About Facts, Legal Facts, and Beliefs: “It’s metaphors, all the way down”
Carel Smith

Eijsbouts’ Philippic against institutional fact, and his plea for real facts, reminds me to the old lady, who couldn’t believe that the earth orbits around the sun, and stated that the world is, in fact, a flat plate supported on the back of a giant tortoise...

Tom Eijsbouts’ response (Blog of January 28) to my claim that the will is an institutional fact, not a brute fact of nature (Blog of January 10), reminds me to the reaction of the old lady, who appears in Stephen Hawkin’s A Brief History of Time. When Russell once gave a public lecture on astronomy, and explained that the earth orbits around the sun, and the sun around a collection of stars, an old woman at the back of the room interrupted and said:

"What you have told us is rubbish. The world is really a flat plate supported on the back of a giant tortoise." The scientist gave a superior smile before replying, "What is the tortoise standing on?" "You're very clever, young man, very clever", said the old lady. "But it's turtles all the way down!" (S. Hawkins, A Brief History of Time, 1980:1)

Just as the earth, for the old lady, cannot float in empty space, but has to stand on firm ground, the will, according to Eijsbouts, is not a matter of belief, but needs real facts in order to exist.

What are these real facts that bring the will into existence? Historic facts, Eijsbouts says, like an utterance at a defined place & moment. “Without that historic fact and its time and place”, he continues, “the will goes up into the thin air of belief indeed. But no belief should find its way into the law without a firm check of real fact”.

Well, I fully agree with that, except for the implied opposition between belief and real fact. If Eijsbouts would have knocked me down just after my lecture on Free Will, the charge against him should include time (January, 8, 2013, 3:45 p.m.), location (Leiden, KOG), and criminal act (the offence of assault). The data of this imaginary case are what Eijsbouts calls real facts. But these facts are, of course, not brute facts of nature: the fact that we allegedly live in the year 2013 is a collective convention (why not the year 4.600.000.013?); so is the habit to call a particular accumulation of brick, asphalt and people together Leiden, and the hefty blow a criminal offence (in the parliaments of Kiev and Moscow it’s just a rough continuation of the debate).

To call a bodily movement and its effect an assault is to ascribe a status to these phenomena, and it owes it correctness to the legal framework of the law. The law, in turn, is not something given, but the creation of a people who ascribe some status to a body of rules, and who behave accordingly. That is another way of saying that the existence of the law is not a brute fact of nature – not a phenomenon that exists independently of people – but a phenomenon (although the plural would be more
apposite) that exists in and through the collective behavior of people, including their beliefs about its origin, function and validity. In this respect, the law is a phenomenon that is “everywhere and nowhere at the same time”, for our collective beliefs do not have the precise location that the brute facts of nature have.

There is no firm ground, no giant tortoise, which serves as the foundation of the legal system, except for the collective behavior of officials and citizens that confirms the status of the legal system time and again. This reveals that the metaphor of foundation is not apposite to explain the system’s validity. The system manifests itself in and through the enumerable acts by countless participants, whereas the behavior of each participant is guided by the system in turn. If we are still inclined to think in terms of facts being grounded in reality, we should reverse that image or metaphor, and say that the foundation-walls are carried by the whole house (Wittgenstein, *On Certainty*, § 248), just as the solar system is a self-supporting system.

The alignment of behavior (due to upbringing, education and participation) results in what Searle calls *collective intentionality* or collective belief. From an individual point of view, the collective belief is not arbitrary or subjective – Eijsbouts’ worry. It rather functions as a restraint on each individual behavior, and turns certain utterances and appearances at a defined place & moment into real facts (Eijsbouts). But they could better be called *objective* facts. For they are not given, as the hydrogen atoms or the snow near the summit of the Mont Blanc, *they are created* – they exist because we collectively believe them to exist.

The worries of the old lady and Eijsbouts are, in one word, *groundless*. 