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Law as an Artifact

Introduction

On a very broad reading, the idea that law is an artifact can be understood in the sense that law is artificial in character. In this sense it roughly means that law is posited or positive law, law understood as the creation of human beings, the product of human actions, and not something occurring naturally. However, a growing interest in the theories of artifacts within general philosophy (analytic metaphysics in particular) at the end of the 20th and the beginning of the 21st century (Lowe 1983; Hilpinen 1992, 1993, 2011; Dipert 1993; Thomasson 2003, 2007, 2009, 2014; Rudder Baker 2004, 2006, 2008, 2010; Elder 2007; Houkes & Vermaas 2009; Preston 2009, among others) and social ontological theories (especially Searle 1995, 2010; Tuomela 2002, 2007, 2013) prompted legal philosophers (both legal positivists and natural law theorists) to inquire into the ontological implications of the thesis that law is an artifact, i.e. to explicate, by using the conceptual apparatus of these theories, what kind of an entity law is and what its specific mode of existence amounts to (Burazin 2018: 112). On this reading, the idea that law is an artifact can be understood in the sense that law is a (social) mind-dependent entity, in the sense that the mental states of its creators (and perhaps users) and the concepts on which these states are based are (at least partly) constitutive of its existence. In other words, in the sense that law not only causally, but also existentially or ontologically depends on its "authors'" mental states and concepts (Burazin 2018: 112-113; Marmor 2018: 59).

Although all the inquires into the ontology of law as an artifact have as their object 'law', some of them specify their object as law in the sense of laws or legal norms (Crowe 2014), some as law in the sense of legal institutions (Roversi 2015, 2018), and still others as law in the sense of legal systems (Burazin 2015, 2016, 2018). In addition to this, 'law' is in these inquiries usually considered a kind (or a genre) of artifact, and 'laws', 'legal institutions' and 'legal systems' its instances or instantiations, i.e. artifacts belonging to the kind law (Gardner 2004: 171; Finnis 2018: 1; Crowe 2014: 751; Ehrenberg 2016: 192).

In what follows, the main attributes usually ascribed to law as an artifact kind through the analyses of the instantiations of law, such as laws, legal institutions and legal systems, within the contemporary jurisprudential accounts of the artifactual character of law will first be set out, after which some potential payoffs of the artifactual understanding of law will be indicated.

Artifactual Character of Law

According to some, the thesis that law is an artifact kind implies that the instantiations of law have authors and that they are intentionally created (Leiter 2011: 666; Ehrenberg 2016: 17, 122-123; Burazin 2016: 397), meaning that human mental states and concepts are (at least partly) constitutive of what, e.g. a legal system, legal institution or a legal norm is. These seemingly basic implications of the artifactual character of law also seem to be the most contested ones. Customary law (or laws) and the common law system are usually given as counterexamples of the supposedly unintentionally created instantiations of law that have no authors (Green 2013: 202 in response to Leiter 2011; Crowe 2014: 737, 739-740; Leiter 2018: 10-11, modifying his earlier view; Priel 2018: 244-254). In view of these objections and the fact that the instantiations of law (in particular, legal systems and customary law) often do not have precisely identifiable authors and that many people with different roles contribute over a long period of time to the emergence and continuous existence of such instantiations of law, some advocate a broader concept of (collective) authorship in order to include as authors a wide range of persons, including those who sustain the instantiation of law in question and its active users (Burazin 2016: 395-399, 2018: 120-122). Also, they understand the intention condition as implying the authors' collective intentionality in the form of collective recognition or acceptance (that a particular instantiation of law exists) and as allowing that a part (or even the greater part) of the coming into existence of a particular instantiation of law gradually emerges from a standing practice (Burazin 2016: 395-399, Burazin 2018: 114-122, 124-126; for a similar account based on collective intentionality see Crowe 2014: 743-748, although he counts neither collective acceptance as part of the intention condition nor those who collectively accept as authors). Others circumvent the problems arising from the authorship and intention conditions by seeing the artifactual character of the instantiations of law (in particular, legal institutions) in their, *inter alia*, being the outcome of a deliberative history tracing back to an intention-rooted (linguistic) creation process, the term 'process' capturing the fact that the creation of a legal institution can extend over time and involve several acts of different persons, and the term 'intention-rooted' referring to a broad variety of phenomena, ranging from a specific creative intention to a simple regularity of behaviour recognized afterwards as having constituted a legal institution (Roversi 2018: 95-96, 98, 2015: 219, 233).

A further implication of the thesis that law is an artifact kind is that law has some use or purpose which can be characterized as its function (Ehrenberg 2016: 86, 106, 120; Himma 2018: 136-138, Crowe 2014: 750-752). For some, this is precisely what makes law not only artificial but also artifactual in character (Himma 2018: 137-138). There are, however, different views on what that function is. Himma (2018: 147-154), for example, argues that the conceptual function of law is keeping the peace, Crowe (2014: 752-756) that the characteristic function of the artifact kind 'law' is "to serve as a deontic marker by creating a sense of social obligation", and Ehrenberg (2016: 197) that the function of law following from its artifactual and institutional character is "setting a framework for the specification,

recognition, and protection of contextually bound rights and duties within the widest possible social setting […], that is, the generation and validation of other institutions".

On the predominant view, law is considered a special type of artifact. Unlike "ordinary" artifacts, such as tables, chairs, and clocks, law is taken to be an institutional artifact kind (Burazin 2016: 397-399, 2018: 112-135 and Ehrenberg 2016: 32-36, 2018: 188-189; Crowe 745-748; Roversi 2015: 228, 2018: 98-99, calling legal institutions rule-based artifacts). This implies that the instantiations of law are norm-based and require collective intentionality for their existence, meaning that the necessary condition for their existence as institutions is the collective recognition or acceptance by members of the relevant community of constitutive norms which confer institutional status accompanied with relevant deontic powers (e.g. rights, duties, powers, liabilities) (Burazin 2018: 113). As an institutional artifact, law is a social arrangement "in which members have defined roles that carry specially created rights and responsibilities […], giving those subject to them new reasons for action" (Ehrenberg 2016: 32-33; see also Ehrenberg 2018: 188-189).

Law is also considered an abstract, immaterial (intangible) or intellectual artifact (Ehrenberg 2016: 11, 2018: 184; Burazin 2018: 113-114; Roversi 2015: 228-230; Marmor 2018: 45-51, 57-59; Tuzet 2018: 223-226). It is abstract in the sense that it is not ontologically material and not perceivable as material objects are (Tuzet 2018: 223-224). Law has an important semantic aspect in that it "consists of a set of concepts specifically created to organize, define, empower, and limit human behaviour in a complex social setting" (Roversi 2015: 228). It is "not identical to any specific set of physical entities" (Ehrenberg 2016: 11). For instance, a legal system would not cease to exist if all its original normative texts (sources) were destroyed (Burazin 2018: 113-114).

Moreover, it is said that law is also a public and social artifact. It being a public artifact means that law is intended to be recognizable as law to the intended audience, i.e. law-addressees, and that as such it carries certain norms of recognition, i.e. norms on how it should be recognized or identified (Ehrenberg 2016: 31, 2018: 184-188, following Thomasson 2014: 50). It being social means that "it only exists in a society and for social purposes" (Tuzet 2018: 227).

Finally, although human mental states (in particular the intentions and beliefs of the members of the relevant community), collectively shared, constitute what law is, the prevailing view is that law cannot (effectively) exist if these mental states are not realized in practice. Some state this view by arguing that law does not (effectively) exist if it is not capable of carrying out its characteristic function (Crowe 2014: 748-753) or its interaction plan, i.e. the way norm-addressees are supposed to interact with law (Roversi 2018: 96-97), to at least some extent. Others argue that law does not really exist if the collective recognition which determined its ("intended") character had not been largely successfully realized, which is manifested precisely in officials and citizens actually using law, i.e., in their

social practices which are based on the collective recognition that law exists (Burazin 2018: 129-134).

Theoretical Implications of the Artifactual Character of Law

The inquiry into the artifactual character of law or, as some call it, the artifact theory of law (Burazin 2016; Crowe 2014: 756; Roversi 2018: 89) seems to have some potential payoffs for descriptions and explanations of law and our understanding of it.

The understanding of the artifactual character of law, law's dependence on human mental states and needs can, for example, facilitate jurisprudential explanations of why the concept of law cannot be static in character (Burazin 2016: 388) and why there can be different, culture-dependent concepts of law (Schauer 2018: 35-36). Since human beliefs, intentions and interests can change over time and can be different at different places, the concept of law is also susceptible to historical and cultural developments and changes. Once it is recognized that our concepts of law are contingent, there is no reason why there could not be different concepts of law, e.g. one treating and the other not treating moral acceptability (or, indeed, something else) as a condition of legal validity (Schauer 2018: 36). Also, there seems to be no reason for holding that law (in the sense of law wherever and whenever it appears) has some essential or necessary properties. These insights might then perhaps direct our descriptive jurisprudential inquires towards identifying the important but necessarily contingent features of law, instead of attempting to discover the necessary or essential features of law wherever and whenever it appears (Leiter 2011: 669-670, 2018: 7-15; Schauer 2012: 458, 2018: 30; Burazin 2015: 73; however, for an opposite view, see Murphy 2015: 124-127; Marmor 2018: 51, arguing that artifacts do have essential features at least at a commonsense level). Also, if, given the artifactual character of law, human concepts play a vital role in determining the "nature" or character of law, this might provide additional support for and justify the use of conceptual analysis when theorising about the nature of law, but at the same time might also call for supplementing conceptual analysis with experimental philosophy, i.e. finding out what people really think about law (Burazin 2016: 387). The recognition that our concepts of law are contingent could also, as some claim, open up the possibility of a different kind of normative jurisprudential enterprise, the project of prescribing conceptual revision, i.e. an "enterprise that would consist of *prescribing* what some revised concept ought to be", where prescriptions could be based on considerations other than the moral ones (Schauer 2018: 38). A theorist could, for example, "urge that it would be preferable to understand some phenomenon differently from the way it is now understood – to have a different concept from the one we now have" (Schauer 2018: 38).

In addition to this, some point to the epistemic consequences of the artifactual character of law. If law, as an artifact, is created by people, and if its "nature" or character is constituted by our concept of it and our collective recognition of its existence, then we

cannot have fundamental errors about its "essential" features (Marmor 2018: 49, 59). This does not imply that people cannot be wrong about the ontology of law, i.e. about what makes something be law (Marmor 2018: 49, 59; Burazin 2018: 126), but it does imply (*contra* Dworkin 1998: 3-6) that there cannot be fundamental "theoretical" disagreements about what law, as a kind, is (Marmor 2018: 59-60).

Furthermore, some claim that if the artifactuality of law implies that law by definition has some purpose or function, then one of the tasks of legal philosophy is to engage in the functional analysis of law, i.e. to explain law's function(s) and to understand law's "nature" or character in terms of those functions (Ehrenberg 2009: 91, 2016: 1-2, 86, 106, 120). The understanding of the artifactual character of law can, for example, attract much more theoretical attention than before to the question of whether law has a conceptual function and, if it has, what that conceptual function is, thereby staying within the legal positivistic tenets (Himma 2018). However, accounting for law's artifactual nature in terms of its function, e.g. by arguing that something cannot count as law if it is not constitutively capable of performing its purported function of creating a sense of social obligation due to its content, can also be used to vindicate a version of a natural law theory (Crowe 2014).

According to some, the artifact theory of law (or at least a particular version of it) can coherently accommodate some of the seemingly opposed insights of (formalistic) legal positivism (the need for objectivity of law and legal certainty) and (antiformalistic) legal realism (the need for actual acceptance of law and legal effectiveness), which makes it "a crucial link in the chain of explanation of legal ontology" (Roversi 2018: 99). In particular, a deliberative history of the intention-rooted creative process of legal artifacts can, as an objective fact, account for the objectivity of law and legal certainty, and collective acceptance or recognition, which enables a legal artifact to fulfil its function or carry out its interaction plan, can account for legal effectiveness (Roversi 2018: 103-105).

Finally, some emphasize that the understanding of the artifactual character of law and especially its public and institutional aspects can help better explain normativity of law (i.e. law's purported ability to create new reasons for action). Normativity of law is deemed to be explainable by the public aspect of law's artifactual character, i.e. by the fact that law is intended by its "creators" to be recognized as law (Ehrenberg 2018: 184-185), and by the special purpose of institutional artifacts, i.e. that of giving people subject to them "desire-independent reasons for action" by attaching "special statuses to people, events, objects, or states of affairs" which are accompanied by sets of deontic powers "to alter the rights and responsibilities of those within the ambit of the institution" (Ehrenberg 2018: 188-189; see also Ehrenberg 2016: 8).

Conclusion

The thesis that law is an artifact has several implications: that the instantiations of law have authors and are intentionally created, that law has a function, that law is a special type of artifact, i.e. an institutional, abstract, public and social artifact, and that law cannot exist if it is not socially efficacious. The inquires into the artifactual character of law that reveal these implications seem to have some potential payoffs for the understanding of law (e.g., of the dynamic character of law, contingency of the concept of law and law's properties, and normativity of law) and of our epistemic relation to law (e.g., of the immunity from massive error about what law is). They also seem to have an impact on the jurisprudential methodology (e.g., by directing us to non-essentialist ontological inquires into law, emphasizing the functional explanation of law and the need to combine conceptual analysis and experimental philosophy, and opening up the possibility for the project of prescribing conceptual revision) and to accommodate some of the seemingly opposed insights of the current theories of law (e.g., by accounting in a coherent way for both the objectivity of law and its effectiveness).

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