SIX HERESIES ON CONSTITUTIVE RULES

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ABSTRACT

The concept of "constitutive rule" is inextricably linked with the philosophy of John R. Searle and with the field of study that we now call "social ontology". It is less known, however, that starting from the '70s, and only partially linked with Searle's work, a deep and fruitful discussion on constitutive rules emerged in Italian legal philosophy. This paper aims at acting as a bridge between these two important discussions by arguing six "heretic" theses on constitutive rules.

KEYWORDS

Constitutive rules, Social Ontology, Searle, Metaphysics of Law, Institutional Facts.

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In memory of Amedeo G. Conte

1. *Introduction*

The concept of "constitutive rule" is inextricably linked with the philosophy of John R. Searle and with the field of study that we now call "social ontology", a domain that owes much to Searle's work. In discussing this topic, scholars typically and rightly focus on those ideas by Searle that turned out to be crucial for its development, such as the "count as" formula, the concept of status function or that of direction of fit, the theory of collective intentionality. The debate on constitutive rules that resulted from those ideas has been up to this day lively and full of results. It is less known, however, that starting from the '70s, and only partially linked with Searle's work, a discussion on constitutive rules emerged in Italian legal philosophy that reached a level of complexity and depth hardly matched in the rest of the world. This is due primarily to the work of two main authors – Gaetano Carcaterra and Amedeo G. Conte – and to a rich literature that, starting from the ideas of those two and possibly criticizing them, either elaborated new conceptual tools or put forward critical statements whose discussion resulted in a major step forward in the understanding of constitutive rules. Unfortunately, most of this literature was in Italian, hence typically it is not known by English-speaking readers.

I would like this paper to act as a bridge between these two important discussions: the socio-ontological one and the one drawn from Italian legal philosophy. However, I am not going to make a presentation of them. Rather, I will criticize some of the main tenets of the Italian legal-philosophical discussion on constitutive rules by arguing six theses that, within that community of scholars, can be perceived as "heretic". But, in explaining *why* these theses are heretic when judged from an Italian perspective, I will consider the socio-ontological perspective, thus trying to draw a picture of the differences and overlaps between those two perspectives about constitutive rules. Hopefully, in this way, I will be able to give some details about those

important discussions while at the same time giving a contribution to them.

Let me state the six "heretic" theses.

First thesis: The fact that a rule is constitutive of a given institutional fact should not be accounted for in terms of that rule being a condition of that fact.

Second thesis: Anankastic rules should not be considered as an independent kind of constitutive rules.

Third thesis: Constitutive rules are not a *kind* of rules but rather a *way to use* rules.

Fourth thesis: Constitutive rules are not inviolable.

Fifth thesis: Constitutive rules are not stipulative definitions.

Sixth thesis: Constitutive rules do not imply any kind of "weird" ontology.

All the theses are framed in a negative way. However, they are not meant to be a critical contribution only. The arguments I will be putting forward are linked and, taken together, they make up a comprehensive perspective, a theory of constitutive rules which I will summarize at the end of the paper. Moreover, the reader may feel a little bit disoriented in looking at these theses, particularly if he or she is not well acquainted with the Italian legal-philosophical debate on constitutive rules. However, in arguing for each of these theses in the sections that follow, I will explain their context, presenting the background discussion and explaining how this discussion gives deep insights on the nature of constitutive rules.

Let us consider the heresies, now.

2. *First Heresy: "Being a Condition of" Does Not Explain "Being Constitutive of"*

2.1. *The Double Nature of Constitutive Rules in Conte and Carcaterra*

As mentioned, the first "heretic" thesis I will be arguing for states that constitutive rules cannot be explained in terms of rules being a condition of what they regulate. This idea – that constitutive rules can be accounted for in terms of the relation "being a condition of" – is the main outcome of a theory due to Amedeo G. Conte and Giampaolo Azzoni. More precisely, this theory states that (1) constitutive rules either *are* or *set* a condition for the behavior they regulate, and that (2) this condition can be necessary, sufficient, or necessary *and* sufficient. On this path, the theory is able to provide a wonderfully simple and symmetric taxonomy:

- Some constitutive rules *are necessary* condition of what they regulate. These are *eidetic*-constitutive rules.
- Some constitutive rules *are sufficient* condition of what they regulate. These are *thetic*-constitutive rules.
- Some constitutive rules *are necessary and sufficient* condition of what they regulate. These are *noetic*-constitutive rules.
- Some constitutive rules *set necessary* condition of what they regulate. These are *anankastic*-constitutive rules.
- Some constitutive rules *set sufficient* condition of what they regulate. These are *meta-thetic* constitutive rules.
- Some constitutive rules *set necessary and sufficient* condition of what they regulate. These are *nomic* constitutive rules.

Conte and Azzoni provide examples for all these categories (see among others CONTE 1985, AZZONI 1988). Here I will focus on the distinction between "eidetic" and "thetic" constitutive rules, whereas in Section 3 I will instead discuss that between "eidetic" and "anankastic" constitutive rules. I think these distinctions are particularly relevant because they exemplify the

idea that the constitutive nature of a rule can be explained in terms of the *kind of condition* a rule is, on the one hand, and of that rule *being or setting* a condition, on the other hand.[1]

Indeed, before arriving at the full taxonomy just presented, Conte had maintained that the distinction between "thetic" and "eidetic" constitutive rules can alone encompass the whole domain of constitutive rules: namely, that all constitutive rules are either "thetic" or "eidetic". Here is a passage by him that exemplifies this stance:

> «*All* constitutive rules are conditions of what they are about [*di ciò su cui esse vertono*]: This is the *first thesis*. In a relation of condition are not only those rules whose constitutive nature consists in their being a *necessary* condition *for thinking* what they are about and hence being its condition of possibility – rules that I propose to call *eidetic* constitutive rules, given that they are conditions *for thinking* – but also those rules that I have called *thetic constitutive rules*. [...] More specifically, thetic constitutive rules are sufficient condition for the actuality [*di attualità*] of what they are about. [...] *Only* constitutive rules are conditions of what they are about: This is the *second thesis*. Regulative rules are not conditions (neither necessary, nor sufficient) of what they are about. A regulative rule can certainly condition action [*condizionare l'azione*], but no regulative rule is a necessary condition (for thinking, of possibility) of a praxeme of a praxis» (CONTE 1995a, 245 f.; *my translation*).

Thetic-constitutive rules are, in Conte's words, sufficient conditions for the *actuality* of what they are about, whereas eidetic-constitutive rules are necessary conditions of *possibility* and at the same time conditions *for thinking* what they are about. What does this mean? Two examples can explain this difference. Repealing statutes are thetic-constitutive rules in Conte's sense. These statutes, in fact, determine by their very enactment (and hence are «sufficient conditions of actuality» of) the "coming into being" of what they are about, namely, the invalidity of one or more other statutes (or part of them) in a given legal system. On the other hand, an eidetic-constitutive rule is a norm that creates (completely or partially) the concept – or, as it is often said by Conte himself, the *type* – of a legally relevant role, act, or fact: for example, art. 83 of the Italian Constitution («The President of the Republic is elected by Parliament in joint session»), which, unlike repealing statutes, does not "immediately actualize" the coming into being of a President but creates part of the concept of "President of the Republic" in the Italian legal system and hence is a necessary condition for the existence of Presidents in this systems.

This distinction between different kinds of constitutive rules was formulated by Conte to solve a problem that emerged in the work of Gaetano Carcaterra, the other Italian scholar whose work on this topic has been crucial and groundbreaking. In his books *Le norme costitutive* (*Constitutive Norms*), of 1974, and *La forza costitutiva delle norme* (*The Constitutive Force of Norms*), of 1979, Carcaterra shows how being "constitutive" is a crucial property not only of some legal norms (repealing statutes or competence norms, for example), but also, and more in depth, of *all* legal norms, because every legal norm can be conceived as something that produces (and hence "constitutes") legal effects in the system. In this regard, apart from a "mixed theory" in which constitutive rules were recognized as being a kind of legal norms, Carcaterra advanced a "unitary theory" of law in terms of constitutive rules (see CARCATERRA 1974, 117 f.; CARCATERRA 1979, 39 ff., 71 ff.).

The effort for such a "unitary theory" had as a result, however, the overlapping of two kind of phenomena that seemed different: the immediate constitution of legal effects, as in the case of repealing statutes, and the constitution of legal institutional concepts whose instantiation can

[1] To be sure, it is not clear whether Conte and Azzoni consider their systematization of constitutive rules in terms of condition as an *explanation* of constitutive rules or rather, simply, as a useful systematization of phenomena they consider different. In a sense, my two "heresies" assume that the first is the case.

produce such legal effects, as in the case of competence norms. Whence comes Conte's distinction:

> «In A.G. Conte, *Konstitutive Regeln und Deontik*, of 1981, I observed that scholars were speaking of rules being constitutive in two seemingly irrelative senses [...]. Hence I asked myself: Is there here a common denominator able to justify the common denomination? And I replied to this question as follows. There is a common denominator. Both kinds of constitutivity [...] can be characterized in terms of condition [...]». (CONTE 1995b, 296; *my translation*).

Since the beginning, Conte's attempt to unify these two senses of constitutive rules was therefore made in the light of a perceived difference (or even incommensurability) between the two phenomena he traces respectively to thetic-constitutive and eidetic-constitutive rules. However, this approach clearly aims at a unitary theory of constitutive rules, as in the case of Carcaterra. Basically, it takes up the original idea by tracing all constitutive rules to a common root which is supposed to provide an explanation of all of them.

And here is where my heresy comes up. I think that, despite its elegance, this unitary theory cannot provide an explanation of what constitutive rules are: there is no real explanatory advantage in framing constitutive rules in terms of condition, and in particular no advantage in considering thetic-constitutive and eidetic-constitutive rules as species of a single genus. This for three reasons: first, the category of thetic-constitutive rules is pleonastic; second, the idea of condition cannot explain the peculiar features of the phenomena it purports to explain; third, the distinction in terms of species of a single genus conceals the fact that one of the two species can be systematically implied by the other, namely, that the two species can be hierarchically related within the taxonomy. Let me explain my view on these three points.

2.2. *The Concept of Thetic-Constitutive Rule is Pleonastic*

As mentioned, thetic-constitutive rules are sufficient conditions of what they are about because they immediately determine it: repealing statutes immediately determine the abrogation of another norm or part of it. It is now necessary to identify exactly what, in these rules, has this effect. Consider a thetic-constitutive rule like "Art. XX of the Civil Code is repealed" and suppose that I am a lawyer and I say to my client, "Art. XX of the Civil Code was repealed in June". By saying "was" I am attributing some kind of temporality to the rule: there was a specific moment of time when the rule was constitutive in the thetic sense. On the other hand, it would be meaningless to attribute the same kind of temporality to eidetic-constitutive rules, that is, it would be meaningless to say "The rule on checkmate was constitutive in June".

Now, how can we explain this difference? Let's take a look at the statement "Art. XX of the Civil Code was repealed in June" and ask what happened in June. Of course, it was not a rule (a rule is not something that "happens") but the *enactment* of that rule: by enacting that norm, the Parliament repealed the relevant statute. Hence basically the thetic-constitutive character of the rule in question is nothing else than the performative, declarative character of the speech act of norm-enacting: thetic-constitutive rules in Conte's sense are performative speech acts, declarations in Searle's sense. Just as successful declarations «bring about some alteration in the status or condition of the referred to object or objects solely in virtue of the fact that the declaration has been successfully performed» (SEARLE 1979, 17), thetic-constitutive rules determine the coming into being of their content when they are successfully enacted and hence become law in force.

But, if we concede that repealing statutes – and more in general all kinds of acts that immediately determine legal effects – are declarative speech acts, then the category of thetic-constitutive rules is, from an explanatory point of view, pleonastic. More than that: it can even be confusing, because declarations can explain the temporality of these kinds of phenomena in

terms of the temporality of acts, whereas thetic-constitutive rules cannot. Being framed in terms of rules, this last concept seems to remove temporality as if by saying "the validity of this repealing norm determines the continuous abrogation of that statute". In this sense, the abrogation of that statute should be conceived not in terms of something that happened but as something that *still happens*. Moreover, there is not much we can gain by adopting the category of thetic-constitutive rules in place of that of declarations. It seems, on the contrary, that by so doing we would end up having a certain degree of ambiguity: are we speaking about the constitutive character of the rule or of its enactment?

2.3. *"Being a Condition of" Hides Ontological Distinctions Relevant for the Analysis of Constitutive Rules*

As said, Conte's distinction between thetic- and eidetic-constitutive rules assumes that the two phenomena these categories should capture are different and it is meant exactly as a unifying account for them. And, indeed, the account is wonderfully elegant and simple. It is extremely helpful as a systematization, it conveys clear ideas that can be discussed clearly, and this is a major achievement by itself. It is only one example of Conte's incomparable originality and depth of thought. If it is conceived as an explanation of constitutive rules, however, this approach ends up sacrificing too much: in particular, it sacrifices explanatory power to uniformity. The relation of condition does not explain the differences between the relevant phenomena. First, it does not explain the *active subject* of constitution: what is that which *is constitutive*? Second, it does not explain the *passive object* of constitution: what is that which *is constituted*? Third, it does not explain the *process* of constitution: what is *to constitute*, what does it mean?

The first point, related with the *subject* of constitution, has been already argued for: thetic-constitutive rules are basically speech acts, whereas the status of eidetic-constitutive rules is not so clear. What are the rules of a game? Are they mental entities, propositional contents, texts? The typical problems concerning the ontology of norms clearly reverberate on the ontology of eidetic-constitutive rules: not so with thetic-constitutive rules, given that they can easily be explained in terms of speech acts. Now here is my point: nothing in the difference between sufficient and necessary conditions can give us clues to explain the difference between rules and speech acts. Things can be necessary conditions and be different from rules, things can be sufficient conditions and be different from speech acts. The logical gap between necessary and sufficient conditions cannot explain the ontological gap between rules and declarations.

The second point, related with the *object* of constitution, is one that Conte underscored several times. Thetic-constitutive rules create specific instances of legal effects, whereas eidetic-constitutive rules create the concept of legal institutions and effect: repealing statutes create a concrete *token* of repeal, whereas an eidetic-constitutive rule on repeal, if there were one, would create the concept of repeal in general, its *type*. Now, the problem is the same as before: how does the logical distinction between necessary and sufficient conditions explain this difference in the object of constitution? Something can be a sufficient or necessary condition of tokens or of types, depending on circumstances. If, for example, I say that the rules of chess are necessary and sufficient conditions for the game of chess to exist, I can refer either to an actual instance of gameplay or to "the structure" of chess. This kind of ontological ambiguity depends on the fact that the logical distinction between necessary and sufficient conditions is insufficient from an explanatory point of view.

This example about chess is also helpful to understand the third point, related with the *process* of constitution. As already mentioned, when I say that the rules of chess are necessary and sufficient conditions for the game of chess to exist, I mean that (in some sense) these rules make gameplay possible, not that their creation immediately create an actual instance of gameplay. In fact, we need players to have gameplay. On the other hand, repealing statutes

create an actual instance of repealing. Again, this is a distinction that Conte himself formulated very clearly: thetic-constitutive rules determine the coming into being of their object, whereas eidetic-constitutive rules determine its possibility. Here too, however, there is nothing in the logical distinction between necessary and sufficient conditions that can explain this difference in the nature of constitution: something can be a necessary condition of actuality (professors are necessary conditions for grades), something can be a sufficient condition of possibility (complete game design is a sufficient condition of possibility of gameplay). The logical distinction between necessary and sufficient condition seems unfit to explain the ontological distinctions that are at stake when considering the phenomena we refer to when speaking of thetic-constitutive and eidetic-constitutive rules.

2.4. *"Being a Condition of" Hides a Possible Ontological Overlapping Relevant for the Analysis of Constitutive Rules*

Up to this point, I have not referred to Searle's theory, because I think there is not much this theory has to say on the problem of conditions and constitutive rules. Searle has instead much to say about the kind of ontological distinctions mentioned above: for example, he focuses on the distinction between institutions as types and tokens of institutional facts or objects (see for example SEARLE 1996, 32-34). But, moreover, there is another, more indirect sense in which Searle's theory can be very relevant for this discussion, namely, it shows that constitutive rules can be a specific kind of declaration. In *Making the Social World*, of 2010, Searle writes that when status functions are attributed on the basis of a rule specifying general classes, as in «for all x, if x is the oldest living son of the deceased king, then x counts as the king», institutional facts presuppose institutions in the form of sets of constitutive rules, and he adds that, just as the attribution of status functions in singular cases is a form of declaration applied to a single case, an institution's constitutive rules are declarations as well, only applied to an indefinite number of cases: they are "standing" declarations (SEARLE 2010, 96 f.).

I will not enter into the difficulties that the problem of "standing" declarations can raise. What I want to show here is that, if Searle's thesis that constitutive rules are standing declarations is true, then, in Conte's terms, eidetic-constitutive rules are kinds of thetic-constitutive rules: they are not only necessary conditions for the possibility *of institutional facts* but also sufficient conditions for the actuality *of an institution*. Now, the distinction between rules being necessary conditions and rules being sufficient conditions, conceived as a taxonomical distinction between two species of a single genus, hides this possible ontological overlapping. Eidetic-constitutive and thetic-constitutive rules are presented as independent categories whereas, from an ontological point view, they could be hierarchically ordered. It could be, namely, that "thetic-constitutive rules" had to be conceived as a hypernym of "eidetic-constitutive rules" rather than its co-hyponym under the genus "constitutive rules being a condition of their object". In this case, the taxonomy of constitutive rules in terms of condition could turn out to be ontologically misleading.

3. *Second Heresy: Anankastic Rules Should Not Be Considered as an Independent Kind of Constitutive Rules*

3.1. *The Definition of "Anankastic-Constitutive Rules"*

I have argued so far that the distinction between eidetic- and thetic- constitutive rules can be misleading as an explanation of the phenomena it is aimed to capture. The second "heresy" I want to bring forward here is related with this chain of reasoning. As I mentioned in Section

2.1, the taxonomy of constitutive rules in terms of conditions created by Conte and Azzoni is built on two different criteria: the first is whether a rule is a necessary, sufficient, or necessary and sufficient condition for the institutional facts it regulates; the second is whether the rule *is* or *sets* a condition for those facts. I have been discussing the first criterion at length. Now I would like to discuss the second, and in particular the distinction between eidetic-constitutive rules, which in this taxonomy *are* necessary conditions of possibility for the behavior they regulate, and "anankastic-constitutive" rules, which instead *set* a necessary condition. This is how Conte introduces the concept of "anankastic-constitutive" rule:

> «I proposed the neologism '*anankastic-constitutive* rules' to refer to those (deontic) rules that set a necessary condition [...], namely, *a condicio sine qua non* of what they are about. [...] Here there are two anankastic-constitutive rules. The *first* is a rule about holographic wills: [...] "Holographic wills must be signed by hand of the testator." [...] The *second* [...] is a rule that sets a necessary condition for an act to count as [*abbia valore di*] donation: [...] "Donation must be made by way of a public act [...]"» (CONTE 1985, 360; *my translation*).

And here is how Conte distinguishes between eidetic- and anankastic- constitutive rules:

> «Eidetic-constitutive rules *are* necessary conditions of what they are about. For example, the rules of chess are necessary conditions both for the *praxis* "game of chess" and for its *praxemes* (its pieces, pragmemes, ludic *statuses*). [...] Anankastic-costitutive rules, on the other hand, *set* necessary conditions of what they are about: [...] The rule "Holographic wills must be signed by hand of the testator" sets a necessary condition for an act to count as [*abbia valore di*] a holographic will» (CONTE 1985, 362; *my translation*).

As said, my heresy in this regard in a sense complements the one presented in the previous section. I want to argue in particular that, just as the distinction between kinds of conditions does not capture ontological differences relevant for constitutive rules, the distinction between *being* a condition and *setting* a condition creates a distinction where there is none.

3.2. *Anankastic-constitutive Rules Do Not Exist*

Let's consider Article 602 of the Italian Civil Code, which Conte considers an example of anankastic-constitutive rule: «A holographic will must be handwritten, dated and signed by the testator». This rule certainly sets a condition for making a will. Now, is this condition part of the legal concept of "holographic will" in the Italian legal practice? Either it is or it is not. I do not intend to take a stance on this problem and will simply consider both cases.

Let's consider the case in which the condition «being handwritten, dated, and signed by the testator» *is* part of the concept "holographic will". In this case, Article 602 of the Italian Civil Code is simply an eidetic-constitutive rule in Conte's sense and a constitutive rule in Searle's sense: it creates a way in which institutional facts can happen and institutional acts be performed. In connection with other rules, this rule makes holographic wills possible and legally significant in Italy. Hence, anankastic-constitutive rules are not a specific kind of constitutive rules separate from eidetic-constitutive rules: they are simply eidetic-constitutive rules setting up necessary conditions for the performance of a given legal transaction. In a sense, you can read almost all eidetic-constitutive rules in the anankastic way, namely, as rules that set necessary conditions. Under Art. 587, par. 1, of the Italian Civil Code, for example, «a will is a revocable instrument through which someone, once no longer living, disposes of his estate, either in whole or in part», which means that in order to make a will you must through that instrument arrange for your estate to be devised, either in whole or in part, at the time of

your death. The provision thus states that disposing of our own estate is a necessary condition for making a will. Or consider Searle's example of a "count-as" constitutive rule about kings, namely, «The oldest surviving son counts as the new king»: this rule states that the necessary (and sufficient?) condition for being the new king is to be the oldest surviving son of the old king. Or, finally, consider the so-called "deontic" eidetic-constitutive rules described by Conte, such as «the bishop must move diagonally»: here, too, the rule sets a necessary condition for moving the bishop. I am not sure whether all eidetic-constitutive rules are indeed anankastic-constitutive but, if anankastic-constitutive rules define the concept of what they regulate, then they are a subset of eidetic-constitutive rules: hence, the distinction between eidetic-constitutive and anankastic-constitutive rules suggests an ontological difference between kinds of rules when there is none, at least on the assumption that anankastic-constitutive rules concur to create the concept of what they regulate.

Suppose now that this is not the case, namely, that in Article 602 of the Italian Civil Code «being handwritten, dated, and signed by the testator» is *not* part of the concept "holographic will". I find this solution highly implausible, but let's suppose for the sake of argument that it is possible to understand what "holographic will" means in the Italian legal system without knowing Article 602. A lot of legal norms define necessary conditions for performing something we already have a concept of: rules defining the procedures to obtain a research grant, for example. But these rules are simply anankastic rules: they set necessary conditions to obtain a given result. Why should we suppose that they are also constitutive, apart from being anankastic? What is it that makes the rule different from an anankastic rule if it is not eidetic, namely, if it does not contribute to create a new institutional concept? If anankastic constitutive rules simply set a necessary condition for an institutional fact without defining the concept of that kind of institutional fact, then they are simply anankastic rules. Hence, the distinction between anankastic-constitutive and anankastic rules suggests an ontological difference between kinds of rules when there is none.

This concludes my second heresy.

4. *Third Heresy: Constitutive Rules Should Not be Conceived as a Kind of Rules but Rather as (Hybrid) Illocutionary Acts*

4.1. *The Well-known Limits of the "Count-as" Formula*

Apart from the two problems I have discussed in Sections 2 and 3, I think there is a more general problem arising from Conte and Azzoni's taxonomy of constitutive rules, namely, that it conveys the idea that constitutive rules should be conceived as a kind of rules, separate from that of regulative rules and with specific logical features. Here is where my third heresy comes up: I will argue that the peculiar feature of constitutive rules lies not in their being a specific kind of rules with a specific structure, but rather in the kind of illocutionary force we apply to certain sentences, whose structure can very well vary.

In Searle's view, the idea that constitutive rules are not connected with a specific structure is perfectly acceptable. Even though it is usually said that Searle originally traced constitutive rules to the "count-as" formula, this statement must be qualified. Here is how Searle introduces constitutive rules in *How to Derive 'Ought' from 'Is'*, *Speech Acts*, and *The Construction of Social Reality* respectively:

> «I need to distinguish between two different kinds of rules or conventions. Some rules regulate antecedently existing forms of behavior. For example, the rules of polite table behavior regulate eating, but eating exists independently of these rules. Some rules, on the other hand, do not merely

> regulate but create or define new forms of behavior: the rules of chess, for example, do not merely regulate an antecedently existing activity called playing chess; they, as it were, create the possibility of or define that activity. The activity of playing chess is constituted by action in accordance with these rules. Chess has no existence apart from these rules. The distinction I am trying to make was foreshadowed by Kant's distinction between regulative and constitutive principles, so let us adopt his terminology and describe our distinction as a distinction between regulative and constitutive rules» (SEARLE 1964, 55).

> «Regulative rules regulate a pre-existing activity, an activity whose existence is logically independent of the rules. Constitutive rules constitute (and also regulate) an activity the existence of which is logically dependent on the rules» (SEARLE 1969, 224).

> «Some rules regulate antecedently existing activities. For example, the rule "drive on the right side of the road" regulates driving; but driving can exist prior to the existence of that rule. However, some rules do not merely regulate, they also create the very possibility of certain activities» (SEARLE 1996, 27).

No structural requirement for constitutive rules is stated in these passages. And, when we take a deeper look at how Searle introduces the "count as" formula in *Speech Acts*, it seems that this is not meant to be a strictly structural criterion, because constitutive rules come in systems (something that Conte, too, acknowledged; see for example CONTE 1995d, 329), and only some of them are said to have a "count as" structure:

> «Regulative rules characteristically have the form or can be comfortably paraphrased in the form "Do X" or "If Y do X". Within systems of constitutive rules, *some will have this form, but some* will have the form "X counts as Y", or "X counts as Y in context C"» (SEARLE 1969, 224; *italics added*).

And in the passage that follows he clarifies that the "count as" structure cannot be a formal criterion:

> «This is not intended as a formal criterion for distinguishing constitutive and regulative rules. Any regulative rule could be twisted into this form, e.g., "Non-wearing of ties at dinner counts as wrong officer behavior". But here the noun phrase following "counts as" is used as a term of appraisal not of specification. Where the rule naturally can be phrased in this form and where the Y term is a specification, the rule is likely to be constitutive» (SEARLE 1969, 224).

Hence, even though since *Speech Acts* several limits of the "count as" formula have been underscored, for example by Conte when discussing the so-called "x-rules" (see CONTE 1995c, 536), or by Frank Hindriks with his "XYZ conception of constitutive rules" (see HINDRIKS 2005, 123 ff.), or even before by Joseph Ransdell (see RANSDELL 1971, 388), I think it is fair to say that much of these criticisms had been anticipated by Searle.

I consider these qualifications on the "count-as" formula as an important background for the discussion that follows, because they already show the several shortcomings of a structural view of constitutive rules. The thesis I want to argue for, however, is much stronger than the idea that the "count-as" formula has counterexamples. It is rather that the logical structure of a rule is not relevant for its constitutive nature: any kind of rule can be constitutive, if used in the constitutive way. My argument in support of this conclusion is twofold. First, seemingly regulative rules can very well be constitutive; second, rules in "count as" form can very well be regulative. By arguing for these two theses, I will try to show that the same rule can be either regulative or constitutive depending on use and context. Hence, if the same statement can become constitutive depending on contextual circumstances, it seems that its "being constitutive" has to do with the pragmatic force applied to it rather than with the statement's logical structure.

4.2. *Seemingly Regulative Rules Can Be Constitutive*

Rules that seem to be regulative can very well be constitutive, depending on use: this is the first thesis I want to argue for. As already mentioned, Conte has shown that deontic constitutive rules are perfectly possible, for example when embedded in the context of a game. "The bishop must move diagonally", or "the king must move when under attack", are rules that define obligations connected with chess pieces and that, in so doing, constitute the concept of those pieces: they are regulative statements, but they have a constitutive role. For another example of a regulative norm that can very well have a constitutive force, we can turn to the norms in criminal law that constitute the legal-technical concept of a criminal offence. For example, Art. 575 of the Italian Criminal Code, under which «whoever causes the death of a human being is punishable by no less than 21 years in prison», both prescribes the punishment for murder, instructing judges on how to decide such cases, and constitutes the concept of *omicidio* (murder) in Italian criminal law[2]. These are instances of a broader phenomenon: depending on contextual circumstances, regulative rules can play a constitutive role in "shaping" the concept of the behavior that rule is meant to regulate[3].

4.3. *Count-as Rules Can Be Regulative*

We have seen how regulative rules can play a constitutive role. Conversely, depending on contextual circumstances rules with a "count-as" structure can have a purely regulative role. Suppose that I want to play a chess match with a friend, but that black bishops are missing in our chessboard. I then take two wooden stoppers and say that they "count as" black bishop. The rule is not constitutive in this case – the concept of bishop has already been defined by the rules of chess – but simply sets an equivalence based on a regulative rule: basically, it says "Let's consider these stoppers as bishops for this game". A similar example can be found in Art 46, par. 2 of the *Rules of Procedures of the Italian Chamber of Deputies*: «Deputies engaged in activities outside the Chamber premises, to which they have been appointed by the Chamber itself, or deputies who, being members of the Government, are absent by reason of their office, shall be counted as present for the purpose of establishing the presence of a quorum». This is a "count-as" rule that is *not* constitutive of the concept of presence in the Chamber: rather, it simply prescribes to consider as "being present" people who clearly are not present.

Apart from "count-as" rules that prescribe people to consider something as equivalent to something else, rules can seem constitutive while being regulative in a more general sense. Consider this rule written on a board in front of a public garden: "Civilized people respect flowers and flowerbeds". Quite clearly, this rule is not aimed at constituting the concept of "civilized people", which we are supposed to know already. Rather, by explaining what civility is, that rule is meant to prescribe visitors not to step on flowers and flowerbeds: it is a prescriptive, regulative rule disguised as a constitutive one. This is again a matter of context: if we found a similar rule in an authoritative handbook of etiquette, we could indeed consider that same rule constitutive of what courtesy and politeness are.

[2] By saying that the rule about murder can be considered constitutive of the concept of *omicidio* in Italian criminal law I do not mean to imply that the killing behavior is made possible by the rule. Of course there is a distinctively regulative point in rules of this kind, but they can also be used as constitutive rules: rules that create a legal concept, of which any actual instance of killing behavior can be seen as a more or less borderline example. I am thankful to an anonymous reviewer for helping me in clarifying this point.

[3] One could even say that every rule trivially constitutes the concept of a behavior, namely the behavior corresponding to following that rule. This is a point raised by David Hillel-Ruben (HILLEL-RUBEN 1997, 444), to which Searle had already replied in SEARLE 1969, 35. See also his direct reply in SEARLE 1997, 445.

4.4. *Towards a Pragmatics of Constitutive Rules*

If, depending on contextual circumstances, regulative rules can have a constitutive import, and, conversely, "count as" rules can be used as hidden prescriptions, it seems plausible to conclude that the constitutive nature of a rule should be explained not in terms of logical, structural factors but rather in pragmatic, context-dependent terms. In my book *Pragmatica delle regole constitutive* (ROVERSI 2007) I tried to analyze constitutive rules in terms of illocutionary forces applied to sentences. I maintained that constitutive rules are statements with a complex illocutionary force consisting of three, more elementary aspects: a *thetic* or declarative aspect, by which the rule contributes in creating the concept of its object, be that an institutional fact, act, object or event; a *descriptive* or assertive aspect, by which the rule may be taken also to describe that concept; and finally a *prescriptive* aspect, by which the rule, in creating a new institutional element, also plays a role in prescribing how people must interact with it. I also recognized that the intertwining between a descriptive and thetic aspect had to be accounted for in terms of Searle's concept of declaration having a double direction of fit: word-to-world and world-to-word (see ROVERSI 2007, 272 ff.).

As already mentioned in Section 2, from 2010 on Searle, too, advocated this conception of constitutive rules in terms of declarations: "standing declarations", as he says. But, despite his original statement that «constitutive rules constitute (*and also regulate*)» (italics added) – a statement that can be appreciated in all the formulations of the distinction quoted above – to my knowledge Searle has never discussed the possibility, which I have instead tried to support in 2007, that this regulative, prescriptive role could be a further element of the illocutionary force of constitutive rules. I suspect the reason behind this reticence is connected with his taxonomy of illocutionary acts. In his *A Taxonomy of Illocutionary Acts*, of 1975, Searle indeed presented a taxonomy of illocutionary acts based, among other things, on a wonderfully elegant and symmetric distinction between directions of fit: assertions, for example, have a "word-to-world" direction of fit, because their conditions of satisfaction require that what is said conform to what is the case in the actual world; on the other hand, prescriptions have a "world-to-word" direction of fit, because they are satisfied only when what happens in the world conform to what is said. In this picture, declarations fit perfectly because they have a double direction of fit: they both represent the world in a "word-to-world" direction and they stipulate how the (institutional) world goes in a "world-to-word" direction (see SEARLE 1975). This is indeed an awesome symmetry, and in a sense, given this background, it becomes natural to describe constitutive rules only in terms of one of these illocutionary acts, declarations being the way to go. What I tried to show in 2007, instead, is that constitutive rules could be conceived as hybrid illocutionary acts within Searle's taxonomy: declarations *as well as* prescriptions. They create the concept of institutional entities, but they also prescribe how to interact with them[4]. This makes it possible to see how the constitutive rules of a game can be broken just like any other rule of a game, a conclusion which brings me to my fourth heresy.

[4] Jaap Hage has recently argued for the contrary: «rules [of chess] do not prescribe behaviour and if "regulating" is interpreted as determining what is and what is not allowed, the constitutive rules of chess do not regulate the game. They determine what counts as a valid move in chess, they determine what the players should strive for in order to play the game seriously, they define certain situations such as check-mate and stale-mate, and they determine when a game is finished and who the winner is. The rules of chess "deal with" playing chess, but they are not prescriptive or permissive» (HAGE 2018, 24). My argument is not aimed at denying that constitutive rules «determine what counts as a valid move» in a given practice; rather, it denies that, from this assumption, one can derive the conclusion that constitutive rules do not regulate or prescribe.

5. *Fourth Heresy: Constitutive Rules Can Be Broken*

5.1. *Constitutive Rules Cannot Be Broken?*

Several authors have maintained, or at least implied, that constitutive rules cannot be broken. Let's consider Conte's statement in this regard, which is perhaps the best explanation of this inviolability thesis. As already mentioned, Conte makes a distinction between *ontic*-constitutive rules having a "count-as" structure (for example, "the pieces placed on c1 and f1 count as the white bishops in chess") and *deontic*-constitutive rules having a prescriptive structure (for example, "bishops must move diagonally"): in Conte's view, both cannot be broken. Ontic-constitutive rules «cannot be broken by their very nature [*intrinsecamente*]» (CONTE 1995a, 250), namely, because they have no prescriptive structure. Deontic-constitutive rules cannot be broken despite their prescriptive structure because «acting not in accordance with a deontic eidetic-constitutive rule [...] rules out the possibility of being a violation of it». More specifically,

> «when someone moves a bishop in a way that does not comply with the deontic eidetic-constitutive rule about bishops (for example, if someone moves a bishop not diagonally, but orthogonally)[, given that] he does not comply with the deontic eidetic-constitutive rule "bishops must move diagonally," then [...] what he is moving on the chessboard loses its quality of being a *token* of the *type* "bishop", and the movement he performs does not acquire the specific meaning of "a move in chess". [...] But, if this someone is not moving a bishop (namely, a *token* of the *type* "bishop"), then we can exclude a priori that he is violating a rule about bishops» (CONTE 1995b, 294; my translation).

According to this explanation, a violation of (deontic) constitutive rules is not possible for ontological reasons: basically, in order for something to break a rule, that something must be an instance of that kind of thing the rule is about; but, in the case of constitutive rules, something cannot be such an instance if it does not meet the criteria set out by that rule. The rule is the only way in which you identify the relevant entity: hence, the entity cannot by definition be in contrast with the rule, which means that a constitutive rule is by definition inviolable.

5.2. *Some Constitutive Rules Can Be Broken?*

There is something strange in the inviolability thesis: in a sense, it contradicts our ordinary conception of the rules of a game. In games, you can cheat: how is it, then, that the constitutive rules of a game cannot be broken? Wojciech Załaniec discussed and criticised Conte's argument exactly by showing that it seems at odds with our normal linguistic practices:

> «However, if in the middle of a game of chess someone moved his bishop as he would a pawn, it would be, by contrast, very unnatural to say: "what you have just moved has a *certain* similarity to a bishop, but is certainly *not* a bishop." Still less natural – or maybe, witnessing a profoundly philosophical mind – would it be to say: "what we have so far been doing has a certain similarity to chess, but, given your recent move, is certainly not chess." The natural reaction would, instead, be: "this has been a wrong, illegal move", or something like this» (ZEŁANIEC 2013, 103).

In Załaniec's view, this is an argument against the inviolability of deontic-constitutive rules in Conte's sense, but the same argument cannot be applied to ontic-constitutive rules. In particular, Załaniec argues that, when it comes to ontic-constitutive rules in a "count-as" form, it is very difficult to object to Conte's argument on the basis of ordinary language, because ordinary language seems to support the inviolability thesis. He writes in this regard:

> «I think a fairly clear example of failing to comply with a CR [constitutive rule], and thereby failing to constitute something as a "thetic object" of a certain sort would be this: putting items looking like those usually interpreted as pawns and figures of chess in the centre of the chess board rather than on their due positions. If someone did *that*, we should, probably, say, *not*: "you are offending against the rules of chess", but something like: "what you are setting up has a certain similarity to chess, but is definitely not chess"» (ZEŁANIEC 2013, 102 f.).

I am not sure that such an appeal to ordinary language can succeed in rebutting Conte's inviolability thesis in the case of deontic-constitutive rules. Conte's argument rests on a very basic consideration about the concept of violation of a rule: the behavior in which violation consists must be relevant for the rule; but, in the case of constitutive rules, you cannot identify the relevant entities if they do not comply with the rules. Now, it seems to me that, even if our intuitions about ordinary language as applied to games can have some heuristic value in giving us doubts about the inviolability thesis, they cannot be a definitive counter-argument to it. If we aim at objecting to the inviolability thesis, we need a somewhat stronger argument. And here is where my fourth heresy comes up: I want to argue that *all* constitutive rules *can* be broken, not only the deontic-constitutive ones.

5.3. *All Constitutive Rules Can Be Broken, because They Are (Also) Prescriptive*

Here is my argument against the inviolability thesis. I will conclude that all constitutive rules can be broken on the basis of three premises: first, constitutive rules come in systems; second, these systems are teleologically oriented within a given institutional practice; third, in order to identify what is relevant for a constitutive rule you must take into account not only that rule but the overall system and the connected teleology; fourth, by considering constitutive rules from such a "bird's eye" perspective it is possible to appreciate how they can be broken.

Let's consider again an example of ontic-constitutive rule in "count-as" form about the bishop in chess: "the pieces placed on c1 and f1 count as the white bishops in chess". Let's call this rule "Bishop-CONDITION", because it describes the necessary condition that must be met to include a bishop in a match of chess. As Żełaniec observes, it is difficult to understand what could be a violation of Bishop-CONDITION. I agree with him, but I submit that this depends on the fact that we are considering the rule in isolation, namely, detached from the other rules that constitute the concept of bishop. Taken alone, Bishop-CONDITION cannot constitute the concept of bishop: it says how to introduce the bishop in a match of chess but not what the bishop *is for*, its import in the game. What is, then, the import of a bishop?

To answer this last question, you must consider the bishop in its broader context, namely, as defined not by a single rule but rather by a system of rules which is in its own turn embedded in a meaningful practice. Chess is a game, and in particular a competitive game. This means that someone wins and someone loses, hence the rules of that kind of games must eventually define what are the conditions of victory. All the system of institutional elements is teleologically ordained towards these conditions of victory, in the sense that the import of these elements must be relevant in our struggle to achieve them: "Victory" is therefore not an institutional concept in competitive game-playing, but rather a *meta*-institutional one (see MILLER 1981, LORINI 2000, LORINI 2014, ROVERSI 2010). This is what the import of a bishop is: something which is relevant to achieve victory in chess. And a bishop is relevant to achieve victory because, just like all the other pieces in chess, it can take other pieces and, just like all the other pieces in chess apart from the king, it can attack our opponent's king. Hence there is another constitutive rule of the bishop in chess apart from Bishop-CONDITION: it is a rule stating that "a bishop can take other pieces and can attack the king", a rule we may call "Bishop-CONSEQUENCE", because it states what are the consequences of having and using a bishop.

Depending on the features of the game and on the other elements of the system, very often there is at least another kind of constitutive rules defining an institutional element, namely, those rules that define the regulations connected with the institutional elements and hence Conte's deontic eidetic-constitutive rules: in the case of the bishop, the rule "bishops must move diagonally". Let us call this rule Bishop-REGULATION. By adding together Bishop-CONDITION, CONSEQUENCE, and REGULATION, you have the full constitutive rule of a bishop in chess: these rules are complementary in defining the institutional concept of bishop. Hence, if you want to formulate the full constitutive rule in "count as" form, you should state it not as "the pieces placed on c1 and f1 count as the white bishops in chess" but rather as "the pieces placed on c1 and f1, *that must move diagonally and that can take other pieces and attack the king*, count as the white bishop in chess" (Bishop-FULLY CONSTITUTIVE). It is important to note that the overall teleology of the system of constitutive rules limits in a crucial way what can be stated by these rules. If, for example, the rules about bishops defined them as too powerful pieces able to checkmate the king in a few trivial moves, then the game would result in failed game design and would require important modifications.

We have therefore introduced two theses about constitutive rules and the way in which they create institutional elements: a "complementarity thesis", according to which constitutive rules create institutional concepts by defining a complementary interlocking of conditions, consequences, and regulations; and a "dependence thesis", according to which constitutive rules must be conceived in systems, and a system of constitutive rules depend on a broader social practice endowed with a teleological structure that limit and frame the way in which the institutional elements must be constituted. These theses have been discussed in several variants by many authors. With regard to the complementarity thesis, Neil MacCormick noted that the constitutive rules of an institution always include, apart from the condition-setting, also consequential rules defining the institution's typical legal effects (MacCormick 1986, 52 ff.; cf. also Ruiter 2001, ch. 4). On the same path, Frank Hindriks argued that Searle's "count-as" structure, conceived as a combination between an X corresponding to a brute element or pre-institutional condition and an Y corresponding to the connected institutional element, should be complemented with a Z defining the institutional import of that element (Hindriks 2005, 123 ff.). Searle himself, while not including consequential rules as a sort of constitutive rules, acknowledges the role of institutional consequences or import in the important discussion he devotes to deontic powers (see Searle 1996, 100 f.). On the other hand, with regard to the dependence thesis, the idea that institutions are teleologically ordained towards an end – a sort of institutional *point*, or purpose – has always been underscored by institutionalists in legal philosophy: by MacCormick (MacCormick 1998, 34 ff.; MacCormick 2007, 36 f., ch. 16) but in a sense also by classic institutional authors like Maurice Hauriou, with his concept of enterprise (*œuvre*), and Santi Romano. Finally, the idea that constitutive conventions find a meaning only within a background of deeper conventions is one of the crucial point of Andrei Marmor's theory of social conventions (see Marmor 2009, ch. 3), but before him had been discussed by Hubert Schwyzer (Schwyzer 1969) and Giuseppe Lorini (Lorini 2000, 263 ff.).

The introduction of the complementary and dependence thesis is relevant for my discussion of the inviolability thesis because, taken together, they show how all constitutive rules can be violated. The fully constitutive rules of an institutional element can be violated because it is normative in an anankastic sense, in the light of the institution's teleological structure: if you want to obtain the normative consequences, you must fulfill the requirements set by the conditions and regulations. With regard to our example: Bishop-FULLY CONSTITUTIVE has, along with its declarative illocutionary point, a prescriptive illocutionary point stating that "if you want to take other pieces and attack the king and eventually win with one of the white bishops, then you must place them on c1 and f1 at the beginning of the game and always move them diagonally". Hence, if you take a piece or attack the king with a bishop while moving it orthogonally and not diagonally, you are violating

the deontic-constitutive rule Bishop-REGULATION – and this is what Załaniec stated when criticizing Conte's inviolability thesis on deontic eidetic-constitutive rules. But – differently from what Załaniec seems to imply – also the *ontic* Bishop-CONDITION "the pieces placed on c1 and f1 count as the white bishops in chess" can be violated, at least if considered in the broader context of BISHOP-FULLY CONSTITUTIVE "the pieces placed on c1 and f1, *that must move diagonally and that can take other pieces and attack the king*, count as the white bishop in chess". If, for example, a player swaps her bishops with her knights at the beginning of the game, and still takes pieces with those bishops, she has broken the rule – she claims the consequences while not fulfilling a condition. She has cheated[5].

5.4. *The Argument from* ludus *vs.* lusus

I have argued so far that all constitutive rules can be broken because, when framed in their fully constitutive form, they have an anankastic prescriptive illocutionary profile determined by their being embedded in a broader, teleologically-oriented social practice. As stated in Section 4, this argument is based on the assumption that constitutive rules have a prescriptive illocutionary point along with their declarative one – hence in a sense on the idea that a constitutive rule is also a sort of anankastic rule. This is an assumption against which Conte and Azzoni formulated an objection already in the 1980s and that prompted a significant discussion in the Italian legal-philosophical community. Let me show briefly how this discussion goes, while trying to defend my assumption.

Conte and Azzoni have objected to the idea that constitutive rules can be anankastic by showing that constitutive rules can *ground* anankastic obligations while not *being* anankastic rules. This is a view that Azzoni, in particular, develops in connection with a theory about "principles of generation" (*principi generatori*) in law brought forward by the Italian jurist Giovanni Brunetti. According to Brunetti, anankastic rules in legal systems presuppose the existence of a (constitutive, not prescriptive) principle of generation in that same system: for example, a prescriptive rule such as "if you want to make a holographic will you must write it, date it and sign it by your own hand" presupposes the existence of a constitutive, non-prescriptive rule like "a document with such-and-such features is a holographic will and has such-and-such legal effects" (see BRUNETTI 1913, 85 ff.; AZZONI 1991, 88 f.)[6]. So here is the conclusion by Azzoni: «It is relevant, from the semiotical point of view, that an anankastic [...] rule can be homonymous with its underlying constitutive rule» (AZZONI 1988, 88 f.; *my translation*); or, in Conte's words,

> «every deontic eidetic-constitutive rule of a given *praxis* (for example, of the game of chess) has as its own epiphenomenon [*epifenomeno*] a homonymous anankastic rule [...] that prescribes how one should act to perform [*per realizzare*] that *praxis*» (CONTE 1985, 358; *my translation*).

Conte and Azzoni both insist that we should keep the constitutive rule and the corresponding technical rule distinct even though, as Mario Jori observes with regard to Conte's just quoted passage,

[5] I believe that this argument can also counter the observation by Hage (HAGE 2018, 25) that «[i]n case of the rules of chess, violation leads to invalid moves which have no influence on the progress of the game. These rules, which define the game, cannot be violated because a violation would require that an illegal move be made in the game, while "moves" that violate the rules do not count as moves in the game. Therefore it is not possible to violate the rules that define how pieces move in a game of chess, which is a sure sign that these rules are not prescriptive». My point is that invalid moves *can* have an influence on the progress of the game, if the normative import connected with the move is claimed even when the move's conditions of performance have not been correctly fulfilled.

[6] Incidentally, but quite strikingly, this theory by Brunetti anticipates in legal terms several tenets by Kendall Walton on principles of generation in games of make-believe: see WALTON 1990, 37 f.

> «Conte's usage of a logically obscure term such as *epiphenomenon* hides, in my view, what cannot but be a relation of entailment going from the eidetic-constitutive rule to the so-called anankastic one: That usage hides the fact that those two rules are only one rule» (JORI 1986, 465; *my translation*).

Why, in Conte and Azzoni's view, is it mistaken to consider the two rules as the same rule? Conte has an argument about this, based on the distinction between the game as a system of rules, on the one hand, and the actual practice of game-playing, on the other hand: what he calls respectively *ludus* and *lusus*. He argues, in particular, that constitutive rules define the structure of *the game*, its *ludus*, whereas the corresponding anankastic rules are rules for *gameplay*, rules directed at players about how one is supposed to play and that are based – or, as Azzoni says, grounded (*fondati*) – on the general structure of the game. Here is Conte's passage:

> «One must draw a distinction between the deontic eidetic-constitutive rules that constitute a ludic system (a game, or a *ludus*, to use the phrase I have proposed by playing on the assonance of the terms *ludus* and *lusus*), on the one hand, and the homonymous non-constitutive-but-anankastic rules that prescribe how one should act to realize the game: These are the anankastic rules of the ludic activity – of *play*, of the *lusus*. This obvious distinction between the rules that are constitutive of the *ludus* and the anankastic rules of the *lusus* seems to be rejected by others: in particular, by those scholars who think that a deontic eidetic-constitutive rule of the *ludus* and the homonymous anankastic rule about the *lusus* are two allotropic states of a (unique and same) rule, namely, two allonyms: This is the allonymy thesis» (CONTE 1995d, 332; *my translation*)[7].

My criticism of the inviolability thesis therefore ultimately depends on whether I can provide a counterargument against this line of reasoning by Conte and thus defend the allonymy thesis. And here is my defense: the distinction between *ludus* and *lusus* is pleonastic in this case because the constitutive rules of the game and the anankastic rules about gameplay have the same content *and* the same addressees. An analogy can be helpful in explaining my point: consider the case of videogames. In the case of videogames, the difference between *ludus* and *lusus* is *not* pleonastic, because the constitutive rules of the game – the internal mechanisms of the game, the connection between conditions and consequences, the results of interaction with the different situations and objects – are encoded into a specific software, whereas the anankastic rules about how to play are written as guides for players. A player knows for example that, by pushing button X at a given point of the game, effect Y will follow, and he pushes X having in mind an anankastic rule about how to obtain Y. But that rule is grounded on another rule which is part of the software code and is constitutive: it is indeed a principle of generation in Brunetti's sense, according to which a given connection between input X and output Y is established. Here you have indeed two different addressees for the two different kinds of rules: the constitutive rules encoded at the software level are "addressed" at the machine – the computer processor, the hardware – whereas the anankastic rules written in players' guides are addressed at human beings. My question, however, is: why should we extend the case of videogames to all kind of games and even to constitutive rules in general, hence to all kinds of institutional phenomena? In the case of chess, for example, who are the addressees of the rules of *ludus* if not the same addressees of the rules of *lusus* – the players? Players come to know in a rulebook how to play by looking at how the game is framed: there is no role in constitutive rules other than that of giving players rules about gameplay. Hence, if one wants to avoid an unnecessary duplication, constitutive rules must also have an inbuilt prescriptive character, and this is what I meant by saying that they have (also) a prescriptive illocutionary point. There are

[7] Azzoni traces the allonymy thesis to Bobbio, von Wright and Searle: see AZZONI 1991, 91 f.

not two homonymous rules at play here, but only one that does two different things: «constitute[s] (and also regulate[s])», just as Searle said (without explaining exactly, however, what he meant with this weird duplicity).

This is *not* a way to reduce constitutive rules to prescriptions: the conclusion is *not* that constitutive rules are nothing else than anankastic rules. As Searle, Conte and Carcaterra rightly explained, constitutive rules are aimed at creating something, and in particular they create the concept of an institutional fact, act, object, or event. They have a declarative aspect, but the institutional entities these concepts refer to are built for interaction, hence, in declaring what these entities are, the same rules explain how to interact with them. This concept of interaction is crucial to understand the ontology of constitutive rules and to discuss my last two heresies.

6. *Fifth Heresy: Constitutive Rules Are Not Stipulative Definitions*

6.1. *A Counter-Heresy*

My fifth heresy is in reality a sort of *counter*-heresy, because it is meant to criticize a reductionist thesis, namely, a thesis aimed at demystifying constitutive rules and explain them in terms of more basic and allegedly clearer notions. In this case, the relevant notion is that of stipulative definition, and the thesis is that constitutive rules are nothing else than stipulative definitions. The idea can be found, for example, in this passage by Riccardo Guastini, in which he is discussing Conte's ontic constitutive rules or Searle's "count-as" rules:

> «This rule [...], despite its peculiar formulation, is a stipulative definition belonging to a system of rules. It defines or redefines a term that appears in other rules within the same system. [...]. If the chosen example didn't relate to play but was legal, we would have to say that we are looking at a typical "legal definition"» (GUASTINI 1986, 167).

Let me state again an example of Conte's ontic constitutive rules: "The pieces placed on c1 and f1 count as the white bishops in chess". In Guastini's view, this rule is a (stipulative) definition of "bishop": I will call it the "definition thesis". My fifth heresy consists in providing an argument against this thesis. In fact, I will try to provide arguments against two variants of it, the second being stronger and more qualified than the first.

6.2. *First Variant of the Definition Thesis: The "Counts as Formula" Is a Stipulative Definition*

The first variant of the "definition" thesis emerges from a strict reading of Guastini's passage: Searle's "counts as" rules, and Conte's ontic eidetic-constitutive rules, are stipulative definitions. This variant does not work. For reasons already given when discussing the fourth heresy, a "count-as" formula such as "the pieces placed on c1 and f1 count as the white bishops in chess" cannot be a definition of the relevant institutional concept, in this case the concept of a bishop. In fact, as we have seen, this rule simply specifies the conditions for that element to be instantiated – in this case, the procedures that must be followed to introduce it in a match –, but the meaning of "bishop" is not exhausted by those conditions. The import of a bishop within the game (the fact that it is a piece, that it can take other pieces, that it can attack the king) and the regulations that are connected with it (the fact that it must move diagonally) are also relevant. Hence, the meaning of "bishop" is not exhausted by the "count-as" formula. However, if the "count-as" formula were a stipulative definition, the meaning of the relevant institutional

element would be exhausted by it. Therefore, a "count-as" formula is not a stipulative definition.

6.3. *Second Variant of the Definition Thesis: Constitutive Rules are Simply Stipulative Definitions of Connections between Conditions and Consequences*

Of course, even if the argument just provided can rebut the first variant of the thesis on definitions – and a strict reading of Guastini's argument – it does not rebut the general reductionist idea behind it. In fact, Guastini could simply adapt his view by saying that the "count-as" formula is a stipulative definition *provided that* we include all the relevant elements into it. Hence, he could simply re-formulate the definition not in terms of Bishop-CONDITION but in terms of Bishop-FULLY CONSTITUTIVE, namely, as "the pieces placed on c1 and f1, that must move diagonally and that can take other pieces and attack the king, count as the white bishop in chess". So formulated, it seems that the "count-as" formula completely defines the meaning of "bishop". This is a second variant of the "definition thesis" and it is much more difficult to counter.

Here, the full reductionist import of the thesis becomes clear. In the end, one could argue, constitutive rules are nothing else than definitions that connect a set of conditions, on the one hand, and a set of normative consequences, on the other hand. As Hindriks (Hindriks 2009) has shown, along these lines constitutive rules could even be conceived as merely linguistic devices, similar to simple regulations about how to connect conditions and consequences. In this way, one can be a reductionist not simply with regard to constitutive rules but, more in general, with regard to the institutional reality these rules are supposed to create: Hindriks does not support this conclusion, but along similar lines Alf Ross had already argued for it – for the idea that institutional terms have no reference – in his famous paper on *Tû-Tû* (Ross 1957). Hence, properly formulated, a reductionist approach to constitutive rules in terms of definitions, such as that argued for by Guastini, leads quite naturally to a deflationist approach to an ontological reading of institutions in general. This reductionist approach to constitutive rules is an outcome that seems to be supported by Frank Hindriks and Francesco Guala (Hindriks, Guala 2015) with their recent theory of institutions as game-theoretical equilibria plus regulative rules, a theory to which Searle (Searle 2015) has replied defending the ontological, creative role of constitutive rules.

What is, then, my counter-argument against this second variant of the "definition thesis"? My argument is that Bishop-FULLY CONSTITUTIVE cannot be a stipulative definition of "bishop" because there are aspects of the semantics of the term *bishop* that it cannot explain. Let me give an example. Suppose that I am teaching chess to my daughter and I tell her "now you should move your bishop to defend your queen", and suppose that she says "I would like to defend my queen with a rook". It would be quite natural for me to say: "No, it is much better to defend the queen with a bishop than with a rook, if possible". Now, how can a definition in terms of conditions and consequence explain the difference between a bishop and a rook? After all, they are both pieces that must be placed on the chessboard at the beginning of the game, that move in a certain way, and that can attack the king. But any chess player knows that a rook is much more important than a bishop in a match of chess: "A rook is generally worth about two pawns more than a bishop" (Wikipedia, entry "Bishop (chess)"). This is part of the concept of bishop as used in playing chess and discussing about chess.

How can Bishop-FULLY CONSTITUTIVE explain this difference in value? It cannot, and the reason is that this is not its point. The rule is not aimed at defining completely the meaning of 'bishop', but rather at defining how players can manipulate and make use of a bishop when playing: it dictates not how we should *speak*, but how we should *act* with that object. As I have already argued, the rule indeed has a stipulative character: it is a declaration, but not simply a

declaration *about a meaning*. It is a declaration about the way in which a bishop works, behave, and must be interacted with: of course this declaration has a crucial role in determining the meaning of *bishop*, but it does not exhaust it. That meaning is determined by several other features, including the role that bishops play in the game of chess, the point that game designers wanted to achieve in designing the rules about bishops in that way and not in others, the comparison between bishops and the other pieces.

Brian Epstein (EPSTEIN 2015, ch. 6) has introduced a distinction between "grounding" and "anchoring" that can be useful to further explain this point. Epstein says that institutional facts are not grounded on constitutive rules: rather, they are grounded on a set of conditions stated by the X in Searle's "counts-as" formula "X counts as Y in X". But, if you ask *why* X grounds Y – why the institutional element is so framed – then general principles (what he calls "frame principles") provide the relevant reasons, and these principles are in their own turn "anchored" on something. Epstein uses the concept of frame principle as a substitute for Searle's constitutive rules because he thinks that the term 'constitutive rule' is too closely associated with Searle's formula X counts as Y in C, and that the concept of frame principle is more general. However, in adapting Epstein's point on frame principles to constitutive rules, his question about anchoring is indeed very relevant: why do constitutive rules frame the relation between X and Y in that way and not in others? The reason, I submit, is that there is a role that institutional facts of a given kind are meant to play, a point, purpose and value of them. This is an important part of their nature and of the meaning of the term by which we denote them, and this meaning is not created but rather "presupposed" by the rules.

One could say that it is impossible to define *a priori* the role and purpose of an institution, this being rather a matter of interpretation. When it comes to legal institutions, for example, it is pointless to suppose that they have a point before the interpretive activity of judges and scholars. It can very well be, and indeed it is very reasonable, that the purpose of institutional facts should not be conceived as being fixed once and for all, being rather the outcome of a development in which interpretive activities have a crucial impact. What matters for my purposes here is that this argument does not contradict but supports my counter-argument to the definition thesis. In fact, if interpretations about the point or purpose of an institution are relevant to understand its rules, and interpreting is a matter of understanding (assigning?) a meaning, the underlying assumption is that this point or purpose is a crucial aspect of the meaning of the relevant institutional terms. Which is exactly my point.

Let me state this as a general point about constitutive rules and institutional facts. Constitutive rules do not stipulate the meaning of the terms used to refer to those facts: they rather stipulate the features of those facts that are relevant for agents. But these facts have an underlying *ratio*, a role they play within a broader system and within a broader practice (on this, see also the "dependence thesis" introduced in Section 5.3), and these factors, too, have an important role in determining the meaning of the relevant institutional terms. Hence, constitutive rules are not stipulative definitions of an institutional term because the meaning of that term is not exhausted by constitutive rules.

This is also related with the "hybrid", declarative *and* regulative character of constitutive rules introduced in Section 4.4 when discussing the third heresy, and also with the idea that constitutive rules can be violated discussed in Section 5 as the fourth heresy. Stipulative definitions fall under Conte's argument about violation: if one stipulates a meaning, then any discourse that does not fit that definition is meaningless. Suppose I say: "I hereby define 'crow' as black birds and I have just seen a white crow". This is plainly contradictory because, if the declaration is satisfied, the assertion does not have conditions of truth. Now suppose instead that I say: "the pieces placed on c1 and f1, *that must move diagonally and that can take other pieces and attack the king*, count as the white bishops in chess and I won today by moving my bishops

orthogonally". Is this contradictory? Not at all: I am simply declaring a rule and saying that today I have cheated.

In the end, the argument about constitutive rules as stipulative definitions captures an aspect of constitutive rules but does not succeed in its reductionist attempt: it captures the declaratory, thetic aspect of constitutive rules but not the object of this declaration. Constitutive rules are not aimed at defining meanings but rather the *modes of interaction* between an institutional element and agents. Of course, this has an impact on the meaning of an institutional term, but it does not exhaust that meaning.

Now, the point here is what I mean exactly by "modes of interaction". This is something I am going to explain in my sixth, and final, heresy.

7. *Sixth Heresy: Constitutive Rules Do Not Entail a Weird Ontology*

7.1. *If Not Meanings then... What?*

In rebutting the approach aimed at reducing constitutive rules to stipulative definitions one could face skeptical looks. This attitude is not unreasonable: that approach has a strong merit, namely, that of dissolving institutions and institutional reality into a very basic phenomenon: language. Searle himself has built his theory of institutional facts on a theory of language, acknowledging their crucial symbolic nature. One thing, however, is to say that in order to build institutions human beings need language, just as Searle does, another is to say that institutions are nothing else than a specific vocabulary defined by rules, as the definition thesis seems to imply.

But, one could ask, if they are not simply a set of meanings, then what are they? How can we explain them within an empiricist epistemology and a realist ontology? A general skepticism towards the ontological consequences that seem to follow from the phenomenology of constitutive rules has been and still is quite widespread and influential among Italian legal philosophers. The idea is that the overall theory of constitutive rules and institutional facts implies bizarre metaphysical assumptions, mostly based on the hypostatization of semantics into a sort of Platonist framework. The following quotation, again by Guastini, is quite exemplary in this regard:

> «In what sense can it be said that a part of the world is language-"dependent"? [...] In a first (innocuous) sense, this means that in choosing one language over another, we create a given image (representation, depiction) of the world. [...]. In a second (likewise innocuous) sense, it means that the language creates names, classifications, qualifications, senses, and values for the nonlinguistic objects of the world. In a third (overtly metaphysical) sense, it means that, in some circumstances, the language is endowed with the demiurgical power to conjure nonlinguistic entities into existence. Regrettably, Searle neglects to draw this simple distinction. His discussion is ambiguous, allusive, giving the impression that the distinction between brute facts and institutional facts is ontological – as if institutional facts were not facts among facts but mysterious supersensory entities, perhaps dwelling in the Kelsenian world of the Sollen or in Popper's "World 3"» (GUASTINI 1983, 170 f.; my translation).

This is not a preoccupation that the international debate in social ontology has underestimated. In a sense, this is the crucial problem of Searle's *The Construction of Social Reality*:

> «Here, then, are the bare bones of our ontology: We live in a world made up entirely of physical particles in fields of force. Some of these are organized into systems. Some of these systems are living systems and some of these living systems have evolved consciousness. With consciousness comes

> intentionality, the capacity of the organism to represent objects and states of affairs in the world to itself. Now the question is, how can we account for the existence of social facts within that ontology?» (SEARLE 1996, 7).

Searle's solution to this problem has become a paradigm: Constitutive rules (and, more recently in Searle's terminology, standing status functions declarations) are based on collective acceptance, a sort of intentional state in the plural form that individuals are able to have in virtue of their biological makeup. In contemporary social ontology, the idea of collective acceptance and intentionality has found several alternative variants but also several criticisms.

As I have argued elsewhere (ROVERSI 2012, 180-199), the main problem I find in the theory of collective acceptance is that it reduces assertions about constitutive rules to assertions about mental states within a community. Hence, any discussion within that community about the structure and rules of institutions cannot be descriptive in any sense: it is rather a struggle among the holders of different views, a sort of persuasive argument about how you would accept that institution. This I find implausible on explanatory grounds: jurists, sociologists, policymakers argue about *something*, they do not simply try to make people change their mind. There is some sort of objectivity in the nature of institutions, however much vague and indeterminate, and it is not meaningless to say that people could be collectively *mistaken* about an institution's structure and rules. If, starting from tomorrow, Italians collectively accepted that labour rights have no real place in the Italian constitutional framework, their collective acceptance would not make this opinion right.

The problem is, however, that collective intentionality provides us with a solution to the problem of a realist and empirically coherent ontology of constitutive rules. What kind of alternative can be found? I submit that an alternative is possible, and particularly an alternative based on artefacts. Let me explain how.

7.2. *Constitutive Rules and Institutional Artefacts*

Constitutive rules and institutional facts are perfectly compatible with a realist ontology and an empiricist epistemology because they have a role in the typically human activity of building immaterial artefacts, like fictions. This activity is performed through symbols and, from an evolutionary point of view, it emerged when the human brain developed the capacity to create "meta-representations", namely, rules about the meaning and significance of other representations (see DUBREUIL 2010, 123-125): in this way, it became possible to create artefacts made up of symbols, more or less connected with a material substrate.

This phylogenetic development has an ontogenetic counterpart in children development. Experimental studies have shown that the understanding of institutional facts and statuses in children is connected with the capacity to understand the so-called "games of make-believe" (RAKOCZY 2007, RAKOCZY, TOMASELLO 2007). In these games, which we all know very well since our infancy, fictional statuses are assigned to objects and events on the basis of cooperative agreements about rules for their generation: for example, a chair is an Orc and can paralyze when touched, Anna incidentally touched the chair, now Anna is paralyzed (see WALTON 1990 for an analysis of these phenomena). These rule-based fictions are immaterial artefacts (THOMASSON 1999, ch. 3), and so are institutions and institutional reality.

Constitutive rules are exactly like the principles of generation of games of make believe: In particular, they define the "interaction plan" of institutional objects, events, and facts. Every artefact has a sort of interaction plan: my laptop, for example, has been built with in mind a

complex and detailed plan about how to use it and how to obtain results from it[8]. Normally, this interaction plan is nothing else than a set of conditions defined in terms of actual interaction on the part of agents and consequences defined in terms of outcomes that actually follow from that interaction. In the case of institutional artefacts, instead, this interaction plan is not descriptive but normative: it states the normative consequences that follow from a given interaction and that people are supposed to accept. Some degree of collective acceptance is therefore indeed crucial for institutional artefacts: it is the mechanism through which they can work. But, from the fact that institutional artifacts need acceptance in order to *work*, it does not follow that what they *are* is nothing else than the content of mental states. Instead, what an institutional artefact is depends on its artefactual nature: it is a matter of history, an history that explains how and why the artifact has been created, when it emerged, how and why it has been modified and acquired further functions and roles. This is the reason why an argument about the institution's "objective" nature and structure can be meaningfully framed against collective acceptance at a given time: the artefactual object has a history and development that is distinct from actual collective acceptance at a given time, even though it always requires collective acceptance in order to fulfill its function and role. Of course, much about the reconstruction of this history depends on interpretation of vague and indeterminate facts: this does not mean, however, that collective acceptance makes that interpretation right or wrong and possible criticisms meaningless. Constitutive rules are therefore not mysterious from an ontological point of view: rather, they play a crucial role in a distinctively human activity. They create and support interaction plans of immaterial artefacts. *This* is what they "define": not the complete meaning of an institutional term, but that part of that meaning which is crucial for interaction. I have explained this theory in full in ROVERSI 2016 and ROVERSI 2018.

And here my heresies come to an end.

8. *Conclusions*

I have thus completed the discussion of all my heresies and my hope is that, throughout this discussion, the relevant differences and relations between the Italian legal-philosophical debate on constitutive rules and the contemporary debate in social ontology emerged in a sufficiently clear light. The Italian debate focused primarily on the phenomenology, logic and structure of constitutive rules, dealing with the relation between them and kinds of logical conditions, anankastic obligations, and stipulative definitions; instead, contemporary social ontology has focused primarily on the ontology of constitutive rules, dealing with collective acceptance, collective intentionality, and shared mental states as a possible foundation for their existence. On several occasions, the two debates were intertwined, either as matter of actual historical interaction between authors or as a matter of overlapping theoretical solutions: this happened when Conte and Azzoni, Carcaterra, Jori, Guastini discussed and often criticized Searle's ideas about constitutive rules, but a parallelism and partial overlapping can also be found between Guastini's definition thesis and Hindriks's reductionism, and in a sense the whole debate about collective intentionality and its possibility – a debate that emerged out of Searle's *The Construction of Social Reality* – seems to meet the preoccupations raised by Guastini about realism and empiricism in the theory of constitutive rules.

My heresies are also deeply embedded in this complex picture. They are meant to frame a theory of constitutive rules, which I have tried to develop taking into account both the Italian

[8] Cf. HOUKES, VERMAAS 2010, 20 f. Houkes and Vermaas use the expression "use plan" rather than "interaction plan". In previous works I have adopted the term "interaction plan" to account for disabling artifacts on a par with enabling artifacts: see on this ROVERSI 2016, 223 ff.; ROVERSI 2018.

legal-philosophical debate and the debate in contemporary social ontology. For the reader's convenience, I summarize here the main tenets of this theory. Constitutive rules are speech acts with a hybrid illocutionary point, declarative *and* regulative. They define the interaction plan of an immaterial artefact, hence, at least a set of conditions in terms of human interaction, on the one hand, and a set of normative consequences in the other hand: in so doing, constitutive rules regulate how agents are supposed to interact with that artefact to obtain the relevant normative outcomes. Constitutive rules come in systems embedded within a teleological structure, namely, a point or purpose dictated by the broader practice in which the institution is embedded. In order to understand the meaning of an institutional term, it is necessary to understand not only the relevant constitutive rules but also their underlying teleology.

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