Constituting Power

9

Constituting Power

CORRADO ROVERSI

1. Introduction: In Defence of Constitutive Rules

Constitutive rules have been an important concept in philosophy of the last century. After the introduction of this concept by the the Polish legal philosopher Czeslaw Znamieroswki and later independently by John Rawls, the notion has played a role in debates about normativity, the nature of speech acts, the Is/Ought question, the metaphysics of the social world, to name only a few. However, this concept tends to divide scholars between those who consider it to be an important explanatory tool and those who, instead, believe it to be void. I am in the first camp, and admittedly this is not a comfortable position: Several authoritative authors have levelled important criticisms to the concept of constitutive rules, even recently.

In previous writings, I have tried to defend the heuristic relevance of this concept and to qualify it against several objections.[1] Some argue, for example, that all kinds of rules can be constitutive, and that there is no structural opposition between constitutive and regulative rules. This is true, but it does not entail that constitutive rules do not exist: If we replace a strong structural distinction between constitutive "count-as" rules and regulative rules with a pragmatic distinction between constitutive vs regulative *uses* of a rule, and consider this last distinction as a continuum between two extremes rather than a dichotomy, the objection can be countered. Others argue that constitutive rules can be reduced to more ordinary regulative rules, and in particular to a regulative connection between conditions and normative consequences.[2] I have argued that this reduction does not work, because the *ratio* of the connection is not captured by it and needs instead the concept of a constituted status. Recent developments in social metaphysics replace constitutive rules with the notion of "grounding",[3] but this, I have tried to show, can cause a collapse of the strong, practical normativity of statuses on the weak, epistemic normativity of explanations. Several scholars think that constitutive rules entail a weird, platonic metaphysics of ideal entities,[4] but in fact a metaphysics of immaterial artifacts is sufficient to explain them while being consistent with an empiricist attitude. This also shows, in my view, why constitutive rules are not simply stipulative definitions[5]: because their point is not that of defining a meaning but rather that of creating an artifact's interaction plan. The consequence of this is that constitutive rules, conceived as speech acts, have a double illocutionary point: declarative *and* prescriptive. Constitutive rules are not aimed at teaching agents how to speak but rather how to behave when interacting with an institutional element. Of course, these objections do not exhaust the range of criticisms that can be raised against constitutive rules, but at least they show the reasons why the notion is still worth considering

[1] Roversi (2007), (2018), (2019), (2021a).
[2] Hindriks and Guala (2015), building an argument very similar to Ross (1957).
[3] Epstein (2015).
[4] Guastini (1983).
[5] Contra Guastini: see ibid.

and fruitful. There is a very simple intuition according to which rules make possible new activities, new ways of talking, even new objects: This is indeed a constitutive role and I think that any empiricist caution one may have should not entail ignoring its relevance.

As I said, in defending constitutive rules I have also tried to qualify the notion. First, as already mentioned, I defend a pragmatic notion of constitutive rules and not a logical one. Hence, I do not think that constitutive rules must have a peculiar structure, for example a "count-as" structure ("X counts as Y in context C"). This is the formula that J. R. Searle has often cited as being characteristic of constitutive rules and that, according to a shared misunderstanding of his view, should be found in all constitutive rules. In reality Searle himself states clearly, already in *Speech Acts*,[6] that only some constitutive rules have this form, whereas some have a more regulative structure, and that in most cases only the system of constitutive rules has this form. Searle is not alone in this regard. Amedeo Conte,[7] for instance, shows with a simple example borrowed from chess—"Bishops must move diagonally"—that the process of conceptual constitution of institutional elements involves rules that are clearly regulative in structure (he calls these rules "deontic eidetic-constitutive rules"). And, conversely, constitutive rules in the "count-as" form can have a distinctively regulative purpose. Neil MacCormick's[8] example "Broken bottles count as weapons in pub brawls" shows in a wonderfully simple and explanatory way that very often count-as statements are used only to include entities within an already rule-regulated domain. More in general, depending on context, the same statement can fulfill a constitutive or regulative function: "Well-educated people do not step onto flowerbeds" can mean that people should not step onto flowerbeds, if the statement is written on a sign in a park, thus expressing a regulative rule, but it can also be genuinely constitutive of the idea of education if included in a handbook of etiquette. The distinction between constitutive and regulative rules is not a structural distinction between kinds of rules, but rather a pragmatic distinction between different ways of using rules. This leads to a pragmatic conception of constitutive rules: being constitutive is not simply a question of semantic content but of illocutionary force.

Second, just like all speech acts, constitutive rules must fulfil some requirements. Some are formal: Constitutive rules must define the conditions for an institutional element to be instantiated in the actual practice, but they must also define what is the normative import of the element (namely, what consequences for the practice an instantiation of that element has) and what kind of regulations are involved in interacting with it. For example, chess pieces must be put on the chessboard in specific positions, but it is also crucial for players to know that all chess pieces can take other pieces and checkmate the king, and also to know how those pieces must be moved. Similarly, legal transactions are concluded if specific acts under specific circumstances are performed, but legal transactions are performed because they have consequences in terms of the obligations and rights of individuals. To use Searle's formula in the way in which it was meant since the beginning, namely, as a "useful mnemonic",[9] it can be important to remember that constitutive rules must state which X counts as Y, but also which Z is implied by Y: this is Frank Hindriks "XYZ Formula",[10] by which we can also capture Neil MacCormick's point about the need for "consequential rules" as a complement to "institutive

[6] Searle (1969), p. 36.
[7] Searle (1995), pp. 279-80.
[8] Searle (1998), p. 334 n. 25.
[9] Searle and Smith (2003), p. 301.
[10] Hindriks (2005), pp. 123ff.

rules".[11] Further, as it is clear in Conte's already-mentioned example "Bishops must move diagonally in chess," the element Z stating the normative consequences of being a Y includes also prescriptions about how the constituted entity must behave and, conversely, about how agents must behave when interacting with that entity.

Third—and this again is no surprise given their pragmatic nature—constitutive rules are context-dependent. Apart from formal requirements, they must also fulfil substantive requirements, depending again on the context in which they are used. Rules constitutive of a game element must define conditions that players can perform and consequences that are (directly or indirectly) relevant for victory, whereas rules constitutive of a legal institutional entity will at least define the relevant conditions of existence of that entity within the legal system and the consequences of that existence in terms of rights, powers, and duties of legal subjects. As Hubert Schwyzer[12] has shown, the overall meaning of a system of constitutive rules depends on the broader social practice in which that system is embedded, and that practice sets the conceptual boundaries that the constitution of institutional elements must respect: to use an expression by Andrei Marmor,[13] the "deep" conventions in the background of which surface conventions are framed.[14]

This concludes my preliminary discussion. To capture it with a formula, being constitutive is not a structural feature of a rule but a way in which rules are used. Constitutive rules create the concept of an artifactual status by way of a connection between conditions for its instantiation and normative consequences, *plus* a point, a *ratio* given by the deeper social practice in which that status is embedded. Hence, constitutive rules both declare what the artifactual status is and regulate the interaction of agents with it: They "constitute (and also regulate)", as Searle originally said. This discussion provides the general framework within which I will address the specific topic of this paper, namely, the relation between constitutive and power-conferring rules and, more in general, the relation between constitutive rules and institutional power.

I will try to argue for two distinct theses. First, though power-conferring rules are often constitutive and constitutive rules are often power-conferring, these are two distinct sets: they overlap but do not coincide. In arguing for this conclusion, I will try to show why these two sets are related but not reducible. Second, though much of institutionally-relevant power—the kind of social power that is relevant to explain an institution—is attributed by power-conferring, possibly constitutive rules, power-conferring constitutive rules and power-conferring rules in general do not exhaust it. There is a whole domain of institutionally-relevant power that is not conferred nor constituted by an institution's rules.

2. Constitutive Rules and Power-conferring Rules

2.1. Four Possible Relations

There are five possible relations between the set of constitutive rules (or better, as said: of rules used in a constitutive way) and the set of power-conferring rules: either (1) the two sets overlap,

[11] MacCormick (1986), pp. 52ss.
[12] Schwyzer (1969).
[13] Marmor (2009), chap. 3.
[14] See also Lorini (2000), pp. 263ff.; Roversi (2010) on this.

or (2) they coincide, or (3) they are entirely distinct, or (4) the first is included in the second, or (5) the former is included in the latter. However, I will rule out since the beginning alternative (3)—that the two sets are distinct—leaving only four available. Constitutive rules create statuses, and these statuses are at least sometimes connected with powers as one of their normative consequences: hence, it is apparent that constitutive rules can have a power-conferring nature and that the two sets cannot be entirely distinct. The problem is not whether constitutive rules can be put in connection with power-conferring rules, but rather what is the connection between them. Given the other four options, it seems fruitful to proceed by addressing alternatives (4) and (5)—identifying a relation of inclusion of one set into the other. If it will turn out that at least one of these alternatives is false, then (2) is false: if not all constitutive rules are power-conferring, or if there are power-conferring rules that are not constitutive, then the two sets cannot coincide either. Moreover, if it will turn out that both (4) and (5) are false, given that (3) is false, the conclusion will be (1)— the two sets overlap but do not coincide, and one is not included in the other—, which is the only other available alternative. This will indeed be my conclusion and, in order to argue for it, I will proceed as follows: I will first consider, in Section 2.2, whether all constitutive rules have a power-conferring nature, and I will conclude that they do not; then I will enquire, in Section 2.3, whether all power-conferring rules are constitutive, and again I will answer negatively. Finally, I will identify the features of the overlap between these two sets. Then, in Section 3, I will consider a broader question, namely, the relation between constitutive rules and institutional power—a notion that, as I will argue, is not entirely coincident with that of power constituted or conferred by rules.

2.2. Are Constitutive Rules Power-conferring?

Several authors have underscored the fact that constitutive rules have an essentially enabling role. In a paper titled *The Nature of Institutional Obligation*, dated 1972, J. R. Cameron suggests that this enabling role is connected to the very idea of constituting new practices:

> The constitutive convention which forms the basis of such a practice, whether it be promising or playing Pontoon, is not a convention which restricts people's action or limits their freedom. Rather it plays an enabling role, making it possible for them to do things that they want to do, creating the possibility of a new kind of institutional status, such as that of husband or wife, which, once it exists, is a status people desire enter into.[15]

In this general sense, constitutive rules can be seen as power-conferring— they give people the power to perform a new activity—or more broadly as enabling, because by creating new activities they open spaces of possibility. If we limit our analysis in this way, constitutive rules can indeed be seen as a kind of power-conferring rules. Such an approach, however, would be quite superficial. It is helpful here to use a distinction between two senses of constitutive rule that Jaap Hage has used in his works: that between practice-defining rules and fact-to-fact rules.[16] Systems of rules can generically be qualified as constitutive because they define a practice. But, among rules constitutive in this sense, there are some rules that are constitutive in a more specific sense because they attach normative consequences and conditions of instantiation to statuses. What we are looking for is not the generic enabling nature of

[15] Cameron (1972), p. 325.
[16] Hage (2018a).

constitutive rules in the first sense, but rather an equivalence between power-conferring rules and constitutive rules in the second, more specific sense. Cameron's broad idea of the enabling character of constitutive rules therefore does not bring us much closer to our objective.

Let's focus then on constitutive rules that create a status. To exemplify, let's consider not the system of rules of chess as constitutive of the game of chess, but rather the specific rules that constitute chess pieces by connecting their conditions of instantiation, normative consequences, and inherent regulation within a general teleological framework. An example can be the following:

> The pieces placed on c1 and f1 count as the white bishops in chess. Bishops must move diagonally. Bishops can take other pieces and check the king. Bishops can be taken by other pieces through a valid move.

Is such a rule inherently power-conferring? Of course, this depends in large part on the notion of power-conferring rule that we assume. In his work on legal competence, Torben Spaak frames the notion of competence, similarly to Hohfeld, as the capacity to change the legal position of someone (another subject, or the acting subject) by way of an act performed with the specific intention of obtaining that change.[17] In this conception, norms of competence conditionally connect changes in legal positions with the performance of acts plus a specific intention. This general idea is shared by other legal theorists. Lars Lindahl and David Reidhav, for example, conceive competence norms as rules framing ground relations between manifestations of intentions and legal effects,[18] and Jaap Hage, too, connects competence directly to rules establishing a relation between a certain kind of legal powers and a certain kinds of intentional acts, though he argues for a distinction between legal powers and competence (the former being based on any kind of rules framing a relation between legal facts, while the latter being a specific legal status with the power to create particular legal consequences by means of juridical acts).[19] The trait which is common to all these analyses, therefore, is the idea that power-conferring rules, in the sense of competence norms, create the possibility to obtain some legal effects if some acts with the intention to obtain those effects are performed. So, are all constitutive rules power-conferring in this sense? The answer is no. Constitutive rules can constitute statuses that are not connected with powers, in the sense of the capacity to intentionally get effects if some acts are performed. A famous example by John Searle can help me show this point:

> Consider for example a primitive tribe that initially builds a wall around its territory. The wall is an instance of a function imposed in virtue of sheer physics: the wall, we will suppose, is big enough to keep intruders out and the members of the tribe in. But suppose the wall gradually evolves from being a physical barrier to being a symbolic barrier. Imagine that the wall gradually decays so that the only thing left is a line of stones. But imagine that the inhabitants and their neighbors continue to recognize the line of stones as marking the boundary of the territory in such a way that it affects their behavior.[20]

The border, in Searle's example, can be connected with powers (for the example, the power of chiefs to rule within the border) but it is mainly connected with an obligation, namely, the duty not to trespass: It can simply have a purely disabling role. Similarly, as Searle makes clear,

[17] Spaak (2009), 78.
[18] Lindahl and Reidhav (2017), pp. 169-71.
[19] Hage (forthcoming).
[20] Searle (1995), p. 39.

status functions can be connected with "rights, responsibilities, obligations, duties, privileges, entitlements, penalties, authorizations, permissions", not simply with powers, and this is why Searle qualifies the "deontic powers" connected with status functions as being either "positive" or "negative".

> On our earlier suggestion, that in general the Y terms confers (or denies) power, the obvious hypothesis would be that there are two broad categories of such status-functions. The first is where the agent is endowed with some new power, certification, authorization, entitlement, right, permission, or qualification granting the ability to do something he or she could not otherwise have done; and the second is where the agent is required, obligated, in duty bound, penalized, enjoined, or otherwise compelled to something he or she would not otherwise have had to do. […] Roughly speaking, the two major categories are those of positive and negative power.[21]

Some statuses, moreover, are inherently honorific and do not entail any kind of power or duty:

> the point of honors (and dishonors) is to have statuses valued (or disvalued) for their own sake, rather than just for their further consequences. Examples are victory and defeat in games, and institutionally sanctioned forms of public honor and disgrace.[22]

As Searle shows clearly, statuses can be connected with powers but need not, which means that constitutive rules can be power-conferring but they need not.

There remains, however, a perceived connection between constitutive rules and power-conferring rules. Searle himself, when discussing the significance of institutional facts for social life, gives priority to the enabling aspect. He writes in this regard: "The existence of institutions, as I have emphasized over and over, is enormously enabling in human life, and gives us all kinds of possibilities that we could not otherwise conceive of",[23] thus suggesting that, though the connection between constitutive and power-conferring rules is not necessary, it is quite typical. An interesting statement of this connection can also be found in Joseph Raz. When discussing constitutive rules in his *Practical Reason and Norms*, Raz writes:

> Searle has an additional test for identifying constitutive rules. They can be and often are cast in the form 'X counts as Y in the context C'. […] It may be that in proposing this second test Searle is groping towards the distinction between power-conferring and mandatory norms.[24]

A few pages after this passage, Raz indeed provides a reformulation of the constitutive of chess pieces in terms of power-conferring rules.

> 'A player who is to make the first move or whose opponent has made the last move, has power, unless he makes another move, to move his rook to any square lying horizontally or vertically on a straight line from its present position, provided that no other piece lies between its present position and that square and that the square to which it moves is not occupied by one of his own pieces.' [...] Similar power-conferring rules apply to all the other pieces in the game.[25]

---

[21] Ibid., p. 100.
[22] Ibid., p. 101.
[23] Searle (2010), p. 124.
[24] Raz (1975), pp. 110-111.
[25] Ibid., p. 115.

In Raz's view, therefore, even "deontic" constitutive rules regulating how a piece *should* behave—the kind of rules that Conte would have called "deontic eidetic-constitutive"—must be seen as modalities of exercise of a power. Searle's example of the border, however, shows that such an analysis cannot be extended to all kinds of rule-constituted institutional statuses. If constitutive rules create normative statuses, there is no conceptual reason to assume that these statuses cannot entail obligations only. To state my conclusion again: Constitutive rules can be power-conferring, perhaps they most often are, but they are not so necessarily.

Moreover, this conclusion and its underlying argument—the idea that there can be disabling, rule-constituted statuses—make it possible to counter Raz's general criticism against constitutive rules. Raz argues that, if we assume Searle's criterion for distinguishing constitutive from regulative rules, then all rules are both regulative and constitutive and the distinction loses its relevance. The criterion criticized by Raz is stated by Searle in *Speech Acts* and is formulated in terms of action-descriptions:

> There is a trivial sense in which the creation of any rule creates the possibility of new forms of behaviour, namely, behaviour done in accordance with the rule. That is not the sense in which my remark is intended. What I mean can perhaps be best put in the formal mode. Where the rule is purely regulative, behaviour which is in accordance with the rule could be given the same description or specification (the same answer to the question "What did he do?") whether or not the rule existed, provided the description or specification makes no explicit reference to the rule. But where the rule (the system of rules) is constitutive, behaviour which is in accordance with the rule can receive specifications and descriptions which it could not receive if the rule or rules did not exist.[26]

In reality, Raz writes, a rule-dependent description of rule-following behaviour is possible for all kinds of rules. He provides two examples, each divided into a pair of act-descriptions, one that is rule-dependent and one that is not rule-dependent:

> 1 (a) 'Giving £50 to Mr. Jones' (b) 'Paying income Tax'
>
> 2 (a) 'Saying "I promise"' (b) 'Promising'.[27]

Given these two pairs of act-descriptions, "both the law imposing income tax and the rule about promising are each of them both a regulative and a constitutive rule".[28] Raz therefore concludes as follows:

> There is nothing in Searle's explanation to suggest that his classification is exclusive, that the same rule cannot be both regulative and constitutive. Searle assumes that the same act can be given different descriptions and that a rule is regulative if a description of a certain kind is available for acts in accordance with it, and that a rule is constitutive if a different description, which is of a kind logically independent from the first, is available to describe the same act. But it follows from this account that *all* rules are both regulative and constitutive.[29]

Raz is here arguing that, just like in the case of "citizens must pay income tax every year", *all* rules—even those that are most clearly regulative—entail a non-trivial, rule-dependent action description like 'paying income tax' as opposed to 'Giving £50 to Mr. Jones'. If this is the

[26] Searle (1969), p. 35.
[27] Raz (1975), p. 108.
[28] Ibid., pp. 108-109.
[29] Ibid., p. 109.

correct interpretation of his text, then Raz is assuming that "citizens must pay income tax every year" is clearly an instance of a regulative, non-constitutive rule. It seems to me, however, that this assumption in its own turn presupposes Raz's reading of all constitutive rules as inherently enabling—a reading that, as we have seen, is false. The rule "Citizens must pay income tax every year" is a constitutive rule of the institutional status "income tax", a status that, just like that of a border, is connected with a disabling, not enabling, institutional entity. This institution is linked with a specific field of application and exemption, a specific mode of calculation, and one main normative consequence: Citizens must normally pay the amount in money every year. Compare it with the rule "Do not park in the city centre on Thursday evenings": *that* is a regulative rule. People already park in the city centre, even without the rule, but they would not pay an income tax without its specific regulation.

Raz could reply here that the way I have framed the comparison between parking and paying income tax is biased by my own view. The problem is not whether people pay income tax without the rules, but rather whether people have an income without the rule: and they have one. The conclusion, Raz could argue, is that the rule about paying an income tax is regulative, not constitutive, because it regulates an already-existing activity, namely, that of earning an income. Even if framed in this way, Raz's position would still be wrong, but it would be so in an illuminating way. It would show a difference between two ways in which rules can be constitutive in the legal domain: They can be constitutive because they make possible an activity for ordinary citizens *and* officials, or they can be constitutive because they make possible a practice only for officials or legal experts. I still think that "paying income tax" is an institutional, rule-constituted activity both for citizens and officials, but I concede that the concept of "income tax", its regulation, all the practices that revolve around it are more a matter for accountants and tax lawyers than for non-experts. Hence, one can say that what is really constituted by the rules is not the general form of life of earning an income and giving a tribute to the State, but the highly professionalized activity of "paying income tax" as the outcome of a complex calculus, a careful consideration of strategies for tax efficiency, a deep knowledge of tax exemption zones. This is an important distinction, that can be found more clearly in other areas of the law. Consider Art. 575 of the Italian Criminal Code:

> Murder. Whoever causes the death of a human being is punishable by no less than 21 years in prison.

Despite its regulative appearance, this rule is also constitutive, and in particular it is constitutive of the concept of "murder" in criminal law. This does not mean of course that murdering people is not possible in absence of criminal law: What is not possible, however, is the highly institutionalized activity of prosecuting murder as performed by officials and lawyers. Art. 575 is constitutive not of the activity of killing people, but of the way the law responds to that activity. Identifying this ambiguity of the expression "constituting a legal practice"—an officials' practice, or a citizens' practice, or both—is an important point that must be kept in mind when dealing with constitutive rules in legal institutions, as opposed to other kinds of social institutions.

With this I conclude my treatment of the question "Are all constitutive rules power-conferring in nature?". My answer, to state it again, is: No. Constitutive rules, at least if not interpreted in a generic sense of practice-defining rules but rather as rules that constitute institutional statuses, can be power-conferring but can also create disabling statuses. There is no conceptual connection between constitutive rules and power-attribution.

2.3. Are Power-conferring Rules Constitutive?

Let me now consider the second, inverse question: "Are all power-conferring rules constitutive?". This question can be reframed as follows: Do all the rules that confer power to a status constitute the concept of that status and make it possible? The answer is negative. Professors have the power to give a score to students after the exam, but they also have the power to include some research assistants in their research group when applying for research funds. If we took away from professors the power to share funds with their research assistants, for example by giving research assistant their own funds, the status of being a professor and the ensuing institutional practices would still be there in their most important elements; if we took away the power of evaluating students' knowledge, however, perhaps professorship would not exist anymore or at least it would be essentially changed. Hence it seems that, just as not all constitutive rules are power-conferring, not all power-conferring rules are constitutive: some are, some are not.

The problem here is to understand which power-conferring rules are constitutive, and which are not. I will use here Lynne Baker's concept of "primary kind property", which she developed in working to solve the problem of material constitution and understand which change an object can undergo without losing its identity. In Baker's view, objects have primary-kind properties—i.e., properties they cannot lose without ceasing to exist as such—, and artifacts are objects whose primary-kind property is a function.[30] As said, constitutive rules define the interaction plan of immaterial artifacts, hence Baker's line of argument can be extended to institutional statuses. In order to understand which power-conferring rules are constitutive of a given status, it is necessary to understand whether the conferred powers are part of the "primary function" of that status in Baker's sense, and in order to do this we must imagine counterfactually what would happen if the relevant power-conferring rule were repealed: Would that status remain the same status? Would it retain its identity, that is, its functional role in the system? These questions can be answered only by considering again the teleological background of institutional entities, a background that I have already shown to be one of the necessary elements of constitutive rules.

Of course, trying to find the functional role of an institutional status is in large part a matter of interpretation. In some cases, however, the function of a status is stated by the rules themselves, and in that case the kind of counter-factual reasoning I am proposing is easier. Consider the example of the President of the Republic in the Italian Constitution:

> Art. 87 of the Italian Constitution. The President of the Republic is the Head of the State and represents national unity.

Now, let us examine the following two power-conferring rules about the President:

> (1) Art. 74 of the Italian Constitution. The President of the Republic may send Parliament a reasoned opinion to request that a law scheduled for promulgation be considered anew. If such law is passed again, it shall be promulgated.

[30] Baker (2004).

(2) Art. 59 of the Italian Constitution: The President of the Republic may appoint five citizens who have honoured the Nation through their outstanding achievements in the social, scientific, artistic and literary fields as life Senators.

According to the kind of counterfactual reasoning I am conjecturing, Rule (1) is a constitutive power-conferring rule, whereas Rule (2) is not. Given that the President of the Republic represents National unity, it has among its primary functions that of guaranteeing the legal system's constitutional coherence: Hence, if Art 74 were repealed by a Constitutional reform, the status would lose a power which is essential to fulfill its role, because the President could not be anymore a constitutional control over the Chambers' legislative activity. On the other hand, it seems that Art 59 is not constitutive, though it is clearly power-conferring: The President can represent the Nation's unity even without being able to appoint life Senators. Of course, the system envisages other kinds of constitutional control, the Constitutional Court being the most important one. What is important for our purposes, however, is not the system as a whole but the essential function that a given status must perform within the system. If the rule-conferred power is necessary to perform that function, then it is "primary" in Baker's sense and it is an integral part of the status' identity conditions. In that case, the power-conferring rule is constitutive. On the other hand, the capacity to appoint important personalities, who played an important role in Italy's culture and progress, with the status of life Senators is *not* a primary function: It certainly represents the Nation's acknowledgment, but the President can fulfill its symbolic role even in absence of that power. Hence the power-conferring rule is not constitutive.

The whole argument rests on the assumption that trying to find the essential function of institutional entities is a meaningful endeavour, an idea some are skeptical about. In general, this is an assumption of my conception of constitutive rules and of institutions, and particularly of the idea of an essential teleological role that institutional statuses must play within an institution embedded in a deeper social practice. I cannot argue for this assumption here. As a partial support to it, one could perhaps appeal to Jaap Hage's observation, that he brings to counter Alf Ross's reductionism, according to which institutional statuses are translatable and comparable across different legal systems even if the relevant rules that constitute them are in some way different.[31] If statuses are completely expressed by the connection between its conditions and normative consequences, how can it be that different regulations concerning, say, marriage can nevertheless be compared? The answer could be, in this light: because an analogy is found not strictly between the rules, but between the teleological role these statuses play within the respective institutions, hence by finding a common "primary function" working in the background of slightly different regulations.

I have thus argued that constitutive rules and power-conferring rules can be related but that there is no conceptual connection between them: There can be constitutive rules that are not power-conferring and there can be power-conferring rules that are not constitutive. Power-conferring constitutive rules are those rules that constitute institutional statuses by attaching enabling normative consequences to them; constitutive power-conferring rules are those rules that attribute a power that is a primary-kind property, or better a primary function, of the constituted institutional status.

[31] Hage (2018b), Chap. 2, Sec. 3.4.

3. Constitutive Rules and Institutional Power

I have thus far argued that the set of constitutive rules and that of power-conferring rules overlap but do not coincide, nor is one included in the other. I turn now to the more general question of the relation between constitutive rules and institutional power. What I will try to argue is that, even in those cases where power is attributed only by way of rules constitutive of statuses—where all power-conferring rules are constitutive—there are kinds of power relevant for an institution that are not constituted by rules. To put it in a formula: not all institutional power is rule-dependent.

3.1. Three Layers of an Institution

I have argued in previous writings that the ontology of an institution can be fruitfully analyzed as an interlocking of three, metaphysically connected layers: an institutional, meta-institutional, and para-institutional layer.[32] The institutional layer includes all the rules the institution is made of, be they authoritative or customary, regulative or constitutive; the meta-institutional layer provides the teleological background of constitutive rules, that is, the broader and deeper social practice in which the institution is embedded and which gives it its overall purpose and meaning; the para-institutional layer includes all the features of the institution that depend not on its actual rules but on the way these rules are practiced in a given social context.

This distinction may seem very abstract and obscure, so an example is in order to clarify it. Let's consider a game. One could say that the game is made up of—and conceptually constituted by—rules. So, in the case of chess, there are constitutive rules that dictate how pieces are placed on a chessboard, how they must be moved, and what is their role in the game; in the case of football, rules define the number of players, how players must behave, the way a goal is scored, etc. Similarly, legal institutions are defined by rules. Rules define, for example, how a specific tax is to be calculated, when it must be paid and who should pay it, and in so doing they constitute a specific institutional concept—like the concept of income tax, used by Raz, or *IRPEF* in Italian, *imposta sul reddito delle persone fisiche*.

Even though the rules play an essential role in defining these institutions, however, they are not sufficient: It would be pointless to abide by the rules of chess or football without knowing what competitive game-playing is, and impossible to understand *IRPEF* if we did not know what a tax is for, what is the role of taxation in our political community. The overall institution constituted by rules presupposes a deeper background, that clarifies its teleology and its basic values. Some of this background can be made explicit (the duty to pay taxes in proportion to income is codified in Art. 53 of the Italian Constitution), some is simply given for granted (the very notion of a tax is presupposed by Art. 53, just as no rulebook explains what it means to play a game when giving you the basic rules of the game). Accordingly, some concepts that are very relevant for the institution are not constituted by the rules but rather presupposed: the rules of chess define how you can checkmate but do not explain what it means to win in a competitive game, just as Art. 2 of DPR 22/12/(1986) n. 917 defines those who are subject to *IRPEF* but do not define the notion of passive subjectivity in law. These concepts, these general principles and values—the overall conceptual background the institution presupposes to have a

[32] Roversi (2018), (2021b).

meaning—make up the meta-institutional layer: They are "meta" because, in a sense, they define the basic grammar of our social context and legal practice.

Distinct from the institutional is also the para-institutional layer, which includes phenomena that are made possible by the way the institution is practiced rather than by its structural features. The fact that in chess there is a slight first-move advantage, or that the Queen's Gambit is divided into two major categories based on the opponent's response, or that football teams in a 5-3-2 formation typically rely on a counterattack strategy to win, are facts that of course require the games' rules to be in place but are not constituted by them like, for example, the fact that in chess bishops can move only diagonally or that in football a goal is scored when the ball passes completely over a goal line. They are para-institutional facts as opposed to institutional, using the prefix *para-* in the same sense as it is used in terms such as paramedic, paralegal, or paralanguage, namely, as qualifying objects which in some sense attach to more fundamental entities and which are relevant for the concrete practice revolving around those entities. Phenomena of this kind are relevant for law as well, and particularly for legal sociology. The fact (1) that there are parliamentary strategies like filibustering, that (2) there were governmental practices like reiteration of decrees, that (3) a perfect two-chambers system can lead to legislative gridlocks, that (4) tax efficiency is easier when a business is based on intangible assets, or finally that (5) a receipt lottery mechanism reduces tax evasion: These are all facts made possible but not strictly constituted by the rules, hence in my terminology "para"-institutional rather than pure institutional facts.

To summarize, the ontology of an institution is the outcome of three, interlocking layers: meta-institutional, institutional, and para-institutional. An institution is explained not simply by its rules but also by its axiological and teleological background and by the emerging features of the institutional practice. What I am going to argue now is that three kinds of power relevant for an institution—and here we come back to the main topic—can be distinguished accordingly.

3.2. Three Kinds of Power Relevant for an Institution

Power can be exercised at each of the three levels of institutional ontology. Institutional power is typically rule-constituted. Enacting statutes, applying and enforcing legal norms, sending laws back to the Parliament: All these are instances of institutional power, which along with institutional duties and other rights come with the specific roles and statuses an institution creates.

Meta-institutional power depends instead not on the institution's rules, but rather on the axiological and teleological background, the broader practice in which that particular institution is embedded. When games are played in non-formalized contexts, a player or a team has the power to quit whenever he or she wants: This is an activity people perform for fun, basically. Another example of meta-institutional power is the power that a player has to propose a change or adaptation or simplification of the rules, or even propose "house rules" given certain conditions (limits given by time and context, for example): If players agree, this house rule can become part of the game in that context. Unlike institutional power, meta-institutional power can be applied to different institutions, provided that they all belong to the same meta-institutional background: In non-formalized contexts, I can quit a match of chess or football, or baseball, or tic tac toe, or of any other game.

Para-institutional power is a causal capacity to influence other people's behaviour in virtue of having an institutional status and being able to obtain concrete effects from it. To take again the example of games, as a good player of chess I can influence worse players with my moves and ideas about the game, or I can make people try to avoid me in tournaments. This does not depend on the formal powers I have as a player—all chess players have the same powers in the game—but on the way I play, hence on the way I typically make use of those powers in the actual practice. Like in the case of meta-institutional power, para-institutional power can be cross-institutional, and indeed the example just made can be applied to all kinds of competitive games, not only chess. But it can also be typical of a given institution: If, as it seems to be the case, it is a typical para-institutional fact about chess that the white player, who moves first, has a slight advantage, then as a white player I can capitalize on this slight advantage by making my opponent play in a way different from that he or she would have liked.

It is apparent that there is a strong difference between institutional, meta-institutional, and para-institutional power: The first is normative, the second can be normative or causal depending on the conception one assumes, the third is definitely causal. Normative power has to do with the normative consequences of a given status, which can be expressed by way of sentences having deontic operators. Causal power is instead a capacity, hence a disposition to obtain effects that can be expressed by way of descriptive sentences. Though several authors have argued that there is an analogy between these two senses of power,[33] and the analogy indeed lies in the fact that they both trace back to the general idea of a capacity to get effects from reality, there is a categorial distinction between the two kinds of realities these effects take place in: To use Hans Kelsen's words, power in the first sense belongs to the domain of the Ought (*Sollen*), whereas power in the second sense belongs to the domain of the Is (*Sein*).

Meta-institutional power can be interpreted as being either normative, though less formalized and transparent than institutional power, or causal, depending on the conception. An example drawn from legal theory can be used to exemplify these two possible interpretations. Let us consider norm-enacting processes in law. As Kelsen among others has shown, it is possible to conceive legal systems as hierarchical chains of validity, in which norms are valid if enacted through acts of normative power qualified by other legal norms (or fragments of norms) of the system. Hence, in my terminology, a legal system can be interpreted as a system of statuses having the institutional power to enact other norms. The problem of this approach is that it leads to a regress: if a norm is valid because enacted through institutional power, and institutional power is rule-constituted, either you have an invalid norm at the root of the system or you have a power that is not institutional. Kelsen famously solved this problem with his idea of a transcendental *Grundnorm*, that is presupposed as valid and qualifies the power of the Constitutional Assembly. Hart, on the other hand, solved this problem by stating that his basic norm, the Rule of recognition, is not part of the formal game of validity because it is a social rule. An alternative to these normativistic solutions were those of John Austin, on the English tradition, and Carl Schmitt, on the continental: Both traced the ultimate foundation of law to a factual, causal power to become a source of directives for social behaviour in a community. I propose to interpret ontologically this long-standing and venerable problem of legal philosophy—the problem of the foundation of legal validity and authority—as a question of legal meta-institutional powers. Whether the Constituent Assembly originally had the constituent power to create the legal system is a question of meta-institutional rather than institutional power: it depends not on the power created by that legal system but on the more

[33] See for example Spaak (2009), p. 75; Hage (forthcoming).

general concept of law. It is a feature of our concept of law (at least as it evolved in the Western legal and political tradition) that a factual capacity to enforce in a way which is superior to all other claims is necessary to create legal rules, and also that the law should be enacted primarily in the form of rules (and not paradigms, for example). The distinction between normativists like Kelsen and reductionists like Austin and Schmitt—with Hart's insistence on the rule of recognition being a fact lying in between—is a distinction among which of the two features of legal meta-institutional power should prevail. Hence my conjecture is that Kelsen and Hart conceived meta-institutional power in law as primarily normative—though both provided an account of the role of effectiveness—whereas Austin and Schmitt conceived it as exclusively causal. Of course, this interpretation would require much more discussion than the one I can give in this work, but this conjecture should give an idea of the way in which I think the concept of meta-institutional power to be relevant for legal theory.

Para-institutional power is always causal. As a player, I have the capacity to do something in the game in the normative sense, whereas as a good player I have the factual capacity to influence other players' behaviour. Para-institutional power in law can have several different forms. Professors have several para-institutional powers connected with their institutional status, for example (1) the power to have students collaborate with them in the activities they propose in class (particularly before the exam), or (2) the power to influence their students' beliefs in virtue of their role. Other examples of para-institutional power in the legal domain are the following: (3) policemen in a city square influence the behaviour of people by their mere presence; (4) new regulations on tax deductions for house renovations can make people improve the anti-sismic resilience of their home; (5) receipt lotteries can reduce tax evasion; and (6) regulations prescribing that zebra crossings be drawn three-dimensionally can foster the prudence of car drivers. All these are instances of causal capacities to influence human behaviour in virtue of institutional legal roles, though it is clear that they are quite disparate in kind. A first, necessary clarification regards the causal mechanism that underlies the capacity. In some cases, para-institutional power is based on reasoning, and in particular prudential reasoning, like in the case of (1), (3), (4), and (5): Here, people are assumed to take into consideration the institutional powers connected with a given status and behave accordingly to maximize their benefits and minimize their costs. In other cases, the mechanism is less reflective and more automatic, as in the case of (2) or (6), where behavioural dispositions are elicited by way of a sort of cognitive or perceptive suggestion. Let's introduce then a distinction between transparent vs. opaque para-institutional power, but it is worth mentioning since now that this is more a matter of degree than a dichotomy: Is fear of sanction, as in (3), a prudential calculus or a behavioural unreflective attitude, or is hope for reward in a lottery, as in (5), rational or merely reactive, a kind of compulsion? Rather than presupposing a clearcut distinction between transparent and opaque para-institutional powers, we should talk of them as being *more or less* transparent or opaque.

Another distinction that is worth mentioning is that between direct and indirect para-institutional power. In (1), (2), or (3), causal influence on people's behaviour is exercised directly, simply in virtue of someone having a given status endowed with normative powers and the factual capacity of putting these powers into effect. On the other hand, (4), (5), and (6) all involve an influence by way of law-making power: A Legislator can influence people behaviour not directly, by virtue of its being the Legislator, but indirectly, by way of its enacted laws. All these para-institutional facts depend on what the Italian legal philosopher Amedeo G. Conte called "nomotropic behaviour", namely, behaviour that is not an instance of rule-

following but is performed in light of the rule or the context created by the rule.[34] An example of nomotropism in this sense is that of the thief described by Weber who, though he does not abide by the law of property, acts in light of the law of property when concealing the stolen goods. To capture the difference between direct and indirect para-institutional power in terms of the idea of nomotropism, it is important to appreciate that nomotropic behaviour can be twofold: either in light of a status' constitutive rules or in light of the regulative rules enacted by people having that status. When, for example, students show a collaborative attitude in class activities, they act in light of the rules constituting the status of professors and giving them the power to give grades at exams: Hence this is a case of direct para-institutional power. When, instead, students attend classes regularly, they possibly act in light of a rule set up by the professor about extended reading lists for non-attending students: This is indirect para-institutional power.

If we cross the distinctions between transparent vs. opaque, direct vs. indirect para-institutional power, we can introduce a taxonomy to put some order among the examples provided above. (1) is an instance of direct and transparent para-institutional power: Students are collaborative and kind with the professor because they act prudentially in light of the professor's institutional power to give grades (of course this is a rather gloomy view about students, and I trust it is inaccurate!). (2) is instead an instance of direct and opaque para-institutional power, because in this case students do not formulate a rational calculus but are rather impressed by the professor's aura of authority. (3) can be interpreted as a direct para-institutional power that is somewhat middleway between transparent and opaque: people regulate nomotropically their behaviour out of the policemen' capacity to react and inflict sanction, and this can be seen both as a rational calculus or simply as a gut reaction out of fear. (4), (5), and (6) are instead all instances of indirect para-institutional power, because here people act nomotropically not in light of the institutionally-empowered status but of the rules enacted by that status. (4) is transparent, because people make a cost-efficiency calculus about tax deductions, whereas (6) is opaque, because car drivers react behaviourally to three-dimensional zebra crossings differently than in the case of ordinary, flat road markings. (5) is, as in the case of (3), in the middle between transparent ad opaque para-institutional powers, because as said it is not clear whether the hope for a lottery win is a rational calculus or simply an automatic, unreflective attitude. An interesting question—though one I cannot deal with here—would be where to locate "nudge-like" regulations in this framework.

3.3. Andersson and Searle on non-Rule-Constituted Power

The phenomena I am trying to capture with the concepts of para-institutional and meta-istitutional power have been discussed in social ontology by Åsa Andersson, in her book *Power and Social Ontology*, and to some extent more recently by Searle himself in *Making the Social World* with his concept of "Background power".[35] Andersson formulates a "taxonomy of social power" distinguishing between normative and causal social power.[36] Under the normative kind of social power, she introduces a further distinction between "deontic" and "telic" powers. Deontic powers are created by an institution's constitutive rules, or more in general by status

[34] Conte (2011), pp. 47ss.
[35] See respectively Andersson (2007); Searle (2010), chap. 7.
[36] Andersson (2007), pp. 149ff.

functions attributions in Searle's sense: Hence, they fall under what I call "institutional" power. Telic powers, on the other hand, are connected not with the codified powers of a given status but with the ideal normativity that depends on that status's purpose.

> Many functions are defined in terms of goals or purposes, rather than in terms of rights and obligations. We impose a purpose or telos on knives, which makes it meaningful to speak of good or bad knives. […] This point holds for Searle's status functions too. A professor has certain rights and obligations in virtue of this status, but this status function can display a different kind of function, since the role is also characterized in terms of certain ideals the professors and others expect her to live up to.[37]

Andersson's concept of "telic power" seems to be broader than the concept of meta-institutional power I am presenting here. While meta-institutional power is explicitly focused on the kind of power that result from an institution's broader purpose or axiology, telic power can exist even without institutions.

> Telic power, in contrast to deontic power, is not necessarily dependent on institutions to exist, since there can be non-institutional social statuses displaying telic normativity. Some functions of being a woman is defined in terms of a purpose or goal, rather than in terms of rights and obligations, which means that there is an ideal measuring how well we live up to this purpose.[38]

On the other hand, Andersson's examples of telic power are instances of a disabling rather than enabling kind of normativity. If we consider some of the examples she provides—good professors are expected to publish high quality work beyond what is merely required, women ought to stay at home with the kids, boys ought to play soccer—telic normativity and telic power have to do with standards dictating what someone should, rather than can, do. In this sense, Andersson adopts Searle's broad notion of "power", which we have already touched upon in Section 2.2 above. My notion of meta-institutional power, instead, is meant to capture the enabling normative elements that can be connected with an institutional status in virtue of its conceptual background.

Andersson's other notion of power distinct from deontic powers—causal power—finds a parallel in my notion of para-institutional power. Above, I introduced para-institutional power as a kind of para-institutional fact, and defined para-institutional facts as phenomena that depend not on the institution's rules but on the way those rules are practiced. In other writings,[39] I explicitly linked para-institutional facts with what Searle calls "systematic fallouts", namely, "intentionality-independent facts about intentionality-relative phenomena".[40] Searle's idea is that some facts emerge from the way institutions are framed but are not institutional and do not carry a deontology with them:

> To take a trivial example, it has been discovered in baseball that, statistically, left-handed batters do better against right-handed pitchers, and right-handed batters do better against left-handed pitchers. This is not required by the rules of baseball; it is just something that happens. I propose to call these "third-personal fallout facts from institutional facts," or more briefly, "fallouts" from institutional facts. They are "third-personal," because they need not be known by participants in the

[37] Ibid., p. 97.
[38] Ibid., p. 151.
[39] See Roversi (2018), pp. 150ss.
[40] Searle (2010), p. 117; see also Thomasson (2003), pp. 275-276.

> institution. They can be stated from a third-person, anthropological, point of view. They carry no additional deontology, and so no new power relations are created by fallouts.[41]

Searle states here that "no new power relations are created by fallouts", meaning "power" in his sense of "deontic power", namely, institutional, normative power. Andersson notes, however, that fallouts create power relations in the causal sense: not a normative qualification, but an influence on people's behaviour that emerge as a more or less indirect side-effect of the rules. First, she broadens the focus from systematic fallouts to what she calls "social macro-phenomena", and she considers the former included in the latter:

> Social macro-phenomena include social structures such as class or gender structures, economic phenomena like inflation and recession, and urbanization and migration. Some macro-phenomena are unintended consequences of other arrangements, e.g. traffic jams and migration, while others are systematic fallouts (a species of unintended consequences), e.g., that entrepreneurs sell where marginal cost equals marginal revenue, or that people who are not able to sell their labor in a market economy will be poor.[42]

Then, she focuses on social structures as a kind of macro-phenomenon that can be at the root of causal power. Social structures restrict the opportunities of some and enhance the opportunity of others, whence the idea of causal power made possible by these structures.[43] They can be opaque and even unintentional and they are connected with membership in social groups, possible examples being gender inequalities, race discrimination, labour relations. Causal power can be "visible", when both the power-holder and the passive subject are aware of it, or "invisible" when either the power-holder, or the passive subject, or both are not aware of it. An example of visible causal power is the head of the central bank increasing the profit of his friend's company by simply mentioning that company as an interesting start-up.[44] The most invisible kinds of causal powers are instead dependent on existing social structures that can be in place even though the agents are unaware of them. As a result, just like in the case of telic powers compared with meta-institutional powers, Andersson's perspective on causal powers seems again broader than mine on para-institutional powers and also in some respects different. Though I explicitly made a distinction between "transparent" and "opaque" para-institutional power depending on the mechanism of motivation, para-institutional power is rooted in direct or indirect nomotropism with regard to an institutional status, hence it is in general visible in Andersson's sense. Hence, para-institutional power is only an instance and does not coincide with what Andersson qualifies as causal power. It is that kind of visible causal power that is connected with an institutional status.

Another discussion aimed at showing that the ontology of power cannot be reduced to institutional, rule-constituted power is Searle's treatment of "Background power" in Chapter 7 of his *Making the Social World*. In this chapter, Searle aims at broadening his notion of institutional, rule-dependent deontic power to capture a broader notion of social power, and in particular the diffused, acephalous processes of social normalization that Michel Foucault labels as "bio-power". Searle defines a core notion of power as follows:

---

[41] Searle (2010), p.117.
[42] Andersson (2007), p. 114.
[43] Ibid., pp. 121ss.
[44] Ibid., pp. 151-152.

> A has power over S with respect to action B if and only if A can intentionally get S to do what A wants regarding B, whether S wants to do it or not. Special cases of this are cases in which A gets S to want to do B when he would otherwise not have wanted to do it and where S wants to do B because he has been prevented by A from seeing all the available options.[45]

Clearly, this notion of power is causal: it is described through a non-normative but modal meaning of "can". Searle, however, thinks that normative, deontic power can be included in this core causal notion by way of the notion of reason for action.

> In simple paradigmatic cases of getting someone to do something, the power wielder does not necessarily have to use force. Indeed, this is a characteristic feature of deontic powers. They involve getting people to do things without using force. […] So, if I make a promise to you, then you do indeed have a deontic power over me, because I have created a binding reason on myself for doing what I promised to do. I think this is a case of a power relation, but deontic powers are typically cases in which the power consists of reasons for action. […] So deontic power is legitimately described as power even though typically it is not a case of the use or threat of force.[46]

According to Searle, then, in the case of deontic powers causal influence on people's behaviour is obtained through their sensitivity to reasons for action. Here Searle is implicitly performing a semantic shift in his notion of "deontic power", because even though the kind of reason-motivated power Searle is describing here certainly depends on people's acceptance of the institution's purpose and rules as standards, obviously it is not something that can be conferred through a rule, and hence it is not institutional and deontic. This is an important ambiguity to explain how Searle, with his notion of "Background power", uses a normative notion to explain causal, social processes of normalization.

> The Background and Network, as I have defined them, contain among other things, a set of norms of behaviour. If someone violates the norms of the community, various sorts of sanctions can be imposed on the violator. […P]rovided that there is indeed a set of shared Background norms, *anybody* can exercise power over *anybody* else.[47]

Background power is a kind of (causal) power that society exerts on individuals, pressuring them to conformity, because in case of violation any members of society have the (normative) power to sanction through criticism or disapproval or even violence. The power conferred to individuals is normative according to Searle because he traces it to Background norms. On the other hand, the pressure society exerts in virtue of Background norms is causal according to Searle because it is expressed in terms of possible influence:

> My knowledge that sanctions can be imposed upon me and that I would find those sanctions unacceptable places me in a power relation with those who have the perceived option of imposing the sanction. That is, they are able [a causal sense of "can"] intentionally to get me to do something, whether I want to do it or not, and that satisfies our initial core definition of power.[48]

---

[45] Searle (2010), p. 151.
[46] Ibid., pp. 147-148.
[47] Ibid., p. 157.
[48] Ibid. italics mine; comment in square brackets is mine.

Here the crucial expression is "perceived option": the normative power conferred by Background norms becomes a perceived option to sanction and hence a capability to causally influence others' behaviour because they act nomotropically in light of those Background norms.

This clarification about the ambiguous nature of Searle's notion of "Background power" enables me to explain the relation between that notion, on the one hand, and meta-institutional and para-institutional power on the other. Given that Searle has always used the concept of Background (and also of Network) to capture the web of concepts, capabilities and practices presupposed by institutions, my idea of meta-institutional facts as facts about the general social practices in which institutions are embedded can be seen as a specification of the Background: Hence, meta-institutional powers are a subset of Background powers. More specifically, meta-institutional powers are those Background powers that depend not simply on social norms in general, but on the specific sections of the local Background that are connected with institutions. As we have seen, however, it depends on the conception of meta-institutional powers we assume whether they are connected with Background powers in the normative or causal sense. Para-institutional powers, on the other hand, are not typically connected with the concept of Background powers, because they depend on nomotropic behaviour in light of an institutional status or of the rules enacted by that status, not in light of Background norms.

4. Conclusion: Three Theses about Rules and Power in Institutional Ontology

Given the foregoing discussion, we can now come back to our original question: Is all power relevant for an institution exhausted by the institution's constitutive or power-conferring rules? The answer is no. In giving an account of institutional ontology, institutional power is only one among three kinds that must be taken into account. Meta-institutional power does not depend on the institution's rules but rather on its conceptual, teleological and axiological background. It is cross-institutional and can be accounted for both in normative and causal terms. On the other hand, para-institutional power is a kind of causal influence on social behaviour that depends, either directly or indirectly, on institutional power and that can be more or less transparent. In some cases, it is cross-institutional, in other cases it is not. Both meta-institutional and para-institutional powers are part of the life of an institution, the first because it follows from that institution's conceptual and axiological roots, the second because it follows from its actual social effects. Restricting the notion of legally-relevant power to institutional power create a mono-dimensional perspective, whereas a three-dimensional conception of power is required to account for a full ontology of institutions.

The outcome of this analysis is that the relation between constitutive rules and power in institutional ontology is more subtle than it may seem. One can draw from a formalistic attitude in legal philosophy and from social ontology the idea that power depends on rules based on formal procedures or collective acceptance. On the contrary, it can happen that a non-formalized kind of power is implied not strictly by the rules but rather by their teleological structure and background, the social purpose that institution is meant to play in the community. It could even be that this meta-institutional, background layer provides the original power to enact formalized rules: if this were the case, power would not depend on constitutive rules but, on the contrary, constitutive rules would depend on that original power. Moreover, rules do not even exhaust the *object* of institutional power: The set of behaviours an authority could obtain

by exercising institutional power is not exhausted by rule-following behaviour. There is a whole domain of nomotropic behaviour an authority can aim at that is an indirect effect of rules enacted in virtue of normative power.

I take this to be a conclusion about the ontology of institutional power, and I think it is relevant not only for constitutive, power-conferring rules, but also for power-conferring rules in general. The examples I have used when discussing meta-institutional power, even when interpreted to be instances of normative power, clearly do not depend on the explicit rules of an institution but rather on background presuppositions. The general conventions about game-playing or the very concept of legal authority and of law in a given community are basic elements of social practices, a social grammar that the different institutions specify in various ways, depending on context: They are presupposed by the rules of these institutions, hence they are not conferred by those rules (though of course those rules elaborate on them). This means that even those power-conferring rules that, though institutional, are not constitutive cannot capture the idea of meta-institutional powers: just like constitutive, power-conferring rules do not exhaust the domain of institutionally-relevant power, neither do power-conferring rules more generally. The same holds for para-institutional powers. The examples of para-institutional power I have discussed, though clearly connected with institutional, normative powers, are instances of causal power that depend on the prudential reasoning or behavioural reactions of agents. Students who become more collaborative in the presence of professors act in light of those professors' capacity to exercise normative institutional power or simply in light of their institutional, rule-constituted status. But the institutional, rule-conferred power of professors is the normative capacity to change the student's normative situation by giving them a score at the final exam, not the causal capacity to influence them. This causal capacity of course depends on the rules but is not conferred by those rules. Just like constitutive, power-conferring rules, non-constitutive power-conferring rules cannot give professors the causal capacity that corresponds to para-institutional power. What I have argued with regard to constitutive, power-conferring rules holds as well for power-conferring rules in general.

One could object at this point that, by including into the picture both normative and causal kinds of power, I am in fact discussing two different kinds of phenomena under a single label. Under such an objection, it would be quite trivial to conclude that institutional ontology does not include instances of causal power like those I describe under the label 'para-institutional', because institutions are normative, rule-constituted entities, and then the kind of power they create cannot but be inherently normative. I think this objection can be countered by way of two distinct arguments. First, not all the examples of institutionally-relevant, not-rule-conferred power I have discussed are causal. As we have seen, under some interpretations meta-institutional power can be considered to be normative: only, it is not conferred by the rules of the institution but rather by the tacit, teleological and axiological presuppositions that form the institution's conceptual background. Second, the phenomena I have discussed are extremely relevant for institutional ontology: They are part of what an institution is. Even if all these instances of power are interpreted to be causal, they are connected with an institution's normative framework: Though they are not constituted by the institution's rules, they provide those rules' background (in the case of meta-institutional power) and they are indirect effects of those rules (in the case of para-institutional power). Their presence in the life of institutions is unavoidable: Constitutive and power-conferring institutional rules necessarily require a teleological and axiological background and necessarily will give place to peculiar kinds of nomotropic behaviour. This is the reason why I conceive the intertwining of institutional, meta-

institutional, and para-institutional layers to be a metaphysical feature of institutions, and from this my thesis follows that a complete metaphysical explanation of institutional power is not restricted to rule-constituted, normative power but rather calls for a complex intertwining of normative and causal powers.

Admittedly, however, the idea of focusing only on rule-constituted, normative power has an advantage over this more complex, more shaded view of institutional ontology, and this is that rule-constituted normative power is clearly defined, whereas both meta-institutional and para-institutional powers are quite vague. Meta-institutional power is vague because the norms or causal powers that lie behind a social practice are always fuzzy, tacit, and require a great deal of interpretation to make them explicit. Para-institutional power, on the other hand, is vague because the consequences of an institutional status or of regulations on social behaviour can be very indirect, to the point of being nothing else than unintended side-effects. Hence, while in the case of meta-institutional power the content is vague, in the case of para-institutional power it is the power-holder and its intentionality that is indeterminate. We face therefore a theoretical choice between a conception that provides a seriously partial and limited view of institutional power and one that, though more complete and encompassing, concedes that some facets of power can be fuzzy and indeterminate. My conclusion goes in support of this second alternative. Despite this vagueness and the complexities involved in identifying meta-institutional and para-institutional power, these kinds of power exist and are relevant for institutional ontology. Hence, constitutive and power-conferring rules do not exhaust the domain of power relevant for an institution.

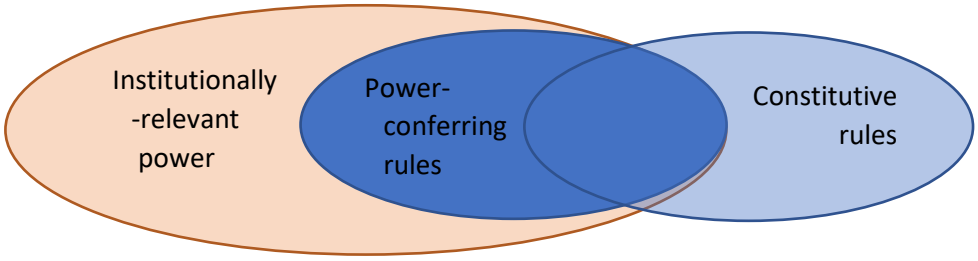
In conclusion, it is possible to summarize the overall discussion by advancing three theses about the relation between constitutive rules and power in institutional ontology.

First thesis. Constitutive rules do not necessarily attribute power to statuses: They can attribute only disabling modalities, like duties or prohibitions. Being a constitutive rule does not conceptually entail being power-conferring.

Second thesis. Not all normative power in a given institution is attributed through constitutive rules. Some powers are essential to the institution, some are not. Being a power-conferring rule does not conceptually entail being constitutive.

Third thesis. Power in a given institution is not exhausted by the rules of that institution. Some powers may depend on the deeper social practice the institution is embedded in and may therefore be meta-institutional. Some powers, that I have called para-institutional, may depend on the way people act in light of the rules, either for strategic reasons or behavioural dispositions.

One could draw these relations by imagining three sets: constitutive rules, power-conferring rules, and institutionally-relevant power. As said, the relation between the first two sets is one of intersection: They have some rules in common but not everything in the two sets is shared, nor is one set included in the other. On the other hand, institutionally-relevant power includes all power-conferring rules and the intersection with constitutive rules but is not exhausted by these two sets: Some powers connected with institutional statuses do not depend on rules. The following picture represents the relation I have tried to reconstruct:



References

Andersson A (2007) Power and Social Ontology. Malmö: Bokbox Publications

Baker L R (2004) The Ontology of Artefacts. Philosophical Explorations, 7, 99-111

Brigaglia M (2019) Potere: Una rilettura di Michel Foucault. Naples: Editoriale scientifica

Cameron J R (1972) The Nature of Institutional Obligation. The Philosophical Quarterly, 22, 318-32

Conte A G (1995) Regola costitutiva in Wittgenstein. In: Filosofia del linguaggio normativo. I. Studi 1965-1981. Turin: Giappichelli. (1st ed. 1981)

Conte A G (2011) Sociologia filosofica del diritto. Turin: Giappichelli

Epstein B (2015) The Ant Trap: Rebuilding the Foundations of Social Sciences. Oxford: Oxford University Press

Guastini R (1983) Cognitivismo ludico e regole constitutive. In: Scarpelli U (ed.) La teoria generale del diritto. Problemi e tendenze attuali. Studi dedicati a Norberto Bobbio. Milan: Comunità. 153-176

Hage J (2018a) Two Concepts of Constitutive Rules. Argumenta, 4, 21-39

Hage J (2018b) Foundations and Building Blocks of Law. The Hague: Eleven International Publishing

Hage J. (Forthcoming) Capabilities, Powers and Competences. In: *This Volume*. Berlin: Springer

Hindriks F (2005) Rules and Institutions. Essays on Meaning, Speech Acts and Social Ontology. Ablasserdam: Haveka BV.

Hindriks F and Guala F (2015) Institutions, Rules, and Equilibria: A Unified Theory. Journal of Institutional Economics, 11, 459-480

Lindahl L and Reidhav D (2017) Legal Power: The Basic Definition. Ratio Juris, 30, 158-185

Lorini G (2000) Dimensioni giuridiche dell'istituzionale. Padova: CEDAM

MacCormick N (1986) Law as Institutional Fact. In MacCormick N, Weinberger O, An Institutional Theory of Law. Dordrecht: Kluwer, 49-76

MacCormick N (1998) Norms, Institutions, and Institutional Facts. Law and Philosophy, 17, 310-345

Marmor A (2009) Social Conventions: From Language to Law. Princeton: Princeton University Press

Raz J (1975) Practical Reason and Norms. Oxford: Oxford University Press

Raz, J (1979) The Authority of Law: Essays on Law and Morality. Oxford: Oxford University Press

Ross A (1957) Tû-Tû. Harvard Law Review, 70, 812-825

Roversi C (2007) Pragmatica delle regole constitutive. Bologna: GEDIT

Roversi C (2010). Constitutive Rules in Context. Archiv für Rechts- und Sozialphilosophie, 96, 223-238

Roversi C (2018) Constitutive Rules and the Internal Point of View. Argumenta: Journal of Analytic Philosophy, 4, 139-156

Roversi C (2019) Six Heresies on Constitutive Rules. Diritto e Questioni Pubbliche, 2, 1-25

Roversi C (2021a) In Defense of Constitutive Rules. Synthese, 119, 14349-14370

Roversi C ((2021)b) A Three-dimensional Ontology of Customs. In: Frezet E, Goetzmann M and Mason L (eds.) Spaces of Law and Custom. London: Routledge, 27-45

Schwyzer H (1969) Rules and Practices. The Philosophical Review, 78, 451-467

Searle J R (1969) Speech Acts. An Essay in the Philosophy of Language. Cambridge: Cambridge University Press.

Searle J R (1995) The Construction of Social Reality. New York: The Free Press.

Searle, J R (1997) Responses to Critics of The Construction of Social Reality. Philosophy and Phenomenological Research, 57, 449-58

Searle J R and Smith B (2003) The Construction of Social Reality: An Exchange. American Journal of Economics and Sociology, 62, 285-309

Searle J R (2010) Making the Social World: The Structure of Human Civilization. Oxford: Oxford University Press

Spaak T (2009) Explicating the Concept of Legal Competence. In: Haage J, von der Pfordten D (eds.) Concepts in Law. Berlin: Springer, 67-80

Thomasson A (2003) Foundations for a Social Ontology. Protosociology, 18-19, 269-90