

Chapter 2

Separating Rules from Normativity

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Abstract Often the notion of a rule is connected to the guidance of behaviour. The expression ‘following a rule’ nicely illustrates this. The aim of this paper is to show that this connection between rules and normativity is much looser than is often assumed, and that—although there are rules which aim to guide behaviour—the notion of a rule and the notion of normativity are not necessarily connected.

This aim is pursued by two arguments. The first argument tries to show that rules that guide behaviour, regulative rules, are at the same time constitutive rules and that therefore the opposition of regulative and constitutive rules is a bogus one. To this purpose, it is first shown that there are more constitutive rules than counts as-rules only. Secondly it is argued that there can be ‘deontic facts’, facts that specify what should be done, and which can therefore guide behaviour. These facts can fulfil the role of guiding behaviour, and therefore rules are not essential to fulfil this function. Thirdly it is shown that two main kinds of ‘regulative’ rules are in fact both kinds of constitutive rules, and more in particular duty imposing fact to fact-rules or obligation-creating dynamic rules. The existence of these obligations and duties are deontic facts. Fourthly it is argued, very briefly, that other kinds of regulative rules are, for similar reasons, also constitutive rules and that therefore regulative rules are a subcategory of constitutive rules.

The second argument tries to give an account of rules as constitutive rules by presenting rules as constraints on which facts can go together, or—to state the same in more technical jargon—as constraints on possible worlds. To this purpose the argument takes from model-theoretic semantics the ideas of a possible world and of constraints that define which worlds count as possible. The technical aspects of model-theoretic semantics are mostly ignored, however, since they are irrelevant

The argument in this paper elaborates some of the ideas that were mentioned in Hage (2013), and parts of this paper are adaptations of the texts of the Sects. 2.3 and 2.4 of that article. The argument in its present form has not only benefited from comments from the persons mentioned in the footnotes, but also from other participants in the Rules 2013 conference in Kraków, where an earlier version of the argument was presented, and in particular those of Michał Araszkiewicz, Andrzej Grabowski, and Marcin Matczak.

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for the purposes of this paper. The paper gives a mostly informal indication of the logic of constitutive rules by positing them as ‘soft constraints’ in between the constraints that define sets of possible worlds and declarative sentences which are contingently true or false.

Keywords Constitutive rules · Constraints on possible worlds · Deontic facts · Duties · Obligations · Regulative rules

2.1 Regulative and Constitutive Rules

The idea of a rule is traditionally associated with the guidance of behaviour. Rules prescribe behaviour, they can be followed, obeyed and disobeyed, and after the behaviour has taken place, rules can be used to evaluate behaviour as correct or incorrect. This association between rules and the guidance of behaviour is reflected in philosophical discussions about rule following¹, and in jurisprudential accounts of the nature of law. According to Aquinas, law is a rational ordering of things²; according to Kelsen³, law consists of norms, where norms are defined in terms of ‘ought’, and according to Hart⁴, primary rules are behaviour guiding rules. Moreover, recent discussions emphasise the behaviour guiding role of law.⁵

And yet some rules seem not to guide behaviour at all, or only in the marginal sense that they allow the evaluation of behaviour as correct (in agreement with the rule) or incorrect. Examples of rules which seem not to aim at guidance at all are the rules that confer competences, or define the institutions of, for example, the European Union. Examples of rules which do not strictly guide behaviour but which can nevertheless be used to evaluate behaviour as correct or incorrect are the rules of language and of mathematics, but also the definitions of terms used in legislation, and the rules that specify which procedure should be followed in order to reach a particular result.

Rules of games form an in between category in the sense that they only specify what should be done in order to play the game correctly. They do guide behaviour, but only for those who want to play the game. Some would see the ‘rules’ of morality⁶ and legal rules⁷ in a similar way: they only specify what somebody should do who wants to comply with morality or with the law.

¹ Wittgenstein (1953); Kripke (1982); Brożek (2013).

² Aquinas (S. Th.) I, II, qu. 90 Sect. 4; d’Entrèves (1970, p. 57).

³ Kelsen (1960).

⁴ Hart (2012, p. 94).

⁵ Shapiro (2011, pp. 118–234); Berteau (2009); Berteau and Pavlakos (2011).

⁶ Foot (1978).

⁷ Raz (1977).

The phenomenon that not all rules can easily be said to guide behaviour has found philosophical recognition in the distinction between regulative and constitutive rules. This distinction has gained most of its popularity from the work of Searle.⁸ According to Searle regulative rules regulate antecedently or independently existing forms of behaviour.⁹ He mentions rules of etiquette as an example. Constitutive rules, on the contrary, would create or define new forms of behaviour. In a later work Searle discusses constitutive rules as a means to impose status.¹⁰ An example would be the status of money which is imposed on pieces of paper. Constitutive rules are then assumed to have the form ‘X counts as Y under circumstances C’; they are what will later be called ‘counts as-rules’.

My aim in this paper goes far beyond Searle’s however. I will argue that *all* rules are constitutive and that strictly speaking no rule guides behaviour. Norms may be defined as rules that prescribe or prohibit behaviour. My purpose is to separate these two aspects of norms into the rule-aspect of a norm and the normative aspect of a norm. The rule-aspect as such has no normative aspect, while the normative aspect can exist separate from the norm. It is this normative aspect, what I will call a deontic or normative fact, which guides behaviour and which can be followed or violated.

To this purpose I will argue that:

1. Searle’s account of constitutive rules is too limited, and that there are more kinds of constitutive rules than only counts as-rules;
2. regulative rules can very well be interpreted as a kind of constitutive rules, and that therefore Searle’s opposition between regulative rules and constitutive ones is a bogus one.
3. constitutive rules can be interpreted as a kind of constraints on what counts as possible.

The ultimate purpose of the argument is to disconnect the notion of a rule from that of normativity and to emphasise the role of rules as tools by means of which human beings impose ontological structure upon the world.¹¹ In my argument I will mostly use legal examples, but I do not think that this bias damages the strength of the overall argument.

⁸ Searle (1969, 1979, 2010).

⁹ Searle (1969, p. 33).

¹⁰ Searle (1995, pp. 43–44).

¹¹ The exact opposite has been argued by Zelanec (2013, p. 98), who states that constitutive rules cannot create anything unless they are followed. I became aware of this argument too late to discuss it extensively. My main objection would be that it is not the ‘being followed’ of constitutional rules that gives them their effect, but their existence. Moreover, it is not at all clear how, for instance, count as-rules can be followed.

2.2 Three Kinds of Constitutive Rules

The first step in my argument that regulative rules are constitutive is to distinguish between three different kinds of constitutive rules. It is not my intention to argue that these three kinds are the only constitutive rules, but their existence suffices to show that there is no need to assume the existence of regulative rules which are not at the same time constitutive rules. The three kinds of constitutive rules that will be distinguished are dynamic, fact-to-fact, and counts-as rules.

2.2.1 *Dynamic Rules*

Dynamic rules create new facts, or modify or take away existing facts, as the consequence of an event. Examples of events to which a dynamic rule attaches consequences are that:

- John promised Richard to give him € 100, which leads to an obligation for John to pay Richard € 100;
- Eloise was appointed as chair of the French Parliament, which has as consequence that Eloise has become chair of the French Parliament;
- a creditor informs his debtor that the latter will not have to repay the money before next year, which has as consequence that the debtor is not under an obligation to repay the money before next year;
- the legislator derogates a law, which has as consequence that the law does not exist anymore.

Dynamic rules may be conditional, in which case their consequences are only attached to the events under certain conditions. An example is the rule that if it is dark, the occurrence of a car accident obligates the drivers to place a light on the road next to the cars.

In law, some dynamic rules attach the presence of an obligation to the occurrence of a particular kind of event. The obvious examples are the rules of contract and tort law.

2.2.2 *Fact to Fact-Rules*

Fact to fact-rules attach a fact to the presence of some other fact. They make that facts of one type (almost¹²) always go together with facts of some other type. Fact to fact-rules are different from dynamic rules because the relation between the connected facts does not involve the lapse of time. An example is the rule that attaches

¹² This ‘almost’ has to do with the defeasible nature of rule application. To avoid complications which have nothing to do with the purpose of this paper, I will ignore defeasibility in the rest of this paper.

the fact that P is competent to alienate O to the fact that P owns O. For example, if Smith owns Blackacre, she is competent to transfer her property right in this real estate to Jones. This is a relation between two facts—being an owner and having the competence to transfer—which does not involve any change that occurs in time.

Fact to fact-rules may be conditional too. An example is the rule that the mayor of a city is competent to evoke the state of emergency in case of emergencies. This rule attaches the fact that some person has a competence to the fact that this person is the mayor under the condition that there is a state of emergency.

Fact to fact-rules often attach a duty to the presence of some status, such as being a house-owner, being the public prosecutor, or being the mayor of a city. Such rules are also duty-imposing rules.

2.2.3 *Counts as-Rules*

Counts as-rules have the following structure: Individuals of type 1 count as individuals of type 2. These ‘individuals’ may be human beings, as in the rule that the parents of a minor count as the minor’s legal representatives. Often, however, the ‘individuals’ are events. For instance, under suitable circumstances, causing a car accident counts as committing a tort, or offering money to another person counts as attempting to bribe an official.

Usually counts-as rules are conditional, meaning that individuals of type 1 only count as individuals of type 2 if certain conditions are satisfied.¹³ An example from Dutch law would be the rule that the delivery of a good counts as the transfer of that good if the person who made the delivery was competent to transfer and if there was a valid title for the transfer.¹⁴

2.2.4 *Constitutive Rules and the Direction of Fit*

All three kinds of constitutive rules, dynamic, fact to fact-, and counts as-rules, affect the facts in the world. A dynamic rules generates new facts, modifies existing ones, or takes existing facts away as the result of some event. Fact to fact-rules make that facts of particular kinds go together with other facts in a timeless fashion. This makes that the first-mentioned facts are attached by the fact to fact-rules to the last-mentioned facts. Counts as-rules, finally, make that some kinds of ‘things’, often events, are also ‘things’ of another kind.

Rules have a lot in common with descriptive sentences: they have a propositional content and they can in some sense ‘correspond’ with facts. For example, the rule that criminals are liable to be punished ‘corresponds’ to the fact that criminals are liable to be punished, just as the descriptive sentence ‘Criminals are liable to be

¹³ Searle (1995, pp. 43–45).

¹⁴ Art. 3:84 of the Civil Code (*Burgerlijk Wetboek*).

punished' corresponds to this fact. However, in this correspondence lies also a major difference with descriptive sentences. Descriptive sentences are 'successful' in the sense of 'true' if they match the facts. They have the 'word-to-world direction of fit'.¹⁵ Constitutive rules are successful in the sense of 'valid', if the facts match the rule. With this match I do not mean that the rule is obeyed, but that the content of the rule is reflected in the world.¹⁶ For instance, the rule that thieves are punishable is reflected in the world if (because of this rule) thieves are punishable. Valid constitutive rules—which I take to be the same as existing constitutive rules—impose themselves on the world. They have the world-to- word direction of fit because they constrain the world in the sense that not all combinations of facts are possible. As a consequence, these rules bring about facts, and in this sense they are constitutive.¹⁷

2.3 Regulative Rules

Having argued that there are more constitutive rules than counts as-rules only, the next argument step will lead to the conclusion that regulative rules can well be seen as a special kind of constitutive rules. To make this step, an intermediate conclusion is required, namely that there can be deontic facts.

2.3.1 *Deontic Facts*

Sentences that tell one what to do often take the form of declarations. For example, the sentence 'You ought to go to the supermarket' looks very much like the sentence 'You will go to the supermarket'. Is this similarity misleading, covering up a kind of order as a description? Or does the former sentence, if it is true, stand for a fact? Because the description contains a 'deontic operator', such as ought, should, must, is to ... etc. the kind of fact at stake would then be a 'deontic fact'.¹⁸ I will argue for the view that these sentences express deontic facts indeed.

¹⁵ Searle (1979). See also Grabowski (1999).

¹⁶ See also footnote 12.

¹⁷ It might be asked—and I owe this question to Tomasz Gizbert-Studnicki—whether the use of the term 'constitutive rule' would not better be reserved for counts as-rules only. This would avoid confusion, given the restricted use of the term in prior work, in particular Searle's.

There is something to be said for that approach, but then we would still need a broader term that applies to counts as rules, fact to fact rules, and dynamic rules. Moreover, either one of the terms 'counts as-rule' or 'constitutive rule' would become superfluous, since the two categories to which the terms apply coincide. However, as we will see, the same objection applies to what I will propose, because then the category of constitutive rules will coincide with that of rules.

¹⁸ The term 'deontic' is used, in particular in logic, for what should (not) be done, or be the case, and also for what is permitted. I would not mind giving up the term in favour of 'normative fact', if only this would not create confusion with norms in the sense of a kind of rules.

The following argument that there can be deontic facts is unavoidably too brief to convince readers who firmly believe in the gap between is and ought. It makes presuppositions about the role of the mind in structuring the world which I defended elsewhere.¹⁹ Here my argument will essentially be limited to clearing away two possible misunderstandings.

One misunderstanding is that a sentence such as ‘You ought to go to the supermarket’ is ‘really’ a kind of order or exhortation, rather than the description of a fact, because it is, or can be, used to make somebody do something. Underlying this misunderstanding is the—often implicit—assumption that the world is inert and that (beliefs about) facts in the world cannot guide behaviour unless accompanied by a motivating factor such as a desire. This would be the reason why the fact that somebody ought to do something, or—probably better—that somebody is aware that he ought to do something, guides his behaviour.²⁰ Because facts by themselves, without accompanying desire, could not guide behaviour, it could not be a fact that somebody ought to do something.

This first misunderstanding has been attacked by Geach²¹ and Searle²² basically because the speech act which can be performed with a sentence does not determine the meaning of the sentence. The sentence ‘You ought to do A’ means the same when it stands on its own as when it is used the conditional sentence ‘If you ought to do A, I will eat my hat’. So if the sentence expresses a fact in its second use, it also expresses a fact in its first use.

The other misunderstanding is that a ‘real’ fact cannot depend on what humans think, believe, project, accept or recognise. On the assumption that standards for goodness and for what should be done are mind-dependent, the misunderstanding becomes that ‘real’ facts cannot depend on standards. This misunderstanding is essentially that of applying an ontological realist stance to all domains, including those in which this is less suitable. One such domain is that of social reality, because social reality depends to a large extent on what people accept or recognise about it.²³ If there are some domains of facts (e.g. social reality) for which an ontological realist stance is not appropriate, there is no decisive reason why other domains could not be mind-dependent too. This opens up the possibility to recognise the existence facts that depend on standards, including facts that depend for their existence on rules. In law, the existence of such facts is assumed in a routinely fashion, for instance when it is said that (it is a fact that) somebody is the owner of a good. If facts can depend on rules, there is no good reason why there cannot be deontic facts.

Because normative judgments can very well, and often are, expressed by means of declarative sentences, apparently there are deontic facts which are expressed by these sentences. The two objections do not suffice to take the force of this appearance away.

¹⁹ Hage 1987. See also Hage (2015), for an English rendering of one of the main arguments of my PhD-thesis.

²⁰ Cf. for instance, the account of ‘internal reasons’ in Williams (1980).

²¹ Geach (1956).

²² Searle (1969, pp. 136–140).

²³ Searle (2010, p. 8).

Fig. 2.1 Rules, facts and descriptions



2.3.2 *Rules, Facts and Descriptions*

A regulative rule is a rule that guides behaviour, either by prescribing or prohibiting particular kinds of behaviour or by indicating what should be done, or how something should be done, without imposing a duty or an obligation to do so.

Examples would be the rules:

- It is forbidden to torture sentient beings.
- Car drivers must drive on the right hand side of the road.
- If the king is in chess, the threat should immediately be removed.

However, these sentences can not only be interpreted as rule formulations, but also as descriptive sentences which, if they are true, express deontic facts. Moreover, if these sentences are true, the most likely explanation is that this is so because the rules with the same formulation brought about the facts which made the sentences true. In schema (Fig. 2.1):

Let us take a closer look at this mechanism according to which rules lead to facts which can be described by sentences that are identical to the rule formulations. To show that this has everything to do with the relation between constitutive rules and facts, and nothing in particular with regulative rules as such, I will start with a competence conferring rule. An example would be the fact to fact-rule that owners of real estate are competent to mortgage this real estate. Then, if Smith owns Blackacre, the rule makes that Smith is competent to mortgage it. The rule applies only to individual cases and makes that in all these cases the owners of real estate have the competence to mortgage it. Indirectly, via these individual cases, the rule also makes that (all) owners of real estate are competent to mortgage this real estate. And this general fact is truly described by the sentence ‘Owners of real estate are competent to mortgage this real estate’.

The same line of reasoning can—almost literally—be applied to rules that lead to deontic facts. An example would be the fact to fact-rule ‘Car drivers should drive on the right’. Let us assume that this is an existing (valid) rule. Then, if Schmidt drives a car, the rule makes that Schmidt should drive on the right. The rule is applicable to all persons who drive cars and imposes on all these persons the duty to drive on the right. The rule applies to all individual drivers and makes that they should drive on the right. As a result, car drivers should drive on the right, and this general fact is truly described by the sentence ‘Car drivers should drive on the right’.

A similar line of reasoning can be used in the case of dynamic obligation imposing rules. An example would be the dynamic rule that those who promise somebody else to do something are from then on under an obligation towards this other person to do what was promised. If this is a valid rule, then, if Smith promised Jones to pay her € 500, the rule makes that Smith is under an obligation towards Jones to pay her € 500. The rule is applicable to all individual persons who made a promise to do something and imposes on all these individuals the obligation to do what they

promised. That all these individuals are under this obligation is truly described by the sentence ‘Those who promise somebody else to do something are from then on under an obligation towards this other person to do what was promised’.

2.3.3 *Regulative Rules Are also Constitutive Rules*

I have discussed two examples of rules that constitute deontic facts, primarily duties or obligations for individual persons, but in a derived sense also for categories of persons. These two examples represent two kinds of regulative rules, namely fact to fact-rules which impose duties on categories of persons, and dynamic rules which impose obligations on persons as the result of events. There are still other categories of regulative rules, for instance the rule of etiquette, which do not really *prescribe* behaviour, but which still tell agents what to do.²⁴ Another example is the rule that if the king is in chess, the threat to the king should be removed immediately. These regulative rules are also constitutive in the sense that they make that agents *should* do something. Such should-facts exist in the same manner as duties and obligations, and if the latter two categories of facts are constituted by rules, so is the former. Therefore these non-mandatory regulative rules are no counter-examples against the general thesis that regulative rules are also constitutive rules. I submit here the thesis that all regulative rules are also constitutive rules, and that they only differ from other constitutive rules in that they constitute deontic facts, rather than other kinds of facts. This is not a sufficient reason to make a special category out of them.

2.4 Rules as Soft Constraints on Possible Worlds

If, as argued above, regulative rules are a subcategory of constitutive rules, one may wonder whether all rules are constitutive ones. A first reason to assume that this is indeed the case is that as yet no other kinds of rules than regulative and constitutive ones have been identified. If all these rules are constitutive, then at least it seems that all rules are constitutive. However, it is also possible to give a positive account of the nature of rules which leads to the conclusion that all rules are constitutive. According to this account, rules are a kind of ‘constraints’ on possible worlds, and more in particular a special kind of constraints, namely ‘soft’ ones.²⁵

Possible worlds play an important role in model-theoretic semantics, an important part of modern logic. Therefore it is important to understand what these possible worlds are. The best technical approximation of logically possible worlds is the interpretation function that explains how truth values are assigned to compound

²⁴ This was pointed out to me by Paul Boghossian.

²⁵ The present account of rules as constraints on possible worlds is relatively non-technical. A technically more elaborate account can be found in Hage (2005).

sentences on the basis of the truth values of atomic sentences and to atomic sentences on the basis of individuals being elements of sets.²⁶ The nature of possible worlds is seldom discussed in an informal manner, however.²⁷ It may therefore be useful to say a little more about possible worlds, and to explain the role of constraints in defining which worlds count as possible ones.

2.4.1 *States of Affairs, Possible Worlds and Constraints*

For the purpose of this article, the terms ‘possible world’ and ‘state of affairs’ will be defined as follows:

A *state of affairs* is what is expressed by a declarative sentence. Notice that it is not necessary that the sentence is true. States of affairs are merely ‘potential facts’. True sentences express *facts*, a subset of the states of affairs.

A *possible world* is a complete set of compatible states of affairs. Both completeness and compatibility are defined below.

Logic cannot determine which states of affairs are compatible, because logic presupposes the notion of (logical) compatibility rather than defining it. Which states of affairs are deemed compatible is not something that is ‘objectively’ given²⁸ but depends on the constraints that are imposed on the world. Constraints determine which states of affairs can go together in a possible world. It is possible that it rains and the sun is shining at the same time, but not that John is both a thief and not a thief.

Compatibility of states of affairs is by definition relative to a set of one or more constraints. The states of affairs that John is a thief and that he is not a thief are incompatible because of the constraints that a state of affairs cannot both exist and not. Another constraint is that the compound state of affairs that John is both a thief *and* a minor can only exist if *both* the states of affairs that John is a thief and that he is a minor exist. Such constraints are usually called *logical* constraints.

Besides logical constraints there are also other constraints. *Physical* constraints prevent a piece of metal being heated without expanding. *Conceptual* or *semantic* constraints make it impossible that something is both a square and a circle.

What is possible depends on the constraints that are taken into account. This brings us back to the notion of a possible world. A possible world is a set of states of affairs that are compatible relative to some set of constraints *C*, in the sense that the facts of that world satisfy the constraints in *C*. For instance, a logically possible world does not contain both the fact that the capital of Belgium is Brussels and the fact that the capital of Belgium is not Brussels.

²⁶ E.g. Kripke (1963).

²⁷ Cf. Lewis (1973); Chellas (1980, p. 4); Forbes (1995). But see Loux (1979) and Stalnaker (2011).

²⁸ Some may contest this with respect to physical necessities.

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