The Free Will: Brute Fact of Nature or Institutional Fact?

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Dear Members of the Faculty, dear Students,

This Meijers lecture holds a novum: it will be the first one to be held, not in our native language, but in English. The request to do so came from the Onderzoeksbestuur, taking into consideration the growing number of faculty members from abroad. The research board nevertheless left the choice up to me to speak either in Dutch or in English. After some consideration, some weighing and balancing, I deliberately chose to present my lecture in English. But did I? Did I really choose? Is my choice the result of a decision of my conscious mind? Or is the conscious mind just a "kwebbeldoos", a chatterbox, as some neuroscientists say, and the idea of choice, of free will, a fabrication of this "chatterbox"? These are bold claims, which run against our intuitions of the capacities of men. But counter-intuitive claims are not necessarily wrong, and we might ask what law can learn from other sciences, such as the neurosciences.
The idea that the law *can* learn from other scientific disciplines, is one of the reasons of this Faculty to develop a research master, which is called "External Perspectives on Law". Its aim is to train law students to study law from different perspectives, such as economics, psychology, and anthropology and to learn from their knowledge and approaches.

This lecture, I will nevertheless reverse the perspective. Although law can definitely learn from the other sciences, the other sciences can also learn from the law. That, at least, is the proposition I would like to develop in this lecture. To test its credibility, I will discuss the challenging claim by the neurosciences: the claim that the FREE WILL does not exist.

The structure of my lecture is as follows. I will first give a brief outline of the claim of the neurosciences that the will and free will do not exist; I than move over to the field of law, and reconstruct the law's concept of the will;

in the last part of the lecture I will invoke a bit of philosophy of language to test the validity of the claim of the neurosciences.

The topic of the FREE WILL used to be the province of theology and philosophy. Augustine and Luther, for example, considered the idea of a FREE WILL blasphemous in light of God's omnipotence, whereas Erasmus and Kant reasoned that moral responsibility presupposes FREEDOM OF THE WILL. But the recent and rapid developments in the neurosciences have changed the character of the debate. The arguments for and against the existence of the FREE WILL are no longer primarily based on logic or moral intuitions, but on scientific evidence – on what is called the "brute facts of nature", or, shortly, facts.

According to brain researchers, such as Dick Swaab and Victor Lamme, to mention two famous Dutch neuroscientists, scientific research on the brain showcases that we erroneously identify ourselves with the conscious mind, with REASON. We still are inclined, they argue, to consider our decisions, at least in principle, as the result of an act of deliberation.

This view, the view to identify ourselves with our conscious mind, has a long and respectable history. Plato gave us the beautiful metaphor of the human soul as a charioteer, driving two horses. The charioteer represents the faculty of REASON, whereas the horses represent the impulses of DESIRE and TEMPER. Although it is a difficult task for REASON to hold DESIRE and TEMPER in check – we are often led off(the right) track, due to a weakly developed REASON and a lusty DESIRE – Plato's message is an optimistic one: REASON, if trained appropriately, is able to keep the impulses of the soul in check. Just as we blame the charioteer when the chariot is on the wrong track, we blame ourselves, that is, our conscious mind, our REASON, for not having mastered our impulses and inclinations.

But the message on the role of our conscious mind in decision-making from the neurosciences is less favourable. In his bestseller WIJ ZIJN HET BREIN ("We are the brain"), Dick Swaab demonstrates that much of what we call our identity is, in fact, prepared in the womb, during pregnancy. Hetero- or homosexuality, for example, are not a personal choice, neither an effect of social pressure, but can, according to Swaab, be explained in terms of characteristics of the brain – in particular the size (!) and functioning of the

hypothalamus, which, in turn, is causally related to an increase or decrease of particular chemicals during pregnancy.

A second example. According to Swaab, we correctly connect the degree of self-control to moral consciousness, in that aggressive impulses are, among others, restrained by the cerebral cortex (what we call the "frontale hersenschors"). This part of the brain is crucial for moral judgment. But who or what masters the cerebral cortex? What happens if this part of the brain is damaged? Some war veterans and Altzheimer patients, says Swaab, demonstrated to be more violent and aggressive than they used to be before the damage on the cerebral cortex. And when the development of the cerebral cortex of the foetus is damaged during pregnancy, because of smoking, bad nourishment, or the use of medicine, there is also an increased chance of violent and aggressive behaviour later on in life.

This raises the question whether it is our conscious mind that governs our (moral) behaviour, or that the conscious mind *itself* is the product of the complex interplay of different parts of the brain, whereas the brain, in turn, is primarily the collective product of the generic background (wat is dat? Of genetic?) and the formation during pregnancy. The title of Swaab's book, *WE ARE THE BRAIN,* answers this question unequivocally: the conscious mind is a product of the brain, and the brain is the product of genetic material and chemistry.

Victor Lamme, in his book *DE VRIJE WIL BESTAAT NIET* (The Free Will does not exist) is as unambiguous as Swaab about the role of the conscious mind in our behaviour; he only uses a more rhetorical vocabulary. According to Lamme, we should consider the brain as an extremely complex computer. The brain processes all kind of stimuli, stemming from different parts of the brain, and it is the strongest stimulus that will be decisive. It is this stimulus, the strongest in relation to other stimuli, which accounts for what we call the decision.

What, then, creates the conscious mind? And what is its function? Both Swaab and Lamme consider the conscious mind as a by-product of the complex organisation of the brain. They state that the BRAIN PRODUCES THE SELF, just as the kidney produces urine. The *function* of this "SELF" is the experience of a unity in the multitude of different stimuli, feelings and

experiences. The experience of a SELF accounts for the continual need to explain our behaviour.

And the explanation runs as follows: If there is no external force that caused our behaviour, it must be an *internal* force. That internal force cannot be some arbitrary stimulus – that wouldn't be an explanation at all. It must therefore be located in the SELF, from the experience of unity, and therefore from the centre where all action is set in motion. If the SELF is the cause of action, than it is because the SELF *willed* that action.

Now, this account of the conscious mind, says Lamme, accounts for the vocabulary of WILL, INTENTIONALITY, and DECISION that is so characteristic for the way we interpret our actions and those of others.

But just as the SELF is an illusion, so is the WILL. For our action is not set in motion because of some reason that we deliberately choose, but, conversely, a reason is *invented* by our conscious mind in order to explain the choice that the brain has already made. The upshot is that the explanation of the conscious mind falsely reverses the order of things.

Lamme therefore calls the conscious mind a chatterbox. It tells a tale, but it is just a narrative. The truth is that there are no such things as the SELF or the WILL, let alone that a FREE WILL would exist. The only facts are the brute facts of nature, that is, the hardware of the brain, and the electrical and chemical signals of its neurons.

This, albeit in rough outline, is the position of the neurosciences with regard to the phenomena of the WILL and FREEDOM OF THE WILL. Its conclusion seems devastating for the major areas of law – such as contract law, tort law and criminal law. Because legal responsibility, a key concept in law, is primarily based on the assumption that a human being is, at least in principle, capable to determine its WILL and to act accordingly, an explanation that Swaab and Lamme call consider a reversal of the order of things. To deny man the faculty of the WILL seriously affects the legal and cultural landscape that men have inhabited for millennia.

But Victor Lamme's conclusion that there exists no such thing as the WILL seems drawn rather hastily. The problem is not the contention of the neurosciences that the will is a *construction* – for an analysis of the legal concept of the will reveals that even the law conceives of the will, not as a

brute fact of nature, but as a construction. The problem is that Swaab and Lamme stick to the naïve positivistic idea that only brute facts of nature are true facts, and everything else mere illusions. A bit of philosophy of language will suffice to exhibit that this world, although composed of physical particles, not only consists of brute facts of nature, such as molecules and biological organisms, but also houses a social world – and the facts of the social world, although a different kind of fact, are as real as the alleged brute facts of nature.

But let us first turn to the law and answer the question what kind of phenomenon the will is from a legal point of view. The regulation of the juristic act (articles 3:33-35 BW) offers a sophisticated view on the legal concept of the will. Article 3:33 states that the juristic act requires a will, aimed at a legal consequence, and expressed through a statement or declaration. Now, if we focus on the will, what happens if I wasn't able to determine my will properly at the moment of the declaration? With respect to the will, two interesting questions arise.

First: how do **I** know that my will at the moment of the declaration wasn't my true will? And, second, how does **the other party** know whether or not I expressed my true will at the moment of my declaration?

To make these questions more tangible, I will offer a concrete, albeit imaginary case. Suppose that I offered for sale my apartment in Amsterdam, November last year. With the profit I want to live near *Pic de Bugarach,* in the South West of France, for I believe that the world will perish on December 21 (2012), when the Maya calendar ends, but that I will be safe on this mountain. When a prospective buyer asks me the reason I sell the house, of course I don't mention the true reason for selling the house,– I want him to *buy* the house, not to *join* me to *Pic de Bugarach*. The standard reason I give satisfies him, as does the reasonable price I ask for the apartment, so we closed the deal. But a few days later, just before the conveyance, and a week before Dooms Day, I wonder what happened to me, how could I truly believed that the world would perish December 21? I wonder whether I might have been intoxicated by the use of tranquilizers, which I'd bought via Internet. I definitely do not want to sell the house and I decide to invoke the exception of article 34.

This article 34 states that the will is supposed not to cohere with the declaration, if a mental disorder prevented a *reasonable* judgment of the involved interests. But how do I know that I suffered a mental disorder at the time of the declaration? The law states: that is the case if the juristic act is *disadvantageous* for the mentally disturbed person at the time of the declaration.

Now, it is clear that, at the time of the declaration, I believed that the juristic act was advantageous for me. So, what justifies my *present* judgment that the juristic act is, in fact, disadvantageous? What makes me sure, to put it differently, that my present mental state is sound, and that it was unsound in November, last year? For in November, I would have judged the other way around. My own *conviction,* therefore, cannot be the proper criterion to determine whether or not the juristic act is disadvantageous. What I need, is a criterion to assess the soundness of my *conviction*. I therefore need a criterion that is *external* to my own feelings or inclinations.

The law gives such an external criterion. It is the criterion of *reasonableness.* According to article 3:34, we suffer a mental disorder when we lack a *reasonable* judgment. But when do we lack a reasonable judgment? That is the case when we act against our interests. We act against our interests, when the juristic act is disadvantageous for us. But when is a juristic act disadvantageous for us? The only answer is an appeal to reasonableness. In order to answer this question, I have to determine whether I judged like a reasonable person, that is, whether a reasonable person in similar circumstances would consider the juristic act clearly as disadvantageous.

From the analysis of article 34 we can draw two conclusions. First, what we call our true will is, according to the law, not identical to the inclination, that is, to the net result of the stimuli in the brain. The stimuli may cause my acts, as Swaab and Lamme state, but whether these acts are also truly willed, and not the effect of an aberration or thoughtlessness, is something different. *My true will is what I reasonably could have willed at the time of the juristic act.* The conclusion is that what we call the will, is not the inclination on the level of the brain – a brute fact of nature – but the positive *judgment* on the inclination.

And that judgement is a construction.

The analysis of the legal concept of the juristic act reveals a second aspect of the will. It reveals that we have to resort to public standards in order to determine whether or not the will is my true will. For I have to reflect upon my real interests, and to assess the proper means to achieve these interests. In doing so, I already left the solipsism of my own brain, and have entered the social world of family, work and authorities in which I participate, each with their values, policies and standards of reasonableness.

It is with regard to these public standards, that I consider my initial sale's offer to be an aberration. As I resort to public standards of reasonableness, my true will is not a private phenomenon, but a social construction.

If we determine the will from the perspective of the other party, the buyer, the conclusion is similar. Article 35 states that, if the buyer could *reasonably* assume that my declaration and behaviour expressed my true will, I have to stand by the agreement, even if I suffered from a mental disorder at the time of the declaration. The will, attributed to me by the other party, is what *reasonably* can be inferred from my declaration and behaviour in these particular circumstances. And as the criterion of reasonableness refers to public standards of behaviour, embodied in what Holmes called "the reasonable and prudent man", the will attributed to me, is, firstly, something that is constructed, and secondly, not a private, but a public phenomenon.

We are now in the position to define the legal concept of the will more precisely, both from the perspective of the person who acts, as from the other party:

- First: the will is something we attribute to others and to ourselves.
- Second: an act is willed if, according to public standards of common behaviour, it is reasonable to suppose that I, or the other person, willed this act.

The legal concept of the will holds a highly sophisticated view on the will, which we owe to Meijers, and we have gotten accustomed to it, so much so, that we almost forget how revolutionary and bold this concept of the will still is. What seems to be private to the utmost, my personal will, is

not private at all, but a phenomenon that emerges in and through the handling of public standards. The will is a judgment, not a brute fact of nature.

In this respect, there is a remarkable resemblance between the legal concept of the will and the findings of the neurosciences, according to which the will is something that we invent – more precisely: that the brain invents: a construction, not a "brute fact of nature".

But there is also a huge difference between the law and the neurosciences. The neuroscience concludes that, as the will is a mere construction, something the brain invented in order to explain behaviour, it therefore does not really exist; it is just an illusion.

The law, by contrast, considers the will not as an illusion, but as an objective fact of the world. I think the law is correct. I think the law is correct, because the facts of social life are not less real than the brute facts of nature, although they exist only because we believe them to exist.

And n order to substantiate this claim, I shall briefly discuss the nature of institutional facts. That is the bit philosophy I promised you at the outset.

The distinction between brute facts of nature on the one hand, and social or institutional facts on the other, is from the philosopher John Searle. He was a pupil of John Austin, who developed the theory of speech acts.

In his wonderful book "The Construction of Social Reality", Searle offers an answer on the problem that, 'although there are portions of the real world that exist only because we believe them to exist, many facts regarding these things are nevertheless "objective" facts in the sense that they are not a matter of your or my preferences, evaluations, or moral attitudes.' Examples of such facts are the fact that I am a Dutch citizen, that this piece of paper is a 20 Euro bill, that my nephew got married on December 14, that I am the owner of this bicycle, and that FC Ajax won the Intercontinental Cup in 1995. These facts contrast differ from such facts as that the Mont Blanc has snow and ice near the summit or that water consists of consists of two hydrogen atoms and one oxygen atom. The latter facts are, arguably, totally independent of any human opinions. Searle calls the latter facts "brute" facts of nature.

The former facts – the Euro bill, my citizenship – are called institutional facts, because they require human institutions for their existence. In order that this piece of paper is be a 20 Euro bill, there has to be the human institution of money. After all, this piece of printed-paper has hardly any value in itself – it has, so to speak, no intrinsic value, contrary to the gold coins of the old days (although the fact that gold has value is also based on an assigned function to gold). It is worth 20 Euro only because we collectively agree upon the fact that these bills have this value.

Here something magical happens: pieces of worthless paper become valuable only because the function to possess this value is *assigned* to them and we collectively accept this assigned function. It is this assigned function that turns these worthless pieces of paper, that is, these brute facts of nature, into money.

The formula of assigning a function to an object is: X counts as Y in context Z. In our example: this paper bill (X) counts as a 20 Euro bill (Y) when authorized by the ECB (Z). The latter condition is of course the most complicated element of the formula. For the ECB is itself an institution, a complex organisation with powers, duties and procedures.

To assign a function to an object is a necessary, though not sufficient condition to turn it into an institution. In order to become an institution, we have to *accept it collectively* and to behave accordingly. The institution of money is our collective behaviour towards money: the fact that I believe that you believe that we all believe that these pieces of paper are worth 20 Euro. As long as there is a collective acceptance or recognition of the validity of the assigned function to these paper bills, the institution of the Euro exists. The Euro-crisis illustrates very well that acceptance and trust are necessary conditions for the existence of an institution.

The example of money exhibits that we must differentiate between the institution of money, and the objects that are called money: the coins and paper bills. The objects owe their status as money not to their physical qualities, but to the assigned function. If we study the physical characteristics of the coins and paper bills, we might discover a lot about the alloy, seal and ink, but it will reveal nothing about the institution of money. Money is not the coins and not the paper bills; money is the collective *behaviour* of people towards money: it is the whole network of

practices and rules of owning, buying, selling, earning, paying for services and paying off debts, etc.

The institution of money is paradigmatic for all institutions. We can find them everywhere, especially in law. In fact, the law is one, huge, and complex network of institutions. Property, for example, is not an intrinsic feature of objects, but it is an assigned function to objects. Property is not the object owned – the brute fact – but the collective behaviour with regard to this object, based upon a belief in the existence of property. It is the cluster of rights, powers, and duties that define property.

That is a different way of saying that money, property, as well as marriage, parenthood, elections, academic degrees and chairs, to mention a few more, are social constructions. But are they illusions?

Now, I think that even Swaab and Lamme will agree that money is not an illusion, but an objective fact of our world. After all, they enjoy the convenience of a pension and salary, got their research financed by grants, and get their share of the sales from their bestsellers.

But if they admit that money exists, they have to admit too that institutional facts are part of the world, although they do not have a precise location; and they do not reveal their features by mere observation. For the institution is not only what people do (that could be observed, in a way), but also what they *believe* about what they are doing, as well as what they believe they *ought to do* – aspects that cannot be observed, but that require interpretation. The institution is, in one word, an elusive phenomenon, a phenomenon that is everywhere and nowhere at the same time.

The step to the institution of “the will”, and in its wake “the free will”, can now be made rather easily. An act is willed, we said, if, according to public standards of common behaviour, it is reasonable to suppose that I, or the other person, willed this act. The will is, therefore, an assigned function to a person according to the formula: X (behaviour) counts as Y (will) in context Z (kind of relation/person/expectation, etc.).

I agree with Swaab and Lamme that the will cannot be found in the brain; and that, therefore, it makes no sense to even consider the possibility of a free will somewhere in the hardware of the brain. Their

mistake is, what is called, a category-mistake: they fail to see that the will does not belong to the category of biology – it does not describe a feature of the human organism, such as blood pressure – but that it belongs to the social world.

Only if we consider the Euro, the UN, property, calendars, and New Year Receptions to be mere illusions, we may call the will and the free will illusions too. But to accept that option, is to wipe out the social world with its institutions of law, science and art, and to find us in a naked, nasty world of brute facts only.

Although I am convinced that the law can learn a lot from the neurosciences, I believe that the reverse is true as well. The aim of the proposed research master is precisely that: to form a bridge between the law and other disciplines. This lecture hopes to contribute to this goal.

Thank you very much.