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Lipstick law, or: the three forms of statutory law

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ABSTRACT

Legal scholars often distinguish between de jure rules and de facto situations to explain certain legal situations. However, in some instances this distinction might obscure the legal understanding of these legal situations. In particular, the distinction leaves out often occurring instances in which there is a difference between formal, written law and (rule-based) policy actively pursued by the legislator, both when this is and is not publicly known. In the current article, I propose to replace the de jure/de facto understanding of the legal order by a new conceptual framework for the understanding of statutory law. I will argue that statutory law within the legal order can appear in three different forms: (1) written formal law, (2) law for the community and (3) non-public law.

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Introduction

It is a common understanding that travelling to different cultures leads one to reflect on one's own culture with, as the Chinese say, "new eyes". For me, this happened in relation to the legal order, while doing field research in Rwanda during the summer of 2013.

In Rwanda, I found that although formally the country's political system is a multi-state party democracy with guaranteed freedom of press, it is common knowledge that in fact media are continually censored (see for example Waldorf 2007, 404–416), and president Kagame has often been labelled a dictator (see for example Reyntjens 2004, 177–210).[1] When reflecting on what all of this tells us about the Rwandan legal order, one is inclined to conclude that in some instances there is a large discrepancy between the formal law and the reality on the ground. At least, this is the common view of legal scholars who often distinguish between de jure and de facto reality.[2] However, this de jure/de facto distinction seemed dissatisfying for explaining the socio-legal situation that I was trying to understand. In fact, I felt that applying the de jure/de facto distinction to the legal situation in Rwanda actually obscured the legal understanding of the situation. In particular, the distinction leaves out often occurring instances in which there is a difference between formal, written law and (rule-based) policy actively pursued by the legislator, both when this is and is not publicly known. A familiar example of a legal situation in which this occurs (in many countries, including Rwanda), is the formal legal freedom of press combined with active censorship of public media and prosecution of journalists.[3] In some

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situations, the legislature pursuing a different policy than dictated by the formal law is not publicly known. In this case, we are discussing the level of legal hidden power and corruption.

In the following article, I will argue that in fact, from a perspective of normative jurisprudence,[4] statutory law within a legal order can appear in three different forms: (1) written formal law, (2) law for the community and (3) non-public law. Drawing mostly on Kelsen's pure theory of law (1967/2001, 1949/2005) for the theoretical foundation of the argument, I am hoping to convincingly show that this distinction makes better sense for understanding the legal order than a de jure/de facto distinction, including the often implicit view that law is solely written formal law addressing subjects. Although I arrived at the current argument during field research in Rwanda, I will argue that the distinction holds true for all legal orders, and is not particularly African or Western, democratic or tyrannical or otherwise. In this sense I will argue that to understand any legal order, we have to look at it with "new eyes".

The legal order of the sixth floor

Consider the following scenario. I am sitting here at my desk, on the sixth floor of the building of the law faculty. For some time now, I have enjoyed the privilege of being the legislator of this floor. All other colleagues on the sixth floor are my subjects. You, one of my subjects, come into my office. I immediately notice that you are wearing bright red lipstick. Now, as you are well aware, because I have recently told all subjects, the only colour of lipstick allowed on this floor is blue. I created this law a few months ago, and in fact two people have already been fined, and paid these fines, for wearing non-blue lipstick. Just as I am about to tell you to paint your lips blue and go and see law enforcement to pay your fine (third office on the left), Harry enters. Harry is from the seventh floor. He works for the International Community of Legal Floors (ICLF), of which we are a member by having signed the charter. Article 3c of the ICLF charter states that "anyone is free to use make-up in any way they please". Harry looks at me and says "I just came in to see how you are doing on freedom of lipstick colours these days. Do you have that report for me?". I point at the wall, where "The Laws of the Sixth Floor", our constitution, is on public display. Two months ago I took down this document, to score out the old article 6 and write it anew. I had been hoping that Harry would pop in ever since. "Article 6, Harry" I say with a slight sneer. Harry lifts up his glasses, turns to the wall and reads our constitution. Article 6 states: "Any person is free to wear any make-up they like". Harry looks at me, nods happily, and walks away. Meanwhile I am thinking I have to visit the ICLF soon, to see about those donations, now that we are doing so well on human rights. Then I realize you are still in my room and so I call law enforcement to come pick you up.

Next enters Sally, one of my closest advisors. She is wearing green lipstick. Being a state advisor, Sally falls under the protection of a secret legal act that I have written down on a document known to few, which I keep in my bureau drawer. On this document, it is stated that certain highly valued government officials are officially exempted from the blue-lipstick law.

Now what would you say is the law? Harry clearly thought the law of the sixth floor could be known completely by studying the written formal law. I wonder if you agree, while you are paying a fine in the law enforcement office. If you are courageous enough,

or stupid enough to go upstairs to ICLF and complain, they will probably argue that on our floor there is a de jure right to wear any colour of lipstick, although the de facto situation is different (and unfortunately there is not much they can do for you). You on the other hand might argue that "The Laws of the Sixth Floor" is just a document, a meaningless piece of paper, and that in fact the law states that you can only wear blue lipstick.

I agree with you (although not publicly, for obvious reasons). In fact, I want to argue that within any legal order, there are three distinguished forms of statutory law, with statutory law understood in a broad sense as law created by the legislature.[5] These three forms of law I want to label "written formal law", "law for the community" and "non-public law".

Defining the three forms of statutory law

To appreciate this distinction, first we have to clarify what we mean with the "legal order".[6] For Kelsen, the legal order is a dynamic system of valid legal norms, which are valid by virtue of the fact that they have been created according to a definite rule, or basic norm (1967/2001, 30–32). It is the basic norm that establishes the legislative power of the legal order (1967/2001, 8–9; 1949/2005, 115–117; Lindahl 2013, 146–155).

In our legal order, of which I am the legislator, it is clear that there are actually three different forms of law. One is the written formal law, the constitution; the law that is recorded on the document on my wall. Second, there is the law for the community which I have declared to all my subjects, namely, that the only colour of lipstick allowed on the sixth floor is blue. Third, there is the non-public law that one can find on the secret document that I keep in my bureau drawer, which states that government officials are exempted from the lipstick law. All three are statutory law, which is law created by the legislator,[7] because they are created by the sovereign (legislator) who is legitimized, through recognition of the basic norm stipulating this legislative power, by the relevant community to create laws.

For any legal order, statutory law can thus be analysed on these three levels. Taken together they constitute the statutory law of the legal order. The three forms and their respective categories can be schematized as follows:

	Written formal law (A)	Law for the community (B)	Non-public law (C)
Written	+	B1	C1
Non-written	–	B2	C2
Public	+	+	–

In general, the first form of law, the written formal law (A) is found in official legal codes. It can be defined as rules found in official, formal legal texts, created by the legislature and open and available to the public. This form of law is necessarily written and necessarily public.

The second form of law, the law for the community (B) refers to what the subjects of a legal order believe the law actually is and what the law tells them – under the condition that this belief is the result of a relevant legislative act. It can be defined as rules created by the legislator, known by the subjects of the legal order. There are two kinds of law for the community; written and non-written (B1 and B2). Often, especially considering state

law, the written formal law and the law for the community overlap. In this case, the written formal law is the written law for the community (B1). To say that these overlap, amounts to saying that the relevant community knows the formal, written law. In practice, the only situation in which (A) and (B1) completely overlap is in a situation of direct democracy, or when a legislature is equal to its subjects. In any other legal order, legal codes are usually full of laws that the community is unaware of, and so it is not law to them in this sense.[8] The conceptual distinction between written formal law (A) and written law for the community (B1) can be a useful epistemological distinction to research these instances.

More complicated is the non-written law for the community (B2). This again can occur in two situations; either in a situation of a legal order that has no written formal law (B2i), or in a situation when a non-written law for the community contradicts written formal law (B2ii). When a legal order does not have written formal law (situation B2i), laws can be merely non-written and in some sense non-formal. In this case there is no A law. To study such a legal order one has to engage in qualitative research with both the legislator and the subjects of the relevant order. This kind of legal order will not likely be found among current state legal orders. It can be found amongst ancient legal orders, or as a non-state legal order in a framework of legal pluralism, or in a state of nature.[9] For example, when one views the family as a legal order; this order usually consists of informal and unwritten law, that is nevertheless well-known to the subjects of this legal order (see e.g. de Sousa Santos 2002, 385–388).

The second situation in which non-written law for the community occurs, namely when a non-written law for the community contradicts written formal law (situation B2ii), comes to the fore when the subjects of a legal order have knowledge of a law, issued by the legislator, that contradicts the written formal law. In this case one finds that there are non-written rules created by the legislature, which the people of the relevant community recognize (which means that they have a relation of recognition to the law, meaning: they abide, relate to, believe to be, live up to, break, etc., the law).[10] It is not about the choice of the individual who breaks or abides the law, it is about what law is recognized by the subjects of a legal order, based on a justified belief in the legality of this rule.[11] So when a group of psychiatric patients believe the government is ordering all citizens to kill birds, yet no such law has been created, this is not a non-written law for the community. My law that forbids the wearing of non-blue lipstick for all subjects of the sixth floor is a non-written law for the community that contradicts written formal law.

A real-life example in modern society of a non-written law for the community that contradicts written formal law (B2ii) would be the Dutch soft drug law. According to Dutch written formal law, the "Opium Law" (A) it is forbidden to sell (amongst others) hash, weed and magic mushrooms, categorized as "soft drugs".[12] This same law designates what executive powers are responsible for the enforcement of this law[13] and how enforcement should happen.[14] Punishment for anyone selling drugs can be either a prison sentence of two to five months or a fine.[15] However, as most Dutch citizens (and non-Dutch, for that matter) know, "coffeeshops" selling all kinds of hash, weed and magic mushrooms, are flourishing in the Netherlands. This is not due to inefficaciousness of the legislator; it is the unwritten law of the Dutch legislator that allows for the selling of soft drugs by coffeeshops under certain conditions. This policy is called "gedoogbeleid" ("tolerance policy") (B). Information about this tolerance policy can be found in several places, such

as academic writing[16] and on the government website[17] although it directly contradicts written formal law.[18]

The third level of law, the non-public law (C), is the level of hidden power and corruption. It can be defined as non-public rules created by the legislature, known only to a specific group of people. Of this form of statutory law again there are two kinds; written and non-written non-public laws (C1 and C2). The written lipstick law that I created for government officials, that I keep in my bureau drawer and that Sally knows about, is an example of a C1 category non-public law. To give an example in real-life modern society, I would like to refer to the USA/NSA practice of domestic surveillance before this was revealed to the public by E. Snowden. In this case, the written formal law (A) stated that the collections of communications without a warrant was allowed when at least one end of the communication is a non-US person.[19] However, for the NSA a "top-secret document" was created, under legal authority enabling the agency to warrant the reading of emails and tapping of phone calls between US citizens (C1) (Ball & Ackerman, 2013; The Guardian, 2015; Waterman 2013).

A possible example of a non-written non-public law (C2) might be the rule-based allowing of certain high party officials to take public money and use it for their personal gain which is said to happen, and/or have happened in Uganda. A recent report by Human Rights Watch and the Yale Law School argues that corruption in Uganda, benefitting the high placed government officials, is indeed allowed by the legislator. They imply the existence of an underlying non-written non-public rule when they argue that "[y]ears of evidence indicate that Uganda's current political system is built on patronage and that ultimately high-level corruption is rewarded rather than punished" (Lowenstein 2013). In fact, the report is a good example of how the ever-implicit de jure/de facto distinction obscures the actual legal situation of finances and corruption, in this case in Uganda. All the report can state is that there is a law (A) and what the law states does not de facto happen. For example, according to the report,

> [e]xisting Ugandan laws require 'leaders' to disclose financial assets. This is an enormously important obligation that, if implemented, would greatly enhance the transparency of public officials' finances and likely deter public graft. The public also has a right to information (deemed in the public interest) under the constitution and the Access to Information Act. Despite the numerous laws, however, Uganda's regulatory framework to combat corruption fails to apply the requirement of asset declarations to presidential appointees and other high-level officials, the tribunal to challenge the content of declarations has never been established, and there is no system for the public to access information regarding financial assets of officials (Human Rights Watch 2017, 27).

This kind of analysis implies that the law is "correct" and that it is only a matter of enforcing the law by, for example, setting up a proper system for the public to access this information. However, the problem is not necessarily a question of lacking resources or lack of practical solutions, but rather the cause of corruption here lies with Ugandan unwritten non-public law, created by the legislator for an elite group. This law, judging from the analysis in the report, would in written form be something like 'the president and other high-level officials are exempted from law (A) that requires existing Ugandan leaders to disclose financial assets'. The corrupt government high-level officials do not just take money on their private initiative – they abide to unwritten, non-public rules. In general,

corruption usually falls under this category of non-written, non-public (C2) laws.[20] Obviously, C laws and in particular C2 laws are extremely hard to research.

Written and unwritten law

On the sixth floor, I am the legislator and the laws that I establish are valid because I am authorized to be the legislator (by the constitution, or basic norm). If you question the validity of the lipstick law, asking "why am I not allowed to wear red lipstick?", the answer will be "because you have to obey the rules of the sovereign", or "because you have to obey the law". Note that this reply does not answer the ethical objection that you might have to the lipstick law, and maybe even to my position as sovereign. The legitimacy, or validity, of my authorization lies in the basic norm of the legal order of the sixth floor, which is recognized by the relevant community. This recognition renders my laws on the whole efficacious.[21]

However, you might argue that the lipstick law is not a law, because I did not write it down in a formal legal code. Many western-centred legal researchers and legal practitioners insist on the written formal law as condition for understanding it as "law". Kelsen for example, expressly states that "the law as the product of the legislative procedure, a statue in the formal sense of the term, is a document containing words, sentences […]" (Kelsen 1949/2005, 123), challenging the possibility of both law for the community that is not in conformity with the written formal law (since this needs to be unwritten law, or at least, not written in formal legal codes) and for non-written non-public law.[22]

Kelsen is in this respect exemplary for modern legal scholars. Although being written and formal is mostly not explicitly mentioned as a requirement of statutory law, it is often implied.[23] This is especially apparent in legal research methodology, which generally focuses on the study of legal codes, or on the effect of written formal law on the subjects addressed.[24] The underlying, false assumption of modern legal scholars is that for law to be law, for a statute to be legal, a law created by the legislature needs to be a written document filed in legal codes.

Because the issue at stake here is at least partly an issue of semantics of the concept of "statutory law", I want to take a quick look at its etymology. Beatrix Weber researched evidence of language contact in the parliament rolls of medieval England, comparing occurrence of Latin, French and English nouns. In French and Latin, the most frequent co-occurent noun was *estatut* or *statutum*, respectively. In English on the other hand, the most frequent complement by far was the word *act* (2011, 71–85). According to Bennion, the English word statute was first used in a political/legal context by Matthew Paris in 1246 to describe a meeting of the first English parliament; prelates who gathered to

> […] discuss the state of the realm. When this body's decrees became formal they were called Statutes, from the late Latin *statutum* a decree, decision or law. In this way we got the earliest statutes, from which we get the current term *statute law*. Shortly afterwards it became the custom to call a piece of such legislation by the name *Act* of Parliament from the medieval Latin *actus* (Bennion 2001, 29).[25]

Here you see that originally, the word *statute* refers to the decision of the sovereign, and not to written legal documents. In much of the not western-centred legal theory oral legal culture is widely recognized and non-written legal norms are often considered law

(see for example Allott 1984; Sacco 1995, 460; Leman 2011, 28–29; Bishop 2008, 3). In addition to non-written customary law, which is not under discussion here, statutory law (understood as law expressing the will of the legislator) can be non-written too. In fact, what has been defined as "customary law" would within the current conceptual framework at least in part be understood as non-state statutory law. The laws of local tribes in several African countries for example were by the colonizer often labelled "customary law". These laws were created by a legislature (for example a group of elders in the village) and shared orally, or by means of performances, with the relevant community (Allott 1977).[26] Under the current framework, these laws are (non-state) non-written statutory law for the community (B2).

The three forms of statutory law, legal pluralism and sociology of law

Lastly, I would shortly like to say something about how the definition of the three forms of statutory law relates to debates on legal pluralism and sociology of law. The theoretical framework for the analysis of statutory law as presented in this article can be used by both legal researchers who believe that formal written state law is the only existing form of statutory law, as well as by legal researchers who believe the world contains many different legal orders that each have their own statutory law – and by any legal researcher holding a position in between. However, it might be of interest to see how the theory relates specifically to the two positions found in research of law that stress the view that legal scholars have to go beyond state law to understand the law of a legal order, namely legal pluralism and sociology of law.

Legal pluralism is generally defined as "a situation in which two or more legal systems coexist in the same social field" (Merry 1988) and debates on legal pluralism usually amount to a discussion of the status of different legal orders within a single social field.[27] If one adheres to the idea of legal pluralism, the currently proposed epistemology of law can be a useful framework for researching these different orders. If, for example, one agrees with Pospisil's notion of legal levels (Pospisil 1967), that:

> [a]ny human society [...] does not possess a single consistent legal system, but as many such systems as there are functioning subgroups. Conversely, every functioning subgroup of a society regulates the relations of its members by its own legal system, which is of necessity different, at least in some respects, from those of other subgroups (3).

Then for each of these subgroups the legal order can be analysed according to the three forms of statutory law. To give a concrete example: Pospisil gives the example of a criminal gang in the USA. Because

> the law of the criminal gang is usually provided with sanctions much harsher and infinitely more effective and immediate in application than sanctions of the official law of the country; therefore members of such organizations conform primarily with the legal system of their illicit organization (1967, 17).

When trying to understand the legal situation of such a gang member, one could use the current framework to analyse the statutory law of both the USA state legal order and the criminal gang's legal order, using the distinctions between the three levels of statutory law so as not to miss any relevant laws, and come to an understanding of, for example, where and how the laws of these different legal orders are in conflict.

As you can see, in a more general sense, the conceptual framework at hand can be used to support what Oomen calls "the central mission of legal pluralism"; "[o]n the one hand, it is about setting out [...] that there are many different orders and systems that essentially perform the same function as law, and should thus also be studied and even recognized as such. In addition [...] to point out the limits of state law, and how law in action very rarely corresponds to law in the books" (Oomen 2015).[28]

The current theory is likewise distinct from a theory of sociology of law. It is in fact a theory of normative jurisprudence, and not of sociological jurisprudence, or sociology of law. It is not concerned with observing actual human behaviour, discussing for example in what way the law influences what individual human beings actually do or how they perceive themselves; rather, it aims at "a structural analysis of law as a system of valid norms" (Kelsen 1949/2005, 162–163). It does in part discuss attitudes towards law if we study the law for the community, but does not question whether or not these attitudes influence human behaviour. The object of the study of statutory law is norms issued by law-creating authorities, and not patterns of actual behaviour (Kelsen 1949/2005, 163).[29]

Ehrlich and Isaacs argue that "the whole law is incapable of being included in legal provisions". They hereby refer to "social laws", that regulate social order in the absence of legal provisions (Ehrlich and Isaacs 1922). Whether or not we agree that there are laws that regulate social order, that are not legal provisions – especially, whether these social rules are properly called *laws* – is irrelevant for the current argument, which only focuses on statutory law. It does not aspire to include all existing law. Rather, it provides a new conceptual and epistemological scheme for understanding statutory law. It does however argue that the studying of these three forms of law is necessary for understanding the statutory law of a legal order.

Pospisil in some way recognizes this when he argues in reply to Ehrlich, that Ehrlich's "living law" failed when he inquired the nature of inner ordering of society's subgroups, that "he failed to uncover within the associations formal or informal leaders who actually influenced and moulded what he called 'living law'" (1967, 7). This implies that to understand a legal order, we need to understand its statutory law.

Conclusion

To understand the socio-legal situation in a legal order, a distinction is often made between the de jure and the de facto situation. "De jure" is often taken to mean written formal law. In this article, I have made a plea for a broader and more accurate understanding of statutory law within a legal order. I have argued that statutory law in fact can appear in three different forms; written formal law (A), law for the community (B) and non-public law (C). Of these three forms, law for the community and non-public law can both occur as written and non-written laws.

Using Kelsen's *Pure Theory of Law* and *General Theory of Law & State*, I have argued that the three forms of statutory law all comprise valid forms of law, since they are rules that originate from the legislature, who is authorized by a basic norm or rule to establish or annul these rules. The proposed theory is a theory of normative jurisprudence, it offers a structural analysis of (statutory) law as a system of valid norms. It can therefore be combined with a theory of legal pluralism if desired, and it is therefore not a sociology of law.

Returning to the Rwandan situation as described in the introduction, we would now be able to say something more meaningful about the legal situation of Rwandan journalists. Rather than arguing that every journalist has a de jure right to freely express his/her opinions, but that de facto this right is violated, we can now understand the legal situation as follows: Rwanda has a written, formal law that guarantees freedom of press and freedom of information (A). However, there is another overruling non-written law for the community in Rwanda, which states that any journalist who writes critically about the current government will be prosecuted (B) (see Waldorf 2007, 405–411). This further our understanding of the country's statutory law, which in its turn could inform, for example, international politics.

Obviously, the story of Rwandan journalists is only an illustration. Throughout the article I have presented different examples, relating to completely different legal orders. As has been argued, I believe the proposed framework of the three forms of statutory law can be used to research the statutory law of any legal order. It is my good hope that the proposed epistemology will serve to come to a more thorough understanding of statutory law in different legal orders, and that it will serve to do more justice to the legal situation that many people actually find themselves subjected to.

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Notes

1. To understand more about the socio-legal history of Rwanda leading up to the current form of government, I recommend to read Nigel Cantwell's UNICEF Innocenti report (1997). In the report, Cantwell explains and describes how after the 1994 genocide, the new government and the judiciary, amongst other socio-legal institutions, quite literally had to start from zero.
2. See for example the 2012 report by Haverman "The Hiil Rule of Law Quick Scan Rwanda", in which the current de jure legal situation of Rwanda is described and compared to the current de facto situation (using data from several reports by NGOs, government, research institutions). These two taken together result in "positive trends" and "main challenges" in relation to the rule of law in Rwanda. In the context of international law and statelessness, Laura van Waas has criticized the de jure/de facto distinction (2008, 20–27).
3. Art. 34 of the Rwandan constitution guarantees freedom of the press and freedom of information. This is echoed in the 2009 Media Law, which states that "censorship is not allowed" (art. 17), "any journalist has the freedom to express opinions" (art. 16), etc. Article 17 does give a restriction, adding that although censorship is not allowed, expressing of opinions should not "jeopardize the peace of the general public and good morals". Other restrictions concern sharing of confidential state documents if conflicting with issues of national security and national integrity (art. 14). However, Freedom House ranks 2013 press in Rwanda as "not free", arguing that "in practice the Rwandan media remain[s] under tight government control" (see Freedom House 2014). Similar comments are made by, amongst others, Amnesty International and Human Rights Watch (see Amnesty International (2013) and Human Rights Watch (2017)).

4. Meaning: a structural analysis of law as a system of positive law (law created and annulled by acts of human beings). It studies the legal norms that are rules about how human beings *ought* to behave, instead of studying how human beings in fact behave (see Kelsen 1949/2005, 114, 162–163).
5. For a definition of "statutory law", I follow Kelsen, who defines statutory law as "law created in a way other than by custom, namely, by legislative, judicial, or administrative acts or by legal transactions, especially by contracts and (international) treaties" (1949/2005, 115). As such I am stretching the semantics of "statutory law" so as to include any law created by the legislature, both written and unwritten, public and non-public. This probably takes the meaning of the concept back to its original meaning, see footnote 7 and 8.
6. The concepts of "legal order" will be used throughout this article. This will be considered semantically equal to the notion of a "legal system" as referred to by some cited authors.
7. Please note that, although in the legal order of the sixth floor the legislator is only one individual, the legislator of a legal order can include any number of people and institutions, up until including the whole legal community in a situation of a pure democracy.
8. See for example Gestel (2008) who describes the utopic idea that the relevant community of a state legal order knows its laws completely. According to van Gestel, there is a distance between law in the legal codes and law in practice (2008, 3). Ehrlich in this context argues that "[a] juristic science which conceives of law as a rule of conduct could not consistently have laid down a principle that men are bound by the law even though they do not know it; for one cannot act according to a rule that one does not know" (1975, 12).
9. Thomas Hobbes, for example, defines the family in a state of nature as a "little Monarchy", wherein the dominion that parents have over their children is analogous to the dominion of the sovereigns over their subjects (1996/1996, 142).
10. See Searle, on the recognition of a social fact; in the terminology of Searle, the power of the sovereign is derived from the fact that the status function of the sovereign is accepted by the relevant community. According to Searle, acceptance in this context means anything from enthusiastically embracing to grudgingly endorsing. This also includes the situation in which someone finds himself helpless and unable to do anything about the situation in which he finds himself. Recognizing thus does not mean approval. Hate, apathy and despair are consistent with the recognition of what one hates, is apathetic about or despairs of changing (Searle 1995, 39–41; 2011, 8). To avoid confusion, I use the term "recognition".
11. Where 'justified belief', following Kelsen, relates to the fact that the law is created by the legislator, receiving its validity from the constitution (basic norm).
12. Dutch Opium Law, art. 2b, 3b1.
13. Dutch Opium Law, art. 8j, 8k.
14. Dutch Opium Law, art. 9.
15. Dutch Opium Law, art. 11.1–11.3.
16. See for example Buruma (2007, 73–113). Buruma distinguishes "legal tolerance" and "cultural tolerance". Tolerance as a legal concept, according to Buruma, "[o]rdinarily [..] means that administrative or punitive reactions are postponed if the perpetrator agrees to act according to precise instructions. In certain fields – for instance, environmental law – there exists something called a 'tolerace order' (*gedoogbeschikking*), which means that the local or provincial authorities promise to not punish for a certain period under certain conditions. Such an order is legally binding on the relationship between local authorities and citizens. However, it is not the same as a permit (and if the Public Prosecutor finds out, he is free to prosecute)" (85–86). According to the author, this system is clever from a pragmatic and especially from a rule-of-law perspective, because of the public character of tolerance as compared to secret tolerance in other legal orders (87). Legal pubic tolerance, then, in general is a category of law for the community, whereas legal secret tolerance would be a category of non-public law. Bruinsma (2003, 60) explains the Dutch practice of *gedogen* by saying that they apply to crimes without victims. In these cases, "the law in the books symbolically keeps up moral condemnation, while the law in action formulates a policy of non-enforcement".
17. See Rijksoverheid (2015).

18. The example of Dutch *gedoogbeleid* illustrates that non-written law does not necessarily have to be orally communicated law (such as a direct verbal command by the legislator). Instead, there can be (non-formal) documents describing the law, without actually stating the non-written law, or recognizing the law as law. Such is for example the information on *gedoogbeleid* provided on the website of the Dutch government. It describes the workings of a non-written law, to which it implicitly refers. For example, its first line states that "Soft drugs are less harmful for public health than hard drugs. Coffeeshops are allowed to sell cannabis under strict conditions" – thereby referring to a non-written law which states that coffeeshops are allowed to sell cannabis. The document further lists these conditions. The same kind of documents explaining the workings of formal written laws can be found on the government website – usually these documents are used to turn complicated written formal law into law for the community.
19. Fisa Amendments Act of 2008.
20. For a discussion of corruption in relation to the legal order, see: Nuijten and Anders (2007). The editors argue that "[…] most important, we take distance from the commonly held view that corruption is simply the law's negation, a vice afflicting the body politic. Instead, we argue that corruption and the law are not opposites but constitutive of one another. Thus, we propose an approach that transcends binary oppositions and explores the hidden continuities between corruption and its antonyms law and virtue" (2). See also, amongst others, Schneider and Schneider (2005) on Italian governments "looking the other way" in relation to criminal activities of the Maffia; Shore (2005) on nepotism and corruption within the Eureopean Commission; Lazar (2005) on corruption on local and state level in Bolivia.
21. The recognition of the basic norm, and the resulting efficaciousness of my legal order, can be deduced from the fact that there is an operative law enforcement, and the fact that several people have already paid a fine for wearing the wrong color of lipstick.
22. Although elsewhere, Kelsen does indicate the possibility of unwritten norms of constitution in relation to customary law, in case the written constitution does not institute custom as a form of law creation and "nevertheless the legal order contains customary besides statutory law […] there must exist unwritten norms of constitution, a customarily created norm according to which the general norms binding the law-applying organs can be created by custom" (1949/2005, 126).
23. Boaventura de Sousa Santos writes about the meaning that Western culture attributes to writing as a ceremony and to the written product as expression of commitment. "It appears", he concludes, "that the writing and the written are a rhetorical topos in our socio-legal culture". This may explain the inclination of legal scholars to identify law with written formal (state) law (2002, 107–108). Allott in this context mentions "[…] the "black-letter" lawyers who see law as norms and rules in books […]" (1977, 3).
24. Of course there are many exceptions to this general practice in law schools. However, often when legal researchers do look further than written formal law to understand the law, they often pass by "statutory law" to look for "common law" or other forms of non-statutory law. For an overview of the history of legal research methods, see for example Claire Angelique, Vaughn, and del Carmen (2010); Sithigh and Mac (2012).
25. According to Bennion, "statute law" has a double meaning; "One meaning is law in statutory form, that is the body of enacted law sometimes referred to (inaccurately) as the statute book. I shall refer to statute law in this sense as "legislation". The other meaning is the area of knowledge and skill concerned with the nature, functioning and interpretation of legislation" (2001, 7).
26. Allott describes how under English colonial rule all customary laws from different ethnic and religious groups (and therefore from different legal sources) were "being lumped together under the single title of "native customary law", to which he sometimes refers to as "native law". "This law was not recorded in writing; it was transmitted originally by word of mouth from the memory of the older to that of the younger generation called upon to observe and apply it". He describes how the English colonizer started to record these "customary laws", and wonders in this situation "why not go the whole hog, and call the new law a statutory one, which in truth it is?" (Allott 1984).

27. See, amongst others: Griffiths (1986, 3–4); Davies (2010, 805–806); Barzilai (2008, 396). For a critique of this debate in legal pluralism, see Tamanaha (1993); von Benda-Beckmann (2002).
28. See also: Griffiths (1986, 3–4), Merry (1988) and Pound (1910).
29. See also: Tamanaha (1995, 503–506).

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