

Constitutive Rules and the Internal Point of View

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Abstract

In this paper, I connect J.R. Searle's concept of constitutive rules and H.L.A. Hart's concept of internal point of view and look for an extension of this joint paradigm in institutional ontology. I make a distinction between five different perspectives about an institution—structural, teleological, axiological, strategic, and sociological—and connect these perspectives to three kinds of concepts: institutional, meta-institutional, and para-institutional. In the light of these distinctions, I submit that an explanation of institutional phenomena requires a three-dimensional ontology consisting of a structure (framed by constitutive rules), a conceptual background, and an actual practice. I then proceed by showing that this three-dimensional ontology makes it possible to specify Hart's famous distinction between internal and external point of view (the latter being either moderate or extreme) into a more shaded distinction between six different approaches to an institution, exemplified by six different archetypical characters.

Keywords: Constitutive Rules, Institutions, Social Ontology, Internal Point of View, H.L.A. Hart.

1. Introduction: H.L.A. Hart and J.R. Searle

When considering the main authors who have been giving a major contribution to the philosophical discussion on constitutive rules, the role of H.L.A. Hart is often overlooked. This is quite odd, in a sense, given the focus he devotes to the enabling character of several legal norms, as opposed to the disabling character of duty-imposing commands. He writes in this regard:

The criminal law is something which we either obey or disobey and what its rules require is spoken of as a 'duty.' [...] But there are important classes of law where this analogy with orders backed by threats altogether fails, since they perform a quite different social function. Legal rules defining the ways in which valid contracts or wills or marriages are made do not [...] impose duties or obligations. Instead, they provide individuals with facilities for realizing their wishes. [S]ome of the distinctive features of a legal system lie in the provision it makes, by rules of this type, for the exercise of private and public legal powers. If such

rules of this distinctive kind did not exist we should lack some of the most familiar concepts of social life, since these logically presuppose the existence of such rules (Hart 1994: 27-28, 32).

Hart speaks here of concepts that logically presuppose rules and are connected to private and public powers. He calls these rules secondary, as opposed to primary rules of obligation.

Another important distinction we find in Hart's philosophy of law is that between an internal and an external point of view on rules. Hart maintains that one of the crucial features of the social phenomenon we call "existence of a rule" is that people have an *internal* point of view, namely, they treat the rules as standards for justifying their behaviour and possibly criticizing that of others. On the other hand, when people simply describe regularities of behaviour or the beliefs of others about their own rules, they adopt an *external* point of view. Usually, people who adopt an internal point of view use a specific normative vocabulary, which in the case of the primary rules of obligation involves expressions like "You ought," "You must," "That is right," and "That is wrong" (see Hart 1994, 55ff.).

Now, in Hart's view, the existence of a legal system requires an internal point of view not only on primary rules of obligation but also on secondary rules. When officials have an internal point of view in regard to secondary rules, their normative vocabulary is enriched by a set of concepts that is much broader than the one which includes only simple deontic qualifications of behaviour:

With the addition to the system of secondary rules, the range of what is said and done from the internal point of view is much extended and diversified. With this extension comes a *whole set of new concepts and they demand a reference to the internal point of view for their analysis*. These include the notions of legislation, jurisdiction, validity, and, generally, of legal powers, private and public (Hart 1994: 98-99; italics added on last occurrence).

This phenomenon of rule-created concepts connected with an internal point of view, namely, an attitude of general acceptance of the rules, is similar to the one that John R. Searle describes in terms of constitutive rules. In his theory, Searle shows how human beings create institutional phenomena by collectively accepting constitutive rules assigning status functions to "brute" facts. In Searle's theory, as in Hart's, the acceptance of constitutive rules relates to a specific internal perspective in which agents act according to the rules and use the concepts defined by them: This is the perspective where agents interact with the institutional facts made possible by those rules. The institutional world made possible by constitutive rules so understood is pervasive, and to appreciate as much we can look at the following passage by Searle:

One of the advantages of living in other cultures is that one can become more acutely conscious of the different and unfamiliar institutional structures. But at home one is less aware of the sea of institutionality. I get up in the morning in a house jointly *owned* by me and my *wife*. I drive to do my *job* on the *campus* in a car that is *registered* to both of us, and I can drive *legally* only because I am the holder of a *valid California driver's license*. On the way, I *illegally* answer a cell phone call from an old *friend*. Once I am in my *office* the weight of institutional reality increases. I am in the *Philosophy Department* of the *University of California* in

Berkeley. I am surrounded by *students*, *colleagues*, and *university employees*. I teach *university courses* and make various *assignments* to my *students*. The *university* pays me, but I never see any *cash* because my *pay* is *deposited* automatically into my *bank account*. [...] All the italicized expressions in the previous paragraph refer to institutional reality in its various aspects. Institutional facts range all the way from the informality of friendship to the extreme legal complexities of international corporations (Searle 2010: 90-91).

For all the similarities between Searle's concept of constitutive rules and Hart's concept of secondary rules, the two are not identical. In particular, Hart's secondary rules are meta-rules, that is, rules that define concepts and institutions related to the way in which other rules in the legal system must be dealt with (see Hart 1994, 96-98). By contrast, Searle's constitutive rules simply attribute status functions that are not necessarily connected with the use of other institutional rules. Hence, one could conclude that Hart's secondary rules are a subset of Searle's constitutive rules. However, it cannot be denied that both Hart's and Searle's theories seek to address the way rules can provide us with new ways of thinking and acting.

The question, then, is: can Hart's internal point of view on an institution and Searle's concept of constitutive rules be sufficient to understand the conceptual domain linked to that institution and the behaviour of the agents who interact with it? I submit that they cannot: other elements are needed. If we are to understand the "life" of an institution, we need to be acquainted not only with its specific rule-constituted concepts but also with the social purpose and meaning of the overall practice these constitutive rules are part of: we have to view constitutive rules in light of a background practice that the institution instantiates. And this in turn gives rise to a more nuanced distinction between the possible perspectives that agents may have on an institution. It is not only a matter of whether we take an internal or an external point of view on rule-defined facts, or whether we accept them or not, or how we interact with them: it is also a matter of how the institution's structure, purpose, and core values are conceived, how we act strategically with respect to it, how interested we are in its typical sociological outcomes, and so on. Hence, the kind of conceptual broadening that Hart and Searle rightly call for in explaining law and institutional facts in general requires a knowledge not only of constitutive rules but also of the background in which these rules are embedded, a background that moulds the possible kinds of perspectives we can take when dealing with institutions and living in an institutional setting. In this sense, we have to push Hart and Searle's perspective further.

In this paper, I present five different kinds of perspectives on rule-constituted institutions—structural, teleological, axiological, strategic, and sociological—illustrating how these perspectives are typically connected with different kinds of concepts. I also argue that not all these concepts can be explained in terms of constitutive rules: these rules only form the *structure* of institutions, but a full explanation of institutional concepts needs to be complemented by bringing in both the background and the practice connected to that structure. Further, I show how the distinction between different kinds of perspectives on an institution makes it possible to nuance and further specify the distinction between the internal and external points of view put forward by Hart. The structure of the paper is as follows. In Section 2, I present the *structural* perspective, arguing that

it typically focuses on *institutional* concepts, namely, concepts constituted through rules. In Sections 3 and 4, I respectively deal with the *teleological* and *axiological* perspectives, and show how these are based on *meta-institutional* concepts of two different kinds. In Section 5 and 6, I introduce the *strategic* and *sociological* perspectives and connect them to *para-institutional* concepts, again of two different kinds. In Section 7, I relate these perspectives to Hart's distinction between the internal and external points of view, showing how they can specify and enrich that distinction. Finally, in Section 8, I draw some conclusions.

2. The Structural Perspective

Suppose I want to teach my daughter Adriana to play chess. I lay the chessboard on the table and look at her: she is curious, she really wants me to teach her what this strange thing is. But I immediately face a crucial question: How should I teach her? I begin to ponder several options but am pressed by her insistence. So I decide to adopt this method: "Ok, Adriana, this is the chessboard. And this is the king, that is the queen, and here we have the two bishops, the rooks, the knights, and all the pawns. Now, let me explain how chess works: the king can move only by one square, whereas the queen can move in any direction Oh, and any piece can capture any other piece simply by landing on the same square once its own move has been completed"

Here I would be taking a structural perspective on the game of chess. Indeed, what I am describing to Adriana is the *structure* of the game, and in particular that of its basic concepts: the pieces, the mechanics by which pieces can be "taken" or captured, the possible moves. I am teaching her the game's constitutive rules. According to Searle, all these rules can be traced to a common cognitive and linguistic process, that is, they are "standing declarations" that attribute status functions connected to deontic powers (see Searle 2010: 101ff.), and they make it possible to qualify some facts and actions as institutional. In this way, my act of taking a piece of material shaped in such and such a way and moving it across a checkered board becomes my moving a *bishop* on a *chessboard*.

In Searle's view, not all institutional facts depend on constitutive rules, but in general institutions do. In *Making the Social World*, he distinguishes between three different types of institutional facts (Searle 2010: 94-98).¹ The first type he calls "institutional fact[s] without an institution" (Searle 2010: 94). Here, by collective acceptance the members of a community simply assign status functions and deontic powers to a given entity, as when someone is collectively recognized as king. In this case, while a status function and some deontic powers are attributed to a concrete and specific entity, there is no standard connection between entities *of a given kind* and the relative status function: what matters is the *individual* entity.

In Searle's view, institutions, and hence institutional facts of the second kind come into being when we do have this standard and regular connection between kinds of entities and status functions. Here we have status-function attributions on the basis of constitutive rules, as when the members of a community "evolve a standard procedure for selecting the king" (Searle 2010: 96). The cru-

¹ I will skip Searle's third type of institutional fact, because as far as we are concerned it does not differ significantly from the second.

cial difference with respect to institutional facts of the first kind is that here the rule has to do not with a specific individual recognized as the king, but rather with a procedure on which basis *any king* can be selected *on any occasion*.

Now, typically, when constitutive rules come in systems (as in the game of chess) they create new concepts, because the attribution of a status function connected to deontic powers is relative to the other elements of the systems, and can have no meaning unless it is connected with them. Hence, the meaning of an institutional term depends on the relations between the elements of the system and is typically new, or at least it is a substantial modification of another, pre-existing concept (this is the sense in which, for example, the concept of a bishop in chess is created by the rules of chess). This is the main feature of what I will be calling *institutional concepts*, which is that constitutive rules are necessary and sufficient conditions for the existence of such concepts because they create them.

In a sense, the structural perspective is a kind of internal point of view in Hart's sense. But it is a very narrow point of view, because in taking that perspective we limit our discussion to institutional concepts. When we reason within a purely structural perspective, the "internality" of our point of view is so extreme that we simply speak in technical terms, focusing on the system of rules and on rule-constituted concepts: we do not address questions like what is the overall point of the institution in question, whether it is just, or whether and how it is practiced. Law has an abundance of institutional concepts, and jurists and legal professionals can very well stick to a purely structural perspective. In a strictly legal-positivistic sense, they adopt the point of view of simple "norm technicians", analysing and combining normative propositional contents to establish the relative institutional structures and accurately determine the normative consequences that follow from them.

3. The Teleological Perspective

But let us go back to Adriana: she is not going to understand my explanation of chess. At first she will gaze at me in amusement, listening to my elaborate description of the rules and pieces, but soon she will grow impatient. The problem is not that she cannot understand what I am saying: she is smart. She now starts to move the pieces on the chessboard according to the rules, and does so correctly. We take a few turns making moves but then she gets bored. "What's the matter, Adriana?" I ask. "Aren't you enjoying yourself?" "Not at all," she retorts: "This is boring." "Why do you think this is boring? You are very good at moving the pieces." "Yes, but I don't understand *why* I have to move them!"

As mentioned, Adriana is smart. She realizes that the structural perspective is severely limited and cannot by itself provide a full picture of the game of chess. If Hart's concept of the internal point of view were confined within the structural perspective, it would be extremely wanting as an explanation of law: any Martian observer trying to understand the practice of chess would be in the same position as Adriana. What, then, should I say to her? The answer is quite simple: "Adriana, this is a game, and you should try to win!"

Here we have a perspective on the game of chess that is broader than the skeletal structural perspective. If we conceive the elements of chess as pieces with which we have to interact in order to win, we broaden our view beyond the strictly internal perspective where only the structural connections among ele-

ments are considered: we take the more embracive internal perspective, where those connections are understood to form part of a means-end structure—a teleological structure. What we are essentially doing in taking this teleological perspective is that we are viewing the constitutive rules of a given institution, along with the corresponding system of institutional concepts, against the background of a broader practice: in the case of chess, the broader practice of competitive game-playing, of which the game is an instance.²

As in the case of the structural perspective, the teleological perspective is connected with concepts of a kind that is relevant to the institution at hand. But these concepts cannot be described as institutional. In fact, going back to the example of chess, victory is not a rule-constituted institutional concept on the same level as, say, “castling” or “checkmating”.³ Whereas the conditions of victory in chess are determined by rules, the *import* of victory, namely, what it *means* to win in chess, is not: this is not something we will find in a chess handbook, because we are assumed to know what it means to win a game. On the other hand, the constitutive rules of chess have to specify a set of conditions of victory, for otherwise we would not be able to understand in what sense chess is a competitive game. Hence, the meaning of the concept of victory depends not on the constitutive rules of chess but on the fact of chess being a competitive game. This is the sense in which concepts like victory can be called *meta-institutional* concepts: their relevance for the institution depends not on constitutive rules, as in the case of institutional concepts in the structural sense, but on the overall meaning of the system of rules as an instance of a given social practice.⁴ Considering that this overall meaning shapes the system of rules within a teleological framework, I will call these kinds of meta-institutional concepts *teleological*. (And shortly I will be arguing that not all meta-institutional concepts are teleological.)

The teleological perspective is still internal in Hart’s sense. It can be said to frame a more reasoned form of acceptance than the structural perspective, because it endows the system of constitutive rules with a clear meaning and rationale and so makes it possible to actually *understand* the game. But since this perspective is not just dependent on institutional concepts, a comprehensive, reasoned, well-grounded internal point of view toward an institution must be understood to include more than rule-constituted concepts: at a minimum, it needs to also include the meta-institutional concepts that make it possible to design a given system of rules in view of its objective. Hence if, as agents internal

² The distinction between an institution conceived as a system of constitutive rules and its broader meaning as a practice was first introduced by Hubert Schwyzer (1969). On this distinction see also Lorini 2000, 263ff., Marmor 2009, Roversi 2010. The teleological structure of rule-constituted institutional practices, and their connections with “basic needs of human life,” has been stressed and discussed thoroughly by Wojciech Żelaniec in Żelaniec 2013, 106-108, 151-55. See also, in this regard, Ottonelli 2003.

³ This has also been noted by Amedeo G. Conte (1995: 530), and subsequently by Giuseppe Lorini (2003: 299).

⁴ The expression *meta-institutional*, along with its concept can be found in an insightful paper by Dolores Miller (1981) where she discusses the example of victory in competitive game-playing in analogy to the role the concept of obligation plays in Searle’s (1969: 63ff.) theory of the “essential rules” of speech acts. Giuseppe Lorini discusses how meta-institutional concepts can be “a new category for social ontology” in Lorini 2014.

to a legal system, we were able to carry out acts and interact with objects constituted by legal rules but ignored the meaning of law as a practice—what the law is *for*, what purpose a legal system is meant to serve—we would still have an internal point of view, but one that corresponds to a sort of institutional autism, a self-referring attitude that would turn us into blindfolded technical legal machines. Such a purely structural perspective, detached from its teleological sense, is certainly not impossible: we can be motivated to apply the rules without pondering their purpose. But the self-reflective critical attitude that Hart speaks of in analysing the internal point of view can raise the question about the grounds we have for accepting the rule, and this will in turn require us to understand and accept—at least in outline—the rationale behind the rules. Hence, it seems safe to conclude that Hart’s internal point of view on a given institutional structure can be grounded only if that structure is viewed through a combined structural and teleological perspective.

An example of a teleological meta-institutional legal concept that is particularly relevant for Hart’s theory is that of legal validity. Legal systems typically lay down the main procedures by which to enact valid norms, but this validity is connected to specific institutional concepts denoting different kinds of directives.⁵ In Italy, for example, there is a set procedure that Parliament needs to follow if it is to enact a *legge ordinaria* (a statute), but *legge* is a technical term in the Italian legal system, because there are other sources of law which are not strictly speaking *leggi*. Hence, this institutional framework can be reconstructed by defining *leggi* as kinds of directives whose institutional concept is created by constitutive rules: a text approved by both chambers of the Italian Parliament under a given procedure counts as a *legge* (status function) in the Italian legal system. Now, the import of a *legge* is to establish one or more legally valid norms, but this concept of validity is not constituted by any rules of the Italian legal system itself. Rather, it depends on the broader practice of legal norm-enactment: it is the typical outcome and main objective of norm-enactment in general within a parliament. Hence, while *legge* is an *institutional* concept, validity is a *meta-institutional* concept. And if we are to have an internal point of view on the institution of norm-enactment in the Italian legal system, we of course need to take *both* concepts into account.

4. The Axiological Perspective

Adriana likes chess very much, and she is very good at it. In fact she is *too* good. Given that her knights seem to be always in the right place, I pay closer attention to the way in which she moves them until I realize that she is moving them incorrectly: not by two squares and then a turn but by three or even four squares and then a turn. I correct her several times but she keeps moving her knights incorrectly. In the end I say, “Adriana, you can’t move your knight to that square! That move is *illegal*”. To which she replies, “But I *want* the knight to be on that square! It’s almost checkmate that way!” I thus understand. She is not making mistakes. “You are cheating! You cannot cheat while playing: you’re supposed to follow the rules!” “Why?” she asks naively. “You didn’t mention this rule”.

⁵ I have developed this point (as well as several others related with the different perspectives) in a manuscript titled “Five Kinds of Perspectives on Legal Institutions”, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2143275

“That’s true”, I say. “And the reason I didn’t is that I took it for granted, because to break it”, I go on to explain haltingly, “would be, well, dishonest”.

As in the case of the teleological perspective, I am here taking a point of view broader than the purely structural one. When I explained to Adriana that she was supposed to follow the rules in striving to win, I was making explicit something that matters not only in the game of chess but also in the wider practice of competitive game-playing: I was referring to the *background* of constitutive rules rather than to their structure. But here the background element I am referring to is not the point of the practice, or what is ostensibly its ultimate objective, but its axiological structure, or the complex of values that are generally associated with it. When playing a game, honest players follow the rules in trying to win: from an evaluative and moral point of view, it is far better to lose and play honestly than to cheat and win. This axiological perspective is connected with the teleological one, either because the objective of the practice can be understood as inherently valuable or because there is a specific deontology that must be observed in trying to achieve that objective. Where games are concerned, both perspectives are relevant: on the one hand, the objective of the game is to win, but on the other (in normal circumstances) it is to enjoy your time with your opponent. If you cheat, you are spoiling the enjoyment of your opponent in competing with you. The assumption here is therefore that the deontology embedded in game-playing is functional to the value of cooperation as an essential element making it possible to enjoy a shared activity or, in a strictly competitive setting, making it possible to compete on an equal footing.

When we adopt this axiological perspective, cheating presents a concept relevant for chess. But, as in the case of victory, the concept of cheating is not constituted by the rules of chess. Rather, it is connected with certain features of the general game-playing practice. Moreover, while the constitutive rules of chess set out the conditions of victory, they do not set out any conditions subject to which a player may cheat, at least not directly.⁶ Since cheating is not constituted by the rules of the game and depends on the general features of the game-playing practice, it is a *meta*-institutional concept. But it is an *axiological* meta-institutional concept and not a teleological one, because it is used in evaluative judgments that already take for granted which values the practice is meant to embody and which kinds of behaviour are consequently held to be offensive and morally objectionable.

Clearly, given the emphasis the axiological perspective lays on an institution’s axiological structure, and hence on the values the institution is ultimately meant to serve, this perspective can figure as an aspect of the self-reflective critical attitude that Hart connects with the internal point of view. In a sense, this axiological perspective is even more internal than the teleological, because it inevitably brings evaluative judgments to bear, and in assessing the grounds for criticizing our own and others’ behaviour, the axiology behind the institution will be even more important than its purpose. And no doubt this perspective is more internal than the purely technical structural perspective, because only by taking an axiological standpoint can the normative grounds of our acceptance

⁶ To my knowledge, the best treatment so far made of the problematic relation between cheating and the constitutive rules of a game is that of Amedeo G. Conte: See Conte 2003.

ultimately be justified. This further supports the two claims previously made in discussing the teleological perspective, namely, that the internal point of view can be analytically broken down into constituent perspectives, and that judgments made from the internal point of view need more than institutional, rule-constituted concepts for their formulation. If we want to fully understand the internal point of view and its grounds, we will have to focus not only on secondary, constitutive rules but also on their conceptual and axiological import and background.

If we go back to the example of validity and norm-enacting procedures, we can clearly appreciate in what way axiological meta-institutional concepts and the axiological perspective are relevant for the internal point of view. In fact, apart from being “valid”, statutes can also be distinctively just or unjust, and norm-enacting procedures can be evaluated in light of their capacity to realize substantive moral and political values such as democracy. It can even be argued that to a certain extent if a norm-enacting speech act openly contradicts its own claim to justice, it is defective if not self-defeating: this is Robert Alexy’s (2002: 35ff.) well-known “argument from correctness”, according to which an act of constitutional norm-enactment, like “X is a sovereign, federal, and unjust republic”, is tantamount to a performative contradiction because it patently conflicts with the claim to correctness and justice implicitly made by all acts of legal norm-enactment (see Alexy 2002: 38). The problem, in this case, is not that the procedures for enacting a constitutional norm have not been followed correctly, but rather than something wrong happens *even if* we are following those procedures correctly. Hence, in order to work through this problem, or at least understand it, we need to conceive that act of norm-enactment as embedded in a general practice grounded in a specific set of values, and how these values are conceptually interconnected with the inner structure of that practice; that is, we have to view the law from an axiological perspective distinct from the purely structural one—distinct, to be sure, but even more internal.

One could observe here that the interpretation I am providing of Hart’s internal point of view is cast in the mould of natural law theory, along the lines of the argument that John Finnis (1980: 13), for example, makes about the “central case” of the “legal viewpoint”. I am, to be sure, assuming that to accept an institution’s rules on the ground of their axiological and teleological rationale is to take a point of view which is more internal than simply accepting the rules such as they are, as exclusionary and entrenched reasons. I am not, however, assuming that an internal point of view is impossible outside a teleological or axiological perspective. Indeed, as noted, people can hold a purely *structural* internal point of view. What I am arguing, rather, is that a person holding a teleological and axiological perspective will have a deeper understanding of the grounds for the critical attitude connected with an internal point of view. Hence, rather than providing a natural-law interpretation of Hart’s internal point of view and assuming that an appeal to the axiological dimension is “the central case of the legal viewpoint” (Finnis 1980: 15), I am trying to nuance the critical reflective attitude connected with the internal point of view: I am doing so by describing different degrees of internality in terms of a more or less deep acceptance of the

grounds for accepting an institution's rules—and that without assuming any cognitivist account of the axiological dimension behind an institution.⁷

5. The Strategic Perspective

Adriana is making progress. I see that she is now very cautious in moving her queen, whereas her previous game plan essentially consisted in capturing every piece by moving the queen all across the board. “I like the queen”, she would say, “I want to capture pieces with my queen”. But now she appreciates that it is better to avoid using the queen to capture pieces if there are other means of doing so. Not only has she correctly learned the rules of chess but she also uses them well in her game, because she understands the comparative advantage of the pieces when playing: she understands not only the structure of chess and its basic features as a game, but also the flow of a good game, appreciating, for example, when it is advisable to attack the opponent's king and when to defend her own.

Adriana is now able to have a strategic perspective on the game, enabling her to play it *well*, that is, to her own advantage in working on victory. This strategic perspective is not focused on the institution's structural features in the abstract but on actual practice: its basic question is how to maximize the likelihood of achieving the objective. As that suggests, the teleological aspect of the practice is crucial here, too, but the strategic perspective is entirely different from the teleological one, because on a strategic perspective we consider not only the main objective of the game and the structural conditions of its achievement but also what the most effective way is to achieve that objective in a concrete match.

The strategic perspective includes several specific concepts. Consider this entry on chess drawn from Wikipedia:

The *King's Indian Attack* (KIA), also known as the *Barcza System* (after Gedeon Barcza), is a chess opening system for White, most notably used by Bobby Fischer. [...] The KIA is often used against the *semi-open defences* where Black responds asymmetrically to e4, such as in the *French Defence*, *Sicilian Defence*, or *Caro-Kann Defence*. Yet it can also be played against Black's more common *closed defences*, usually through a move order that begins with 1. Nf3 and a later *fianchetto* of the white-square bishop. For this reason, transpositions to the *Réti Opening*, *Catalan Opening*, *English opening* or even the *Nimzo-Larsen Attack* (after b3 and Bb2) are not uncommon.⁸

Here we have a list of several terms referring to different kinds of attacks, defences, and openings in chess. Statements of this kind are quite normal in chess theory, but it is important to note that these concepts are not institutional. In fact, they are not constituted by the rules of chess but rather denote different ways in which the institutional, rule-constituted elements of chess can be used. These concepts are not meta-institutional, either, because they depend not on the features of the general game-playing practice but rather on the specific fea-

⁷ I am grateful to Jaap Hage for pointing out to me this possible ambiguity of my conception.

⁸ From the Wikipedia entry “king's Indian attack”: http://en.wikipedia.org/wiki/King%27s_Indian_Attack. Italics added. Accessed January 4, 2017.

tures of chess: there is no other game where you can carry out a king's Indian attack. Concepts of this kind I will call *para-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. The same is true of *para-institutional* concepts: they work as parts of descriptive sentences that already take for granted the instantiation of one or more institutional elements. When, for example, I say that "Kasparov carried out a king's Indian attack", the truth conditions of this sentence include the truth of other descriptive sentences, such as "Kasparov moved a knight" and "Kasparov moved a pawn", and these other sentences are formulated from a structural perspective, in that they only involve institutional, rule-constituted concepts.

Now, is the strategic perspective internal or external in Hart's sense? I submit that it can be both. Of course we can adopt a strategic perspective from the internal point of view: players in any game do this ordinarily, but so do members of parliament, who usually act both in accordance with parliamentary procedure and with their concrete experience in maximizing the chances of having a legislative bill actually pass into law. But the strategic perspective can be external, too, because a "bad man" who should reject an institution's rules could still use them to advantage by exploiting the fact that almost everyone else accepts and follows the same rules. Typically, in this case, the point of view taken in such a scenario would be a moderately external one in Hart's sense, namely, a point of view from which "the observer [...], without accepting the rules himself, assert[s] that the group accepts the rules, and thus [...] from the outside refer[s] to the way in which *they* are concerned with them from the internal point of view" (Hart 1994, 89). In fact, in order to work out strategies by which to achieve an objective that is internal to an institution, a bad man will have to take the institution's internal structure and teleology into account, however much externally.

Let me now illustrate how a strategic perspective, with its connected *para-institutional* concepts, can be relevant for our previous example of norm-enactment in a parliament. Consider the case of parliamentary obstructionism, or "filibuster". The concept of filibuster denotes a set of parliamentary strategies that can be carried out in instantiating institutional rule-constituted concepts. In a filibuster, we follow all the procedures constituted by the rules of parliament, but we do so as a means of carrying out strategy, as when making attack or defence moves in chess. This, then, is a typical case of a *para-institutional* concept subordinate to the institutional concepts making up a legal system's norm-enactment procedures. When parliamentarians filibuster, they can do so from either an external or an internal point of view, but in either case their perspective will be strategic: they may be contrary to parliamentary practices in general, and hence act "from within" to take them down, or they may have constitutional reasons for rejecting a specific legislative bill, and hence act strategically to prevent it from passing.

6. The Sociological Perspective

Adriana and I have been playing chess for an entire year. She has become a very good player, probably better than me. She is fully conversant with all the rules and their variants, and she no longer cheats. In fact, chess has taught her the

value of tacit cooperative agreements to follow the same set of rules, even in competitive settings. I am very proud of her but cannot imagine just how deep her understanding of the game has become. One evening we are watching TV together when Adriana suddenly says, “Dad, chess is a good game, but it’s not evenly balanced: the player who makes the first move always has a slight advantage”. “No, that’s an impression and it’s mistaken”, I reply: “Chess is the perfect game. It’s common knowledge”. But then I check Wikipedia, and it supports her statement:

The first-move advantage in chess is the inherent advantage of the player (White) who makes the first move in chess. Chess players and theorists generally agree that White begins the game with some advantage. Since 1851, compiled statistics support this view; White consistently wins slightly more often than Black, usually scoring between 52 and 56 percent.⁹

In considering whether the first player has a slight advantage in a chess match, I am not looking at any rule of the game or any combination of rules, and of course I am not discussing the typical teleology or values of competitive game-playing. Nor am I considering a strategy, because the question here is theoretical rather than practical: it is not a matter of how to maximize my chances of winning but a matter of how chess matches concretely unfold in general. This is a sociological perspective on the institution, where we focus on the patterns and features of an actual institutional practice that can be generalized on a statistical basis: we are looking at features of an institution as an actual practice over against its structural features as constituted by its own rules.

A sociological perspective generates its own concepts. The concept of first-move advantage is not constituted by the rules of chess itself but rests on the way in which chess winds up looking like when actually played. Just like the concept of “king’s Indian attack”, that of first-move advantage *depends* on constitutive rules but is not itself *constituted* by those rules: it needs the rules of chess to define the game’s constitutive elements, for otherwise it could not have the meaning it has, but its features are owed to the way in which the game of chess unfolds in actual gameplay. Thus, the concept of “first-move advantage” is a para-institutional concept, but a theoretical and not a practical one, because it denotes something which typically *happens* and not anything that one can *do*.

The sociological perspective and its associated para-institutional concepts can be described more perspicuously by enlisting the help of Searle’s theory. In *Making The Social World*, Searle treats the problem of “systematic fallouts”, underscoring several crucial properties of these phenomena, the most important being that, while institutional phenomena depend (in his theory) on collective acceptance, systematic fallouts do not: they are “intentionality-independent facts about intentionality-relative phenomena” (Searle 2010: 117).¹⁰ Further, Searle notes that, while institutional elements typically have “deontic powers” or normative consequences, systematic fallouts do not have such consequences. Thus, systematic fallouts depend on “ground-floor institutional facts” and carry no distinctive deontology, to the point that participants in a given institutional practice

⁹ The Wikipedia entry “first-move advantage in chess: https://en.wikipedia.org/wiki/First-move_advantage_in_chess. Accessed January 4, 2017.

¹⁰ See also, in this regard, Thomasson 2003: 275-56; Andersson 2007: 105-26.

can very well be unaware of them. Searle makes in this regard a baseball example very similar to our example of the first-move advantage:

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 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 (Searle 2010: 117).

As Searle notes, systematic fallouts are typically described in economic theory:

In economics the ground-floor facts are in general intentionality-relative. For example, so and so bought and sold such goods. But the facts reported by economists are typically intentionality-independent. For example, the Great Depression began in 1929 (Searle 2010: 117).

Just like the strategic perspective, the sociological perspective from which we consider systematic fallouts denoted by way of theoretical para-institutional concepts can be either internal or external. For example, a teacher of constitutional law can accept the overall constitutional system but need to also consider and describe the kinds of features and possible flaws the corresponding institutional framework entails in actual practice. On the other hand, an alien observer can take a sociological perspective from an external point of view, to the point of considering in statistical terms not only the distinctive “fallouts” of an institutional practice but also normal rule-abiding behaviour. This would be an extreme external point of view in Hart’s sense, in which “an institutional practice is described in terms of observable regularities of conduct, predictions, probabilities, and signs” (Hart 1994: 89-90). Finally, it is perfectly possible to hold a sociological perspective from a moderate external point of view. Indeed, any bad man willing to act in an institutional framework strategically, thus considering the most effective way of achieving an objective in light of the beliefs that people hold, will be exploiting observations made from a sociological perspective. Hence, even if observers typically take a sociological perspective, whereas participants take a strategic one, participants who act strategically can advance their strategy by reasoning from a sociological perspective. On the other hand, a good sociological description of how a given legal framework works in practice needs to be able to consider the strategic reasoning of all actors. Thus, the two perspectives that typically involve para-institutional concepts—the strategic and the sociological—are intertwined in a peculiar way, as are the teleological and axiological perspectives, which involve meta-institutional concepts.

The relevance of theoretical para-institutional concepts can be illustrated by going back once more to our example of legal norm-enactment. Some situations, such as filibuster, can give rise to “legislative gridlock”, namely, situations where actual parliamentary practice cannot have any significant normative outcome because no party has a filibuster-proof majority. This is a para-institutional concept, because the constitutive rules of parliamentary procedure do not *create* the concept themselves but are *necessary* to create the institution in which legisla-

tive gridlock can happen. However, unlike filibuster, which is a practical concept relevant to the participants engaged in the practice, legislative gridlock denotes a typical situation created by parliamentary practice, not a kind of parliamentary strategy. Through this theoretical para-institutional concept we are describing the possible outcomes of an institutional practice from a sociological perspective. Of course, as noted, we can momentarily take this perspective for strategic purposes: if for, example, deputies know how legislative gridlocks can happen in a given constitutional framework, they can use this information to act strategically toward the goal of forcing new elections.

7. Constitutive Rules between Background and Practice

The description so far made of the various perspectives on an institution makes it possible to analyse institutional ontology in a more fine-grained way than can be achieved on the basis of the simple model of constitutive rules. In fact, constitutive rules are the crucial element of institutions only from a structural perspective: if we consider institutions from the other perspectives previously described, we will see that there are at least two crucial elements that need to be taken into account. The first of these is how constitutive rules are related to their *background*; the second how these rules translate into *practice*.

On the one hand, the teleological and axiological perspectives show that constitutive rules can create a set of institutional concepts—and hence an institutional activity (chess, for example)—only against the background of another, more fundamental kind of activity (competitive game-playing, in the case of chess): they frame a surface layer that must be embedded within a deeper layer.¹¹ This background dictates specific conceptual and normative boundaries within which constitutive rules can be framed. For example, the constitutive rules of a competitive game *must* define conditions of victory and normally presuppose that players will not cheat. Hence, the teleological and axiological perspectives make it possible to ascertain several considerations that have an *a priori* impact on the institutional structure, because they define the conceptual and normative background within which constitutive rules operate.

On the other hand, the strategic and sociological perspectives show that there is a difference between the structure created through rules, namely, the institution on paper, and the way in which constitutive rules are actually put into practice, namely, the institutional activity in its concrete unfolding. In a sense, and somewhat mysteriously, there always develop emergent features of an institutional practice that cannot be foreseen simply by looking at the institutional structure itself. These emergent features can in the long run entail structural considerations. For example, we could seek to change the structural features of a given norm-enacting process if we find that some strategy can be abused, or phenomena considered from a sociological perspective can eventually result in the death of that institution and hence require a massive overhaul of its constitutive rules. Hence, just as in the case of considerations made from the axiological and teleological perspectives, even those made from a strategic or sociological perspective can affect the institutional structure. But, unlike the former, they do

¹¹ I am borrowing from Marmor 2009 this distinction between surface and deep conventions.

so only *a posteriori*, that is, only after the institution has had some history of practice.

Institutions therefore have a distinctive three-dimensional ontology: First, they are framed against an *a priori* conceptual and normative *background*; second, their constitutive rules define a *structure*; and third, they have *a posteriori* emergent features resulting from their *practical outcomes*, or from what happens when they are put into practice. Constitutive rules provide only one of these three elements, and for an adequate explanation of institutions, they must therefore be complemented by the other two.¹²

This applies not only to constitutive rules but also to Hart's idea of the internal point view. In our analysis of the three perspectives from which an institution may be viewed, we have seen how these perspectives and the three dimensions of institutional ontology interlock with Hart's dichotomy between the internal and the external point of view (and with his further dichotomy between the moderate and the extreme external point of view). The analysis essentially brings out the further shades that can be brought to the main idea: Hart's three-fold distinction between an internal, a moderate external, and an extreme external point of view becomes a distinction between six possible approaches and corresponding characters—two for each of the three points of view, depending on the kinds of perspectives that are dominant for that character.

The internal point of view can be shaded into the perspectives of two characters: the *committed practitioner* and the *alienated technician*. The main difference between the two is that, while the former has a structural, teleological, and axiological perspective on institutions, the latter looks at them solely through the structural perspective. A committed practitioner takes a deep internal point of view on an institution and considers both its structure and its axiological and conceptual background, not only accepting the rules but also understanding why they have been framed that way, in light of their basic conceptual boundaries and values. An alienated technician takes a superficial internal point of view on the institution and considers only its structure, without necessarily considering in full how this structure is connected with deeper requirements and values. This person knows the institution's constitutive rules very well and follows them closely, but without taking their conceptual background into account: constitutive rules are understood by this character as reasons for action in themselves, without having to take up the question of their justification, and hence without taking a fully self-reflective attitude to their normative force.

The moderate external point of view can likewise be shaded into the perspectives of two characters: the *bad man* and the *social theorist*. Here the main difference is that, while the former acts primarily from a strategic perspective, the latter instead acts from a sociological perspective. Both the bad man and the social theorist take account of the way people behave within a certain institutional framework in light of their beliefs about that institution. They are interested in what committed people believe about the institution and so can also take a structural perspective, or even a teleological and axiological one. But, for them,

¹² That law has a three-dimensional ontology has been pointed out before by several legal philosophers in the 20th century, three classic examples being Gustav Radbruch (1993), Hermann Kantorowicz (1962: 69-70), and Miguel Reale (1968), and it would be interesting to see how these conceptions relate to the analysis of institutions offered in this paper.

any consideration made from the structural, teleological, or axiological perspective is subordinate to the strategic or the sociological one: both the bad man and the social theorist are interested in what people believe about the institution, but while the former needs this information to maximise the likelihood of achieving the desired institutional outcome, the latter needs it in order to understand how such beliefs translate into concrete social phenomena. Constitutive rules, and their relevant conceptual and axiological background, do not provide them with normative reasons for action: the bad man considers them as providing prudential reasons for action, while the social theorist simply describes them.¹³

Finally, even the extreme external point of view can be shaded into the perspectives of two characters: the *alien agent* and the *alien scientist*. In one respect, the difference between them can be analogised to the one between the bad man and the social theorist, in that, while the *alien agent* acts from a strategic perspective, the *alien scientist* reasons from a sociological one. But in another respect the analogy breaks down, because these two perspectives afford an entirely different view once we step into the shoes of the latter two characters. Which is to say that, unlike the former pair, the alien agent and the alien scientist both confine themselves to recording the regularities of behaviour that people have within a certain institutional framework and assign to them a certain degree of statistical probability: they do so without entering into the conceptual domain of that institution. Hence, in this case, no reference is made to the structural, teleological, or axiological perspectives. For the alien agent, considerations made from the strategic perspective can work as prudential reasons for action, whereas for the alien scientist considerations made from the sociological perspective are simply descriptions and do not involve any kind of practical reasoning.

In this way, by appealing to the different perspectives previously identified, Hart's threefold distinction between points of view on an institution is further shaded into a sixfold distinction. These six perspectives differ by reason of the way each of the characters who embody them sees the constitutive rules of a given institution: the committed participant considers them as strongly normative reasons for action, because he or she understands and embraces their conceptual and axiological background, whereas the alienated technician considers them as normative reasons for action in isolation, namely, simply as practical assumptions; the bad man considers them as prudential reasons for action, whereas the social theorist considers them as the content of social descriptions; finally, neither the alien agent nor the alien scientist considers them at all.

8. Closing Remarks

In this paper, I proposed that Hart's concepts of the internal point of view and of secondary rules be combined with Searle's concept of constitutive rules. As discussed, this promises to be a powerful paradigm for analysing institutional on-

¹³ Of course this reference to a "bad man's" attitude goes back to Oliver Wendell Holmes (1897: 459). Stephen Perry (2000: 164) has argued that Holmes's bad man adopts not an external point of view but an internal one, because he is engaged in practical and not theoretical reasoning, a sort of practical reasoning based on prudential reasons. It seems to me that prudential reasons cannot ground an internal point of view in Hart's sense, and that an external point of view can include both a practical (strategic) and a theoretical (sociological) attitude.

tology. What I have argued is that this paradigm can be further enriched and specified. Constitutive rules create a structure embedded within a conceptual and axiological background and give place to a concrete activity that always ends up having emergent features: hence, they are connected both with a background and with a practice. Background, structure, and practice are thus the core elements of a three-dimensional institutional ontology. I have argued for this conclusion by distinguishing between four kinds of perspectives on an institution, and this in turn made it possible to further specify (or shade) Hart's threefold distinction between an internal, a moderate external, and an extreme external point of view into a sixfold distinction between the perspectives taken by possible paradigmatic characters who represent different ways of approaching the institution in question.

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