# Rules and the Social World

**Document status and date:**
Published: 01/12/2022

**Document Version:**
Publisher's PDF, also known as Version of record

**Please check the document version of this publication:**

• A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
• The final author version and the galley proof are versions of the publication after peer review.
• The final published version features the final layout of the paper including the volume, issue and page numbers.
Link to publication

Download date: 03 May. 2024

# Rules and the Social World

Jaap Hage

*Maastricht University*

*Abstract*: **Rules and the Social World**
There are many issues around rules and related concepts. By developing a theory about the existence of social reality, this article aims to address these issues by discussing:
- the relation between rules and norms,
- the difference between deontic normativity and the normativity of reason,
- the (im)possibility of prescriptive rules,
- two kinds of constitutive rules, and
- the function of rules as constraints on possible worlds.

*Keywords*: constitutive rules, constructivist facts, normativity, social facts, social rules.

**Summary**: 1. Introduction. – 2. Some Misunderstanding about Rules. – 3. The Social World. – 4. Constructivist Facts. – 5. Conclusions. – 6. Future Research.

## 1. Introduction

In earlier publications, I have argued that:

a. There are two notions of normativity that are often (con)fused, which leads to serious misunderstandings[1].

b. The notion of a norm had better be abandoned, as it leads to more confusion than insight[2].

c. Strictly speaking, there are no rules that prescribe behaviour, although there are regulative or mandatory rules[3].

---

[1] J. Hage, "Two Kinds of Normativity", in Stefano Bertea (ed.), *Contemporary Perspectives on Legal Obligation*, Routledge, London, 2020, pp. 18-33.
[2] J. Hage, *Studies in Legal Logic*, Springer, Dordrecht, 2005, p. 202.
[3] J. Hage, *Foundations and Building Blocks of Law*, Eleven International Publishing, Den Haag, 2018, pp. 111-113.

      d. All rules, including the mandatory ones, are in a sense constitutive[4].

      e. There are two notions of constitutive rules[5].

      f. Rules function as constraints on possible worlds[6].

In this article, I will try to give these views an underpinning by means of a theory of how social reality, or the social world, exists and of the place of rules in it.

## 2. Some Misunderstanding about Rules

### 2.1. Get Rid of Norms!

One question that needs to be addressed in a discussion of rules, is how rules relate to norms. The notion of a norm has many variants. According to Von Wright, the word 'norm' is used in many senses and often with an unclear meaning[7]. Kelsen distinguished four functions of norms: prescribe, permit, empower, and derogate (*Gebieten, Erlauben, Ermächtigen, Derogieren*)[8]. To this list, Brouwer, added norms of adjudication (*beoordelingsnormen*)[9]. Conte distinguished five different referents of the term 'norm'[10]: deontic sentences, deontic propositions, deontic utterances, deontic states of affairs, and deontic noemata[11]. Where Conte focused on the deontic aspect of norms (that norms prescribe or permit), Bispinck-Funke sees a similarity between norms and rules. The main difference between the two is,

---

[4] J. Hage, "Separating Rules from Normativity", in M. Araszkiewicz, P. Banaś, T. Gizbert-Studnicki and K. Pleszka (eds.), *Problems of Normativity, Rules and Rule-Following*, Springer, Cham, 2015, pp. 13-30; J. Hage, *Foundations and Building Blocks of Law*, cit., chap. V.

[5] J. Hage, "Two Concepts of Constitutive Rules", in *Argumenta*, 07 (2018), DOI <u>10.14275/2465-2334/20187.hag</u>

[6] J. Hage, "Separating Rules from Normativity", cit; J. Hage, "The (Onto)logical Structure of Law: A Conceptual Toolkit for Legislators", in M. Araszkiewicz and K. Pleszka (eds.), *Logic in the Theory and Practice of Legislation*, Springer, Cham, 2015, pp. 3-48.

[7] G. H. Von Wright, *Norm and Action. A Logical Enquiry*, Routledge and Kegan Paul, London, 1963, p. 1.

[8] H. Kelsen, *Allgemeine Theorie der Normen*, ed. K. Ringhofer and R. Walter, Manzsche Verlags- und Universitätsbuchhandlung, Wien, 1979, chap. 25.

[9] P. W. Brouwer, *Samenhang in recht. Een analytische studie*, Wolters-Noordhoff, Groningen, 1990, p. 21.

[10] A. G. Conte, 'Norme: cinq référents', in P. di Lucia and L. Passerini Glazel (eds.), *Norm: What Is It? Ontological and Pragmatic Perspectives*, special issue of *Phenomenology and Mind*, 13 (2017).

[11] P. Di Lucia, and L. Passerini Glazel, "Two Semiotic Shifts in the Philosophy of Norms", in P. di Lucia and L. Passerini Glazel (eds.), *Norm: What Is It? Ontological and Pragmatic Perspectives*, special issue of *Phenomenology and Mind*, 12 (2017).

according to this author, that social norms are usually implicit, while social rules are explicit and have a clear linguistic formulation[12].

No doubt, there will be many more characterisations of norms. Twenty years ago, I saw this variety – or mess – of meanings and vagueness as a reason to abolish the word 'norm' in literature with scientific aspirations[13]. Later, I realised that my hope that the word 'norm' would be removed from philosophical and scientific discourse would be in vain and proposed to use the word for mandatory rules[14]. However, deep in my heart, I am still in favour of completely banishing the word from philosophical and scientific discourse. If we do that, there is no need any more to discuss the relation between rules and norms. So: *get rid of norms*!

## 2.2. Rules Do Not Always Prescribe or Permit Behaviour

It is often thought that rules are there to prescribe, prohibit, and perhaps also permit, behaviour. On this view, typical examples of rules are 'Don't steal', 'Drive on the right', or 'Debtors must pay their debts'. No doubt, all three are rules, more in particular: mandatory rules. However, there are many other kinds of rules, and they have in common that they attach facts to other facts (static rules) or to the occurrence of an event (dynamic rules)[15]. Consider the following examples of rules:

*The moment that the President dies, the Vice-President becomes the new President.*

This is a dynamic rule about succession. It attaches a new fact – the person who happened to be the Vice-President is the (new) President – to the occurrence of an event: the (old) President died.

*Statutes are created by Parliament.*

This static rule attributes the exclusive competence to create statutes to Parliament. In doing so, it attaches a fact – this entity has the competence to create statutes – to another fact: this entity is Parliament.

*A bachelor is an unmarried man of marriageable age.*

---

[12] C. Bispinck-Funke, "On the Question of how Social Rules and Social Norms exist", in P. di Lucia and L. Passerini Glazel (eds.), *Norm: What Is It? Ontological and Pragmatic Perspectives*, special issue of *Phenomenology and Mind*, 13 (2017).

[13] J. Hage, *Studies in Legal Logic,* Springer, Dordrecht, 2005, p. 202.

[14] J. Hage, *Foundations and Building Blocks of Law*, cit., p. 172; J. Hage, "Of Norms", in G. Bongiovanni, G. Postema, A. Rotolo, G. Sartor, C. Valentini and D. Walton (eds.), *Handbook of Legal Reasoning and Argumentation*, Springer, Cham, 2018c, pp. 103-138.

[15] Sometimes rules do not create new facts, but take away existing facts, or modify them. I will ignore this possibility here, because it has no serious impact on the main messages of this article.

This static rule both defines the meaning of a word, and at the same time conceptually connects two kinds of entities: bachelors and unmarried men of marriageable age. Through this conceptual connection, the facts that – on the one hand – somebody is a bachelor and – on the other hand –that this person is a man of marriageable age who is not married, are connected.

*If two or more parties conclude a valid contract, everything in the contract holds between the contract partners.*

This is a (strongly simplified) dynamic rule about the consequences of a contract. These consequences often – but not always – involve mutual obligations, but the rule does not mention them explicitly[16]. Neither does the rule mention duties or permissions. Therefore, we cannot say that it is a mandatory rule, even though its application will often lead to obligations.

*Car drivers must stop at red traffic lights.*

This is a typical mandatory rule. It imposes a duty – to stop – on agents that belong to a particular category – car drivers. Notice that the duty itself, for instance that Henry must stop at this red traffic light, is not a rule. The duty is a 'thing', and the existence of this duty is a fact. This fact is attached by the static rule to other facts, namely that Henry is a car driver and that the traffic light before Henry is red. By attaching this fact to another fact, the rule creates a *new* duty[17].

If somebody does not recognise the consequences of an applicable rule without good reasons, he[18] makes a mistake. Examples are a car driver who does not see a reason to stop for a red traffic light, a legal subject who does not recognise the competence of Parliament to create legislation and, thereby, rules, a speaker of the English language who calls a married man a bachelor, or a chess player who moves a rook diagonally. However, making a mistake is not violating a duty, and from the fact that somebody who does not recognise the consequences of a rule when he ought to have done so makes a mistake one cannot conclude that all rules impose duties.

A slightly different way to look at the same phenomenon is to notice that there are two kinds of normativity attached to a mandatory rule. All rules, and therefore also mandatory rules, define what is the proper thing to do: if one believes that the

---

[16] J. Hage, *Foundations and Building Blocks of Law*, cit., pp. 97-102.

[17] To be consistent with earlier work, in particular J. Hage, *Foundations and Building Blocks of Law*, cit., pp. 123-139, I distinguish between obligations and duties. Very briefly, this distinction can be described by saying that obligations are directed towards a creditor, while in the case of duties there is no creditor.

[18] To avoid cumbersome constructions in the use of personal pronouns, I will use the convention that an author uses her or his own gender for pronouns. Therefore, I will write about 'he', 'him' or 'his'. I encourage female authors to use 'she' or 'her' instead.

rule conditions are satisfied one ought *pro tanto* to recognise the rule consequence. This is the ought of rational thinking, and it represents the normativity which attaches to all rules. If a rule is mandatory, there is also a second form of normativity, as such a rule imposes a duty. Let us call this second kind *deontic normativity*. The addressee of the duty *pro tanto* ought to do what the duty prescribes. This deontic normativity only applies to mandatory rules, or – to be precise – to the duties created by mandatory rules. If one does not recognise the difference between the normativity of reason and deontic normativity, it is easy to believe – mistakenly – that all rules are mandatory.

## 2.3. Some Other Misunderstandings

That all rules impose duties is not the only misunderstanding. Other misunderstandings are to confuse rules with their sources[19], or with speech acts[20], or to assume that all rules have been created[21]. I will be very brief about them. Many rules result from legislation or judicial decisions. However, neither a statutory provision nor a court decision *is* a rule, although making a statute or taking a judicial decision are events to which one rule attaches the existence of another rule. In general, rules can be created by means of these – and other – acts with a propositional content, but the events from which rules result are not the rules themselves. Moreover, some rules are not the result of a single event but exist because they are broadly recognised. Rules of positive morality, or of customary law, are cases in point.

    The final misunderstanding that needs to be mentioned is that rules describe. Rules do not describe anything. For example, the rule that thieves are punishable does not describe the legal status of thieves. It *creates* that legal status; it makes it the case that a person who happens to be a thief receives the legal status of being punishable. However, it should be noted that the reasons why rules do not describe is not that they prescribe. Rules do not prescribe either; they only create new facts and *sometimes* these new facts are the existence of a duty or an obligation.

    It is possible to *describe* the effects of all rule applications by saying that thieves are punishable or that car drivers have the duty to stop at red traffic lights. These sentences do describe, but they are not rules. Rules have effects in the world,

---

[19] This mistake is made if it is assumed that a statute *contains* rules. Statutes are instruments to create rules, but they do not contain what they create (J. Hage, "The (Onto)logical Structure of Law: A Conceptual Toolkit for Legislators", in M. Araszkiewicz and K. Pleszka (eds.), *Logic in the Theory and Practice of Legislation*, Springer, Cham, pp. 3-48; 30-32 in particular).

[20] We find this misunderstanding in the so-called 'expressive' or pragmatic conception of norms (C. E. Alchourrón, and E. Bulygin, "The Expressive Conception of Norms", in R. Hilpinen (ed.), *New Studies in Deontic Logic*, Reidel, Dordrecht, 1981, pp. 95-124; P. E. Navarro, and J. L. Rodríguez *Deontic Logic and Legal Systems*, Cambridge University Press, Cambridge, 2014, pp. 66-71.

[21] Von Wright (G. H. Von Wright, *op. cit.*, London, Routledge and Kegan Paul, 1963, p. 7) suggests this view in connection to what he called 'prescriptions' or 'regulations'.

and these effects can be described by sentences which have (almost) the same formulations as the rules that created the effects[22].

## 2.4. Rules and Principles

It is not necessarily a misunderstanding, but legal theorists – and also doctrinal lawyers – often distinguish between rules and principles, while the difference between these two is not very clear. The distinction was popularized by Dworkin and Alexy[23]. According to Dworkin, the difference between rules and principles is that rules apply in an all or nothing fashion, while principles need to be balanced. According to Alexy, legal principles are a kind of commands to optimize values.

Dworkin seems to overlook that rules can have exceptions, and therefore do not always apply when they are applicable, that is: if their conditions are satisfied by a case[24]. If these exceptions are considered, the difference between principles and rules becomes a matter of degree. Alexy seems to overlook that not all principles deal with what ought to be done. Perhaps all principles have as their function to optimize one or more values, but not all principles – and perhaps not any – are commands (prescriptions) to do so.

Rules as they will be characterised below, connect facts to other facts and principles do the same.

## 3. The Social World

The account of rules that I want to defend here is part of a more general view on the 'social world' or social reality. In this section about the social world, I will attempt to show how the existence of rules is *in last instance* a matter of social fact and that the existence of many social facts, including facts about the existence of rules, depends on rules. This seems circular: rules depend on facts and facts depend on rules. However, the circularity at stake is not problematic. Social facts and rules are inextricably intertwined, and the issue is mainly expository: where should the explanation of the mutual dependence start. I will start with social facts, as some social facts exist without any role for rules.

---

[22] J. Hage, *Foundations and Building Blocks of Law*, cit., p. 69; see also section 5.1 of the present paper.

[23] R. Dworkin, *Law's Empire*, Fontana, London, 1986; R. Alexy, *Theorie der Grundrechte*, 3rd edition, Frankfurt, Suhrkamp, 1996; R. Alexy, "On the Structure of Legal Principles", *Ratio Juris* 13 (2000), pp. 294-304.

[24] F. Schauer, *Playing by the Rules*, Clarendon, Oxford, 1991; B. Verheij, "An Integrated View on Rules and Principles", in R. W. van Kralingen e.a. (eds.), *Legal Knowledge Based Systems. Jurix '96. Foundations of Legal Knowledge Systems*, Tilburg University Press, Tilburg, pp. 39-48; J. Hage, *Reasoning with Rules*, Kluwer, Dordrecht, 1997.

### 3.1. Facts, States of Affairs, Language and the World

Before continuing it may be useful to introduce some terminology. I will use the words 'fact', 'state of affairs', and 'world' in a technical sense. My starting point will be the existence of a language which includes statements (descriptive sentences). Statements express states of affairs and are either true or false. For instance, the English language includes the statement 'It is raining'. This statement expresses the state of fairs that it is raining and is true if it is raining and otherwise false. If the sentence is true, the expressed state of affairs is a fact, and otherwise not.

The world is the collection of all facts[25]. A statement is true if and only if the state of affairs that it expresses is an element of the world (in a technical sense). A language, such as the English language, determines what states of affairs there are. The world selects, metaphorically speaking, which of these states of affairs are elements of the world and therefore facts.

The 'social world' is the collection of all social facts. How these facts exist will be explained below.

### 3.2. Objective, Subjective, and Social Facts

People distinguish between what is objective, subjective, and sometimes also social. The distinction between these three kinds of states of affairs is based on two underlying characteristics which may be present or not. The two characteristics are whether the state of affairs is:

1. mind-dependent; and
2. the same for everybody.

*Objective facts*[26] are (1) not mind-dependent and (2) the same for everybody. An example would be the fact that Mount Everest is a higher mountain than the Vaalserberg (the highest 'mountain' of the Netherlands)[27].

*Subjective 'facts'* (1) depend on what individual persons think they are and are therefore mind-dependent, and (2) are therefore not the same for everybody. That is why their status as facts is contested; many people would not call subjective facts 'facts' at all. An example would be the 'fact' that Mozart was a better composer than Brahms.

---

[25] L. Wittgenstein, *Tractatus logico-philosophicus*, Suhrkamp, Frankfurt a/M, 1984, theses 1.1 and 1.11.

[26] I will write about objective, subjective, and social *facts*, but strictly speaking it would be better to write about objective, subjective and social *states of affairs*. My expectation is that many readers will find the former terminology easier to follow.

[27] Because all facts depend on language and because languages are social phenomena, it may be questioned whether there are any objective facts. However, most people believe that some kinds of facts are objective, and the example would be a case in point.

*Social facts* are somehow in between objective and subjective facts: (1) they depend on what the members of a social group recognise and are in that sense mind-dependent, and (2a) they are the same for the members of a group, but (2b) not necessarily the same between groups. A possible example is the law of a country. The law depends, in a complicated manner, on what the legal subjects of a country recognise as law and is the same for these legal subjects. However, different countries may have different laws, and what is the law for a Frenchman may not be the law for somebody in China[28].

### 3.3. Basic Social Facts

A proper understanding of the social world starts with basic social facts. Basic social facts exist in a group if most members of that group recognise that they exist. For instance, Hendrik is the leader of the Maastricht Cycling Club (MCC) if sufficiently many members of that club recognise that Hendrik is their leader. In this connection, the notion of recognition is crucial. The notion is used here in a technical sense: a person recognises a fact if he believes that it exists and tends to act in accordance with this belief. This sounds complicated, and some examples may be helpful.

The simplest case is when recognition is nothing more than mere belief. If Mary believes that yesterday the train to Groningen left at 15h00, she also recognises this fact.

Usually, the recognition of a fact involves more than mere belief[29]. If all members of MCC believe that Hendrik is their leader, but do not attach any further consequences to this belief, it cannot be said that they recognise Hendrik as their leader. To have a leader for a club means that club members believe that he is the leader, but also that they attach the relevant consequences to this believed leadership. What these consequences are, depends on how the notion of leadership is given content, but there cannot be leadership without any consequences. This means, for instance, that if the leadership of Hendrik involves that club members must do what Hendrik tells them, they will be disposed to act accordingly.

---

[28] An interesting move in this connection is to talk about relativized facts, such as the law of China or of France. Such facts have their relativity to the legal subjects of a country built-in, so to speak. Judgements about such relativized facts seem objective – the law of France is the same in China as in France – while the original facts are social. A similar move is possible with regard to subjective 'facts': it seems to be an objective fact that for Dieter, Mozart was a better composer than Brahms. There is much more to be said about this possibility, but for now the above must do. Thanks to Manuel Atienza for pointing out to me the relevance of this move.

[29] This formulation suggests that belief is a more primitive notion than recognition and that recognition requires belief and sometimes something more. For the purpose of the present article, this will do. However, for future research is may be more fruitful to take recognition as the primitive term and assume that recognition under appropriate circumstances leads to different kinds of behaviour, such as giving particular answers to questions, or compliance with some duties.

Sometimes the task of recognition is delegated to one or more specific persons or institutions. Examples are that the recognition of a particular stuff as gold may be delegated to chemists or gold traders[30]. A well-known legal example is that the recognition of rules as legal rules is delegated to courts and other 'officials'[31].

Suppose that all members of MCC recognise that Hendrik is the leader of their club but are not aware that the other members do the same. In such a case, we cannot say that Hendrik is the leader of the group. More is needed and this more includes that the group members should be aware that Hendrik fulfils the same function for most other members that Hendrik fulfils for them personally. It should not only be the case that sufficiently many members of MCC recognise Hendrik as their leader; the club members should also believe that sufficiently many other members also recognise Hendrik as leader of the group, and that these other members have the same beliefs about their fellow cyclists. In other words, a group member P should not only have beliefs about Hendrik, but also about what his fellow group members recognise, including what his fellow group members believe about the beliefs of P himself.

Another condition for the existence of social facts is that something can only be a social fact if facts of that kind are not considered to be objective or subjective. For instance, even if everybody believes that heat consists of calories, and also believes that everybody else believes this, it is still not a social fact. The reason is that the nature of heat is (usually) considered to be an objective fact. For types of facts that are considered to be objective, such as the nature of physical phenomena, the existence of a consensus is not decisive for what the facts are.

Something similar holds for subjective facts. If people consider tastes in music to be subjective, the 'fact' that Mozart was a better composer than Brahms is not a social fact in Austria, even if everybody in that country believes Mozart to be the better composer.

So, the existence of a social fact requires recognition on two levels: a particular type of state of affairs must be considered social – not objective or subjective – and a concrete instance of this type must be broadly recognised as existing. For instance, the members of MCC must (1) consider the leadership of their club to be a matter of social fact and (2) they must recognise Hendrik as their leader.

Social facts are the same for all members of a social group, even for those members who do not recognise them. If Petra does not recognise Hendrik as the leader of MCC, she makes a mistake, and other members of MCC may criticise or even sanction her for this mistake. In this respect, social facts are very much like objective facts. The only difference is that social facts depend on the views of the members of a social group. In this respect, social facts are like subjective facts. To

---

[30] H. Putnam, "The Meaning of "Meaning"", in *Mind Language and Reality. Philosophical Papers Volume 2*. Cambridge University Press, Cambridge, 1975, pp. 215-271.
[31] H. L. A. Hart, *The Concept of Law*, 3rd ed., Oxford University Press, Oxford, 2012, pp. 113-117.

state it briefly: from within a group, social facts are like objective facts, and from the outside, social facts are like subjective facts.

## 3.4. Efficacy of Duties and of Rules

The most basic form of existence for rules is existence as a social rule. I will define the existence of social rules as their efficacy. To make this definition understandable, I first need to say something about on the one hand the efficacy of duties and on the other hand the efficacy of rules. A duty is efficacious, if and only if the duty-holder tends to do what it is his duty to do for the reason that it is his duty. For instance, the duty for Gerald to wear a hat in church is efficacious if (1) Gerald tends to wear a hat in church, and (2) if asked, Gerald tends to motivate his behaviour by reference to the duty.

Many rules do not impose duties, and this definition of the efficacy of duties can therefore not be used for rules. A definition of efficacy for rules should refer to what rules do, namely attach facts to other facts. Therefore, I propose the following definition for the efficacy of a rule: a rule is efficacious in a group if:

1. Sufficiently many members of the group are disposed to recognise the rule consequence if they believe the facts of the rule conditions.

   For instance, the rule that the person to whom a property was transferred has become the (new) owner of this property can only be efficacious in a group, if most group members are disposed to recognise the person to whom a property was transferred as the (new) owner of the property.
2. Persons who recognise a rule consequence tend to motivate their recognition by reference to the rule or its conditions.

   For instance, if a group member recognizes Carole as the new owner of a book, he will typically justify this recognition by mentioning his belief that the book was recently transferred to Carole.

## 3.5. Social Rules

A *social rule* exists in a group if sufficiently many members of the group are disposed to recognise the rule consequence if they believe the facts of the rule conditions and tend to justify their recognition by mentioning their belief. For instance, if most people in Belgium are disposed to recognise the person to whom a property was transferred as the (new) owner of the property and tend to justify their recognition by reference to the transfer, then the social rule exists in Belgium that the person to whom a property was transferred has become the (new) owner[32]. Another example deals with a duty-imposing rule. If most members of the Maastricht Cycling Club normally recognise the duty to do what the leader of the

---

[32] A legal rule can (also) be a social rule. The distinctions legal/non-legal and social/rule-based (institutional) are orthogonal.

club told them to and justify this recognition by mentioning the power conferring rule, the social rule exists in MCC that if the leader says that you must do something, you have a duty to do it.

This definition of when a social rule exists implies that all existing social rules are efficacious and that a social rule will stop to exist as soon as it loses its efficacy.

Being efficacious is not the only requirement for the existence of a social rule. Group members should also believe that most other members of the group recognise the rule consequence if they believe the rule conditions and that they justify this by reference to the rule. Moreover, the others should have the same belief. Take for instance a small group, consisting of Albert, Bernadette, and Charlotte. The issue at stake is whether this group has the social (inference) rule that smoke means fire. One condition is that Albert, Bernadette, and Charlotte tend to recognise the existence of a fire if they believe there is smoke. A second condition is that the three justify their belief that there is a fire by referring to the smoke or to the inference rule that smoke means fire. A third condition is that Albert, Bernadette, and Charlotte individually all believe that the two others also recognise the existence of a fire if they believe there is smoke. And a fourth condition is that Albert, Bernadette, and Charlotte individually all believe that the two others have the same beliefs about them.

A direct result of this characterisation of social rules and their existence is that the consequences of applicable social rules exist as basic social facts. If sufficiently many members of a social group believe a fact and recognise a social rule which attaches consequences to this fact, these members will (1) recognise these consequences, (2) believe that the other group members recognise these consequences, and (3) believe that the other group members believe the same about them. *In other words, the rule consequences will be basic social facts in the group.*

If a group member does not recognise such a basic social fact even though he believes that the relevant social rule is applicable, he will not only act irrationally by refusing to apply the social rule, but he will also deny the existence of an existing basic social fact. For instance, if inhabitants of a country recognise the rule that the king can appoint judges and believe that the king appointed Jane as a judge, Jane is a judge as a basic social fact. If Henrique believes that the king appointed Jane, but does not recognise Jane as a judge, he acts irrationally by not applying an applicable rule and has a false belief by not believing a basic social fact. This mistake may lead to social pressure to recognise the rule-consequences, and to (self)criticism. In other words, social rules will have the 'internal aspect' that was described – but not explained – by Hart[33].

Notice that this 'internal aspect' of rules is not intrinsically connected to mandatory rules. Rules that prescribe behaviour may lead to (self)criticism in case of non-compliance, but the same holds for rules that govern addition, the succession of presidents, or the use of words. Somebody who claims that 3+5 equals 7, or

---

[33] H. L. A. Hart, *op. cit.*, pp. 88-9.

somebody who calls a dog a cat may attract criticism ('that is stupid'). The internal aspect of social rules is attached to all social rules, not only the mandatory ones. Moreover, that they ought to be followed is the ought of rationality, not the deontic normativity of mandatory legal rules, or of morality[34].

We see here that the relation between basic social facts and social rules is bidirectional. On one hand, social rules depend for their existence on the recognition of their consequences, but on the other hand they determine for individual group members what they rationally ought to recognise. In this respect, social rules are like social facts: from within a group their consequences are objective, but from the outside the rule consequences are subjective.

## 3.6. Rule-based Entities and Rules

Some facts exist because they are attached to other facts by a rule. We have already seen the example of Jane who became a judge because she was appointed by the king. Another example is the fact that Hendrik is a bachelor, as this fact is attached by a meaning rule to the facts that Hendrik is an unmarried male of marriageable age. Both examples also illustrate the existence of rule-based entities. The judge that Jane became is an entity that came into existence through application of the rule about king-appointed judges. The bachelor Hendrik exists because of the meaning rule for the word 'bachelor' which is at the same time also a rule that constitutes the institution of bachelors (and spinsters).

For the law, an important category of rule-based entities consists of created rules. It is possible that a legal rule exists because it is broadly accepted. Rules of customary law and other rules of 'unwritten law' are cases in point. However, by far most legal rules exist because they were created, by means of a statute, a by-law, a convention, or a court decision. All these 'sources of law' – because that is what we are talking about – are sources because of social rules that assign a rule the status of law if the rule was created by means of such a source[35]. Rules that exist in this manner are rule-based rules.

It should be noted that rule-based rules can – and often will – also be social rules. For example, if there is a statutory rule to the effect that thieves are punishable, people will usually consider a person of whom they believe that he is a thief, as punishable. However, theoretically it is possible that a rule-based rule is not efficacious. Even then, the applicability of the rule is a reason for recognising the rule consequences, even if people do not actually recognise them[36]. Such a valid, but inefficacious, rule will be called a 'purely rule-based rule'.

---

[34] Unless, of course, morality is defined as (practical) rationality.
[35] In the jurisprudential literature, these social rules are since Hart (*op. cit.*, pp. 100-110) known as 'rules of recognition'.
[36] Why this is the case will be explained in section 4.2 about constructivist facts.

## 4. Constructivist Facts

### 4.1. Introducing Constructivist Facts

Suppose that the members of MCC take a vote on what was the best cycling trip they made this year. They decide unanimously that the trip to the castle gardens in Arcen was the best trip. Does this mean that the Arcen trip really was the best trip? No, even if all club members agree on what was the best trip, this does not mean that it *really* was the best trip. It remains possible to raise the question of whether all members of the club were mistaken about the best trip.

There seems to be a difference between what most or even all members of the group recognise as the best trip and what really was the best trip. Facts such as the fact about what was the best cycling trip of the year seemingly do not fit in the simple trichotomy of objective, social and subjective facts. They are not objective, because they depend on how people 'feel' about things. Neither are they merely subjective, as it makes sense to argue about them. And, finally, they do not seem to be 'ordinary' social facts either, because a broadly shared belief about them is not the final word. I will call such facts *constructivist facts*[37].

Constructivist facts are social facts, which are nevertheless open to serious questioning. This combination is possible if the social practice of a group does not only recognise the existence of these facts, but also the possibility to question them. For instance, *prima facie* it is a basic social fact in MCC that the trip to the castle gardens of Arcen was the best trip of the year. However, the members of MCC agree and know that the others also agree that, theoretically speaking, everybody might be mistaken. If somebody came up with convincing reasons that another trip was even better, this other trip would be better. Moreover, it would have been better from the beginning, not merely because the members of MCC changed their minds. If an argument makes people change their minds about constructivist facts, they change their minds about what the facts already were.

Constructivist facts are characterized by the possibility to have a *serious* debate about them. 'Serious' means in this connection that the participants in the debate believe that it is possible to disagree about these facts without thereby showing a misunderstanding of what the debate is about. For instance, if Joanna and Frédéric disagree about whether red wine is better or white wine, while they believe it is just a matter of taste, they consider the issue at stake to be a merely subjective one and their disagreement not as serious. If two members of MCC disagree about whether Hendrik is their leader, while both know that practically all members of the club accept Hendrik as their leader, their disagreement is not serious either. The reason is that not believing that Hendrik is the leader while also believing that 'everybody' recognises Hendrik as the leader, shows

---

[37] There are close connections between these constructivist facts and constructivism (intuitionism) in the philosophy of mathematics and constructivism in moral philosophy.

misunderstanding of the conditions for leadership. The example about the best cycling trip of the year illustrates that it is possible to disagree seriously about what was the best trip. The seriousness of the debate becomes manifest in the assumption of all participants that there is a right answer to some question, even though it is not a matter of objective fact, and that this right answer does not change if people merely disagree about what the answer is.

## 4.2. Which Social Facts are Constructivist?

Constructivist facts are a branch of social facts, and it is convenient to have a term for those social facts that are not constructivist. I propose to use the term 'conventional facts' for them[38]. So, there are two kinds of social facts: conventional and constructivist. This distinction is orthogonal to the distinction between basic and rule-based social facts, leading to four different categories.

Which social facts are constructivist, and which ones are conventional? It is impossible to give this question a general answer. The social practice of a group determines which social facts count as constructivist and which ones as conventional. In this article I have used the example about Hendrik, the leader of the Maastricht Cycling Club, to illustrate the existence of conventional facts. Other examples would be the fact that the proposition $P \supset P$ is necessarily true in sentential logic, or that Amsterdam is the capital of The Netherlands. Examples of constructivist facts are some evaluative facts, e.g. about the best cycling trip or the beauty of famous paintings, and the classification of Mercury as a dwarf planet.

Hopefully, these examples convince many readers, but there is no guarantee that they will because it is not a matter of objective fact what social facts are conventional or constructivist. The distinction between objective and social also applies to the categorization of social facts as conventional or constructivist. It seems that this categorization is itself a matter of constructivist, and therefore also social, fact. People can seriously disagree on whether a particular kind of fact is conventional or constructivist. In legal philosophy, for example, there is a serious debate between hard legal positivists and non-positivists on whether law is conventional or constructivist[39]. Confusingly, this debate is often presented as dealing with the question of whether there is a necessary connection between law and morality. In ethical theory, there is a similar debate between conventionalists

[38] Although there are connections between the present use of the word 'conventional' and the discussions of conventions in the (legal-)philosophical literature (see A. Marmor, *Social Conventions. From Language to Law*, Princeton University Press, Princeton, 2009; M. Rescorla, "Convention", in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2019 Edition), URL = https://plato.stanford.edu/archives/_sum2019/entries/convention/), the present treatment of conventional facts does not endorse any of those accounts.
[39] J. Gardner. "Legal Positivism: 5 1/2 Myths", in *American Journal of Jurisprudence*, 46 (2001), pp. 199-227; R. Dworkin, *op. cit*.

(relativists) and constructivists[40]. Moreover, a kind of fact may be conventional in one group and constructivist in a different group, or in the same group at different times. Arguably, the terrible events of World War II may have changed legal facts in Germany from conventional to constructivist.

## 4.3. Rational Reconstruction and Its Ontological Effects

A constructivist fact is a fact that is recognised as a result of the rational reconstruction of the set of objective facts and social facts that are recognised in a social group. Such a reconstruction will often consist of a debate. The debate may be casual, as amongst the members of MCC about the best cycling trip. It may also be more formal, as a debate in science about the best explanation of a newly discovered phenomenon[41].

The rational reconstruction may involve no change for a particular social fact, and then that fact exists as a social fact in the group because it was already recognised. An example would be that the members of MCC group believe that the cycling trip to the castle gardens of Arcen was the best trip of 2020 and that this belief survives a rational reconstruction of their belief set. Then the belief that the cycling trip to the castle gardens of Arcen was the best trip is an element of the rationally reconstructed belief set, because it was already in the original belief set and nothing changed in this respect.

The reconstruction may involve the inclusion of a particular social fact, and then that fact exists as a social fact in the group because it ought to be recognised according to the rational reconstruction. An example would be that the members of MCC initially did not have the rule that members of all religious convictions should be treated equally, but that the existence of this rule is included in the rationally reconstructed belief set and the rule therefore already existed as a matter of constructivist fact.

A legally more interesting example is the case of a purely rule-based rule, a rule that exists because it was made valid by some rule of recognition, but which is nevertheless not also efficacious as a social rule. The legal consequences of such as

---

[40] C. Gowans, "Moral Relativism", in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition), URL https://plato.stanford.edu/archives/spr2021/entries/moral-relativism/; C. Bagnoli, "Constructivism in Metaethics", in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition), URL https://plato.stanford.edu/archives/win2017/entries/constructivism-metaethics/.

[41] There are several ways to look at a rational reconstruction. One way is to see it as a process that takes place in time, for instance a debate. In this process, some facts lose their recognition, while other facts may become recognised. Ideally, the process only ends if the resulting set of recognised facts is coherent (J. Hage, *Studies in Legal Logic*, cit., pp. 33-68). Another way is to see rational reconstruction as a function that takes a set of recognised facts as input and returns a coherent set of recognised facts as output.

rule exist as a matter of constructivist fact, because a rational reconstruction of the original set of objective and social facts will include the consequences of this rule[42].

Finally, this reconstruction may involve the removal of a particular social fact, and then that fact does not exist as a constructivist fact in the group because it ought not to be recognised according to the rational reconstruction. An example would be that the members of MCC group ought not to have recognised the trip to Arcen as the best one. Then the belief that the cycling trip to the castle gardens of Arcen was the best trip is not part of the rationally reconstructed belief set and the trip to Arcen was, all things considered, not the best trip.

Rationally reconstructing a set of recognitions or beliefs leads to a judgement on what ought to be recognised, given the original beliefs. The recognitions in the reconstructed set are what the believer of the original set ought to recognise. Moreover, as the example of the best cycling trip illustrates, the facts that rationally ought to be recognised are also the 'real' facts, because we are speaking of constructivist social facts. The members of MCC who argue about what was really the best cycling trip argue about what really was the case. Constructivist facts are the conclusions of the best possible arguments. These arguments determine what ought to be recognised, but *ipso facto* they also determine that part of social reality. Perhaps this is the most important thing to remember about constructivist facts: *constructivist reality is what rationally ought to be recognised as real*.

## 5. Conclusions

It is time to draw some conclusions, and to do so it is convenient to have another distinction in place: the distinction between directions of fit.

### 5.1. Directions of Fit[43]

Perhaps the best way to introduce the distinction between directions of fit is by means of an example[44]. Suppose that Elisabeth makes a shopping list, which she uses in the supermarket to put items in her trolley. A detective follows her and makes a list of everything that she puts in her trolley. After Elisabeth finished, the list of the detective will be identical to Elisabeth's list. However, the lists had different functions. If Elisabeth uses her list correctly, she places exactly those items in her trolley that are indicated on the list. Her behaviour is adapted to what is on her list. In the case of the detective, it is just the other way round; his list reflects Elisabeth's shopping behaviour. The two different functions of the lists with

---

[42] Complications may arise if the lack of recognition of the consequences of a rule may make the rule invalid because of *desuetudo*. Here, I will ignore these complications except for mentioning them once.

[43] This section was adapted from J. Hage *Foundations and Building Blocks of Law*, cit., pp. 59-62.

[44] G. E. M. Anscombe, *Intention*, Basil Blackwell, Oxford, 1957, p. 56.

regard to Elisabeth's behaviour represent the two different directions of fit that we are looking for.

The two items involved in Anscombe's example are a linguistic one - the list of items - and the world. The directions of fit-distinction can also be applied to other items than purely linguistic ones, but let us focus on the purely linguistic case first.

The relation between language and the world goes in two directions. If the world is to be adapted to the linguistic entities, as when Elisabeth puts those items in her trolley that are mentioned in her shopping list, the fashionable expression is 'world-to-word direction of fit'[45]. Descriptively used sentences consist of words that aim to fit the world. The propositions expressed by them are true and the speech acts in which they are used are successful in the sense of 'truthful', if and only if the facts in the world correspond ('fit') to what these propositions express. This will be called the 'word-to-world direction of fit'.

For the world-to-word direction of fit we can distinguish between three categories. For all three categories holds that somehow the facts in the world are adapted, to make them 'fit' what is expressed by the words. One case is when the words function as a *directive*, as when Adrian shouts 'Bernadette, stop!' when he fears that his young daughter will cross the busy street. This order aims at making Bernadette stop, and if the order is successful in the sense of 'efficacious', Bernadette will stop and the facts in the world will fit the content of the order. In this case the relation between the utterance of the order (the performance of the speech act) and the fact in the world is causal. I will therefore speak of the 'causal world-to-word direction of fit'. Orders are not the only speech acts that have the causal world-to-word direction of fit; other examples are questions, and requests. They all aim to bring about a change in the world, for instance that a correct answer is given, or that the request is granted. Speech acts with the causal world-to-word direction of fit are intended to bring about a particular event and they are successful if the intended event takes place as causal result of the speech act. In that case, the world fits the content of the speech act.

A second form of the world-to-word direction of fit manifests itself in constitutive speech acts[46]. Constitutive speech acts are speech acts performed with the intention to bring about a particular change through the operation of a dynamic rule. They differ from directives which operate by means of a causal, non-rule-based, connection. Examples of constitutive speech acts are the baptism of a ship ('I hereby baptise you the Herald of Free Enterprise'), granting a competence ('You can consider every promise made by Janet on my behalf as a promise made by me'), and the issuing of a command (as distinguished from an order). The result of the baptism, brought about by a convention about the baptizing of ships, is that after

---

[45] J. R. Searle, "A Taxonomy of Illocutionary Acts", in J. R. Searle, *Expression and Meaning. Studies in the Theory of Speech Acts*. Cambridge University Press, Cambridge, 1979.

[46] J. L. Austin, *How to Do Things with Words*, 2nd Edition, ed. J. O. Urmson, M. Sbisà, Oxford University Press, Oxford, 1962; J. R. Searle, *Speech Acts*, Cambridge University Press, Cambridge, 1969.

the baptism, the ship bears the name that was given to it by means of the constitutive action. The result of granting the competence is that the person who was given the competence - in the present case Janet - can bind the speaker by making promises on his behalf. This result is brought about by a rule that makes it possible for speakers to grant competences by announcing that they do so. In both cases the facts in the world fit the content of the speech act, but in contrast to the operation of directives, the result is brought about by a rule or convention, and not through a causal connection. In connection with constitutive speech acts we will speak of the 'constitutive world-to-word direction of fit'.

The result of a successful command, such as 'I hereby forbid you to cross the street' directed by Adrian to his daughter Bernadette, is that a duty comes into being, in this case it is the duty of Bernadette not to cross the street. If such a prohibition is successful, the facts in the world come to match the content of the speech act and Bernadette has from that moment on the duty not to cross the street. In this case the relation between the speech act and the fact in the world is constitutive; the performance of the speech act constitutes the duty. The speech act is successful, here in the sense of being valid, if its intended consequences set in.

The example about the command, as opposed to an order, also illustrates the constitutive world-to-word direction of fit, but it is discussed separately to emphasise the difference between orders, conceived as a kind of directives, and commands, conceived as constitutive speech acts. The terminological distinction between orders and commands is stipulative: that is how I use these words here. However, the difference between directives, based on a causal connection, and the creation of duties by means of constitutive speech acts and based on the operation of rules or conventions, does not depend on this terminological convention.

Notice that the world-to-word direction of fit of commands relates the performance of a speech act to a duty, not to the compliance with the duty. Success here, is the entering into existence of the duty which the speech act aimed to create. The duty itself can be efficacious in the sense that it is complied with, but that would be an example of the causal world-to-word direction of fit.

The third kind of world-to-word direction of fit concerns the effects of rules. Take, for example, the conceptual rule (the meaning postulate) that the word 'bachelor' denotes unmarried men. Given this rule, if somebody is a bachelor, he must be unmarried. This 'must' depends on the conceptual rule that defines the relation between being a bachelor and being unmarried. The facts in the world adapt themselves to the rule, and that is what is meant by the world-to-word direction of fit of rules.

## 5.2. Rules as Constraints

If a rule exists, it has impact on the social world. For example, if the rule exists that thieves are punishable, thieves tend to be punishable. This is obvious in the case of social rules, as their existence is *grosso modo* defined as the recognition of the rule consequences in case the rule conditions are believed to be satisfied. Because rule

consequences are social facts, their broad recognition normally implies their existence. This means that if the conditions of a social rule are satisfied, the consequences of the rule normally obtain. In this way, an existing social rule constrains the facts in the social world.

In the case of purely rule-based rules, the story is slightly more complicated. It is possible that a rule-based rule is valid (exists), while the people to whom the rule applies do not recognise the rule consequences. Earlier, I defined this situation as the validity of a purely rule-based rule. However, if such a rule is valid, the persons to whom the rule applies rationally *ought to* recognise the rule consequences. If the rule consequences are constructivist facts, this means that they exist, because constructivist fact exist if their existence rationally ought to be recognised. So, in the end, the same thing holds for social and purely rule-based rules, namely that they constrain the social world[47].

Because rules constrain, rather than describe, the social world, rules support conditional and counterfactual arguments. For instance, if the rule is valid that bachelors are unmarried men of marriageable age, the argument 'If you become a bachelor, you will be unmarried' is conclusive, as well as the argument 'If you would have been a bachelor, you would have been unmarried'.

## 5.3. Two Kinds of Constitutive Rules

All rules are constitutive in the sense that they create their consequences. The definition of a bachelor makes it the case that an unmarried man of marriageable age is a bachelor. The rule that thieves are punishable makes it the case that John, who is a thief, is punishable. And the rule that car drivers must drive on the right makes it the case that Louise, who drives her car, must stay on the right.

However, some rules are also constitutive in an additional sense. The rule about castling in chess does not only direct chess players about when and how to castle, it is also a constitutive part of the game of chess. And the rule that assigns Parliament the competence to make statutes does not only assign this competence, but also co-defines what it means to be a Parliament. More in general, some rules are constitutive elements of a social practice (the game of chess; having a Parliament) and add in the context of this practice facts to other facts. In an apt phrase of Zelaniec, these constitutive rules 'create to rule'[48]. When Searle popularised the notion of constitutive rules, he focused on rules that are constitutive

---

[47] Theoretically, there might be a difference. A purely rule-based rule only leads to its consequences if (1) it is applicable and if (2) the consequences consist of constructivist facts. This last requirement does not apply to social rules. However, especially in the case of rule-based rules, one may expect that their consequences are constructivist. So, normally speaking, the difference does not make a difference.

[48] W. Zełaniec, *Create to Rule. Studies on Constitutive Rules*, Edizioni Universitarie di Lettere Economia Diritto, Milan, 2013.

in the sense of being a constitutive element of a social practice[49]. Regrettably, he overlooked that these rules are also constitutive in the sense of attaching facts to other facts and constraining social reality, thereby missing what seems to be the more interesting aspect of constitutive rules.

## 6. Future Research

This article focused on the relation between rules and social reality. An essential complement would deal with the relations between brain and mental processes and rule following. First steps in this field were made by Bartosz Brożek, Corrado Roversi and Marco Brigaglia[50].

---

[49] J. R. Searle, *Speech Acts*, cit.; J. R. Searle, *The Construction of Social Reality*, The Free Press, New York, 1995

[50] B. Brożek, *Rule-Following*, Copernicus Center Press, Kraków, 2013; C. Roversi, "Cognitive Science and the Nature of Law", in B. Brożek, J. Hage and N.A. Vincent (eds.), *Law and Mind. A Survey of Law and the Cognitive Sciences*, Cambridge University Press, Cambridge, 2021, pp. 99-137; M. Brigaglia, "On the Psychology of Normativity", Working Paper.