An Artifact Theory of Legal Rights

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1. Introduction

That legal rights exist seems to be a platitude. Legal officials, legal scholars and people in general *talk about* them in their everyday discourse and *use* them to make judgements about what to do or not to do regarding a certain (hypothetical or real) situation. And yet, this is so despite not having a clear answer to the following two questions. Firstly, *what are legal rights?* That is, what all those people are talking about when talking about legal rights, and what exactly they are using when using them to make decisions. And secondly, *what does it take for legal rights to exist?* In this paper, I try to answer these questions from a metaphysical point of view.

Although true that these questions have certainly been part of the philosophical discussion about rights, the mainstream methodology employed thus far has only been *conceptual analysis*.[1] That is, the kind of analysis that attempts to unravel logical or analytic relations between certain concepts. Think, e.g., of three important cases: (Hohfeld, 1917; Raz, 1984; and Alexy, 2002). Unlike these theories, I do not propose here a *definition* of (legal) rights nor suggest that, to understand the nature of (legal) rights, all we need is to establish a certain conceptual relation (e.g., the very frequently used 'if and only if' relation) between the concepts 'legal rights' and, e.g., 'legal obligations.' On the contrary, I pursue a metaphysical approach to analyse the ontological status of legal rights, i.e., their existence, identity, and persistence conditions.

To put it bluntly, I argue here that legal rights are *institutional social artifacts*, the purpose of which is to provide legal officials with reasons for institutional actions (including, prominently, institutional decision making). The structure of my argument goes as follows. In Sec 2, I briefly explain both what are artifacts and social artifacts and what is the main difference between them: Whereas artifacts are objects intentionally created by an author (or group of authors) to fulfil certain functions (partially determined by the corresponding artifact concept or *artifact kind*), social artifacts are socially created by their being socially recognised as fulfilling certain functions (partially determined by the corresponding social artifact concept or *social artifact kind*). In Sec 3, I elaborate on the thesis that legal rights are socially created by their being institutionally recognised. Also, since social and institutional recognition are not the same, I take this thesis to help us appreciate the difference between the existence of non-institutional rights (e.g., moral rights) and the existence of institutional social rights (e.g., legal rights). In any case, I conclude, there are no fundamental (or

[1] As clearly evidenced in (Wenar, 2015; and Campbell, 2017).

natural) rights. I consider as well what institutional recognition is and the role it plays in the metaphysical analysis of legal rights, namely, as a defeasible condition for their existence. In Sec 4, I motivate this kind of metaphysical analysis in terms of *an artifact theory of legal rights*, which spells out both their intentional and conceptual nature, i.e., their institutional recognition and their being partially determined by the concepts that specify their identity conditions (including, of course, their appropriate functions). By taking this artifact theory seriously, I finally claim, we do not diminish the importance of legal rights; on the contrary, we understand what they are, what their main general function is, and why their existence depends on both a certain form of intentionality and a given conceptual framework.

2. Rights as Social Artifacts

To claim that legal rights exist should not strike us as extravagant at all. For instance, we can easily find people (e.g., legal officials and legal scholars) writing books, articles, legal documents, etc. making use of them. Also, we usually discuss, e.g., whether we have a legal right (or a correlated obligation based on a legal right), or what the content (or the correct interpretation) of such-and-such legal right is, etc. All of these intentional actions and activities seem to be grounded in the acceptance that legal rights exist. This is, to put it otherwise, a common premise presupposed in our discursive and practical contexts. Yet, if true that legal rights exist, what is their ontological status? That is, *is there something in this world that is such-and-such legal right?*

I answer this question in this paper. I argue that legal rights are artifacts of a certain kind. As such, I hold, we can easily prove that they are existing entities. That is, that they genuinely exist and it is not true that we just pretend that there is something like legal rights in the world. Let me start this argument by introducing some clarifications. Firstly, I distinguish between *rights* and *legal rights*. By 'rights' I mean non-institutional (or non-formal) rights, e.g., moral rights. By 'legal rights' I mean a special case of institutional (or formal) rights. Secondly, I use 'artifacts' to refer to ordinary, inanimate objects, e.g., chairs, forks, laptops, etc. Thus, the theses 'rights are artifacts' and 'legal rights are artifacts' are clearly false. However, as I claim here, this does not prevent us from analysing both rights and legal rights as being artifacts of a different kind. I presently suggest some reasons to justify the following thesis about rights:

R-SA: *Rights are social artifacts*

2.1. Artifacts

Chairs, forks, laptops, etc. are artifacts. They all have in common their being objects intentionally created to fulfil a certain function or set of functions. Think, e.g., of forks. They are objects

intentionally created to prick food to pick it up and carry it to the mouth. This may be taken as an essential feature of forks, i.e., as one of the features that can generally help us identify them and distinguish them from other objects, e.g., spoons or tables.[2] Of course, when it comes to functions, we should be flexible enough. Not all forks fulfil (only) this function, e.g., they can be used to prick something other than food. Also, they can fulfil it deficiently or in a non-standard way. In any case, the functions that any kind of artifact is supposed to fulfil may be fulfilled (or carried out) not only to a certain extent (i.e., functions are gradually fulfilled), but further, they may be subject to revision. I come back to this later.

Independently of what specific (although revisable) functions they have, all artifacts are *intentional creations*, i.e., they are the product of intentional actions or activities (or of actions and activities that involve certain intentional actions or activities, e.g., industrial processes). As such, artifacts are not *natural objects* (i.e., objects naturally given), but created or modified by someone (or something) with a certain capacity, namely, *intentionality*. Thus, the objects created through a certain form of intentionality are *artificial objects* (or artifacts, for short).

To understand what artifacts are, let me consider a standard characterisation of them. In his (1992), Hilpinen says: "I take artifacts […] to be physical objects which have been manufactured for a certain purpose or intentionally modified for a certain purpose" (Hilpinen 1992, 58). Chairs, forks and laptops are the kind of artifacts that make this characterisation intuitively correct. Yet, we may easily find some other kinds of artifacts that, even though intentionally created for a certain purpose, are not *physical objects* at all, e.g., melodies, poems, genre, race, legal rules, legal rights, etc.

I defend here that all these non-physical objects (that satisfy the conditions of intentionality and functionality) are artifacts of a different kind. Some of them, such as melodies and poems, are the kind of artifacts that we identify as *artworks*. Some others, such as genre and race, are *social artifacts*. And a special category of these, e.g., legal rules and legal rights, are *institutional social artifacts*. I say something general about the second in this section and discuss the latter in Sec 3. I shall mention almost nothing about artworks here.

To say that artifacts are intentionally created means that there is a *causal relation* between the (physical or non-physical) objects and the intentional actions or activities of those who create them. Thus, to say that *A* (an entity that possesses intentionality, i.e., an *agent*) intentionally creates the artefact *f*, means that the product (or effect) of *A*'s action or activity is *f*. *f* is therefore the kind of

[2] Although 'essential features' will be mentioned along this paper, I shall not specify what an essential feature is. Moreover, the discussion about essentialism and anti-essentialism concerning artifacts is postponed for another occasion.

object that would not exist without *A* (or, more specifically, without the appropriate *A*'s intentional action or activity). See (Hilpinen, 1992: 59).

Causality, however, is not a fine-grained enough relation to be able to capture the *dependency relation* that obtains between the agent and the object intentionally created.[3] We would not say, after all, that babies are artifacts just because they are the product of the intentional activity of having sex. Artifacts depend on intentionality in a different way that babies do (see Thomasson, 2007: 52). When an agent (or author) intentionally creates an artifact, she has the appropriate intention to create an artifact. That is, she has a certain notion or conception of what *artifact kind* she wants to create, and adjust their actions and activities according to producing an instance of such kind of artifact (i.e., an *artifact token*). Since the artifact kind is socially constructed, in that it is up to her linguistic community to decide what counts and what does not count as such-and-such artifact, her corresponding intention is partially determined by her social environment. Babies, on the other hand, are the product of intentional activities that are not determined at all by artifact kinds. People as well as non-human animals have babies without need of any conceptual or linguistic framework. To put it otherwise, babies are tokens of *natural kinds* (which, strictly speaking, are not up to us to decide).[4]

Before explaining what this dependency relation consists in, let me say something more specific about the *content* of the agent's intentionality. When *A* intentionally creates the artifact *f*, there is something that is the content of her intention to create *f* (see Hilpinen, 1992: 60). If *A* intentionally creates, e.g., a fork, part of the content of her intention is a certain conception (or *type-description*) of fork. I say 'part of the content of her intention' because there may be some other elements involved, e.g., a (private, shared, or group) reason to so intend.[5] Thus, if *A* successfully creates a fork, the product of her intentional action or activity (i.e., the fork token) is partially determined by *A*'s conception of fork (i.e., its type-description). If *A* is wrong about what a fork is (i.e., about the type-description generally associated to the concept of fork), then her creation is not a fork (at least, not intentionally).

Since *type-description* plays such a significant role in the intentional creation of artifacts, a general theory of artifacts should explain it in detail. As I do not attempt this kind of theory here (but see, e.g., Thomasson 2007), I shall not elaborate on it any further. In any case, I take a type-description to contain what Thomasson calls 'application and co-application conditions,' i.e., existence and

[3] On the metaphysics of causation, see (Schaffer, 2016).

[4] Although commonly accepted, the distinction between natural and artificial kinds has been contested on different grounds. For a general overview of this, see (SEP; Franssen, 2013; and Soames, 2007). However important for my argument, I shall leave this controversy aside and work on the assumption that we can still classify objects in the world by using such categories.

[5] On private, shared and group reasons, and the role they play in individual and joint intentional action, see (Tuomela, 2007, 2008, and 2013).

identity conditions (see Thomasson, 2009). Also, I consider as part of these identity conditions the function (or set of functions) generally associated to the artifact kind in question. For a similar idea, see (Hilpinen, 1992: 61). So, if true that artifacts are partially determined by their corresponding type-description, it also follows from it that they are partially determined by the function (or set of functions) that they are supposed to fulfil.

However difficult to specify the functions that certain artifacts are to fulfil, my contention here is that their *functionality* (pace Thomasson, 2013) is still part of what determines their artificial nature. Thus, if *A* successfully creates an artifact, say, a fork, this fork is partially determined by the notion or type-description associated to forks. As long as this type-description contains as an identity condition the function (or set of functions) that forks are supposed to fulfil, the fork that *A* intentionally creates is also partially determined by its functionality.

Two important caveats are in order here. Firstly, I do not think of type-descriptions as establishing criteria of correctness (with *fixed* meanings), but solely as socially shared notions or conceptions (with *revisable* meanings). These shared notions are generally built out of different ideas of what a certain artifact is or should be, the function or set of functions that it is supposed to carry out, the material that it should be made of, its size, etc. Since all of these ideas are revisable, i.e., subject to change and refinement, we should not expect to have always the same conception of what a certain kind of artifact is.

Secondly, I take type-descriptions to refer. This is part of the reason why artifacts are objects, i.e., existing entities in the world. Since, as clearly defended by (Hilpinen, 1992; and Thomasson, 2009 and 2015), there are only two elements involved in the metaphysical methodology required to decide whether a certain artifact token exists, namely, *conceptual competence* (i.e., to understand the application and co-application conditions of the corresponding type-description) and *empirical investigation* (i.e., to determine whether such conditions are satisfied by a certain object in the world), the only way this methodology can work is if type-descriptions are referential. I shall consider this metaphysical methodology and its application to answering ontological (or *existence*) questions about institutional social artifacts (particularly, legal rights) in Sec 4. In the following subsections, though, I shall only focus on the intentional nature of artifacts (i.e., the dependency relation between artifacts and their creators).

2.2. Intentionality

An artifact (i.e., an artifact token) is an object intentionally created.[6] For Hilpinen, this means that an object is an artifact *only if* it is the product of an intentional action or activity (Hilpinen, 1992: 60). He, accordingly, proposes two *success principles* to decide when an object intentionally made or created is an artifact: The first (A1) establishes that an object is an artifact made by an agent only if it *satisfies* some type-description included in the agent's intention which brings about the existence of that object, whereas the second (A2) establishes that an object is an artifact made by an agent only if the agent *accepts* it as satisfying some type-description included in the intention of that agent which brings about the existence of that object (Hilpinen, 1992: 61, 62). In other words, according to (A1), the object intentionally created is an artifact if it satisfies to a certain extent the type-description that is part of the content of the agent's appropriate intention.[7] According to (A2), on the other hand, the object created is an artifact if the agent accepts (or *recognises*) it as satisfying such a description.

Let me consider each of these principles with a couple of examples. First, I can successfully create an artifact, say, a fork, by transforming (i.e., manufacturing) a certain physical substance (e.g., plastic), only if – according to (A1) – it satisfies the application and co-application conditions of the type-description of fork (which is part of the content of my intention to create that fork).

Second, if I recognise a certain object (e.g., a twig) as satisfying the application and co-application conditions of the type-description of fork, then – according to (A2) – I shall have successfully created a fork as well. In this case, unlike the previous one, what makes the object (i.e., the twig) an artifact (i.e., a fork) is not the fact of being intentionally created through a certain manufacturing process, along with the fact that it satisfies to a certain extent the corresponding type-description, but rather its being *recognised* as satisfying it.

To recognise, as well as to create something through a certain manufacturing process, are intentional activities by means of which we can create artifacts. In the former case, the intentional activity (or more specifically, the intentional mental activity of recognition) consists in attributing a certain object the features or properties usually attributed to any other member of the artifact kind in question (including, of course, the functions commonly associated to it).[8]

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[6] By 'intentionality' I mean the capacity of having mental states about (or *addressed to*) certain content (e.g., a proposition or any other form of representation) with an appropriate semantic relation of satisfaction (or *direction of fit*). On this, see (Searle, 1983).

[7] The expression 'to a certain extent' is not accidental. Type-descriptions (or, more specifically, the application and co-application conditions contained in type-descriptions) are generally vague.

[8] Recognising something, as well as having a belief or a desire, are intentional mental activities that relates in a certain way a certain content with the subject (or the agent) that holds such an intentional state. As said, this relation is usually understood in terms of *aboutness*, e.g., a belief or a desire is about or addressed to something, i.e., a certain content, e.g., 'it's snowing outside,' or 'I'll submit my paper on time,' etc. Thus, my recognising a certain object as an *f* is about that object counting as an *f*, and my believing that *p* is about *p*, etc.

It is important to notice here that these two intentional activities (i.e., manufacturing and recognising) are multiple realisable. For instance, a fork created through a certain manufacturing process, can be equally the product of either a manual or an automatised activity. On the other hand, a fork created through a certain recognition process, can also be the result of either an *implicit* or *explicit* recognition. An example of the former would be *using* the object as a fork. An example of the latter would rather be *stating* that the object at issue is a fork.[9]

To decide when an implicit or explicit recognition is part of the existence conditions of an artifact, depends on both the artifact kind and the context of recognition (i.e., the context where the recognition is to take place). Additionally, as it can also be the case with the intentional activity of manufacturing, the activity of recognition can be *individually* or *collectively* performed. For example, if the agent *A* recognises a twig as satisfying the application and co-application conditions of the artifact kind *fork*, then the twig will count as a fork for her. This is an individual form of performing the intentional activity of recognition. For the twig to count as a fork for someone else, e.g., *B*, *B* also has to recognise it as a fork. That is, *B* has to share *A*'s recognition of the twig as a fork.

Before explaining what I understand by the *shared* (or *joint*) intentional activity of recognition, I shall briefly mention the metaphysical role it plays in the existence of artifacts. Let us consider again the twig-fork case. If anyone asks, 'what's that object?' (referring to the twig), then we can answer (at least) in two different ways. Either by saying 'it's a twig' (i.e., a token of a natural kind) or 'it's a fork' (i.e., a token of an artifact kind). It all depends, as (Searle, 1995: 9-10) explains, on which aspects are taken into account when answering. One says that it is a twig if one only considers its *brute* (or natural) aspects. One says that it is a fork, on the other hand, if one also considers its *institutional* (or artificial) aspects (i.e., its being recognised as a fork).

Although Searle distinguishes between brute and institutional *facts*, I think the analogy could also be helpful for classifying objects. Natural objects would be those whose existence does not depend on any form of intentionality (e.g., twigs, rocks, rivers). Artificial objects (or artifacts) would be, then, those whose existence does depend on a certain form of intentionality (e.g., forks, chairs, laptops). Some of these artifacts are brought into existence by means of a certain manufacturing activity, whereas some others by an implicit or explicit recognition. Being recognised, therefore, is not a necessary condition for the existence of artifacts (generally speaking). However, it may be necessary (or only sufficient, etc.) for the existence of some other kinds of artifacts. Since I am not

[9] To state falsely or insincerely that something is an artifact is not a counterexample to recognition. If I say that an object is an instance of an artifact kind, although I do not actually recognise it as such, then I am not stating my recognition at all. Indeed, I am performing another intentional activity, namely, I am falsely stating that this object is an artifact of a certain kind. Furthermore, to be wrong about what object I am actually recognising as an artifact, is not a counterexample either. As it is the case with other intentional mental activities (e.g., beliefs), error is always possible.

considering here all kinds of artifacts, I shall leave this point unspecified. Yet, I shall say something more precise about the conditions for the existence of institutional social artifacts (the only kind of artifacts that interest me here).

As is very well known, in Searle's theory of social reality (as developed in his 1995 and 2010) the notion of recognition plays a significant role. Firstly, because it allows us to distinguish between facts, properties, and objects whose existence is not *mind-dependent* (i.e., ontologically objective) from those whose existence is *mind-dependent* (i.e., ontologically subjective). And secondly, because it helps us understand why the dependency relation between intentionality and artifacts is still coherent with the main claim of *ontological naturalism* (or physicalism), that is, the idea that there is nothing in the world over and above natural (or physical) facts, properties and objects.

I shall not argue for any of these theses here. Instead, I want to suggest that the notion of recognition can help us understand the idea that social reality can be described only from *the internal* (or *the participant*) *perspective*. Following (Hart 1994: 242-244, and 254-259), there are two perspectives from which we can describe facts or make statements about them: The *external* (or the observer) perspective and the *internal* (or the participant) perspective. In relation to objects, one takes the observer perspective when, in reporting their existence, we only take into account their brute nature (i.e., one does not recognise or does not share the recognition of a certain object as an artifact). One takes the participant perspective, on the other hand, when one does recognise a certain object as an artifact or share the appropriate recognition.

To participate in a *social practice of recognition* is part of our living in society. Of course, we do not only recognise objects as artifacts, we do also recognise facts, events, actions, attitudes, etc. as counting as something else, e.g., crimes, concerts, toasts, plans, etc. All of them play an important role in the construction of our human societies and, more specifically, in our cultural development. This is partially why, in order to explain the evolution of human communities, it is necessary (although not sufficient) to consider the objects, facts, events, etc. that counted or still count as something else (including, certainly, the objects recognised as artifacts).

As (Thomasson, 2013) has clearly highlighted, the *reasons* that participants have for participating in a social practice of recognition is also another important element within this explanation. Admittedly, not all of us participate in such a kind of practice for the same reason(s), nor are all of the reasons we have to participate stronger than the reasons we have not to so do. For instance, someone can have a reason (e.g., a political reason) not to participate in the recognition of a certain object as an artifact of a certain kind (e.g., a religious artifact). Thus, in general, we shall not have a complete understanding of what participating in a certain social practice of recognition is until we know the reasons that participants have for doing so. Of course, one can explain in general what

social recognition is (i.e., a collective intentional activity), but not why people do recognise or do not recognise such-and-such object as an artifact (unless, of course, one knows the reasons they have to do so).

In what follows, I shall consider some kind of social artifacts, though I shall not discuss the reasons people have to participate or not in their social recognition.

2.2.1. Social Artifacts

Rights are not forks, i.e., they are not the same kind of artifacts. The clearest difference between them is that rights, unlike forks, are not physical objects. Also, forks can equally be created by either their being the product of a manufacturing activity or their being the physical objects recognised as satisfying the type-description of forks. Rights, on the other hand, can only be created through a certain form of recognition. The similarity between them, however, is that both are intentional creations that are supposed to carry out a certain function (or set of functions). I shall say something general about the purpose or functionality of rights later on; for now, I only want to focus on their existence conditions, and more specifically, on their social recognition.

Considering their lack of physical composition, rights are more like corporations: Neither of them are physical objects. Also, they exist only if we recognise them (i.e., their existence depends on their being appropriately recognised). For instance, a corporation exists as long as it is *legally recognised* as a legal entity. Its being created through its legal recognition means that its owners carried out a certain (formal or institutional) activity in order to create it. Nevertheless, the corporation cannot be identified with its owners. Firstly, the corporation can exist with completely different owners. And secondly, its properties are distinct from those of its owners, e.g., it has rights, obligations and responsibilities different from the rights, obligations and responsibilities of its owners, etc. To say that corporations are physical objects as they are created by individual agents is, therefore, totally mistaken – and a similar point can be made regarding other kinds of artifacts, e.g., rights, legal rules, etc.

Now, however similar in this important respect, rights and corporations are still different kinds of artifacts. Although true that all institutional artifacts, e.g., corporations, contracts, etc. can exist only if they are appropriately recognised, and this is something they have in common with rights, the latter require a certain form of recognition that is different from that required for the former. The existence of corporations (and other institutional artifacts) depends on a specific, formal form of recognition, i.e., a *legal recognition*. The existence of rights, on the other hand, depends on a non-formal, *social recognition*. Let me unpack this in the following subsection.

2.2.2. Social Recognition

That rights are social artifacts is based on the thesis that they are non-physical objects intentionally created by their being socially recognised. As such, they are not *artifacts*, since artifacts are – according to Hilpinen – physical objects intentionally created for a certain purpose. Corporations and rights, on the other hand, are the kind of artifacts that are not physical objects. The difference between them, however, is that whereas corporations are *institutional artifacts*, rights are *social artifacts*. The former are the kind of artifacts that are necessarily intentionally created by their being institutionally recognised. The latter, instead, are necessarily intentionally created by their being socially recognised. I shall presently explain this difference.

Generally speaking, corporations are created through a certain *constitutive act* (Levy, 1998: 442). I take constitutive acts to be institutional artifacts whose purpose is to attribute legal existence to certain physical or non-physical objects (e.g., unions, universities, political parties, and corporations). The attribution of legal existence, depending on the specific legal context, can be either *definitive* or *defeasible* (i.e., subject to revision). I shall not stress this point any further. What I want to emphasise instead is that, although the constitutive acts by means of which corporations come into existence can have a certain physical composition (e.g., they can be stamped documents),[10] we should not conclude from it that corporations can have any physical composition. The reason: As true about their owners, corporations are not identical (nor reducible) to their corresponding constitutive acts (although they need them for their definitive or defeasible legal existence). However true that corporations cannot exist without their corresponding constitutive acts, they are two different kinds of artifacts. Constitutive acts are institutional artifacts intentionally created to create (i.e., to attribute legal existence) to corporations, whilst corporations are institutional artifacts intentionally created by their being legally recognised through their corresponding constitutive acts to pursue a certain function (or set of functions), e.g., to provide commercial loans to farmer communities.

The existence of rights, on the other hand, does not depend on the existence of other institutional artifacts (e.g., constitutive acts). Rights (e.g., moral rights) are not the kind of artifacts that require their being created through any formal or institutional recognition. Institutional rights, e.g., legal rights, are different in this important respect: They require the existence of other institutional artifacts, e.g., legal rules. I shall come back to them in Sec 3. Although moral rights are correctly associated to a certain normative framework of recognition (which I would say can be explained in terms of a *non-*

[10] In this respect, we may say, constitutive acts are more like forks. However, they are still totally different. For example, constitutive acts are intentionally created by their being institutionally recognised (which, as I shall argue later, necessarily requires collective recognition), whereas forks can merely be individually recognised (i.e., without need of any collective, let alone institutional, recognition). Also, both of them are intentionally created to fulfil completely different functions. As such, the intentional content of their corresponding recognition is different in each case.

formal normative social practice), there is nothing institutional in it. This partially explains why moral rights are more basic, widespread, and easily contested than legal rights. By 'basic' I simply mean non-formal (or primitive). Moral rights arise from people facing similar needs in their ordinary life, which has not been always constrained by any institutional normative framework (think, e.g., of primitive communities). They are more widespread than legal rights for the same reason: They have to do with human needs (and some other aspects of human beings, e.g., cooperation, altruism, selfishness, rationality, etc.) rather than with the stability of a certain legal system based on certain legal relations (e.g., legal obligations, legal responsibilities, etc.). Their contested character comes along with the idea of being subject to social improvement. That is, moral rights are taken to be the basis but not the goal of human civilisation, which means that they can be refined according to the expectations of human societies. Legal rights, on the other hand, cannot be contested on the basis of similar expectations, since this requires a certain institutional action triggered by a certain institutional office, etc. Also, it is commonly said that legal systems pursue the establishment and protection of certain legal rights, which is not the goal of human societies in general.

Whether human, individual, and social rights are moral or legal rights is not a matter of discussion here. The only general claim I defend in this paper is that all of these rights are artifacts of a certain kind. Some of them are social artifacts (whose existence does not depend on any institutional form of recognition), and some others are institutional social artifacts (whose existence does depend on a formal form of recognition). When it comes to the latter, there must be a certain *institutional normative framework* that establishes the conditions under which their corresponding recognition takes place. In any case, however, there are no *fundamental rights* at all.

Let me explain this latter claim. By 'fundamental rights' I do not mean those rights which are supposed to have the highest default importance (or *weight*, if the reader prefers to use this popular metaphor) within a certain normative context. 'Fundamental' here is ambiguous. In this latter sense, fundamental rights, e.g., human rights, are usually understood as founding (including limiting and creating) the normative content of a certain normative framework. For this reason, they are also taken to prevail in conflicting situations within the corresponding normative framework over other important rights (e.g., institutional rights). In the former sense (i.e., in the sense used in the previous paragraph), fundamental (or natural) rights would be those whose existence would not depend on any form of recognition. Think, e.g., of Feinberg's natural conception of moral rights: "Natural rights are part of the nature of the things to be discovered by human reason, whereas conventional and institutional rights, including legal ones, are the products of human draftsmanship and general compliance and acceptance" (Feinberg, 2003: 40). According to him, then, natural rights would be,

following Searle's terminology, *ontologically objective*. The existence of such kind of rights is what I am denying here.

Now, since all kinds of rights depend for their existence on a certain form of recognition, it follows from this that they are also partially determined by their corresponding type-descriptions. As such, rights are different from corporations (and from any other artifact of any kind) in that the content of their recognition is different in any case, i.e., the type-descriptions of rights that are part of the content of their recognition are different from the type-descriptions of any other artifact kind, e.g., corporations, contracts, etc. In the following subsections, I shall discuss both the social recognition of rights and their type-descriptions.

2.2.3. Social Recognition of Rights

Expressions like 'Rights recognised by this Charter…,'[11] or '… the rights recognised by the Convention…,'[12] etc., although very common in our everyday discourse, have not yet received enough attention from legal scholars. For an artifact theory of legal rights, however, these expressions play a very significant role: They provide us with both empirical and conceptual truths for the metaphysical analysis of legal rights. In other words, they tell us which legal rights actually *exist*. The rights recognised in a Charter, Constitution, international treaty, etc. are the rights that exist for the State where the Charter, Constitution, international treaty, etc. has political power (i.e., the kind of power that is required in order to establish the conditions for the existence of legal entities, including legal rights). As such, the notion of recognition is not only a very familiar one, but it also has an important explanatory value.

Talking about recognition is certainly more common within the *legal discourse of rights* than within the more *general language of rights* (i.e., including non-institutional rights, e.g., moral rights). However, this would diminish its importance. The existence of all kinds of rights (i.e., institutional or not) depends on their being appropriately recognised. Yet, some of them require for their existence an explicit (or formal) form of recognition, whereas some others do not. As the latter are implicitly recognised, their existence is presupposed in our discourse rather than explicitly confirmed when talking about them.

I shall say something more specific about this implicit form of recognition in this subsection. In the next one, I shall briefly analyse its content (i.e., the type-descriptions of rights, including their functionality). To say that rights are not physical objects but still a certain kind of artifacts, seems to be an important departure from the standard theory of artifacts (i.e., Hilpinen's). Recall that according

[11] Art. 52, 2 EU Charter of Fundamental Rights.
[12] The Human Rights Act, https://www.libertyhumanrights.org.uk/human-rights/human-rights-act

to this theory, artifacts are only physical objects intentionally created for a certain purpose. Although in this paper I cannot thoroughly defend an alternative, more comprehensive theory of artifact kinds (but see Thosmasson 2007; and Franssen, 2013), I can at least try to suggest its possibility. To my view, the reason we should not think of every possible kind of artifact as necessarily physical is that neither of the characteristics that make something an artifact of a certain kind requires so. Both *intentionality* and *functionality* can be properties of non-physical objects too. Of course, a non-physical object cannot be an artifact *simpliciter*, but it can perfectly be a different kind of artifact, e.g., a social artifact.

The intentional nature of social artifacts is given by their being necessarily socially intentionally created. That is, the intentional activity by which we create social artifacts (i.e., their recognition) can only be social or collective – as opposed to private or individual. This is a significant difference regarding other kinds of artifacts. To recognise a certain object as an artifact of a certain kind (i.e., as satisfying the type-description of a certain artifact kind) is an intentional activity. However, when this recognition is a shared social recognition, the intentional activity is rather a *collective intentional activity*. This is possible since, as explained before, recognition is multiple realisable, i.e., it can be made of different forms (e.g., individual or collective, implicit or explicit, formal or non-formal, etc.).

Let us come back to the example given above of the twig that is recognised as a fork. My recognising the twig as a fork, i.e., my carrying out the intentional activity of recognition towards this twig by using a certain conception or type-description of fork, can be realised in different forms. If my recognition is explicit, then it can be realised by my declaring, e.g., 'this twig is a fork.' If, on the contrary, it is an implicit form of recognition, then it can be simply made through its being used in the appropriate way, i.e., by my using the twig as a fork. Nothing in this way of using the twig requires social or collective intentionality.[13] The twig can only be recognised as a fork (i.e., used in the appropriate way) by me. Of course, as also mentioned before, if someone wants to report my intentional activity from the internal or participant point of view, then they have to share my recognition. Otherwise, they would be reporting exclusively from the external or observer perspective (i.e., without sharing my recognition of the twig as a fork).

Social artifacts (e.g., rights) cannot be created on the basis of private or individual recognition. They necessarily require social or collective recognition. As such, they do not depend on *individual* but only on *collective intentionality*, i.e., the kind of intentionality by means of which groups of individuals carry out certain intentional actions and activities together, e.g., dancing at a wedding,

[13] This is so, however, without denying the social element involved in using a certain socially constructed notion (i.e., the type-description of fork).

playing tennis, forming a queue, etc. For a general overview about collective intentionality, see (Tollefsen, 2004).

A central claim within analytic social ontology is that human beings collectively create certain objects through their intentional activity of recognition, e.g., concepts, artifacts, and institutions. See, e.g., (Searle, 2010; and Tuomela 2013). This claim, along with the idea that rights, legal rights, and law itself are collective constructions, are two remarkable assumptions in this paper.[14] Thus, neither of them should be tested here. Instead, I want to focus only on the way we collectively create social artifacts through our social recognition.

Social recognition is a certain collective intentional activity that does not require for its realisation any specific form. For example, we can socially recognise something based on a certain agreement (or convention), e.g., we can take a certain pile of rocks as being (or satisfying the type-description of) the border between our nations. In this case, the social recognition is carried out through our *collective acceptance* of such an agreement.[15] Yet, this is not the only way we can socially recognise something as satisfying a certain type-description. Think, e.g., of a social practice of recognition. In Hart's theory of law, for instance, participants employ certain primary rules (i.e., rules of obligation) to determine which conducts are wrong or incorrect (i.e., reproachable). See (Hart, 1994). As long as this employing certain rules does not get formalised (or institutionalised), he argues, the appropriate determination of wrongfulness will be unstable, e.g., people may not agree on which rules are supposed to be employed, or who is to decide (i.e., who are the participants), etc. These are some of the problems that Hart identified in what he calls the *pre-legal world*, which are supposed to be solved only by introducing certain secondary rules (i.e., rules of power) and thereby institutionalising the social practice of recognition. This institutionalisation would be then the necessary step from the *pre-legal* into the *legal world*.

I do not want to argue for Hart's theory of law here. This is only an example of a non-formal, social recognition. In his theory, participants socially recognise certain rules by their *employing* them when deciding which conducts are wrong. In other words, similar to the case of social recognition based on agreement or convention, these participants have a certain collective attitude of acceptance towards those rules. When those participants use or employ those rules in a certain situation, they make explicit (e.g., in their respective utterances) their acceptance attitude. Institutionalising this

[14] With this, however, I do not want to suggest that law is a certain kind of artifact. Although there are some attempts out there addressed to defend such an idea (e.g., Burazin, 2016, and 2018), I have argued elsewhere that this is a mistake. See my (forthcoming). Of course, my objection does not lead one to deny that law is a social construction and, therefore, depends on a certain form of collective intentionality. Law and (legal) rights are similar in this important respect; however, they are still different: Law is an *institutional normative social practice* (see MacCormick, 1986 and 2007), whereas (legal) rights are (institutional) social artifacts.

[15] The most developed theory of collective acceptance is Tuomela's. See his (2002, 2007, 2008, and 2013).

practice, amongst many other things, requires this use being made explicit in a certain form, under certain conditions, following certain formalities, etc.

My view here is that social artifacts come into existence by their being socially recognised through a certain non-formal collective intentional activity of recognition. In the case of rights (and, more specifically, moral rights), I think, they are socially created by their being socially recognised through a certain social practice of recognition. Participants in this kind of social practice collectively recognise that something (i.e., an utterance) satisfies the type-description of a certain moral right (e.g., the right to own property). Since what they are creating is an instance of a type-description,[16] the utterance is not about the concept or type-description itself, rather it is something like 'No one shall be arbitrarily deprived of their property.' Within a certain community, where this utterance is taken to be an instance of the moral right to own property, there is a moral right, namely, the moral right to own property. Discussing about the correctness of the utterance, its ability to satisfy the type-description of the corresponding moral right, or to what extent there is an agreement amongst participants as to what should be the appropriate type-description, etc., is a problem that cannot be kept out from the social practice of recognition. As said, people can be wrong about what they recognise (as is the case with their beliefs and other intentional states). Moreover, to decide which is the appropriate type-description, they can always pursue a conceptual analysis (including the means to resolve conceptual disagreements, e.g., *metalinguistic negotiations*).[17]

I do not intend with this to give a complete, detailed analysis of social recognition and the role it plays in the construction of social artifacts. Instead, I have proposed some general ideas that can help us understand how non-physical objects (e.g., moral rights) can be collectively intentionally created. Since this element (i.e., the intentionality) is only one of the two conditions for something to be considered an artifact of a certain kind, I move on now to briefly consider the second, namely, its functionality.

2.2.4. Functions of Rights

One of the consequences of accepting that the existence of rights depends on their being socially recognised, is that the corresponding existential claims (e.g., 'there is a moral right, namely, the moral right to own property') can only be made from the internal or the participant perspective, i.e., from

[16] We should remember that type-descriptions or concepts are part of our socially constructed conceptual framework (or home language). *How do we socially create this kind of framework?* is a crucial question that goes beyond the scope of this paper. In any case, see (Searle, 2010).

[17] On this, see (Thomasson, 2014, 2016a, 2017a, and 2017b). A *metalinguistic negotiation* is the kind of philosophical discussion we have about the semantic content of certain terms (mainly, but not exclusively, *normative terms*). See (Plunkett & Sundell, 2013; and Plunkett, 2015). For a discussion, see (Marques, 2017) and (Cappelen, 2018: Ch 15).

the perspective of those who participate in the corresponding social practice of recognition. From an external or observer perspective, on the other hand, such a claim cannot be literally true, precisely because it consists in not taking part in the social practice of recognition. Yet, it is still possible for someone who adopts the external perspective to say something like 'within a certain community, there is a moral right….' If she is not part of that community, then the existential claim 'there is a moral right…' is not available to her (i.e., she cannot use it in her corresponding reasoning, e.g., to make a decision about someone's correlated obligation). The detachable 'within a certain community' means that the people who are part of such a community can make use of the existential claim, but no one else. Thus, to detach it, the observer should take part in that community, i.e., in the social practice of recognition.

Now, *why is it that rights are supposed to be used in certain reasoning?* As I shall briefly explain in this subsection, this is the kind of function that rights are supposed to fulfil. Again, if rights are artifacts of a certain kind, they must be intentionally created for a certain purpose. Although the specific function (or set of functions) that they are supposed to fulfil can be further discussed, their purposiveness or general functionality can still be explained straightforwardly. Let me unpack this.

The *kind of function* that rights are supposed to fulfil is to give us reasons to make decisions within a certain normative framework. For example, if a certain right exists, it can be used to claim that someone (or their property) ought to be protected in a certain way, or to decide that someone else has a certain correlated obligation or that is responsible for failing at complying with their obligation, etc. Of course, to say something more specific about the function that it is supposed to fulfil requires saying something more specific about the right at issue. Although all rights are social artifacts, we should agree that they all have different specific functions (e.g., some of them are used to protect individual people, some others to protect groups of people, some others to protect property, and some others to protect nothing, but rather, to promote certain liberties, etc.).

Besides this, there is another important and closely related point here: We may discuss whether rights give us reasons to protect *interests*, to promote *liberties*, or to justify the *imposition of obligations* over others, etc. To decide this, however, we need to consider and take a stance on the philosophical debate about the general *theory of rights*. Unfortunately, this is something I cannot do here. Nonetheless, I want to emphasise that an artifact theory of rights (i.e., a metaphysical theory of rights) should make room for all (or, at least, the most promising) theories of the functionality of rights (e.g., the interest theory of rights, the will theory of rights, etc.).[18] Yet, I leave to the reader testing the suitability of my understanding of rights in these terms.

[18] For a general overview of these and other theories of rights, see (Wenar, 2015).

Regardless of the specific reasons they provide, the functionality of rights is clear: Rights give the participants *practical reasons*, i.e., the kind of reasons that explain certain dispositional attitudes, e.g., disapproval, reproach, etc., and intentional actions, e.g., making decisions. Roughly speaking, this can be conceptualised as the *conative role* that rights play (or are supposed to play) in their participants' social life. They give them reasons to act in a certain way, to decide whether or not someone has a correlated obligation, to justify a responsibility attribution, etc. Thus, from this metaphysical, artifact theory of rights, this way of understanding the functionality of rights clearly expresses their contribution to the general *practical reasoning*: Rights provide participants with the practical reasons they can use to argue for or against a certain normative judgment.

The ongoing discussion about which specific function (or set of functions) corresponds to such-and-such right should not stop us from understanding their general purpose. This is because to decide which specific functions they have does not determine the kind of function that they are supposed to fulfil. Or to put it otherwise, the truth of the thesis that rights provide practical reasons does not depend on deciding which specific practical reasons they provide. Were the interest theory, the will theory, or any hybrid theory of rights correct, the practical reasons that rights provide would be conceptualised as being of one kind or another (e.g., utilitarian, liberal, or some other). Since their function (or set of functions) is part of their corresponding type-descriptions (and, more specifically, their corresponding application and co-application conditions), which – as previously suggested – are analysed by conceptual analysis, it must therefore be a conceptual, but not a metaphysical theory of rights which informs us about which specific reasons they are supposed to provide.

3. Legal Rights as Institutional Social Artifacts

Thus far, I have only considered rights and their metaphysical investigation. I suggested in the previous section that rights are social artifacts, and that they exist only if they are socially recognised. Also, I mentioned that their recognition, unlike that of institutional artifacts (e.g., corporations), is not formal (or institutional), and that it can be evidenced in the way participants use them to make decisions. Since their being socially recognised is part of their existence conditions, I argued, rights can only be used for those who participate in the collective intentional activity or social practice of recognition. In other words, they exist only from the internal or the participant perspective. Their characteristic of being able to be used in a certain way, on the other hand, follows from the thesis that they are artifacts of a certain kind. That is, it is part of their artificial nature that they are intentionally created to fulfil a certain function (or set of functions). In general terms, I finally said that the kind of function that non-formal rights (e.g., moral rights) are supposed to fulfil is to provide participants with practical reasons for action, e.g., for decision making.

In this section, I consider what legal rights are. I offer a metaphysical analysis of them based on the general framework I have drafted in the last section. The main thesis I shall argue for is

LR-ISA: *Legal rights are institutional social artifacts*

3.1. Institutional Social Artifacts

Legal rights (e.g., the Data Subject's Right to Object)[19] are a special case of social artifacts. They exist only if they are *institutionally recognised*.[20] Since this form of recognition, as I explain below, is not the same as the non-formal, social recognition, I shall conclude from it that legal rights are not ordinary social artifacts, but rather, *institutional social artifacts*. Before arriving to that conclusion, though, I shall explain what institutional social artifacts are.

To put it simply, institutional social artifacts cannot exist without there being a certain institutional normative framework, because it is this kind of framework which establishes their conditions of existence. Take, for instance, the case of legal rules. They cannot exist without there being a certain legal system that establishes the conditions for their existence (i.e., for their being *legally valid*).

Although *institutional artifacts* and *institutional social artifacts*, e.g., corporations and legal rules, respectively) are similar in this important respect, they are still different. Corporations, unlike legal rules, legal rights, etc., do not aim at providing practical reasons for institutional action (e.g., for institutional decision making). Corporations have a completely different function (e.g., provide commercial loans to farmer communities). In this sense, they can be normatively relevant. For example, the corporation can be found responsible for committing fraud. However, the corporation itself does not give legal officials the appropriate reasons to justify such a claim. Instead, it is the function of a certain legal rule to provide them with the reasons to decide whether the corporation committed fraud and is therefore responsible for it. We can explain this difference by thinking of legal rules as having the property of reason-giving (i.e., they have a certain *justificatory value*). Thus, when legal rules are used to make a decision, they have (however defeasible) a justificatory value, i.e., they justify the legal decision. The function of corporations, on the other hand, does not have this justificatory value. No legal official can justify a legal decision by using a corporation.

[19] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Art. 14. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML

[20] Take, for instance, Campbell's opening line in his SEP entry on legal rights: "Legal rights are, clearly, rights which exist under the rules of legal systems or by virtue of decisions of suitably authoritative bodies within them" (Campbell, 2017).

Since legal rights are the kind of institutional artifacts that possess this reason-giving property (i.e., the reasons they provide have an institutional justificatory value), they are institutional social artifacts. Although non-formal or non-institutional rights (e.g., moral rights) do not have the property of legal validity, since this is attributed from a certain legal system, they do have a certain justificatory value. That is, as asserted in the previous section, they are used to justify certain (non-institutional) decisions. For this reason, I identified them solely as social artifacts.

To understand how it is that legal rights fulfil this function (i.e., the function of providing justificatory reasons for institutional decision making), we need a better understanding of what institutional recognition is. Recall that their being institutionally recognised is part of their existence conditions, and it is what makes them intentionally created (i.e., artifacts of a certain kind).

3.2. Institutional Recognition

For something to be institutionally recognised, there must be a certain institutional normative framework. This is the claim I want to defend here. In the last section, I held the view that the recognition of social artifacts consists in an intentional collective activity, more specifically, in a social practice of recognition. As long as this is a non-institutional social practice, its participants are not required to carry out such a recognition in any formal way. A participant in a social practice of recognition can perfectly take a certain statement, e.g., 'no one shall be arbitrarily deprived of their property,' as a reason for a particular action (e.g., a decision), or simply as a reason for having a certain dispositional attitude (e.g., a reproach). So, for instance, if someone wants to take something from you arbitrarily, you can use such a statement to justify that it is wrong. Nothing here prevents you from using such a non-institutional right.

Legal rights, on the other hand, can only be recognised and used within a certain institutional normative framework. What is more, depending on the specific normative framework, they can only be recognised and used by a certain group of people, e.g., *legal officials*. Were you not a legal official, your recognition of a certain statement as a legal right (or your lack of it) would not make any difference to its legal (i.e., institutional) existence. Moreover, you could not use it to justify any legal decision. The reason for this should be clear: Because it is only legal officials who can make legal decisions.

Legal officials, unlike ordinary participants, are institutionally authorised to create (i.e., to recognise) legal rights. A very common thesis within contemporary analytic legal philosophy, is that this authorisation comes from the establishment of *secondary rules*. Although I cannot defend any theory of secondary rules here, I want to emphasise that there are several ways to understand both

their existence and their normative character.[21] Take, for instance, these two different theories of law: Hart's practice theory of law and Shapiro's planning theory of law. The former defends the view that secondary rules (i.e., rules of recognition, rules of adjudication, and rules of change) are introduced as remedies to the problems of uncertainty, inefficiency, and static character of primary rules, respectively (Hart, 1994: 91-92). Shapiro, on the other hand, affirms that secondary rules (i.e., plans and subplans), whose purpose is to authorise or *empower* office-holders to create plans and subplans for others, are established by the legal officials' adoption of a master plan (Shapiro, 2011: 165-166).

This is obviously not the place to argue for or against either of these theories, or any other. They are only two accounts, among many others, that can help us understand what it is for a certain institutional normative framework (i.e., a legal system) to exist. Once granted the existence of such an institutional framework, all it takes for legal rights to be institutionally recognised, is to meet the conditions for their being legally valid. Yet, we should be careful with this. In certain legal systems, it is still possible that legal rights, legal principles, legal rules, etc., despite their being legally valid, are subject to revision. In those cases, it is better to understand the satisfaction of those validity conditions as *defeasible* (i.e., subject to exception and further revision). Let me further clarify this.

So, depending on the specific legal system, it is still possible that the institutional recognition of a legal right is not a sufficient condition for its existence (i.e., its legal validity), but only a necessary condition of a sufficient condition (i.e., a *contributory* or defeasible condition). This is a reason to modify Hilpinen's (A2) success principle if it is to be applied to legal rights. Remember that, according to his principle, a physical object is an artifact intentionally created *only if* it is recognised as satisfying the type-description that is part of the intentional content of the author's activity of recognition. When it comes to legal rights, on the other hand, we should consider adding an extra clause: A certain statement is a legal right intentionally created *only if (and absent any further exception)* it is institutionally recognised as satisfying the intentional content of the legal officials' legal activity of recognition. This principle, but not the standard (A2) suggested by Hilpinen, gives enough room for the possibility of *reviewing* the legal validity of the corresponding legal right. Although this is just a subtlety, it is important to mention it here, since we need to be clear about what exactly the role of the institutional recognition is in the metaphysics of legal rights.

In any case, unlike the social recognition of rights, the institutional recognition of legal rights requires the participants (i.e., legal officials) to carry out their corresponding activity of recognition according to certain rules and formalities (established by the secondary rules of the legal system). Thus, there cannot be a legal right (e.g., the Data Subject's Right to Object), without there being a

[21] Some of the most prominent theories about the institutionalisation of law (i.e., the introduction of secondary rules) are (Hart, 1994; MacCormick & Weinberger, 1986; MacCormick 2007; Marmor, 2009; and Shapiro, 2011).

formal statement (e.g., 'Member States shall grant the data subject the right […] to object, on request and free of charge, to the processing of personal data…') which satisfies the conditions for its being legally valid.

Which specific conditions are to be satisfied? is a question that depends on the specific institutional normative framework. For example, in some legal systems, legal rights can only be introduced via legislative action; in some others, they can also be introduced via judicial (and administrative) decision. Also, in some cases, only those rights which are proved to be coherent with certain moral or legal principles are recognised as legally valid, etc. A metaphysical, artifact theory of legal rights, in any case, cannot decide on this matter. Furthermore, it cannot answer whether legal rights are nothing other than institutional moral rights (i.e., whether the only reason legal officials have in order to create legal rights is their being already socially recognised). To make this metaphysical theory as comprehensive as possible, I leave this unspecified and, consequently, accept the idea that legal officials can also create legal rights from scratch, e.g., when an elected President signs into law a certain act (think, for instance, of the Wagner Act signed by President Franklin Roosevelt in 1935, which guarantees the right of workers to organise, bargain collectively, and strike).[22]

3.3. Functions of Legal Rights

Clearly, legal rights provide participants (i.e., legal officials) with reasons for institutional (or legal) decision-making. This is the kind of function that they are supposed to fulfil. At this point, it must also be clear that to say anything more specific about the function that corresponds to such-and-such legal right requires further analysis. Firstly, it requires specifying the type of legal right that we are dealing with. That is, legal rights may differ from each other regarding the specific reasons they provide. For instance, some of them may be created to protect individual people, and some others to protect collective entities (e.g., groups or corporations), or non-human animals, or (physical or non-physical) properties, etc. And secondly, it requires taking a stance on what the correct theory of (legal) rights is. For example, if we support the will theory in favour of the interest theory of (legal) rights, then we shall conceptualise their function as being the promotion of certain liberties, instead of being the protection of certain interests, etc.

Whatever the specific reasons they provide, legal rights can be used by legal officials to justify a certain legal decision regarding, e.g., the existence of a correlated legal obligation to act or not to act in a certain way. The importance of the existence of legal rights, in this kind of cases, is evident:

[22] http://rooseveltinstitute.org/wagner-act/

The correlated legal obligation would not exist (i.e., there would not be any justification for a legal official to decide that there is a correlated legal obligation), if the legal right did not exist and were not used in the appropriate way. Now, whether the reasons they provide are definitive or defeasible is a question yet to be answered. As commonly defended by the general theories of legal argumentation (especially for those which postulate that legal rights must be *balanced* both with other potentially conflicting legal rights and the specific circumstances of the situation where they are to be used),[23] legal rights do not (normally) provide definitive reasons for legal decisions. Thus, for these theories, legal rights do not lose their legal validity, despite their not being used (or being only used to a certain extent) to justify a certain legal decision. As true about any other artifact kind, whether legal rights are used (or only used to a certain extent) does not imply that they were not intentionally created for a certain purpose (i.e., for the purpose of being used to justify legal decisions).

4. The Metaphysics of Legal Rights

For a participant (i.e., a legal official) to be able to use a certain legal right (e.g., the Data Subject's Right to Object) to justify a certain legal decision, this legal right must exist. That is, the ontological claim 'there is a legal right, namely, the Data Subject's Right to Object' must be true if it is to be used as a premise in a certain institutional, legal reasoning. My suggestion here is that institutional recognition and type-description of rights (including the functions that they are supposed to fulfil) are all we need to answer existential or ontological questions about legal rights. For example, answering the question *Does the Data Subject's Right to Object exist in this or that legal system?* does not require anything other than *conceptual competence* (i.e., master the application and co-application conditions of the type-description of the appropriate right) and *institutional intentionality* (i.e., carry out the appropriate institutional activity of recognition established by the legal system). I shall finish this paper by considering in some detail these two elements of the metaphysical analysis of legal rights.

4.1. Metaphysical Analysis of Legal Rights (*rough scheme*)

(i) In order to decide whether such-and-such ontological claim about a certain legal right is true, we do not need anything other than a deflationary metaphysical methodology (i.e., a deflationary metaontology).

[23] On balancing, see (Dworkin, 1986; and Alexy, 1989, and 2002)

(ii) Easy ontology: in order to answer existential questions about legal rights, we only need conceptual competence and empirical investigation – see (Hilpinen, 1992; and Thomasson, 2009, and 2015);
(ii) Conceptual competence: to understand the application and co-application conditions of the type-descriptions of legal rights;
(iii) Empirical investigation: to confirm whether a certain institutional recognition has been realised.

4.2. Conceptual Analysis (*rough scheme*)

(i) The content of the intentional activity of recognition is partially determined by a certain type-description, which includes the application and co-application conditions of the corresponding artifact kind;
(ii) We cannot create any instance of any kind of artifact without the appropriate intention, and because part of such an intention is determined by the type-description, it follows from it that we cannot create any instance of any kind of artifact without the corresponding type-description;
(iii) If true that rights are artifacts of a certain kind, then any theory of rights attempting to elucidate their nature cannot deny the importance of their type-descriptions (or concepts of rights);
(iv) Thus, conceptual analysis should also be considered as part of the metaphysical analysis of rights.
(v) (iv) does not mean that there is nothing over and above the metaphysical analysis of rights than their conceptual analysis. This is, I think, a very common mistake that some of the most important theories of rights commit. They usually propose that mere conceptual analysis (i.e., the inquiry into the application and co-application conditions of the type-descriptions of rights) would give us answers to both what legal rights are and whether or not they exist.
(vi) To answer the questions in (v), we need an artifact theory of legal rights.

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