TWO SENSES OF LAW AS AN ARTEFACT

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This paper aims to analyse the claims that law is an artefact. There are two different concepts of the artefact in legal–philosophical literature. In some contexts, the concept of an artefact implies that a law is a social kind rather than something similar to a natural kind. Philosophers use the concepts of essentialism, fallibilism, and externalism to juxtapose law with natural kinds. However, in different contexts, the use of 'artefact' seems to presuppose some ontologically robust views from the specific field as the philosophy of technical artefacts. This latter use, however, assumes certain ontological presuppositions concerning the examination of law; specifically, the intention of the author and the purposive character of law. I argue that between the thesis that law is an artefact understood as a social kind or social construct and the thesis that law is similar to technical artefacts, there is a conceptual shift. I claim that this shift is unjustified.

I INTRODUCTION

This paper aims to analyse the concept of an artefact as used in legal–philosophical inquiries. The references to legal artefactuality are ubiquitous, but even a brief review of the literature reveals serious conceptual confusion. This confusion may lead to verbal disputes,[1] and delimit genuine theoretical disagreements. On the one hand, in some contexts, the concept of an artefact implies that law is socially constructed, rather than something that is eternal and natural (wide sense of artefact). On the other hand, in different contexts, the use of 'artefact' seems to presuppose certain ontologically robust views from a specific field like the philosophy of technical artefacts (narrow sense of artefact). The detection and (re)conceptualisation of this philosophical disambiguation are crucial for this paper's clarificatory aim.

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1 This is as understood in David J Chalmers, 'Verbal Disputes' (2011) 120(4) *Philosophical Review* 515.

As noted by Burazin and Crowe, although the very claim that law is an artefact is not new, it has so far been under-theorised — in the sense of the lack of ontological and other philosophical consequences of that claim.[2] Nonetheless, most of the earlier legal–philosophical papers referring to artefacts associated them with the lack of features of the natural kind.[3] When the framework of law as an artefact developed, this contrast with the natural kind began to be less relevant and claims about law understood as a kind of technical artefact became popular.[4]

This ambiguity may have resulted from an apparent conceptual shift. Firstly, this conceptual shift consists of recognising that law is not natural, so it is artefactual (the wide sense). Then there is the description of law in the conceptual framework of the philosophy of technical artefacts (the narrow sense). The tacit assumption is that 'an explanation of law can gain a lot from an understanding of law's artifactual nature'.[5] This paper argues that the implementation of the narrow sense of artefact needs a sounder justification than the detection of certain characteristics of law as an artefact in the wide sense.

In Part II, I outline two approaches to studying law as an artefact. In Part III, I dwell on the problem of the wide sense of artefact, presenting, based on a literature review, three contexts in which legal philosophers deploy this concept (Parts III(B)(1)–(3)) and outlining the broader philosophical context (Part III(A)). In Part III(C), I wonder whether the terms 'social construct' and 'social kind' are better suited for the goals of juxtaposing features of law with features of natural kinds. In Part IV(A), I outline the main interests of the narrow theories of artefacts and, in Part IV(B), query whether these problems should be analysed using the conceptual framework of the narrow sense of artefacts. I also address a potential objection which argues that the narrow sense of an artefact implies that law is a real kind. Therefore, the disagreement between philosophers who use either narrow or wide concepts of an artefact is essentially about whether law is a social construct or a real kind. In Part V, I conclude my paper, highlighting that for some scholars, the main argument for using the narrow sense of artefacts as applied to law is in recognising that law is an artefact in the wide sense. However, this reason is not sound, as the wide and narrow senses of artefact are indeed different concepts of artefact.

2 Luka Burazin, 'Can There Be an Artifact Theory of Law?' (2016) 29(3) *Ratio Juris* 385, 385–6; Jonathan Crowe, 'Law as an Artifact Kind' (2014) 40(3) *Monash University Law Review* 737, 737.

3 See, eg, Brian Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism' (2011) 31(4) *Oxford Journal of Legal Studies* 663, 664–7 ('The Demarcation Problem in Jurisprudence'); Frederick Schauer, 'On the Nature of the Nature of Law' (2012) 98(4) *Archiv Für Rechts-und Sozialphilosophie* 457.

4 See, eg, Burazin (n 2); Crowe, 'Law as an Artifact Kind' (n 2).

5 Corrado Roversi, 'Law as an Artifact: An Assessment' in Simona Chiodo and Viola Schiaffonati (eds), *Italian Philosophy of Technology: Sociocultural, Legal, Scientific and Aesthetic Perspectives on Technology* (Springer, 2021) 129, 129.

II WIDE AND NARROW SENSES OF ARTEFACT

That 'law is an artefact' seems to be a ubiquitous thesis. Currently, this short statement raises many vital questions concerning the concept of law. Leiter even claims that '[t]hose who might want to deny that law is an artefact concept are not my concern here; the extravagance of their metaphysical commitments would … be a subject for psychological, not philosophical investigation'.[6] However, the alleged artefactuality of law has many senses.

The term 'artefact' seems to be understood as being twofold: (a) *the wide sense* — '*artefact*' *as* '*opposed to the natural kind*' and (b) *the narrow sense* — '*artefact*' that refers to works from a philosophy of technology: roughly, '*an object intentionally made by an author to serve some purpose*'.[7] Those two understandings, although interdependent, are rather orthogonal; they do not give us the same theoretical outputs. For instance, the narrow sense seems to provide more ontological commitments because from a set of non-natural objects it selects only those intentionally created to serve some purpose. By this hypothesis, this ambiguity seems to emerge from two paradigmatically different approaches to studying law as an artefact.

On the one hand, as will be discussed below, some scholars have detected the non-natural character of law and contrasted it with natural kinds (using concepts of fallibilism, essentialism, externalism, and mind-dependency). This approach is *bottom-up* because it does not start from any general theory of artefacts but rather builds upon a more or less structured and intertwined set of theses about the concept of law. Such theses are derived from the observation that a phenomenon — law in general — may be fruitfully described when contrasted with features of natural phenomena.

On the other hand, others try to place the conceptual framework of a given theory of artefacts (eg historical–conceptual) into the legal discourse. They assume that law is non-natural, so artefactual, and then infer that studying law from the point of view of a given theory of artefacts may acquaint us with law's nature.[8] I will call these the *top-down* approaches, as this starts our investigation into the concept of law from the presupposition of a general theory of artefacts. Then, it verifies whether the law can be fruitfully described in terms of a given account. The top-down approach assumes that by the very fact that law is an artefact, we should stress those features of law that are typical for other artefacts (eg its purposive nature, function, and authorship).

6 Leiter, 'The Demarcation Problem in Jurisprudence' (n 3) 666.

7 This is just an example of the view characterised by the narrow sense. Authorship, as will be discussed later in this paper, is not necessary for all types of technical artefacts.

8 Burazin (n 2) 387–97; Crowe, 'Law as an Artifact Kind' (n 2).

III BOTTOM-UP APPROACH: THE WIDE SENSE OF ARTEFACT

In the bottom-up approach, law is contrasted with natural kinds. The next sections are devoted to a closer analysis of this juxtaposition. Let me underline here that understanding law as something non-natural (or artefactual) is not a new idea. This is what positivism in legal theory brought to the analysis of law. From the normative perspective, the fact that law is non-natural means that the roots of its normativity lie in human activity.[9] Another aspect is the ontology of law. If law is non-natural, its existence should be explained in a conceptual framework referring solely to human activity; namely, actions and attitudes. In other words, it is reducible to the thesis that law is socially constructed.[10]

What is more, if law is non-natural and somewhat human-made, it can be an object of criticism; both the actual content and the mode of existence of law reflect a traditional and latent division of power in societies. This view is traceable back to Bentham. Hart, comparing Bentham and Marx, uses the word 'artefact' in the *wide sense* in a context of the demystification of law:

> Notwithstanding these great differences of both temperament and political thought, Bentham and Marx agreed on two fundamental points which are relevant to my present theme: first, that their tasks as social thinkers were to clear men's minds as to the true character of human society, and, *secondly, that human society and its legal structure which had worked so much human misery, had been protected from criticism* by myths, mysteries, and illusions, not all of them intentionally generated, yet all of them profitable to interested parties. Bentham found the law obscured by mysteries and so spoke of it as wearing a mask; Marx spoke of the 'mystical veil' of the life-process of society, though unlike Bentham he thought this could be removed only by radical social change in the course of a long and painful historical development. For both of them such mystery was made possible by the failure on the part of ordinary men to realize that *the forms of law and human society were at bottom merely human artefacts, not natural necessities but things actually made by men, and hence things which could be unmade and remade.*[11]

Contrasting law with naturally existing things (eg water or gold) and highlighting its 'artefactual' or 'artificial' character makes the endeavour of general jurisprudence no more foundational. Thus, there is no single point of reference, nor a focal and omnipresent source in eternal natural law.

Tamanaha provides a paradigmatic and clear case of the bottom-up approach to study law as an artefact (wide).[12] Firstly, Tamanaha rebuts the apparent similarity

9 This is as a part of the so-called 'Modern Scientific World View' from Christine M Korsgaard, 'The Normative Question' in Onora O'Neill (ed), *The Sources of Normativity* (Cambridge University Press, 1996) 7, 7.

10 Cf Miguel Angel Garcia-Godinez, 'Flaws and Virtues of an Artifact Theory of Law' (2019) 32(1) *Ratio Juris* 117.

11 HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, 1982) 25–6 (emphasis added).

12 Brian Z Tamanaha, *A Realistic Theory of Law* (Cambridge University Press, 2017) ch 3.

between law and natural kinds — essentialism. This rebuttal consists of recognising that, unlike water and other natural kinds,[13] law is socially constructed and 'is a folk concept with multiple versions and variations'.[14] Then, Tamanaha focuses on one of two aspects of social constructs. He discusses essentialism ('eschewing claims about necessary features';[15] 'the features of law are contingent')[16] and externalism ('[l]aw is neither mind independent nor fixed by the laws of nature').[17] To endorse the claims about the lack of essential features of law, Tamanaha enters the debate on whether artefacts have essence.[18] He concludes then that '[a]rguments that social artifacts have essential natures have not won over many philosophers'.[19] Let me sketch the philosophical context in which such claims are raised. Then, I will show how particular philosophical problems (semantic, ontological, and epistemological) are solved by legal philosophers with the reference to the concept of artefact (wide).

A *Philosophical Context*

The extensive development of modern science has prompted some philosophers to contrast natural with artefactual/social kinds, as they seem to have different ontological, semantic, and epistemological features. The first step was to reidentify the semantical and metaphysical character of natural kinds. Kripke–Putnam theory holds that the meaning of the natural kind's term X is determined not by manifest features of instances of natural kinds (ie their description), but by their connection to the paradigmatic case. The paradigmatic case is the object that was for the first time predicated as X (the baptism), and our successful reference is guaranteed by our 'subscription' to the chain of references from the moment of baptism.[20]

This is an externalist account because our beliefs about the properties of the natural kind X are not relevant to the successful reference. We may be wrong about the proper characterisation of natural kind X or even be unable to characterise 'what X is'. Whether or not some substance X can be genuinely considered as a member of natural kind X is left for the experts to determine. This statement is sometimes called the 'division of labor' between linguists and scientists.[21]

13 This is as assumed in Scott J Shapiro, *Legality* (Belknap Press, 2011) 8–9.

14 Tamanaha, *A Realistic Theory of Law* (n 12) 59.

15 Ibid 58.

16 Ibid 59.

17 Ibid.

18 Ibid 58–65.

19 Ibid 60.

20 Hilary Putnam, *Mind, Language and Reality: Philosophical Papers* (Cambridge University Press, 1997) vol 2, ch 12; Saul A Kripke, *Naming and Necessity* (Harvard University Press, 1980).

21 Putnam (n 20) vol 2, 227.

Take 'water' as an example. From the moment of baptism, for years, people had been using the term 'water' to refer to transparent, tasteless liquid. The extensive development of chemical analysis determined that what was being meant by 'water' had a chemical formula of H_2O. 'Water' may not be transparent, tasteless, or a liquid (the description), but *essentially* water is H_2O. For our everyday life, assessing what water truly is may not be relevant. The description is pragmatically satisfactory, but sometimes calling for expertise is essential. Take pyrite and gold. The former is sometimes called 'fool's gold' because of its manifest resemblance to the latter. We can imagine that for centuries, before proper chemical and physical analysis of those elements, people mistakenly designated 'gold' things to be 'pyrite'. The Kripke–Putnam theory serves as a touchstone because most views understand the natural kinds in this manner. However, some scholars argue that natural kinds are of an epistemic nature — according to this view, 'natural kinds are picked out by those categories that appear in our completed scientific theories'.[22]

Those novel approaches to kinds blur the very opposition of natural versus artefactual. The epistemic conception of natural kinds is a good example. According to Khalidi, natural kinds are categories that operate only within a given completed scientific theory.[23] However, they play a causal (or other) role therein, so it remains a realistic account, consistent with the Kripke–Putnam theory.[24] What this account blurs, however, is the very distinction between natural and non-natural kinds; for some 'social kinds are indeed natural kinds'.[25] Mind-dependency, normativity, or the evaluative character of social science do not jeopardise the natural character of their categories.[26]

This peculiar 'epistemological turn' in natural kinds may first be localised in the very philosophy of artefacts.[27] A deeper understanding of the mind-(in)dependency criterion has prompted some to challenge the views that all natural kinds are mind-*independent*,[28] or all artefacts are mind-*dependent*.[29] Reydon argues for unification, because 'what counts [for being a natural kind] is being useful in human epistemic practices, such as inference and explanation, by

22 Muhammad Ali Khalidi, *Natural Categories and Human Kinds: Classification in the Natural and Social Sciences* (Cambridge University Press, 2013) 79 ('*Natural Categories and Human Kinds*'). Cf Thomas AC Reydon, 'Metaphysical and Epistemological Approaches to Developing a Theory of Artifact Kinds' in Maarten Franssen et al (eds), *Artefact Kinds: Ontology and the Human-Made World* (Springer, 2014) 125.

23 Khalidi, *Natural Categories and Human Kinds* (n 22) ch 2.

24 Ibid 79–81.

25 Ibid 165.

26 Ibid ch 4.

27 Beth Preston, 'Artifact', *Stanford Encyclopedia of Philosophy Archive* (Web Page, 3 October 2022) <https://plato.stanford.edu/archives/win2022/entries/artifact/>.

28 Reydon (n 22) 129–30.

29 Crawford L Elder, 'On the Place of Artifacts in Ontology' in Eric Margolis and Stephen Laurence (eds), *Creations of the Mind: Theories of Artifacts and Their Representation* (Oxford University Press, 2007) 33, 37.

corresponding in some way (which is still to be explicated) to the state of affairs in nature'.[30] The same can be said of artefacts.

B *Contextually Salient Senses of Law as an Artefact (Wide)*

It should be remembered that the study of law understood as an artefact in *the wide sense* is about contrasting law with natural kinds. The most important ideas concerning those of the natural kind understood in the Kripke–Putnam manner are (a) *fallibilism* (epistemology), (b) *essentialism* (ontology), and (c) *externalism* (semantics). A default attitude towards the artefactuality of law is to claim that the character of the law is reverse to (a)–(c) (infallible, with no essential feature, and its proper semantics is internalist). Notwithstanding, one does not have to maintain those three disavowed theses to claim that law is an artefact. Contrasting natural kinds with artefacts is not general but local; it holds in the context of one of those three problems. In addition, the very concept of artefact (wide) may lead to contradictory conclusions.

1 *Epistemological Context: Fallibilism vs Infallibilism*

Infallibilism is an epistemological concept, and it is understood in many ways. As an example, Haslanger underlines that *fallibilism* means that 'all beliefs are revisable, and one might be epistemically justified in believing something that is nonetheless false'.[31] In the context of human kinds Guala defines *infallibilism* as the view 'that there are features of institutional entities about which we cannot possibly be wrong'.[32] In the natural realm, as an example, we discovered that water is H_2O; the question of what water is is independent to the question of what we think about water.

When applied to natural kinds, fallibilism means that we can never be sure about whether the content of our beliefs concerning natural kinds is accurate and that there is no conclusive evidence for such a conviction. If a given natural kind (say water) is ontologically independent on our mental attitudes (ontological objectivity),[33] then obviously we may be collectively wrong about the true nature of this natural kind. The ontological objectivity, ad hoc, implies fallibilism.

Human-kind is all but ontologically dependent on our attitudes and beliefs. If for human-kind to exist a social acceptance of constituting rules or conditions is needed, then we cannot be *substantially* wrong about social kinds, provided that we cannot be wrong about the content of our beliefs (here: the content of constitutive rules). This reasoning, ad hoc, implies infallibilism as a feature of non-natural kinds (eg artefacts).

30 Reydon (n 22) 132, quoted in Preston (n 27).

31 Sally Haslanger, *Resisting Reality: Social Construction and Social Critique* (Oxford University Press, 2012) 147.

32 Francesco Guala, 'Infallibilism and Human Kinds' (2010) 40(2) *Philosophy of the Social Sciences* 244, 244.

33 See generally John R Searle, *The Construction of Social Reality* (Free Press, 1995).

Among social ontologists, some form of infallibilism is endorsed by Thomasson.[34] This conclusion is in contrast with the dominant view among social ontologists, who 'do *not* endorse it, and in some cases make explicit pronouncements *against* it'.[35] Among legal philosophers, infallibilism seems to be endorsed by Marmor,[36] Burazin,[37] and to some extent Dyrda and Gizbert-Studnicki.[38] Nevertheless, this kind of infallibilism does not concern all theses about law, but about being wrong about certain substantial characteristics of the object in question.

As an example of infallibilism in legal philosophy, Marmor argues that there can be no deep theoretical disagreements or discrepancies concerning the very concept of law.[39] We can be wrong about the artefactual character of law, but we, as creators, cannot be wrong about the essential features of things we created and the content of our laws. Marmor's conclusion lies in the very division between 'the things we find or discover, and the things we create'.[40] As law is an artefact, the second type of phenomenon, we are collectively immune to errors about its fundamental features.[41] Concerning the natural kinds, according to Marmor, such a global error (fallibilism) is possible.

2 *Ontological Context: Essentialism vs Non-Essentialism*

The received view about natural kinds is that they have some essence. In the context of essentialism, Schauer contrasts natural kinds with artefacts and claims that, like any other artefacts, law is contingent and culturally dependent.[42] Nevertheless, Schauer states that in a given period, 'there are concepts connected with our artifacts, and that it is the job of the philosopher to locate and analyze them'.[43] So, contingency does not preclude the value of conceptual analysis, but the artefactual character of law should indicate to what extent such analyses are

34 Amie L Thomasson, 'Realism and Human Kinds' (2003) 67(3) *Philosophy and Phenomenological Research* 580. Thomasson divided infallibilism into 'ignorance and error principles': at 582–3.

35 Guala (n 32) 252 (emphasis in original).

36 Andrei Marmor, 'Law, Fiction, and Reality' in Luka Burazin, Kenneth Einar Himma and Corrado Roversi (eds), *Law as an Artifact* (Oxford University Press, 2018) 44, 48–51.

37 Luka Burazin, 'Legal Systems as Abstract Institutional Artifacts' in Luka Burazin, Kenneth Einar Himma and Corrado Roversi (eds), *Law as an Artifact* (Oxford University Press, 2018) 112, 129–30.

38 Adam Dyrda and Tomasz Gizbert-Studnicki, 'The Limits of Theoretical Disagreements in Jurisprudence' (2022) 35(1) *International Journal for the Semiotics of Law* 117, 134–8.

39 Marmor (n 36) 59–60.

40 Ibid 48.

41 Ibid 49.

42 Frederick Schauer, 'Law as a Malleable Artifact' in Luka Burazin, Kenneth Einar Himma and Corrado Roversi (eds), *Law as an Artifact* (Oxford University Press, 2018) 29, 35–8, 43.

43 Ibid 32.

possible and fruitful. As a result, he argues that no essential and eternal features of law can be provided.

Along the same vein, Tamanaha argues that a new approach to the nature of law is needed.[44] Classical, analytical jurisprudence understood 'the nature of law' in terms of 'those essential properties which a given set of phenomena must exhibit in order to be law'.[45] Shapiro unpacked such a general philosophical endeavour to the nature of law in terms of the 'Identity Question' ('what it is to be that thing') and the 'Implication Question' ('what *necessarily follows from* the fact that it is what it is').[46] Their application to the philosophy of law uncovers the analytical question of the nature of law: 'which facts *ultimately* determine the existence and content of legal systems'.[47]

Tamanaha challenges this view: '[the nature of law] is a social construction that exists owing to the meaningful actions of people and groups, it has a history, it could all have been constructed differently and can all be changed'.[48] As Tamanaha argues, the law has many faces, functions, and culturally dependent features. His approach aims to uncover historically dependent manifestations of law (eg different legal systems and branches of law, not to mention human rights) and how people used those manifestations in relevant contexts.

In contrast, Marmor, without dwelling on details, connects the artefactual character of law with its essential features.[49] As a result, the apparently simple and self-explanatory notion of artefact may be used both for and against some views concerning their legal nature (eg essential feature). Therefore, it may be claimed that the *wide sense of artefact* is local. Local means that the concept of artefact is used to manifest only some aspects of law (ie it appears in the context of fallibilism, essentialism, or externalism) and sometimes serves as a heuristic tool.

3 *Linguistic Context: Externalism vs Internalism*

The externalism–internalism debate concerns the question of how we pick objects to which a certain name may denote; either via some external, even unbeknown to us aspect or history of reference (externalism), or via our representation of this object (internalism). If we wish to grasp, for example, the concept of law, we should stand for one of those options.

In the general philosophical literature, the proper reference to terms of artefacts is not settled. Putnam argues for externalism and treats artefacts as kinds parallel to

44 Tamanaha, *A Realistic Theory of Law* (n 12) 80.

45 Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing, 2001) 17, quoted in ibid 80.

46 Shapiro (n 13) 8–9 (emphasis in original).

47 Ibid 25 (emphasis in original).

48 Tamanaha, *A Realistic Theory of Law* (n 12) 80.

49 Marmor (n 36) 59.

natural kinds.[50] Names of artefacts have been traditionally defined by a cluster of features. According to Putnam, this is a misconception. Pencils, as he depicts, might turn out to be organisms, and no function or cluster of features would cover that discovery.[51] The words referring to artefacts are therefore indexical, and

> 'pencil' is not *synonymous* with any description … When we use the word 'pencil', we intend to refer to whatever has the same *nature* as the normal examples of the local pencils in the actual world. 'Pencil' is just as *indexical* as 'water' or 'gold'.[52]

Putnam seems to not recognise the *artefactual* nature of artefacts. For while it is tenable that natural kinds of nature are mind-independent and to be discovered by scientists, the 'discovery' of the natural character of artefacts would prompt us first to revisit the very category of artefacts as their proper classification. In other words, one may argue that artefacts, *necessarily,* cannot be natural. Consequently, we should not change the semantics for artefacts just because some artefacts may be hypothetically natural. There may be no single meaning of 'meaning'.

Such reasoning is applied by Schwartz. He rebuts the semantical similarities between artefacts and natural kinds.[53] He refers to the Lockean notion of nominal essence and classifies artefacts as nominal kinds with non-indexical (non-rigid) semantics.[54] The crucial reason is an argument from induction. The very act of distinguishing nominal kinds lies in the fact that 'they do not support inductions in the following sense: The fact that several examined chairs are upholstered, say, does not support the claim that all chairs are upholstered'.[55] This account reclaims classical philosophical debates about universals. Schwartz finds artefacts not as an objective category but nominal, 'grouped together by ignoring all aspects except a single … one'.[56] However, one may contest this account as blurring the metaphysical and semantical character of artefact terms.

The problem of externalism/internalism is somewhat tacit in the legal literature. For example, in the context of applying this problem in general jurisprudence, the natural/artefactual division is vital for Patterson.[57] He explicitly juxtaposes ideas of the natural and artefactual kind and discusses in this context the problem of Raz's view on the nature of law (the idea that law essentially claims authority).[58]

50 Putnam (n 20) 242.

51 Ibid 242–3.

52 Ibid 243 (emphasis in original).

53 Stephen P Schwartz, 'Putnam on Artifacts' (1978) 87(4) *Philosophical Review* 566.

54 Ibid 572.

55 Ibid 573.

56 Ibid, quoting Hilary Putnam, 'The Analytic and the Synthetic' in Jay F Rosenberg and Charles Travis (eds), *Readings in the Philosophy of Language* (Prentice-Hall, 1971) 94, 115.

57 See Dennis Patterson, 'Can We Please Stop Doing This? By the Way, Postema Was Right' in Paweł Banaś, Adam Dyrda and Tomasz Gizbert-Studnicki (eds), *Metaphilosophy of Law* (Hart Publishing, 2016) 49.

58 Ibid 50.

Patterson maintains that a proper understanding of Raz's view depends on whether the theory of law should provide us with necessary truths or just (merely) a self-understanding.[59] Patterson depicts the natural kinds as having essence 'dictated by a microstructural element'.[60] Artefactual kinds, conversely, are mind-dependent and 'products of human invention'.[61] Here, the problems of externalism and essentialism interfere. However, the crucial, albeit tacit, element of this juxtaposition is where the alleged essence lies: in the external world, in the designates (externalism), or us, as well as our attitudes (internalism). Additionally, he assumes that one cannot provide any necessary or sufficient features when adopting the internalist view.[62] Consequently, one can interpret Patterson as claiming that the things which ontology lays under 'human invention' are contingent and with no essence.

Tamanaha argues similarly. While he refers to the problem of essentialism, Tamanaha also discusses externalism/internalism. As with Patterson, Tamanaha depicts natural kinds as mind-independent, whereas law 'is constructed through the meaningful actions of humans; the features of law are contingent on and shaped by human subjectivity and purposes while the essential properties of water are not'.[63] Although the concept of artefact (wide) is used as an argument for internalism, the debate on how we refer to artefacts remains unsettled.

C *Artefact or Social Kind?*

The bottom-up approaches aim to reflect on what we can say about law as a non-natural object and focus on one of three central problems: fallibilism, essentialism, and externalism. References to the conceptual framework of the theory of artefacts (eg borrowed from the philosophy of technology) are not needed, but, when used, only instrumental. Conversely, the top-down approach, as it will be discussed below, analyses law from the very framework of one of the theories of artefacts.

In other words, we either try to understand law's non-natural nature (bottom-up), or we put a conceptual framework of one or more theories of artefacts and ask: what type of artefact is law? Which (un)modified theory of social artefacts can we attach to law? The bottom-up approach helps to understand some features of law with little ontological commitment. In contrast, the top–down approach tries to elucidate similarities between law and other artefacts and apply concepts from the philosophy of artefacts to the philosophy of law. The wide and narrow senses of artefacts are developed within those two approaches.

Despite this, it may be debatable whether the theories of the wide and the narrow sense of artefact are using 'artefact' in the same sense, and whether it is indeed the

59 Ibid 51. Cf Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009) ch 2.

60 Patterson (n 57) 50.

61 Ibid.

62 Ibid 51.

63 Tamanaha, *A Realistic Theory of Law* (n 12) 59.

same concept. To argue that things are not natural, one does not need a notion of artefact, but rather a concept of social constructionism[64] or the concept of human/social kind.[65] The following quoted passage from Hart suggests that what unified Bentham with Marx was recognising the social constructivist reality of law: 'the forms of law and human society were at bottom merely human artefacts, not natural necessities but things actually made by men'.[66] What is claimed here is roughly what characterises social constructs; that 'the category is a real feature of human beings, but it is determined by social, rather than natural or biological properties'.[67]

However, the very term 'social construction' is somewhat blurred and vague due to its use across many contexts and the resulting implication of certain political claims.[68] Discussing this term, Hacking starts with the remark, '[d]on't ask for the meaning, ask what's the point'.[69] He argues that the point behind claims that something is socially constructed is to argue against inevitability and for the contingency of some categories, namely that '*X* need not have existed, or need not be at all as it is. *X*, or *X* as it is at present, is not determined by the nature of things; it is not inevitable'.[70] More plainly, the contingency thesis about social construct refers not to biological conditions but to 'certain social events and social arrangements'.[71] What pushed some legal philosophers[72] to use the term 'artefact' rather than 'social construct' may be that 'most people who use the social construction idea enthusiastically want to criticize, change, or destroy some *X* that they dislike in the established order of things'.[73] Legal philosophers might want to omit such implications. I propose then to use the term 'social kind' as synonymous with the 'wide sense of artefact'.

IV TOP-DOWN APPROACH: THE NARROW SENSE OF ARTEFACT

The wide sense of artefactuality of law relates to one of three problems: infallibilism, externalism, and essentialism. On the contrary, the *narrow* sense of

64 See, eg, Ian Hacking, *The Social Construction of What?* (Harvard University Press, 1999) ch 1; Haslanger (n 31) ch 3.

65 See generally Khalidi, *Natural Categories and Human Kinds* (n 22); Ron Mallon, *The Construction of Human Kinds* (Oxford University Press, 2016).

66 Hart (n 11) 26.

67 E Diaz-Leon, 'What Is Social Construction?' (2015) 23(4) *European Journal of Philosophy* 1137, 1137.

68 Hacking (n 64) 2–3, 5–6.

69 Ibid 5.

70 Ibid 6.

71 Diaz-Leon (n 67) 1138.

72 See, eg, Leiter, 'The Demarcation Problem in Jurisprudence' (n 3); Schauer (n 3).

73 Hacking (n 64) 7.

artefact highlights three other concepts related to but not necessarily characteristic of all artefacts: function, (author's) intention, and history of a given artefact. Here, the questions that arise are: what do philosophers assume to be an artefact (or be of an artefactual nature)? To paraphrase Hacking: the artefactuality of *what*?[74] Further questions are: is it possible to carry out all the ontological labour by just claiming that 'law is (a kind of) artefact'? Is the 'artefactual character of law' explanatory?

These questions may prompt one to accept a more substantial ontological commitment than that implied by embracing the wide sense of artefact — to analyse law through the lens of a given theory of artefacts.[75] The critical question, related to the problem of the domain of discourse, is which aspect of law is studied as artefactual: the legal system, institution, or perhaps Shapiro's 'legality' — things that have 'the property of being law'.[76] A similar problem arises in the debate on social constructs or social kinds.

As an example, Hacking shows that we are sometimes talking past each other while arguing for social construction of categories such as 'women refugees', for this term 'does not refer directly to individual women refugees [but] to the woman refugee as a kind of person, the classification itself, and the matrix within which the classification works'.[77] The problem with artefactuality is effectively the same. By this hypothesis, we do not wish to say that in some sense of artefacts, the provision X, a legal judgment, a legal norm, Judge Y, or a legal institution are all artefacts in the narrow sense. In other words: their artefactuality cannot be easily derived from the alleged artefactuality of law. It needs further insights. This domain restriction is explicitly underlined by Burazin (with regard to the legal system)[78] and Roversi (with regard to legal institutions).[79] Ehrenberg and Crowe, independently, describe unspecified 'law' ('the law is a genre of institutionalized abstract artifact').[80]

74 Ibid 6, where Hacking asks the question, '[t]he social construction of what?'.

75 The most important works from the philosophy of artefacts implemented in legal discourse are the works of Thomasson, 'Realism and Human Kinds' (n 34), Randall R Dipert, *Artifacts, Art Works, and Agency* (Temple University Press, 1993), Wybo Houkes and Pieter E Vermaas, 'Artefacts in Analytic Metaphysics: Introduction' (2009) 13(2) *Techné* 74, and Elder (n 29). See also the classical works of Paul Bloom, 'Intention, History, and Artifact Concepts' (1996) 60(1) *Cognition* 1, Hilary Kornblith, 'Referring to Artifacts' (1980) 89(1) *Philosophical Review* 109, Schwartz (n 53), and Putnam (n 20).

76 Shapiro (n 13) 7.

77 Hacking (n 64) 11.

78 Burazin (n 2) 386.

79 Corrado Roversi, 'On the Artifactual — and Natural — Character of Legal Institutions' in Luka Burazin, Kenneth Einar Himma and Corrado Roversi (eds), *Law as an Artifact* (Oxford University Press, 2018) 89, 89.

80 Kenneth M Ehrenberg, *The Functions of Law* (Oxford University Press, 2016) 192. See also Crowe, 'Law as an Artifact Kind' (n 2) 737.

A *Theoretical Presuppositions of the Narrow Sense of the Artefact*

Burazin's work[81] is a case in point of the top-down approach. Burazin states that by 'law', he will mean 'the legal system'. Then, 'legal systems' in his working definition are understood as 'systems of legal norms'.[82] Thus, there is a clear-cut domain restriction. Acknowledging the lack of further analysis of the artefactuality of law, he suggests adopting a revised theory of artefacts provided by Thomasson.[83] Because Burazin does not aim to settle the artefact debate, he proposes to proceed with the 'prominent theory of artifacts'[84] — the intentional–conceptual theory of artefacts. Crucial aspects of this theory, when applied to law, are: (a) the vital role of concepts in determining the nature of an artefact (the legal system), (b) that artefacts are created based on constitutive rules, and (c) that artefacts are not static in nature.[85] Then, Burazin proposes a specification of the account, Thomasson's 'dependence principle', for the existence of an institutional artefact as law. This specification stressed that the existence of a token *l* of a type of system of law L depends on the fulfilment of a set of conditions: (1) *l* has an author, (2) the author has an intention to create *l* as a token of L and has a 'substantive and substantively correct' concept of L, plus (3) those intentions are realised.[86] Those conditions should additionally be collectively recognised as successful.[87] Based on this 'transposition' of the artefactual framework to law, Burazin tries to analyse some aspects of law-as-an-artefact (author, concept, intention).[88] However, some aspects of treating law as an artefact as specified by the 'dependence principle' are not agnostic to some of the problems traditionally raised in the general jurisprudence.

We can thus reasonably ask: in what sense of authorship is it needed for a legal system to have an author? Are all legal systems of one nature? Does it, historically speaking, cover all laws? How does it explain the concept of law? How does the term 'nature of L' explain the non-static (but dynamic) nature of the law? Finally, what is *the concept* an author has in mind when creating the law?

By answering those questions, Ehrenberg and Crowe have different perspectives on the artefactuality of law. Their theories address crucial problems in legal philosophy. According to Ehrenberg, the artefactuality of law can validate

81 Burazin (n 2).

82 Ibid 386.

83 Ibid 389–90. See also Thomasson, 'Realism and Human Kinds' (n 34).

84 Burazin (n 2) 387.

85 Ibid 387–8.

86 Ibid 395.

87 Ibid.

88 Ibid 397–9.

positivism.[89] On the other hand, Crowe suggests that understanding law as a type of artefact can best explain the weak sense of natural law.[90]

One aspect of technical artefacts that stands out in some theories is their function. Legal philosophers have aimed to distinguish laws from non-laws by establishing law's function as a criterion. Crowe sees the deontic marker as the main function of law. It marks what conduct is permitted, prohibited, or mandated.[91] Prominent objections to this account include the difficulty of distinguishing law from other normative phenomena like games, etiquette, and morality.[92] The function of law that allows one to classify a given phenomenon as law is yet to be discovered, if possible.

However, some argue that the intention is a sufficient condition, and the artefact in question should resemble the token of a given kind in some way. Ehrenberg provides the example of decorative furniture.[93] Although it may not be designed for sitting, we can still consider it as a chair because of its similarity to the typical chairs and the creator's intention of making something that falls into the category of a chair:

> What's more, when we are attempting to understand a genre of artifacts in terms of the functions that members of the genre have in common, we are not saying that each member must attempt to perform those functions in order to be a member of the kind.[94]

Nevertheless, according to Ehrenberg, the functional features are decisive in recognising something as of a given kind: 'It is not about whether the token is capable of serving its function; it's about whether an intended audience can perceive it as a member of the putative class, where that class is understood in terms of that function.'[95]

Ehrenberg suggests that the social functions that law serves can help us understand its nature, since it is an artefact created and used by people.[96] The popular legal positivist thesis that law is an artefact is based on the thesis that 'law is entirely a human creation'.[97] Yet, as I will note further, from the very fact that something is

89 Ehrenberg (n 80) 195.

90 Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019) 180–1.

91 Crowe, 'Law as an Artifact Kind' (n 2) 751–2; Jonathan Crowe, 'Defects and Failures in Legal Artifacts' in Luka Burazin et al (eds), *The Artifactual Nature of Law* (Edward Elgar Publishing, 2022) 37, 44–5.

92 Miguel Garcia-Godinez, 'Law and Its Artifacts' in Luka Burazin et al (eds), *The Artifactual Nature of Law* (Edward Elgar Publishing, 2022) 128, 131.

93 Kenneth M Ehrenberg, 'Intentions in Artifactual Understandings of Law' in Luka Burazin et al (eds), *The Artifactual Nature of Law* (Edward Elgar, 2022) 16, 27.

94 Ibid 17–18.

95 Ibid 35.

96 Ehrenberg (n 80) 86.

97 Ibid.

a human creation (or artefact in the wide sense) does not follow the fact that it is an artefact (in the narrow sense): there is a spectrum of social kinds, and artefacts should not be conflated with social constructs or social kinds. Artefacts are just a subkind of social kinds (or social constructs). Ehrenberg also reckons that law is a kind of tool, as it is made to serve some purpose.[98] It is supposed to support the thesis that we can understand the law as a kind of artefact with all the theoretical and ontological commitments of the theories of artefacts. When we think about laws, we can view them as tools or artefacts that are created with a specific intention to serve some purpose. This means that laws can be analysed by examining the purpose for which they were created and the goals that their creators were trying to achieve. Note, however, that this automatically solves a longstanding tension in legal theory. It is a problem of the interpretation of the law: whether function, intention, or textual meaning should be the focal reference for the interpreter of the law. This suggests that the theory of law as an artefact is not agnostic to some debates in the general legal theory, and the theoretical and ontological commitments of this theory do not fit to describe the law in an agnostic manner.

From yet another angle, Crowe argues that the theory of law as an artefact supports the weak thesis of natural law theory. He argues that 'a putative law that is not capable of fulfilling its function is invalid, while a law that is not minimally adapted to its function is defective'.[99] Crowe pinpoints that some laws and other artefacts are not made in the specific procedure, and authorship or the author's intention (or concept, or function) cannot be properly ascribed. He proposes an 'intention–acceptance theory' of artefacts, according to which

> [s]omething counts as an artifact of kind K only if (1A) it is created with the intention that it be a K (the Intention Condition), or (1B) it is collectively accepted as a K (the Acceptance Condition), and (2) it meets the success conditions for being a K (the Success Condition).[100]

Even without a specific author's intention, something can belong to a given kind of artefact. Nonetheless, Crowe embraces the Success Condition. To belong to the given artefactual kind in question, something has to perform the function(s) characteristic for this kind, at least poorly. The Success Condition, applied to artefact, demands that the putative token of a given artefactual kind have the nomological ability to perform the functions: *the wholesale function thesis*. Ehrenberg assumes that token laws can malfunction (have defects) but also may not serve the functions characteristic of the kind law at all (*the retail function thesis*).[101] This is the crux of their dispute. While Ehrenberg allows that some putative token law may not fulfil the functions of law (what validates the positivism), Crowe is more restrictive and argues that a 'poorly drafted, unjust or

98 Ibid 10.

99 Crowe, *Natural Law and the Nature of Law* (n 90) 180 (emphasis omitted).

100 Ibid 168.

101 Ehrenberg (n 80) 125–8.

unreasonable standard will be legally defective, while an incomprehensible or deeply repugnant standard may be no law at all' (what validates natural law).[102]

B *Law as an Artefact (Narrow) and the Problem of Redundancy*

The explanatory power of the framework of artefacts is not explicitly manifested. In the first general assessment of 'the law as an artefact' theories provided by Roversi, he poses the key question of 'whether the added element an artifact theory of law brings to a socio-ontological account is really needed'.[103] Roversi provides the single, basic, and minimal sense in which the theory of law as an artefact is distinct. He claims that the framework of artefacts improves socio-ontological accounts because '[i]t explains how law can be made up of hypostatized, symbolic things, and how these things can organize normative behaviour'.[104] Roversi locates such accounts as a specification of the more general social ontology of law. Others, such as Garcia-Godinez or Tamanaha, make claims of the sufficiency of the socio-ontological framework in the explanation of the concept of law and raise a problem of non-distinctiveness of the artefactual framework.[105]

It is possible that the artefact theory of law in the narrow sense is reducible to a non-artefactual conceptual framework of social ontology (ie social institutions as rules, conventions, or mind-dependent entities). Thus, for instance, whether law is founded or grounded on rules or conventions has been raised independently to the claim about the artefactuality of law. To that extent, the law as an artefact theory is non-distinctive.

Several examples are available here. The conventional explanation of social institutions has been inspired by Lewis' discussion of the structure of tacit coordinative conventions,[106] while the rule-based approach is given primarily by Searle's and Anscombe's institutional–brute facts division.[107] According to Lewis, convention plays a crucial role in understanding human behaviour, among which are the very phenomena of language and communication.[108] The reference to convention is an alternative explanation for language than the reference to rules. It seems that rules are so strictly connected with their linguistic representations that we can end up with chicken-and-egg or vicious circular problems trying to explain

102 Crowe, *Natural Law and the Nature of Law* (n 90) 181.

103 Roversi (n 5) 144.

104 Ibid.

105 See generally Garcia-Godinez (n 10); Brian Z Tamanaha, *Sociological Approaches to Theories of Law* (Cambridge University Press, 2022).

106 See generally David K Lewis, *Convention: A Philosophical Study* (Harvard University Press, 1969).

107 See generally Searle (n 33); GEM Anscombe, 'On Brute Facts' (1958) 18(3) *Analysis* 69.

108 See generally Lewis (n 106).

language just in terms of rules. Conventionalist explanations of law have been developed by Lagerspetz[109] (among others) and critically assessed by Dyrda.[110]

The most notable rule-based explanation of the law is provided by Marmor.[111] Based on Searle's concept of constitutive rules, Marmor describes law in terms of constitutive conventions. The exception here is that rules arrive prior to conventions:

> The point here is that to the extent that conventions are rules, and to the extent that conformity to a convention is an instance of following a norm, there is always the potential of awareness that in complying with a convention one follows a rule.[112]

Guala provides a novel approach to institutions, not only to law.[113] Guala's approach is to reassess and unify institutions as rules and institutions as problem-solvers (conventions),[114] which fits major shared agency accounts.[115] None of the aforementioned accounts refers to artefacts in the narrow sense.

One can see a distinct value in the claim that law is an artefact in the narrow sense by reference to the concept of real kinds. Some may argue that if law is considered an artefact in a narrow sense, then it is a real kind, similar to natural kinds. The concept of real kinds is ambiguous. It has traditionally been understood to refer to mind-dependency, where real kinds are mind-independent and non-real kinds are mind-dependent. This raises questions about whether psychological categories, like some mental disorders, are real kinds, despite being mind-dependent. Similarly, it raises the question of whether Teflon, which is human-made and therefore mind-dependent, is also a real kind.[116]

Instead, some scholars argue that natural (or real) kinds are epistemic.[117] According to this view, 'natural kinds are picked out by those categories that

109 Eerik Lagerspetz, *The Opposite Mirrors: An Essay on the Conventionalist Theory of Institutions* (Springer Science + Business Media, 1995).

110 Adam Dyrda, *Konwencja u Podstaw Prawa: Kontrowersje Pozytywizmu Prawniczego* [Conventional Foundations of Law: Controversies of Legal Positivism] (Wolters Kluwer, 2013) [tr author].

111 Andrei Marmor, *Social Conventions: From Language to Law* (Princeton University Press, 2009) ch 7.

112 Ibid 7 (emphasis omitted).

113 Francesco Guala, *Understanding Institutions: The Science and Philosophy of Living Together* (Princeton University Press, 2016).

114 Ibid pt 1.

115 See, eg, Michael E Bratman, 'Shared Cooperative Activity' (1992) 101(2) *Philosophical Review* 327 applied to law in, for instance, Shapiro (n 13) ch 5 and Jules L Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press, 2001) 96–9.

116 Muhammad Ali Khalidi, 'Mind-Dependent Kinds' (2016) 2(2) *Journal of Social Ontology* 223.

117 Paul E Griffiths, 'Emotions as Natural and Normative Kinds' (2004) 71(5) *Philosophy of Science* 901, 903–5; Khalidi, *Natural Categories and Human Kinds* (n 22) ch 2.

appear in our completed scientific theories'.[118] The epistemological turn in understanding natural kinds breaks with looking for an essence that governs some fundamental laws of nature to understand the corresponding features of things as causally related. In that sense, given the structure of our world, some features are causally related to one another. Rather than talking about the necessary and sufficient features, it is often said that the epistemic natural kinds consist of a cluster of properties,[119] for example, functional properties.[120] The features of those clusters 'are kept in equilibrium by a causal mechanism'.[121] Those causal mechanisms and the relation between features are determined by experts in basic (eg physics) and special sciences (eg biological species).

In that sense, Khalidi also talks about the kinds studied by social sciences.[122] Some features of social kinds (eg recession and inflation) are discoverable by social scientists.[123] Those kinds can also be projectable, 'enabl[ing] us to make inductive inferences'.[124] As an example, there is a cluster of correlated features among instances of studied recessions. Kinds, according to this scientific-oriented account, are constructed or discovered in the basic and special or social sciences.

Yet, according to Khalidi, there are three kinds of social kinds.[125] The first two are indeed real (or investigative) kinds, while the third kind is purely conventional. The first kind of social kinds is one that demands for its existence propositional attitudes towards neither social kind nor particular tokens. Khalidi's examples, following Thomasson[126] with similar observations, were racism, recession, and inflation.[127] We do not need to be aware of them for them to exist. Of course, this does not necessarily mean that we lack proper concepts (and, accordingly, propositional attitudes towards them) of correlated social kinds. For example, for a recession to exist, it is necessary that a relevant community possess money, a rudimental economic organisation, and a market. We do not demand that past societies have the concept of inflation or recession for it to be studied based on relevant historical data. Money is an example of the second kind of social kinds, which needs to be perceived as a kind to exist, but its instances, or tokens, do not

118 Khalidi, *Natural Categories and Human Kinds* (n 22) 79.

119 Richard Boyd, 'Homeostasis, Species, and Higher Taxa' in Robert A Wilson (ed), *Species: New Interdisciplinary Essays* (MIT Press, 1999) 141.

120 See Francesco Guala, 'Epstein on Anchors and Grounds' (2016) 2(1) *Journal of Social Ontology* 135, 144–5.

121 Khalidi, *Natural Categories and Human Kinds* (n 22) 73.

122 Ibid ch 4.

123 Ibid 154–5.

124 Ibid 165.

125 Muhammad Ali Khalidi, 'Three Kinds of Social Kinds' (2015) 90(1) *Philosophy and Phenomenological Research* 96. See also Khalidi, *Natural Categories and Human Kinds* (n 22) 154–5.

126 Thomasson, 'Realism and Human Kinds' (n 34) 606.

127 Khalidi, 'Three Kinds of Social Kinds' (n 125) 98–100; Khalidi, *Natural Categories and Human Kinds* (n 22) 154–5.

have to be perceived as such to exist. Hence, some social kinds, such as mind-independent (the first kind), can be dependent (eg causally) on mind-dependent kinds (such as how inflation depends on money).

However, the third kind of social kinds not only demands kind recognition but also needs the recognition of particular instances (ie tokens). The most typical third kinds are legal kinds,[128] such as a member of parliament, permanent residence, or legal marriage. Both legal marriage (type) and the marriage of Bonnie and Clyde (token) must be recognised as such (as tokens of this kind). These kinds are strictly conventional, and since they have 'arisen as a result of legislative fiat, [they] would not reflect a causal connection between the properties involved'.[129] Suppose we want to study the first two kinds of social kinds. In that case, we can refer to social practices and empirically examine the causal connection between properties and the kinds or tokens of a given kind — they are investigative, real kinds. However, the fiat properties conventionally associated with the third kind of social kinds cannot be perceived as being causally connected to a given kind.[130] According to Khalidi, the first two kinds of social kinds are real kinds, those that can be projectable. However, third kinds of social kinds are not real, because their properties are associated conventionally.

Note that from the view that law is an artefact in the narrow sense, it does not follow whether law belongs to the first, second, or third kind of social kinds. In other words, the narrow sense of artefacts does not imply the realism about law as a kind. Take Burazin's account as an example. It is underlined that the author of the law has to have the concept of law in mind in order to produce the token law. It seems, then, that the law is instead a third kind of social kinds, so not a real kind. There is then the conventional, not causal, association between the properties of law as they are decided by the author. Moreover, note that according to Burazin, following Thomasson, the token should be successfully realised (according to the concept), and this success should be collectively recognised.[131] This strengthens the conventional assignment between the properties of law, so there is a lack of reality.

One may, of course, argue that the 'substantive and substantively correct concept of [law]'[132] is independent of the intentions of the author or some society. In that sense, we can be wrong about the properties of law: we may unintentionally make laws and wrongly recognise law as something that does not belong to this kind. However, Thomasson, whose theory is used by Burazin, argues that the creator of

128 Paweł Banaś, 'Why Cannot Anything Be a Legal Person? A Critique of Kurki's Theory of Legal Personhood' (2021) 44 *Revus* 163, 170 n 6.

129 Khalidi, 'Three Kinds of Social Kinds' (n 125) 107.

130 Ibid.

131 Burazin (n 2) 397.

132 Burazin (n 2) 395.

something cannot be mistaken about its nature;[133] in the case of law, it would be an author or a legislative body responsible for creating a law. In this sense, the author has epistemic privileged access: they cannot be in deep error of what kind of thing their creation is, although it is possible (eg following Putnam)[134] that they are wrong about the thing as being an artefact. This thesis, of course, has limits, as

> the makers' concepts of what features are relevant to membership in that artifactual kind must be considered intensionally, and are typically superficial, leaving room for ignorance and error in any beliefs they may have about what, for example, physical conditions are nomologically necessary (or sufficient) for artifacts to possess the surface-level characteristics that are accepted as criterial for membership in the kind … Makers may also remain ignorant of a great many other facts about artifacts of the kind they create, including causal factors to do with their economic or political role in the relevant society, unintended functions they turn out to serve, and so on. There thus remains much open for discovery by the social sciences even about artifacts of one's own time and tradition — these things and kinds certainly are not completely transparent to anyone.[135]

As I have argued, understanding the law as an artefact in the narrow sense does not imply realism about the kind law. Nor should it be conflated with this view. While most accounts of law as an artefact in the wide sense aim to defend anti-realism about law by contrasting it with natural kinds, this is not the main difference between the two approaches. The difference between the two approaches is whether they are bottom-up or top-down. The wide account shows that law is an artefact because it is not a natural kind (bottom-up), while the narrow account examines law using popular theories of artefacts (top-down).

V POSITIVISM, NON-POSITIVISM, AND THE CONCEPTUAL SHIFT

The two approaches to studying law as an artefact differ, yet both of them are agnostic to such problems as the realism of law. There are differences, and the wide sense of law as an artefact seems to be more general and can be equated with the claim that 'law is a social kind' or that the roots of law are social. This wide sense of the artefact of law may be a platitude for both legal positivism and non-positivism. Legal positivism unarguably assumes the so-called social source thesis.[136] Among the separate thesis (no necessary conceptual connection between

133 Amie L Thomasson, 'Artifacts and Human Concepts' in Eric Margolis and Stephen Laurence (eds), *Creations of the Mind: Theories of Artifacts and Their Representation* (Oxford University Press, 2007) 52, 61.

134 Putnam (n 20) 242–3.

135 Thomasson, 'Artifacts and Human Concepts' (n 133) 69 (emphasis omitted).

136 John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 *American Journal of Jurisprudence* 199 ('Legal Positivism'). Cf Tomasz Gizbert-Studnicki, 'Social Facts and Legal Facts: Perils of Hume's Guillotine' in Torben Spaak and Patricia Mindus (eds), *The Cambridge Companion to Legal Positivism* (Cambridge University Press, 2021) 419.

law and morality) and the descriptive character of endeavour, the social source thesis constructs the core of legal positivism.

The social source thesis may fit in the 'semantic field' of the artefactual character of law. Modern representatives of natural law theory do not deny the social source thesis, as Murphy notices: 'is there *anyone* who thinks that law's existence and content depends entirely on normative facts, and not at all on non-normative facts? … [This is the thesis that] any sensible view about what law's existence depends on'.[137] Murphy's view refers to Leiter's famous link between legal positivism and legal realism. Any realistic theory of law assumes legal positivism (exclusive) as the accurate description of law.[138] If the 'law as an artefact' platitude is to be accepted by natural law theories, it should not interfere with one of the 'two unhappy dilemmas'[139] for natural law theories: the non-distinctiveness; 'it [would] not make any existence and content claims that are incompatible with the positivist standpoint'.[140]

According to Leiter, legal realism presupposes the positivist criteria of legality.[141] Their difference emerges in such problems as sources of indeterminacy and other *empirical*, not conceptual, matters. In other words, Leiter claims that positivists' description of legal norms recognition, such as pedigree,[142] is uncontroversial. Consequently, the opposition between legal positivism and legal realism is false. The social source thesis, it may turn out, is what all approaches assume. Gardner subsumes legal positivism in a thesis: '(LP) In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits.'[143]

However, legal positivists, legal realists, critical legal theorists, or even natural law theorists may tacitly assume some form of Gardner's proposition of legal positivism ('LP'). If LP is best understood as the verbalisation of common beliefs about law among officials (but not necessarily among folks), then positivism is a platitude-based theory.[144] Consequently, one cannot deny those platitudes. Otherwise, they change the *object*, the referent of the theories taking part in the alleged disagreement. Those platitudes are 'a necessary reference point for a legal philosopher … Theoretical disagreements arise due to under-determination of

137 Mark C Murphy, 'Two Unhappy Dilemmas for Natural Law Jurisprudence' (2015) 60(2) *American Journal of Jurisprudence* 121, 129 (emphasis in original).

138 Brian Leiter, 'Legal Realism and Legal Positivism Reconsidered' (2001) 111(2) *Ethics* 278.

139 Murphy (n 137) 122.

140 Ibid 132.

141 Leiter, 'Legal Realism and Legal Positivism Reconsidered' (n 138) 301.

142 HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 264.

143 Gardner, 'Legal Positivism' (n 136) 199.

144 Cf Shapiro (n 13) 13–16.

theories by the same platitudes. Theories that ignore the foundational platitudes of law are not theories of law'.[145]

The wide sense of artefact expresses the social source thesis and may help elucidate it as a platitude. Murphy[146] or Crowe,[147] as natural law theorists, refer to the artefactuality of law, stressing its social sources. If law is an artefact, then it has its social sources in human activity as presented in LP. Murphy and Crowe find that the distinctive role of modern natural law theories lies in conceptualising *legal defectiveness*, so they would disagree with the 'sources, not its merits' part of LP.[148] Positivism only provides a criterion of defective law.

What is more, it seems that the introduction of the concept of artefact may help revindicate natural law theories. For example, concepts such as 'function' or 'function realisation', so deeply rooted in the framework of artefact theories, may have deep moral background. If so, exclusive LP[149] may be wrong, or at most, it provides a plain and insufficient description of law (provided that law is an artefact). That is why, even within the wide sense of artefact, there is a dispute between non-positivists' (Murphy, Finnis, Tamanaha) and positivists' (Marmor, Shauer, Himma, and to some extent Leiter) understanding of the concept of artefacts. This is because the wide sense of artefact is independent of legal–philosophical debates and can be adopted by theorists from various philosophical perspectives.

Some top-down theorists of law as an artefact, such as Burazin or Crowe, use the narrow sense of artefact; but these narrow senses rely on other scholars' claims that law has some of the wide characteristics of artefact (non-essentialist, internalist, or fallible character). Burazin and Crowe support their top-down approaches to legal artefactuality by detailing that the claim that law is an artefact is ubiquitous, albeit philosophically under-theorised. Burazin supports his claim that law is an artefact in the wide sense by claiming that

> [d]espite the fact that the idea of 'law' as an artifact has recently been invoked in the legal–philosophical literature, this idea was not always developed in detail with regard to the questions of what the claim of the 'law' or 'legal system' as an artifact entails ontologically and what consequences, if any, this claim has for philosophical accounts of law.[150]

145 Dyrda and Gizbert-Studnicki (n 38) 139.

146 Murphy (n 137).

147 Crowe, 'Law as an Artifact Kind' (n 2); Crowe, *Natural Law and the Nature of Law* (n 90).

148 Murphy (n 137) 136; Crowe, *Natural Law and the Nature of Law* (n 90) 753–6.

149 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2nd ed, 2009). Cf Shapiro (n 13).

150 Burazin (n 2) 385–6 (citations omitted), citing Kenneth M Ehrenberg, 'Defending the Possibility of a Neutral Functional Theory of Law' (2009) 29(1) *Oxford Journal of Legal Studies* 91, John Gardner, 'The Legality of Law' (2004) 17(2) *Ratio Juris* 168, Leiter, 'The Demarcation Problem in Jurisprudence' (n 3), and Schauer (n 3).

He then cites Leiter, Gardner, and Schauer, who use the law as an artefact in the wide sense, to support his claim that law is an artefact in the narrow sense.[151] Similarly, Crowe supports his claim by showing that '[i]t is often stated that law is an artifact. Many authors take this claim as obvious; it is rarely explicitly defended. Relatively little attention has been paid to its implications for our understanding of law'.[152] Crowe cites Leiter and Gardner, who view the law as an artefact in the wide sense.[153]

However, there is no connection between the claims that law is an artefact in the wide sense (a popular claim up until Burazin's and Crowe's works) and that law is an artefact in the narrow sense. A stronger justification is needed to ascertain why the framework of some theories of technical artefacts is well-suited for analysing law. Both Crowe and Burazin cite the literature and authors claiming that law is an artefact in the wide sense to support their claim that law can be analysed through the lenses of a given theory of artefacts (namely, the narrow sense of artefacts).

The wide sense of artefact can be elucidated by another term, 'law as a social construction', or 'law as a social kind', and this is likely the meaning that most theorists had in mind when they confronted law as an artefact with natural kinds (the wide sense). While the term 'social construction' has explicit political connotations, the very concept of artefact (narrow) implies many ontological commitments in jurisprudence. Indeed, it seems that we are caught between Scylla and Charybdis, and so some more agnostic term, such as 'social kind', may be more accurate.

However, this wide sense (artefact as 'social construct' or 'social kind') is agnostic to many ontological commitments made by theories of the narrow sense of artefact. It is not settled why authorship is important in analysing the nature of law and whether law is that of a functional kind; such claims are not derivable from the wide sense of artefact but presupposed by the narrow sense. Furthermore, those claims can be elucidated without implementing the debate about technical artefacts.

Suppose a theory assumes a common feature about technical artefacts, such as chairs, phones, or pieces of art, along with institutional artefacts such as legal systems or laws. This theory may subsequently seem to be broad and diluted. This is what appears to happen with a theory of artefacts if one wants to embrace such diverse (eg tangible and non-tangible, concrete and abstract) phenomena. It is not a direct allegation; nevertheless what strikes as the most common feature among those types is that they are social and human constructs. Along this vein, the wide sense of artefact as implemented when studying law is more suited. By contrast, the narrow sense of artefact should be better justified as incorporating presuppositions concerning some of the features of the concept of law; that the content of this concept lies in the intention of some specific group (authors) and

151 Burazin (n 2) 387.

152 Crowe, 'Law as an Artifact Kind' (n 2) 737, citing Leiter, 'The Demarcation Problem in Jurisprudence' (n 3) 666 and Gardner, 'The Legality of Law' (n 150).

153 Ibid.

that the function of law (eg intended by author(s)) decides the concept of law. Other ontological presuppositions are that there are striking similarities between the creation of other artefacts, like chairs, and the law or legal system; the latter claim is counterintuitive.

With the authorship, there is a problem that this concept, as implemented in law, also appears to be vastly overextended; there is no one author or specific authors.[154] Like in the Dworkinian metaphor, the alleged authors write the book of law over centuries and the problems with the interpretation of law strike as arguments against one or more predominant concepts or functions that the alleged authors of the legal system or laws had in mind. Although this does not rebut the very theory of the narrow sense of artefact, it seems that a sounder justification for theories of the law as an artefact (narrow) is needed, rather than the sole assumption that law is an artefact in a wide sense. This is particularly true if one accepts the assumption that the theory of artefacts is superfluous regarding the main theories of law.[155]

Note, however, that some followers of Crowe may argue that the law does not require authorship and instead supports the intention–acceptance theory of artefacts. This suggests that the concept of artefact is subject to disputes and contradictions, making it challenging to implement into law. I argued, following Garcia-Godinez, that the classical approaches to the law and the conceptual resources of social ontology may suffice to describe the law.

However, it does not follow that law is not a kind of artefact (narrow) and should not be described as one. Many disputes in general legal philosophy mirror those that one can see in the philosophy of technical artefacts: What is the role of function, authorship, or nomological structure of a given artefact (or law)? As Ehrenberg noted, law is a kind of tool; we intend to manipulate our social worlds using laws.[156] My claims are then more modest.

First, I argued that law as an artefact needs stronger justification than provided now by scholars like Crowe or Burazin. The argument put forward by Ehrenberg, that law is a kind of tool because we use it to change the social environment, is a promising one. Another intriguing approach is presented by Banaś, who takes a bottom-up approach to study law as an artefact. He starts by juxtaposing law with natural kinds. Yet, through this method, Banaś concludes that law is an artefact in not only the wide sense, but also the narrow sense.[157] These justifications show promise for the advancement of the narrow sense of law as an artefact. Second, I claimed that law as an artefact in the narrow sense is not agnostic to many disputes in legal philosophy. It does not follow that they are not true, but the very debate among philosophers of technical artefacts is full of contradictions. One has to be

154 Tamanaha, *Sociological Approaches to Theories of Law* (n 105) 5.

155 Garcia-Godinez (n 10) 126.

156 Ehrenberg (n 80) 10.

157 Paweł Banaś, 'Truth and Truth-Makers in Legal Discourse' (PhD Thesis, Jagiellonian University, 2018) 41–105, 166–83.

more careful when implementing the theory of artefacts in law. As argued by Banaś:

> [A]lthough the general claim that law is a social artefact is hardly original — many details of the particular theory behind that claim which I presented in this dissertation may sound not only new within the context of philosophy of law, but also quite controversial.[158]

That is why I proposed to stay on the ground of general social ontology and seek stronger justifications for the claims that law is not only a social kind or social construct but also a form of artefact with all the ontological commitments of that claim.

VI CONCLUSIONS

Between the thesis that law is an artefact understood as a social kind or social construct and the thesis that law is similar to technical artefacts, there is a conceptual shift. I argued that this shift is unjustified. In some contexts, the concept of an artefact implies that law is socially constructed rather than something similar to a natural kind. Philosophers use the concepts of essentialism/non-essentialism, fallibilism/infallibilism, and externalism/internalism to juxtapose law with natural kinds. However, in different contexts, the use of 'artefact' seems to presuppose some ontologically robust views from the specific field as the philosophy of technical artefacts. This latter use, however, assumes certain theoretical ontological presuppositions concerning the examination of the law; specifically, the intention of the author and the purposive nature of the law as an artefact. The claim that law is an artefact in the narrow sense needs stronger justifications than a mere observation that law is an artefact in the wide sense. Consequently, the wide and narrow senses of artefact are apparently different concepts of artefact.

158 Ibid 167.