Some Consequences of Law's Artifactuality: Comments on Roversi's Theory

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Abstract

Roversi's theory of law as an artifact raises some interesting questions, some of them concerning what kind of analysis follows from the characterization of law as a socio-ontological entity, if any. In this paper, I will present some remarks regarding the different ways to understand the artifactuality of law, and how they may affect our theories to explain legal phenomena and legal institutions. Against the scepticism about legal phenomena founded in its artifactual character, I will argue that this premise, as it is defended by Roversi, actually takes us closer to a non-sceptic kind of analysis. Then, I will defend the idea that a conceptual analysis of law as an artifact needs to provide an explanation of the changeability of law and legal institutions and I will present different candidates to that purpose. Finally, I will consider whether the relation between structure and function – present in every artifact – can affect the unity of Roversi's theory.

Keywords: Law as an Artefact. Conceptual Analysis. History. Function. Structure.

1. Introduction

In recent works some legal philosophers have defended, under different versions, the idea of law as an artifact. While that statement is not entirely new, their novelty resides in the way they have enriched this discussion by introducing different philosophical theories of artifactual ontology[1]. The general thesis shared by the theories of law as an artifact, is that law – whether if by using this term we are referring to legal systems, legal institutions or the very concept of law – is a human

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[1] See Burazin, Himma, Roversi 2018.

creation of some special kind; one in which the interconnections among intention, function and history seem to play a key role.

Along these lines, Roversi's «*Law as an artifact: three questions*» presents an insightful contribution to legal philosophy, insofar as he develops the distinctive features, as well as the advantages and limitations. of an artifactual theory of law. The author addresses three questions concerning the artifactual character of law and its analysis in terms of artifactual ontology. First, he considers and defends the possibility of a unified theory of law as an artifact, combining the main currently existing versions of it. Then he critically examines the explanatory possibilities of this theory, pointing out its advantages and problematic aspects. Lastly, he tackles the issue concerning how fruitful can an artifactual theory of law be, in comparison with other socio-ontological approaches.

The aim of this paper is to discuss possible implications of applying this kind of theories to the analysis of legal phenomena. Some of these implications may derive from attributing (any) certain ontological nature to law, while others can be seen as a consequence of Roversi's view in particular. I will start by pointing out two observations based on some aspects of the ontology of artifacts in general, drawing from this some tentative conclusions about the kind of analysis of law this ontology allows to make. While the first of these ontological observations addresses the relations between artifactuality of law and conceptual analysis of law, the second one deals with the changeability – or, as Schauer calls it – the malleability of artifactual concepts and, again, how is this reflected on the kind of analysis an artifactual theory of law gives room to. Both comments can be derived from the artifactual ontology of law and can be linked with artifactual theories of law in general. I will conclude introducing a final observation, based on the relation between structure and function of the artifact law/legal institution and assess how this can affect the unity of Roversi's theory, considering the inclusion of a functional account of law as an artifact.

Roversi presents a solid and coherent version of a theory of law as an artifact. Its strength relies, in my opinion, on two methodological choices: the first one consists in the construction of a general and unified theory of law as an artifact, as a set of theses, kinds of explanations and propositions that combine the three main elements of artifactual ontology: intention, function and history. The second methodological choice that contributes to the strength of the theory consists in placing it alongside with other ontological explanations of law, as an approach that isn't in competition, but completes instead the account of law in terms of its social ontology. Let me begin by a very brief review of his work.

Roversi starts by locating the questions about the possibilities and advantages of an artifactual theory of law within a wider problem, namely, the ontological problem. Whatever the scope of an inquiry into the nature of law may be, what is shared – with a few exceptions – by sceptic and non-sceptic conceptions about that sort of

inquiry, is that law is an artifact, so it doesn't only make sense but it is fundamental to know what we talk about when we make this assertion and what are the consequences of it. He tackles this task, as said before, by analysing three questions. The first one is an inquiry into the existence of either several or, instead, one unified theory of law as an artifact. After presenting the main versions of these theories, and their respective philosophical background, he explicitly defends the second of these choices and proposes a unified theory of law that encompasses the intentional, the functional and the historical features of law. While there might be significative differences among the artifactual theories of law that he describes and takes into account, he considers that this «[…] partial difference in focus, however, does not imply that the relative theories cannot be combined. Indeed, they can be conceived as more or less specific ways to describe law's artifactuality»[2].

This unified theory is the first step to fully get into the analysis of the real advantages and limitations of an artifactual account of law. The advantages can be seen in the way an artifactual theory of law solves three classical problems in legal philosophy: first, it contributes to an account of law's normativity; second, it explains the dialectic between construction and recognition/enforcement of law – a dialectic that is expressed by the formalist and realist account of law as two distinct aspects of the same phenomenon – and; third, it explains legal interpretation, specially the dialectic between originalist and teleological accounts. However, Roversi also notes the problematic aspects of this kind of analysis of law: it has problems explaining both authority – for designers' or creators' epistemic or conceptual privilege cannot be taken as authority –. And, lastly, it also has some problems explaining unintentional or customary aspects of law, although there are some possible answers to this last kind of problems.

Finally, given the previous balance of advantages and problems an artifactual theory of law presents, Roversi evaluates the advantages of an artifactual account of law in terms of what can be added to a more general theory of social ontology. Theories about artifactual ontology are, after all, theories about a particular kind of social entities and law – or some aspects of it – has already been explained as a social institution or as an institutional fact. So, what is the contribution of this particular kind of theory of social ontology? Roversi, after addressing some objections related to this problem, concludes that, besides from strengthening a functionalist analysis of law and supporting the use of conceptual analysis of law, an artifactual theory of law gives an account of the objectual aspect of legal institutions as symbolic normative objects.

[2] Roversi 2019: 52.

2. Theorizing about Artifacts: Conceptual Analysis and Accounts of Change

I agree with the possibility of analysing legal phenomena, legal institutions and the concept of law in terms of artifactual kind of objects or artifactual concepts, respectively, for it captures and, most of all, stresses the character of being socially created and the interconnections between intention, function and history, all of them crucial to a fully understanding of law's ontology.

However, accepting this ontological character of law may have certain consequences that need to be addressed. Let me start with the two issues related to the ontology of artifacts and the kind of analysis an artifactual theory of law can pursue: the first issue deals with the possibility of a conceptual analysis of law in terms of necessary or essential properties, and the kind of explanation an artifactual theory of law can give; in other words, are artifactual theories of law committed to the necessary character of the elements of law – either legal systems or institutions – that aims to explain? Aware of this problem, Roversi says: «While the so-called "ontological problem" […] has always been a part of legal philosophy, several important legal philosophers have been raising significant doubts about the possibility of addressing the question in a meaningful way»[3]. Despite the fact that some theories of law ground their scepticism about law's *nature* on the artifactual character of law, Roversi builds his theory on a certain socio-ontological view and this is a way of inquiring into law's nature. This means, in Roversi's reconstruction of the sceptical conceptions of law, that «If there is one element these statements clearly share, it is their assumption that law is an artifactual entity, or rather, that its *nature* is artifactual. Hence, it seems that behind all these sceptical conceptions there lies at least one tenet about the nature of law, namely, that law is an artifact»[4]. He comes back to this idea at the end of his paper, when assessing the relevance and advantages of these theories, since he considers that one possible additional positive aspect of it could be that if the nature of law depends on creative intentions, «[…] this insight might provide additional support for and justify the use of conceptual analysis when theorising about the nature of law»[5]. This, however, and as Roversi himself notes immediately after, is what authors like Leiter and Tamanaha precisely deny due to the artifactual character of law. This, of course, is a critical issue for many kinds of analysis of law, and I'm not suggesting that is a problem only present in theories of law as artifacts: the possibilities of a conceptual analysis of law constitute a more general methodological kind of problem. But I do think it is important to stress that there are two distinguishable understandings of the artifactuality of law and each one of them arise different questions and poses different difficulties:

[3] Roversi 2019: 42.
[4] Roversi 2019: 42.
[5] Roversi 2019: 62.

one of them admits the possibility of some necessary elements of law, even if these aren't of course essential in the same way elements of natural objects are. The other one, while founded on this artifactual character of law, stresses its dependence on human acts and their interests and the incompatibility of this with a possibility of inquiring what are the necessary elements of law, in other words, what is the nature of law. The difference is clear and, most importantly, it leads to radically different conclusions about the *nature* of law, about whether there is even such a thing and about the methodology adequate for its analysis.

Conceptions as Leiter's or Tamanaha's about the artifactuality of law emphasize this characteristic as one that excludes the possibility of even inquiring into a certain nature of law. The mere fact of accepting that law is a human creation, subject to historically and intentionally determined changes and with functions ascribed according to authoritative reasons, demonstrate that nothing such as necessary elements of law can be found, for such an inquiry would entail a contradiction: humanly created objects don't have and cannot have necessary features. Let's illustrate this kind of theorizations. Leiter, for instance, correctly considers that human artifacts answer to human interests, and then adds: «[...] thus their nature and character is hostage to changing needs and wants. Even so, we can try to take a conceptual snapshot of these artifacts that answers to our current concerns. We can try to say what an artifact is *here and now,* with the boundaries of the characterization to be specified»[6]. Leiter's analysis is, actually, a defence of legal positivism and, as such, argues about issues somewhat different to those at stake here[7]; however, the particularity of this analysis is that he incorporates a metaphysical point as part of his argument, namely, that law is an artifact and artifacts can be made of almost anything. The main and decisive difference between natural and artifactual kinds is paramount in Leiter's view: while natural kinds typically have micro-constitutions – something that determines that certain objects belong to that specific kind, artifactual kinds do not –: «Things on the artifact side of the divide, needless to say, do not have distinctive micro-constitutions, but perhaps they can have essential or necessary properties of some other kind?»[8]. After rejecting the possibilities of some sort of artifactual necessary property based on functions of the type "artifact" or on the notion of an intentional author/creator, Leiter denies this possibility. What would be, then, the feature that determines, according to him, that a given object or phenomenon belongs to the artifactual kind? He answers this question giving a concept of artifacts sufficiently broad to avoid some of the problems he detects

6 Leiter 2018: 15. See also, Leiter 2011: 666.

7 The discussion between positivistic and non-positivistic theories of law deals with fundamental issues concerning the demarcation between law and other normative domains. The ontological question of law is not necessarily exhausted, however, by the issue of demarcation.

8 Leiter 2018: 9.

when we identify artifacts with either a given function or with an author's intention. According to his view, we should «think of the category of "artifacts" more broadly, as the category of phenomena that result from human action, which are responsive to human interests, and which are not otherwise natural kinds»[9]. However, this is a suggestion as to what concept of artifact would be useful to understand law on those terms, but it does not solve yet the problem of the distinctions between natural and artifactual kinds, something that nevertheless seems to be decisive in his argument. It appears to be three important aspects about the artifactuality of law in Leiter's analysis: first, that law as a type falls under the artifactual kind of objects and artifacts, as just stated, are phenomena or objects that result from human action which are responsive to human interests. Second, natural and artifactual kinds are distinct not because the objects pertaining to each kind have different nature, or different essential features, but because the former do have them, while the latter do not. Third, the distinction between natural and artifactual kinds may be gradual, but this is not enough reason for abandoning it. This is clearly the idea expressed in the following paragraph:

> [...] there is a way to mark the artifact/natural kind distinction, which seems to commit me to artifacts having some necessary features after all. Everything turns here on the sense of "necessity": if the artifact/natural kind distinction is theoretically fruitful, as I think it is, then we need to say what that distinction is. As with natural kinds themselves, on the Quinean view, the boundaries could shift: in that sense, they are not necessary. But as theorizing stands today, if artifacts have essential features or functions, then someone should name them![10].

Another example of this understanding of the artifactuality of law can be found in Tamanaha's work – though his thoughts on this are somewhat different to Leiter's and so are the consequences of each of those views –. Tamanaha considers that

> There is no unique way to categorize social artifacts, so we should not expect there to be a single correct concept or set of characteristics. The inability to fix groupings shows up in the fact that each theory of law fastens on a different set of features, i.e., governmental social control, institutionalized norm enforcement, union of primary and secondary rules[11].

This paragraph shows, as well as for Leiter, an understanding of the artifactuality of law in such a sense that excludes the possibility of finding necessary elements of law. In the same way as before, in this case there seem to be no way of fixing an

[9] Leiter 2018: 11.
[10] Leiter 2018: 14-15.
[11] Tamanaha 2017: 60.

artifactual kind by some necessary features. Artifactuality here, once again, doesn't have essential characteristics whatsoever.

Theories as the ones developed by Roversi, Burazin, Ehrenberg, however, can't be taken as sceptical at all because the acknowledgment of law as a particular kind of artifact is precisely the starting point of an inquiry into its nature – or character, to put it on less essentialist terms –. This is why Roversi explores a wide range of philosophical accounts of artifacts: these are not sceptical philosophical conceptions about social ontology, but theories built on the necessary elements of different fragments of the social world. Looking at the first question addressed in his work, concerning the possibility of a unified theory of law as an artifact, it is made clear that his understanding of artifactuality does not commit him to a sceptical conception of law. The different approaches of artifactual ontology conveyed by his view can explain several aspects of legal phenomena as a kind of artifact. The fact that the former is part of the latter is not a contingent feature of a particular legal system.

These theoretical considerations in Roversi's view, show a different understanding of the artifactuality of law. Compared to the previous notion, in this case: first, the type law – legal institutions, the concept of law and legal systems – are a specific type of artifactual objects. The concept of artifact may vary to some extent, but this is not problematic. Second, the main difference is that the distinctive feature of artifacts is not characterized as a lack of essence, but as a different and complex one. Finally, as for the distinction between natural and artifactual kinds, this is not an issue especially developed by Roversi, as a consequence of the previous point: inquiring into the socio-ontological kind that law belongs to – and its necessary features – is a theoretical enterprise that is not threatened by its distinction from natural kind objects. To sum up, this understanding of the artifactuality of law, endorsed by Roversi as well as by other proposals along these lines, starts from this general assumption to look into the nature of an object of social kind.

Now, if it is possible to ask questions about law's artifactual nature, or law's essential – and artifactual – features, this amounts to say that conceptual analysis of law as an artifact is a possible and valuable endeavour. At his point, given the assumption of an artifactual character of law as presented by Roversi, it might be asked what sort of conceptual analysis can this admit?

In addressing this issue, it would be useful to make use of Jackson's categories of modest and immodest conceptual analysis in order to ask ourselves to what extent is conceptual analysis of an artifactual kind of object – such as law – possible. According to this philosopher, conceptual analysis can be given either a modest or an immodest interpretation. An immodest interpretation of conceptual analysis draws a conclusion about the nature of the world. From a different – and modest – perspective, however, we would be giving an account about another statement that belongs to our discursive practice. The immodest role or immodest interpretation of conceptual analysis is discarded by Jackson, for he believes that it draws

conclusions too strong to hold about the world and, besides, impossible to demonstrate – for what could we possibly demonstrate by means of a language and a way of thinking that is not our language and our way of thinking? How could we even talk about such a thing? –. He, then, says: «[...] the role for conceptual analysis that I am defending in these lectures is the modest role: the role is that of addressing the question of what to say about matters described in one set of terms *given* a story about matters in another set of terms»[12].

Posing and examining this question is important in order to take into account some of the consequences of an analysis of this kind. In this sense, stating that a given phenomenon or kind of object has a certain property is not coherent with the denial of the existence of any property that can be taken as necessary, even if by "necessary" we should here understand constant in any possible world that would be *understandable to us*.

It is important to note that this is not an objection to Roversi's theory. As a matter of fact, I think these tentative observations are absolutely compatible with his view. Furthermore, his theory, in my opinion, can only be properly understood as a non-sceptic theory of law, and of law's ontology. The point is not only about a discussion between sceptic and non-sceptic conceptions about law's ontology and how the premise of artifactuality can be understood from one or the other point of view. The interesting question is, rather, whether this premise entails either a sceptic or a non-sceptic point of view about law and I think the latter interpretation to be much more promising than the former.

The second issue related to the ontology of artifactual kinds bears a connection with the changeability of artifactual kind concepts and, also in this case, how this can have an impact on the scope of the analysis. The problem, here, has to do with the possibility of accounting for change in law – and, in consequence, for changing concepts – and whether this is possible or not from an analytical perspective. There are, indeed, different possible features of artifacts that show how phenomena of this kind is variable, context dependent at least to some extent. But one of the key features of artifactual objects is that they change through time and usage. This is a crucial point when pursuing a philosophical analysis of these kind of objects. And it is also why we can find at least some theories about artifactual ontology that take this – the temporal or historical character of this objects – as a decisive criterium. Roversi's unified theory of law as an artifact encompasses a historical-intentional kind of analysis, especially useful to explain the ontology of legal institutions. Drawing on Dipert, he says that,

> [The] insistence on phenomena of repurposing, modification, and diachronic evolution also figures centrally in my own "historical-intentional" model of the arti-

[12] Jackson 1998: 44.

> factuality of legal institutions. This model takes up Dipert's concept of "deliberative history" by tracing artifactuality to a historical property rooted in an original "creative process" consisting of authorial intentions and in a series of further modification, reinterpretation, and development processes: legal institutions are therefore, on this view, the outcome not just of an original authorial intention but also, and more significantly, of a *history* of intentions[13].

When Roversi develops his historical-intentional account of law, he talks mainly about legal institutions and how these change over time, due to explicit decisions of the authority, or to the use of the institutions or even both factors. This is a possible path to explain the temporal feature of law's artifactuality. I will here present three more theoretical models aimed at explaining this particular feature of law as an artifact. After doing so, I will assess the possibility of considering these theoretical projects as models of conceptual analysis.

Talking about a changing artifact, such as law, amounts – at least partially – to explaining that we talk about a changing concept as the same one and, moreover, that we are referring to the same phenomena in a fundamental sense. The point is not irrelevant, and it raises an important methodological question, suggested above: if the object that we theorize about is one that changes over time, how is it possible to do this from an analytical perspective? In other words, can we somehow make conceptual analysis about a temporally changing object? Let's first consider Schauer's work on the artifactuality of law. Schauer makes the distinction between a descriptive conceptual analysis and a prescriptive one, saying that the latter consists in an evaluation of what we want that concept to be. The value of this last kind of analysis, rests on the possibility of deciding – to some extent and with obvious limitations – what "direction" do we want the concept to take. Even if this is not a way of saying that a concept of law – or whichever concept – is whatever we want it to be, it acknowledges one important role to a normative-theoretical project, one that is built upon the concept of law we have within our own culture. His idea of the kind of legal theory that can account for the temporal changes of the concept of law in a prescriptive way, is clear in the following paragraph:

> Because our concepts might be at some future time different from what they now are, then there is, in theory, an enterprise of concept revision, and, therefore, another enterprise that would consist of prescribing what some revised concept ought to be […]. Insofar as all of this applies as much to law as to any other artifact, we can now see that one form of normative legal theory would be that of prescribing what our concept of law ought to be. How should a culture understand law, and should it understand law in a way that is different from the way it now understands it? Insofar as a theorist might wish to answer or at least address this question, she can be said

[13] Roversi 2019: 51.

> to engage in a particular form of prescriptive or normative legal theory, prescriptive or normative not at the level of specific laws or legal institutions, but at the level of a more global understanding of the concept of law itself[14].

Sally Haslanger defends a similar idea through her proposal of an ameliorative analysis of concepts of social kind. While conceptual analysis in philosophy can involve different kind of theoretical projects – descriptive, normative, etc. – part of deciding how our analysis will be depends on certain characteristics of the concepts themselves and, also, on some methodological assumptions. In the case of concepts of social kind – particularly those whose use has a decisive political impact, like "race" and "gender" – she defends the relevance of a conceptual analysis, as well as a descriptive one. But, besides from this, the philosopher talks about an ameliorative analysis of concepts, one that assumes that the only relevant description of what something, is not reduced to a dominant manifest meaning of a term. This explains why a genealogical inquiry into the history of use of the concept becomes of significant importance in order to evaluate what do we want some of our concepts to be. In her own words:

> The genealogist is especially keen to explore cases in which the manifest and operative concepts come apart, that is, when the operation of the concepts in our lives is not manifest to us. If one assumes that the task of philosophical inquiry is simply to explicate the dominant manifest meaning of a term, then any genealogical inquiry – almost any externalist inquiry – will seem revisionary. But philosophical inquiry – even philosophical inquiry that takes its goal to be the analysis of our concepts – should not define itself so narrowly, or else it is in danger of collapsing into lexicography (an interesting endeavour, to be sure, but not our only option)[15].

Finally, also Lariguet argues for a model of philosophical investigation that combines conceptual and historical analysis. In a nutshell, the philosopher thinks that philosophical investigation can combine both conceptual and historical analysis, without having to face any dilemma between one another: the historical aspect of it, would demand an investigation of the history of use of the concepts of philosophical interest, while the conceptual aspect of the analysis it is linked to its necessity and its universality: «History, from an analytical perspective such as the one I defend, is valuable; but it is so insofar as it's true that it helps us to better understand our problems […]»[16]. We deal with concepts, from this point of view, because we are interested in its referential anchorage and their history of use is relevant in that

[14] Schauer 2018: 38.
[15] Haslanger 2005: 19.
[16] Lariguet 2016: 233.

regard[17]. The image is completed with a notion of necessity based on a kripkean view: something can be necessary and *a posteriori*, or contingent and *a priori*. Both these categories would allow us to think about elements of law – as a changing artifact – that are necessary but regarding which we still don't have full knowledge and also about contingent elements that define some features of our concrete legal practices as they are.

What observations can we draw from these synthetized different versions of philosophical analysis of changing concepts? After having gone through these different accounts, can we arrive at some interesting conclusions about the possibility of a conceptual analysis of law as an artifact, focusing now on its changeability feature? I think the first thing that needs to be acknowledged is that a theory of law as an artifact such as Roversi's, presents at least one possible account of the changeable character of legal phenomena and, in particular, of legal institutions. This is particularly clear if we focus on the historical-intentional approach to artifactual objects, because this model can explain such objects through their deliberative history; however, the account for change is not excluded from the other approaches considered. Take, for instance, the case of the functional approach: the functions can and do change and a unified theory of law as an artifact can take this fact into account, without losing the possibility of finding necessary conceptual features of law.

There is an example – a sort of problem presented by Roversi as a case that his theory can solve –, that can be understood in this way. One of the advantages an artifactual theory of law is considered to have in explanatory terms concerns the dialectic between production and recognition/enforcement of law. Roversi's proposal is that this dialectic should be understood in light of the double existential dependence of immaterial abstract artifacts – an analysis developed by Thomasson to deal with this kind of objects –[18]. This requires that we consider two different types of ontological relations: on one hand, an historical dependence on production and, on the other, a constant dependence on collective recognition. When thinking about the production/recognition pair as explained by these two diverse relations of dependence, we are acknowledging that a theoretical approach can account for two perspectives that can seem incompatible at first sight.

It could still be argued that the elements tracked by any of the approaches here unified in a theory, are only necessary inasmuch as we are talking about a particular legal institution or legal system, in a specific moment and place. However, I think it is possible to interpret Roversi's theory as compatible with a wider analytical scope, such as the one proposed by Lariguet by the combination of historical and conceptual analysis. The advantages and limitations of such an approach would

[17] Lariguet 2016: 234.

[18] Roversi 2019: 54-55. For the distinct types of dependence relation, see Thomasson 1999, chapter 2.

need further evaluation that can't be made here. But examining this possibility is certainly a fruitful theoretical task given, first, the artifactuality as a certain social ontological structure and, second, the possibilities of conceptual analysis of historical and changing aspects of law. If this is the case, two more consequences follow: first of all, the artifactuality of law is not a reason for abandoning any attempt of conceptual analysis in terms of necessary elements of law, but a starting point for exactly that kind of analysis. Second, the changeability of law – legal phenomena in general and the concepts used to refer to it – don't suppose a problem for conceptual analysis if we re-define what constitutes a necessary element of a social and artifactual kind of object.

3. A Unified Theory of Law as an Artifact: Some Inquiries into The Functional Approach

In the previous section, I made two observations given the artifactual character of law. I would now like to briefly comment on Roversi's proposal as a unified theory and whether this is compatible with some aspects of the functional approach. The aim of this last comment is to evaluate some discussions about the possibility of functional kinds and the relation between function and structures, and whether these issues can affect the thesis of a unified theory of law as an artifact.

Theories dealing with the ontology of artifacts in general, as well as theories of law as an artifact, usually combine the functional perspective with some explanation other than function. But even on those cases, theories emphasizing this aspect receive some critiques. If we try to identify an artifact by its function, we will find some problems: first, we tend to classify malfunctioning artifacts as a subclass of functioning ones. Second, we could find other objects that perform – or that can perform – the same function. The possibility of dividing kinds of artifacts according to the different function they perform is problematic, because not all the artifact belonging to a certain kind can and do perform its proper function and other artifacts with a different proper function, might actually perform the same function. As a consequence of this, both the purpose – or function by design, if any – and the actual function are, at the same time, over and under inclusive as criterium to divide into kinds. This is, of course, a well-known problem, but it can be even clearer through some examples. A chair's proper function is to be used to sit and that is, usually, its actual function. Now, if I don't have much furniture at home, I can use chairs to put books on them. And, if I have no chairs at all, I can sit on pillows on the floor. On the first case, my chair is still a chair though it performs a different function than the proper one. On the second case, other objects can fulfil the same function. The same happens with law, if we consider, for instance, that its function is to guide conduct. Law may not guide conduct and, even if or when it does, other

normative domains – such as morality – seem to have the same function[19]. Now, is this problem solved if we combine the functional approach with the intentional and the historical-intentional one? In a way, it does, though maybe not entirely.

Considering these problems with functional kinds, Roversi's theory stresses the importance of combining those three elements relevant in explaining artifacts – function, intention and history – thus conceiving a unified theory: «This intertwining of counterarguments shows that for a satisfactory account of artifactual kinds we need to draw on elements extracted from all the three models, and it also shows why these models are almost never taken in their "pure" form but instead combine in various ways»[20]. Regarding the functional approach, Roversi mainly considers Ehrenberg's work – although he also includes Crowe as a functionalist in this sense –. This model of functional explanation of law, following Ehrenberg, understands artifact functions as multiple realizable – they can be realizable by other artifacts – and it also considers that artifacts can malfunction. Law, on this understanding, is not a functional kind, but it does have a macro-function which is «[…] to signal that some institutions are in fact legal, so as to make it explicit that political authority intends these institutions to be valid in the most general way and to shape and reframe the community members' reasons for action»[21]. Moreover, according to this view many functions change, or legal institutions that were supposed to fulfil them might not work. But law does have that crucial function which consists in signalling that some institutions are in fact legal, communicating its character of valid legal institutions[22].

However, one issue remains unanswered since, even combining these features of artifacts, how should we make sense of the relation between function and structure? An answer to this question would have, of course, also consequences regarding the kind of analysis of law, considering that this is an artifact.

It is not unusual to deal with structure and function of law and legal institutions as incompatible aspects of the same object or phenomena. If, for example, we theorize about private law, we can either focus on the structure of this area of law – by examining the structure of its main institutions, such as contracts – or, on the other hand, we can try to grasp the function fundamentally deployed by those private law institutions. However, and this is the relevant – and tricky – point of matter: both of these ways of approaching the problem seem to be elusive in the following way: we can't fully grasp one of them without the other. Structure and function are intertwined in a way that is not completely transparent and straightforward. Sometimes, it seems clear that we first identify an object by its structure, but we need to

19 See Ehrenberg 2016: 121-122.
20 Roversi 2019: 45.
21 Ehrenberg 2016: 137-139. See also Dipert 1995: 127-130.
22 Roversi 2019: 50-51.

know how it works and what it is used for in order to understand it. However, even knowing its actual function, we will probably find other institutions with the same function and, even more importantly, shifts in that function. Those shifts can be seen diachronically – by looking at the history of the institution – but also more "locally", for it is not unusual to find legal institutions – and artifacts in general – fulfilling more than one function. So, to re-define the limits of our object of study, we may need to go back to its structure. However, that structure may also need to be re-defined in terms of the function we know that institution has, and so on. Roversi takes this relation into account: Summarizing Ehrenberg's position on the matter, he points out that «[…] even an artifact's intended function may not suffice to determine its membership in a given artifactual kind, because to this end it may be necessary to look at other factors, too, such as its shape and structural features»[23].

In a paper about tort law, Dan Priel also talks about precisely this elusive character of the structure and function in that particular institution, observing that there is a normative and political decision to be made when characterising tort law by its structure or by its function; it is a normative-political decision because it is not determined by a given nature of the object, in this case, tort law[24].

There are, however, other ways to explain the relation of structure and function in which the alternative between either one or the other is not really an alternative but instead both need to be considered and combined in the analysis. Tuzet, for instance, considers that structure and function are connected insofar as structure serves function and function depends on structure, and he makes an interesting methodological point regarding both:

> We must treat questions and answers differently. I praise atomism concerning questions. Questions must point at specific features; to be fruitful they must address specific issues of the topic one is about. Hence, we must distinguish *why*- questions from *what*- questions. If we don't, only conceptual confusion will ensue. On the contrary answers must be integrated. To have a full understanding of a given phenomenon, we must put together the answers to the different questions about it. So, I praise holism concerning answers[25].

The relation between structure and function, to sum up, can be theoretically used in different ways: we could consider them incompatible with each other for the analysis of an object and make a justified decision about which methodological approach – one that stress either structure of function – is best in each case or type of cases. Another option is to treat both structure and function as combinable in the analysis, although not answering the same kind of question: an inquiry on the

[23] Roversi 2019: 45.
[24] Priel 2018: 321-322.
[25] Tuzet 2018: 237-238.

structure will tell us what a legal institution is, while an inquiry on its function would answer why do we have that institution and how it is used. In a way, we might want to add, even if methodologically we seem to be compelled to make this distinction, understanding how an institution works – and what is its function – is to understand, too, what that institution is. There is, in my opinion, no other way to explain why we cannot fully comprehend one without the other. The functions of any artifact, while changeable, are not superficial features of it – or, at least, not necessarily so –.

The account of the structure/function relation bears consequences concerning the possibility of a unified theory of law, such as the one Roversi defends. If we identify structure with some set of features a given institution was intended to have, then we could interpret the relation structure/function as a manifestation of the interrelation between intention and function of an artifact. A theory purporting to combine such features, would then have to opt for a methodological approach that cannot but take both structure and function into account. This could be accomplished through an historical-intentional kind of explanation. Along these lines, Roversi's approach, following Dipert, understands that by attributing a deliberative history to an artifact we can better understand its properties, and this would count as a non-naïve functionalist approach[26]. If so, then the structure/function elusiveness wouldn't be an obstacle to a unified theory of law as an artifact. If, however, we think that there is nothing inherent to any artifactual object – such as a legal institution – that determines the fact that we should look into its structure or its functions or both to understand what it is, this could pose a problem for a unified theory of artifacts, since we would have two different possible and apparently incompatible explanations of the same phenomena, mutually exclusive; and, as just said, nothing about the phenomena itself could guide us into following one or the other methodological path.

I think we can conclude, without risking circularity, that if we accept the artifactuality of law – legal phenomena and legal institutions – we cannot but try to offer an analysis that considers structure and function as part of its character. One way of doing this is endorsing a historical-intentional approach, like the one included as one of the elements of Roversi's theory. The history of use of any artifact can probably explain the fact that, sometimes, a certain structure has more relevance in a given interpretation, while function in other. Whether this constitute immodest conceptual analysis or not, depends, at least partially, on an answer to the questions examined in the previous section. If the answer is positive – and historicity can be part of a conceptual sort of inquiry – then the notion of a unified theory is not problematic at all. If, instead, the historicity of an artifact is seen as a way of showing rather accidental features of law, then we could question the decision to

[26] Roversi 2019: 46. See also Roversi 2018: 95.

include this diachronic dimension in a theory of law. Leaving this aspect out of an explanation, however, would represent a loss in our understanding of socially created phenomena.

4. Final Remarks

An artifactual theory of law is not only possible but also an interesting and challenging way to explain legal phenomena and legal institutions. Some of these challenges have to do with the kind of analysis of law we can make given its artifactuality. There are at least two ways to approach this issue: one of them is considering the artifactual character of law as part of a sceptical kind of theory. Under this interpretation, since law is an artifact, there is not such a thing as a nature of law. A different interpretation of law's artifactuality sees this statement as a starting point to dig into, precisely, what makes it so, what is its character and how this helps us understand legal phenomena. Roversi's unified theory of law as an artifact can be understood in the latter sense. The question about the possibility of conceptual analysis of law as an artifact implies giving some explanation of the changeability of law and legal institutions. Here too there are different views that can be defended. I think that conceptual and historical analysis can be combined in a non-dilemmatic way, as part of a search for necessary elements of the analysed phenomenon. Finally, the unified character of a theory of law as an artifact needs to account specially for the relations between the structure and the function of the artifact law – and of legal institutions –. Once again, the history of use of those objects can help us understand that connection.

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