[40] The reasons given by Searle in support of his argument are not entirely convincing, though. In his mind, individual intentions, or *I intentionality* as Searle puts it, cannot be transformed into a *We intentionality* of a genuinely collective kind. Therefore, no reductive model of intentionality can truly grasp collective intentionality[41]:

> In my view all these efforts to reduce collective intentionality to individual intentionality fail. Collective intentionality is a biologically primitive phenomenon that cannot be reduced to or eliminated in favor of something else. Every attempt at reducing "We intentionality" to "I intentionality" that I have seen is subject to counterexamples. – There is a deep reason why collective intentionality cannot be reduced to individual intentionality. The problem with [me] believing that you believe that I believe, etc., and you believing that I believe that you believe, etc., is that it does not add up to a sense of *collectivity*. No set of "I Consciousness", even supplemented with beliefs, adds up to a "We Consciousness". The crucial element in collective intentionality is a sense of doing (wanting, believing, etc.) something together, and the individual intentionality that each person has is derived *from* the collective intentionality that they share.

The question whether to define intentionality in *individualist* or *collective* terms is ultimately based on a choice between *nominalist* and *realist* ontology. For the nominalist, the intentions held by the individuals who make up a symphony orchestra, a football team, a parliament, or a multi-membered court of justice is all there is in the world. As a consequence, there is no such thing as the collective intentionality of a symphony orchestra, a football team, a parliament, or a court of justice with several justices, but the intentions to be taken into account are equal to the sum total of the individual intentions of the subjects involved. For the realist, in turn, there exist

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[39] Ruiter, *Legal Institutions*, p. 22.

[40] Ruiter, *Legal Institutions*, p. 22; Searle, *The Construction of Social Reality*, p. 24.

[41] Searle, *The Construction of Social Reality*, pp. 24–25. (Italics in original.) – Cf. also Tuomela, *The Philosophy of Social Practices. A Collective Acceptance View*; Tuomela, "Collective Acceptance, Social Institutions, and Social Reality"; Tuomela, "Collective Intentionality and Social Agents"; Tuomela, *The Philosophy of Sociality. The Shared Point of View*.

genuinely collective agents with a will-formation that surpasses that of its individual members.

However, Searle's argument as to the missing notion of *We intentionality* in the nominalist accounts of ontology is not entirely convincing. Being an ontological realist, Searle in effect *presupposes* and *postulates* the existence of collective intentionality, and denounces the nominalists for not doing so, while it is the very existence or non-existence of the said phenomenon that is at stake here. Searle's above characterization of collective intentionality as a "biologically primitive phenomenon that cannot be reduced to or eliminated in favour of something else" will not settle the issue without falling victim to a mistake of a *non sequitur* kind.

> But how could an assertion on philosophical ontology be tested, validated, corroborated, or proven true or false? Is the constitution of the world such as depicted by the nominalists or by the realists? As I see it, there is no legitimate way of testing an ontological assertion without committing a logical fallacy – for the simple reason (as the Argentinian author Jorge Luis Borges once pointed out) that we have no access to the reality "out there", without the intrusion of a host of logico-conceptual, epistemic, and other prerequisites that make up the prevalent world-view, with a certain conception of ontology entailed. Each assertion on the constitution of reality by necessity entails some (pre)ontological stance on "what there is" in the world. In other words, each ontological assertion begins with a tacit presupposition: "If we presuppose the validity of a realist, idealist, institutional (etc.) ontology, things are so-and-so in the world" or "On the condition that a realist, idealist, institutional (etc.) ontology is presumed, things are so-and-so in the world." The only criterion that can be applied to a system of ontology is its *internal consistency* or some meta-level criterion of philosophical parsimony, or the like standard.

The grounding choice between nominalism *vs.* realism cannot be resolved by recourse to some higher master criterion that would settle the issue once and for all. Rather, the issue necessitates a choice between two (or more) different grounding premises of philosophical analysis and configurations of a world-view. According to Ludwig Wittgenstein's philosophical stance in his *On Certainty*, any assertions on the ultimate constitution of reality or the ultimate prerequisites of knowledge fall outside the domain of human knowledge, reasonable doubt, and propositional truth-value, since they constitute the ultimate ground of a form of life, a system of pre-propositional "knowledge" that is silently presupposed in all assertions concerning the world, or the ultimate end points of philosophical argumentation.[42] As a consequence, the attributes of (being) true or false cannot be extended to such pre-propositional prerequisites of human knowledge. The concept of knowledge cannot be extended to the prerequisites of knowledge itself, as Georg Henrik von Wright pointed out.[43]

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[42] Cf. Wittgenstein, *Philosophical Investigations – Philosophische Untersuchungen*, § 217 (p. 85/85e): "If I have exhausted the justifications I have reached the bedrock, and my spade in turned. Then I am inclined to say: 'This is simply what I do.'" – In *On Certainty*, Wittgenstein to a great extent followed the philosophical lead of G. E. Moore's line of argumentation.

[43] von Wright, "Wittgenstein varmuudesta", p. 19.

Still, there is a meta-level philosophical argument that lends indirect support to the nominalist position in ontology, viz. the *Ockham's razor* or the principle of parsimony in philosophical and scientific explanation. Reliance on Ockham's razor would seem to turn the scales in favour of nominalism, to the effect of giving philosophical priority to the option with fewer metaphysical commitments or postulates as to the "furniture of the world".

The contrary position in ontology may be backed by the *linguistic* argument that the idea of institutional authorities with collective will-formation frequently surfaces in the legal speech, and the lawyers seldom express any specific difficulties in participating in such discourse. Lawyers in other words commonly present arguments concerning the historically authentic intentions of the parliamentary legislator, as retraced in the text of an enactment and the *travaux préparatoires*, if any; judicial intentions held by a court of justice in the context of issuing a precedent or line of precedents; the corporate will-formation of a joint-stock company, as determined by the board of directors or similar organ; the will of an undistributed estate of a deceased person; and so on. The idea of such collective will-formation would seem to draw major support from the professional self-understanding and common manner of speech of the legal profession so that the intentions of the Parliament or a court of justice, as are traced in the respective legal source material, are detached from opinions held by the individual members of the parliament or by individual justices.

8.5 The Institutionally Qualified Character of Legal Conventions

Legal conventions may be either *formal* and *institutional* or *informal* and *customary* in character. Formal legal conventions have an institutional character, such as state treaties, the constitution, legislation, administrative regulations, precedents and other court decisions.[44] Informal conventions are of customary origin, such as *lex mercatoria*, the law of the Internet, and other norms of *transnational* origin; decisions given by private and semi-official arbitration boards in society; and the guidelines entailed in professional legal ethics and acknowledged standards of good legal practice among the legal profession.

Noel B. Reynolds and Thomas J. Lowery have divided legal conventions into *social conventions* and *customary practices*, depending on whether the members of a community consciously acknowledge some conduct as having conventional force, or whether they just tacitly accept it in their social practices.[45] Social conventions are consciously acknowledged in the community.[46] Customary practices, in turn, are based on a historically evolving tradition the conventional character of

[44] On formal legal conventions, den Hartogh, *Mutual Expectations*, pp. 113–116, 150–153.

[45] Reynolds and Lowery, "Convention and Custom", pp. 161–162.

[46] On the two concepts of "law as unconscious conventional custom" and "law as a conscious conventional creation of social norms, (. . .) deriving from all the people in particular society", Reynolds and Lowery, "Convention and Custom", p. 162.

which need not be consciously reflected in the community. Rather, such practices are based on a *tacit knowledge* that guides the conduct through silently adopted models. Tacit knowledge on law "is learned by doing (. . .) rather than by acquiring rules for doing it", according to Michael Polanyi.[47] Consciously adopted legal conventions à la Reynolds and Lowery are more or less equal to *formal* and *institutional* conventions, while tacit conventions are more or less the same as *informal* and *customary* conventions. Here, the focus is mostly on informal conventions, since formal conventions were treated above under analytical legal positivism.

Legal conventionalism differs from natural law philosophy in that the content of law is now seen as *contingent*, and not necessary, *a priori*, or prepostulated as in natural law philosophy. Whether motor vehicles are prescribed to use the right-hand or the left-hand side of the road in the road traffic legislation, and whether the First of May or the Ascension Day are national holidays or not – these are morally neutral issues settled by explicit legal conventions, and the content of such conventions is quite arbitrary.

Formal legal conventions might be turned into informal ones, though. Such is the case if, for instance, Hart's ultimate rule of recognition, taken as a commonly shared commitment among the judges and other officials to some criteria of legal rule-recognition, is deemed to exist because of a widely shared acceptance or recognition to the said effect among the judges, establishing a set of mutual expectations and cooperative dispositions towards convergent behaviour in their judicial decision-making.[48] Neil MacCormick's reading of Hart's master rule would seem to lend support to such a reading[49]:

> Since only a madman would frame and adopt such a standard [i.e. rule of recognition] without conscious animadversion to the standards he sees and understands others in a like position of responsibility to be using, there are strong reasons to expect a high degree of agreement and conformity among the judiciary in this matter – so that it is indeed not uncommon for the observer to be able to specify with reasonable accuracy the rule of recognition as it "exists" at a given time. (What is more, conformity tends to reproduce itself because of the pressure which it generates upon potential "mavericks", or indeed, to be cynical about it, because of the strong prudential reasons which those who run a system have for keeping it running on an agreed basis.)

Nonetheless, a fully consistent conventionalist reading of the legal phenomena fails to give a satisfactorily account of the *institutional* premises of modern law. In any Western legal system, arguments extracted from the institutional sources of law are

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[47] Kuhn, *The Structure of Scientific Revolutions*, p. 191: "To borrow once more Michael Polanyi's useful phrase, what results from this process [of following paradigms as shared examples] is "tacit knowledge" which is learned by doing science rather than by acquiring rules for doing it."

[48] Hart, *The Concept of Law* (1961), p. 107: ". . . the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact."; Cf.: "The question whether a rule of recognition exists and what its content is, i.e. what the criteria of validity in any given legal system are, is regarded throughout this book as an empirical, though complex, question of fact." Hart, *The Concept of Law* (1961), p. 245 (note to p. 97).

[49] MacCormick, *Legal Reasoning and Legal Theory*, p. 241. – Cf. also MacCormick, *Institutions of Law*, pp. 56–57.

deemed as legally binding vis-à-vis the legal discretion of the judge, not because of a set of prevailing mutual expectations among the judiciary to the said effect, but because such arguments are seen to satisfy with the criteria of rule-identification with reference to the constitution, parliamentary legislation, precedents, and the *travaux préparatoires* in the legal system concerned. The institutional character of law is the primary reason for its legal validity, while the fact of the common criteria of rule-recognition (à la Hart) or a collective judicial ideology (à la Ross) is a derivative issue therefrom.

A mere reference to an existing collective acceptance or recognition of certain social facts among the judiciary or the legal profession will not qualify them as legal, if the *institutional* premises of law are not there to support such a claim. Hart's and Ross' moderately realist premises need to be supplemented by the ones derived from Kelsen's analytical jurisprudence so as to better grasp the institutional nature of law, as argued above.

Let us consider an example to illustrate the institutional linkage of conventional facts in the domain of law.

John F. Nash was awarded the Nobel Prize in economics in 1994 (together with John C. Harsanyi and Reinhard Selten) for his achievements in mathematical game theory already in the 1950s. Nash fell seriously ill for schizophrenia later in the 1950s and 1960s. During an early phase of his mental illness, when his ailing condition had not been diagnosed, nor was widely known among his peers at the University of Princeton, he was offered a professor's tenure in mathematics at the University of Chicago. The offer was considered genuinely attractive. To everyone's astonishment Nash turned down the offer, explaining that he had just been invited to become the Emperor of the Antarctic. At Princeton he also made the odd claim that in the cover of a recent *Life* magazine, where Pope John XIII was presented, it was in fact Nash who was being depicted. The reasons he gave for his conclusion failed to convince his listeners, though, when Nash explained his stance: unlike Pope John XIII, for whom "John" was the papal name attached to the high office, "John" was the true birthname of his. Besides, 23 had always been Nash's personal favourite among the primes. Therefore, the picture in the cover of the *Life* magazine entailed a coded message to Nash that only he could properly decipher.

If the Nash' delusions had in fact been acknowledged as valid by the community of mathematicians and scientists at the University of Princeton, satisfying the conventionalist criteria of there being common acceptance, recognition, or a set of mutual expectations to the said effect, would that fact have made Nash the Emperor of Antarctic? Absolutely not, unless the *institutional* preconditions for his claim were satisfied, as well. Without adequate institutional support found in the international state treaties on the legal status of the Antarctic, Nash' self-description would count as an instance of grand delusion only, irrespective of how widely his claims were in fact acknowledged or disproved among the members of the scientific community at Princeton. Thus, a mere reference to a set of mutual expectations existing in the community is not enough to guarantee the legal character of some social phenomenon, if the *institutional* premises at the back of the conception are not there to support the claim.

Thus, the term *institutional* obtains a slightly different meaning in general philosophy and in jurisprudence. In philosophy, an institutional fact refers to the presence of collective intentionality as common *acceptance* or *recognition* of certain social phenomena as having conventional significance. The terms *mutual expectations* and (possibly) *cooperative dispositions* can also be used, resulting in the line of reasoning: "A knows that B knows that A knows that B knows that A knows (and so on, *ad infinitum*) that *x*", where *x* is a contingent, collectively held belief or conception. In legal argumentation, an institutional fact refers (mainly) to formal conventions, in the sense of the social phenomena that are officially acknowledged as having legal force in the community, such as the constitution, legislation, the *travaux préparatoires*, precedents, and so on. The emphasis laid on such institutional sources of law at the cost of the non-institutional, or societal, ones in modern legal thinking understandably diminishes the use of conventionalist premises in legal analysis. Therefore, the roots of legal conventionalism need to be looked for in the writings by the historical school of law in the nineteenth century.

8.6 Shared Legal Convictions as an Expression of the *Volksgeist*, or the Spirit of the Nation, by Friedrich Carl von Savigny

The primacy of community-based customary law over formally valid enactments can be traced back to Friedrich Carl von Savigny (1779–1861), whose writings gave birth to the *historical school of law* in Germany. The origins of law were to be found in the organically evolving *spirit of the nation* (*Volksgeist*), and the *common legal consciousness* of the people (*die gemeinsame Rechtsüberzeugung des Volkes*) would guide the "organic" path of the law without any whimsical, capricious intrusions on part of the legislator. Savingy's notion of law was outlined in 1814 when his influential essay, "Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft", came out. In it, Savigny fiercely criticized the legal codification ideology that had been influential in Austria and France.

According to Savigny, the French and Austrian idea of drafting would-be all-inclusive codifications in the various branches of law was grounded on false, mistaken premises as to the true nature of law. Instead of legal codifications, primacy was to be given to the authentic *legal convictions* that were prevalent among the members of the community concerned. Savigny's bold (re)definition of the concept of law had a profound impact on legal thinking in Germany at the nineteenth century, effectively challenging modern legal voluntarism at the back of the codification movement.[50] Now, Savigny set out on a mission to resist any demands for legal codification. His chief opponent in the intellectual strife concerning legal

[50] "Diese Konzeption musste in der Augenblick eine tiefgehende Veränderung erfahren, in dem Savigny – zuerst in der Schrift über "Beruf unserer Zeit" – nicht mehr das Gesetz, sondern die gemeinsame Rechtsüberzeugung des Volkes, den "Volksgeist", als die ursprüngliche Quelle allen Rechtes ansah." Larenz, *Methodenlehre der Rechtswissenschaft*, p. 13.

codification was Anton Friedrich Justus Thibaut (1774–1840). Thibaut had urged the codification of even the German law, so as to meet with the criteria that had been set up earlier in Austria and France.[51]

According to Savigny, the concept of law was to be attached to the *shared legal convictions* among the members of the legal community, as given expression in the well-settled usages of *customary law* in traditional legal systems and in the *lawyers' law* (*Juristenrecht*) or *law professors' law* (*Professorenrecht*) in the more sophisticated legal systems, i.e. law as conceived by the legal profession and the professors of law in specific.[52] It was the task of legal science to provide an analysis of the *common legal consciousness* in the legal community, given *in terms of legal institutes* (*Rechtsinstitute*) or *legal relations* (*Rechtsverhältnisse*) and the *organic systemic unity* (*organische Zusammenhang*) that was thought to prevail among such elements of law.[53] Moreover, a legal institute was deemed to be primary vis-à-vis any individual legal norms. Savigny's idea of the inner systemic unity of law and the primacy of legal institutes vis-à-vis any individual legal rules paved the way for Georg Friedrich Puchta's conceptualist notion of law at the latter half of the nineteenth century.[54]

8.7 The Transformations of Customary Law in Modern Society

For Friedrich Carl von Savigny, shared legal convictions in a legal community cover a wide range of material from customary law usages among lay persons to the instances of more specific *Juristenrecht* or *Professorenrecht* among the legal profession or some fraction of it. In modern law, emphasis is placed on the profession-bound tenets of law, at the cost of the legal conceptions held by ordinary people. *Customary law* comprises all well-established practices, habits, usages, and customs that are collectively deemed to have legal impact on some issue by the legal community at large or some branch of it.[55] It need not be consciously acknowledged to have such a position by the members of the legal community. Tacit acceptance

[51] On the intellectual strife on codification by Thibaut and Savigny, cf. *Thibaut und Savigny. Ihre Programmatische Schriften*. The book entails Thibaut's opening essay, "Über die Nothwendigkeit eines allgemeinen Bürgerlichen Rechts für Deutschland", and Savigny's response, "Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft", along with other basic writing by the two prominent authors of the said intellectual strife.

[52] On Savigny's concept of law, Wieacker, *Privatrechtsgeschichte der Neuzeit*, pp. 381–399; Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 11–18; Reimann, "Savigny, Friedrich Carl von (1779–1861)", pp. 772–773. – On Savigny's *Juristenrecht*, Larenz, *Methodenlehre der Rechtswissenschaft*, p. 392. – Savigny's first name is seen written with either *c* or *k* in different sources. Of the major commentators, Karl Larenz uses the form Friedrich Karl von Savigny, while Franz Wieacker uses the form Friedrich Carl von Savigny.

[53] On legal institutes and legal relations in Savigny, Wieacker, *Privatrechtsgeschichte der Neuzeit*, p. 398; Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 14–15, 18.

[54] Larenz, *Methodenlehre der Rechtswissenschaft*, p. 15.

[55] Cf. Klami, "Tapaoikeus", pp. 1135–1137.

will do, but the legislator may have given express recognition to some such practices in the formally valid legislation.[56]

Sometimes the legislator quite deliberately leaves the more detailed regulation of some legal issue to be specified through the self-regulation of the group of individuals or institutions concerned, with reference to the "organically" evolving professional practices and semi-autonomous criteria entailed in the professional standards adopted. The settled norms, practices, and usages that guide the professional standard of *due diligence* in book keeping, accounting, and stock exchange are examples of professional self-regulation that is formally recognized in legislation. Since the breakthrough of modern codifications of law at the late eighteenth and early nineteenth century, the role of customary law has been in constant retreat in the Western world, however, providing no more than a supplementary source of law in cases where there is no legislation or settled precedent on the issue.

Due to the rapid pace of change in modern society, legislation tends to lag behind the needs of legal intervention. As a consequence, there will be gaps in the coverage of future cases by the statutes and precedents. Moreover, the normative impact of legislation may be evaded by the adoption of *arbitration clauses* of either substantive or procedural (or both) kind in the private law transactions. Arbitration clauses are favoured in business-to-business transactions because of their claimed advantages in terms of the swiftness, higher professional quality, and better confidentiality of the decisions thereby rendered, on the one hand, and because of the corresponding disadvantages of the normal judicial process, on the other, i.e. the non-predictable and non-expertise character of the ordinary courts when dealing with highly complicated issues in commercial transactions.

As to their normative function, customary norms are more affiliated to value-laden principles and standards of law than to clear-cut legal rules on three grounds. Firstly, the norms of customary origin cannot be initially created, subsequently altered in content, or ultimately derogated by an act of will of the legislator or a court of justice. Secondly, and related to the first point, customary norms cannot be identified by some formal criteria only, as exemplified by Hart's rule of recognition. As with legal principles, the criterion of enjoying (some kind of) institutional support and content-based sense of approval in the legal community in question is enough, to the effect that such conventional practices cannot be formalized or locked in a rule-like criterion without distorting the issue. Finally, customary law often cannot be captured in the form of a single, authentic, and authoritative linguistic formulation. Rather, the exact linguistic formulation of a legal custom may vary from one context of application to another.

[56]The normative impact of customary law is expressly acknowledged in Article 11 of Chapter 1 of the Finnish Act of Judicial Procedure: "The judge shall carefully consider the right grounds and purpose of the law and give the verdict accordingly, but not against it or according to his own mind. The customs of the land shall also be his guide in giving the verdict, if there is no legislation on the issue." (Translation by the present author.) The said article of the (Swedish and) Finnish law dates back to year 1734.

8.8 Legal Conventionalism and Legal Argumentation Theory

Legal conventionalism, as defined here with reference to the common acceptance or recognition of certain social phenomena as having legal significance or as a set of mutual expectations and cooperative dispositions among the members of the community, is primarily based on the role of *non-institutional*, societal, and community-aligned sources of law. Thus, it gives effect to customary law, such as *lex mercatoria*, and the *profession-specific* standards of good practice and due diligence in the various branches of law. The (semi-)autonomous self-regulation by some profession, such as the ethical guidelines of good professional practice adopted by the attorneys-at-law, book-keepers, auditors, and stock brokers, may have been officially acknowledged in legislation.

Rephrasing the issue in William James' philosophical pragmatism: what difference does it make as to our methods of constructing and reading the law, if the premises of philosophical conventionalism were fully extended to the field of law? According to Govert den Hartogh, conventionalist legal arguments entail[57]:

(1) the argument from the meaning of the legislative statement,
(2) the argument from subjective legislative intention,
(3) the argument from substantive values,
(4) the argument from principles,
(5) the argument from substantial conventions,
(6) the argument from analogy,
(7) the argument from precedent.

As such, they do not differ much from the types of argument that are recognized and given legal effect in the standard legal doctrine. In fact, a conventionalist approach to the law will not to any significant degree alter the method or the resulting outcomes of legal analysis, when compared to the conclusions attained by the *Bielefelder Kreis*, based on a combination of the premises of analytical legal positivism and the new rhetoric, as den Hartogh openly admits.[58] If the constitutive criteria of law, such as the rule of recognition in Hart's analytical jurisprudence, are read in a conventionalist manner, a conventionalist approach to the law may be taken as a subcategory of Hartian legal positivism with a dint of the new rhetoric à la Perelman and the *Bielefelder Kreis*.

The priority given to the non-institutional, societal, and community-created sources of law over the institutional ones under legal conventionalism, strictly defined, may prove hard to justify in a modern legal system. A set of institutional

[57] den Hartogh, *Mutual Expectations,* pp. 221–230.

[58] "This study [by the *Bielefelder Kreis*] resulted in a list very closely resembling the one I developed in this chapter. I take this to be a corroboration of the conventionalist account. Conventionalism can go beyond the mere enumeration of forms of legal argumentation, and provide an explanation of their use." den Hartogh, *Mutual Expectations,* p. 230. – Cf. MacCormick and Summers, eds., *Interpreting Statutes. A Comparative Study*, pp. 512–525.

premises in law, such as ratified state treaties, national constitution, statutes, administrative regulations, and precedents, are commonly identified as having primacy in a modern conception of law. Any other arguments or sources of law that fail to show such an institutional backing are taken as *supplementary* sources only, to be adopted if there is no legislation (*sensu largo*) or precedents available on the issue. Still, the impact of non-institutional sources of law has survived, despite the vast volume of legislation and precedents. The reasons are fairly obvious: the legislator or a precedent-issuing court of justice can never hope to gain complete coverage of the diversified, highly complex fact-constellations in the modern society by means of *ex ante* enactments. Therefore, other legal or quasi-legal instruments are needed, too.

Moreover, the key role given to the value-laden principles of law in the decisions by the Court of the European Union and the European Court of Human Rights have boosted the impact of principle-oriented legal argumentation at the cost of formally valid legal rules in the legal systems within the reach of the two European courts. The ideas promoted by philosophical conventionalism fit in that picture fairly well, or at least better than analytical legal positivism as conceived by John Austin, Hans Kelsen, and H. L. A. Hart.