Law as an Artefact: Three Questions

Corrado Roversi *

Abstract

Artifact theories of law are aimed at explaining the nature of law, that is, answering the ontological question of legal philosophy in terms of the ontology of artifacts in general. In recent years, some legal theorists (particularly Luka Burazin, Jonathan Crowe, Kenneth Ehrenberg, and Corrado Roversi) have been putting forward artifact theories of law to deal with several classic legal-philosophical problems, such as the role of functional explanation in the legal domain, legal normativity, the relation between law and morality, the relation between authoritative production and recognition, and the role of officials in the construction of legal systems. In this paper, I will formulate three questions an artefact theorist of law could be asked, and I will try to answer them, in the process highlighting and weighing the theory's pros and cons. The first question will be, Is there just one artefact theory of law or are there many? Here, I will consider whether the different artefact theories of law that have so far been put forward can be traced to a common root: yes, I will argue, and to a significant extent. The second question goes directly to the point: What are the explanatory advantages of an artefact theory of law? I will argue that an artefact theory can do a good job at explaining two typical dialectics of the legal domain identified by legal philosophy, namely, the dialectic between the production of law and its recognition (a dialectic exemplified in the debate between legal positivism and legal realism), and the dialectic between two different kinds of legal interpretation (teleological and in terms of legislative intent); on the other hand, I will show that an artefact theory typically has greater difficulty than a straightforward socio-ontological account in explaining authority and emergent institutions. Given this balancing of reasons in favour of and against an artefact theory, my last question will be, why, then, should we choose an artefact theory over a socio-ontological theory of law? Here I will argue that there is no direct opposition between the two approaches: An artefact theory

* CIRSFID, Università degli Studi di Bologna, Via Galliera 3, 340121, Bologna, *corrado.roversi@unibo.it*.

can be seen as specifying a socio-ontological account, in a way that fruitfully addresses the hypostatizing aspect of legal experience.

Keywords: Artifacts. Metaphysics of law. Social ontology. Institutions.

1. Introduction

Recent developments in legal philosophy have shown that the metaphysics of artifacts can have an impact on the question of the nature of law. While the so-called «ontological problem», as Norberto Bobbio was wont to call it[1], 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. Brian Leiter, for example, has argued that to outline a universal "nature" of legality is a theoretically hopeless enterprise: «If, in the history of philosophy, there is not a single successful analysis of the "necessary" or "essential" properties of a human artefact, why should we think law will be different?»[2]. Frederick Schauer has maintained that it is impossible to single out a universal nature of law encompassing all its possible instantiations in terms of necessary, essential properties: «If concepts can change […], and no one appears to have argued that the concepts attached to artifacts are in some mysterious way non-revisable or immutable, then there is no reason to believe that the concept of law cannot change in much the same way»[3]. Brian Tamanaha has put forward a pluralistic conception under which the idea of a single nature of law should be replaced with that of several different, context-dependent and historically determined structures, each with its own nature: «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»[4].

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 skeptical conceptions there lies at least one tenet about the nature of law, namely, that law is an artifact. A few legal philosophers have recently been developing artifact theories of law, namely, theories that appeal to the ongoing discussion on the metaphysics of artifacts to explain some features of law, legal systems, and legal institutions. Moreover, a recent collection of essays collects the views of several leading legal theorists (among whom Brian Bix, Kenneth Himma, Brian Leiter, Andrei Marmor, Frederick Schauer, and Kevin Toh) on the topic of

1 Bobbio 2011: 47 ff.
2 Leiter 2011: 669-70; see also Leiter 2018: sec. 3.
3 Schauer 2018: 37; see also Schauer 2012.
4 Tamanaha 2017: 60.

law's artefactuality[5]. If law is an artifact, what does that mean? Can we derive some interesting consequences from this very broad and generic statement? In this paper, I will describe the main features of artifact theories of law and try to balance their merits and problems. In particular, I will address three questions about an artifact theory of law. The first question will be whether, despite the variety among such theories, it is possible to speak of a single artifact theory of law built around their common traits: This is an important question, for in addressing it, we will be able to determine whether we are dealing with a coherent conception or rather with a cluster of loosely related but ultimately incompatible views. The second question regards the explanatory advantage of this theory, namely, whether there is a significant theoretical gain to be had from it. Finally, the third question asks why we should prefer an artifact theory of law over a socio-ontological approach, one that underscores the social and institutional character of legal institutions. Indeed, if we proceed from the assumption that legal institutions are artifactual, we should expect to end up with a conception of law that emphasizes its being the outcome of arbitrary creation rather than social emergence. Hence it becomes crucial to understand how sociality can be fit into an artifactual picture of law. In the three sections that follow, I will address these questions in turn and then draw some conclusions.

2. Towards a Unified Artifact Theory of Law

2.1. *The Metaphysics of Artifacts*

Philosophical discussion about the metaphysics of artifacts revolves around three concepts: intention, function, and history. Most authors in this field point out that an essential property of artifactual kinds lies in their being *intentionally* created. Risto Hilpinen, in particular, traces the existence of an artifact, as well as its belonging to a given artifactual kind, to an author's intention to produce something of that kind and to an author's accepting that the final result is that kind of thing[6]. Amie Thomasson argues that artifacts depend on a «controlled process of making […] involving imposing a number of intended features on the object»[7], and that these creative intentions must include a «substantive concept» of the thing to be created[8].

Other authors underscore in particular the functional nature of the features that are intentionally imposed by an author on his creation. In the work of Peter

5 Burazin, Himma, and Roversi 2018.
6 Hilpinen 1993.
7 Thomasson 2007: 58-9.
8 Thomasson 2003: 600.

McLaughlin[9] and Karen Neander[10], the functionality of artifacts is explained in terms of their makers' and users' intentions. More specifically, Lynne Baker argues that artifacts have an intended proper function as their primary-kind property, and this makes it possible to distinguish between an artifact and the material aggregate it is made up of [11], thus showing that it is possible for artifacts to have an independent metaphysical standing[12].

Functional features have also been used to explain the peculiar metaphysics of artifacts within a historico-evolutionary framework: drawing on Ruth Millikan's concept of a direct proper function, meaning the function in virtue of which instances of a given kind are reproduced in the context of an evolutionary history[13], Beth Preston has outlined a nonintentionalist view on which an artifact is such in virtue of its having a history of selection or reproduction serving a specific purpose[14]. Along similar lines, Crawford L. Elder analyses artifactual kinds as a specific instance of "copied kinds," namely, kinds of things (be they biological systems or artifacts) that are selected and reproduced to serve a specific proper function by reason of their shape and historical placement[15]: this, in Elder's view, applies as well to cultural artifacts, like etiquette and other kinds of social norms[16].

Neither the intentions of makers, nor the function their artifacts are meant to fulfil, nor their historical development can on their own explain the metaphysics of artifactual kinds. An objection typically raised against a pure "intention model" is that artifacts built with a certain intention can be used for purposes that differ significantly from what was originally intended – they can even take on purely accidental functions (artifacts are "multiply utilizable", in Preston's sense[17]) – and another typical objection is that, on this model, any kind of technical construct can be an artifact simply in virtue of its having been intended by an author, even if this author's intentions have no actual support[18]. On the other hand, a pure "function model" finds an obvious counterexample in all those artifacts that have been built with no clear function in mind (a typical case being works of art, at least on a specific interpretation of them[19]); and if function is considered a primary-kind or essential property, as in Baker's theory, then in cases in which an artifact is repurposed over the course of its history, we should wind up with a different kind, and hence

9 McLaughlin 2001, chap. 3.
10 Neander 1991.
11 Baker 2004.
12 Baker 2008.
13 Millikan 1984: 27-8.
14 Preston 1998: 243 ff.; Preston 2009: 226.
15 Elder 2007: 38-9.
16 Elder 2014: 40 ff.
17 See Preston 2009: 227-8.
18 Houkes and Vermaas 2010: 51.
19 See Thomasson 2007: 57.

with two coincident objects of two different kinds[20]; moreover, 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[21]. Finally, a purely historico-evolutionary theory will be hard put to it to explain artifacts of new design and prototypes lacking any evolutionary history[22], and it may also prove to be circular, for it is not clear how you can identify an artifactual kind by referring to the proper functions of its instances, and hence to the previous instances whence comes its reproduction, if you have no substantive concept of the kind that makes it possible to identify such instances[23].

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. Both Hilpinen and Thomasson, for example, underscore that the creative intentions in play must be successful[24]: this brings an element of objective functionality to their theories, but without ruling out the possibility of malfunctioning or borderline artifacts (the success condition posited in their theories is qualified by stating that intentions need to be "largely" successful). Hilpinen concedes that, in most cases, function is a crucial conceptual element of artifactual kinds[25], though Thomasson insists not on «intended *functions*» but on «intended *features*» broadly conceived[26]. Thomasson, moreover, states that «artifactual kinds are notoriously historical and malleable in nature»[27]. Baker insists that her account needs both intentions and function, so much so that artifacts, on her view, are essentially intention-dependent objects[28]. Preston does not underestimate the role of intentions, either, though she lays emphasis on the *collective* intentions behind the *reproduction* of an artifact rather than on the *individual* intentions behind its original production[29], and it seems that, in a sense, Elder places the same focus on reproduction within a context, as if the construction of prototypes from scratch were to be considered a borderline case for artifacts[30].

In the literature, we can also find models that explicitly merge features from the intention, function, and history conceptions. An example is that of Wybo Houkes and Pieter Vermaas, who put forward an intention-causal-evolutionary (ICE) theory

20 Houkes and Vermaas 2010: 146-7.
21 See Thomasson 2007: 57-8, along the lines of Bloom 1996.
22 Houkes and Vermaas 2010: 63-4, and a possible reply in Preston 2013: 164-77.
23 See Thomasson 2009: 205.
24 Hilpinen 1993: 160; Thomasson 2003: 598.
25 Hilpinen 1993: 161.
26 Thomasson 2007: 58, italics added.
27 Thomasson 2007: 62.
28 See Baker 2009: 83.
29 Preston 2003: 611; 2009: 231.
30 Elder 2007: 39-40.

of functions on which technical artifacts are the outcome of design processes based on a belief that the object produced will lead to the desired goal if properly manipulated according to a use plan[31]. In this model, although design depends crucially on the designers' intention, this intention (and this is where the model is not purely intentional) must be based on a supposedly real causal mechanism: the belief that the use plan will in fact achieve the desired goal must be warranted, and this leads to an evolutionary history of reproduction based on a communicative chain in which the warranted ascription of function and the relevant use plan are transmitted[32]. While Houkes and Vermaas's mixed model is meant to account for technical artifacts, and hence is particularly suited to a functionalist approach, Randall Dipert's historico-intentional model is meant to also explain artifacts whose function is not as clear, particularly in works of art. In Dipert's view, artifacts are intentionally modified objects whose features explicitly communicate their artifactual nature (this in contrast to tools, or instruments, which do not have this communicative feature[33]); and useful, technical artifacts are only one type of artifact (the other types being the communicative, the expressive, and the artistic[34]). Hence, the property of being an artifact is historical: it amounts to having a deliberative history that traces back to plans, meaning that a hierarchical system of interrelated intentions has been put into place by its author so that other cognitive agents who interact with the artifact will form certain beliefs which they will act on[35]. In Dipert's view, attributing a deliberative history to an artifact is also the best way to understand its functional properties. Thus, he considers his historico-intentional conception to be necessary as well to a non-naïve functionalist approach[36]. It is important to keep Dipert's historico-intentional model of the metaphysics of artifacts distinct from Paul Bloom's intentional-historical account of the conceptualization of artifacts, on which account an artifactual object is to be categorized under a given kind if it can be traced to a maker's intention to produce an object of a kind we have already encountered[37].

An immediate and preliminary difficulty must be addressed if these models are to usefully contribute to an artifact theory of law. Which is to say that, whereas these models propose to explain the metaphysics of *material* objects, law, legal systems, and legal institutions are inherently immaterial: they mainly consist of representations, and their physical substratum, when present, is relevant only insofar as it supports these representations. Moreover, these representations are inherently social, and hence collective, whereas material objects can be exclusively individual:

31 Houkes and Vermaas 2010: chap. 4.
32 Houkes and Vermaas 2010: 80-4.
33 Dipert 1995: 127.
34 See Dipert 1993: 102-7.
35 Dipert 1993: 54 ff., chap. 7.
36 Dipert 1993: 91 ff.
37 Bloom 1996.

as Thomasson notes, «[u]nlike social and institutional objects, the existence of artifacts doesn't seem to presuppose any collective intentions of any kind – it makes perfect sense to suppose that a solitary human could create a knife, though not a government or money»[38]. So the question comes up, how can a philosophy of material culture contribute something important to a domain of abstract, inherently social entities?

That artifacts may be abstract is a possibility that does find discussion in the philosophical literature. Dipert, for example, contrasts the abstractness of novels with the more "sensuous" qualities of other kinds of works of art, and he claims that abstract artifacts «typically involve more conscious interpretation»[39], which is certainly an interesting point that could apply to law as well. And Hilpinen, for his part, qualifies literary works as types, setting them in distinction to all the copies that can be made of them, these copies being tokens[40]. «In the case of music and literary arts», he explains, his theory leads «to a view of the identity of works of art which resembles David Lewis's conception of works of fiction, according to which a fiction should be identified by an act of storytelling and not just by the text produced by such an act»[41]. Elsewhere, Hilpinen clearly states that «[o]ntologically, an artifact can be a concrete particular object such as the Eiffel Tower, a type (a type object) which has or can have many instances (for example, a paper clip or Nikolai Gogol's *Dead Souls*), an instance of a type (a particular paper clip), or an abstract object, for example, an artificial language»[42]. But it is certainly Thomasson's theory of fictions that deals most clearly with the case of immaterial artifacts. Thomasson sets out an artifactual theory of fictions proceeding from two kinds of existential dependence: *historical* and *constant* dependence. As artifacts, fictions and fictional characters are *historically* dependent (for their existence) on an author's intentions, but in virtue of their abstract nature they are also *constantly* dependent on a given text[43].

Thomasson discusses as well what she calls "public" artifacts, in which connection she also deals with the *social* nature of artifacts. Drawing on Dipert's idea of artifacts as objects specifically conceived to communicate their nature, Thomasson clarifies that some artifacts are explicitly built with some receptive features intended to signal that they belong to a given kind, so that the specific audience to which this membership is signalled can interact with such artifacts in an appropriate way, that is, in accordance with an appropriate set of shared social norms[44].

38 Thomasson 2007: 52.
39 Dipert 1993: 163.
40 Hilpinen 1993: 171 ff.
41 Hilpinen 1993: 173.
42 Hilpinen 2004.
43 Thomasson 1999: 13-4, chap. 3.
44 Thomasson 2014: 49-51.

Examples of this kind are churches and flags. Such public artifacts, as Thomasson explains them, blur the distinction between artifactual and institutional kinds, precisely because some of their intended features depend on social norms, and social norms depend not simply on the intentions of the *makers* of artifacts but rather on the *shared* intentions that are formed within a group[45].

With these models and qualifications in mind, we can now turn to artifact theories of *law*.

2.2. *Artifact Theories of Law*

Artifact theories of law were developed in close temporal proximity (from 2014 to 2018), and in large part independently, by four authors: Luka Burazin, Jonathan Crowe, Kenneth Ehrenberg, and myself[46].

Burazin adopts an intention model, drawing substantially on Hilpinen and Thomasson[47]. In his theory, artifacts are used not to explain legal *institutions* – an idea he qualifies as "not new"[48] – but to explain law as a legal *system*. Legal systems are conceived by him as "abstract institutional artifacts", combining the intention-authorial model of artifacts with a socio-ontological conception framed along the lines of Searle and Thomasson. On this approach, artifacts are objects that, in order to come into being as objects of a given kind, depend on a largely successful authorial intention[49]: A screwdriver depends on a designer's intention. Institutions, by contrast, consist of constitutive rules that set forth existence conditions for tokens of institutional kinds and are based on collective acceptance[50]: I can be said to be standing in line at the post office only if the line of people I am in correctly instantiates the shared rules about what a line of people at the post office is. Hence, institutional artifacts are institutional objects whose existence conditions in constitutive rules require an author[51]. In the case of legal systems, the relevant authors

[45] Thomasson 2014: 55.

[46] It is important to note, however, that several authors have previously worked on the analogy between legal institutions and artifacts, though they did not systematically develop the analogy by bringing to bear the philosophy of technology and artifactual kinds. Thus, for example, Bruno Celano (1999: 249-58) attributes to Hans Kelsen the view that legal norms are "intentional artifacts" (*artefatti intenzionali*), namely, meanings (*contenuti di senso*) based on a creative, authorial act of lawmaking and whose efficacy is of general scope, a view that in several respects resembles the one developed in full-fledged artifact theories of law. Cristiano Castelfranchi and Luca Tummolini (2006) have also put forward a theory of institutions in general as coordination artifacts, namely, «artifacts such that the recognition of their use by an agent and the set of cognitive opportunities and constraints (deontic mediators) are necessary and sufficient conditions to enable a multiagent coordinated action» (*ibid*., 320).

[47] Burazin 2016, 2018.

[48] Burazin 2016: 385.

[49] Burazin 2016: 388-9.

[50] Burazin 2016: 393-4.

[51] Burazin 2016: 395.

are the legal officials, and what constitutes the system is their shared concept of validity, of primary and secondary rules, and of the overall constitutional framework[52], while collective acceptance of the fundamental constitutive rules defining legal authority is rooted in the social community[53]. What we have here, then, is a two-layered ontological structure of developed legal systems: a social *norm* of recognition coupled with a *rule* of recognition, the former embraced by the members of the *community* (perhaps tacitly, but necessarily in the we-mode[54]), the latter shared among *officials*[55]. Burazin holds that not all systems are developed and structured in this way. It can also happen that, at an initial stage of development, the social norm of recognition simply unifies a set of social norms into a body constituting the legal system[56], in which case the authors of the legal systems are the members of the community themselves[57]. This genealogical dimension is meant to capture some features of the historico-evolutionary model for explaining artifacts. Indeed, drawing on Thomasson, Burazin concedes that the authorial concept behind artifacts can change diachronically, and hence that in the mind of officials the concept of a legal system is "susceptible to change"[58]. Finally, Burazin applies to legal systems the success condition that Hilpinen and Thomasson introduce to address the problem of support in creating technical artifacts, to which end he translates this condition into a requirement of social validation: a legal system as conceived by officials must correspond to an actual practice of norm-following and of applying sanctions in case of noncompliance[59].

Crowe, too, previously espoused an intention account of artifacts drawn mainly from Hilpinen[60]. What he theorizes, however, is not a two-*layered* ontology, like Burazin's, but a two-*sourced* one, putting forward an intention-acceptance theory of artifact kinds. Artifacts, and institutional artifacts in particular, can be the outcome of an authorial intention, *or* they can be the outcome of collective acceptance[61], either case requiring a successful realization[62], meaning that the artifact cannot come into being absent that intention or acceptance. It is a crucial role that this "success condition" plays in Crowe's view (indeed, the condition is drawn here, too, from the intention model, where its purpose is to avert the problem of actual support in fulfilling a technical function). Given that, in Crowe's conception, the features that

52 Burazin 2016: 398.
53 Burazin 2016: 397.
54 Burazin 2018: 114-9
55 Burazin 2018: 120.
56 Burazin 2018: 120.
57 Burazin 2016: 396.
58 Burazin 2016: 398.
59 Burazin 2018: 129-34.
60 Crowe 2014.
61 Crowe 2014: 747.
62 Crowe 2014: 748 ff.

explain artifacts are mainly functional, if law (as an artifact) is to be non defective, it must be able to actually perform its function, which is typically that of serving as a "deontic marker," meaning that law «marks the boundaries of permissible social conduct»[63]. This functionalist approach leads Crowe to bring in some elements of a pure function model of artifacts in support of a natural-law conception. In his view, law must be able to create a sense of social obligation, and its "metaphysics of malfunction"[64] therefore entails that, if law fails to include a core moral content, it will be defective[65].

Like Crowe, Ehrenberg also moulds an artifact theory of law within a functionalist framework[66], but unlike Crowe he does not inject any natural law into this framework but rather insists on the *function* of law as a crucial part of any legal-positivistic explanation of it[67]. A crucial element of Ehrenberg's theory lies in the *desiderata* that Preston posits for any theory of artifacts[68], and in particular in the idea that artifact functions must be "multiply realizable", that artifacts must be "multiply utilizable", and that they can malfunction. In Ehrenberg's view, law is a specific genre of social institutions conceived as "abstract institutionalized artifacts": «It is the broadest institution whose function it is to generate and/or validate institutions»[69]. There is no function peculiar to law: law is not a "functional kind" in the sense that anything fulfilling that particular function is necessarily law[70], because several other kinds of social institutions can perform the most general function of law[71], namely, creating or modifying normative reasons for action for the members of a given social community. Moreover, and coherently with Preston's historico-evolutionary model, Ehrenberg argues that the functions of legal institutions can vary and change, and even be "phantasmatic", and legal institution can malfunction in several ways, to the point that they can even be defective in creating normative "deontic powers" when they run out of recognition within a community[72]. Here, again, it is crucial to refer to Searle's model of institutional facts: the institutionality of law makes it possible to clarify how abstract legal artifacts can have a degree of per-

63 Crowe 2014: 751.
64 Baker 2009.
65 Crowe 2014: 754-5.
66 Ehrenberg 2014, 2016, 2018.
67 A functionalist account along legal-positivistic lines has also been developed by Kenneth Himma (2018), who argues that legal systems as artifacts have the conceptual function of regulating behaviour as a means of keeping the peace, and they do so by means of authorized coercive-enforcement mechanisms.
68 See Preston 2009: 214 ff.; Ehrenberg 2016: 120 ff.
69 Ehrenberg 2016: 12, 191.
70 Ehrenberg 2016: 50, 76-7.
71 Ehrenberg 2016: 121-2.
72 Ehrenberg 2016: 119-28.

sistence and continuity even without any actual recognition[73], whereas the artifactuality of law explains a crucial aspect of its normativity. Just as Dipert shows that artifacts typically "communicate" their artifactual nature, and Thomasson clarifies how "public artifacts" serve a specific recognitional function, Ehrenberg holds that a typical function of law (a macro-function) 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[74].

This insistence on phenomena of repurposing, modification, and diachronic evolution also figures centrally in my own "historico-intentional" model of the artifactuality of legal institutions[75]. 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[76]: 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. Moreover, my model makes use of a concept in Houkes and Vermaas's intentional-causal-evolutionary theory of technical artifacts: the concept of a "use plan". In Houkes and Vermaas's theory, artifacts are connected with use plans, understood as ordered, goal-directed sets of actions that must be carried out using the object in question in order for it to fulfil its function[77]. Similarly, in my view, legal institutions as immaterial artifacts have an interaction plan in conditional form (if X, then normative consequence Y follows) specified by constitutive rules. Legal institutions are thus immaterial rule-based artifacts[78]. Moreover, just as Houkes and Vermaas argue that it must be possible to ascribe some causal support to artifactual functions, I make the argument that a legal institution's constitutive rules and the related interaction plans can work only if based on collective acceptance as a general mechanism. Here, again, the argument is crucially predicated on Searle's theory of social institutions. Differently from Crowe, and similarly to Burazin, I do not assume that an artifact theory needs to be connected with any specific theory of law's functionality: legal institutions can serve different purposes. But, similarly to Crowe, I stress that the artifactuality of legal institutions makes them reason-based objects[79]: they are subject to evaluation on the basis of technical and teleological rationality. Moreover, the historico-intentional nature of legal institutions as artifacts is such that, in my

73 Ehrenberg 2016: 108 ff.
74 Ehrenberg 2014: 263 ff.; 2016: 137-9, 175 ff.; 2018: 182 ff.
75 Roversi 2016, 2018.
76 Roversi 2016: 218 ff.; 2018: 95-9.
77 Houkes and Vermaas 2010: 18 ff.
78 Roversi 2016: 224-5, 226-40.
79 Roversi 2016: 225-6, 230-1.

view, their nature and content may not be entirely transparent to us or immediately fixed by actual intentional states in the legal community[80]. The view I take here in regard to legal institutions as artifacts is similar to what in Elder's aforementioned historico-evolutionary model is argued about artifacts broadly and cultural artifacts more specifically.

From this brief presentation we should be able to appreciate in what respects the artifact theories of law so far developed differ and what they have in common. They are certainly different, to an extent, in their object: Burazin's focus is on legal systems, Crowe's and Ehrenberg is on law as a genre of legal institutions, mine is on legal institutions broadly. 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: the artifact "law," in Crowe's and Ehrenberg's sense, makes it possible to qualify legal systems in Burazin's sense and legal institutions in my sense as *legal* artifacts. Further, Crowe's and Ehrenberg's specific insistence on law's functionality does not stand in contradiction to Burazin's model or mine, both of which take a quite neutral view on this point. Indeed, Ehrenberg's view of jurisprudents as "modest joiners" – meaning that they are open to the possibility that functional attributions to legal institutions can vary and be qualified as well on the basis of empirical and historical research[81] – seems perfectly compatible with my and Burazin's neutral stance on functionalism. The most idiosyncratic result of the insistence on law's functionality seems to be Crowe's claim that law's artifactuality can lead to a sort of rationalistic natural-law view, particularly because neither my model nor Burazin's or Ehrenberg's is predicated on a strong cognitivist conception of morality. But to some extent this gap can be filled, to which end it should be pointed out that (*i*) Crowe embraces a context-dependent cognitivist view, on which "natural law is objective and normative, but nonetheless socially embodied, historically extended and dependent on contingent facts about human nature"[82]; (*ii*) Ehrenberg acknowledges that legal institutions are meant to have a distinctive general effect on reasons for action; and (*iii*) my own model connects the defectiveness of legal artifacts with considerations of (technical or teleological) rationality.

There are clearly several common elements to these theories, to the point that they can form the basis on which to put forward a unified artifact theory of law. This unified theory is one I would describe as follows. Law is a genre of abstract institutional artifacts, in the sense that, within a social community, it is collectively recognized to confer a specific status on other institutions, signalling that these institutions are meant by political authority to hold generally and to shape the com-

[80] Roversi 2018: 103-5.
[81] Ehrenberg 2016: 139 ff.
[82] Crowe 2019: introduction.

munity members' normative reasons for action. Legal institutions are thus created as institutional, abstract artifacts in this framework: they are rule-based artifacts built to enable or foreclose interaction among human agents. In *informal* contexts, they are simply the outcome of a creative process rooted in human intentions – an outcome that, at some point in the development of this process, is collectively recognized as such, namely, as having created an institution. Like a tree that becomes a bench, certain regular activities become normative, and the institution that develops with them begins to be referred to as "that institution" and as "legal". In *formal* contexts, collective acceptance supports constitutive rules defining the conditions of legal authority and hence the status of legal officials. Legal institutional artifacts thus become the outcome of the creative intentions of legal officials. The most general legal artifact in this sense is a legal system, meaning a set of legal institutional artifacts defining the conditions under which legal norms are valid and may be produced and applied. On the basis of these conditions of validity, several other institutional sub-artifacts can be created. In informal and formal contexts alike, legal artifacts need collective acceptance as the mechanism enabling them to actually work, that is, to accordingly shape the community members' normative reasons for action. In all cases, in other words, the makers' intentions must find a significant degree of success, that is, it must be that they are actually practiced and enforced. To this end legal artifacts must integrate considerations of rationality in two forms: technical rationality, serving as a basis on which to determine whether a legal artifact is properly framed to achieve its purpose, and teleological rationality, on which basis to determine whether this purpose can find meaningful support in the community. These considerations of rationality are very much context-sensitive, so the approach they require is a "modest" one, open to empirical research, particularly when it comes to defining the purpose of a given legal institution.

Let us now consider some explanatory advantages of this unified artifact theory of law, as well as some of its problems.

3. The Explanatory Value of an Artifact Theory of Law

3.1. *The Advantages*

Having laid out the main features of an artifact theory of law, we know that this can be framed as a unified theory. That was our first question, so we can turn now to the second one: Given such a unified theory, why should we use it to work out the metaphysics of law? What are its explanatory advantages?

The first such advantage relates to the normativity of law. It is a central concern of legal philosophy to explain how law can provide normative reasons for action, especially so when working within a legal-positivistic paradigm, where it is critical that a theory be able to explain whether, and if so how, law can have a norma-

tive force that cannot be reduced to that of morality or that of merely prudential considerations. This independent normative force has been compellingly explained by Ehrenberg[83], who does so by embedding an artifact theory in a functionalist framework, showing that law as an institutional artifact can gain its independent normative force in virtue of both its institutionality and its artifactuality. To be sure, Ehrenberg explains law's normativity by drawing on Searle's theory of desire-independent reasons for action, thus implying that an explanation of law's normativity in terms of its institutionality is not a merit of an artifact theory *per se*[84]. However, the theory does have the merit of pointing out that law's normative force can depend in part on the normativity of recognition typical of normative artifacts, as Ehrenberg argues in line with Dipert and Thomasson[85]. Moreover, as Auke Pols shows through Dancy's model of practical reasoning, artifacts can indeed provide reasons for action by prescribing or enabling action[86]. Hence, it seems that an attempt can be made to connect legal normativity with the general, inherent normativity of artifacts.

Despite these achievements, however, it is doubtful that the normativity of artifacts can fully explain the normativity of law and of social institutions. On the contrary, there are reasons to think that the converse is true, namely, that the normativity of *artifacts* has a social dimension. As Marcel Scheele has shown, the definition of an artifact's "proper use" often depends on the formation of "opinion groups", to the effect that «social features are necessary conditions for justified ascription of proper functions»[87]. Houkes and Vermaas similarly show how an artifact's use plans become normative on the basis of a process of testimony (between designers and users, and among users in a community) that reflects a process of "social entrenchment" and "institutionalization"[88]. Moreover, where artifacts are concerned, normativity always depends on a technical, hypothetical structure, and there is reason to doubt that the same holds necessarily for law as well. It could instead be argued that law can provide us with robust, normative, and context-independent reasons for action[89]. So the contribution an artifact theory of law can give in answering the problem of law's normativity can at best be partial.

In my own work, I argue that an advantage of an artifact theory of law is that it is well-suited to account for a typical dialectic in legal theory: that between the legal authorities' *production* of law – the core element of law in traditional formalistic legal positivism – and the community's *recognition* of law, as well as the *enforce-*

83 Ehrenberg 2016: chap. 7.
84 Ehrenberg 2016: chap. 7, sec. E.
85 Ehrenberg 2014: 263 ff.; 2016: chap. 7, sec. F; 2018: 182 ff.
86 Pols 2013.
87 Scheele 2006: 32.
88 Houkes and Vermaas 2010: 114.
89 A discussion of this question can be found in Ehrenberg 2016: chap. 7, sec. C.

ment through which the law becomes effective in the community, which interest is instead central to legal realism[90]. This dialectic could be understood in light of the double existential dependence of immaterial, abstract artifacts[91], meaning that, on the one hand, these artifacts are *historically* dependent for their existence on an original, authorial creative process, but at the same time their continued existence is also *constantly* dependent on a collective recognition lacking which they would expire. In light of that dialectic, we can work together two of the core tenets of legal realism and legal positivism[92]. Central to legal realism is the insight that norms are shaped and modified in the practice of their application, so much so that concepts like "legislative intent" or the "true meaning of a provision" can be thought to be illusory. So interpreted, an artifact can be explained only in light of (a) its *user function*, namely, the function it comes to have within a certain community of users, and (b) its constant dependence on its gaining actual recognition within that community. On the other hand, a crucial assumption of formalistic legal positivism is that norms and legal institutions find their content in the original authorial act of the legislator and in the latter's creative intention: so interpreted, an artifact can be explained only in light of (a) its *design function*, namely, the function as imagined by its original designer, and (b) its historical dependence on an original act of creation. So, by drawing a distinction between user and design function, and another one between historical and constant dependence, an artifact theory of law can show that both formalistic legal positivism and rule-sceptic legal realism are reductionist accounts, in that they capture only one relevant aspect of the phenomenon they intend to explain[93].

The intertwining of the concepts of function, authorial intention, and history that lies at the core of the metaphysics of artifacts can also illuminate some aspects of legal interpretation – and here I would count a third advantage of an artifact theory of law. In legal interpretation a distinction is traditionally drawn between originalist interpretation – based on the idea of the legislator's original intent or the provision's original linguistic meaning – and dynamic, evolutionary (or also teleological) interpretation, which underscores the need to adapt provisions to new circumstances the legislator either did not or could not foresee[94]. If we look at this distinction from the point of view of an artifact theory of law, we can see it as a particular application of a more general distinction made in the interpretation of ar-

[90] Roversi 2018: 99 ff.

[91] As discussed in Thomasson 1999: chaps. 2 and 3.

[92] Here I understand legal realism mainly along the lines of Scandinavian legal realism, and so as a general theory about the nature of law and not as a contingent description of legal adjudication, as Leiter (2007: chap. 1) instead interprets American legal realism.

[93] A similar point is argued by Bruno Celano (1999: 254), explaining Kelsen's "principle of effectiveness" in terms of "intentional artifacts".

[94] See for example Guastini 2011: 100-1.

tifacts. Dipert, for example, points out «two possible goals for the interpretation of artifacts [...]: 1. Historicism or antiquarianism. To determine the historical genesis and history of an artifact: that is, finding out, as best one can, an object's deliberative history. 2. Functionalism. To determine the most useful function an object can now be conceived as having»[95]. Of course, there is an important peculiarity of legal interpretation. As Dipert points out, when we interpret artifacts, «the pursuit of the function of an object – how we should conceive of and use it – should [...] always be our chief aim», and understanding an artifact's history is useful only because this «sometimes is the best way to achieve an understanding of its function»[96]. This does not necessarily hold for legal artifacts. Here, evolutionary arguments are not inevitably more relevant than originalist ones, and indeed the contrary can often be true. That is because legal artifacts are authoritative: they trace their origin to political authority, and as a result the original function envisaged by the designer carries a special, authoritative status compared to the normal status of an artifact's author. But the intertwining of those interpretive arguments in the context of law is simply an instance of interpreting artifacts generally conceived. A full-fledged theory of legal interpretation along similar lines is developed by Crowe, drawing on the interpretation of artifacts generally conceived[97].

3.2. *The Limits*

The just-mentioned peculiarity in the interpretation of legal artifacts – namely, that legal artifacts are authoritative in a way other artifacts are not – brings out an important limit of an artifact theory of law, a limit that can be expressed in a succinct formula: authors are not authorities. Even though, as Houkes and Vermaas show, designers of artifacts can have a special status in attesting to an artifact's use plan, the status of political authority with regard to legal artifacts cannot be subsumed under that of designers[98]. Legislative intent is not binding simply because of a special epistemic access that legislators have to the content of the provisions they enact: what makes such intent binding, rather, is that legislation is supposed to express an exercise of legitimate political power. In a sense, the relation here is reversed: with artifacts, we become authors in virtue of our having *made* the object, but where provisions are concerned, we need to first have authority (the authority conferred on us within a community) – *only then* can we proceed to enact the provision we intend to enact. Hence, there is a crucial dimension of law – the problem of the legitimacy of legal authority – that an artifact theory cannot adequately capture in terms of the

[95] Dipert 1993: 87.
[96] Dipert 1993: 90-1.
[97] Crowe 2019: chaps. 11-12.
[98] Houkes and Vermaas 2010: 110 ff.

author-user relation. As Crowe argues, an option we can pursue in order to attack this problem would be to change our theory of legitimacy accordingly, for example by shifting the source of legitimacy from authority to social coordination[99].

There is another significant challenge confronting an artifact theory of law. As Burazin has aptly stated[100], in conceiving of law as an artifact, we seem to be making the assumption that all legal institutions have authors and that these authors can be clearly identified, but of course institutions have an extensive evolution, and very often they emerge within a community as the outcome of a process that lacks explicit authors and can very well be tacit. How can an artifact theory of law explain this customary nature of the origin of legal institutions? This is a crucial problem, and one that is not confined to the customary origins of law. In taking up this problem, for example, Dan Priel argues that an account of law in terms of artifacts and design intentions is inconsistent with common law practice: in his view, lurking behind the idea that legal institutions are the outcome of an explicit design is a rationalistic ideology according to which law is «a tool designed by humans to ultimately attain a better life», which means "a more moral life"[101]. The common law, on the other hand, is framed according to a traditional view under which «law… is not put in place where custom fails; it is a continuation of, a manifestation of, custom»[102].

Customs and custom-like legal practices are a problem that has been addressed by all scholars who have engaged with the artifact theory. Burazin speaks of "informal institutional artifacts"[103], having the community as a whole as their original author, and indeed he concedes that the artifact theory of law seems «to adopt a very broad concept of authorship… The artifact theory of law does not preclude collective authorship and accepts as authors a wide range of persons, including those who sustain the artifact in question and its active users»[104]. Similarly, as mentioned, Crowe includes collective acceptance among the possible creators of an artifact, precisely to account for those customary-like phenomena in which (as in the case of a tree becoming a bench) artifacts emerge as kinds of socially created objects: These he calls "unintentionally created artifacts"[105]. Ehrenberg clarifies that customs, at a certain point, come to be based on a conscious decision to «raise the level of the customary rule to the point of seeing it appropriately officially or communally enforced»[106], which amounts to something close to Burazin and Crowe's "collective authorship" phenomenon. In a similar vein, my model introduces the concept of

[99] Crowe 2019: chap. 10.
[100] Burazin 2016: 399.
[101] Priel 2018: 259.
[102] Priel 2018: 264.
[103] Burazin 2016: 396.
[104] Burazin 2016: 399.
[105] Crowe 2014: 746.
[106] Ehrenberg 2016: 123.

"recurrence" artifacts, namely, artifacts created by recurrent action «whose content is in some sense related to the artifact but is not an intention to create an artifact of that kind»[107].

Now, to be sure, these solutions require to a certain degree that the concept of an artifact be "stretched" – something that some may not be ready to accept. Thomasson, for example, explicitly excludes terms like *path* and *village* from the class of artifactual kinds, limiting her discussion to what she calls "essential artifactual" terms, understood as «terms that necessarily have in their extension all and only artifacts, considered as such (as intended products of human action)»[108]. Hilpinen, on the other hand, explicitly accepts the existence of collective artifacts[109], and in this class includes (well-designed) towns, where the parts have been produced «in such a way that each part fits its surroundings architecturally and aesthetically, and contributes to the 'wholeness' of the town»[110]. However, such a stretching of the concept of an artifact is something that other authors call for in the legal domain even in an extreme way: Leiter, for example, suggests that «we 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»[111]. Indeed, that legal artifacts require a broader conception of artifacts may well be not so much a shortcoming of those theories as a significant improvement of artefact theories of law over theories of other kinds of artifacts. First, one is not forced to assume a priority of material, authored artifacts in explaining artifacts in general. And, second, the general observation that artifacts can be the outcome of emergence, rather than of explicit creation, can help us understand several instances of material artifacts as well. Not all material artifacts are like screwdrivers. Some are like Gothic churches: they can be incomplete, defective, even contradictory in their design plans, and may have taken a long time to become the way they are now. This is something a general theory of artifacts needs to be able to explain, and here the general theory can gain a lot by drawing on a theory of legal artifacts in particular.

[107] Roversi 2016: 221.

[108] Thomasson 2003: 593.

[109] Hilpinen 1993: 167 ff.

[110] It is important to note that these collective artifacts, in Hilpinen's view, collect artifacts having their own authors, whereas the collectively created artifacts envisaged by artifact theorists of law are single artifacts created through an act of recognition which is collective, and which may even extend over time.

[111] Leiter 2018: 11.

4. Law as an Artifact and Social Ontology

The problem of customs and emerging institutions, and its tension with the concept of an artifact, brings into light another major challenge that an artifact theory of law must face, a challenge that deserves a separate treatment. All these theorists agree that legal artifacts are socially rooted; that they very often simply depend on collective recognition, which is in itself creative; and that in this sense they are "institutionalized" or "institutional". It wouldn't be unreasonable to ask, therefore, why we should prefer an artifact theory of law over a socio-ontological account relying on the idea of institutions based on collective acceptance. This is the third and final question that will be discussed here.

There is one thing that needs to be clarified, however, before we take up this question. Which is to say that, in a sense, an artifact theory of law *already is* a socio-ontological account. There is no frontal opposition between these two accounts, because legal institutions, conceived as artifacts, are described by all the artifact theorists of law as based on collective recognition and acceptance. An artifact theory of law does not claim to *replace* a socio-ontological, institutional theory of law, but rather proposes to *specify* such a theory, by stating that crucial to an understanding of the nature of law is the process by which abstract artifacts are constructed on the basis of collective recognition – a process through which legal institutions are hypostatized as abstract artifactual objects. So the question, more accurately framed, is not why an artifact theory of law should be preferred over a socio-ontological account – for if the theory is justified, so is its account of law – but rather whether the added element an artifact theory of law brings to a socio-ontological account is really needed.

In a sense, this question lies at the core of a recent article that Miguel Angel Garcia Godinez has written in direct criticism of Burazin's artifact theory of law. Garcia Godinez claims that legal systems are *not* abstract institutional artifacts but rather institutional legal practices, and that collective recognition is a fundamental ontological element of law: «Burazin has no reason at all to claim that his artifact characterisation explains anything about legal systems. [...] He would have to be more interested now in finding the institutional requirements for law and legal systems to exist, e.g., collective recognition and constitutive rules, rather than those for artifacts to come about»[112]. In this way, Garcia Godinez argues that, although one part of Burazin's theory deserves to be salvaged – this being the socio-ontological part – the part connected with artifacts does not work. Let us consider some of his criticisms more in particular.

First, Garcia Godinez points out that in an imagined primitive society where law began to emerge, no concept of legal officials was available: Collective intentionality

[112] Garcia Godinez 2019: 127.

therefore could not create the abstract artifact "legal official" as required by the authorship condition for an artifact's existence[113]. However, neither Burazin's theory nor the unified version of the artifact theory of law previously described proceeds from any assumption that original, informal legal institutions were created "from scratch" on the basis of an already perfectly determined concept. Indeed, as we saw in the previous section, all artifact theorists of law seek to account for customs by looking at their progressive emergence rather than by imagining any straightforward act of creation. But, as Burazin himself notes, a legal custom must in the end have a "recognizable form" as something we can speak of – a substantive concept that can very well emerge gradually but which, at some point, must be fixed as "that institution"[114]. Drawing on Neil MacCormick, Garcia Godinez appeals to the classic institutionalist example of queuing as a nonformal convention based on implicit rules that people can recognize if needed[115]. Artefact theorists might reply here that if people can recognize the practice of queuing, and start referring to that practice as the institution to be followed in certain contexts, then they have a concept of that practice and have collectively created the artifact. The same could be said of the concept of a legal official and, gradually, of a legal system as a system of legal norms.

Again drawing on MacCormick, Garcia Godinez further holds that legal officials cannot have a substantive concept of the legal system, the reason being that there is no clearly defined purpose or function that legal systems are supposed to fulfil[116], nor does Burazin specify one. This argument assumes that the substantive concept required for a legal artifact to be created must necessarily include a clearly and fully specified purpose for that artifact, but neither Burazin's theory nor the unified artifact theory of law previously described makes or even requires such an assumption. Burazin explicitly embraces Thomasson's idea that functional features are not the only kinds of features that matter in placing an artifact within a given kind[117], and indeed, in specifying the substantive concept of the legal system held by legal officials, he lists structural and source-related features along Hartian lines rather than functional ones: «If one remains within the framework of Hart's theory, it is reasonable to assume that the concept adopted by the officials of the legal system includes at least the following two features: that the legal system is a system of valid legal rules, i.e., rules that are members of one and the same system of rules, and that the legal system is structured as a union of primary and secondary legal rules»[118]. Moreover, even if an artifact theory of law is set in an explicitly functionalist mould, as in the case of Ehrenberg's theory, there is no need for such

[113] Garcia Godinez 2019: 122-3.
[114] Burazin 2016: 395.
[115] Garcia Godinez 2019: 123-4.
[116] Garcia Godinez 2019: 123.
[117] Burazin 2016: 389.
[118] Burazin 2016: 397-8.

a theory to assume that the purpose of legal institutions must be clearly stated from the outset. Indeed, the enterprise of understanding and singling out the purpose of legal institutions can be undertaken modestly, as Ehrenberg does[119], and hence as an enterprise for which legal theory must enlist the help of sociology.

There is, finally, another argument that Garcia Godinez raises against Burazin's artifact theory, objecting not to the author condition but to the success condition (which Burazin draws from Hilpinen), namely, the requirement that legal artifacts find some successful realization in some kind of collective, norm-abiding behaviour. Here, Garcia Godinez's objection is twofold: Burazin fails to clarify (*a*) how we can be sure that our collective behaviour corresponds to the right kind of collective recognition (how we can know that what is being recognized is an artifact and not, say, a game or some kind of idiosyncratic construction in the minds of individuals) and (*b*) how collective recognition can provide reasons for action[120]. We have already discussed the problem of the reason-giving nature of artifacts when we considered the challenges that may be raised against the artifact theory of law: Legal artifacts cannot by themselves give a complete picture of law's normativity. As noted, however, and as Ehrenberg in particular illustrates extensively[121], artifacts do give several kinds of reasons for action: prudential reasons to act in a certain way if we want to interact with the artifact effectively, normative reasons to treat them as such, namely, as artifacts of the kind they belong to (according to Thomasson's and Dipert's normativity of recognition), and, when institutionalized, desire-independent reasons for action connected with a given institutional context (as Searle clarifies with regard to institutions). Hence, in the matter of normativity, an artifact theory of law seems to enrich, rather than weaken, a purely socio-ontological account. The same holds for deriving collective action from collective recognition. Of course, one can behave in a certain way for any kind of reason other than a rule, but is it really meaningful to take such a strong sceptic attitude when speaking of behaviours constituted by an artifact's interaction plan? If Garcia Godinez embraces this scepticism, then he should be ready to apply it to pure institutionalist accounts as well: How can he be sure that people queuing at the grocery store do so for normative reasons rather than for purely aesthetic ones?

None of the objections raised by Garcia Godinez seem to invalidate an artifact theory of law. That said, the general thrust behind his objections still stands: Do we really need to reinforce a purely socio-ontological account with artifacts? What, after all, do artifacts add to the socio-ontological picture, given that they are based on that picture? There are several possible answers to this question. On the one hand, reasoning from an ontology of artifacts certainly strengthens functionalist analyses

[119] Ehrenberg 2016: chap. 6, sec. C.
[120] Garcia Godinez 2019: 124-5.
[121] Ehrenberg 2016: chap. 7.

if we think, with Crowe and Ehrenberg, that functionalism solves important problems in legal theory. On the other hand, as Burazin suggests, if the nature of law is shown to depend on creative intentions, «this insight might provide additional support for and justify the use of conceptual analysis when theorising about the nature of law»[122] (even though, as we saw at the outset, Brian Tamanaha and Brian Leiter would derive the exact opposite conclusion from the artifactuality of law). Further, the mysterious nature of constitutive rules in social ontology could find some explanation if embedded in the more ordinary, daily domain of artifacts, and the range of questions relating to an artifact's technical rationality can shed light on the ambiguous normativity of those rules.

But there is a more general consideration to be made here. An artifact theory of law focuses on the peculiar way in which the legal domain is a domain of abstract objects, and not simply of facts about people behaving in a certain way and believing certain things. It explains how law can be made up of hypostatized, symbolic things, and how these things can organize normative behaviour. As Continental legal realists knew very well, this "objectual" aspect of law is not parasitic or irrelevant: Leon Petrażycki, for example, deals with it in terms of his theory of projections[123], while Axel Hägerström[124] speaks of hypostatization in this theory of pseudo-judgments[125]. Both authors thought that this is a kind of illusion, in which pseudo-assertive judgments are made while in reality there is only an expression of emotions. An artefact theory, as I interpret it, aims at capturing this aspect of legal reality without arriving at the conclusion realists want to draw. Hypostatization is not a fallacy: it is rather a feature of the human mind, and an explanation of law should take this feature into account. It has been argued, for example, that from an evolutionary standpoint the characteristic capacity of human beings to attribute legal status and build hierarchies of competence has evolved from the same development of the brain that made it possible to build objects endowed with symbolic value, like ornaments, or with sacred ritual meaning, as in the case of religious burials[126]. In the construction of symbolic artifacts and the construction of legal institutions we have two aspects of the same, distinctly human ability. Law is not simply a matter of socially shared norms: it consists of normative structures charged with symbolic value, and to ignore this metaphysical feature of the legal domain, or to dismiss it as a mere "illusion", would be tantamount to dismissing an important part of its genealogy. An artifact theory of law, then, enhances the explanatory capacity of a pure socio-ontological account by showing how law is embedded within

[122] Burazin 2016: 387.
[123] Leon Petrażycki 1955: 40.
[124] Axel Hägerström 1917: 69.
[125] In this regard, see also Fittipaldi 2016: 451–3, and Pattaro 2016: 325–7, respectively.
[126] Dubreuil 2010: chap. 3.

the broader, distinctly human practice of building artifactual objects (material or immaterial) endowed with symbolic meaning. But, of course, we need the socio-ontological background to explain the shared, inherently collective nature of these objects.

5. Conclusion

In this article, I have set out to answer some questions about the meaning and significance of an artifact theory of law. To begin with, I have shown how, even if the different artifact theories so far advanced depend on different models of the metaphysics of artifacts, it is possible to merge these theories within a single, unified account. In a word, an artifact theory of law explains law as made up of abstract, immaterial artifacts of a specific kind, in that they require us to interact on the basis of constitutive rules grounded in collective acceptance, making such artifacts in this sense institutionalized.

Second, I have discussed the main advantages of this account, while also pointing out the main challenges it faces. An artifact theory of law can explain several aspects of the reason-giving nature of legal artifacts, as well as the dialectic between the production and recognition of law that lies at the core of the debate between legal positivism and legal realism. Moreover, I have argued that the intertwining of different models in the metaphysics of artifacts can also be illuminating in understanding some features of legal interpretation. However, insisting on the artifactual character of legal institutions could be taken to entail that the crucial moment for these institutions' existence lies in their creation, and consequently that all legal institutions need an author – a conclusion immediately falsified by the original, customary nature of law. Also, the author's "authoritative" status over the use of an artifact is much weaker than the normative legitimate status of political authority: artifactual authorship cannot explain legal authority. I have tried to show that customs and emerging institutions are not necessarily a problem for an artifact theory, but I conceded that the concept of authorship assumed by a theory of this kind is broader than is usually assumed, and that the question of legitimacy falls outside its scope.

Third, and finally, I have discussed the relation between an artifact theory of law and a purely socio-ontological account. Given that all artifact theories of law assume socio-ontological concepts like those of collective recognition or constitutive rules, one might ask whether the theory can replace a socio-ontological explanation, and if so how. Here, I have argued that an artifact theory of law is not meant to replace a socio-ontological account but rather to improve on it, and that its contribution consists, among other things, in explaining the "objectual" aspect of legal institutions, namely, the nature of legal structures as symbolic, normative objects – a

characteristic owed to their genealogy and evolution and grounded in the cognitive capacities of the homo sapiens.

References

Baker, L.R. (2004). *The Ontology of Artifacts*, «Philosophical Explorations», 7, 99-111.

Baker, L.R. (2008). *The Shrinking Difference Between Artifacts and Natural Objects*, «American Philosophical Association Newsletter on Philosophy and Computers», 7.

Baker, L.R. (2009). *The Metaphysics of Malfunction*, «Techné», 13, 82-92.

Bloom, P. (1996). *Intention, History, and Artifact Concepts*, «Cognition», 60: 1-29.

Bobbio, N. (2011). *Giusnaturalismo e positivismo giuridico*, Roma-Bari, Laterza (1st ed. 1965).

Burazin, L. (2016). *Can There Be an Artifact Theory of Law?*, «Ratio Juris», 29, 385-401.

Burazin, L. (2018). *Legal Systems as Abstract Institutional Artifacts*, in Burazin L., Himma K.E., Roversi C. (ed.) *Law as an Artifact*, Oxford, Oxford University Press, 112-35.

Castelfranchi, C., Tummolini, L. (2006). *The Cognitive and Behavioral Mediation of Institutions: Towards an Account of Institutional Actions*, «Cognitive Systems Research», 7, 307-23.

Celano, B. (1999). *La teoria del diritto di Hans Kelsen*, Bologna, il Mulino.

Crowe, J. (2014). *Law as an Artifact Kind*, «Monash University Law Review», 40, 737-757.

Crowe, J. (2019). *Natural Law and the Nature of Law*, Cambridge, Cambridge University Press.

Dipert, R.R. (1993). *Artifacts, Art Works, and Agency*, Philadelphia, Temple University Press.

Dipert, R.R. (1995). *Some Issues in the Theory of Artifacts: Defining Artifacts and Related Notions*, «The Monist», 78, 119-135.

Dubreuil, B. (2010). *Human Evolution and the Origins of Hierarchies: The State of Nature*, Cambridge, Cambridge University Press.

Ehrenberg, K.M. (2014). *Law's Artifactual Nature: How Legal Institutions Generate Normativity*, in Pavlakos G., Rodriguez-Blanco V. (ed.), *Reasons and Intentions in Law and Practical Agency*, Cambridge, Cambridge University Press, 247-266.

Ehrenberg, K.M. (2016). *The Functions of Law*, Oxford: Oxford University Press.

Ehrenberg, K.M. (2018). *Law Is an Institution, Artifact, and Practice*, in Burazin L., Himma K.E., Roversi C. (ed.), *Law as an Artifact*, Oxford, Oxford University Press, 177-91.

Elder, C.L. (2007). *On the Place of Artifacts in Ontology*, in Margolis E., Laurence S. (ed.), *Creations of the Mind: Theories of Artifacts and Their Representation*, Oxford, Oxford University Press, 33-51.

Elder, C.L. (2014). *Artifacts and Mind-independence*, in Franssen M., Kroes P., Reydon T.A.C., Vermaas P.E. (ed.), *Artefact Kinds: Ontology and the Human-Made World*, Berlin, Springer, 27-43.

Fittipaldi, E. (2016). *Leon Petrażycki's Theory of Law*, in Pattaro E. and Roversi C. (ed.), *Legal Philosophy in the Twentieth Century: The Civil Law World. Tome 2: Main Orientations and Topics*, Berlin, Springer, 443-503.

Guastini, R. (2011). *Interpretare e argomentare*, Milan, Giuffrè.

Hägerström, A. (1917). *Till frågan om den objektiva rättens begrepp. I. Viljeteorien*, Uppsala, Akademiska Bokhandeln. Leipzig, Harrassowitz.

Hilpinen, R. (1993). *Authors and Artifacts*, «Proceedings of the Aristotelian Society», 93, 155-178.

Hilpinen, R. (2004). *Artifact*, «Stanford Encyclopedia of Philosophy», Winter 2011 edition. https://plato.stanford.edu/archives/win2011/entries/artifact/.

Himma, K.E. (2018). *The Conceptual Function of Law: Law, Coercion, and Keeping the Peace*, in Burazin L., Himma K.E., Roversi C. (ed.), *Law as an Artifact*, Oxford, Oxford University Press, 136-159.

Houkes, W., P.E. Vermaas. (2010). *Technical Functions. On the Use and Design of Artefacts*, Berlin, Springer.

Leiter, B. (2011). *The Demarcation Problem in Jurisprudence: A New Case for Scepticism*, «Oxford Journal of Legal Studies», 31, 663-677.

Leiter, B. (2018). *Legal Positivism about the Artifact Law: A Retrospective Assessment*, in Burazin L., Himma K.E., Roversi C. (ed.), *Law as an Artifact*, Oxford, Oxford University Press, 3-28.

McLaughlin, P. (2001). *What Functions Explain: Functional Explanations and Self-Reproducing Systems*, Cambridge, Cambridge University Press.

Millikan, R.G. (1984). *Language, Thought, and Other Biological Categories,* Cambridge, MA, MIT Press.

Neander, K. (1991). *The Teleological Notion of 'Function'*, «Australasian Journal of Philosophy», 69, 454-468.

Pattaro, E. (2016). *Axel Hägerström at the Origins of the Uppsala School*, in Pattaro E. and Roversi C. (ed.), *Legal Philosophy in the Twentieth Century: The Civil Law World. Tome 2: Main Orientations and Topics*, Berlin, Springer, 319-363.

Petrażycki, A. (1955). *Law and Morality*, in Timasheff N. S. (ed.), Cambridge, MA, Harvard University Press.

Pols, A. (2013). *How Artefacts Influence Our Action*, «Ethical Theory and Moral Practice», 16, 575-587.

Preston, B. (1998). *Why Is a Wing Like a Spoon? A Pluralist Theory of Function*, «The Journal of Philosophy», 95, 215-254.

Preston, B. (2003). *Of Marigold Beer: A Reply to Vermaas and Houkes*, «The British Journal for Philosophy of Science», 54, 601-612.

Preston, B. (2009). *Philosophical Theories of Artifact Function*, in Meijers A. (ed.), *Philosophy of Technology and Engineering Sciences*, Amsterdam, Elsevier/North Holland, 213-233.

Preston, B. (2013). *A Philosophy of Material Culture: Action, Function, and Mind*, New York and London, Routledge.

Priel, D. (2018). *Not All Law Is an Artifact: Jurisprudence Meets the Common Law*, in Burazin L., Himma K.E., Roversi C. (ed.), *Law as an Artifact*, Oxford, Oxford University Press, 239-267.

Roversi, C. (2016). *Legal Metaphoric Artifacts*, in Stelmach J., Brozek B., Kurek L. (ed.), *The Emergence of Normative Orders*, Kraków, Copernicus Center Press, 215-280.

Roversi, C. (2018). *On the Artifactual – and Natural – Character of Legal Institutions*, in Burazin L., Himma K.E., Roversi C. (ed.), *Law as an Artifact*, Oxford, Oxford University Press, 89-111.

Schauer, F. (2012). *On the Nature of the Nature of Law*, «Archiv für Rechts- und Sozialphilosophie», 98, 457-467.

Schauer, F. (2018). *Law as a Malleable Artifact*, in Burazin L., Himma K.E., Roversi C. (ed.), *Law as an Artifact*, Oxford, Oxford University Press, 29-43.

Scheele, M. (2006). *Function and Use of Technical Artefacts: Social Conditions of Function Ascription*, «Studies in History and Philosophy of Science», 37, 23-36.

Tamanaha, B. (2017). *A Realistic Theory of Law*, Cambridge, Cambridge University Press.

Thomasson, A. (1999). *Fiction and Metaphysics*, Cambridge, Cambridge University Press.

Thomasson, A. (2003). *Realism and Human Kinds*, «Philosophy and Phenomenological Research», 67, 580-609.

Thomasson, A. (2007). *Artifacts and Human Concepts*, in Margolis E., Laurence S. (ed.), *Creations of the Mind: Theories of Artifacts and Their Representation*, Oxford, Oxford University Press, 52-73.

Thomasson, A. (2009). *Artifacts in Metaphysics*, in Meijers A. (ed.), *Philosophy of Technology and Engineering Sciences*, Amsterdam, Elsevier/North Holland, 191-212.

Thomasson, A. (2014). *Public Artifacts, Intentions, and Norms*, in Franssen M., Kroes P., Reydon T.A.C., Vermaas P.E. (ed.), *Artefact Kinds: Ontology and the Human-Made World*, Berlin, Springer, 45-83.