

EDITED BY EERIK LAGERSPETZ, HEIKKI IKÄHEIMO & JUSSI KOTKAVIRTA

ON THE **NATURE**
OF **SOCIAL** AND
INSTITUTIONAL
REALITY

JOHN SEARLE, MARGARET GILBERT, OTA WEINBERGER, RAIMO TUOMELA, EERIK LAGERSPETZ,
MICHAEL QUANTE, MARÍA CRISTINA REDONDO, PAOLO COMANUCCI

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*Eerik Lagerspetz, Heikki Ikäheimo and
Jussi Kotkavirta (editors)*

SoPhi

University of Jyväskylä 2001

SoPhi 57

University of Jyväskylä

SoPhi publishes social sciences at the University of Jyväskylä, Finland, and it is located at the Department of Social Sciences and Philosophy. It provides a forum for innovative studies in social policy, sociology, social work, political science and philosophy. SoPhi publishes 10–15 titles per year, both in Finnish and in English. Manuscripts are selected for publication on the basis of expert opinion.

Correspondence should be sent to SoPhi, Dept. of Social Sciences and Philosophy, University of Jyväskylä, P.O. Box 35 (MaB), FIN-40014 Jyväskylä, Finland.

SoPhi is distributed world-wide by Drake International Services, Market House, Market Place, Deddington, Oxford OX15 0SE, UK, tel. (+44) 01869 338240, fax (+44) 01869 338310, e-mail: info@drakeint.co.uk, website: www.drake-int.co.uk.

In North America SoPhi is distributed by International Specialized Book Services, 5804 NE Hassalo Street, Portland, OR 97213-3644, USA, tel. 503 287 3093 or 800944 6190 (toll free), fax 503 280 8832, e-mail: info@isbs.com, website: www.isbs.com.

Visit SoPhi home page at <http://www.jyu.fi/sophi>

ISBN 951-39-09704-X

ISSN 1238-8025

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Printed at Kopijyvä ltd., Jyväskylä 2003

Cover printed at ER-Paino, Laukaa 2001

CONTENTS

On the nature of social and institutional reality 4

Editors' introduction

Social ontology and the philosophy of society 15

John R. Searle

Social rules as plural subject phenomena 39

Margaret Gilbert

On the existence of institutions 70

Eerik Lagerspetz

Collective acceptance and social reality 102

Raimo Tuomela

On the limits of construction
and individualism in social ontology 136

Michael Quante

On normativity in legal context 165

María Cristina Redondo

Confronting two constructivists 193

Paolo Comanducci

Democracy and theory of institutions 215

Ota Weinberger

ON THE NATURE OF SOCIAL AND INSTITUTIONAL REALITY

Editors' introduction

One important consequence of the emergence of modern natural science was that for the first time a clear line was drawn between the natural and the artificial, or man-made, parts of the world. In the Aristotelian world-view the family, the law, the *polis*, and language were natural entities; in the modern world-view they were seen as instituted, as products of intentional human action. The 17th century theorists often used the contract terminology to mark the difference, as did Rousseau and Kant in the next century. The thinkers of the Scottish Enlightenment, Hume, Smith, Ferguson, and in Germany especially Hegel, replaced the idea of an explicit contract with the notion of a conventional arrangement arising as an unintended consequence of separate but interrelated sequences of human actions. Human institutions were seen as products of human action but not of human design. The modern notion of "the social" had entered the stage.

It is a fact that the ontology of the social has yet to establish itself as a well-defined and recognized subject of research. We can easily see this if we compare social ontology with, say, the ontology of mathematical objects. Issues related to the ontology of the social have emerged in different contexts. The participants of the

disputes have usually been only dimly aware of the fact that the same or similar issues have been taken up elsewhere, in other disciplines and philosophical traditions. During the past century, we can recognize at least four separate contexts in which the issues related to the nature of social reality have been focused upon.

First, the nature of the social has been one of the central topics of theoretical sociology since Durkheim and his "scandalous" postulation of social facts as *choses*. Ontological issues have appeared wearing a number of disguises: as questions about whether social collectives can be reduced to individuals, whether the proper way to proceed in the social sciences is to explain collective phenomena in terms of individual properties or *vice versa*, or about the question of what the relationship between structural causal forces and individual agency is.

Second, in legal theory the ontology of institutions and institutionally defined entities, properties and relations has been one of the main theoretical problems, particularly in the Continental positivist and Scandinavian realist traditions. In the analytical tradition, these issues have recently been discussed and reformulated by Ota Weinberger and Neil MacCormick. While in the sociological disputes the main focus has been on the explanation, the discussions in legal theory have been penetrated by the problem of the allegedly normative nature of law.

Third, in phenomenology, the constitution of the intersubjective world is a problem that has been the subject of much discussion and is exemplified by the work of Alfred Schütz. More recently, this problem has been reformulated in various versions of social constructivism, often drawing their inspiration from the writings of Peter L. Berger and Thomas Luckmann – two of Schütz's students. The work of Jürgen Habermas also draws from these phenomenological sources.

The recent development in linguistically oriented

analytic philosophy has initiated a fourth fruitful discussion on the nature of "the social". Due to the independent but parallel works of such philosophers as Philip Pettit (1993), David Bloor (1997), Margaret Gilbert (1989) and John Searle (1995), the ontology of the social world has established itself as a partly independent branch of philosophy. While clearly related to the earlier discussions, social ontology – or, using John Searle's terminology in this volume, "the philosophy of society" – is not just a reflection of the methodological disputes within the special sciences. As the philosophy of language, or political philosophy, have their own identity, which is not reducible to the methodologies of empirical linguistics or positive political science, social ontology could be seen as a separate discipline.

The following questions can be posed in the context of this discussion: "How do things like money, marriage, property or government exist?" "How are they related to individual human actions, propositional attitudes, or physical things?" "How are they created and maintained?" "Are they inherently normative?" "Are they to be explained in terms of rules?" "What is the nature of social rules?" "What is the nature of collective actions?" "How are they constituted by the actions performed by the participating individuals?" "Can collectives like groups or institutions have intentions in the proper sense of the word?"

Hence there are several types of questions posed in social ontology. As we have seen, there is no single means of discussing these issues, but, rather, many separate and partly linked directions of discussion. Such a situation is common in the history of human thought. Nevertheless, it is unsatisfactory. When arranging an international meeting on the nature of social and institutional reality in the summer of 1999, the aim of both the Department of Social Sciences and Philosophy at the University of Jyväskylä and its partners was to open

a possibility for communication between the different traditions of social ontology. Several well-known philosophers, legal theorists, and methodologists of social science were invited. Almost all were able to attend, and almost all of those who did attend contributed to this volume. According to our personal judgment, the meeting was a success. However, the final judgment, of course, belongs to the reader.

The natural starting point of our discussion was the recent work of *John R. Searle*. As one of the leading specialists in the philosophy of language and the philosophy of mind, Professor Searle (Berkeley) has set the agenda for a branch of philosophy more than once. No one doing serious work in the philosophy of language could ignore his work. As we mentioned, several recent works in social philosophy are either parallel to or complementary of his *The Construction of Social Reality*. Nevertheless, in his book, the basic issues of social ontology have found such a clear, accessible and challenging formulation that it is bound to acquire the status of a classic. Therefore, we found it suitable to begin this collection with an essay written by Searle. In it he provides a concise explanation of the main theses of his book.

Our two Finnish contributors have developed views which are in many senses parallel, yet clearly distinguishable, from the theory practiced by Searle. (On their agreements and disagreements with Searle, see Tuomela 1999, Lagerspetz 1999.) The contribution of *Raimo Tuomela* (Helsinki) is part of a project he has developed over the past twenty years in several books and in innumerable articles. Combining the traditional Finnish interest in action theory with rigorous analysis, Tuomela has attempted to develop a theory of collective actions and attitudes that would serve as a basis for a general science of human action. *Eerik Lagerspetz* (Jyväskylä) re-states some central theses already formulated in his dissertation (1989) and his book *The Opposite Mirrors*.

An Essay on the Conventionalist Theory of Institutions (1995). His key concept is the notion of conventional fact, derived and modified from David Lewis' classic *Convention* (1969). In his essay, Lagerspetz also tries to link the recent discussions of social ontology with the earlier debates mentioned above.

Margaret Gilbert's (Connecticut) seminal *On Social Facts* (1989) first appeared some years before Searle's book. Again, there are interesting similarities and dissimilarities between her approach and those of our other contributors. Similarly to Lagerspetz, she is interested in the existence conditions of social rules, but her notion of a "joint commitment" may have more in common with Searle's "we-intentions" than with Lagerspetz' "conventional facts" based on "mutual beliefs". Tuomela's careful classification seems to make some room for all these phenomena as different forms of "collective acceptance". All four authors seem to be widely in agreement that (a) social entities and properties are *sui generis*, not reducible to mental and/or physical entities and properties, (b) their existence conditions should be partly analysed in terms of rules, and (c) their existence is also related to beliefs and/or commitments prevailing in relevant social groups.

Searle's account has, of course, been the subject of a certain amount of criticism. In this collection, Michael Quante (Münster) formulates some critical points. In his essay he discusses the naturalistic and individualistic nature of Searle's project. As Quante remarks, naturalism and individualism are conceptually separate positions. Of the contributors of this volume, both Searle and Tuomela have naturalist aspirations, while Lagerspetz and Gilbert could be classified as anti-naturalists. "Individualism" has several meanings. Lagerspetz's and Tuomela's accounts are, at least in some sense of the term, individualistic, while Searle's "we-intentions" and Gilbert's "joint commitments" seem to have an irreducibly non-

individualistic component. The essence of Quante's criticism seems to be that all constructivist accounts are nevertheless bound to make uneasy compromises with a basically individualistic world-view, and this tends to make them ultimately incoherent or unstable. Individualists attempt to ask the question: How do individuals and their interactions constitute social reality? They tend, however, to forget the complementary question: How does social reality constitute individuals?

Another important issue discussed in Quante's article is the ethical aspect of the constructivist account of social reality. At least two issues are relevant in this context. First, our position on individualism-collectivism axis may have some ethical consequences. Although our support of methodological or ontological theory does not commit us to an ethical view without additional premises – for example, a methodological individualist (say, Hobbes or Pareto) is not automatically a supporter of moral individualism – some views certainly fit together better than others. A view about the ethical status of social collectives (say, of nations) is naturally combined with a view about their ontological status.

Second, there is the question of the normativity vs. non-normativity of social facts. All four authors (Searle, Gilbert, Tuomela, and Lagerspetz) agree that statements such as "X is money in C" are true only if people involved in the context C somehow accept that X is money. Moral, or, more broadly, normative and evaluative, statements do not belong to this type. Most importantly, while the fact that X is accepted as money in C is, for us, a reason to accept X as money (as a means of exchange), the fact that Y is accepted as a moral reason or standard in C does not seem to constitute a reason to share this acceptance. The fact that eating meat is generally permitted in our society is not an argument against vegetarianism – or, at least, if we accept it as an argument, we have to face all the problems related to normative

relativism. But if we, while rejecting moral constructivism or conventionalism, nevertheless accept a constructivist account of social ontology, we have to develop some other theory of the normative aspects of social reality. Interestingly, Searle, in his account on the is-ought question in his earlier works, seems to argue for the irreducible normative character of institutional facts.

The problem of normativity is relevant in law as well as in ethics. As we noted, some important questions of social ontology have also been discussed in legal theory. Our collection reflects this fact. Of the philosophers, both Gilbert and Lagerspetz refer extensively to the works of legal theorists. Conversely, the two contributors hailing from the field of legal science, *Paolo Comanducci* and *Maria Cristina Redondo*, are interested in Searle's account. While seeing the fruitfulness of his approach, and while drawing interesting parallels between Searle's work and the earlier work done in legal theory, both are troubled by the problem peculiar to their own field, law. In his essay, Paolo Comanducci (Genova) compares Searle's project with that of Hans Kelsen, perhaps the most influential of all 20th century legal theorists. His somewhat sceptical conclusion is that the projects have a lot in common, including many of their problems. Law is often considered as inherently normative, yet it is undeniably a part of our social and institutional reality. Unless we accept a strong version of natural law theory, we have to admit that one necessary condition of something being a valid legal rule is that it is accepted as a valid legal rule and treated as one in the relevant jurisdiction. Here we can see a clear connection between social constructivism and 20th century legal positivism (Kelsen, Ross, and Hart), which views legal facts essentially as social facts. Nevertheless, laws are normative in the sense that they are not merely demands backed by a physical threat. As Lagerspetz remarks, the fact that something is a legal rule may be dependent on the existence of another rule, but

this regress cannot go on *ad infinitum*. Legal positivists halt the regress by presupposing an ultimate rule or rules (Kelsen's *Grundnorm*, Hart's "rules of recognition"), which are supposed to give other rules their normative force. How can social ontology account for normativity? Modern legal positivism, unlike its Benthamite and Austinian predecessors, does not try to reduce normativity to "habits of obedience". But can legal normativity be reduced to something else, e.g. to beliefs about normativity?

María Cristina Redondo (Genova) tries explicitly to apply the Searlian analysis to legal institutions. Indeed, she sees it as the only coherent foundation for a positivist theory of legal normativity. But she also raises some interesting questions about the epistemological status of sentences like "X is a valid legal rule". Generally, a constructivist account of Searle's work is committed to a certain form of monistic realism. Although the constructivist account does not accept the standard realist dogma that external reality is completely independent from our beliefs about that reality, the truth of sentences like "X is a valid rule" can be analysed in terms of correspondence between a linguistic entity and a fact. But the truth of such sentences is often controversial: there need be no unanimously shared belief (even among legal experts) as to whether X actually is a valid rule. If its truth is a matter of controversy, and if the existence of the corresponding fact is dependent on the existence of shared belief in its truth, should we say that the sentence in question is untrue, or that it has no truth value? Redondo also reminds us that there exists a competing realist account of legal normativity, namely the view which presupposes an independent moral reality and sees legal normativity as a part of moral normativity.

In the field of legal theory, Professor *Ota Weinberger* (Graz) is certainly one of the most important and most productive theorists of the ontology of norms. In his *An Institutional Theory of Law* (1986), written jointly with

Neil MacCormick (whose lecture is unfortunately not included in the present volume), he applies the notion of institution, which is partly derived from Searle's earlier work. However, his contribution to this volume has a directly normative character. He critically discusses certain theories of democracy, especially the discursive theory put forth by Jürgen Habermas in his celebrated *Faktizität und Geltung* (1992). Weinberger's critical essay illustrates the complex relationship between social ontology and substantive ethical judgments. In democratic theories, expressions like "the general will" or "the will of the people" abound. In the writings of Rousseau or of the Anglo-Idealists, they are assigned a clearly holistic meaning. For this reason, both moral and methodological individualists tend to view them with suspicion. They may agree with W. H. Auden: "We cannot postulate a General Will / For what we are, we have ourselves to blame". In Weinberger's view, ostensibly holistic talk about the will of the people should be analysed in terms of institutional processes. In saying that the will of the people is X, we may, for example, mean that in the relevant community, or some procedure (say, the majority rule) is generally accepted as binding, and, by using this procedure, we have produced the prescription X. In Gilbert's terms, the people become a plural subject. Of course, not any procedure will do. Only some procedures can plausibly be interpreted as **the** democratic means of will formation.

Habermas would in all likelihood agree with Weinberger on this issue, as both theorists share a proceduralistic conception of democracy. However, Weinberger's complaint is against the role of consensus in Habermas' theory. On one hand, the theory is too demanding: there is no assurance in real life that political discourses could approximate the ideal consensus. What it produces is something like a reasonable compromise backed by a sufficient majority. Thus, a theory that makes consen-

sus or general acceptability a necessary condition of legitimacy is simply unrealistic. On the other hand, a consensus is never, not even in ideal conditions, a sufficient guarantee of truth or moral validity – unless it is made as tautologically sufficient by defining the ideal conditions so that they imply truth or moral validity. It may be possible to start from institutional premises similar to those used by Weinberger and to end up with a more positive judgment. But certainly Weinberger is correct in insisting that a philosophical theory of democracy should be based on the analysis of concrete institutions, and that there is no reason to suppose a quasi-automatic harmony between democracy and individual rights.

As the organizers of the Jyväskylä meeting and the editors of this volume, we want to express our gratitude to all who have helped us in our work. We want to thank our partners, Tampere Institute of Social Research; the Department of Philosophy, and the Faculty of Law at the University of Turku; The Academy of Finland; The Otto Brusiin Foundation; and the Faculty of Social Sciences at the University of Jyväskylä, for their financial support. We would also like to thank the representatives of these institutions as individuals, particularly Professors Aulis Aarnio, Juhani Pietarinen, Hannu Tolonen, and Kauko Wickström, for their active cooperation; Ms. Sinikka Hakala for her superb organisational work; and the numerous students and the members of the Department of Social Sciences and Philosophy for their help, attentive interest, and participation.

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I. Some puzzling features of social reality

Now with all that by way of introduction, here is my problem. If you look at our social life it is a remarkable fact that there is a class of entities that have a very important role in our lives, but they only are what they are, because we believe that that is what they are. I will take an obvious economic example: I carry around in my wallet these sordid bits of paper. And they are really not very important as physical objects, but they matter to us. They are examples of 'money'. Now here is my puzzle: It is only money, because we believe that it is money, and yet it is an objective fact that it is money. That is, when I go into a store and I give them one of these, they don't say: "Well, maybe you think it's money, but why should we care what you think?". They accept it as money. So, here is the initial formulation of my puzzle: How can there be an important and objective class of entities that only exist because we think they exist?

I believe that when you start a philosophical investigation you have to start naively and I am just going naively to tell you some of the puzzling features about social and institutional reality. After having gone through a stage of naivete we must become immensely sophisticated in giving answers to our puzzles. I have never found the algorithm for deciding when you have to stop being dumb and naive and when you start being smart and sophisticated. We shall just play it by ear as we go along. Anyway, here goes with half a dozen puzzling features of social reality.

Problem number one is that there is a kind of self-referentiality in social concepts. Something is only money if we believe it is money, and it is only property, marriage, government, a cocktail party, tenure, a summer vacation, if that's what we believe it is. But now, if

money is partly defined as that which is believed to be money, then philosophers are going to get worried. If it has to be believed to be money in order to be money, what is the content of the belief? It looks like you are going to have circularity or infinite regress, because if part of the ontology of money is believed to be money, then part of the definition of 'money' is believed to be money, and consequently the belief that something is money, has to be in part the belief, that it's believed to be money. And that means, you are in trouble, because then the content of that belief is that it is believed to be believed to be money, and so on. So that's the puzzle: how do we avoid circularity or infinite regress in the definition of 'money' if the concept has this self-referential component? And what goes for money, also goes for property, marriage, government, and all sorts of other social and institutional phenomena.

Now that leads to a second question, and that is, what is the role of language in the constitution of social and institutional reality? It looks as if in the case of these institutional phenomena language doesn't just describe a pre-existing reality, but is partly constitutive of the reality that it describes. It looks like the vocabulary of money and government and property and marriage and football games and cocktail parties is partly constitutive of the phenomena. Otherwise, how do we account for the differences between animals that are incapable of language and consequently incapable of this sort of institutional ontology, and language-using animals like ourselves, where the words, in some sense we need to explain, seem to be partly constitutive of the social and institutional reality? Let me nail that down with an example. My dog Ludwig is very intelligent, but there are limits to his intelligence. Suppose I give him a pile of dollar bills and I train him to bring me a dollar bill whenever he wants to be fed. All the same, he is not buying anything, and it's not really money to

him. His bringing me the money is not an economic transaction. Why not?

Let me nail down the problem about self-referentiality a little more closely as well. I said, it's only money, property, marriage, government etc. if we think that that is what it is. This actually has important consequences. Suppose, we decide we are going to give a cocktail party and we invite the whole population of Wilmersdorf, and we have a hell of a great cocktail party. But suppose things get out of hand and the casualty rate is worse than the battle of Gettysburg. All the same, it's not a war. It's not a war, unless people think it's a war. As long as they think it's a cocktail party, then it's a cocktail party, it's just a hell of a cocktail party. This feature of self-referentiality is actually of some historical importance. I have always wondered, how could Cortez with 150 or so bewildered Spaniards beat the entire Aztec army? Not to mention Toltec, Mixtec, Aranhucac and other assembled tribes. Well, part of the answer is, they had a different definition of what they were doing. You see, the Aztecs were fighting a war according to their definition. That means you get close enough to an enemy so that you can hold him without bruising him and later on you sacrifice him to the Great God Quetzacoatl by cutting out his living heart with an obsidian knife on the top of a pyramid. Well, that may be a great definition of warfare for Central American tribes; but it is very ineffective against Europeans on horses with metal weapons. So the sorts of phenomena I'm talking about actually have historical consequences. It isn't just that we are dealing with philosophical puzzles.

So far I have covered two sources of puzzlement. The constitutive role of language and self-referentiality, A third related source of puzzlement for me (and this has a special interest to me) is the special role of performatives in the creation of social and institutional reality.

For a very large number of institutional facts you can create the fact just by saying you are creating it, provided you have the appropriate authority in the appropriate situation and the context is correct. So, you can adjourn the meeting by saying "I adjourn the meeting". You can declare war by saying "We declare war". You can pronounce somebody husband and wife by saying "I pronounce you husband and wife", and so on with a large number of cases. Now why is that? How can you create institutional reality just by saying you are creating it? You cannot do it with everything. You cannot score a goal in football by saying "I score a goal", or even "We hereby score a goal". So what is the difference? What is going on here?

Well, I will give you a couple of more of these puzzles and then we will start to try to solve them. Another puzzling feature of social reality is the complex interrelations among the elements. They seem to be systematic. So you don't just have money, but in order to have money you have to have a system of exchange, ownership, payment, debts and in general you have to have a system of rights and obligations. It might seem that games are an exception because games are self-enclosed in a way that money and property and marriage are not. But even in the game you understand the position of a batter and the position of a pitcher only in terms of understanding the notions of rights and obligations. And that already involves you in more general social and institutional notions. So I am struck by the pervasive interlocking character of the kinds of social and institutional phenomena that I'll be talking about.

There is one last puzzle I will mention. We could go on all night listing puzzles, but let's settle for five. The fifth puzzle that interests me is: though there exists a real institutional reality of elections, wars, property exchanges, stock markets and so on, nonetheless you can't have an institutional reality without an underlying brute

physical reality. Here is an interesting fact. Money can take a very large number of forms. It can be in the form of gold or silver or paper or copper, it can be in the form of credit cards, and some primitive tribes use wampum or sea shells. By the way, most of your money underwent a dramatic physical change in the past 10 or 20 years that you didn't even notice. It happened in the middle of the night. Most of your money is now represented by magnetic traces on computer discs in banks, and it doesn't make a bit of difference: You didn't lose any sleep at all over this, though there was a revolutionary change in the physical representation of your money. Now, here is the point. Almost anything can be money but at some point it has to have some physical reality. There has to be something whether it be gold or magnetic traces that counts or could count as money. Why is that? Why is the physical necessary, and why is there a primacy of the brute physical fact over the institutional fact?

II. Conceptual tools necessary to account for social reality

Now we have a problem. Let's go to work to solve it. In order to solve it, I want to make another distinction that I have been presupposing and that I think is absolutely essential for understanding our position in the world.

There are classes of objective facts in the world which have to be distinguished from certain other objective facts in the following regard. Many things that we think of as real nonetheless only exist relative to observers, in the form of reality that they have. We need to distinguish those features of the world that we might call 'observer-independent' from those features that are ob-

server dependent. Observer independent features are those that, so to speak, don't give a damn about human observers, and here I am thinking of things like mountains and molecules and galaxies and processes like photosynthesis and mitosis and meiosis. All of those phenomena are observer-independent. But in addition to them, there are lots of other phenomena in the world whose existence depends on being treated or regarded in a certain way by human agents. Observer dependent phenomena would include such things as chairs and tables and glasses and money and property and marriage. So, we need a general distinction between those phenomena that are observer-independent and those whose existence is observer-relative.

Typically an observer-relative entity will have both sorts of features. So this object, which I carry around in my pocket, has a certain weight and that it has the weight that it has is observer-independent. It doesn't depend on me or anyone else, it depends on the gravitational relations between the object and the center of the earth. But this object is also a Swiss army knife and the feature of being a Swiss army knife is observer-relative. So we need a general distinction between those phenomena that are observer-independent and those that are observer-relative. Typically the natural sciences deal with phenomena that are observer-independent, phenomena like mountains and molecules and tectonic plates. Typically the social sciences such as economics, sociology, and political science, deal with phenomena that are observer-relative. And here I am thinking of such things as political parties, elections, social classes and money. The question for this evening we can now state a little bit more precisely: we are discussing the ontology of a certain class of observer-relative social and institutional reality. For the analysis of this social reality I need exactly three devices, three tools to try to analyze that ontology.

Here is the first one. We need to call attention to the class of entities to which we have assigned functions. Many of the most common concepts that we use in dealing with the world, for example concepts like “cars” and “bathtubs” and “tables” and “chairs” and “houses”, involve the assignment of function. It is a remarkable capacity that humans and certain animals have, that they can assign functions to objects, where the object does not have that function independently of the assignment. And I want to make a strong claim about this assignment of function. I want to say: All functions are observer-relative. It is only relative to agents, only relative to observers that something can be said to have a certain function.

We are blinded to this fact by the practice in biology of talking about functions interchangeably with talking about causation. But there is a subtle difference. We do indeed discover such facts as the fact that the function of the heart is to pump blood. We do indeed discover, that the function of the vestibular ocular reflex is to stabilize the retinal image. But we discover those functions only against the background presupposition of certain norms. We have to assume that life and survival have a value, and it is against the presupposition of the norm, against the assumption that life and survival and reproduction are valuable, that we can say such things as that the function of the heart is to pump blood. If we thought that life and survival were worthless, that the only thing that really mattered was death and extinction, then hearts would be dysfunctional, and cancer would have a useful function, it would hasten extinction. We don't think these things and it is crucial to our assignments of function that we don't. But it is only against the background of the presupposition of normativity, that we can discover such facts as the fact that the function of the heart is to pump blood.

One way to put this point is to ask: what is the differ-

ence between saying that the heart *causes* the pumping of blood, on the one hand, and saying that *the function* of the heart is to pump blood, on the other. And it seems to me there is a crucial distinction, because once you introduce the notion of function you introduce normativity. Once you introduce the notion of function, you can talk about such things as heart disease, malfunctioning hearts, hearts that function better than other hearts. Notice, we don't talk about better and worse stones, unless we assign a function to the stone. If you think this stone will make a good projectile, then you can evaluate it. You can say this one is better than that one. Or if you assign it an esthetic function you can say this stone is *an objet d'art trouvé*, and with such an assignment of function, you may think the stone has some artistic value. So that's the first point, we assign functions and all functions are observer relative. The second notion I need is that of collective intentionality. All genuinely social behavior contains collective intentionality on the part of the participants. You can see the centrality of collective intentionality if you contrast genuine cooperative behavior from behavior which merely happens to be co-ordinated with other behavior. Suppose for example that we are playing in a symphony orchestra. Suppose I am playing the violin part and you are singing the soprano part, and together we are part of the performance of Beethoven's 9th Symphony. We have to be able to make the distinction between me sawing away on the violin and you independently but by chance simultaneously singing "Freude, schöner Götterfunken", and us doing this intentionally together in concert. So a basic ontological fact about social and collective behavior seems to be collective or shared intentionality in the form of collective beliefs, desires and intentions. But in my intellectual tradition the existence of collective intentionality creates a real problem. If all the intentionality I have, is in my head, and all the

intentionality you have is in your head, how can there be such a thing as collective intentionality? There are a lot of ingenious efforts to try to solve this problem in philosophy. Basically they try to do it by reducing collective intentionality to individual or singular intentionality. They try to reduce we-intend, we-believe etc. to I-intend plus I-believe that you have such and such an intention. And then on your part it is I-intend plus I-believe that you have such and such an intention. On the view that I am opposed to, the assumption is, We-intentionality must reduce to I-intentionality. Collective intentionality must reduce to individual intentionality. Otherwise you would have violated the “principle of methodological individualism”. If you say that collective intentionality is primitive, then it seems you are in very bad company. It seems that you are postulating some kind of Hegelian *Weltgeist* that is floating around overhead, or something like that. Where I live you don't want to be caught doing that, otherwise you'll lose a lot of friends. Given that puzzle – how can there be collective intentionality, when all intentionality is individual? – it looks like we have to reduce collective intentionality to individual intentionality. An enormous amount of intellectual effort has been spent, in my view wasted, trying to do that. The analysis that comes out involves something called “mutual belief”.

For example, consider a case where we are pushing a car together to try to get it started. Now that is a case of collective intentionality. So how is that supposed to be analyzed? The idea is this. When we are pushing the car together, then I intend to push the car and you intend to push the car. And I believe that you believe that I intend, and I believe that you believe that I believe that you believe that I intend and so on up in an infinite hierarchy.

And for you it is the same. It's “I believe that you believe,” etc. on up. Now I think my poor brain will

not carry that many beliefs and I want to suggest there is a very simple way out of this puzzle. The puzzle is, assuming that all intentionality is in the heads of individual human and animal agents, how can it be the case that it's all in our individual brains, if it is irreducibly collective? And the answer is, that we can have intentionality in your brain and my brain, which is in the form of the first person plural as much as we can have it in the form of the first person singular.

On my view there is a trivial notational solution to the puzzle. The irreducible form of the intentionality in my head, when we are doing something collectively is, 'we intend'. And I don't have to reduce that to an 'I intend' and a set of mutual beliefs. On the contrary, I have the 'I-intends' that I do have, precisely because I have an irreducible we-intend. To nail that down to cases, I am indeed playing the violin and you are singing the soprano part, but I am only doing what I am doing and you are doing what you are doing, because we together are collectively playing the chorale movement of Beethoven's 9th symphony. I hope everybody sees that point.

As I said, the problem I am discussing has a traditional name. It's called "the problem of methodological individualism". And the assumption has always been: either you reduce collective intentionality to the first person singular, to 'I intend', or else you have to postulate a collective world spirit and all sorts of other perfectly dreadful metaphysical excrescences. But I reject the assumption that in order to have all my intentionality in my head, it must be expressible in the first person singular form. I have a great deal of intentionality, which is in the first person plural.

Nothing comes without a price and we do pay a price for the solution that I am proposing to this puzzle. The price is this. It turns out that I can be mistaken, not only in what is happening in the world, but I can be

mistaken about the very mental state that I have. That violates the Cartesian assumption that we cannot be mistaken about our intentions. But I think that is the right way to think of it. Suppose in the case where we are pushing the car I discover that you weren't in fact pushing? You were just going along for a ride, I was doing all the pushing. Well, then I was not only mistaken in one of my beliefs, but it turns out that in a way I also was mistaken about what I was doing. I thought I was pushing as part of our pushing and in fact that's not what was happening. I was doing all the pushing, you were just pretending. So that is a price that we have to pay. You can be mistaken about the nature of the activity you are engaged in, if you have an assumption about the collective intentionality, which is not shared by your apparent cooperators. But that seems to be the situation we are in real life.

The third tool is this. Years ago, when I first started working on speech acts I made a distinction between brute facts and institutional facts. Those facts that I said were 'institutional facts' presuppose a human institution for their existence, for example such facts as that somebody is checkmated in chess, or somebody is elected President of the United States. I wanted to distinguish those facts, which are called institutional facts, from 'brute facts' whose existence does not require a human institution, the fact, for example, that the earth is 93 million miles away from the sun. You need an institution in order to state or describe that brute fact; you need the institution of language and the institution of measurement in mileage, e.g. French and kilometers, to describe it that way and you could state the same brute fact using different institutions. But the point I'm making is, the fact of distance between the earth and the sun does not depend on a human institution, though of course you have to have institutions in order to describe or state the fact. Now here is the point. There is

a class of facts that are institutional facts and another class of facts that are 'brute facts', because they do not require human institutions. And then, the question is, how are institutional facts possible?

I also made the claim that you need a distinction between two kinds of rules. One sort of rule regulates antecedently existing forms of behavior. Another sort of rule doesn't just regulate antecedently existing forms of behavior, but creates the possibility of new forms of behavior. I call the difference between these two sorts of rules – using a Kantian terminology here – 'regulative' rules, that regulate antecedently existing forms of behavior, and 'constitutive' rules that constitute new forms of behavior. Examples are obvious: The rule "drive on the right hand side of the road" doesn't create the possibility of driving. Driving can exist without that rule. That is a rule to regulate the already existing activity of driving. But the rules of chess are not like that. It wasn't the case that there were a lot of people pushing bits of wood around on boards and somebody said: "Look fellows, we have to get some rules so we don't keep bashing into each other. You stay on the right with your knight and I go on the left with my bishop!" Rather the rules of chess are constitutive in the sense that they create the possibility of the activity in question. Playing chess is constituted by acting in accordance with at least a certain large subset of the rules of chess.

Now here is the bottom line of this discussion. Those rules have a typical form. The form is 'X counts as Y' or 'X counts as Y in context C'. That is, such and such a move counts as a 'legal knight-move'. Such and such a position counts as 'you being in check'. Such and such a position counts as 'checkmate', and checkmate counts as 'winning' or 'losing' the game. And what goes for chess goes for much more elaborate institutions: such and such noises count as 'making a promise', such and such marks on the paper count as 'voting' in an elec-

tion, such and such number votes counts as 'winning' an election, and so on with a large number of institutional structures.

III. Status functions

We now have three tools to solve our problems. These are, first, the assignment of function, second, collective intentionality, and, third, constitutive rules, rules of the form 'X counts as Y'. With all this apparatus assembled, let's go to work. I will now try to put it all together. I want you to imagine a simple community of (let's call them) hominids, beasts more or less like ourselves. Now it's very easy to imagine that such organisms, such primates can assign functions to objects. It's easy to imagine that they use a stick to dig with, or they use a stump to sit on. They can assign a function of being a digging tool or a stool to sit on. But now it's not a big step to imagine that they do that collectively. That collectively they have a very big stick that they use as a lever, or they have a big log that they use as a bench to sit on collectively. So it's very easy to tie collective intentionality to the assignment of function.

But now I want you to imagine the next step: Imagine – to take an example – our group of hominids live in a series of huts, and they build a wall around the huts. Imagine that they build a wall to keep intruders out and to keep their own members in. And now this is a case of the collective assignment of function, where the function is performed in virtue of the physics of the object on which the function is assigned. We just assume the wall is too big to climb over easily. But now imagine that the wall gradually decays to the point, where it is no longer able to keep the members of the community in, in virtue of its physical structure, nor to keep intruders out in virtue of its physical structure. But now let's suppose that,

out of habit or whatever, the people involved continue to recognize the wall as a boundary – i.e. they continue to acknowledge or accept that you are not supposed to cross the boundary. It is important to notice the vocabulary we use of ‘acknowledge’, ‘accept’, and ‘recognize’. That is we imagine that the wall continues to serve its function, but no longer in virtue of its physical structure. It serves its function in virtue of the fact that it has a certain recognized status.

Now I wanted that to sound innocent, but I think that the move I just described is the basic move by which we create institutional reality of a specifically human sort. What happened was this. We imagine that an entity is used to perform a function, but it cannot perform the function in virtue of its physical structure. It can only perform the function in virtue of the collective recognition or acceptance of the entity in question as having that function.

And I want to say that is the underlying idea behind ‘X counts as Y’. This line of stones, which is all that is left of the wall, now counts as a boundary. It now has a deontic status, it now has a form of power, which it exercises not in virtue of its physical structure, but in virtue of the assignment of function.

And I want to introduce a name for this sort of function – let’s call these “status functions”. A status function is a function that an entity performs not in virtue of its physical structure alone, but in virtue of the collective imposition or recognition of the entity in question as having a certain status, and with that status a function. And the structure of that – logically speaking – is the collective imposition of a function of the form ‘this entity X counts as having this status and therefore this function as Y in this context C’. Now, I’m making a strong claim: this little device is the foundation stone of all institutional reality. So let’s go to work and explain that claim.

I want to extend this account to the case of money. And just to nail it down to historical examples I want to talk briefly about the evolution of paper currency in Medieval Europe. (I love the Middle Ages, because it is, in a sense, the childhood of our civilization. In Medieval Europe, you see institutional forms that are growing and decaying, and the development of paper money is a very good example.) Initially people carried around gold and silver coins and the use of gold and silver was a form of barter. It was a form of barter, because the value of the coin was exactly equal to the value of the gold or silver contained in the coin, and the valuable coin was exchanged for other things. Now if you look in the text books they tell us, there are three kinds of money. There is 'commodity money', there is 'contract money' and there is 'fiat money'. But what they don't tell you is, what's the relation between them? The initial case we are talking about, where people actually had gold and silver, is a case of commodity money. Barter in gold and silver is both dangerous and inefficient, so people found they could leave the gold and silver with a group of people who worked on benches, and they were called "bankers", and the bankers would give them bits of paper on which it was said "we will pay the bearer of this note a piece of gold on demand".

With the introduction of the bits of paper we have now moved from commodity money to contract money, because the bit of paper is a contract to pay in gold or silver on demand. Later some genius discovered that you can actually increase the supply of money in circulation if you are out more bits of paper than you actually have gold in the bank. And as long as not everybody runs to the bank at once, it works. The bits of paper are still as good as gold. Much later on some genius discovered – and it took a long time to make this discovery: you can forget about the gold, and just have the paper. And that's the situation we are in now. We moved from commodity

money, which is barter, to contract money, to fiat money. If you look at these bits of paper that I was waving around earlier, they seem to me good examples of the form 'X counts as Y', that is such and such bits of paper count as "currency". As it says on the piece of paper that I'm holding here, "This note is legal tender for all debts public and private". It counts as money in the United States. But that it counts as money, is a matter of collective acceptance of the status function in accordance with the structure: 'Such and such counts as so and so'. These bits of paper count as legal currency in the United States, just as some other bits of paper count as legal currency in another country.

Now notice, that once you have got that structure 'X counts as Y', then automatically certain forms of abuse become possible. If I go in my basement and produce a lot of things that look like these bits of paper, I will be producing counterfeit money. Thus money isn't just anything that looks like this but it has to be issued by the Bureau of Engraving and Printing under the authority of the Treasury. So one form of abuse is counterfeiting. The structure automatically makes it possible to have abuses, because you can present something as satisfying the X term even if it doesn't in fact, and that's counterfeit. Another form of abuse is if you get too many of the entities in question. Then you have inflation and in hyper-inflation the entities are no longer able to function as money. And what goes for money, goes for other forms of social institutions. You can have counterfeit lawyers and counterfeit doctors, that is, people who don't actually satisfy the conditions, but who masquerade as lawyers and doctors. I don't know how elsewhere, but in the state of California we now have so many lawyers that there is a kind of inflation.

Now here is a puzzling question. If I am correct in describing the logical structure of status functions, if it is just a matter of imposing a status and with it a func-

tion, then how can the system be so powerful? How can these structures have such an enormous effect on our lives, when, as I have described it, it all seems so fragile? There are two parts to the answer to that. One is this: the structure can be iterated indefinitely. Let me give an example. I make noises through my mouth, I just emit this acoustic blast. But these count as sentences of English. And in a certain context making noises of that sort, uttering those sentences of English, counts as making a promise. Making that kind of promise in that kind of context counts as making a contract. Notice how we are going up in the hierarchy. The X-term at one level will have been the Y-term at an earlier level and you keep going with it. Making that sort of contract, counts as getting married. And in the State of California once you get married, all kinds of things happen. You are entitled spousal benefits, income tax deductions, all sorts of rights concerning property, taxes, and so on. So you get an indefinite iteration.

The second point is that you get interlocking structures. I don't just have money, but I have money in my bank account at the Bank of America, which is put there by my employer, the State of California and which I use to pay my debts to the Pacific Gas and Electric Company as well as my federal, state and local taxes. Now, just about every word I uttered in that litany was an institutional notion. We are talking about interlocking institutional facts. The whole point of the institutional is often to structure the brute. For example, recently I went and stood in front of a woman at a counter. I made noises and she made noises, I gave her a plastic card, she gave me sheets of paper, and the next thing is I was on an airplane on my way to Europe. The movement of my body was a brute fact. My body moved from California to Europe. But the institutional facts made the brute fact possible. We are talking about a structure whose point is not just to empower other institutional

structures, but to control brute reality.

However, the structure is also fairly fragile and the amazing thing is how rapidly it can collapse. I will never forget the moment, when I saw the people climbing over the Berlin wall on television. It was an amazing moment, because I was of a generation that thought the two-power division of the world would go on indefinitely. But there came a point, when the system of institutional reality was simply no longer acceptable and it just collapsed quite suddenly. So you can have a collapse of the institutional structure, if it's no longer accepted, and you can have a decay of the institutional structure of the sort that I have been describing.

IV. Solutions to the puzzles

We have a couple of minutes left, so I am going to show you how we solve these puzzles I began with. First, how can there be self-referentiality without circularity or infinite regress? Well, the answer is, you don't have to use the word "money" in order to define money. The word "money" functions as a summary term or as a place holder for being a medium of exchange, a store of value, a payment for services rendered, a measure of value of other currencies and so on. And if something performs all of those functions, then it's money. So we do not have a vicious circularity or infinite regress. If I say in order for something to be money, people have to believe that it's money, there is no circularity because they can have that belief without having the word "money". The word "money" here just is a place holder for a large number of other functional expressions.

Now, what about our second and third points, the role of language and especially performatives, how can performatives create institutional reality? And the answer to that is, that where the X-term is itself a speech-

act, then typically you can create the reality by performing that speech-act. So you can make somebody husband and wife by saying “I pronounce you husband and wife”, or you can find somebody guilty in a court if you are a judge by saying “I find you guilty as charged”. And the creation of the institutional fact need not even take the performative form. It says on this 20 dollar bill “This note is legal tender for all debts public and private”. Now, I am an epistemologist and my natural worry is “how do you know?”, and I want to write to the Treasury and say “How do you guys really know that it’s legal tender? Have you done a survey, have you done an empirical study?” And the answer is, it isn’t an empirical claim. They make it legal tender by declaring that it’s legal tender.

Our next point – and this is the most important – is the constitutive role of language. Why is language constitutive of institutional reality, in a way that it is not constitutive of other forms of reality? Why is it that money and property and marriage and government require a vocabulary in a way that tectonic plates and gravitational attraction and galaxies do not require a vocabulary for their existence? That is in fact a very hard question to answer and I spent a whole chapter on it in the book on which this lecture is based, but now I will just summarize the answer in one sentence: for institutional facts there has to be some form of symbolism because there isn’t anything else to mark the transition from X to Y. We just count the X term as having a Y status. But if we so count it, there must be some way to represent that counting feature. My dog can see somebody cross the line while carrying a ball, but can’t see him score a ‘touch down’. Why not? Because in order to see him score touch down you have to have some way to represent the extra status function and that requires language.

Now you might ask “well why do you need words?”

And the answer is in some cases you do not. Suppose we kept score in a soccer match by piling up stones. I score a goal so I get a white stone to put on my side and you score a goal so you put a white stone on your side, and these are points. I got a point and you got a point. But now here is the 'point': These stones now play a linguistic role. They are now symbolic. They now play the role of symbolizing scoring in the game. So the language or some other symbolism has to be constitutive because there isn't an independent ontology. The move from X to Y is itself a symbolizing linguistic move and there has to be some way for us to represent it, otherwise it doesn't function.

Well, our last questions had to do with systematic relations of institutional reality and also with the priority of the brute over the institutional facts. The answer to the first of these questions is this: The reason we have all this institutional ontology is to organize and regulate our lives. So there has to be a set of interlocking institutions. What I haven't had time to tell you is, all of this at bottom is about power. We are talking about how society organizes power relations. It normally does it through the institution of status functions. Somebody is the boss and somebody else an employee, somebody is an elected president, somebody is defeated and so on. And all of this is designed precisely to intersect with other elements of the society. So, in order to have money you have to have a system of rights and obligations. You have to have the ability to buy and to sell, to store value in the form of money, to receive money as payment for services rendered. So, that is the reason for the interlocking complexity. That's what we have the system for. It is designed and has developed to enable people to cope in complex social groups, in power relations .

The final question was, why is there this priority of brute facts over institutional facts? And the answer to

that is, because the iterated structure of 'X counts as Y' has to bottom out somewhere. For instance, my making a contract can be derived from my signing my name, and my signing my name can be a matter of certain words being written on a page. But then you reach the point where there isn't any more 'X counts as Y'. You just have the brute fact, e.g. the marks on the page, as X-term. So institutional reality of ownership and obligations is built on top of physical reality, it has to bottom out in physical reality.

Now to conclude, I said I would like us to think of the possibility of creating a philosophy of society, where our first task would be to get an understanding of social ontology. If we got that, then, I think, it would give different cast to our political and social theories. I think that political philosophy in the West contains a large fantasy element about how we make social contracts with each other and about when people can violate or not violate the social contract. But in real life it isn't like that, in real life it's a matter of accepting or rejecting, or furthering or fighting against institutional reality. And one way to create institutional reality often is to act as if it already existed. This is how the United States was created. There was no way that a group of people could get together in Philadelphia, all of them subjects of the British Crown in a British Crown Colony and declare themselves to be an independent nation. There was no institutional structure to enable them to do that. Well they just did it. They did it and they got away with it. It helped that they had an army and had the support of the French and so on. But you can do this if you can get away with it. You can create an institutional reality just by acting as if it already existed.

One last thought I want to leave you with and that's this. In order to articulate this I have made it look much more conscious than it really is. Most of these things develop quite unconsciously, and indeed people typi-

cally are not even aware of the structure of institutional reality. It often works best when they have false beliefs about it. So there are a lot of people in the United States, who still believe that a dollar is only really money because it is backed by all that gold in Fort Knox. It's the gold in Fort Knox that makes the dollar money. This is a total fantasy, of course. The gold has nothing to do with it. And people hold other false beliefs. They believe someone is king only because he is divinely inspired, or they believe that marriages have to be made by God in heaven, and so on. I am not trying to discourage them in these beliefs because often the institution functions best when people hold false beliefs about it. But I think as philosophers we must, as a first step in understanding social reality, and as our first step in creating a philosophy of society, understand the basic ontology of social reality.

Note

- 1 A version of this text has appeared in *Analyse & Kritik* 20 (2/1998), pp. 143-158. Reprinted by permission.

Margaret Gilbert

SOCIAL RULES AS PLURAL SUBJECT PHENOMENA

I. Introduction

As we shall see, investigation of the nature of social rules is a good way into some deep questions about social reality. These questions have to do with what one might call the *basic structure* of the social world. It is generally agreed that social rules are pervasive and consequential social phenomena.¹ What, though, is a social rule? I take it that *a social rule is the rule of a social group*.² Precisely what this amounts to, according to our everyday understanding, is the topic of this article.

Perhaps the most famous account of social rules to date is that proposed by the late H. L. A. Hart in his classic work *The Concept of Law*.³ According to Hart, social rules underlie one of the most important and distinctive of human institutions, the institution of law.⁴

Hart's account of social rules is a rich one, incorporating a variety of features.⁵ In this paper I first review Hart's account of social rules. I then articulate three significant problems for it. Finally I sketch an alternative account that avoids the problems. This account involves a kind of holism that is lacking in Hart's and related accounts.⁶

II. Hart on social rules

a. Hart's discussion

Hart asks: 'What is the difference between saying of a group that they have the habit, e.g. of going to the cinema on Saturday nights, and saying that it is the rule with them that the male head is to be bared on entering a church?'.⁷ He goes on to describe a variety of features that he suggests must be present when there is a social rule. He can be construed as proposing at least a partial analysis of 'the statement that a group has a certain rule' in common parlance.⁸

In his discussion of the nature of social rules in general Hart focuses on rules of a particular and central type, and I shall do so as well. First, such rules are *prescriptive*. That is, they can be formulated in terms of what is 'to be done'. Second, they are *basic* or *primary* at least in the sense that they do not exist by virtue of the operation of any special rule-generating rules such as 'We are to do whatever Rex tells us to do'.

Hart's discussion is relatively informal. For present purposes I shall characterize his account of social rules in terms of four central features. The account runs as follows.

There is a perfect case of a *social rule in a group G* that action A is to be done in circumstances C, if and only if every member of G⁹:

(1) regularly does A in C (this behavior need not be invariable).¹⁰ (Call this the *regularity* feature.)

(2) regards doing A in C as a 'standard of criticism' for the behavior of members of G.¹¹ (The *standard of criticism* feature)

(3) criticizes any member of G who does not do A in C and puts pressure to conform on members of G who threaten not to do A in C.¹² (The *criticism and pressure* feature)

(4) believes that such criticism and pressure is legitimate or justified in the following sense: non-performance of A in C by any member of G provides any member of G (either the defector or any other member) with a good reason to express criticism and exert pressure.¹³ (The *criticism and pressure thought justified* feature)

One further aspect of Hart's view of social rules may be mentioned at this point. Hart is at pains to avoid the idea that the significant internal or psychological aspect of social rules is 'a mere matter of 'feelings''.¹⁴

He does allow, however, that when there is a social rule members of the relevant group typically *feel that they are in some sense 'bound' to behave according to the rule*.¹⁵ Though he does not make much of this, and it should not be placed at the core of his account, we might add to the above list that every member of G:

(5) feels in some sense 'bound' to conform to the pattern: doing A in circumstances C.¹⁶ (The *felt bindingness* feature.)

Whatever else might be said about these five features, it is plausible to claim that they are commonly present in those contexts where we deem there to be a social rule according to our everyday understanding. It is therefore worth considering them carefully. Are some of the listed features more fundamental than others, clearly deeper or more basic? Is the list incomplete in some way? Does it call for amplification?

b. A key element in Hart's account: punitive pressure

Feature (3) – the criticism and pressure feature – involves certain actions and utterances, while feature (4) involves the belief that these actions and utterances are *justified*. It seems that feature (4) is the fundamental feature here, for it will presumably underpin the actions and utterances in question.¹⁷

In any case feature (4) – criticism and pressure thought justified – is of the first importance. We should be clear about what it amounts to. When this feature is present group members believe that they are justified in doing more than simply *judging* deviants adversely. Indeed, they believe that they are justified in doing more than dispassionately *communicating* a judgement of error. Hart implies that the *criticism* he has in mind here is a closer cousin to *pressure for conformity* than is a mere *communication of error*.

I take it that the type of criticism in question is a matter of *reproofs, rebukes*, and the like, directed at those who deviate from the pattern of behavior at issue. In other words, it is a matter of something that can be argued to have a *punitive* element. It constitutes a form of *punishment*.¹⁸

So as to keep the kind of criticism at issue here clearly in mind, I shall refer to it as *punitive criticism*.¹⁹ It contrasts with what we might call *descriptive* criticism, which merely notes or points out an error.

Hart stresses that where there is a social rule it will be considered legitimate to pressure *would-be deviants* to conform. He speaks of '*demands for compliance*' in this context. Presumably any such '*demands*' will be '*backed by threats*' at least insofar as punitive criticism can be expected should the deviant act after all be performed.

To characterize feature (4) succinctly, I shall now say that it involves the belief that it is justifiable to meet deviance with *punitive pressure*. This is to be understood

to include both punitive criticism (reproofs and the like) and such pressure as demands for conformity (backed by threats of punitive action).²⁰

Hart was right, I believe, to separate out and to stress feature (4). Any account of our everyday concept of a social rule that neither includes nor implies the existence of feature (4) will be importantly lacking.²¹

III. A structural feature of social rules

How could punitive pressure be justified in the context of a social rule? And what type of justification is at issue?

At one point Hart speaks of justification in terms of 'having a good reason'.²² Now someone could have a good reason to *pressure* another to do a certain thing, without being in a position to *punish* them for not doing it. What one does cannot *count* as punishment unless one has a certain standing. (One can, of course, act *in a punitive fashion* or 'punishingly' without any special standing.) One who is *justified in imposing punishment as such*, then, requires the standing or entitlement to punish. In other words, to judge oneself justified in punishing is (in the first instance) to judge oneself entitled to punish.

Now consider the following dialogue between a mother, Becky, and her daughter, Phoebe:

Becky (reprovingly): 'Phoebe! You've brought the cat in!' Phoebe: 'You're telling me off – again!'

Becky: 'I should think so! We've a rule against bringing the cat in!' or, 'Well, you've broken one of our rules – again!'²³

Becky's response to Phoebe appears to be perfectly in order from a logical point of view. That this is so sug-

gests the following about our everyday understanding of what it is for a group to have a rule: if a given rule is the rule of a particular group, this entitles group members to impose a form of punishment on members who deviate from the rule. Becky's appeal to *their* rule is evidently seen to explain, in the sense of justifying, the imposition of a form of punishment (involved in reproving Phoebe or, as Phoebe puts it, 'telling me off'). Any such justification presupposes an entitlement to impose such punishment.

Can we be somewhat more precise about the presumed basis for this entitlement? Consider a slightly different dialogue.

Becky (speaking as if Phoebe has somehow *offended against her*): 'You've brought the cat in!'

Phoebe: 'What's that to you?'

Becky: 'It's against our rule!'

Once again, I take it that there is nothing untoward in Becky's responses, including her offended surprise.²⁴

This suggests that a group's having a rule grounds a claim for each member against every member for conformity to the rule. Here Becky regards herself as having been offended against by Phoebe's non-conformity, citing their rule as the grounds for her implied claim on Phoebe.

We might now add the following feature to Hart's list: [There is a social rule in group G that action A is to be done in circumstances C if and only if every member of G]

(4') believes that: every group member *has a claim against* every other group member for the performance of A in C, *and a consequent title to exert punitive pressure* on any other group member in favor of doing A in C.

In describing feature (4') I have written that every member of *G* believes certain things. Now, we ourselves have social rules and we take ourselves not simply to believe but rather to *know* or (in that sense) *understand* that *these rules, in and of themselves, ground claims and entitlements of the sort in question*. Rather than altering feature (4'), I suggest that we now simply add to Hart's list:

(A) The existence of a social rule in a group, in and of itself, gives group members a title to exert punitive pressure on one another for conformity to the relevant pattern, in the appropriate circumstances. It does this by virtue of grounding a claim for each group member on every other group member for conformity.

(A) might be said to describe a 'structural feature' of social rules. We understand that it is because of the truth of (A) that feature (4') is present when there is a social rule in some group. Members believe that they have a claim on one another, and so on, because they *do* have a claim. More precisely, members know, rather than believe, these things. Analogous points can be made for feature (4).

IV. A problem for Hart's account

Let us now set apart features (4) and (4') as features *invariably correlated* with social rules that can be explained by the existence of a social rule. Once we do this, the key features remaining on Hart's original list are (1), the regularity feature, and (2), the standard of criticism feature.

I want now to press the following question with respect to each of these features (and, eventually, with respect to their conjunction). Is it the case that, by vir-

tue of the presence of the feature in question, *and that alone*, members of the relevant group have a claim on other members for conformity to the pattern in question, and a consequent title to exert punitive pressure for conformity in the appropriate circumstances?

I am supposing that according to our everyday understanding it is our having a given rule, *and that alone*, that grounds the claim in question. We need to ask, therefore, whether there is what I shall call a *direct* argument from one of the features in question, or from their conjunction, to the claim. No new information should be introduced.

a. The regularity feature

It is surely implausible to claim that feature (1), the regularity feature, itself gives members the relevant type of claim on one another for performance. As it stands, the fact that 'The members of group G regularly do A in C' is not enough to give members of G a claim on one another for the performance of A in C.²⁵

It is worth considering two kinds of argument which introduce additional assumptions beyond the assumption of a regularity in behavior. These assumptions invoke what may be plausible additions to the regularity feature.

The first kind of argument invokes an 'entitlement to expect' conformity. With or without preamble, it supposes that: (1) *Members of G have reason to believe that members of G will continue to do A in C in the future.*²⁶ It proceeds as follows. Given (1): (2) Members of G are entitled to expect future performance from one another. Given (2): (3) each member of G has a claim on other members for the performance of A in C.

There is the following intransigent problem with this argument. The sense in which the argument undoubt-

edly shows members of G to be 'entitled to expect' performance is a matter of their being entitled *to predict* that performance will be forthcoming. Such an entitlement, however, is not in itself sufficient to ground *a claim on others for their performance*.

The second kind of argument involves implicit appeal to a general moral principle. Various such arguments are possible.

Thus consider an argument making use of the assumption that all persons have a moral claim against all persons not to be put in a position where they may *detrimentally rely* on a reasonable but unfulfilled expectation. Given that members of G reasonably believe that other members of G will do A in C in the future, this argument, also, concludes that members of G have a claim on one another for the performance of A in C. This is an indirect argument on at least one count: it appeals to a moral principle.²⁷ The same can be said, evidently, of all arguments from the regularity or expectation feature which appeal to moral principles in this way.

b. The standard of criticism feature

I now turn to feature (2) – the standard of criticism feature. I construe this as follows: *group members regard a certain pattern of action as a standard in relation to which their behavior may be judged as correct or incorrect*. What kind of standard is at issue?

Are correctness and incorrectness, here, matters of moral rightness or wrongness? Hart's few examples of social rules suggest that, in his view, this is not so. The example rule 'Whatever Rex I enacts is law'²⁸ does not look like a moral rule and surely need not be so viewed. The example rule that 'the male head is to be bared on entering a church'²⁹ is similar. It could apparently be understood without the application of any moral un-

derstanding, whether or not moral ideas of some kind in fact led to its adoption.³⁰

Hart's example of baring the head in church is couched in the specific form of a simple *fiat*: such-and-such *is to be done*. No reasons are given, or obviously implied. And he writes: '...if a social rule is to exist some at least must look upon the behavior in question as a general standard *to be followed* by the group as a whole' (my emphasis).³¹

It seems, then, that we should construe regarding a pattern as a *standard of criticism* for one's group as regarding the pattern as, simply, a pattern that *is to be* conformed to, so that members are in error if they fail to conform to it, all else being equal. The nature of the error, and the provenance of the fiat are not specified. This accords with intuitive judgements. Intuitively, there can be a social rule which is not itself at the same time a moral rule.³² Something seen as a rule is, meanwhile, something seen as 'to be conformed to'.

Does Hart's feature (2) of itself ground mutual claims for performance, claims that entitle the claimant to exert punitive pressure in favor of conformity? The fact that I personally regard this pattern as a standard for all members of a certain group, including myself, does not seem to give me any special title to exert pressure in favor of performance.³³

What of the presumed fact that *everyone* in our group regards this pattern as a standard? Does that directly ground the right type of claim in each member of the group? It is hard to see how a direct argument from a standard 'shared' in *this* way can be found. Perhaps a standard 'shared' or 'common' in some *other* sense is at issue. I shall shortly argue that this is indeed so. Much more needs to be said, however, than is given in Hart's text.

I conclude that Hart's features (1) and (2) are not singly such as to directly ground the relevant type of

mutual claims for performance or the corresponding rights to exert punitive pressure. Nor would they appear to be more powerful in conjunction. Hart's account of social rules is therefore problematic.

V. Three issues for any account of social rules

My discussion of Hart so far has brought the following issue into focus: what is it about a social rule that immediately grounds claims for performance and corresponding rights to exert punitive pressure – something that we believe our social rules to do?³⁴ Call this the *grounding* problem (for a short label). It is a problem any fully adequate account of social rules must solve.

At least *two other important problems* are raised by Hart's account. The first can be brought into focus by once again considering Hart's feature (2). According to Hart when there is a social rule in a group the individual group members personally 'regard such-and-such as a standard that all should follow'. I have construed this in terms of the personal endorsement of a certain fiat. This construal raises the question whether individual members of the group are conceived of, and conceive of themselves as, in effect, *issuing* the relevant fiat. If so, it seems reasonable to ask: by what *right or authority or title* do they take themselves to do so?

Paradoxically enough, there is here a problem analogous to that of Hart's imaginary Rex I, who specifies what is to be done by the members of a certain population, but lacks the authority to do so.³⁵ Hart proposes that Rex's problem (lack of authority) would be solved if there were a *social rule* in the relevant population precisely *granting him authority* to 'introduce new standards of behavior into the life of the group'.³⁶ Hart writes: 'In its simplest form this rule will be to the effect that whatever actions Rex specifies (perhaps in certain for-

mal ways) are to be done.³⁷ I propose that Rex's problem recurs at the core of Hart's account of social rules.

Suppose that all we know about the members of a population is that each member of the population regards obeying Rex as a standard to be adhered to by the members of the population, and so on. By what right do any of them issue prescriptions for the population as a whole, with respect to who may give them orders or anything else? Each can have a view on such matters, of course, but such views have an air of irrelevance. The fact that they all have the same view does not seem to make a difference. There may be *safety*, but it is by no means clear that there is *authority*, in mere numbers.

Rex's problem was this: how can he achieve a *right* to specify what is to be done for the group as a whole? Hart's solution – in terms of social rules as he characterizes them – *re-raises this problem at the level of social rules*.³⁸ Assuming that social rules involve the issuing of a *fiat* by someone or something, we have what I shall call the *group standard* problem: *who or what can appropriately issue a fiat for a whole group?*³⁹ In order to solve this problem, I believe that we must go beyond the individualism of Hart's account of social rules (and of many related accounts).

Finally, there is the *bindingness* problem. Though he downplays its importance, Hart himself observes that in the context of a social rule people 'say they 'feel bound' to act in certain ways'.⁴⁰

The following question arises: Is there an appropriate basis for this feeling of being 'bound'? Where there are social rules are group members indeed bound to perform in some relevant sense, perhaps in a sense connected with the justified reprimands of others?

Hart himself may be willing to side at least to some extent with those who take the 'feelings of being bound' to be illusory. In any case, whenever someone claims that a prevalent sense of things is in whole or in part

'illusory' this always leaves open the possibility that one has missed the correct explanation – unless one shows that there must be an illusion in this case.⁴¹ The *bindingness problem* is the problem of finding a warrant for the felt bindingness of social rules – or demonstrating the impossibility of such a solution.

In the next two sections I sketch an account of social rules that surmounts each of the three problems just noted.

VI. The plural subject account of social rules

a. Joint commitment and obligation

In my book *On Social Facts* (1989) I argued at some length that underlying many of our central social or collectivity concepts is an important concept of *joint commitment*.⁴² I there proposed⁴³ that the concept of a social rule is one of the social concepts in question.

In this section I say something about joint commitment with an eye to showing, in particular, how this type of account takes care of the problems.⁴⁴

I take a personal decision to be a paradigmatic case of a *commitment* in some intuitive sense. One who decides to do A is now committed to doing A, so long as his or her decision stands. A personal decision is also a paradigmatic case of a *wholly individual* commitment: as far as the concept of a personal decision goes, I can *come by* such a commitment alone, without the intervention of any other party. I can also *revise* my commitment or *revoke* it altogether without the involvement of anyone else. In short, a wholly individual commitment is *mine to create and mine to give up*. It is also mine to break: no one else can violate a wholly individual commitment.⁴⁵

Those who are subject to a *joint* commitment may be said to have ensuing 'individual' commitments in a sense: each of the individual parties will indeed be committed. But an 'individual' commitment of this sort is significantly different from what I have called a 'wholly individual' commitment.

A joint commitment is, precisely, joint. It is the commitment of more than one person. This has consequences for the 'individual' commitments that derive from a joint commitment: I cannot be subject to such an 'individual' commitment independently of all other people, and I cannot unilaterally rescind such a commitment. It stands or falls only with the underlying joint commitment, which itself can only be rescinded by *us* (the parties to it).⁴⁶

With respect to the content of a joint commitment, in general a joint commitment is a commitment of certain parties to do something *as a body*. (It may sometimes be less awkward to speak of being jointly committed to do something *jointly*, or *together*.) 'Doing something' here must be interpreted broadly. I have elsewhere argued that a standard interpretation of 'We believe that such-and-such' is in terms of a joint commitment to believe that such-and-such *as a body*.⁴⁷

I have elsewhere used the term 'plural subject' to refer to those who are jointly committed to doing something *as a body*.⁴⁸ They will then constitute the 'plural subject' of the 'doing' in question.

We should distinguish between *basic* or 'ground-level' joint commitments and *derived* joint commitments, since the conditions under which these come to be are different. Suppose we are jointly committed jointly to accept that whatever Jones tells us to do is to be done. If Jones now tells us to do something, we presumably have a (derived) joint commitment jointly to accept that we are to do that thing. The derived joint commitment comes about on the basis of the original basic joint com-

mitment plus Jones's telling us to do something.

How do basic joint commitments come about? Roughly, individuals must openly express their readiness to be jointly committed in the relevant way along with the relevant others.⁴⁹

The parties to a joint commitment need not know of one another as particular individuals, though of course they may. One may be party to a joint commitment between oneself *as this particular person and another particular person or other particular people*. But one may also be party to a joint commitment between oneself and another or others *under some particular description*, such as 'friend of Joe' or 'person living on this island'.

In many populations, particularly large ones, the parties do not know of one another as particular individuals. For instance, they know that many people live around them on a particular island but they do not know each of these people personally or know of them as particular individuals. Nonetheless the island dwellers can participate in a population-wide joint commitment; the parties to the commitment would understand themselves to be jointly committed insofar as they are living on the island or *qua* island-dwellers. One important aspect of this type of joint commitment is, evidently, that should the relevant description cease to apply to a given person, they will automatically be freed from the commitment.⁵⁰

A final point about joint commitment in general.⁵¹ A joint commitment – like any other – may be said to *require* that the participants act (or refrain from acting) in certain ways, all else being equal. However, this case has a special feature that is not present in all cases of commitment. A joint commitment is not the creation of any one of those who are subject to it, nor can it be removed at the pleasure of any one person. There is a clear sense in which the parties are *tied or bound* to one another with respect to their personal subjection to the requirement in question. Once the commitment is in

place thanks to the action of all, each is subject to it, absent the concurrence of all (as long as it applies to them).

Let us say that one who is party to a joint commitment has an *obligation* to perform the relevant act or acts. Such an obligation is clearly an obligation of a special type. Among other things, it essentially involves at least two people, the person with the obligation and one or more others. If we call the person with the obligation the *obligor* (on the model of promisor) we may call the relevant others the *obligees* (on the model of promisee). These are the (other) people to whom the obligor is tied with respect to his commitment to a certain course of action. Given that we speak of the *obligations* of the obligor, it seems that we can speak of the correlative *claims* or *rights* of the obligees: they have a claim on the obligor for performance of the act in question.⁵²

I suggest the sense of 'obligation' (and 'right') introduced here is not a novel one. Much of our everyday talk of obligations and rights is plausibly viewed as a matter of reference to a joint commitment. I include in this class the obligations of agreements and promises.⁵³

b. The plural subject account of social rules

I can now sketch an account of social rules, according to our everyday understanding of what such rules are. More specifically, it is an account of when a population has a rule to the effect that members of that population are to perform a certain action in certain circumstances.

I do not aim to give a full defense of this account here, to consider possible objections, or to concern myself with all possible matters of detail. I take the account to have some initial plausibility, and want to show that it avoids the problems noted for Hart's account. It has merit at least to that extent, and to that extent is

superior to a variety of accounts more or less approximating to Hart's. I am inclined to think that it or something like it is a worthy heir to Hart's account. The account – which might be dubbed the *plural subject* or *joint commitment* account – runs roughly follows:

There is a *social rule* if and only if the members of some population P are jointly committed to accepting as a body a requirement of the following form: members of P are to do A in C. (Some reason for doing A in C may be specified, or it may not.)

If we want a somewhat shorter version, we might say, first, that members of a population P *jointly accept a requirement* if and only if they are jointly committed to accepting that requirement as a body. Given that 'joint acceptance' is so understood, we can now write, alternatively (and equivalently):

There is a *social rule* if and only if the members of some population P jointly accept a requirement of the following form: members of P are to do A in C. (Some reason for doing A in C may be specified, or it may not.)⁵⁴

Some comments are in order:

1) In writing that members 'jointly accept a requirement of the following form: they are to do A in C' I mean to capture the idea that such joint acceptance amounts to the imposition of a requirement. One might, therefore, also write that they 'jointly require that members are to do A in C'.⁵⁵

2) The phrase 'accept (require) as a body' is just one of the possible phrases with which the relevant idea might best be indicated. One might also write 'accept as a unit',

for instance, or 'accept as a single person'. The relevant joint commitment is a commitment, if you like, to constitute, as far as is possible, a single entity with a certain psychological property (in this case accepting or requiring something).

3) As ordinarily understood, a joint commitment jointly to accept something does not involve a commitment personally to accept what is jointly accepted. In other words, that members of a population jointly accept: 'We are all to do A in C' does not imply that they personally accept this.

As I have argued in discussing the group standard problem, it is not clearly *intelligible* – without some special stage-setting – that a given individual personally accept 'We are all to do A in C' in the sense at issue here, that is, in the sense that he or she 'requires' that we are all to do A in C. That it does make sense that as a body we require that we are all to do A in C is one way of arguing that 'We require...' does not imply 'I require'.

4) It is striking that this account corresponds to few if any of Hart's listed features. However, it can be argued that if something approximating to this account is correct, then all of Hart's conditions will be satisfied, one way or another. Some of these features will be derivable more or less as a matter of logic. Others will be such that, in standard circumstances, one can expect them to result from the existence of social rules as characterized here.

Thus it does not follow from the fact that one is party to a joint commitment that one will conform to it. One may be swept away by blind passion, or have weighty moral reasons forbidding one to conform. Nonetheless, in the absence of these things, one is likely to find one has reason enough to conform. On the one hand there is the simple fact that one is subject to a commitment.

On the other hand, one knows that should one default, one has offended against other people, who have the standing to rebuke one for it.⁵⁶

5) There is a holism in this account, which is, absent from that of Hart. The holism here is essentially the holism of the concept of a *joint* commitment.

6) Relation to agreements. No appeal is made in this account to an agreement. As I understand it, an agreement amounts to a joint decision, founded in a joint commitment to accept as a body a certain decision. Given this understanding, an account of social rules in terms of agreements would have some of the virtues of the account proposed. The three problems for Hart's account, the grounding, group standard, and bindingness problems, would all be solved. An account in terms of agreements would be flawed by lack of realism, however. An agreement on a rule for the group seems not to be present in many contexts in which we allow that there are social rules in the sense in question.

A joint commitment can arise more informally than an agreement can, through a more gradual process. One way in which this can happen is that someone in the relevant population speaks of 'our rule'.

I believe that a standard interpretation of such phrases is in terms of an underlying joint commitment. In the present case, 'our rule' would be interpreted as 'a requirement we jointly accept'. If what this person says is not rejected the practice of so referring to the rule may spread until it is clear to everyone that everyone is ready to be party to the relevant joint commitment. The initial reference to 'our rule' may be tendentious, but once this way of talking is generally accepted, it may be deemed to have found a genuine basis.⁵⁷

In any case, these uses of language do not stand alone.

Other things people say, and things that they do, will help to confirm the plural subject interpretation of 'our rule'. In particular, the kind of behavior Hart alludes to (the imposition and acceptance of punitive pressure) will help confirm this interpretation as will dialogues of the kind discussed in this article.⁵⁸

c. Relation of the plural subject account to the three problems

1. Relation to the grounding problem

By virtue of the joint commitment present when there is a social rule, each member of the population in question has a claim on every other member for conformity to the rule. These claims are correlates of the obligations joint commitment creates. Each member is obligated to every member to conform to the rule. Each member has the standing or right to rebuke any member who does not conform.

The exercise of any such right will always be subject to moral and prudential constraints. In some circumstances it may not be appropriate to do anything. Should one party rebuke another for nonconformity, however, his standing in the matter will be perfectly clear. That he is, in the relevant sense, *in a position to rebuke* will not be in question.

Members of the population will understand this, since all are party to the relevant joint commitment and understand the structure of such commitments. Thus the grounding problem finds a solution here.

2. Relation to the group standard problem

On this account a social rule's existence is a matter of a joint commitment through which each party becomes

obligated to the others to support a certain standard as a standard for the population as a whole. Here, we accept a standard for *us*.⁵⁹

The proposed account is couched in terms of a 'population' rather than a 'social group'. I argued in *On Social Facts* that any population in which the members are linked through a joint commitment will count as a 'social group' on one standard understanding of that phrase.⁶⁰

I prefer to define a social rule in terms of a population insofar as a given population may in principle constitute a social group by virtue of having a given rule, and within the consciousness of the people concerned the extent of the group may be determined by some description such as 'friend of Sally' or 'person living by Lake Woebegone'. In other words, they understand their rule to be the rule of the population so specified, a population that they will at least now reasonably see as a social group in the relevant sense, given that the members are, as such, party to a joint commitment.

A joint commitment creates, in effect, a new subject of psychological attributes, a *plural* subject. These attributes are not yours, or mine, or mine-and-yours, but rather *ours*: our beliefs, our goals, our acceptance of rules. To put the point more carefully, these attributes are attributable to the body we form by virtue of our joint commitment. In a clear way, that commitment unifies our agency, providing a new source of action. If you like, it constitutes a new entity – an 'us' or 'we'.⁶¹ If anything or anyone has the authority to impose its will upon us it is surely precisely us. Hence the group standard problem is solved also.

3. Relation to the bindingness problem

A joint commitment by its nature involves obligations of a special sort, and clearly could underlie a sense of

being 'bound' to conform to a rule. This account, then, provides a solution to the bindingness problem.

In this case one is 'bound' both horizontally and vertically, so to speak: bound to others, and bound (all else being equal) to conform. One is bound (all else being equal) to conform unless and until the other parties to the joint commitment are willing to accept one's freedom.

The sense of being bound that is grounded in a joint commitment is not, clearly, a matter simply of powerful 'feelings of compulsion'.⁶² Nor is it what some may feel is the alternative, a matter of (in Hart's words) 'something external, some invisible part of the fabric of the universe guiding and controlling us in these activities.'⁶³ It is grounded, but it is not grounded in the fabric of the universe. It is of our own making. If there is a type of obligation that is not of our own making then, as I see it, the obligations associated with social rules are not of that type.

VII. Summary

Careful critical consideration of Hart's account of social rules has led to another account, the plural subject account. Hart's account brings into focus the fact that when there is a social rule punitive pressure on deviants and would-be deviants is generally accepted as justified. From this starting point I argued in favor of the plural subject account. Punishment presupposes entitlement and it seems that we regard our group's rules as themselves grounding claims for performance and corresponding entitlements to punish for deviance. This argues against Hart's own account of social rules and in favor of the plural subject account. If a social rule is a jointly accepted standard we can expect many of Hart's features to be present whenever a group has a rule. Thus,

though this discussion rejects Hart's account of social rules in favor of an account distinct in every particular, it remains quite close to Hart's of social rules and, if correct, goes some way to confirm it.⁶⁴

Notes

1 Social theorists often use the term 'social norm' as an alternative to 'social rule'. Related phenomena include (social) conventions, customs, and traditions, all of which appear to bear some relation, perhaps of subsumption, to the category of social rules. On this see Gilbert, 1989, 403-407. I discuss social conventions (with particular reference to David Lewis's work) in Chapter 6.

In the sociological classic *Suicide*, Emile Durkheim famously argued that 'anomie' or the paucity of social rules contributed to higher rates of suicide in human societies.

2 Cf. Raz, 1975, 52: 'A social rule is a rule of a certain society or community'.

3 Hart, 1961. It has been said that the 'central and distinctive element of Hart's contribution to descriptive jurisprudence' is his 'elucidation of the idea of a social rule and the methodology he applies in that elucidation' (MacCormick, 1981, 43). The extensive literature on Hart's philosophy of law includes monographs by Bayles (1992), MacCormick (1981), and Martin (1987).

4 This paper will largely ignore the role of Hart's account of social rules in his theory of law. Hart makes and emphasizes a distinction between what he calls 'primary' and 'secondary' rules, and claims that 'The union of primary and secondary rules is at the center of a legal system...' (Hart, 96). Secondary rules include rules enabling the promulgation of new rules by particular people or specific bodies. A simple rule of this kind would be 'whatever actions Rex (some particular person) specifies are to be done' (Hart, 56). There has been much discussion and questioning of the way Hart distinguishes between primary and secondary rules. See, for instance, Sartorius, 1966.

5 Hart's account of social rules has been critiqued from many angles by numerous authors. Important reflections are to be

found in Raz (1975), Dworkin (1977), MacCormick (1978), MacCormick (1981), Sartorius (1987), and Bayles (1992) among others. See also Hart's own 'Postscript' to *The Concept of Law*, (second edition, 1994). I do not attempt a review of this literature here. I focus on Hart's original discussion and move directly to concerns of my own.

- 6 Cf. Cotterrell, 1995, 222-230, who sees Hart's legal philosophy as expressive of an individualistic conception of law.
- 7 Hart, 54.
- 8 Hart, 55. Some may wonder at the idea of characterizing Hart's project as 'analytic', given his own caveats about what he thinks can be done for the concept of law itself. On reading what he writes on social rules, however, it is easy to see him as engaged in a form of semantic analysis. Thus at (Hart, 9) we find: 'The account which we are at first perhaps naturally tempted to give...is that *to say that a rule exists means only that...*Plainly this is not enough, even though it *conveys part of what is meant.*[My emphasis]' And his later discussion is conducted in such terms as 'There is *no contradiction in saying that people accept certain rules but experience no feelings of compulsion*' (Hart, 36; my emphasis). One way of taking his account of social rules is therefore to interpret such terms as 'must' and 'is enough' in terms of logical (or conceptual) necessity and sufficiency.
- 9 Hart suggests that it is always possible that there be a minority of members who do not share the attitudes involved in the listed features (Hart, 55). We can thus consider the account given here (in terms of 'every member of G') as listing conditions for a 'perfect' case of a group's having a social rule. Compare David Lewis's procedure in his discussion of convention (Lewis, 1969).
- 10 Hart, 54.
- 11 55.
- 12 *ibid.*
- 13 54 (good reason), 55 (any member of G).
- 14 *ibid.* This (important) negative aspect of Hart's account of social rules is emphasized in the summary in MacCormick, 1981, 29.
- 15 56-7. Later in the book, when he focuses on what he calls 'rules of obligation' (see especially 84-5), Hart seems to deny that 'bindingness' is a feature or perceived feature of *all* social rules. See the text below.

16 56.

- 17 Cf. MacCormick's query as to whether 'expressions of demands and criticisms' are 'constitutive of, or merely evidentiary of, the critical reflective attitude envisaged' (MacCormick, 1978, 285). Hart himself distinguishes the existence of the 'critical reflective attitude' he regards as fundamental from its 'display' in overt actions and utterances including criticisms and demands for conformity. See 56.
- 18 Cf. Hart, 10-11, where Hart refers to 'informal reproofs administered for the breach of non-legal rules'. Informal reproofs are seen here as the functional equivalent of legal punishment. For some discussion of the punitive nature of a rebuke see Gilbert, 1994a.
- 19 The criticisms involved in feature (3), also, will include those of the punitive type.
- 20 Hart uses the phrase 'coercive pressure' in the postscript to the second edition of *The Concept of Law*, 1994. There is a distinction between 'coercive' and 'punitive' pressure. 'Punitive' pressure, or the threat of it, may always be coercive. But coercion need not be, or be seen as, punitive—a form of punishment.
- 21 As is, therefore, what Hart calls the 'predictive account' (10ff). According to this, to say a group has a rule is simply to say that the reproofs and punishments of other members are *predictable* if members deviate from a certain pattern of conduct.
22. Hart, 54. Elsewhere he writes of our taking a given non-legal rule as a '*reason and justification*' for reproofs (Hart's emphasis, 10-11).
- 23 Interpret Becky's use of 'we' and 'our' as inclusive here, rather than exclusive. That is, she includes Phoebe within the 'we'. That it is inclusive is not self-evident from the dialogue as written: that seems to be equally well open to either interpretation.
- 24 Cf. my discussion of 'offended rebukes' in Gilbert, 1994.
- 25 Compare what Hart himself says: 'habits [sc. of obedience] are not 'normative'; they cannot confer rights or authority on anyone' (58).
- 26 Is to say that 'members of G regularly do A in C' already to imply that 'members of G will do A in C (*ceteris paribus*)'? If so, then of course members of G have reason to believe there will be future conformity if they 'know of' the existence of

the 'regularity'. Perhaps, though, the regularity condition should be interpreted in terms of what people have done up until now. I have argued elsewhere that if we are contemplating rational agents conceived of in a particular rather stringent way, a (prior) regularity in behavior does not of itself imply that there is reason to expect its continuance (Gilbert, 1989, Chapter 6, and 1990a.) If we restrict ourselves to actual human beings, it is not always true that a (prior) regularity legitimates expectations of continued conformity. There could be special circumstances which (as is known) will soon cease to produce conformity, for instance, the past behavior was coerced but the coercion is about to stop. Perhaps a prior regularity in behavior legitimates expectations of future conformity, *ceteris paribus*.

27 It can also be argued that the conclusion of this type of argument is not the desired conclusion, since it concerns the wrong type of claim or right. The type of moral premise used in this argument – alluding to the moral claims of all persons against all persons – will then quite generally fail to lead to the desired conclusion. I shall not pursue this argument here.

28 Hart, 56.

29 54. also 9.

30 This is not the place to explore what distinguishes a moral standard from other types of standard. I rely here on a certain intuitive understanding on the matter.

31 55. The word 'standard' could presumably be replaced by 'pattern' without loss of content to this sentence, since the implied normativity of the term 'a standard' is made explicit by the phrase 'to be followed'.

32 Cf. Gilbert, 1989, on morality and convention, 392-396.

33 The same seems to go for the fact, if it is a fact, that I *prefer* that others conform. Recall that we are eschewing appeal to moral aspects of the situation. Thus even if it could be argued that it is morally required that one conform to existing preferences, all else being equal, this would be considered extraneous to the preference condition itself.

34 Similar problems arise for other social phenomena. Cf. Gilbert, 1990b on shared action, and 1987 and 1994 on group belief.

35 See especially Hart, 56-57.

36 Hart, 57.

37 56.

- 38 I believe that this also applies to Hart's more recent discussion of the authority of a 'commander' in Hart, 1982.
- 39 Some would dispute the viability of any 'imperative theory of norms', in other words, they would question the assumption at issue in the text above. See Raz, 1975, 51. I believe however, that it can be made good. See section V (iii) below.
- 40 *ibid.*
- 41 Cf. Gilbert, 1989 Chapter 3, where I argue that to criticize an intuitive doctrine as 'mysterious', is nothing like the presentation of a knock-down argument against it.
- 42 I continue to explore the details of this concept. Some further references are given in subsequent notes.
- 43 Gilbert, 405.
- 44 This discussion is inevitably somewhat rough. For my initial quite lengthy introduction of this concept see Gilbert, 1989, especially Chapters 4 and 7. I have explored this idea further in subsequent writings, many of which are collected together in Gilbert, 1996. See also the Introduction to that book.
- 45 What of a father who says to his daughter 'I've decided that you'll go to college'? If the daughter is not thereby committed, she does not (failing some other relevant commitment on her part) violate any commitment by failing to go to college. She does prevent the fulfillment of her father's commitment, but that is another matter.
- 46 I connect use of the pronoun 'we' and joint commitment in Gilbert, 1989, Chapter 4. See also Chapter 7.
- 47 See Gilbert, 1987, 1989, Chapter 5, 1994a, 1994b, and the Introduction to 1996. I originally wrote of 'accepting as a body' in this context. 'Accepting' is one synonym of 'believing', and I see no obvious reason not to take it in that sense here.
- 48 First in Gilbert, 1989.
- 49 'Openly' here is a rough way of indicating the relevant context. Something like 'common knowledge' in the sense of Lewis (1969) would seem to be a requirement. See Gilbert, 1989, Chapter 4, on how plural subjects are formed.
- 50 This is by no means a full discussion of this type of case. For some further discussion of joint commitment in large groups see Gilbert, 1989, especially 212–3, 1993a, 1994, and 1999.
- 51 See also Gilbert, 1993b, and 1999.
- 52 Hart himself, writing on rights, explains our talk of rights in connection with promises in terms of the promisee's having

- the 'power to release' the promisor. Thus our intuitions in this matter have some affinity. I ground this power of release in an underlying joint commitment. Hart does not. See Hart, 1955. On promising as a joint commitment phenomenon see Gilbert, 1993c.
- 53 This is not the place to argue this, but see my articles Gilbert, 1993b and 1993c.
- 54 Cf. Gilbert, 1989, 405. Here 'members of P are' replaces 'one is'.
- 55 In Gilbert, 1989, I stipulated that 'To accept a principle of the form 'do A in C' is to subject oneself to it' in discussing social convention. In the subsequent (and intendedly derivative) discussion of social rules I wrote of 'accepting that one is to do A in C' which formulation perhaps makes it less clear that this is a matter of imposing or issuing a requirement.
- 56 Sartorius, Gavison, ed., 51, argues that 'contrary to what seems to be a virtually universal assumption among philosophers, it makes perfect sense to speak of a social rule as existing in a community' in which it is not generally conformed to. In his 'Comment' on Sartorius, John Finnis agrees (Gavison, ed., 66, 53n). The issue is discussed at some length by Hanina Ben-Menachem in her 'Comment' on Sartorius (Gavison, ed., 76–80). See also Wozzley (1967), 72. For a related discussion of social convention, in which I argue contra David Lewis that regular conformity is not a requirement, see Gilbert (1989) Chapter 6, and elsewhere.
- 57 See Gilbert, 1989, Chapter 4, where there is a lengthy discussion of the first person plural pronoun and its relationship to plural subjects. See also Chapter 7 on inferences from premises of the form 'We are doing such-and-such'.
- 58 Section II
59. If the plural subject account of social rules is correct it explains, in effect, how 'customary rules can be regarded as imperatives issued by a society to itself', thus constituting a version of the 'imperative theory of norms'. The quoted words in this note are from Raz, 1975, 51, who there assumes the falsity of the imperative theory. This account also shows how it can be that, in Wozzley's terms, '...a social rule is a rule to the extent that it has the authority of society behind it' (ibid).
- 60 See Gilbert, 1989, especially Chapter 4.
- 61 Cf. Emile Durkheim: 'This sui generis synthesis, which constitutes every society', *The Rules of Sociological Method* (orig. 1895). Many others might be quoted to the same effect.

62 Cf. Hart, 11.

63 Ibid, 11-12. John Mackie makes a similar (skeptical) characterization of the everyday conception of the way morality is grounded, which he sees as an obvious error. How can anything that is 'intrinsically action-guiding' be part of the 'furniture of the world'?

64 This paper is a shorter version of Gilbert 1999c. The longer essay also appears in my forthcoming book *Sociality and Responsibility: New Essays in Plural Subject Theory*, (Lanham, Md.: Rowman and Littlefield, 2000. Many thanks to Heikki Ikäheimo for help in preparing this version and to the convenors of the Jyväskylä Social Reality conference for their welcome invitation to participate. I am also grateful to classes and colloquium audiences who have heard and discussed various versions of this material at the University of Connecticut, Princeton University, King's College London, the London School of Economics, and Stirling University, and to Michael Cook and Arthur Kuflik for relevant discussion.

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Eerik Lagerspetz

ON THE EXISTENCE OF INSTITUTIONS

I. The problem of institutions

Terms which are used to refer to institutions are in some sense like theoretical terms. The word 'state', for example, does not refer to anything directly observable. We say that 'the state' has some properties, or even that it does something. But all we can perceive are just people and their doings (plus certain physical objects). 'state' seems to have something in common with, say, 'electron' or 'eco-system', which are theoretical terms having a meaning only as parts of scientific theories. However, it is not only political scientists or legal theorists who use terms like 'state'. Ordinary people have to deal with the state almost daily, and when referring to it, they do not usually suppose the truth of any scientific theory.

As institutions form a part of our everyday life, the terms referring to them belong to our everyday vocabulary. Neither can these terms be removed from our vocabulary. A scientist could claim that the extension of an established theoretical term is empty. There was no thing corresponding to the term 'phlogiston'. But 'state' is clearly different. The state as an institution could perhaps whither away, but it cannot be proved to be non-existent.

These terms – I will call them institutional terms – have another interesting property. Somehow they are connected with norms and rules. When we refer to something as ‘a legislature’, we suppose that its existence as a legislature is based on some norms which make it what it is: a legislature is not just a group of people having the habit of gathering together in a big building. These norms form a part of a larger normative structure, and the actions of a legislature and even the fact that some actions are ascribed to it can be understood only by grasping the content of this structure. Besides entities, some acts and properties seem to have this inherently normative nature, too. ‘Cashing a cheque’ or ‘having a legal right’ are understandable only in a pre-existing normative context. In this sense they have something in common with expressions like ‘wrongdoing’ or ‘having a moral right’. These are meaningful only in a context of a presupposed system of moral norms. But nevertheless, it seems that we can speak about institutions or institutionally defined properties and acts without committing ourselves to any substantial moral position.

Hence, there seems to be something mysterious in the existence of institutions. Heidegger, for example, was puzzled by it:

A state – is. By virtue of the fact that the state police arrest a suspect, or that so-and-so-many typewriters are clattering in a government building, taking down the word of ministers and state secretaries? Or “is” the state in a conversation between the chancellor and the British foreign minister? The state is. But where it is being situated? Is it situated anywhere at all? (Heidegger 1959, 35)

Institutional terms seem to refer to real things. There are states and legal rights, for example. By saying that

there are such things we mean that they are not fictions or illusions. But they are conceptually connected with actions and interactions of individual people. A state can do something only if particular individuals do something.

Statements about institutions and institutionally defined actions and properties are not statements about people's mental states or physical movements. They have something to do with norms and rules which are not physical things. Nevertheless, it is possible to speak about institutions without committing oneself to the acceptance of a system of norms or rules. To say that something is 'a state' is to express a descriptive and not a prescriptive judgement. Thus, there seems to be at least three different problems involved. First: how institutions are related to individuals? Second: how institutional facts are related to natural facts? Three: how descriptive judgements about institutional rules are related to prescriptive judgements?

In his classic *Speech Acts* John Searle makes the distinction between 'brute' and 'institutional' facts. The former are characterized in this way:

One might say that they share the feature that the concepts which make up the knowledge are essentially physical, or in its dualistic version, either physical or mental. The model for systematic knowledge of this kind is the natural sciences, and the basis for all knowledge is generally supposed to be empirical observation recording sense experiences. (Searle 1974, 50)

Institutional facts are different:

They are indeed facts; but their existence, unlike the existence of brute facts, presupposes the existence of certain human institutions. (...) These 'institutions'

are systems of constitutive rules. Every institutional fact is underlain by (a system of) rule(s) of the form 'X counts as Y in context C'. (Searle 1974, 51-2)

This characterization of institutional facts has inspired many social and legal theorists. Most notably, McCormick and Weinberger (1986) base their institutional legal theory on it. Searle's distinction between institutional and brute facts is, I think, sufficiently clear. Institutional facts: 'X cashes a cheque', 'Y has a legal right', 'Z makes a move in chess' – are inherently dependent on rules which exist in some community. But what kind of fact, then, is the fact that these rules do exist in relevant communities? Obviously, a fact about the existence of a rule cannot be a brute fact in Searle's sense: it is not a fact on the furniture of the physical world, neither are the statements expressing it subjects of direct perceptual control. If Searle's classification is meant to be an exhaustive one, facts about rules must themselves be institutional facts. Therefore, they are inherently dependent on the existence of further rules: something is a rule only if there is a rule with the effect that it is counted as a rule. We are in an infinite regress. This might be called as the logical regress of rules.

My solution to these problems is to develop a notion of non-brute fact which is not inherently rule-dependent. The basic idea behind the solution is the following: There are things which exist and facts which hold only if the relevant individuals believe that they exist or hold and act according to these beliefs. What we call institutions and institutional facts fall under this description. Descriptions of these things and facts are implicitly circular or self-referential, but the circle in question is not a vicious one. In the descriptions, institutional terms reappear only in the scopes of propositional operators describing the attitudes of relevant individuals. Moreover, the existence of the related beliefs is only

a necessary condition for the things being there. Here are some examples:

What the international community accepts as a state is a state. (van Maarseveen and van der Tung 1978, 234)

Money is whatever is generally accepted in exchange. (Dornbusch and Fischer 1978, 209)

A nation exists when a significant number of people in a community consider themselves to form a nation, or behave as if they formed one. (Seton-Watson 1977, 5)

A work of art is an artifact of a kind created to be presented to an artworld public. (Dickie 1984, 80)

A social class is a quasi-group of people whose links are that they think they have similar interests, and who share common beliefs about the system of social class, their own position in that system, and similar dispositions as to their behaviour appropriate to their position in that system. (Jarvie 1972, 120)

I am not claiming that these descriptions are necessarily correct: only that they are of the right type (the fourth one becomes more transparent when we try to describe "an artworld public"). All the descriptions are functional in the sense that any object which can be a subject of the relevant attitudes and actions may satisfy them. There are functional limitations. Items which are accepted as money must be distinguishable, relatively durable, relatively scarce, not too difficult to use etc. But inside these constraints anything, including cows, furs, shells, and bits of information in a computer can be used as money. And almost anything can work as an

artwork. In this sense, these terms behave like, say, 'weapon'. Anything used or intended to be used as a weapon satisfies the term. But unlike the existence of a weapon, the existence of money, or a state, or art is a social or conventional and not a private matter. Private money is as impossible as private language. Money is something existing in a community. Neither is it enough that members of a community just happen to believe that some objects are money: they must also know that this belief is generally shared by other members. Moreover, the attitudes must be shared by relevant individuals. And lastly, these attitudes must be related to actions. They must appear as (at least partly) reasons for the members of the respective societies to do certain things. If something is money, it is generally used as a means of exchange and as a measure and store of value. The shared belief is a necessary but not a sufficient condition for the existence of institutional entities and properties. (Cf. Searle 1991, 339)

The idea that institutions and institutional facts exist by the virtue of shared beliefs in their existence is called here conventionalism. Institutional terms are normally used in expressions which can be analysed in this conventionalist way. Such statements express conventional facts. This solves the puzzle created by Searle's distinction. As my examples show, there is nothing new in this idea. However, there might be some new elements in my attempt to explicate the idea in a more precise way and to connect it to other theories and issues.

II. On mutual beliefs

The self-referential nature of conventional facts is not an anomaly, for there are things in the world which are capable for self-reference and for cross-reference. Propositional attitudes – believing, knowing, hoping,

fearing etc. – have this capability. We can have beliefs about other people's beliefs, while they have at the same time beliefs about our beliefs. This gives rise to the phenomenon called mutual or shared belief, or common or mutual knowledge (the terminology is not well established).

This phenomenon is especially visible in strategic situations. In the seventies, a Soviet diplomat, Juri Derjabin, wrote several books with the pseudonym 'Juri Komissarov'. The purpose of the books was to influence on the Finnish foreign policy without openly intervening to it. In an interview, Mr. Keijo Korhonen, the former Under-Secretary of the State, recalled the debate aroused by 'Komissarov's' books:

We knew there [in the Ministry of Foreign Affairs] quite well what the real issue was. We knew that Komissarov knew what the issue was. And we knew that Komissarov knew that we knew that he knew. (*Helsingin Sanomat* 19. 7. 1991)

Obviously, reiterated beliefs of this type can be of extreme practical importance in strategic situations, e.g. in diplomacy, economy or war. Uncertainty at some level may affect the behaviour of the parties, and for this reason the parties not only engage in intelligence activities in order to find out each other's beliefs, they also try to find methods to convince the other side. But reiterated beliefs appear also in less exciting contexts. Here is a nice list of possible examples: "Shaking hands is an everyday example, and so is rowing a boat, speaking and listening, driving down a highway, signalling a Morse code, walking in a crowd of people, meeting, and dancing". (Clark and Carlson 1982, 2) In all the cases certain beliefs are normally shared by the participants. People become more conscious of these beliefs when there is some room for uncertainty, when it is not

self-evident that all participants of an activity master the same rules of language, traffic or dancing. Sociologists have coined phrases like “taking the role of the generalized other” (Mead), “interpenetration of perspectives” (Dewey) or “reciprocity of perspectives” (Schutz), but it seems that they all are talking about situations in which we not only believe something but also expect others to have the same beliefs, including this belief about others’ beliefs (Bach 1975, 191). Consider, for example, Schutz’ analysis of the face-to-face relationship:

as I watch you, I shall see that you are oriented to me, that you are seeking the subjective meaning of my words, my actions, and what I have in mind insofar as you are concerned. And I will in turn take account of the fact that you are thus oriented to me, and this will influence both my intentions with respect to you and how I act toward you. This again you will see, I will see that you have seen it, and so on. This interlocking of glances, this thousand-faceted mirroring of each other, is one of the unique features of the face-to-face situation. (Schutz 1967, 170. See also the fascinating examples in Lacan 1966, 11-61, 197-213.)

The standard notion of *mutual belief* includes a series of reiterated beliefs like (1)-(5) ascending to infinity:

- (MB) It is mutually believed in a population S that p iff
- (1) everyone in S believes that p ;
 - (2) everyone in S believes that everyone in S believes that p ;
- and so on ad infinitum.

This analysis supposes that human beings can have in-

finite sets of beliefs in their minds. However, the human mind seems to be an apparatus with a limited capacity. The defenders of (MB) can argue in the following way. Although people can possess only a finite number of propositions as contents of their minds at any one time, they can have an access to infinite sets of propositions: they can believe them in a dispositional or potential sense. For example, I could work out the truth, and form the respective beliefs, of an infinite number of arithmetical propositions, if I only had enough time. Similarly, if I know the syntactical rules of English, I can in principle form an infinite number of judgements on the grammaticality of different expressions (on this defence, see Tuomela 1984, 210). Schutz may mean something like that when he says that in a face-to-face relationship the mirror images are not grasped reflectively but lived through (Schutz 1967, 170).

Jane Heal (1978) has shown two flaws in this defence. Firstly, we are interested in mutual beliefs that have an effect in interaction situations. These beliefs are able to guide people's actions. A belief with, say 10^{30} iterations ("I believe that she believes that I believe...") cannot possibly occur in my practical reasoning under any circumstances (Heal 1978, 119-20). The supposition that I "dispositionally" have this kind of belief has no explanatory role whatsoever. Secondly, the analogy with arithmetic or syntax does not hold. I can "dispositionally" have an infinite number of beliefs about the truths of arithmetical propositions in the sense that I know the rules of arithmetic and can apply them recursively. But my beliefs about the beliefs of some other person are empirical. I cannot mechanically infer the contents of anybody's mind (Heal 1978, 121). And in any case, it is not clear what it means to have dispositions which cannot actualize themselves in any physically possible circumstances.

Another solution would simply be to cut off the regress. Thus, Kent Bach (1975, 192) proposes that only the first two iterations are needed; we get an adequate definition simply by deleting the *ad infinitum* -clause from (MB). But this proposal seems to be *ad hoc*. It may be true that in the most common cases we have only beliefs of the second order; but even if beliefs of a higher order are unusual, they certainly can exist – as in the case of ‘Komissarov’ and the Finnish Ministry of Foreign Affairs.

Clark and Carlson (1982) remark that in order to form a mutual belief, people need not have separate pieces of evidence for all component beliefs: they can make inductive inferences from a single or a few pieces. In the acquisition of mutual beliefs, this claim is relevant. Messrs. Korhonen and Derjabin could not safely infer that beliefs were distributed symmetrically between them, but normally we can make such inferences. We form new mutual beliefs by using the earlier ones as premises. As members of the human species, and as members of various human communities, we already believe that individuals being in an interaction with us have similar inductive, practical, linguistic, perceptual, etc. capacities, and that they also share with us some background beliefs and standards. From this we can infer that certain properties of a situation are generally taken as evidence for certain beliefs, and therefore we can in such a situation relatively safely make inferences about other people’s beliefs, including their beliefs about our beliefs. Thus, if I see you looking at me while I am sitting at a table, I have evidence that you know that there is a table, that you know that I know that there is a table and that you know that I know that you know that there is a table... Only under special circumstances (e. g. I recognize that you are heavily intoxicated) are there reasons not to make such an inference automatically.

The question is how these beliefs should be represented in a formal definition. (See the discussions in Tuomela 1995, in Clark 1996, 93-5 and in Itkonen 1997, 54-9) I am not going to solve the problem here. But the phenomenon itself is fundamental.

III. Conventional facts

Mutual beliefs, however defined, form the basis of what I have called conventional facts. We may recall that there are certain facts which hold because relevant individuals believe that they hold. This belief must be mutual in the relevant group. Let us give an example. Suppose that the relevant population *S* consists of all the inhabitants of a certain village – *S*-ville. From time immemorial, the *S*-villeans have held their meetings under a tree growing near the village. It is a mutual belief among *S*-villeans that there is a meeting place under the tree. That there is a meeting-place under the tree is a *conventional fact* in *S*. The definition of a conventional fact is the following:

- (CF) 'a is F' expresses a conventional fact iff it is a necessary and a sufficient condition for a's being F that
- (1) it is a mutual belief (of at least the second order) in the relevant population *S* that a is F, and
 - (2) in the situations of the relevant type, (1) is at least partly a reason for the members of *S* to perform actions which are meaningful because a is F

For example, because the *S*-villeans believe that meetings are held under the tree, and because they believe

that the others believe it, too, they have a reason to go under the tree, provided that they want to attend the meetings. For those S-villeans wanting to avoid the meetings it is a reason not to go there; for a woodcutter it is a reason not to cut that particular tree down, and so on.

It is a peculiar property of conventional facts that propositions expressing them cannot be false if they are generally believed to be true and if this belief plays a relevant role in the behaviour of relevant persons. The sentence "There is a meeting-place under the tree near S-ville" cannot be true if the S-villeans do not believe it. But if they do, the sentence is true simply by virtue of the mutual belief. While any individual S-villean can be mistaken in his beliefs (and act inappropriately), *collectively* the S-villeans cannot be wrong in their belief: their meeting-place is there if they say so. Similarly, any individual speaker of a language can have mistaken beliefs about the grammaticality of a sentence. But the whole linguistic community cannot collectively be mistaken. Beliefs about conventional facts are collectively non-corrigible. (cf. Itkonen 1974) This belief-dependency makes conventional facts quite extraordinary. Nevertheless, I cannot see any reason to deny that they are indeed facts. They form an important part of our environment. The fact that shops close their doors at eight is a conventional fact in my society. As a fact, it is at least as reliable and as important for me as the natural fact that the darkness will fall at eight this time of the year, and it equally constrains my actions. From my point of view, it could as well be a law of nature. Here we may quote Berger and Luckmann:

The institutions, as historical and objective factities, confront the individual as undeniable facts. The institutions are *there*, external to him, whether he likes it or not. (...) Since institutions exist as external real-

ity, the individual cannot understand them by introspection. He must 'go out' and learn about them, just as he must learn about nature. This remains true even though the social world, as humanly produced reality, is potentially understandable in a way not possible in the case of the natural world. (...) The institutional world is objectivated human activity, and so is every single institution. In other words, despite the objectivity that marks the social world in human experience, it does not thereby acquire an ontological status apart from the human activity that produced it. (Berger and Luckmann 1966, 57)

Conventional facts are like natural facts in the sense that they are not dependent on the beliefs and actions of *any* particular individual. They are unlike natural facts in the sense that they are dependent on the beliefs and actions of *all* relevant individuals. Berger and Luckmann speak about the paradox that human beings are capable of producing a world they then experience as something other than a human product. The source of this experienced paradox is that while we all contribute to the existence of institutions, and in that sense they are *our* products, none of them can be *my* or *your* product.

Consequently, there are acts which are possible for any one individual without being possible for all individuals. An individual may withdraw his deposit from a bank, or break the law, or the rules a game, without causing the change or collapse of the institutions concerned. Such an action would not be possible for all individuals acting as a collective. Conversely, there are acts which are possible only for all individuals, but not for any single individual. Changing, creating, maintaining or destroying institutions are examples of this. In institutional contexts, all individuals, taken as a collective, can be free, while the possible actions of any one

individual are strictly constrained. Only groups and communities can establish or change laws, monies or symbol systems. The fact that the options open for any individual are not the same as the options open for all individuals is not a contingent matter; rather, it follows conceptually from the nature of institutions.

Three things should be noticed. First, by saying that something has merely a conventional existence, we do not imply that it is some kind of an illusion or ideological delusion. For example, by saying that 'nationality' is a conventional property, we do not mean that it is therefore less real than some other properties; it is just different. Second, if something exists conventionally, it does not follow that it can be changed at will. Some conventions are almost impossible to change. Third, there is no reason to suppose that conventional properties or entities are morally less relevant than 'natural' properties and entities. For example, some authors have inferred that national differences are morally irrelevant, because they are merely 'constructed' or 'imagined' properties. But there is no *a priori* reason to make this inference.

(CF) says that conventional facts exist by virtue of beliefs of "relevant populations". How is the relevancy to be determined? Intuitively, if the S-villeans generally believe that some place is their meeting-place, it is their meeting-place, while if the R-villeans believe that some other place is the meeting-place of S-villeans, that place is not necessarily a meeting-place. But if we want to test the statement that some place is the meeting-place of the S-villeans, we have to determine which people are S-villeans and which are not.

Populations relevant to the existence of conventional facts can normally be identified by other conventional facts. If, for example, something is a conventional fact in the Finnish society, the relevant population is defined by the legal facts which define the territory of

Finland and set the criteria of citizenship – and these legal facts are based on explicit conventions. In the case of S-ville the matter may be more complicated. Perhaps there are no explicit rules defining the borders of S-ville. There may be some disagreement on whether some person really is an S-villean or not. But there are criteria, however inexact, and these criteria exist because they are used by the S-villeans themselves. Thus, “relevant populations” define themselves. Human beings live and act in groups, and these groups – families, clubs, neighbourhoods, communities, tribes, churches, parties, nations and alliances – define themselves by referring some criteria of membership. They grant citizenship rights, baptize proselytes, and deliver member cards. Quite often, these criteria are recognized by outsiders, by the state, for example. Sometimes this outside recognition is fundamental. The statelets (“bantustans”) created by the white South African government were not states because the international community did not recognize them as states.

IV. Ontological worries

One claim which has been made against the idea of conventionality of social facts is that it is just an instance of conceptual relativism or subjectivism. For example, Alexander Peczenik argues against Tore Strömholm’s conventionalist theory of law in the following way:

Strömholm... claims that the concept “valid law” does not refer to anything extant. The reason is that valid legal rules would disappear had people not thought about legal rules. However, cannot one say the same about material things? The fact that one now and here sees a forest depends not only on the forest but also on the eyes and mind of the observer. (...) Had people

not interpreted the “data” as a forest, the forest would disappear, precisely as valid law. All concepts are conventional. Yet, it is absurd to claim that no concepts refer to anything extant. (Peczenik, 1989, 262)

This criticism does not apply to my version of conventionalism. According to my version, the concept “valid law” refers to something extant, namely to conventional entities of certain kind. These entities do exist, in their own peculiar way. Nevertheless, it is true that they would necessarily disappear if people ceased to use the concept, and in this sense they are not like forests. The claim is not that our concepts are just conventionally agreed ways of classifying our perceptual world. The claim is that the *entities themselves* are created by conventions. The conventions are not about the use of the language, but about the proper way to act. This claim is neutral in respect of the ontological realism-antirealism issue. A realist would say that there were forests before humans entered the scene, and, hopefully, there may be some forests left when they leave it. But there were no valid laws before the emergence of human societies.

Another charge raised against conventionalism is that it seems to move in circles. A necessary condition for the existence of a conventional entity is, that it is believed to exist. Then, the term which appears in *analysandum* also appears in *analysans*. Isn't this an obvious logical defect? It would be, if my purpose were to give a *reductive* definition of the analysed notions (“Instead of saying ‘P’ you may say ‘Q & R.’”). But this is not the aim of my analysis. By analysing ‘money’ as something which is believed to be money in the relevant community, I try to point out a connection between the use of the concept and a condition which holds in respect with ‘money’ but not in respect with some other concepts (like ‘forest’). While a circular or reflexive analysis of this kind does not give us the meaning of the word

'money', it provides us some information which may help us to determine the extension of the concept (On a defence of circular analyses of this kind, see Humberstone 1997).

The work of David-Hillel Ruben (1985) provides us an excellent example of a criticism based on the circularity charge. At the same time, his analysis on the basis of what he calls "social properties" very similar to my notion of conventional facts (Ruben 1985, 114-15). Ruben claims that a reductive or "non-reductive illuminative" identification of social entities or social properties with individual entities or properties is impossible. This is an ontological thesis. He also claims that individualistic explanations do not enjoy any priority over non-individualistic ones: this is his methodological thesis.

Why does Ruben think that irreducible social entities exist? His example of such an entity is France. It seems that we ascribe several properties to the entity called 'France', and that there is no set of individual facts and entities which would be identical with that social entity. Only the last of the candidates rejected by him, "reduction of France to beliefs and attitudes" (p. 30), is relevant here. His counter-argument is this: The set of relevant beliefs can be described only if the name 'France' itself appear inside the scope of belief-operators. But if somebody has an intelligible singular belief about an entity, then the entity must exist. In that case the identification of France with beliefs about France becomes circular:

A necessary condition for there to be persons with singular beliefs about France is that France exists. (...) Nor, for that matter could the identity be even non-reductive but illuminative, since the circularity is so obvious. (Ruben 1985, 35-6)

His argument in respect to the identification of social properties with systems of beliefs is just the same:

Whatever the properties are, if there is an intelligible belief that x is P , there must be the property of being P . (ibid. p. 124)

Now, the problem, admitted by Ruben himself, is that the argument implies that fictional entities like Santa Claus or the alleged planet Vulcanus also exist (cf. Ruben 1985, 35). And the same holds with fictional properties, like 'having a magical power'. An ontological individualist is not likely to be much afraid of a theory which claims that social entities or properties have the same ontological status as Santa Claus has. The basic disagreement between Ruben and me is, however, not on the issue of individualism, but on the issue of circularity. Ruben believes that the circularity, obvious in my definition of conventional facts (CF), makes the analysis completely trivial, while I find it illuminating. For me, the circularity is simply a matter of fact. A may believe that certain objects have the property of being money. She may be wrong in her belief. But if her belief is generally shared, it is necessarily correct. If the conventionalistic analysis of money is generally accepted in the community, everybody also believes that money is only money because it is the object of a general belief that it is money. The analysis is circular, or reflexive, because the things referred to in the analysans, beliefs, are themselves reflexive.

Suppose that we can analyse Ruben's example entity, France, in this way. More exactly, suppose that the nation of France is identical (reductively or non-reductively) with a system of attitudes concerning the nation of France. This analysis is illuminative, for numerous attempts to identify the nation with some racial, linguistic, cultural, metaphysical, etc. properties or enti-

ties are inconsistent with it. Indeed, if the conventionalist analysis is accepted, a substantial part of the ideology of modern nationalism has to be rejected. According to the conventionalist analysis, a nation comes into existence just when sufficiently many people, for some reason or other, do form the relevant shared attitudes. Thus, the analysis, in spite of its circularity, does help us to determine the extension of the concept. Notice that it does not follow from my analysis that nations like France are somehow unreal or “merely fictional”. They are as real as their constituting parts: beliefs, intentions and actions.

Ruben also denies that social facts could be *explained* in terms of individual beliefs, attitudes and actions. His argument is basically the same as before:

In the case of rationally held true belief, we don't explain the social facts by means of agents' beliefs about social facts: we explain the beliefs about social facts in part by the social facts. (Ruben 1985, 168)

Thus, he accuses methodological individualists of reversing the correct order of explanation. In normal cases, a fact is part of the explanation of the belief about the fact, not the other way round.

I think that beliefs about social facts can be partially explained by these facts. If we ask: “Why does *A* believe that certain objects are money?”, the natural answer seems to be: “They are money in the society in which she lives”. This answer refers to a social fact which exists independently of any particular beliefs about the fact. But how has *A* learned this fact? Well, the others – *B,C,D* and so on – have told her that the objects are money, and she has seen that *B,C,D* etc. behave in a way which becomes understandable by supposing that the objects are money. *B,C,D* etc. have formed their similar beliefs in the same way: by learning from others, *A*

among them. The continual existence of the belief is partially explained by mutual reinforcement: the beliefs of individuals support each other. Every individual sees the behaviour of all others as a part of his environment with which he or she has to cope. From individuals' point of view, the fact is just there: others use certain objects as money. My thesis is that *this situation itself* constitutes the social fact – the fact that the referred objects are money. If we want a further explanation, it must be a historical one. How did the members of the society originally form their beliefs? The explanation is likely to be complex: there are the practical constraints (only some kinds of objects can function as money); there are psychological factors, including memories of the past, and conscious selection, which make some conventions more likely to arise than others. These factors may be partially explained by a general theory of human perception. But conventions are partially arbitrary: pure chance may play an important role in their formation.

This theory is, indeed, circular. The mutual belief about the existence of a social fact is a kind of self-fulfilling prophecy which necessarily makes itself true. The only alternative seems to be that social facts exist independently and before the beliefs. That is implied by Ruben's account. He does not, however, tell us *how* they exist.

Compare again the status of social facts with the status of such facts as a's being a weapon. If I take a stick with the intention of using it as a weapon, the stick is a weapon. It is possible for me to form such an intention only because I have learned the concept of weapon, or at least I have some kind of corresponding idea in my mind. Somehow, the idea or concept exists. But I don't think that this implies any of the following positions: (a) that the concept exists independently of human minds and activities, or (b) that even if it exists, that

particular object was a weapon before I formed that intention, or (c) that my intention-formation should be explained by some kind of causal effect the concept had on my mind. We cannot explain why a stick is a weapon by referring either to its physical properties or to the general concept. It is necessary to refer to my propositional attitudes: I need a weapon and I believe that this particular stick is a suitable object to be used as a weapon. Thus, my propositional attitudes are used to explain an external fact and not the other way round. There seems to be nothing odd in this.

Conventional facts and properties are different mainly because they require mutual attitudes in order to be realized. *I* can make something a weapon, but only *we* can make something money. If there is no collective consciousness or World Spirit operating behind our backs, the fact that something becomes money has, ultimately, to be explained in terms of our individual actions and beliefs. But, when constructing such an explanation, we are not trying to reduce the notion of money to something else. We are simply pointing out that money can exist only in this peculiar way. The question whether this type of analysis deserves the name 'individualist' or not, is of secondary importance.

V. Conventional facts and legal institutions

What kinds of facts are conventional in my sense? The paradigmatic cases I have in my mind are (1) cases in which *a* is a rule or norm or practice in *S* and (2) cases in which *a* is *F* because there is a rule, norm or practice in *S* that *a* should be counted as *F* – the case analysed by Searle. Both rules and instances or applications of rules can be treated as conventional facts. But two things should be noticed. Firstly, this is not intended to be a linguistic analysis covering all the possible meanings of

the words 'rule' or 'norm'. For example, technical rules are not conventional: we have a reason to follow them even if they are not generally recognized or followed, if they are useful for our purposes.

The norms of personal or critical morality are not conventional either. If I believe that eating meat is wrong, I have a reason to follow the rule never to eat meat even if I am the only person having that conviction. The contrast with the rules of grammar, etiquette or (some parts of) law is obvious. (Theorists having a conventionalist view of morality may disagree here.) Similarly, a rule which is maintained by coercion only does not fit into the definition. A second important point is that the notion of conventional fact is not inherently tied to the existence of rules. It is possible that some *a* is *F* simply because the relevant mutual belief is there: this cuts off the regress appearing in Searle's account. We can sometimes create new conventional (or, as Searle calls them, social) facts without a reference to a pre-existing practice. I can sometimes communicate meanings without relying on rules which would give my expressions or actions that meaning; I can give authoritative commands without a rule authorizing me (as in Weber's case of charismatic authority) and so on. Some convention-creating acts can have their intended effects simply because they are believed to have these effects. Ultimately, every chain of rules has to originate from convention-creating acts.

Institutions are systems of existing, interlocked rules. By giving a conventionalist analysis for rules, it is possible to build up a theory of such basic institutions as law, money or language which satisfies our pre-theoretical intuitions mentioned before. Notice that the term 'institution' is used in a wide sense. Usually, we do not call language an institution. Here, this use is adopted in order to indicate the common nature of rule-governed practices – I follow the example of de Saussure who in

his *Cours de linguistique générale* considered language (*langue*) as *institution sociale*. A more restricted use of the term presupposes that ‘social institutions’ are only those practices which are related to *authority* and *power*. In the modern society, law is the most prominent among those institutions.

There are several classifications of rules in the literature. Searle’s (Kantian) distinction between *regulative* and *constitutive* rules is important because it reminds us of the fact that rules do not only regulate actions by prescribing and prohibiting: they also make it possible for us to do new things, by defining something as something. However, these classes are not mutually exclusive.

It seems that every rule called “regulative” by Searle has a constitutive aspect (but not *vice versa*!). A rule which forbids stealing creates new types of actions: stealing and refraining from stealing. Any regulative rule makes it possible to re-describe actions as instances of following or breaking that rule. On the other hand, not all constitutive rules have a regulative effect. But many do. A constitutive rule of football says that players have to kick the ball, not to throw it with hands. If this rule is not generally observed in a game, the game in question is not football but a different game. Nevertheless, an individual player can break the rule and suffer a penalty. We could either say that the general observance of regulative rules constitutes the practice, or that the constitutive rules of the practice have a regulative effect in individual cases. These descriptions are equivalent.

My first analysis of rules is the following:

- (R) R is a regulative rule in S if
 (1) the members of S generally comply with R;

- (2) there is a mutual belief in S that R is a regulative rule in S, and
- (3) (2) is at least partly a reason for (1).
- (DR) R is a definition rule in S if
- (1) the members of S generally count a's as F's;
- (2) it is a mutual belief in S that there is a definition rule R in S which defines a's as F's, and
- (3) (2) is at least partly a reason for (1).

These analyses cannot be the whole story. Sometimes it is possible to say that there are rules, for example, legal rules, which are not generally followed by the members of a particular society. Therefore (R) and (DR) give only sufficient conditions for the existence of rules. Another sufficient condition for the existence of rules is the following:

- (RR) R is a rule in S if there is a definition rule R' which defines R as a rule in S.

(R), (DR) and (RR) are special cases of my description of conventional facts. (RR), however, shows how the existence of a rule is not necessarily a conventional fact. A rule can exist because it is defined as a rule by another rule. But because the chain produced by the reapplications of (RR) cannot go on indefinitely, the ultimate rules which define other rules must exist conventionally. The conjunction of (R), (DR) and (RR) gives the necessary and sufficient conditions for something's being a conventionally existing rule in S.

The point of the recursive clause (RR) is this. Social rules may form *systems*. An individual member rule of a rule-system need not exist by the virtue of mutual belief concerning its existence – consider some more esoteric

parts of law which are not known by a small circle of legal specialists. It is enough if a rule belongs to a chain or net of rules which ultimately can be traced back to rules which exist in the relevant community as conventional facts. To put it in more familiar terms, the rules exist if they are recognized by a "rule (or rules) of recognition" which is itself efficacious. The similarity between this view and that of H.L.A. Hart in his classic *The Concept of Law* is obvious. My view, however, provides an answer to the charge of circularity made against Hart's view of law. In Hart's view, the rule of recognition exists as a social practice among the officials. Against this, N. E. Simmonds has claimed that the questions about the validity of the ultimate norms of a system cannot be merely about the beliefs and actions of officials, for

if the question about the nature of a practice were a question about what official *thought* then the content of their thought could not be a thought about the nature of the practice. (Simmonds 1984, 104)

This is another instance of the circularity charge discussed above. If my view is correct, the circle is not a vicious one; the content of the ultimate rules can be analysed partly in terms of officials' (and of other citizens') thoughts about these rules.

This account of rules leaves many questions unanswered. For example, the question of how the belief "R is a rule for the community S" can work as a *reason* for the members of that community to comply with the rule? The fact that R is recognized as a rule is a necessary condition for conscious (and not merely epiphenomenal) compliance, but it is not a sufficient condition for that. There is no simple answer to the question, for rules affect on individuals' practical reasoning in different ways. But one essential role of rules in human life is to help individual to *coordinate* their actions. In

interaction situations, the consequences of actions taken by me (including their symbolic consequences) are often dependent on the actions taken by you, and *vice versa*. Indeed, according to Jürgen Habermas, every social interaction that comes without the exercise of manifest violence can be understood as a solution to the problem of coordinating the action plans of several actors (Habermas 1996, 17). In many cases, especially in face-to-face situations, we can solve the problem without any institutionalized rules, by relying on our shared beliefs. To use David Hume's favorite example, "two men pull the oars of a boat by common convention for common interest, without any promise or contract". Each man prefers to row, if and only if the other rows; the problem is to find a common rhythm of rowing, and that can be solved without any explicit rule, or even without discussion.

Compare this with another time-worn example: the traffic rules. Here we have institutionalized rules. Even here, the main interest of every one is to follow a pattern followed by others; the exact content of the rules is less important than the existence of a general pattern. But several factors affect here: (i) the large number of actors, (ii) the difficulty to communicate and, (iii) the risks involved in the case the coordination fails. What is needed is a system of rules which are known by all, and known to be known by all. Therefore, there should be a single authoritative source for the rules, so that in order to learn the content of the rules, we have to consult the law-book and not, say, the local custom.

Traffic rules are a particularly good example of the coordinative functions of law. However, large fragments of law are not directly related to coordination. Rather, their function is to protect interests or values, or to regulate conflicts of interests or values. But even those parts of law are indirectly related to coordination. Hume explains the existence of property rights in the same way:

I observe that it will be in my interest to leave another in the possession of his goods, provided that he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense is mutually expressed and is known to both, it produces a suitable resolution and behaviour. And this may properly enough be called a convention or agreement betwixt us, though without an interposition of a promise; since the actions of each of us have a reference to those of the other, and are performed upon the supposition that something is to be performed on the other part. (...) In like manner are languages gradually established by human conventions, without any promise. In like manner do gold and silver become the common measures of exchange, and are esteemed sufficient payment for what is of a hundreded times their value. (Hume 1739/1948, 60-1)

What is most important, the conventional existence of the rules of recognition which define the sources of other legal rules makes possible for courts and officials to coordinate their decisions concerning the application and enforcement of rules. Here, the “relevant population” is the sub-community of officials – i.e. of those who are recognized as officials by the entire community. This not exclude the possibility that there are several, partly competing rules of recognition. For example, national legislation and the regulations created by international organizations (eg. by the EU) may be partly incompatible, and there may be no super-rule determining their mutual relations. The systemic nature of rules is always a matter of degree. But, contrary to what Hobbes said, the existence of several, partly competing authorities need not make our life “nasty, brutish, and short”. For, as Leibniz remarked to Hobbes, people may well live under a divided power, if they “hold some

middle road, so as not to commit everything to hazard by their obstinacy" (Leibniz 1677/1981, 119). The plurality of rules may make coordination more difficult, but not impossible.

The idea of convention may help us to develop a more detailed theory of the nature of *social power* and *authority*. The notion of convention used here differs from the notion developed by David Lewis in his classical work *Convention* (1969). There, one of the main properties of conventions is that for every conventional solution to a coordination problem there exists a possible alternative or alternatives which would solve the problem equally well, and the agents involved in the problem are virtually indifferent between the alternative solutions. They go along with the existing conventions just because they happen to be there. This implies that their interests are basically identical. And then, of course, there is no power dimension in their interactions. But consider such practices as using dollar as the international currency, or using English as the *lingua franca* in India or Africa. These practices solve real coordination problems: there is an obvious need in both cases to find a shared practice, and the existence of some shared practice is, for individual agents, more important than the particular nature of the chosen practice. But certainly these practices are not neutral. They are products of pre-existing power-relations, and they tend to reproduce the very same relations

VI. Conclusion: institutions and freedom

As Berger and Luckmann remark, the 'objective' nature of institutions is a potential source of alienation. Institutions, although built on human conventions, tend to appear us as natural facts which are outside any human control – a phenomenon already noticed by Marx and

Durkheim. This follows from the fact that institutions are produced, not by you or by me, but by us. They can be changed only by collective action. When collective action is impossible, institutions may look as impenetrable and immovable as physical laws or entities. This gives rise to the phenomenon called as "ideology" by Marx. People tend to see the institutional reality as a part of the eternal order of things. When such a belief becomes mutually shared, it *makes* institutional changes more difficult, although it does not, of course, make them as parts of the eternal order. Ideological beliefs are not self-grounding; they are collective illusions, like the belief in the existence of the Emperor's new cloths.

Nevertheless, institutions are also potential sources of human freedom, in three different ways. The standard liberal argument, also present in Hume's account, is that institutions extend our freedom by protecting us against the intrusions of others. But there are two other, less obvious connections between institutions and human freedom. First, by facilitating coordination, institutions make us possible to act in concert. Second, institutional rules create *normative powers*: by virtue of institutional rules, we may promise and make contracts, vote and marry, accept commitments and step into institutional roles. Because of institutions, we are able to do things which cannot be done outside institutional contexts.

The importance of the last point becomes more visible when we consider the "negative" conception of political freedom, introduced by Jeremy Bentham and William Paley and made popular by sir Isaiah Berlin in his famous inaugural lecture 'The Two Concepts of Liberty'. According to this conception, politically relevant liberty is simply the absence of sanction-backed regulative rules. (Hence, Robinson Crusoe on his isle possesses the largest possible amount of this form of free-

dom.) Bentham, Paley, and Berlin made the explicit contrast between this negative “liberal” conception and the more classical “republican” conception that defined politically relevant liberty as possession of certain powers (e.g. voting rights).

Elsewhere (Lagerspetz 1998), I have tried to argue that the standard negative view is too limited even for political liberals. For it neglects the positive contribution of constitutive institutional rules. To make the matter more clear, consider a person who is put under a guardianship. He is unable to make valid contracts, to make a will, to vote, or marry. This is not so because he is under some specific *regulative* rules. He may well draft and sign texts entitled as “My Last Will and Testament” or “A Contract of Sales” without being subjected to a punishment. He may raise his hand when votes are counted, or say “I do” at the presence of a person dressed as a priest. He may be free to perform the same sets of physical movements as his fellow citizens. The difference is that these movements do not constitute any new institutional facts. They are not counted. It seems plausible to say that the ward is less free than his fellow citizens – less free in an ordinary and politically relevant sense. He is less free because he does not possess certain powers which can be conferred to him only by constitutive (or definition-) rules.

Certainly, the freedom to make contracts is the most liberal theme one can imagine. If it cannot be defined in terms of “negative” liberty, there seems to be no foundation in the claim that the Benthamite negative conception of liberty is *the* liberal conception. This example shows that the kind of metaphysics of institutions I am defending may also have some relevance in the normative political theory.

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Raimo Tuomela

COLLECTIVE ACCEPTANCE AND SOCIAL REALITY

I. The Collective Acceptance account of collective sociality

Many social and collective properties and notions are man-made in a collective sense. There are two important features of the collective creation of some central aspects of the social world that have previously been emphasized in the literature – by such authors as Barnes (1983), Bloor (1996), Kusch (1997), and Searle (1995). The first feature is that of the *performative* character of many social notions. The second is the *reflexive* nature of many social concepts. My account adds to this list a third feature, the collective availability or “*for-groupness*” of collective social items.

I will argue in this paper that sociality is in many cases created through collective acceptance. I have elsewhere created a “Collective Acceptance” account of sociality and social institutions (see Tuomela and Balzer, 1999). The first section of the present paper will present this account. The second and third section introduce some new features to the account. The fourth section discusses social institutions. Section V makes some general philosophical comments on the scope of the account. The sixth section applies the account to the prob-

lem of the ontology of the social world. On a general level, the basic problem to be discussed in this paper is what collective acceptance can achieve concerning ontological matters. I will try to show that it can serve to make relevant parts of the social world objective and ontologically real in a sense not relying merely on “epistemic objectivity” (in Searle’s, 1995 sense).

According to the Collective Acceptance account of (collective) sociality – developed in Tuomela and Balzer (1999) – certain entities get their social status by being collectively created. For example, many kinds of physical entities – for instance, squirrel fur in the case of medieval Finns – can “in principle” become money. This occurs through the members of the collective in question accepting it as money. As soon as they cease to collectively accept it as money and to mutually believe that it is money, squirrel fur loses its status and function as money.

We must distinguish between a) collectively creating an idea, b) collectively holding and maintaining it, and finally c) collectively realizing it or carrying it out. Collective acceptance relates to a) and b) in the first place. I argue that those collective social reasons, viz. reasons for which collective social actions in general are performed, are special kinds of “we-attitudes” (cf. below and Tuomela, 1995, Chapter I, Tuomela and Bonnevier-Tuomela, 1997).¹ Collective acceptance basically is coming to hold and holding a relevant we-attitude. The we-attitudes (social reasons) that are needed for collective acceptance basically belong either to the intention-family or to the belief-family of attitudes. My account concentrates on intentional achievement actions, but it must be remembered that neither coming to hold a we-attitude nor holding a we-attitude need be intentional actions. Thus, in principle, an agent can acquire a belief that, for instance, there is a tree in front of him, without his reflection and intentional action. Thus, an agent

can accept something as correct without having intentionally arrived at this kind of acceptance state. I will below concentrate on acceptance beliefs, which are states of acceptance of a content (sentence, proposition) as correct (or true), while mere believing is a state in which the agent experiences something as true or real (cf. Cohen, 1992, Tuomela, 1999). Typically such a state of acceptance is produced by the mental action of acceptance and is, furthermore, based on the agent's reflection of what is being accepted and often also on relevant evidential considerations – e.g. other group members' acceptances. Analogously it can be claimed that individual acceptance typically – although not always – is intentional. However, collective acceptance need not be collectively intentional in the strong sense of being based on a joint intention to accept – the participants may instead be connected in terms of their mutual beliefs (recall the cases of collective acceptance without even an individual intention present).

Acceptances as states (*viz.*, as states normally resulting from acceptance action) are basically dispositions to act in accordance with the contents of those states, these contents serving as reasons for those actions. Whatever else those reasons may include, intentions and beliefs of a relevant kind must always be involved (this is a generally accepted fact about reasons of action). Thus the account of acceptance in the sense of holding a *we*-attitude of a relevant kind can concentrate on intentions and beliefs: intentions and beliefs must accompany wants, wishes, fears, and whatever can motivate action, simply because the concept of action is based on the idea of doing something at will under the guidance of beliefs. In general, I argue that the question of how much intentionality and of which kind (cf. *I*-mode versus *we*-mode intentionality, correctness versus falsity of relevant beliefs) there must be in each particular case is to be decided on the basis of the collec-

tive outcome – what kinds of activities result from collective acceptance and the maintenance of what has thus been accepted. Trivially, people must be able to do with money what we generally do with it and the same goes for schools, churches, governments and so on.

Consider collective action performed with some (even if perhaps not full) collective intentionality, viz. collective social action performed for the same shared social reason. For instance, in a group there might be a (weak) we-goal to oppose a tax increase; viz. this is the group members' goal, and they believe that the others share this goal and believe that this is mutually believed among them. Collective acceptance in this kind of situation can be construed as acceptance either in the sense of conative commitment to a sentence or proposition s (intention to make s true or to uphold s , e.g. s = The tax increase is to be prevented) or doxastic commitment to s (the "acceptance" belief that s is true, e.g. s = The earth is flat). Collective acceptance here is a) (weak) "we-acceptance", viz. each person comes to accept s , believes that the others accept s , and also believes that there is a mutual belief about the participants' acceptance of s . This we-acceptance can be either "private" acceptance (acceptance in the I-mode, viz. the group members "privately" accept s) or acceptance in the we-mode (viz. the group members together accept s and are collectively committed to s). In both cases acceptance involves reflective awareness not only concerning what one oneself accepts but also what the others accept. In the latter, we-mode case also a collective commitment to s must be involved, and we get the minimal sense of accepting *for the group* (and the involved "we-mode" togetherness which intersubjectively involves the group). Furthermore, without the "we-mode" mutual belief there is not enough intersubjectivity and collective commitment for the application of the phrase 'for the group' and for saying that the participants are attempting to

see to it collectively that the accepted content will become satisfied or – as the case may be – remain satisfied. Acceptance “for the group” with collective commitment can be viewed in this context as coextensive with acceptance in the we-mode. Thus, “We accept that *s* is correctly assertable for us in our group-related activities” is truth-equivalent with “We accept *s* in the we-mode”. We can also say that we-mode acceptance consists of collective acceptance for the group with collective commitment concerning what has been accepted (see Section III for further discussion). When accepting something for the group the participants are collectively committed to a system of norms, which in general *requires* that the members perform certain actions (e.g. inferences) and *permits* the performance of some other actions. In general there will be social sanctions – approval, disapproval – to control the group members activities supposedly governed by their normative collective commitment.

Stronger forms of collective acceptance “for the group” that may be mentioned here are b) norm-based, institutional acceptance and c) plan-based or agreement-based collective acceptance. An example of b) is the collective acceptance that drunk driving is wrong and punishable, that anniversaries in a marriage ought to be celebrated, and perhaps also in some collective that squirrel fur counts as money. The last example is based on the social norm that everyone in the collective ought to treat squirrel fur as money. An example of c), plan-based or agreement-based collective acceptance, is the group members’ joint decision to elect a certain person as their leader. In general, acceptance for a group entails mutual belief in the acceptance, at least in “egalitarian” groups and in groups in which the normative structure of the group does not affect collective acceptance.²

II. Collective constructivist sociality

The following general thesis of sociality in a collective and “constructivist” sense can now be proposed (cf. Tuomela and Balzer, 1999, and recall note 2):

Collective Acceptance Thesis (CAT): A sentence *s* is *social* in a primary constructivist sense in a group *G* if and only if the following is true for group *G*: a) the members of group *G* collectively accept *s*, and b) they collectively accept *s* if and only if *s* is correctly assertable.

In the analysis a) is the assumption of the categorical collective acceptance of *s* while clause b) is a partial characterization of the kind of collective acceptance that is needed here.

In logical terms,

(CAT*) *s* is *social* in a primary constructivist sense in *G* if and only

if

$\text{Forgroup}(CA(G,s) \ \& \ (CA(G,s) \leftrightarrow s))$.

Here the ‘operator’ *CA* represents the collective acceptance of *s* as true or as correctly assertable by *G* for *G*. $\text{Forgroup}(G,s)$ means that *s* is correctly assertable for the group, *G*, in question (see Tuomela and Balzer, 1999, for discussion). (In the case of descriptive sentences correct assertability can be regarded as truth in a correspondence sense.) Acceptance for the group in general, viz. in the case of intentional collective acceptance, entails mutual belief concerning the acceptance.

CA must be a performative achievement-expressing notion and ‘acceptance’ is general enough to cover both the creation and upholding of *s* and has achievement conceptually built into it. In standard cases collective acceptance involving collective commitment to what has been accepted can be required. However, norm obeying on the basis of private commitment seems possible in some cases, although not perhaps in a full-blown

sense; see the discussion in Chapter 6 of Tuomela, 1998.

Let me clarify correct assertability. First note that we can derive from (CAT) and some logical assumptions concerning FG that FG(s) (see Tuomela and Balzer, 1999). We can interpret FG(s) as “group G takes s to be correctly assertable in G-contexts” or “G treats s as correctly assertable in G-contexts”, where G-contexts are contexts related to the activities of the group members of G when they act *as group members* as opposed to privately. This, when we go to the individual or member-level, entails “s is collectively available or premissible in G-contexts”. Premissibility is the idea of taking s to be correct or to be assumable in the context in question. But a group member does not really have to *believe* it is true. (Nevertheless, premissibility in G can be viewed as a notion in the belief-family, construed in a wide sense.) To accept something as right or correctly assertable entails that one has the right to use the sentence as a premiss. In some cases, e.g. when a “flatearther” is asked about the shape of the earth, the member ought to use a certain premiss (in the example, “The earth is flat”). Using it as premiss means accepting it as a premiss in one’s practical inference or using it as the basis of one’s action. We can now ask whether one can accept s and not-s. The answer is that a rational group member cannot do it. Note, however, that one can to some extent rationally accept s *qua a member* of G and accept not-s *as a private person*. My present account does not rely on the notion of correspondence truth as an analytical notion. The basic notion here is the normative notion of a group’s treating something as correctly assertable. However, correctly assertable *descriptive* sentences can be regarded as true in an objective, “picturing” sense (cf. Sellars, 1968, Tuomela, 1985).

Consider now briefly the notion of collective acceptance as characterized by (CAT*): Forgroup(CA(G,s) <-> s).

First consider the implication from left to right:

Forgroup($CA(G,s) \rightarrow s$) (Performativity)

This is true simply on the basis of the notion of collective acceptance, which is an achievement notion relative to the group's "intentional horizon." What the group accepts is correctly assertable or true for the group members.

Next consider the converse implication:

Forgroup($s \rightarrow CA(G,s)$) (Reflexivity)

This gives a central and often emphasized conceptual "mark of the social": For s to be correctly assertable within G it must be collectively accepted in G . The truth of s for G makes reference to s itself within the sentence $CA(G,s)$. This condition will be discussed in Section V.

We can say roughly that a sentence is collective-social in a *derived* sense if it is not "constructively" social in the above primary sense but *presupposes* for its truth (for the group) that there are some relevant true (for the group) sentences, which are collective-social in the primary sense. For instance, sentences using 'power', 'unemployment', or 'wealth' are at least in some cases candidates for constructively social sentences in the derived sense. Latent or unilateral social influence are social features of the social world that would not - and correctly so - be cases of even derivatively social features in the constructivist sense (not even when many agents are concerned). The same holds for "naturally" social emotions such as envy often is (cf. Tom envies John for the latter's new car). Furthermore, many shared we-attitudes are not socially constructed either (for instance, shared fear may be a "natural" or "non-constructed" social phenomenon).

There is also a kind of "shadowy side" in collective acceptance in our present sense. A group can *collectively reject* (\overline{CR}) ideas. For instance, let s = Human beings are a product of natural evolution. A group might reject s . I submit that this entails not only that it does not accept s but that it accepts the negation of s , viz. $\neg s$.

In other words, I claim that collective rejection is a sub-species of non-acceptance by which the group is able conceptually to construct notions. We do not, however, need to adopt a special technical notion of collective rejection for this job, for my present thesis reduces the task to collective acceptance, viz. $CR(G,s)$ entails $CA(G,-s)$. It can be mentioned here that there is also another way of dealing with “negative items”, although these two ways are complementary and do not compete. Briefly, a group may (and here must, if rational) accept also that it rejects s and accepts $-s$. Thus, in symbols, $CA(G, CR(G,s))$ and $CA(G, CA(G,-s))$ would be true in this case. For instance, a group may accept e.g. that the thought that human beings are a product of natural evolution is rejectable (this is of the kind $CA(CR(G,s))$). In my account collective acceptance has as one of its intuitive source ideas that it concerns what the group members are licensed to write down and use as premises. In my example, $CR(G,s)$ is accordingly taken to entail that they may use $-s$ as a premise, and ought to use it when the genesis of the human race is the object of inquiry.

My somewhat tentative thesis is that the family of intention concepts (including agreements and commitments) and acceptance beliefs (doxastic takings) are the basic attitudes needed to sustain (*CAT*), but a detailed defense is not possible here.

III. More on collective acceptance

I have above required of collective acceptance that, in the context of (*CAT*), it be for the group and that involve collective commitment concerning what has been collectively accepted. I will now consider collective acceptance (*CA*) somewhat more generally in view of the “variables” forgrouppness (*FG*) and collective commit-

ment (CoCom).

We have seen that collective acceptance is either a) a collective social action performed for a shared social reason or b) the state of having accepted something and being therefore disposed to perform relevant collective actions. Case a) is exemplified by the case of the group members making the agreement to accept a sentence *s* (e.g. *s* = We always walk on the right hand side of the road in our village). Making the agreement is a collective social action which is performed for the shared reason (purpose) of achieving consensus on some question (e.g. concerning traffic rules) and specifically on whether to accept *s* or something else. The agreement (and shared intention) to accept *s* results in the acceptance of *s* – indeed there is no conceptual room here for agreeing to accept *s* and not accepting *s*. Acceptance of *s* thus is the conceptually inbuilt “result event” of the agreement-making in question. The participants’ continued acceptance of the agreement entails that they will have the intention to continue to hold onto *s*. The intentions to enter agreement making, to accept *s*, and to continue to hold onto *s* need not be full blown joint intentions although they must be shared intentions with the same content.

Once a sentence, *s*, has been collectively accepted, collective acceptance (CA) in the “rather full” sense required in the present account (which need not be in a we-mode sense) can be regarded as a disposition to perform relevant collective social actions (viz. actions performed for the same social reason) concerning the accepted content, say *s*. The social reason here will be to collectively satisfy or uphold (as the case may be) the sentence in question. The participants may be either collectively or privately committed to this kind of activity. They must in this context mutually believe that they have collectively accepted *s* and understand what such collective acceptance is (and thus that they are

committed to *s*). As their social reason involves not only the idea of satisfying or upholding *s* but also the idea of doing this in part because of the others also do it, we can see that collective acceptance involves reflection of social expectations. The participants must be aware of, or believe, not only that they themselves have accepted *s* but also that the others have similarly accepted *s* and in fact that the others also believe similarly of the others (and so on higher up in the belief hierarchy, at least in principle). The fuller cases thus must involve at least loop beliefs: each person should believe something not only about the others' beliefs but also about their beliefs concerning his belief and perhaps more.

It can be pointed out, that for the above to be correct, CA must be understood as a proper collective social action, viz. collective action performed for a shared social reason (in the sense exactly characterized in Tuomela and Bonnevier-Tuomela, 1997). In the literature on collective action – especially in the literature dealing with the public goods problem – collective action is often understood only in a weak aggregate sense falling short of being proper collective social action. In this aggregate sense a collective action consists of people performing the same type of action, perhaps mutually believing that they are doing so. If only this much were meant by collective action, it would not by itself rationally entail mutual belief (be there mutual belief or not), forgroupness, nor collective commitment. It can be noted that there could even be aggregate collective action for the group, viz. $FG(CA(G,s))$, without the rationally necessary accompaniment of mutual belief. This is because CA would be private (individual-mode acceptance), and whether or not mutual belief actually happens to be present would not change the matter.

Consider briefly collective commitment in its weakest, we-attitude sense. In the case of two persons, you and me, if we are collectively committed to a proposi-

tion *s*, the following must be true: I take myself to be committed to *s* and will act accordingly, in part because I believe that I ought to do what it takes to make or keep *s* correctly assertable for the group; and I believe that you are also similarly committed to *s* and will act accordingly, in part because of your similar personal (not necessarily social) normative thoughts; furthermore, we both believe that all this is mutually believed by us. Here *s* could be "The earth is flat", and we are talking about your and my commitment to maintaining its correct assertability. In present weak sense of collective commitment my account goes in terms of shared we-belief only. Thus communication is not required and still less is explicit agreement making at stake. (Note that private mode collective acceptance need not involve collective commitment even in this weak sense.)

The present notion of collective commitment can be strengthened, on the one hand, by requiring the normative aspect to rely on an intersubjective norm or obligation towards *s*. On the other hand, it can be strengthened by requiring the participants to think that the others ought to perform their "parts" of the collective commitment to uphold *s* and that they, being committed, indeed do perform them. This latter addition can be called a social commitment or a social aspect of the collective commitment to *s*. In all, collective commitment in this strongest sense involves i) action expectation (especially for the others), ii) intersubjective ("objective") normative basis for commitment, and iii) social expectation (entitlement to expect that the others will act appropriately).

Let me now systematically consider CA, FG, and CoCom in their various combinations. We may think of a Venn diagram concerned with the domain of all things that are in a group's concern, something the group actually or dispositionally is concerned with. Let us call

this domain of items (sentences) the group's intentional horizon (IH). We can also say, equivalently, that the elements of IH are items that the group is concerned with in its propositional attitudes, its thoughts, so to speak. Within IH we may now consider the following contents:

$(+-)CA(G,s) \ \& \ (+-)FG(G,s) \ \& \ (+-)CoCom(G,s)$.

Here the + and - signs obviously mean, respectively, inclusion and exclusion related to the sets in question.

Let us now consider the subclasses of IH in obvious shorthand notation:

1. $CA \ \& \ FG \ \& \ CoCom$
2. $CA \ \& \ FG \ \& \ -CoCom$
3. $CA \ \& \ -FG \ \& \ CoCom$
4. $CA \ \& \ -FG \ \& \ -CoCom$
5. $-CA \ \& \ FG \ \& \ CoCom$
6. $-CA \ \& \ FG \ \& \ -CoCom$
7. $-CA \ \& \ -FG \ \& \ CoCom$
8. $-CA \ \& \ -FG \ \& \ -CoCom$

Our discussion in Section II has shown that collective acceptance in the fullest sense must be of the kind 1, viz. it must be collective acceptance for the group and it must involve collective commitment (but recall the mention of some marginal cases with private commitments only and see the discussion of case 2 below). This is in fact what we mean by we-mode collective acceptance. (This is not mere stipulation, but accords with how I have analyzed the we-mode in Chapter 2 of Tuomela, 1998.) However, the Collective Acceptance account can exceptionally tolerate also case 2 (while still requiring private commitment; cf. below).

Given our earlier discussion, I propose the thesis that we-modeness (WM) is truth-equivalent to collective acceptance with collective commitment for the group, viz.

i) $WM(G,s) \leftrightarrow CA(G,s) \ \& \ FG(G,s) \ \& \ CoCom(G,s)$.

The second conjunct could also have been $CA(FG(G,s))$, but in the present context the latter en-

tails the former and conversely.

The following can, furthermore, be proposed as a valid truth:

ii) $\text{CoCom}(G,s) \rightarrow \text{FG}(G,s)$

Clause ii) says that collective commitment in the context of collective acceptance entails collective acceptance for the group. ii) can be argued for by saying that a group cannot be collectively committed to s unless everybody somehow takes part in seeing to it that s will be or is kept correctly assertable and that, accordingly, when s is satisfied or maintained (as the case may be) it is collectively available for all group members and $\text{FG}(G, s)$ is true. It of course immediately follows from i) and ii) that

iii) $\text{WM}(G,s) \leftrightarrow \text{CA}(G,s) \ \& \ \text{CoCom}(G,s)$

is true as well - and of course accords with what was earlier said about the we-mode.

Given this, we can now consider more generally which of the cases 1)-8) are rationally possible? Case 1 amounts to we-mode collective acceptance and does not require further comments here. Case 2 is possible. There can be cases of collective acceptance for the group involving only private commitments. Suppose thus that it is mutually believed – in a private, tacit sense – by the Finns that they are the toughest people in the world. This kind of collective acceptance based on mutual private belief would only entail private commitments but could still be for the group and even be a reason for collective social action. Case 3 is not possible, as CoCom entails FG . Case 4 is possible: There might be collective private acceptance of statement such as that emeralds are green without this being for the group and without its being collectively committed. Or consider another example directly concerned with action. The group members might all accept to go picking mushrooms and accept it as true that everybody will go, without accepting all this for the group. There might be mutual

knowledge about this in the group, but the group members would compete for the mushrooms. This can be taken as collective acceptance in the I-mode without collective commitment to the accepted activity and without forgroupness. Case 5 I find conceptually impossible at least in the case of "egalitarian" groups (my sole concern here). There can be no collective commitment without people collectively accepting the sentence they are collectively committed to, as commitment entails having an intention to act appropriately; and that is what collective acceptance here amounts to. Thus collective commitment to the proposition that the earth is flat entails the collective acceptance of the use for all group members of the premiss "The earth is flat" (although the converse is not generally true). How about case 6? Private acceptance by only a few people in the group of a sentence *s* would satisfy this case. It is certainly possible. More strongly, the group might collectively reject *s*, and this is also an instance of 6. As to 7, it violates ii) and is impossible also for the reason that there can be no collective commitment without collective acceptance - recall the discussion of case 5. Case 8 is possible. Items which are the group's concern (although they are not for the group) but which it has not actively considered or has actively considered but not accepted belong here. E.g. the statement that titanium is a light metal might be given as an example.

In all, we have found that of the combinatory possibilities 1)-8) only CA & FG & CoCom (case 3), -CA & FG & CoCom (case 5), and -CA & -FG & CoCom (case 7) are not "conceptual-rationally" possible, if we take collective acceptance (CA) to be collective social action or disposition to collective social action in the discussed, relatively precise sense of Tuomela and Bonnevier-Tuomela (1997). Although the Collective Acceptance account is typically concerned with case 1 (and occasionally with 2), the consideration of the other cases

has both justified that fact and has thrown some further light on the notions of CA, FG, and CoCom.

IV. Social institutions

Let us now consider social institutions from the point of view of the Collective Acceptance model. The phrase 'social institution' has been used in very many different ways, as also dictionaries witness. I submit that institutions presuppose some kind of collective acceptance of a way of acting in group contexts. Thus institutions fundamentally relate to practices (recurrent activity) and to social collectives or groups. In the present general case institutionalization then amounts to the creation, by the group members via their collective acceptance, of specific repeatable ways of acting relative to group tasks and functions. For instance, in some tribes certain ritualized ways of doing things (cf. rain dance) are institutional and certain roles (e.g. hunter) are institutional in this sense. I claim that in its most general and "rock bottom" sense institutional (viz. institutionalized) acting is acting and functioning *as a group member* (as opposed to acting as a private person), viz. in a certain group position or role (be the positions differentiated or not). Acting as a group member accordingly necessarily involves a group context, viz. acting in relation to some group tasks, purposes, or functions. In the group's view there is a right and a wrong way of so acting, and thus we have at least a weak element of normativity here. Assuming collective commitment to the instituted item, we can here equivalently speak of institutional acting in a group as acting in the we-mode rather than in the I-mode. (However, institutional acting without collective commitment and thus acting in the I-mode also seems possible, given the existence of an institutional context.)

If a group has structure in the sense of division of

labor and tasks we must be concerned with different kinds of group positions and roles and in this sense with institutions in a *narrow* sense. In such cases acting as a group member amounts to acting in a certain norm-governed position or role. Acting as a group member means that one acts in a position and is in principle replaceable by some other individual (group member) of the right kind (say teacher, priest, carpenter). In other words, the notion of group member abstracts from specific individual features of persons and makes for the possibility of change of members without a change of the group into a different one.

In the full-blown “standard” case, covering e.g. the general institutions of money, language and law, as well as such specific (viz. narrow) institutions as the school and the banking system, institutional acting is a social practice governed by a social norm accompanied by sanctions (cf. Tuomela, 1995, Chapter 10, and the references given there). This serves to create the collective outcome that the group as a whole functions “as meant”, viz. so that it tends to fulfil its basic tasks and functions.

In terms of the analysis (*CAT*) we get the following account of social institutions in the “standard” sense (see Tuomela and Balzer, 1999, Tuomela, 1995, Chapter 10, for a longer discussion):

(*SI*) A generic sentence *s* expresses a *social institution* in a primary sense in a collective *G* if and only if

1) *s* expresses or entails a social norm or system of interconnected social norms governing a social practice or a system of interconnected practices;

2) the members of *G* collectively accept *s* for *G* with collective commitment and with the understanding that collective acceptance for the group entails and is entailed by the correct assertability of *s*. (This collective acceptance guarantees that the social norm expressed or entailed by *s* is in force.)

This account is stated in general terms, but is meant

to capture the view that a social institution in the standard sense involves one or more recurrently performed social practices, SP, and a "task-right system", TR, in the sense of Tuomela, 1995, Chapters 1, 10. Thus the sentence *s* is supposed to express the couple (SP, TR), in colloquial terms that there is a usually position-involving social practice or system of interconnected social practices governed by (interconnected and interlocking) social norms (rule-norms or proper social norms in the sense of Tuomela, 1995, Chapter 1). Clause 2) entails that the social norms in question must be in force. Roughly, they are in force if obeyed to a suitable extent and are also suitably sanctioned (Tuomela, 1995, Chapter 1). Due to the assumption of collective acceptance for the group we get the result that a social institution is for the use of the social group in question. Consider a village in which certain people help one of the villagers concerning a certain task. This is, so to speak, helping on an interpersonal level but not yet at the group level. But if a working-bee, viz. a meeting for combined work and amusement (especially of neighbors and friends), is organized, the helping in question is a group-level affair, one that involves the villagers as a group (or, possibly, a certain subgroup of that group). Collective acceptance with collective commitment (and accompanying social sanctions) is required in the kind of full-blown standard case we are discussing here, but we may have to tolerate institutional cases in which there are social norms to which the target persons are only privately committed, e.g. subconscious norms concerning communication and body position in face-to-face interaction.

Searle (1995) emphasizes that social institutions are based on a collectively created social status of something. This seems to be right in the case of standard social institutions, although in the case of weaker social institutions this idea may not always be involved

(cf. below). I would like to say that the kind of new understanding and new “social meaning” involved in a social institution, as compared with the case where the social institution did not exist, is due to two factors. First, we have a system of interaction which need not have existed before; and, secondly, there is the holistic or group-level element involved in “forgroupness” and collective commitment, both involved in collective acceptance. These elements did not exist before and especially they account for the new status of the social interaction structure involved.

Let me still emphasize that the present account in the general case involves differentiated positions and roles and hence interlocking social norms (and, although I do not above stress it, interconnected institutions). This element of systemicity makes activity governed by a single social norm, if there such be, problematic if regarded as an institution. For instance, norms concerned with dressing (e.g. lifting one’s hat) might be regarded as a case in point. We are hesitant in regarding cases like, for instance, greeting by lifting one’s hat or removing one’s hat when entering a building as social institutions because they do not relate to a system of group-positions and to other activities. It seems that borderline cases like these can often be treated as minimal institutions in the sense to be discussed below. In any case, cases of mere norm-obedience are not as such social institutions even in that minimal sense (as collective commitment and forgroupness may be missing).³

Social institutions in a derivative sense can be characterized analogously with how derived sociality was based on primary sociality above. In them the sentence *s* is social in the derivative (rather than in the primary) constructivist sense. A norm-based social power-relation could be cited as an example of a social institution in the derived sense. (Cf. Lagerspetz, 1995, for a somewhat similar approach, which, however, relies on mu-

tual belief rather than collective acceptance.)

As has become clear by now, there are many kinds of social institutions. Thus (SI) only gives a basic idea concerning normative social institutions. It is thus not informative concerning such specific institutions as are organizations (such as a business company, or a church). On the other hand, one can – in accordance with the above idea of institutions as collectively accepted repeated acting in a group context – also consider weaker kinds of social institutions. Thus, even mere collective acceptance with collective commitment towards a non-normative proposition *s* already makes *s* institutional in a “minimal” sense. Suppose thus that some people collectively accept as one of their fundamental principles that the sun is their god. Supposing that they are collectively committed to this principle and are also disposed to sanction each other in relevant ways we are already dealing with a kind of institutional social fact. It seems that we should still require that there be some recurrent activity (e.g. worshipping every morning at sunrise) to confirm that the people really are collectively committed to their belief. Given this we are here dealing with a minimal kind of social institution even if there were no specific social norm to engage in such practices – over and above the persons’ (possible) private normative thoughts that they ought to collectively uphold their basic principle.

A couple of remarks are due. First, the present model of social institutions is of course highly general and only diachronic. It is, however, possible to give more content to it and to make it dynamic (see Tuomela, 1995, Balzer and Tuomela, 1999). The result is a detailed mathematical model that I have called a “social mill”. It shows how social institutions can be maintained and revised via the agents’ collective practices. While the general idea is familiar from previous contexts (cf. e.g. Giddens’s theory of structuration), there is no account

working seriously with “jointness” notions and collective acceptance as presented above and in other works by myself and my collaborators.

My second remark on social institutions concerns Searle’s (1995) theory of the construction of social reality. His account basically shares many features with my above account but deals with only with a strong notion of institution. His central formula for collective acceptance in the context of social institutions is “We accept that *S* has power (*S* does *A*)” (Searle, 1995, p. 104, 111). This is understood to be implicitly entailed by my central acceptance sentence “We collectively accept *s*” (or $CA(G,s)$), but what is explicitly accepted in the present case is the sentence *s*, e.g. *s* = squirrel fur is money, and not the underlying powers, rights and duties, concerning the possessors of squirrel furs and other members of the group.

Searle’s account operates in terms of constitutive rules, but it seems hard to fit proper social norms such as conventions into this account. Nevertheless, there can be institutional facts also in their case. Furthermore, there can be institutional facts in cases where no constitutive norms seem available. Thus the case of the people collectively accepting (with collective commitment) the view that the Sun is their god would not represent an institution in his account, for at least seemingly no new status function with deontic powers is created. (I discuss these points in Tuomela, 1999.)

V. On the scope of the Collective Acceptance account

What is the precise class of sentences *s* to which (CAT) is claimed to apply? Underlying my Collective Acceptance model is the general assumption that in each context of application one can distinguish between sen-

tences whose objective correct assertability – collectively taken – is entirely up to the members of the group (or up to their conceptual activities, especially to what they on metaphysical grounds can accept as true) and sentences whose truth is at least in part up to nature, to the way the world is, and thus in part dependent on the causal processes occurring in the external world. The sentence “Squirrel fur is money” belongs to the first class of sentences and “Stars determine our fate” to the second. Thus, the first sentence will be correctly assertable for the group due to collective acceptance and no external, objective truth standard applies to it. The second sentence can only be correctly assertable for the group as a kind of stereotypical belief. It cannot be true in the standard objective sense, as it is not up to the group members to determine whether stars indeed determine our fate. The present point gives an argument for the employment of the “forgroupness” concept. Note that in principle any sentence can be collectively accepted as correctly assertable for the group, but a central assumption here is that far from all sentences thus accepted count as objectively true – to the extent one can even speak of objective correspondence truth here. In other words, both class one and class two sentences can be collectively accepted as correctly assertable for a group, but only in the case of the latter kinds of sentences can the question of objective correspondence truth meaningfully be raised. Also note that while objectively false sentences collectively accepted for the group can be called “groupjective” (to coin a neologism) they need not be subjective in the standard sense, for their truth or correct assertability typically does not strictly depend on a single subject’s (group member’s) acceptance.

Generally speaking, social concepts and sentences are reflexive in the following sense. A collective-social sentence using a putatively social predicate (e.g. ‘money,’

'leader,' or 'marriage') does not apply to real things (such as certain pieces of paper or squirrel furs in the case of 'money') unless collectively accepted and, so to speak, validated for that task. Let us consider money ("fiat money", in the economist's sense) as an example. The predicate 'money' does not refer to itself but to coins, dollar notes, squirrel furs, and so on. Reference here means that 'money' correctly applies to those things. The loose talk about reflexivity in this context therefore should be understood as being about presupposition-stating sentences such as "Money is not money unless collectively accepted to be money." This is not a matter of what phrase to use but what the concept of money is. This concept is expressed by what the user of the predicate 'money' in English is entitled to say and, especially, extralinguistically do (and what he may be obligated to do). The concept of money thus connects with some deontic powers and obligations collectively bestowed upon those who use the predicate 'money' and who belong to the collective in question. The discussed presupposition (viz. that money is not money unless collectively accepted to be money) is central precisely because of the following assumed fact: It is up to the members of the collective – and nobody else – to bestow those extralinguistic deontic powers upon its members. This contrasts with sentences involving only physical predicates like 'tree' or 'mass.' In their case it is not up to the members of the collective to do more than stipulate how to use certain linguistic phrases and, e.g. what word to use for trees.

It can thus be said that the alleged reflexivity of collective and social concepts strictly speaking is not directly concerned with the entities that the concepts (predicates) apply to. Rather, we may say that a collective-social concept is conceptually reflexive or "self-conceptual" in the sense that it presupposes itself; and this can be explicated in terms of correct assertability for

the group as follows. When for a social predicate 'q' and a singular term 'a' the sentence 'q(a)' is correctly assertable (for the group) this presupposes the collective acceptance of the sentence 'q(a)' and thus of a as q in the group. Thus, if 'q(x)' expresses that 'x' denotes an item of money and if 'a' denotes a piece of squirrel fur, then the sentence 'q(a)' can be correctly assertable (for the group) only if - speaking in the material mode - squirrel furs are, in fact, collectively accepted as money or "made" money in the group. A similar point can be made about meanings of words, leaders, marriages, property rights, and so on.

It is not easy to say precisely to which kinds of things the Collective Acceptance account applies. The earlier discussion in this paper has shown some central areas that certainly fall within the scope of "what is up to us to determine as true or correctly assertable". Thus social institutions in formal, informal, and belief-based senses qualify. Here e.g. various kinds of social positions and roles are included and so are social rules and norms. Accordingly, law is included here, and a case can be made for morality to be included as well (cf. Scanlon, 1998).³ Mathematics is another area to which the Collective Acceptance account seems basically applicable. I cannot here try to argue for these kinds of broad claims, but rather present them as conjectures. I wish to emphasize that the Collective Acceptance account in no way entails that the propositions or sentences to which it applies are arbitrarily made correctly assertable by the whims of the members of a collective. Thus, for instance, in the case of law and morality surely some objective standards not depending on collective acceptance can come to play a role. The final say in these matters, however, is argued to be what the collective, perhaps given a number of highly restrictive (objective and other) constraints, accepts as correctly assertable.

VI. On the ontology of the social world

The Collective Acceptance account basically says that the parts of the social world it applies to are collectively constructed and man-made. However, this needs qualifications. Some remarks on the matter will be made below (in part drawing from Tuomela and Balzer, 1997).

One can argue that reality is criterially connected to causality in the sense that an entity cannot be real unless capable of occurring in singular causal inquirer-independent contexts (viz. in claims of the form $C(f, f')$, C standing for causation and f, f' being facts related to the entity in question). Here inquirer-independence is independence of an inquirer's mind or, put somewhat differently, the "ideally rational" scientific community's "mind" (attitudes, views). Roughly speaking, the inquirer-independence of causation here can be understood in the sense of causation in a world similar to ours but in which there are no (mind-possessing) inquirers. (Cf. Tuomela, 1985, Chapters 4-7, for a discussion of this and the appearance – reality distinction from the point of view of scientific realism.) Note that our present criterion for a mind-independent world "out there" of course allows that there are creatures possessing minds (e.g. intentions and beliefs) "out there" and thus mind-dependent things in that sense. It also allows that the things out there be describable and conceptualizable in various different ways. In addition to the two "levels" of a) inquirer-independent reality out there and b) the (ideal) scientific community's view or, put differently, the standpoint of the ideal best-explaining theory, we must also deal with c) a group's (any group's, large or small) point of view. From a group's point of view the social institutions and other collectively constructed and upheld things in that group are collectively mind-dependent in the sense of being de-

pendent on the group's acceptance and thus its attitudes. Such group-dependent things can nevertheless be said to be "socially real" in the group (viz. intersubjectively real and belong to the group's posited "public space"), and they are also real in the sense of being independent of an external inquirer's or best-explaining theory's point of view.

Criterion a) of independence may be argued to be coextensive with b), but one may still want to keep these criteria conceptually distinct. It can be noted that although group-dependent items can be regarded as "groupjective", viz. as "generically" mind-dependent (viz. dependent on the "group's mind", as it were, and hence group members' minds) an item can still be group-dependent without in fact being dependent on any particular member's mind, because collective acceptance is compatible with such "exceptions". Thus ontological groupjectivity is distinct from ontological subjectivity. Let me emphasize that group-dependent things are still objectively investigatable in the sense that they are inquirer-independent (see below). This is the case even if we, as a thought experiment, let the group grow and become the class of actual and possible human beings. The inquirer's reflective stance towards an external, inquirer-independent world, which now includes also the class of all human beings, is still at least conceptually and metaphysically possible – at least if we are allowed to assume (scientific) realism. One underlying reason for this is that the method of investigation used, viz. the scientific method, is idealized and normative and thus transcends the limitations of human beings.

One can, nevertheless, refuse to be a realist and argue that there are things in the world, which are inquirer-dependent. Consider, for instance, "qualia" such as the perceived sound of the English horn or an ache in one's tooth. They are subjective and mind-dependent in the sense of being dependent on the listener's

mind, but yet they are extensionally describable or recordable (even if not perhaps phenomenally experientiable by an external inquirer by sentences such as "S is experiencing the sound of an English horn". A realist's stance accordingly seems possible here.

Let us concentrate on social matters and reconsider the claim that squirrel fur is money in a certain social group. What this amounts to is that the group accepts that squirrel fur is money. In other words, 'money' can be taken to refer to something real (viz. squirrel furs with a certain social use in exchange, etc.) if it satisfies the acceptance criterion. Ultimately I would like to cash out all this in terms of the participants' activities and thus move to a kind of social practice ontology. In any case, if the acceptance criterion is satisfied we are dealing with a real social fact. (If squirrel fur is not accepted as money in the group, this is also a social fact of course, but it does not make money real.)

All this leaves us with such questions as whether groups and their activities are real or only fictional. Provided that one is prepared to use the predicates 'social group' and 'collective acceptance' and, more generally, 'group action' at all, it does not matter so much for our present purposes what specific ontic content one gives them. Thus, for instance, a tough individualist may treat groups just as certain individuals "acting groupishly" or a somewhat holistically disposed theoretician may treat them as entities supervenient on certain individuals. In all such cases groups and group actions may be regarded real (in the specified sense). What is at stake here is the (or an) ontological individualism-holism issue, which, however, I will not discuss in detail here.

From a group's point of view there can in accordance with our discussion then be things which depend for their existence (creation, re-creation, and maintenance) on intentional group activities, depending thus on the underlying intentions and beliefs of the group mem-

bers (cf. the “duality models” of Giddens, 1984, Bhaskar, 1989, Balzer and Tuomela, 1999). Note that the group members generally need to have correct beliefs about e.g. money and school, etc., when they act, but they need not think that by so acting they contribute to the maintenance and renewal of the institutions involved. Of course, there are also things, which are independent of collective acceptance.

Recall from Section V that the present collective acceptance model presupposes the dichotomy between sentences whose correct assertability is entirely up to “us” (viz. up to the group members or indeed any human beings or beings capable of operating as the CA-account requires) collectively considered (or, rather, up to our conceptual activities) and sentences whose truth is at least in part up to the way the inquirer-independent world causally is. This assumption presupposes that sense can be made of the causal processes occurring in the world out there. (A realist is in general disposed to accept this.) Thus, according to this view, group members can collectively accept (for the group) the truth of some sentences, e.g. “Stars cause our fate to be what it is,” without making it the case that those sentences are true in the standard sense. The truth of sentences like “An Euro coin is money” on the other hand is completely dependent on relevant collective acceptance.

I wish to emphasize that the central thesis (*CAT*) has ontic import in the sense of connecting with the mind-independent causal order. This is because it serves to give the participating group members rights and duties in a sense having naturalistic content, their having rights and duties entailing their being (conditionally) disposed to act in certain specific ways. This is an entailment of ontic content within the realm of facts, which are up to us to create. To be more specific, according to the Collective Acceptance account social institutions (in the full-blown sense), *qua* some kind of collections of posi-

tion-involving normative structures, can be causally effective ultimately only via the group members' minds and actions. This is because we need not assume that they ontically include other, more "holistic" elements, although the social institution concepts seem to be irreducible primitives. Thus, social institutions have causal impact via the participants' (in collective acceptance) thoughts and thus subjectively (in the group members' beliefs) *qua* social institutions, or at least their central nervous systems (in non-intentional cases). The "internalized" rights and duties related to e.g. institutional entities like money or institutional positions (e.g. teacher) can, accordingly, in this embedding involve causal connections independent also of the group members' minds.

In "non-normative" cases (cf. leader, esteem, status) based on collective acceptance in the sense of mutual acceptance belief (*viz.* the acceptance of something as true for the group) the analogous observation holds, for collective acceptance always is group-relative, *viz.* it relates the constructed and recreated things to the group (thus to the mental life of the group members; cf. Tom is our leader only in so far as he is accepted by us as our leader).

Considering the group-dependent part of the social world, we can make the conceptual-epistemic point that in order to be intelligible (in the sense of being correctly explainable) at least this part of the social world must be conceptualized largely as its inhabitants conceptualize it (squirrel fur may have been money for medieval Finns but not for others). This is because without this the contents of the created social facts here do not depend on the group-members' thoughts and cannot be made sense of as facts with social meaning. (This does not exclude the possibility that people have false beliefs about their physical and social environment, as long as the errors are not grave enough to result in cha-

otic activities.)

Clearly, for every intentionally described singular social fact there is an equally true non-intentional description in a specified vocabulary of this fact (a suitable definite description will do the trick). Thus corresponding to the singular fact (a token event) that Matti today used squirrel fur, as money at the local market there is a complex description of this fact in physical and biological terms. This does not, however, suffice for the reduction of the corresponding type of event (viz. the event type of using squirrel fur as money), and it seemst that no corresponding non-intentional type reduction is in the offing.

Next, physical social artifacts such as church buildings, cars, chairs, books, and generally much of at least a city-dweller's environment and "public social space" and "social geography" should be mentioned. All these exist as causally effective entities. They can enter causal connections not only *qua* having suitable physical features but also, and in the present context in an important sense, *qua* being artifacts expressing normative or non-normative collective practices (see Tuomela, 1998, for *qua*-causation).

Various unintended and unanticipated consequences (cf. the states of high inflation and unemployment, pollution of the environment) also belong to social artifacts broadly understood. It seems that they generally fall outside the scope of primary social things. Nevertheless, they are often if not in general are collective-social in the derived sense, being based on things social in the primary sense.

Finally, there are social properties and relations which can be regarded as real in a more naturalistic sense and which correctly fall outside the scope of the CA-model. For instance, as seen in Section II, Tom's envying John for the latter's new car can be offered as an example of such a non-constructed social fact, one, which correctly

falls outside the scope of (CAT). Another example is provided by some shared collective attitudes (or we-attitudes) in the “I-mode” (but not those in the “we-mode”) in the sense of Tuomela (1995). Our shared we-fear that a lion will attack us can at least in some cases be a relevant example of a non-constructed social fact.*

* I wish to thank Kaarlo Miller, Pekka Mäkelä, Maj Tuomela, and Petri Ylikoski for discussions and comments related to this paper.

Notes

- 1 A we-attitude in its *core* sense is defined as follows relative to an attitude ATT: A person has the we-attitude relative to ATT and a content *s* if and only if the person a) has ATT (*s*) and b) believes that also the others in the group have ATT (*s*) and also c) believes (or at least is disposed to believe) that it is mutually believed (or in a weaker case plainly believed) that the members have ATT (*s*).
- 2 In this paper I concentrate on such egalitarian groups and the notion of collective acceptance. Groups are here to be understood merely as collections of people, of which nothing more need to be antecedently assumed. The central notion of acceptance is that of a number of persons – those constituting the group in question – collectively accepting a proposition. Collective many-person acceptance in this sense obviously supervenes on the participants' acceptances, because it is constituted by them. I will accordingly assume in this paper that in the case of collective acceptance of a proposition all the participants will accept it. Note, however, that this assumption can be relaxed even in the cases of the present kind of loose collections of people. The individuals might share a we-belief and be collectively committed to the believed proposition. Assume, however, that the sharing is not full sharing but that still almost all share the we-attitude (while the others fail to have the belief or even disagree with

it). Then it still is true that this collection of individuals (say the Finns, the Londoners) can be taken to collectively accept the proposition. Another possibility for having disagreement is that there is the kind of spontaneous power structure in the collective that one individual or a clique of individuals is able to determine the collective' view.

There are other, important cases of collective acceptance in which proper social groups are involved. In such cases we speak of a social group's acceptance of a proposition. In such a case the members' acceptances must also be involved, but in many cases only the so-called "operative" members will jointly accept the proposition in question, while the others in some weak sense must tacitly accept it or go along with the operative members' collective acceptance of the proposition. Not only the non-operative but also the operative members may in principle privately accept the negation of the proposition accepted by the group. (See the treatment in Tuomela, 1995, Chapters 5 - 7.)

- 3 The Collective Acceptance model resembles Scanlon's (1998) contractualism to some extent. As such almost any moral principles and ideas can be collectively accepted. Acceptance in this sense is formal. To connect CA model to morality we need other formal principles, at least universalizability. There should be also some kind of idea of maximizing or optimizing moral good or moral rightness. That would also be a formal decision principle. But also substantive assumptions concerning what is right and wrong or good and bad (or what we owe to each other) in the moral sense are needed. Perhaps Scanlon's cooperation principles, viz. the Rescue principle and Reasonable Helpfulness, can find a place here as formal principles. Scanlon's Rescue Principle says this: If you are presented with a situation in which you can prevent something very bad from happening, or alleviate someone's direct plight, by making only a slight (or even moderate) sacrifice, then it would be wrong not to do so. The principle of Reasonable Helpfulness states the following: Take into account others' interests when that can very easily be done. I could add other similar principles, e.g. Helpfulness: Be helpful, when it is relatively easy to be so, and Cooperativity: Cooperate, when it is relatively easy to do so. Other moral ideas that are concerned with whatever our fellow members regard as morally important can easily be found, e.g. Scanlon mentions the importance of human life, the minimization of suffering

is important, and the preservation of diversity as such acceptable moral ideas. These substantive principles are group-relative and basically to be found out by means of empirical research.

As a summary we have something like the following. Speaking in tentative terms, the CA model of morality would accordingly seem to require the following kinds of principles (most of which are considered in Scanlon, 1998):

- I Formal principles (absolute, not group-relative)
 - a) Universalizability
 - b) Optimization of moral rightness
 - c) Individual complaint principle (individuals' complaints must count, consensus principle)
 - d) Cooperation principles (such as Rescue Principle of Reasonable Helpfulness) and other morally relevant principles of action
- II Substantive principles (group-relative)
 - i) a priori ideas of what is morally right (e.g. human life, including of course one's own life, is to be preserved)
 - ii) empirically investigatable ideas about what a group finds as morally important in a substantive sense (substantive moral "bottom lines").

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Michael Quante

ON THE LIMITS OF CONSTRUCTION AND INDIVIDUALISM IN SOCIAL ONTOLOGY

*Outlines of social ontology beyond scientific
naturalism*

Die Vereinigung als solche ist selbst der wahrhafte Inhalt und Zweck, und die Bestimmung der Individuen ist, ein allgemeines Leben zu führen.

(G.W.F. Hegel)

In this article I will try to make visible the limits of construction and individualism in social ontology. My main thesis is that the ideologies of scientific naturalism and methodological individualism have a deep – and distorting – influence on the current approaches in social ontology. This can be seen even in the excellent theories of John Searle and Margaret Gilbert who try to free themselves from these background ideologies. My interest in this article is primarily on ontological and methodological questions. But since the relation between ethical and ontological questions is important for my topic, I want to separate ontological and ethical questions clearly from each other. Sometimes in the literature on our topic these questions and the answers to

them are confusedly run together or are not distinguished at all. To be sure, distinguishing between these two kinds of questions does not amount to the claim that they are completely independent from one another. Nevertheless I want to emphasize that these questions must be clearly distinguished if we want to clarify how they might be related.

Ontological questions, to give some examples, include the following: Are there irreducible social facts? Can groups be reduced to their members? Is social reality constructed? What is the relation between nature and social reality? What is the function of social entities such as groups or states? What is the nature of social entities? Are social facts evaluative or normative?

With respect to the last question one clarification may be in order. To ask whether social facts are evaluative or normative is not to ask an ethical question. If we give a positive answer to this question, evaluative or normative terms are mentioned, not used. We should always have in mind that to point out the evaluative or normative nature of social reality is not the same thing as to make an evaluative or normative claim.

Ethical questions include the following: How should the freedom of autonomous persons be related to political or social obligations? Should social entities have irreducible rights? Should social entities have aims which cannot be reduced to the interests of individuals? Should autonomous individuals acknowledge obligations which are in conflict with personal autonomy? Should members of social entities regard these social entities in a purely instrumentalistic way?

The rough notion of ethics which is operative in this article includes questions about the good life and normative aspects of morality or political obligations. Since I am here primarily interested in the ontological level and in how the ontological and the ethical levels are related, this somewhat loose sense of the ethical will

suffice for my purposes in the following.

Having distinguished between ontological and ethical problems of social reality one may ask how these two domains are related. Do answers to the ontological questions have ethical implications? Do ethical considerations guide our thinking about ontological questions? If so, what are we to make of this? Is the evaluative (or normative) nature of social reality at least partly shaped by ethical considerations? Are we allowed to have a normative ontology here in the sense that ethical considerations may at least be included in the ontology of the social? Is it a mistake to analyse social ontology on the basis of some ethical premises such as assumptions about the right relation between – say – political obligations and personal autonomy? Is there an ontology of the social which is fundamental in the sense of being completely independent of our ethical thinking?

In order to understand these questions about the relation between the ontological and the ethical level it is necessary, first to clarify the ontological issues. As the title of my article suggests, I shall concentrate on the notions of construction and individualism – understood as ontological categories.¹ Furthermore it suggests that although there is some truth in construction-talk and individualism there is also something wrong with it. In the following I will try to show where their limits are.

I. Individualism and constructivism

Individualism is, as we shall see, a version of social constructivism. “The doctrine of methodological individualism” is, as Steven Lukes has put it, the thesis “that facts about society and social phenomena are to be explained solely in terms of facts about individuals” (Lukes 1992, p. 121).² If we take “psychological” to

mean “psychological features of individuals”, the central question here is:

(Q-1) Are social phenomena reducible to psychological phenomena?

A second question which lurks behind the picture of the construction of social reality can be stated as follows:

(Q-2) Are social phenomena reducible to brute facts?³

Whereas the first question concerns the relation between two levels within the mental – the psychological and the social – the second question deals, roughly speaking, with the relation between the mental and the physical (or biological). The answers to these questions are logically independent (cf. Mandelbaum 1992, p. 110 fn. 3). One may be a reductionist in the sense of adopting methodological individualism without being a reductionist concerning the mental and the physical (or the biological). Or one might hold that both the social and the psychological can be reduced to the physical (or the biological) without holding that the social can be reduced to the psychological. Or one might think that neither reduction is possible. Finally – as many philosophers do – one may believe that the social can be reduced to the psychological in a first step, and the psychological to the physical (or biological) in a second step.⁴

Individualism is, as I claimed above, a version of social *constructivism*. So we need to distinguish between two kinds of construction: the construction of social reality on the basis of individual psychology and the construction of social reality on the bedrock of the physical (or biological). In order to keep these two forms of constructivism distinct I shall use “constructivism” to refer to the latter sort and “individualism” to refer to the former.

Constructivism and individualism as such do not entail reductionism. Therefore, we can speak of non-reductive constructivism and of non-reductive individualism. As I read them, John Searle defends a version of non-reductive constructivism, while Margaret Gilbert defends a version of non-reductive individualism. Underlying John Searle's non-reductive constructivism is a concept of nature which belongs to scientific naturalism (of which he accepts certain elements and criticizes others). In the background of Margaret Gilbert's non-reductive individualism is a reductive version of individualism, i.e. methodological individualism. In what follows I will try to show that scientific naturalism and methodological individualism are a source of certain misleading tendencies in social philosophy – tendencies which make it difficult to see and understand the limits of individualism and construction.

II. Searle's theory

In *The Construction of Social Reality* Searle approaches social philosophy primarily from the ontological point of view.⁵ Ethical considerations are not explicitly at issue. This feature of his approach and his commitment to naturalism make his arguments a good starting point. According to Searle, the starting point for social philosophy must be a proper understanding of the mind-body relation:

“The mind is just a set of higher-level features of the brain, a set of features that are at once ‘mental’ and ‘physical’. We will use the ‘mental’, so construed, to show how ‘culture’ is constructed out of ‘nature’.” (CSR 9)

Searle wants to abandon the traditional dualistic conception of the mind-body relation, and I am quite

sympathetic with this wish. A second crucial component of his approach is what he calls “external realism” – the thesis, ascribed to common sense and accepted by Searle, that there is a mind-independent reality.⁶ Finally, Searle introduces a “distinction between those features of the world that exist independently of us and those that are dependent on us for their existence” (CSR 9). Although I agree that there is some sense in which this claim is correct, much depends on how it is to be understood.

Searle distinguishes first between an *ontological* and an *epistemological* sense of the subjective-objective-distinction. The mind-independent part of reality is objective in the ontological sense and the mental builds the ontologically subjective part. All mind-dependent parts of reality are ontologically subjective. On Searle’s formulation the subjective and the objective in this ontological sense are modes of existence.

In the epistemological sense, according to Searle, facts are objective if they can be justified. And it is possible that there might be epistemically objective facts about ontologically subjective parts of reality. Moreover there are subjective facts knowable only from the first-person-singular-perspective.

A second important distinction which Searle makes is between *objects* and *aspects* or *features* of objects. Mind itself is a feature of reality – a higher-level feature of the brain. This seems puzzling to me because the mind itself is – from the first-person-perspective – clearly activity, not a feature of something. This problem is a consequence of the fact that the “higher-level-feature-reading” is made from the third-person-perspective while – seen from the first-person-perspective – the mental is part of our being in the world, part of our *Lebensform*.

Given the distinction between objects and their features or aspects it follows, thirdly, that there can be different kinds of features belonging to the same objects.

Hence the ontological distinction between subjective and objective parts of reality may be understood as a distinction between features of substances, not between substances or domains of objects. Consequently, Searle distinguishes between *subjective* and *objective features* of the world.

It seems unproblematic to me that there may be epistemically objective facts about subjective features without this requiring that there be 'subjective' objects in the world. We may therefore draw an epistemic distinction between *subjective* and *objective facts*.

Searle further distinguishes between two kinds of features: *intrinsic* and *observer-relative* ones. Intrinsic features are mind-independent, whereas observer-relative features are relative to observers and users. These features are mind-dependent, and so, according to Searle, ontologically subjective.

This distinction is crucial, since according to Searle observer-relative features are ontologically constitutive of social reality or at least of social institutions. Since these features are created or constructed by intentionality and are mind-dependent, the notion of construction comes into play here (CSR 190).

Problems relevant to our topic lurk here because, as Searle himself notes, there is a tension between intrinsic and observer-relative features on the one hand and subjective and objective features on the other hand (CSR 11). Mental features are intrinsic and not mind-independent, that is, they are intrinsic subjective features. Searle's distinction between consciousness and intentionality as kinds of ontologically subjective features of reality and his restriction of observer-relativity to intentionality does not resolve this tension, because intentionality itself is an intrinsic feature of the world.

Furthermore Searle invokes a distinction between brute and non-brute facts. Here Searle's talk of non-brute facts reflects a problem that I have encountered

in reading him. He seems generally to oppose brute facts to institutional facts (cf. CSR 2, 27, 34f. or 190f.), except for one time (CSR 15) where brute facts are contrasted with facts including function ascription generally. Since Searle distinguishes between the class of social facts and the class of institutional facts as a subclass of social facts (CSR 26), it seems to follow that all non-institutional facts are brute facts. Hence there could be brute social facts. Now I think that this reading is not intended, for brute facts seem to be intrinsic facts of nature, which are not observer-relative. Brute facts are completely representation-independent. Hence they might be altogether independent of intentionality. Indeed, Searle's employment of the term "brute physical facts" (CSR 121) suggests this interpretation.

Another passage in Searle's book suggests an alternative conception of brute facts, however. Social facts can be created only by agents who have the capacity to assign functions (CSR 19). In my mind this is not helpful, however, since Searle does not strictly adhere to the distinction between social and institutional facts. Sometimes he uses the notion of social facts to pick out the special features of this subclass of institutional facts, sometimes he uses institutional facts – as *pars pro toto* – to reveal something about social facts generally.⁷ Since I was not successful in overcoming my uncertainty according to the criteria for social facts and the relation between social and institutional facts generally, I will oppose brute and non-brute facts leaving it open whether some social facts are brute ones or not.

Before I can try to show where these difficulties in Searle's theory might come from, I want to make briefly one more point concerning brute facts that is of some importance for my arguments. Although Searle claims that his notion of brute fact is derived from Elisabeth Anscombe, I do not think that he actually uses this notion in Anscombe's sense.⁸ According to Anscombe

(1958), the bruteness of a fact is a relational feature. A fact B may be brute relative to some descriptions of events or some set of facts, but it may be that the very same fact B is non-brute relative to some other description of events or some other set of facts. Now Searle does employ something akin to Anscombe's conception of brute facts, for he maintains that brute facts are intelligibility-conditions for other facts. To be sure brute facts and the related set of non-brute facts are hierarchically related. But on Searle's account the distinction between brute and non-brute reflects an ontological distinction, and so it is not a relational but an absolute distinction. Moreover, he relates bruteness to robustness and fundamental reality. Hence on Searle's picture we seem to have different ontological levels – a kind of “layer-ontology” (cf. Kim 1993, p. 337). Even though this is not incompatible with Anscombe's model, it does not follow from it.

It seems to me that Searle's reading of the difference between brute and non-brute facts is motivated by scientific naturalism. On this picture, what is real is the world described by natural science. Everything else depends on it and all other features are observer-relative and constructed or created.

III. The fundamental problem of Searle's theory

Intentionality is an intrinsic (even if higher) feature of the brain, a biological phenomenon. It adds no non-physical objects to reality. We-intentions which even hyenas might have (according to Searle), are natural in this sense. Thus intentionality and, I might add, the social world as a whole is realised in physical reality. In his insistence on the biological or even physical basis of intentionality Searle opposes the natural to the super-

natural. But in the next step he further identifies what is natural with objects and features described by natural science. All other features, even biological functions, are constructed by intentionality. By consequence of this the natural is opposed to the mind-dependent, and there is a strict opposition now between nature and culture.⁹

Searle's chief example of a mind-dependent feature is being money. Since there is no physical basis for why a piece of paper is a ten-dollar-bill, being a ten-dollar-bill is a feature constructed by complex relations of intentionality and representation. There is consequently a part of social reality in which features of objects are observer-relative. This much is true in constructivism.¹⁰

But something has also gone wrong here. First of all, we need an argument which leads from the naturalness of the mental (as opposed to the supernatural) to the idea that nature is completely described by natural sciences.

Hinting at external realism is of no help here. Even if common sense accepts the thesis that there is a mind-independent reality, it is not committed to the idea that there are no mind-dependent parts of reality, a fortiori not if it is accepted that the mental is a part of reality itself. Furthermore, common sense is not committed to the idea that nature is restricted in the sense in which scientific naturalism takes it to be. My claim is that philosophers should not hold to scientific naturalism here either. True, the mental is part of nature, but we do have the notion of "second nature" which includes those aspects that belong to the way members of a species live their lives. Our culture is natural for us, maybe not in the sense of being mind-independent, but in so far as it is a realisation of our natural and intrinsic capacities and features. These features are not observer-relative in the sense stated above.

Searle himself tells us that in doing social philosophy we must adopt the hermeneutic stance and – accordingly – the first-person-perspective, including both

the first-person singular and plural.¹¹ However, it is not true that all features of second nature are observer-relative. Only some – such as being money – are. Searle unplausibly extends the features of the money-example to cover all social phenomena. Moreover, his distinction between brute and non-brute facts is drawn from a purely explanatory third-person-perspective, which is not suitable for social phenomena. Indeed, even the thesis that the mental is a natural biological phenomenon does not imply that this phenomenon may be properly explained from the third-person-perspective. With respect to social philosophy mind should not be taken as a feature of the brain but as an activity, or as a *Lebensform* – and this may be done only from the first-person-perspective. Even though Searle devotes considerable attention to intentional activity, his conception of construction is quite clearly motivated and determined by an underlying commitment to scientific naturalism.

In other words, Searle's arguments are infected with the idea that nature is completely and exclusively described by natural sciences. Although he himself sometimes makes clear that there are some tensions in his account that derive from this, he nevertheless conflates social reality as it is seen from the first-person-perspective with his ontological criteria coming from the third-person-perspective.

This is especially apparent in his notion of the background abilities which – I think – is one of the most fascinating and successful parts of his theory. Even in his discussion of the background abilities Searle oscillates between the first-person- and the third-person-perspective. Although the rejection of Cartesian dualism implies that all our abilities supervene on our biological capacities, it is incorrect to reduce these background abilities to dispositions or something else as described by natural science. Background abilities are

our first nature as it is shaped by our second nature, or our biological aspect seen from the perspective of second nature. It is no surprise that education, habitus or *Bildung* are the central categories of this part of reality. I think that we need an ontology that allows us to understand the difference between background phenomena and intentional phenomena without reducing the background phenomena either to our biological nature as it is described by natural science or to mere social constructions.

Although there are features of reality and even of intentionality itself which are constructed or created by intentionality, not every feature that is not a part of scientific naturalism is observer-relative, created or projected onto reality. We should not identify common sense realism with scientific realism and we should not identify nature with the worldview of scientific naturalism. In adopting this strategy one does not fall back into Cartesianism. Moreover, we should not concentrate only on those features of reality which are observer-relative in the way a piece of paper that functions as money is. The bedrock of social reality are the structures of intentionality: recognition (*Anerkennung*), values, intentions and the will. The mental taken as activity is the basic structure of social reality. With this in mind I would like to suggest an alternative way of distinguishing the mental and the physical.

IV. An alternative way of drawing the lines

I suggest that we have to distinguish between four kinds of features realised in natural physical objects and events: mind-independent, mind-involving, mind-dependent and mind-constructed features.

Mind-independent features are features which can be realised independently of the existence of intentional-

ity.¹² They are those features which have existed or would exist in a world devoid of mental features. *Mind-involving* features are constituted¹³ by intentionality but are either not realized as effects of intentional actions at all or are causally independent of any actual intentional action which takes place at the moment of the realisation of the token of the mind-involving feature in question. Many learned and trained movements of the body for example in sports or driving a car are of this kind. As results of former intentional efforts they become – as we say in German – “*in Fleisch und Blut übergegangen*”. The realisation of *mind-dependent* features is always the effect of an intentional action *x* of *S* without *S* having intended¹⁴ to realise them by his doing *x*. A famous example of these features is given in the analysis of alienated labour in the social philosophy of Karl Marx. Finally, *mind-constructed* features are those features whose realisation is the effect of an intentional action *x* of *S* and which are intended by *S* to be realised by his doing *x*.

The first and the fourth group of features need not be discussed here, although I am not convinced that Searle is right in excluding all functions from the mind-independent features. If two persons agree in using a piece of wood as a knight in their chess game, they obviously intend to give this piece of wood features which are mind-constructed. Here we have a clear case of social construction, even if the money-example Searle uses so often may not be such a clear example of this. Furthermore, mind-dependent features are not in need of a lengthy discussion since they have been studied at length in the philosophical analysis of social phenomena. Many effects of intentional actions are not intended by agents and yet are of great importance because they constitute social reality and deliver conditions in which individual agents have to realise their goals (e.g. the market-system). Obviously to analyse mind-dependent or mind-constructed features is no problem for a social

constructivist theory such as Searle's. Things are different when it comes to those features I have named "mind-involving". This group of features includes some of the background abilities such as those abilities, disposition, or patterns of individuals which exist independently of actual intentional actions but which cannot be identified without knowing that there is intentionality and without knowing what it is to be an intentional agent. Moreover this group includes those aspects of intentionality which are realised in the way humans live their lives. Here we see that there are facts about human beings which constitute the way human intentionality is shaped, structured or organised, and which nevertheless cannot be taken to belong to nature as it is described by scientific naturalism. They are facts about the second nature of human beings that cannot be reduced to the class of mind-dependent or even mind-constructed features. Many social phenomena like love or trust are neither reducible to biological phenomena nor are they mere causal 'side-effects' or intended results of human constructions. To put it this way: Mind-involving features are those features which our social nature consists of and which are realised when our social nature manifests itself in the social reality we live in. Since these mind-involving features can help us to explain other social facts, they can be taken as brute facts. And since they are not result of intentional action they can be regarded as intrinsic facts. These facts can be discovered by observers but they are not created thereby.

This account implies that constructivism makes two mistakes. First, it draws an absolute ontological distinction between mind-independent, intrinsic, or brute features and those features that are regarded as observer-relative. Second, it conceives all features which are not mind-independent as mind-constructed. Thus constructivism draws one rough distinction where we need

several fine-grained ones. Like John Searle, I think that “there ought to be a more or less continuous story that goes from an ontology of biology to an ontology that includes cultural and institutional forms; there should not be any radical break” (CSR 227). Therefore I think we should replace social constructivism with a more fine-grained theory.

V. The limits of individualism

I want to turn now to the limits of individualism and to the question of how the ontological and the ethical dimension of social philosophy might be related. Although ethical considerations are not the topic of Searle’s *The Construction of Social Reality* we can read the following evaluative statement there:

“One of the most fascinating – and terrifying – features of the era in which I write this is the steady erosion of acceptance of large institutional structures around the world. The breakdown of national identification in favor of ethnic tribalism occurs in places as various as Bosnia, Canada, the former Czechoslovakia, Turkey, and many American universities.” (CSR 117)

I fully agree with this description. Furthermore, I think that social philosophy has two main tasks: first understanding the reasons for this erosion of the social world and secondly developing theories which help to restore the acceptance of institutions and to develop reasonable ways of identification with the social world.

I think that common understanding of the nature of our social reality has a tremendous impact on how people live in their social world. Furthermore I believe that philosophical theories about the social are an important factor in this common understanding: they are ar-

ticulations of this common understanding on the one hand and they give rise to new versions of the common understanding on the other hand.¹⁵

My intuition is that the 'trickling down' of unlimited constructivism and individualism with respect of social ontology into this common understanding is one of the reasons why identification with existing and allegedly "created" institutions vanishes and an orientation allegedly objective "brute" ethnic facts comes to the surface. This may be understood as a result of a loss of belief in the robustness of social reality, and as a response to the idea that social institutions are created only to serve the interests and purposes of individuals. In times of crisis a more fundamental basis is demanded than anything that could be derived from institutions when they are understood as mere conventions, creations or as simply dependent on human agreement. And often biological or ethnic features are proposed as the basis for a new biological or at least natural social order.

Searle's version of social constructivism may not be guilty of this on the surface level, because his theory suggests explicitly that the created or constructed social world is not merely a tool for specific purposes or for the fulfilment of individual, group or class interests. Yet the background ideologies of scientific naturalism and of methodological individualism may nevertheless be discerned in non-reductive constructivism and individualism. And to my mind these background ideologies have consequences not only for social philosophy, but also for social reality since they have the tendency of leading common understanding of the nature of social reality and social institutions into the direction of varieties of unlimited constructivism and individualism. The apparent erosion of the acceptance Searle diagnoses might very well be partly a consequence of this changed common understanding.¹⁶

In order to make my intuition plausible and to make some of these relations apparent, I shall consider the relation between the ontological and the ethical in the course of my discussion of non-reductive individualism. Yet, I do not mean to claim that there need be strong logical connections between ontological and ethical theses. These relations seem to me to be more ideological than logical. One might even say that philosophers doing social philosophy are sometimes led astray because they believe that certain ontological claims will necessarily result in certain – unacceptable – ethical conclusions.¹⁷

To bring these possible relations between these two dimensions of social philosophy into view I want to consider (1) the relation between scientific naturalism and methodological individualism, and (2) the relation between methodological individualism and ethical individualism. Furthermore I will ask (3) what is the significance of ontological holism for ethical individualism and (4) whether we may build ethical considerations into our social ontology.

Before I give a short sketch of my answers to these four problems in the concluding section of this article, I will clarify what these questions mean. I will argue for my claim that even non-reductive individualism has its limits. In the following, only the relation between the psychological and the social, and not the relation between the mental and the physical, is at issue. Also it is important to notice that we are speaking of human beings not simply as biological organisms but as part of the social world, as having personality and individuality – as beings that may be acknowledged as more or less autonomous members in various social contexts. Therefore we are dealing with autonomous persons who have a right to personal autonomy which has to be realised in social and political institutions and has to be respected by the state.

For the purpose of this article it will be helpful to distinguish three ontological and four ethical options which seem to be in the background of much discussion in the philosophy of social reality.¹⁸

On the ontological side we firstly have *ontological holism*. According to this position personal autonomy of a human individual presupposes the existence of a suitable structure of the surrounding social world and is constituted by social facts. The credo of *methodological individualism* is that all facts about social phenomena can be reduced to facts about psychological states of individual persons. According to this second option reality is constituted by individual psychological facts. A third way is suggested by *non-reductive individualism*, which claims both that there are irreducible social facts and that there are irreducible individual psychological facts.

Considering the theory of John Searle, one might ask whether he is a methodological or a non-reductive individualist (since he accepts irreducible first-person-singular intentional states he is an individualist in any case). On the one hand he claims that collective intentionality or We-intentions are not reducible to I-intentions. This seems to make him a non-reductive individualist. On the other hand he says (CSR 26) that having a we-intention is a psychological state realised in an individual agent. In this sense he might be a methodological individualist because he refuses to postulate some social super-mind which is the owner of an we-intention (CSR 25). Margaret Gilbert's approach (LT 211) is similar in this respect.

Nevertheless, I think that they are both non-reductive individualists. There are two ways of understanding this idea. Now we must bear in mind that – according to my thesis – social philosophy has to be committed to the first-person-perspective and the hermeneutic stance. Therefore the fact that a we-intention is instantiated in the brain of an individual organism is irrelevant here.

Relevant are the contents and the commitments which are instantiated thereby. Moreover the instantiation of we-intentionality in more than one organism does not constitute social reality.¹⁹ What is decisive is the special structure of we-intentions forming a joint-commitment, as Gilbert has shown. There is hence more to social reality than the simple co-instantiation of we-intentions. Decisive for the ontology of social reality is the structure of collective intentionality which cannot be reduced to interrelations between individual intentionality. As Gilbert shows, no summative account can grasp fully the content of collective intentionality (LT 197 ff) and as Searle argues in a similar way, “no set of ‘I Consciousness’, even supplemented with beliefs, adds up to a ‘We Consciousness’” (CSR 24).

But why call these accounts individualism? Let me say first, that I believe that Searle would defend non-reductive individualism and not ontological holism, although in *The Construction of Social Reality* there are no arguments for this claim. My reason for believing this is his commitments in the philosophy of mind, especially his claim that any form of externalism is incorrect (cf. Searle 1983, Chapter 8). So I take him to hold the thesis that individual intentionality can exist independently (in the constitutive, not in a genetic sense) of any form of social reality. As I read him, human beings simply have individual and collective intentionality.

My reason for counting Gilbert’s theory as a form of individualism is that – as far as I can see – she takes autonomous individuals as the starting point and argues forcefully then that a non-reducible social reality emerges from their interactions. This is evident for example in the discussion of love in her earlier work (cf. Gilbert 1989, pp. 223ff.) and her recent papers (e.g. LT Chapter 8): Love is discussed primarily under the aspect of how autonomous individuals “merge” in love relationships. The other direction, that is, how human

beings develop a sense of being autonomous persons in love-relations, is not discussed.²⁰ Other themes dominant in her various papers are “agreement” (cf. LT 293) which seems to presuppose autonomous persons, and “identification” (LT 377).²¹ Moreover she seems to accept the “individualistic’ nature” of focus in her approach claiming however that she is “sensitive to the ‘holistic’ nature of what is achieved by agreements” (LT 307 fn. 23). As she states in this note, an ontologically individualistic approach need not take joint commitments as “‘asocial’ or atomistically” (ibid.) – in an ethical sense, as I would like to add.

But maybe this formulation does not capture Gilbert’s position. Indeed at one point she explicitly says that she does not want to decide “whether plural subject concepts are in some way parasitic upon or secondary to our conceptions of the psychological attributes of individual human beings” (LT 349). Furthermore, there clearly is a development from “On Social Facts” to the papers included in “Living Together”. In the later works she writes, that in “On Social Facts” she spoke of the sum of wills and the pool of wills without implying “the wills in question somehow merged together to become indistinguishable, as drops of water might merge in a pool of water” (LT 20 fn. 10). And, as I read her papers, the theory of joint commitments includes non-reductive individualism more clearly than the former book but it is not committed to ontological holism either.

My point is that we should not only focus on the way autonomous persons let social reality emerge but also on the way social reality constitutes autonomous persons. If we remember that becoming an autonomous person is possible only as a member of social reality we should ask whether we ought to regard the development of autonomous individuals as the first and fundamental step within social reality and the emergence of social groups out of autonomous individuals as the sec-

ond and – ontologically – dependent step. This, I think, is the truth in ontological holism and it is a limitation of social philosophy if it cannot accommodate the first claim. Attention has to be paid to the “social passions” – to use Josiah Royce’s phrase (1908, p. 41) – like loyalty, or to the phenomenon of basic trust in social institutions without which these institutions simply cannot work. There are social emotions, feelings and passions which are constitutive for our social world and also for personal autonomy – which thus cannot be reduced to forms of mutual intentionality (Lagerspetz) or collective acceptance (Tuomela).²² To my mind the concentration on the second step primarily is a reflection on and reaction to the doctrine of methodological individualism, which forces us to take autonomous persons as the basic units. Since this may – at least partly – be ethically motivated we have to consider the ethical aspects now.

On the ethical side four positions have to be distinguished. *Strong ethical holism* claims that the interests²³ of social entities are the only ethically respectable values. The interests of the individuals are respectable only as means for realising the social functions and aims. *Strong ethical individualism* holds the opposite thesis that only individual interests are worthy of ethical consideration. Interests of social entities are respectable only as means for realising individual interests. Besides these two extreme positions there are two mediate options. According to *weak ethical holism* both the interests of social entities and the interests of individuals are ethically respectable. In cases of conflict social interests should receive primary consideration. *Weak ethical individualism* agrees with the first part of weak ethical holism but holds that in case of conflict the individual interests should dominate the interests of social entities.

Certainly other positions may be held. Yet I think my distinctions suffices to include the most historically

influential positions and systematic options. Strict libertarians like John Stuart Mill, for example, would clearly defend strong ethical individualism. Many contemporary communitarians, on the other hand, hold versions of weak ethical holism. And maybe most sophisticated liberals would want to defend versions of weak ethical individualism.

VI. Conclusions

Having outlined these different positions, I would like to propose some short answers to the four problems and questions formulated above.

(1) Scientific naturalism and methodological individualism seem to be close relatives: There is a historical precedent for this idea in the work of Hobbes, who sought to do social philosophy analogously to physics. Moreover, methodological individualism follows the natural sciences in recognizing only causal explanations. Furthermore, the scientific concept of a completely disenchanted nature makes it necessary to ignore the evaluative aspects of the mental. Consequently the most respectable philosophy of mind was to construct human beings as individuals driven by psychic forces which could be understood in a naturalistic way. Of course, much current philosophy of mind remains in thrall to the influence of this scientific naturalism. An yet, there is no logical connection here. As the system-theory of Luhmann or Foucault's structuralism and some tendencies in the philosophy of Marx suggest, ontological holism is also compatible with scientific naturalism. But scientific naturalism and methodological individualism are certainly 'natural allies'.

(2) The relation between methodological individualism and ethical individualism is not so straightforward. We can understand why there is an affinity be-

tween scientific naturalism and methodological individualism rather than one between scientific naturalism and ontological holism better if we add to our picture the fact that most philosophers who oriented their philosophy according to the model of natural sciences did so within the tradition of Enlightenment and political liberalism. Disenchanted nature undermined philosophical doctrines which tried to justify social and political order by recourse on some evaluative order of nature. As is clear, e.g., in the work of John Stuart Mill, the additional ethical idea of personal autonomy underlies methodological individualism as well. If it could be established that everything in the social world could be reduced to individual psychological facts, it would be far more difficult to restrict individual autonomy. This might be done only in a contractarian, liberal, fashion.

(3) To understand the relation between ontological holism and ethical individualism we have to understand the direction and nature of their dependency precisely. If we could establish independently from ethical considerations that there are no irreducible social facts, it would follow that some ways of justifying social or political obligations which are not reducible to individual interests will no longer be plausible. Obviously strong ethical holism would no longer be an option in such a case.

However, since we have reasons independent of ethical considerations to believe that ontological holism or at least non-reductive individualism is true, it is important to recognize that ontological holism is not committed to any special ethical position, but is even compatible with strong ethical individualism. Hence one might argue e.g. that only those social interests that support individual autonomy are worthy of ethical consideration.²⁴ The reason why ontological holism is not committed to any special ethical position, and a fortiori not to strong ethical holism, lies in two features of

the nature of social reality that we must consider in order to answer my fourth and final question.

(4) Are we allowed to build ethical considerations into our social ontology? It should be noted that the nature of social reality is evaluative or normative in several respects, although I agree with Gilbert that we should not regard these as moral in the narrow sense. Since ethical thinking itself is part of our social reality, the way different values, norms or obligations are ranked and related is itself a constitutive feature of social reality. Although I have argued for the thesis that much of this evaluative social reality is not constructed by intentionality, social reality is open to reconstruction and improvement through thought and action. This much is true in constructivism. Yet, there are limits to construction and hence also limits for constructivism. These limits may be discovered only when we try to create social realities that enable us to lead good lives. The nature of social reality is "second nature" which is the domain of freedom.²⁵ This is the truth of constructivism and creating societies which make personal autonomy possible is, as far as I can see, the best way to make our world a place in which a good life may be lead. This is the truth in ethical individualism. But, as I have tried to show, unlimited constructivism and individualism buttressed by the ideology of scientific naturalism not only give an unsatisfying account of social ontology they may even threaten our goal of making a good life possible.

Notes

1 I deal with the difference between the social and the institutional only indirectly and will concentrate primarily on the question of realism. So I shall henceforth speak of social reality without further qualifications most of the time. Although neither "reality" nor "nature" are part of the title of this article the notion of "nature" shall prove crucial to my

- arguments, since it marks the limits of construction in social ontology. It is important to notice that “nature” may be understood in two different senses: in a normative or at least evaluative sense which concerns the essence (and perhaps telos) of social and institutional reality; and in a descriptive sense which concerns the ‘naturalness’ of social reality.
- 2 Since the label “methodological individualism” is used in a variety of ways (cf. Ruben 1985), some clarifications are in order. First of all, I take it in the classical sense that it is a metaphysical thesis about what social phenomena really are, namely that they are just, or are wholly constituted by, individual persons (with beliefs, desires, and other mental states) in various relations with one another. This states the metaphysical thesis both in terms of identity and constitution and takes individuals to be “natural persons”. Secondly, I presuppose a kind of ‘explanatory realism’ in the following. This means roughly that an explanation of a kind *x* can be a genuine one only if there are some entities of the kind *x* which cannot be reduced. This principle of explanatory realism is incompatible with what many social theorists hold who accept methodological individualism in the ontological or metaphysical sense on the one hand, and believe in the explanatory autonomy of social explanations on the other hand (cf. Coleman 1990, Chapter 1). For sure, the doctrine of methodological individualism presupposes that we have criteria to determine whether a fact is a social one or not, but I shall not press this question here.
 - 3 By “brute facts”, I mean those included in the explanation of phenomena given by a natural scientific account of the world. I shall say a bit more about the very idea of “brute facts” later (I.1).
 - 4 Presupposing the ontological thesis of methodological individualism, or the principle of explanatory realism, reduction can be understood along the lines of Kemeny & Oppenheim (1956) as “explanatory replacement” (without these presuppositions a stronger notion of reduction which includes ontological claims would be needed – cf. Nagel 1961, Chapter 11).
 - 5 I refer to Searle’s *The Construction of Social Reality* as CSR and to Gilbert’s *Living Together* as LT.
 - 6 Although I agree with Searle that we should overcome the traditional dualistic conception of the mind-body relation, I do not agree with his thesis that the abandonment of such a

dualistic conception is necessary for giving a correct answer to the questions concerning social phenomena. And although I agree with Searle in ascribing the external-realism-thesis to common sense and although I agree that there are mind-independent aspects of reality, I do not think that these theses are crucial for answering any philosophical questions which are special for social ontology. To put it this way: I think that there are no reasons in Berkeleyan metaphysics which make the development of an adequate analysis of social phenomena impossible.

- 7 One further difficulty is the following: Searle maintains that he takes "social fact" to refer to any fact involving collective intentionality" (CSR 26) taking we-intentions as a sufficient condition for social facts. Thus he counts even the hyenas hunting a lion as a social fact (cf. CSR 38 or 121). Now I do not know Searle's view about the cognitive abilities of hyenas, but given that for something to count as a social fact it must be ascribed a function (CSR 19) and must be recognized as a social fact (CSR 34), it seems problematic to consider hyenas hunting a social fact. Something can be, to use Searle's example, a war only if it is thought and accepted to be a war. But perhaps hyenas have the needed abilities so that hunting the lion really is a social fact.
- 8 "The notion of 'brute fact' *in this sense* is due to G.E.M. Anscombe" (CSR 229 fn. 1 – my emphasis).
- 9 My line of argument in this section is deeply indebted to McDowell (1994 – cf. also Quante 1998a and 1998b).
- 10 Yet the money-example, especially if we think of the modern forms of electronic money, shows that the general thesis that the mental is a higher feature of the physical does no work in explaining the special features of money. Another example along the same lines are persons playing chess 'blindly'. Even if we presuppose that all their moves and communicative acts somehow are realized in the physical, this thesis does no work in explaining their playing chess without using figures and a chessboard. We can understand what is going on here only from within the practice of playing chess. Moreover Searle's general theses about the mind-body relationship simply are not relevant here.
- 11 According to Searle the assignment of function, collective intentionality, and constitutive rules are necessary for an analysis of social reality. "In explaining these notions", Searle

- says, "I am perforce in a kind of hermeneutic circle" (CSR 13). The inevitability of this hermeneutic circle is evidence for my claim that doing social philosophy is bound to the hermeneutic stance. Unfortunately Searle infects this analysis with theses and presuppositions which are due to the explanatory stance of natural science.
- 12 "Independent" means "logically and causally independent". This implies a commitment to a realistic conception of features.
 - 13 "Constitution" means that the realisation of the feature is logically or causally dependent on intentionality.
 - 14 I use "being intended" as including "having foreseen" in this context.
 - 15 Although Searle does not state this with respect to social philosophy especially, he agrees with this claim in general: "I actually think that philosophical theories make a tremendous difference to every aspect of our lives. In my observation, the rejection of realism, the denial of ontological objectivity, is an essential component of the attacks on epistemic objectivity, rationality, truth, and intelligence in contemporary intellectual life." (CSR 197)
 - 16 For sure, this is not the only cause for this erosion. Economic problems, the pressure on traditional forms of life arising from globalisation and the erosion of the biological framework arising from bio-technologies are further important factors. They all contribute not only to the impression that our social world is fragile but to the idea that it is open to free and unlimited construction.
 - 17 In the conference where this paper was presented Ota Weinberger reacted to Margaret Gilbert's suggestion that there are good ontological reasons for postulating non-reducible social entities by making just this move. He replied that such an ontological claim would result in bad ethical consequences.
 - 18 For sure, alternative ways of structuring the field are possible and may be more adequate for different purposes.
 - 19 Maybe Searle's internalism is an obstacle for formulating a relational account of the deeper structure which is necessary for this constitution. In the conference Searle explained that the success-conditions of a we-intention cannot be analysed in a purely internal way in one respect: the success of the reference of "we" is dependent on external factors. But as far as I can see he gives us no further analysis of the deeper structure in which this "we" is constituted beyond the idea of co-instantiation.

- 20 In this Gilbert follows the main trend in the recent literature on love. Delaney (1996, p. 340) takes it to be a "pretty generally accepted" idea that love is a form of fusion (cf. Friedman 1998). Even Frankfurt (1999) who explicitly does not concentrate on the special form of 'romantic love' overlooks the fact that in love we have an intersubjective basis for personal autonomy (cf. Quante (a.) for a detailed discussion of this).
- 21 As her discussion makes clear she is not interested in how personal autonomy is constituted in acts of identification (cf. Quante (a.) for this line of thought) but in the ethical question whether an identification of an autonomous person e.g. with her country is "legitimate" (LT 377).
- 22 I don't want to claim that these concepts are irrelevant for social philosophy. Quite the opposite. But I think that they take for granted a basic level of our social nature which is important for social philosophy on the one hand and irreducible to individualism on the other hand (cf. also Siep 1992).
- 23 I use the notion of interest as a neutral term covering everything which might be ethically relevant in the following.
- 24 By referring to phenomena like loyalty, trust or love I do not intend to make the normative claim that these autonomy-constituting relations should be taken as the sole normative principles for a legitimation of social or political institutions. But I want to hold that some problems of legitimation cannot be answered without taking these pre-autonomous aspects into account.
- 25 I discuss the notion of second nature, as it is used in the work of John McDowell, as an alternative to scientific naturalism in Quante (b.).

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María Cristina Redondo

ON NORMATIVITY IN LEGAL CONTEXTS

I. Introduction

With the following remarks, I basically wish to suggest two things.

First of all, I propose to apply John Searle's epistemological and ontological thesis regarding institutional reality to a central discussion in jurisprudence.¹ I will try to show that these theses are a necessary foundation if we want to explain the specific practical character of law. If I am right, the epistemic and the ontological thesis of Searle's theory – which I will call the “social-reality theory” – support a certain positivistic analysis against two classical reductionist approaches used in jurisprudence.

Secondly, I would like to raise some doubts and pose some questions about the content and the grounds of these ontological and epistemological theses as such. Regarding this point, I will suggest that the approach needs to be developed further. In some cases, what is needed is only greater precision; but in others, the aim must be to show, against possible objections, that the proposal is possible.

There is an ongoing debate in legal theory about the interpretation of some typical normative properties as-

cribed to legal dispositions.² I am talking about properties such as “obligatoriness”, “genuine normativity”, “binding force”, “practical character”, etc. These properties are predicated in order to express a kind of evaluation, which is sometimes covered by the notion of “validity”.³ Sometimes, “validity” is understood in the sense of “binding force”, and it is thought to exist only when certain moral requisites are satisfied, where this refers to a critical or ideal, rather than to a positive morality. The *epistemological* status of statements ascribing such properties, and the *ontological* status of the moral properties they refer to depend on what metaethical theory one adopts.

Of course, not all legal theories admit “validity” or “binding force” as referring to a normative property. But what matters is to underline that whenever this *normative* meaning is at issue, whether it is admitted or rejected, it is generally regarded as a *moral* property.⁴

From a classical point of view, there are two alternative positions which are usually considered to be exhaustive. In one case, normativity, as binding force, is to be demystified or, at least, left aside – I will call this the “skeptical position”. In the other, it is a strictly moral predicate, and to determine its specific meaning requires an ethical discussion – this I will call the “moral position”. Although they start from different premises and with different commitments, both positions agree on the same kind of reduction since both reject the idea that legal dispositions may have a specific *social* normativity which is not necessary related to a moral property but can also not be reduced merely to individual agents’ beliefs. The difference is that *skeptical approaches* – generally represented by so-called “legal realism” – hold that there is nothing that can be identified as “genuine” validity or normativity, neither in the social nor in the moral sense. Consequently, those who believe in such a thing are assumed to be wrong; and

theories that admit it are regarded as nothing but justificatory ideologies. In turn, *moral approaches* – classically represented by natural-law theory, but also by a larger class of critics of positivism – claim that it is possible to identify “genuine” valid norms, that is, norms which have “binding force”: they are precisely what is called “moral norms”. In this view, a legal system is authentically binding or normative if, and only if, its contents correspond with morality. In other words, the basic difference between the two perspectives lies in the fact that skepticism rejects *all* kinds of non-reducible normativity, whereas post-positivistic approaches do admit *one* single kind, namely moral normativity.

In my view, these positions are not exhaustive. One can counter the two reductionist approaches by seriously taking into account a dimension of institutional normative facts and by explaining, on this basis, the specific way how law can be said to be normative or binding. That is to say, we can explain genuine legal normativity as an irreducible *social* phenomenon which does not necessarily depend on critical morality. In summary, I think that, in explaining the practical character of institutions in general, social-reality theory also provides an explanation of the practical character of law in a positivistic way. This explanation does not resort to an ideal morality (which would contradict the positivistic thesis of the separation between law and morality), nor does it imply a metaphysical commitment with a strange kind of entities (which would contradict its empirical philosophical background).

In this context, I think it is important to recall the distinction between two different kinds of discourse, which are sometimes expressed in the same terms. For instance, even when it is formulated in descriptive language, the ethical discussion about the conditions that must be satisfied for an authority to be legitimate, or a law to be just, is either a critical (evaluative) or a meta-

physical discussion. Its purpose is neither to identify nor to explain real normative institutions. Rather, it tries to establish what would be good *justificatory* reasons for creating, maintaining or rejecting such institutions. Social-reality theory does not compete with these approaches, because its purpose is a totally different one. It does not intend to offer good justificatory reasons in support of the existence of institutions in general or specific institutional facts in particular. Instead, it competes with other *explanatory* attempts, and specifically with all dualistic or reductionist theories regarding the deontic element involved in institutional reality.

With respect to this, it is generally accepted that law as a social reality is an agent-relative “reality”. But precisely because of this, the normativity of law – if it is not to be of a moral kind – is thought to be reducible to agents’ beliefs. If we look at social reality, it is said, we cannot find genuine normative facts. We can find and explain only *what is considered to be* a normative fact. Here, I think, we can see clearly where the difference of the approach of social-reality theory lies. Social-reality theory can attempt to explain social normativity; but a reductionist approach, if it is coherent, cannot – simply because it denies the existence of such a thing.

II. Some necessary premises

In order to carry out my purpose I will mention some premises of social-reality theory that must be taken for granted. (Although I will later point out some problems concerning these premises.)

a. Social-reality theory is based on a *monistic philosophical thesis*: We live in one single world. And that world is, we hope, more or less as the empirical sciences describes it.

b. Social-reality theory is a *non-reductionist theory* about social institutional reality. It offers us a structure or a pattern of interpretation according to which under certain conditions we can assert the existence of a special kind of facts, namely *institutional facts*. This kind of reality includes human rights.⁵ And if that is so, then we can certainly say that it also includes legal rights, duties and powers.

c. Institutional reality is *ontologically subjective*. That is to say, its mode of existence depends on agents' attitudes and background capacities. But this does not mean that such attitudes are the truth-condition of a statement about institutional facts. The truth-condition of a statement about an institutional fact is precisely the institutional fact referred to by the statement. Subjective ontology means only that this fact would not exist if the appropriate attitudes did not obtain.

d. Institutional reality is *epistemically objective*. The existence of institutional facts can be objectively known. That is to say, we can determine the truth-value of statements about them.

I would like to make a comment on this first group of ideas. In order to interpret them correctly I think it would be useful to keep in mind a distinction between the *theoretical proposal*, on the one hand, and the *philosophical metaphysical thesis* underlying it, on the other. In other words, we must not confuse the non-reductionist thesis of social-reality theory with its monistic philosophical assumption. Reductionism and non-reductionism are theoretical theses regarding specific properties or facts. There are different kinds of reductions that a theory may propose or refuse, regarding specific objects or properties. To sustain non-reductionism about some kind of facts or properties means to distinguish the existence of two kinds of things or realities: those *which* are considered to be irreducible, and those *to which* they are said to be irreducible.

In contrast, to sustain a reductionist thesis means to deny this distinction and to defend the thesis that the first kind of entity or reality is actually nothing other than the second. In that case, there are then not two types of ontologies, but only one. In other words, if a theory offers a non-reductionist thesis regarding certain facts, that means that it offers a language and establishes the conditions under which the facts in question can be said to exist. An existential statement in this sense is internal to a theory, it must be understood in the sense proposed by the theory.

The metaphysical assumptions of the theory regarding the external world are something completely different. A theory may say that, at the end of the day, there is nothing out there; or, on the contrary, that all the theoretical distinctions correspond to independent external realities. But the arguments for or against a reductionist or a non-reductionist stand regarding a specific property analysed by a theory are not arguments for or against metaphysical presuppositions, such as idealism, monism or pluralism. I am not trying to say that there cannot be any logical relations between theoretical and metaphysical theses in general. For instance, if one assumes certain metaphysical theses, some theoretical reconstructions must be rejected as logically incompatible. But in this particular case I am saying that the theoretical recognition of two different ontologies does not imply two different external worlds. The *theoretical* identification of multiple kinds of entities is logically compatible with the *philosophical* idealistic, monistic or dualistic background. If this were not admitted, then social-reality theory would be *ab initio* contradictory; since it is trying to sustain that we can distinguish two kinds of entities in a unique metaphysical world.⁶

III. Legal normativity as institutional existence of rights and duties

As we know, the same set of words may be uttered with a mind- (or word)-to-world direction of fit or with a world-to-mind (or -word) one. By examining the direction of fit of the respective speech-acts we can determine whether they constitute a directive or a descriptive use of language. To be sure, directive discourse is not always legal. In this respect, let us suppose that legal theory provides us with a sufficiently clear criterion to recognize which discourse should be considered a legal one.

According to social-reality theory, just as we have words for describing success or failure in achieving fit for statements, we also have words for describing success or failure in achieving fit for directive discourse. The terms for statements are “true” and “false”, and the terms for directive discourse are “obeyed” and “disobeyed”.⁷

Taking these ideas into account, it should be noted, however, that obedience may not be the principal aim of a directive discourse. It may have further purposes and may therefore be evaluated in additional ways. In legal theory, it has been underlined that obedience is neither the only nor the principal purpose or aspiration of authorities; the main goal is rather to constitute justificatory reasons for actions. This aim is generally considered as the trait that distinguishes legal authorities from a gangster. Leaving aside the discussion regarding the kind of reasons legal discourse intends to produce,⁸ we can say that since Herbert Hart’s proposal, existing law – law, that is, whose rule of recognition is accepted – is better understood as a set of justificatory reasons for action than as a set of orders backed by threats. In this line of thought sophisticated contribu-

tions distinguishing between mere obedience and acceptance have been developed in legal philosophy.

Obedience, according to Herbert Hart, is a relationship between a lawgiver and the addressee(s) of the law. If this were the only way to evaluate legal discourse we could not understand the law as a continuous phenomenon that persists even when authorities change. It would then have to be understood as a set of orders related to each other by their origin in one single lawgiver. But if, for whatever reason, the lawgiver disappeared, the legal system would collapse and it would not be possible to say that a new lawgiver has the *right* to command. For that to be true, the new lawgiver would first have to gain new obedience from the addressee[s]. I mention these Hartian ideas at this point only to emphasise that, in his view, the principal aim of law is not obedience but acceptance; only when some basic constitutive rules are accepted, we can see legal dispositions as specific institutional facts.⁹

In addition to this, we can say that, to a great extent, one of the central aims of legal dispositions is to give rise to new rights, duties and powers. To be sure, not all legal dispositions succeed in this attempt, and not all dispositions that do succeed are legal ones. Nonetheless, it is generally acknowledged that a legal disposition reaches its goal in establishing a new duty or right when it has binding force. To predicate the normativity or binding force of a legal disposition means to assert the existence of the corresponding duties, rights, or powers.

On the basis of these ideas, a parallel can be drawn. Like “truth” and “obedience”, “normativity” is another word of evaluation.¹⁰ Just as statements can be judged to be true or false, and commands to be obeyed or disobeyed, directive discourse intending to create rights and duties can be evaluated as valid or invalid (binding or non-binding). In doing so, we produce statements –

validity statements or *statements of binding force*. Such statements can, in turn, be judged as true or false. That is to say, legal dispositions are valid or invalid, and validity statements are true or false. Now, if what I said before is correct, a non-reductionist account of the existence of rights and duties as institutional facts permits a non-reductionist account of this property – validity, understood as normativity or binding force – with which we evaluate legal dispositions about rights and duties. Therefore, the truth of a statement predicating the validity or binding force of some ought-statement must be assessed on the basis of whether or not it corresponds with the existence of the duty in question.¹¹

According to social-reality theory, the notion of truth must be understood in terms of “disquotation” and “correspondence”. The disquotation and the correspondence theory are both tautologically true. Once a misleading interpretation of the notions of “facts” and “correspondence” is avoided, we can accept both views as completely compatible. The (brute or institutional) facts referred to by statements are not at all metaphysically strange objects. In this view, truth and facts are necessarily related because a fact is what makes a statement true. According to social-reality theory, ‘the whole point of having a notion of “fact” is to have a notion for that which stands outside the statement, which makes it true, or in virtue of which it is true, if it is true. On this account, every statement determines its own truth-conditions’,¹² and facts are the *conditions* in the world that satisfy the truth-conditions expressed by statements.¹³

For instance, take the following prescription *P*:

P: ‘All citizens aged 18 and older are allowed to vote in presidential elections.’

Now we can ask whether this prescription *P* belongs to, or exists within, a given legal system. [This question corresponds to a sense of “validity” that could also be analysed in terms of institutional facts, but I will not

discuss it here. Cf. footnote 3] Additionally, we can ask whether this prescription is “valid” in a different sense, that is, whether it has “binding force”. In the approach I am presenting now, normativity or validity in this sense means that the corresponding right does in fact exist. The truth of the validity statement ‘Prescription *P* is valid’ should be analysed in terms of disquotation. That is to say:

‘Prescription *P* is valid’ is true if, and only if, Prescription *P* is valid.

In virtue of the correspondence theory of truth, the “fact” that makes the statement true is the validity of Prescription *P*, that is, the institutional existence of the right to vote.¹⁴

It could be said that one of the principal goals of directive language in legal contexts, as far as it claims to have binding force and normativity, is the social existence of institutional powers, rights and duties. Note, however, that neither such language by itself, nor the procedures in the context of which it has been uttered, nor the intentions of the utterers can guarantee that the alleged rights and duties come to exist. In the approach of social-reality theory, duties and rights can be said to exist when a constitutive rule is accepted and some status functions are thus assigned to certain persons or things. On that account, it may well be that a right or duty is only formally established by legal dispositions, without constituting, or corresponding to, a right or a duty as an institutional fact. In this case such rights or duties are the content of legal dispositions which have been formally promulgated, but still do not exist. To the extent that the existence of these rights and duties is the truth-condition of statements of validity, or binding force, such statements are false, that is to say, the corresponding legal dispositions lack binding force. By making this distinction we make explicit the difference between the institutional existence of law or legal dis-

positions and the institutional existence of the rights and duties that they intend to, but do not always successfully, create.

IV. Some general remarks on reductionism

As I have already said, from the predominant perspective, there is only one sense – if at all – in which a legal disposition may be authentically normative or binding, and that is a moral one.

It must be stressed that if, in the last resort, morality is to be understood as an institutional social phenomenon, then the confrontation between a moral and a social approach to normativity is merely a verbal dispute. Likewise, we would have only an apparent disagreement if *moral approaches* did not intend to analyse normativity or normative institutions, but to propose – with a world-to-word direction of fit – the conditions people *should* consider before accepting, or refusing to accept, certain norms. On this interpretation, the moral approach would be a proposal from which we can criticise real or potential institutions. In this case, it would then be necessary to recognise that there are two genuine senses of normativity, namely social institutional normativity, and rational or moral normativity that is a regulating ideal.¹⁵ However, most legal theorists reject this last proposal and consider that there is only one sense of genuine or non-reducible normativity, and that ascribing normative or practical force to social institutions independently of critical moral requirements amounts to a fallacy committed by ideological positivism. In virtue of what has been called the principle of the unity of practical reason, for something to be a genuine duty, it must be in last resort a duty in a moral sense.¹⁶ From this point of view, social authorities attempting to establish duties, rights and powers, even if they are

accepted, do not succeed in their attempt when they do not conform to moral requirements. All this amounts to a real disagreement between the moral approach and the social-theory approach; because from the former point of view, in order to understand and identify authentically normative facts or binding norms we must rely on metaethics and a critical morality. From the perspective of social-reality theory we only need a philosophy of society and a theory of institutional social facts. Here, an interesting point must be underlined. Moral approaches do not deny that socially accepted norms *exist*. What they say instead is that if the content of such accepted norms does not conform to moral standards, their practical character, or binding force, can be reduced to pure coercion or false beliefs. But, on this hypothesis, such social rules cannot be genuine reasons for action. Summing up, the alternative is the following, normativity is to be understood as a moral property or as sheer coercion plus beliefs. Against this alternative, we need an argument for upholding the recognition of a genuine – non-reducible – social normativity.

On the one hand, according to social-reality theory, the continuous acceptance of the members of a group is strictly necessary in order for institutional normative reality to exist. This is not a claim about the meaning with which people use normative language from an internal point of view. Nor is it a claim about participants' beliefs. The participants may not be aware of it, or they might think that the accepted rules have binding force independently of the attitudes of human beings.¹⁷ Social-reality theory is an *external*¹⁸ explanation compatible with the fact that, from an *internal* point of view, participants attach different kinds of meaning to statements about powers, duties, prohibitions and rights.¹⁹

In order to explain the practical character of authoritative language regarding duties and rights as the insti-

tutional existence of the rights and duties that they propose, this approach doesn't require that participants believe in the arbitrariness of these rights and duties (as would be required by a strict conventionalist reconstruction). In fact, it neither requires that participants believe that they are constituting rights as institutional facts nor that they believe in the existence of these facts as metaphysical entities. All it requires is that participants assign these status-functions, for whatever reasons they may have. Only after certain institutional facts come to exist, the beliefs referring to them can be evaluated as objectively true or false.

In the example, participants must accept that 'x (being a citizen aged 18 or older) counts as y (having the right to vote) in context C', and it is irrelevant whether they think that it could have been otherwise, or that it ought to be that way, for necessary moral reasons. The important point here is that social-reality theory can explain the existence of these rights, even if they are considered a matter of conviction or arbitrary convention.²⁰ The institutional theory matches well in both cases.²¹

On the other hand, according to social-reality theory, we live in one single world – at most.²² We must abandon the idea that there is a mental world besides our physical one. In the same vein, we must abandon the idea that there is a realm of ought ('ein Reich des Sollens') alongside the physical one. In other words, we should renounce the classical *is/ought* distinction as metaphysical. Nevertheless, this last thesis does not imply that we cannot, from a theoretical point of view, distinguish different kinds of entities that we can claim to exist when the conditions stated in the respective theory obtain.²³ We thus do not need to reduce our mental or institutional normative reality in order to be coherent with the rejection of metaphysical dualism. Mental and normative reality can exist according to a theory, without metaphysical consequences.

To consider different kinds of reductions in Searle's approach, we should move on to the arguments presented in his *The Rediscovery of the Mind*.²⁴ In this work, we can find a reflection about why we are able to reduce phenomena as heat, sound, color, solidity, etc. to their physical foundations, while we are unable to do the same regarding mental entities. Concerning the question 'Why do we regard heat as reducible and pain as irreducible? The answer is' – Searle says – 'that what interests us about heat is not the subjective appearance but the underlying physical causes.'²⁵ Extending this argument to normative reality, we can say that our interest in some contexts is directed towards its *objective* appearance rather than its underlying *subjective* basis.

Regarding consciousness, Searle observes:

Part of the point of the reduction in the case of heat was to distinguish between the subjective appearance on the one hand and the underlying physical reality on the other. Indeed, it is a general feature for such reductions that the phenomenon is defined in terms of the 'reality' and not in terms of the 'appearance'. But we can't make that sort of appearance-reality distinction for consciousness because consciousness consists in the appearances themselves. *Where appearance is concerned we cannot make the appearance-reality distinction because the appearance is the reality.*²⁶

If we keep this idea in mind, we can realise that the same may be said about normative phenomena of rights and duties. We cannot make the appearance-reality distinction for normative facts, such as the existence of rights or duties, because they consist in the appearances themselves.

Following the parallelism we should say that, of course, the reduction is possible. 'Surely when you get down to brass tacks, there are no real facts'.²⁷ This is so because

this non-reductionism does not reflect any metaphysically necessary feature, but a trait of our definitional practices.²⁸ The interesting point to remark is that if the parallel to the non-reducibility of mental entities can be drawn, we can say something more about the recognition of a specific institutional normative reality. We *could* try to reduce and redefine institutional normative properties like binding force in terms of what is believed or considered to be binding, just as we redefine “red”, in a reductionist way, as the reflection of light of a specific kind. But this would not mean that we eliminate the appearance of normativity (as we also don’t really eliminate the subjectivity of red), it would simply mean that we stop calling them by their old names.²⁹

V. Some epistemological and ontological remarks

1. *Institutional reality is epistemologically objective.* It is, we could say, a cognitivist thesis about institutional reality. That something can be objectively known entails that statements about it are true or false, or that questions about it have a correct answer. Objective knowledge supposes that ‘disagreement does not undermine the thesis that there is a fact of the matter awaiting discovery. Rather, such disagreement suggests a fault of at least one of the interlocutors’.³⁰

In social-reality theory, the contrast between epistemic objectivity and epistemic subjectivity is a matter of degree.³¹ Hence, institutional reality can be objectively known only if collective acceptance and the practice supporting it are also clearly established.

Even if this is apparently simple and sound, I think that some difficulties arise when we distinguish between *act-categories* and *act-individuals*,³² or between institutions – and the general rights and duties related to them

– on the one hand, and individual instantiations of such institutions, on the other. The problems we may encounter here are of different kinds. We may be uncertain about the truth-value of a “pure statement” regarding the very existence of an institution.³³ This may be the case, for instance, when acceptance is not yet, or no longer, clearly established. Uncertainty, however, does not mean indeterminacy. We can still maintain bivalence regarding this kind of statements. That is to say, we can stipulate that statements about the existence of an institution – for instance, commercial transaction or donation – are objectively true if the institution has reached a certain level x of acceptance, and that they are false in all other cases. Our ignorance about this fact, that is about the level of acceptance, does not undermine the truth-value of propositions about the existence of the institution. There may, however, arise additional problems related to the truth-value of “applicative statements” referring to individual instances of some clearly existent institution – for instance, concerning whether some agent A on a particular occasion has performed a commercial transaction or a donation, and what the corresponding rights and duties are. This is so, first of all, because the concepts referring to institutions and the rights or duties related to them may be vague; and secondly, because there may be unresolved conflicts between equally valued rights and duties, or between incommensurable ones.³⁴

Here social-reality theory leaves room for discussion. For example, regarding the problem of vagueness, there are two classical approaches. From one point of view, indeterminacy is an epistemological problem. Perhaps it is not always possible to know the truth-value of some propositions, but this does not mean that they do not have any. Indeterminacy, in this view, is a lack of knowledge, and that presupposes that there is something to be known. On the second approach, the indeterminacy

of a proposition is a semantic problem. For instance, imagine a transaction *X* where, taking into account all the relevant characteristics of *X*, we cannot determine whether it is a sale or a donation. The problem is that the meaning of “sale” and “donation” is partially indeterminate. There will always be borderline cases. Propositions about borderline cases are semantically indeterminate; that is to say, they are neither true nor false.³⁵

For social-reality theory, it is an open question whether or not epistemological objectivism regarding institutional facts implies that any single – pure or applicative – proposition about social reality has a truth-value. On the one hand, objectivism suggests bivalence, and that implies that the answer to the question is, Yes, they do. On the other hand, the gradual nature of the objective-subjective distinction, the general problem of vagueness, from which our statements cannot escape, as well as the possibility of genuine conflicts suggest that the answer in these cases should be No, institutional statements referring to such cases lack truth-value.

Summing up, as far as the explicit thesis of social-reality theory goes, it seems compatible with both classical opposite answers regarding borderline cases and unresolved conflicts. In principle, we can say that this does not represent any problem to the theory. The only purpose of this remark is to underline that these doubts reflect others about the special ontological status of this kind of reality. Usually, epistemic objectivism regarding normative facts which are non-reducible to empirical reality has been associated with a problematic ontology, namely an ideal reality that can be known objectively because it is ontologically objective, that is to say, it exists independently of human beings. To conserve an objective epistemological thesis regarding a gradually man-made reality may have paradoxical consequences for applicative statements if semantic and

valorative disagreements about them are, as seems to be the case, unavoidable.

2. Now I want to move on to another point concerning the ontological and epistemological thesis of social-reality theory. Institutional reality exists because of the acceptance and practice of agents. It is an agent-relative reality and, in this sense, it is ontologically subjective. Only if the (subjective) conditions of existence obtain, objective truth-judgements are possible. For example, when can we truly say that *A* is an authority or *B* is a duty within a given group? The answer is: When it is an institutional fact that *A* is an authority or that *B* is a duty within that group. At this point, what matters is not the issue of determining who or how many agents should sustain an institution in order to make such statements objectively true. The interesting point here is that we are allowed to state that it is objectively true that *A* is an authority, or that *B* is a duty for the members of the group as a whole, even if not all the members of the group do accept the respective institution.

This asymmetry emerges because social entities are not strictly subjective mental ones. A feeling of pain exists if one agent feels pain. The existence of this feeling is relative only to that agent, although it can be objectively recognized or known by others. Institutional facts, in contrast, do not exist relative to each agent; at least that is clearly suggested by the fact that we characterise them as “social” facts. Hence, unless we are willing to admit that social entities exist merely in relation to each single acceptant (in which case we should stop characterising them as part of a *social* reality), we are facing a problem of asymmetry.

Let's suppose that I reject the institution of authority. If the sentence ‘*A* is an authority in group *G*’ is objectively true, then ‘*A* is an authority for me’ is also objec-

tively true, provided I am a member of group G. This means that according to this theory, that authority, with all its practical consequences, exists in relation to me even if I do not accept it. At this point it is easy to slide into a futile discussion about the "real" existence of an authority if we do not remember the different directions of fit with which the same words can be used. When we affirm that according to the premises of social-reality theory, A is an authority also for me or relative to me, even if I do not accept the institution of authority, this does not mean that the theory assesses this fact as a morally good thing. Nor does it mean that I should accept the authority simply because it is an institutional normative fact according to the theory. The theory offers a language in which we can identify and explain that kind of reality. Its purpose is not to explain what I think, or should think, as a member of the relevant group. It offers a reconstruction according to which we can state that, in the example, A is an authority that will have practical consequences even for those that reject it.

In this context, it is perhaps useful to introduce a distinction which was originally drawn with a different purpose.³⁰ The existence of something may be subjective in two different senses. It is possible to distinguish between existence *relative to* someone and existence *in virtue of* someone. In the first sense, that something exists subjectively means that it exists only for, or in relation to, a person or group of persons. To say that something is relative to some group does not tell us anything about why it exists or what the necessary conditions for that existence are. In particular, it does not tell us whether it exists because it is accepted. This first kind of "subjectivity" implies a threshold beyond which the ontological claim vanishes. From this point of view, a mental entity is relative to one person while institutional facts are always relative to a group. This means that

such facts exist only within groups and do not exist outside of them.

The second sense of "subjectivity" stresses the fact that agents' attitudes constitute a necessary condition for the existence of an institutional fact. To say that an object is subjective in that sense is to say that it would not exist if the person or group of persons in question did not have the right attitudes. From this point of view, institutional reality exists in virtue of the acceptance of certain individuals and not in virtue of the acceptance of the whole group.³⁷ Social-reality theory asserts that institutional entities are subjective in both senses, but it does not say that the members of the group must be aware of that. Hence, the fact that participants *believe* that their institutions exist in a non-relative way, independently of any agent's attitudes, does not refute the explanation. An object can be subjective in both of the senses mentioned even when that subjectivity is denied by the agents in relation to whom that object exists and on whose attitudes it depends.

Summing up, institutional reality is subjective because it exists *relative to* a social group. In this sense, it is relative to *all* agents belonging to the group. But it is also subjective because it exists *in virtue of* certain agents, namely those who give their acceptance. This may seem a purely linguistic movement, but I think it might be relevant to stress the difference. A may well be an authority *in relation to* myself and relative to my actions, without being at the same time an authority *in virtue of* my actions and myself.³⁸

3. Finally I wish to say a few words about the transcendental argument for external realism on which social-reality theory is founded. This argument does not refer to institutional reality. It only shows that institutional facts – which depend on our representations – presuppose a different kind of reality independent of any rep-

resentation. It is worth noting that, first of all, the plausibility of the argument for external realism does not exclude the plausibility of another argument for external *moral* realism, which does not reject the first, but rather completes it with the recognition of an objective normative reality. In fact, metaphysical realism about genuine normative properties (which are usually conceptually assimilated to moral ones) rejects neither external physical realism nor a correspondence theory of truth. Secondly, the argument for external realism is even more compatible with a subjective reductionist view of institutional normative reality – namely, the one which I had called the “skeptical approach”.

This is not a fault of the argument for external reality as it is presented in social-reality theory because it does not intend to be an argument for monism – that is to say, for the existence of only one external reality – or non-reductionism concerning institutional reality – that is to say, for the recognition of institutional normative facts which can be distinguished from the subjective attitudes on which they depend. In other words, this argument is not a support for the two central theses here discussed; because it is not directly relevant in the discussion about the ontological subjective thesis and the epistemological objective thesis regarding institutional reality. It says nothing about reductionism and non-reductionism of a specific institutional ontology. Likewise, it says nothing to those who hold that alongside the external physical world there is another, normative world independent of the first.

In a work devoted to institutional normative facts, instead of this clear argument for the existence of an objective independent reality it would have been desirable to find an argument for this special subjective-objective institutional reality. I am not asking for another transcendental argument about institutional reality. It could be sustained that a theory which ex-

plains the structure and the conditions of existence of such entities – just like other theories about entities like electrons, numbers, mathematical relationships, and so on – does not need to produce a transcendental argument for the acknowledgment of these entities. A theory's success or failure depends on its capacity to account for the problems it intends to explain and to formulate useful hypotheses about them. In other words, there is no need for a philosophical argument for every theoretical distinction. However, as a theory about social reality the theory under scrutiny competes with various other theories, which are philosophically compatible with it, that is, theories which accept monism, external realism and the correspondence theory of truth, but which explain the structure and the emergence of institutional normativity in other ways.

Concerning this point, I would like to go back to something I have said earlier. In practical philosophy, there are two classical approaches to the ontology of norms, which may be extended to the ontology of rights and duties. I have called them the moral and the skeptical approaches. As I already said, they are usually considered to be not only mutually exclusive, but also exhaustive. In other words, it is assumed that there is no logical space for a third approach. On this view, we can be either realists (empiricists) or idealists regarding norms, rights or duties.³⁹ Realism is necessarily connected with monism, but also with reductionism about normative properties. On the opposite side, the analysis of norms as ideal entities amounts to non-reductionism, but it is at the same time committed to the existence of an independent ideal world. Considering this classical dichotomy, we must produce an argument to show the possibility of that logical space in which monism does not imply reductionism, and non-reductionism does not imply dualism. Without such an argument, a central critique of the social-theory ac-

count of normative social reality says that it is logically impossible. If we take its non-reductionism seriously we must accept dualism. If we take its commitment with monism seriously we must be reductionist regarding all non-physical properties.

In other words, we must still argue for, and not only assert, the thesis that we live in *only one single* world, because this does not follow from the transcendental argument for an external world. We must not overlook that on a different account, external moral realism is considered to be the best explanation for non-reducible normative properties.⁴⁰ The commitment with the existence of an objective moral reality, together with the thesis that social institutions are normative insofar as they correspond – or in some way relate – to that moral reality, is not a new theoretical proposal. It is a philosophical thesis that contradicts the assumptions of social-reality theory. Its implausibility is not shown by merely asserting that we live in only one single world it must be shown as the result of an argument. Therefore, a general argument for non-reducibility of social normativity and against dualism seems to be needed if we are to debate – as I think we should – with those who sustain alternative positions. This argument is a necessary basis if we want to defend – as I have intended here – that an institutional approach constitutes the only coherent foundation of a positivistic conception about legal normativity as a possible genuine property, which does not depend on morality.

Notes

1 I will refer especially to: Searle 1995.

2 I will use the terms “legal norm” and “legal disposition” indiscriminately to refer to meaningful language intending to prohibit or to make obligatory some conduct, or to confer a power in legal contexts.

- 3 Of course, here I am not talking of validity as a systemic relation internal to law reconstructed as a system. I am aware of the fact that in investigations about the structure of legal systems "validity" is understood in this latter sense.
- 4 It is important to take note of the ambiguity of the word "normativity". In a very wide sense it refers to all language with a world-to-word direction of fit. In a narrower sense, it refers only to the practical nature or binding force which I intend to discuss now. In the first sense, all legal dispositions explicitly intended to prohibit, obligate or empower are norms. In the second sense, not all of them are normative, because even if they intend to, not all of them succeed in constituting a right, a duty, or a power. Thus, legal dispositions may be assessed as having binding force or normativity. The ontological and epistemological status of this property is what I intend to analyse. Regarding this issue, Lagerspetz distinguishes between "rules", "norms", and "obligations". I will be concerned with the practical force which is a necessary element of obligations but a contingent element of norms. Cf. Lagerspetz 1995, pp. 141–142.
- 5 Cf. Searle 1995, p. 93.
- 6 I am suggesting that the irreducibility of institutional normativity is independent of a monistic or dualistic metaphysical thesis. For example, one could accept metaphysical realism regarding moral properties and still explain social normativity as an irreducible institutional fact independent of moral properties.
- 7 Cf. Searle 1995, p. 215.
- 8 Central on this issue is the proposal of Joseph Raz, which has given rise to many others contributions. See especially Raz 1990. In resumed terms, we can say, following MacCormick, that by taking into account the force of the rules it is possible to distinguish 'rules of absolute application', 'rules of strict application', and 'rules of discretionary application'. The first and the second correspond to Raz's and to Schauer's models, respectively. The third one corresponds to rules of thumb. According to MacCormick, we should recognise that these last ones have a specific force as tie-breakers when the balance of reasons does not determine a result. Cf. MacCormick 1998, pp. 316–318.
- 9 Using the schema provided by social-reality theory we can interpret the rule of recognition as the constitutive rule

acceptance of which allows us to identify the laws which belong to and have to be applied in a legal system.

- 10 For a different analysis of this property cf. Celano 1999.
- 11 Regarding ontology in the legal context, cf. also Coleman and Leiter 1995.
- 12 Cf. Searle 1995, p. 215.
- 13 Cf. Searle 1995, p. 211.
- 14 It might be said that there is a similarity between the results of application of Searle's theory and Kelsen's theory of law. But although it is true that Searle's theory enables us to explain as institutional facts both the existence of legal norms and the existence of rights and duties, we should not therefore confuse the two things. As explained above, if a legal norm has no binding force, it does not give rise to a right or obligation, even though it may exist. Kelsen's theory, in contrast, has been criticized precisely for confusing two different meanings of "validity", that is, for equating the existence of a legal norm with the existence of the duty to do what that norm says.
- 15 Of course, as far as metaethics engages in ontological reflections, there are many specific metaethical theories that contradict the monistic ontological thesis.
- 16 Cf. Nino 1991, pp. 16–24.
- 17 'Where the institution demands more of its participants than it can extract by force, where consent is essential, a great deal of pomp, ceremony, and razzmatazz is used in such a way as to suggest that something more is going on than simple acceptance of the formula X counts as Y in C.' Cf. Searle 1995, p. 118.
- 18 In fact this is an example of a 'non-extreme external point of view' or 'hermeneutic point of view'. Cf. MacCormick 1981, p. 38. Also, MacCormick 1986, p. 104.
- 19 It is important to admit that the agents who participate in the practice can use the institutional words – "authority", "rights", "money" and the like – with a meaning that does not correspond to the reconstruction provided by social-reality theory. If this were not the case (for instance, if all participants in the practice of authority were to reject the idea that the concept of authority implies that they are believed to be, or regarded as, such authorities), the theory would have to admit that authority is not an institutional fact. We must remember that for social-reality theory, for instance, 'part of the content

- of the claim that something is money is the claim that it is believed to be money¹. If all participants refuse the claim, there are only two alternatives, namely: to say that money is not, in this case, an institutional fact or, as I am suggesting, that the participants use the word with a meaning which is different from the reconstruction proposed by the theory. Regarding this issue, cf. Celano 1999.
- 20 On this subject I am referring to the well known discussion related to Ronald Dworkin's criticism regarding conventionalist approaches to law. Cf. Dworkin 1986.
- 21 It is obviously true that many aspects that can be analysed with this theory can also be analysed with a strict conventionalist theory. But it is also true that social-reality theory can explain more than the conventionalist approach. For example, cases where the arbitrariness clause does not obtain, or the case in which institutions emerge independently of any coordination problem.
- 22 Cf. the quote of Davidson in Searle 1998, p. 144.
- 23 Carnap 1952.
- 24 Searle 1992.
- 25 *Ibid.* p. 120.
- 26 *Ibid.* pp. 121-122.
- 27 Cf. Searle 1995, p. 45.
- 28 I take this argument as a good one, even if linguistic practices have been considered as an insufficient basis for preventing reductionism. Cf. Sabates 1999.
- 29 Searle 1992, p. 123.
- 30 Shafer-Landau 1994.
- 31 Cf. Searle 1995, p. 8.
- 32 von Wright 1963. Also, Searle 1995, p. 32.
- 33 I take this category from Joseph Raz. We can say that true or false statements about institutions are either pure or applicative. A statement is pure if the existence of an institution suffices to make it true. It is an applicative statement if there is an institution and an individual fact, which together are sufficient to make it true, while none of them separately suffices to do so. Joseph Raz talks about normative, rather than institutional statements. Cf. Raz 1980, pp. 49 and 218.
- 34 This could be presented with the language of Joseph Raz. Raz affirms that in virtue of the social sources of legal rights, powers and duties, there are certain kinds of inescapable gaps, which correspond to statements about rights, powers and duties having no truth-value. They arise when the language

of rights, duties and powers is semantically indeterminate or when there are unresolved conflicts. Cf. Raz 1979, pp. 53–77.

35 von Wright 1996.

36 Cf. Sosa 1993, p. 621.

37 Institutional facts require acceptance by a sub-group or some relevant individuals. Cf. Lagerspetz 1995, pp. 6 and 156.

38 Note that if Searle's theory defined 'authority' (or any other institutional concept) as that which is subjectively considered to be an authority; it would have a logical problem. In the example, provided that I do not consider *x* to be an authority, '*x* is an authority' would be false regarding to me; but it would at the same time also be true, provided that it is objectively true that *x* is an authority relative to the group and it is also true that I belong to the group.

39 Cf. von Wright 1969, pp. 89–90.

40 Cf. Moore 1982 and 1989; Brink 1989; Hurd 1990.

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Paolo Comanducci

CONFRONTING TWO CONSTRUCTIVISTS

I. Introduction

When I began to read *The Construction of Social Reality*,¹ for the first time, I was amazed by the similarity between the starting point of this book and the starting point of Hans Kelsen's *Pure Theory of Law*.² It seems to me that both authors are facing almost the same problem, but from the very beginning of their books they solve it differently. Even though, probably, the differences between the solutions they propose are not as deep as may appear at first sight. In the following, I will critically compare their solutions, and then I will contrast both of them with Alf Ross's alternative.

Kelsen, in the second edition of *Pure Theory*, facing the question of 'whether the science of law is a natural or a social science; whether law is a natural or a social phenomenon',³ he writes: '[...] the clean delimitation between nature and society is not easy, because society, understood as the actual living together of humans beings, may be thought of as part of life in general and hence of nature. Besides, law [...] seems at least partly to be rooted in nature and to have a "natural" existence. For if you analyze any body of facts interpreted as "le-

gal” or somehow tied up with law, such as a parliamentary decision, an administrative act, a judgment, a contract, or a crime, two elements are distinguishable: one, an act or series of acts – a happening occurring at a certain time and in a certain place, perceived by our senses: an external manifestation of human conduct; two, the legal meaning of this act, that is, the meaning conferred upon the act by the law. For example: People assemble in a large room, make speeches, some raise their hands, others do not – this is the external happening. Its meaning is that a statute is being passed, the law is created. [...] A man in a robe and speaking from a dais says some words to a man standing before him; legally this external happening means: a judicial decision was passed. A merchant writes a letter of a certain content to another merchant, who, in turn answers with a letter; this means they have concluded a legally binding contract. Somebody causes the death of somebody else; legally, this means murder.¹⁴

In Kelsen’s theory, as in Searle’s, social facts are, in a sense, natural facts (and then legal science could be reduced to natural science), but, in another sense, they are not reducible to natural facts. This is so because every social fact – legal fact, from Kelsen’s perspective, for, unlike Searle, he was interested in explaining legal phenomena only – is constituted, not only by a mere natural fact (“brute” fact in Searle’s terminology), but by a further element too: its specific social (or legal) “meaning”. For Kelsen as well, as for Searle, it is at bottom a norm that ascribes to a natural fact such specific social (or legal) “meaning”, that constructs it as a social (or legal) fact. Here, however, the analogies between the two theories fall short, and the paths of the two authors diverge.

From what I have said so far, both Kelsen and Searle could in fact be considered as constructivists, and, more specifically, “social” constructivists, according to the clas-

sification of different kinds of constructivism recently established by Vittorio Villa.⁵ Villa writes that this label ‘[...] explicitly recalls Finn Collin’s characterization [...] of the thesis according to which “social reality is somehow generated by the way we *think* or *talk* about it, by our *consensus* about its nature, by the way we *explain* it to each other, and by the *concepts* we use to grasp it. Social facts are thought to be a product of the very cognition, the very intellectual processes through which they are cognised, explained and classified, in so far as this cognition is a shared, collective one” (F. Collin, *Social Reality*. London, Routledge 1997, pp. 2-3).’

We can notice, however, some differences between Kelsen and Searle. In the next section I shall focus on three main differences, concerning the scope of their theories, the distinct kinds of constructivism they endorse, and the contrasting answers they present to the so-called question of “institutional reality”.

II. Some differences between Kelsen and Searle

A. *The scope of their theories*

The first sharp difference refers to the aims and scope of Kelsen and Searle’s theories, respectively.

As is well-known, Kelsen’s aim is to build up a *pure* theory of law. Therefore, he carries out (at least) a triple “purification”:

a) To begin with, Kelsen wants to purify legal theory of any ideological elements, that is from any value judgement, or any political, religious or moral evaluation: ‘[...] the Pure Theory has an outspoken anti-ideological tendency. The Pure Theory exhibits this tendency by presenting positive law free from any admixture with

any “ideal” or “right” law. The Pure Theory desires to present the law as it is, not as it ought to be; it seeks to know the real and possible, not the “ideal”, the “right” law. In this sense, the Pure Theory is a radical realistic theory of law, that is, a theory of legal positivism.⁶

b) Secondly, Kelsen wants to purify the methodology of legal theory of any influence of different sciences. Kelsen aims at avoiding any methodological syncretism – that is, the combined use of tools proper to different disciplines – especially in the field of social sciences, where only the methods of inquiry could draw a line between disciplines having the same object. In particular, Kelsen wants to avoid methodological syncretism between sociology and legal theory: the first one belongs to the causal sciences (together with natural sciences and history), while the second one belongs to normative sciences (together with ethics, logic and grammar).⁷ The division between causal and normative sciences – hence the difference between sociology and legal theory – reflects, in Kelsen’s opinion, the fundamental antithesis between *Sein* and *Sollen*, *is* and *ought*.

c) Thirdly, and consequently, Kelsen also wants to purify the object of legal theory. Kelsen writes of his own theory: ‘It characterizes itself as a “pure” theory of law because it aims at cognition focused on the law alone, and because it aims to eliminate from this cognition everything not belonging to the object of cognition, precisely specified as the law.’⁸

Thus, provided that ‘[...] the law – the sole object of legal cognition – is norm’,⁹ Kelsen restrains the scope of his analysis to legal norms only: ‘The obvious statement that the object of the science of law is the law includes the less obvious statement that the object of the science of law is *legal norms*, but human behavior only to the extent that it is determined by legal norms as condition or consequence, in other words, to the extent that human behavior is the content of legal norms. Interhuman

relations are objects of the science of law as legal relations only, that is, as relations constituted by legal norms. The science of law endeavors to comprehend its object “legally”, namely from the viewpoint of the law. To comprehend something legally means to comprehend something as law, that is, as legal norm or as the content of a legal norm – as determined by a legal norm.¹⁰

John Searle’s work, on the other hand, has a more ambitious aim and a broader scope than Kelsen’s. He wants to build up a ‘philosophy of society [...] centering essentially around questions of social ontology.’¹¹ Like a great fresco, Searle’s work now includes a theory of speech acts,¹² a theory of mind¹³ and a theory of social reality. The three theories purport, as a whole, to provide an answer to the puzzling existence, in our unique world, of phenomena which do not seem reducible to the phenomena described by natural sciences. Accordingly every social fact constitutes the scope of Searle’s theory: not only legal facts – as in Kelsen’s pure theory – but also those labelled, for example, as political, economic, and moral ones.

It seems, therefore, that the two theories differ too much to be compared. But, in my view, this is not the case, for at least three reasons.

First, Searle, being concerned with all social facts, is consequently concerned with legal facts, too. It is true that we cannot compare Searle and Kelsen’s theories as such, having different aims and scope: but we can compare them in so far as both offer an explanation of the legal dominion.

Second, the explanation of the legal dominion is not a matter of secondary import in Searle’s work: not only because he often refers, as examples of social facts, to many legal concepts and institutions, but also, and chiefly, because he maintains that his analysis ‘at bottom is about power’,¹⁴ about the power relations in society. And there is no doubt that law has much to do

with power relations, even if, of course, it does not exhaust them.

Third, because, from the point of view of a legal philosopher, it is interesting to test the impact of Searle's philosophy of society in the legal field, exactly comparing it with the most important legal theory of our century, namely, Kelsen's theory.

B. Social constructivism and scientific constructivism

Both Kelsen and Searle seem to be constructivists. But what kind of constructivists are they? To name both of them "social constructivists", as we have done above, is not an answer but the beginning of an answer. This label, in fact, is used for keeping them apart: on the one hand, from radical constructivists, who think any kind of reality, natural reality included, is observer-dependent;¹⁵ and, on the other hand, from radical empiricists, who think any kind of reality, social reality included (if any), is observer-independent.

Constructivism has to do with one's ontology and epistemology. The differences between Searle's and Kelsen's constructivisms, in my view, lay more at the epistemological level than at the ontological one.

Etymologically, ontology is the study of what is. But, since classical philosophy, "what is" means, alternatively or cumulatively: a) what exists, which things do exist; b) how it is what there is, what is the nature of things that do exist. Ontology studies, using old-fashioned terminology, the existence and/or the essence of things, whether facts exist and/or how facts are, the "being" and/or the "is".

Well, I guess Kelsen and Searle – who, in my opinion, do not explicitly distinguish the two meanings of 'ontology' – share a similar ontology, in both meanings of the word.

They share, in the sense of 'ontology' as the study of

the existence of things, a realistic ontology: there is a world outside, and it is one world. Searle, on this subject matter, is more explicit than Kelsen, but also the latter, I believe, could subscribe Searle's external realism, that is '[...] the view that there is a way that things are that is logically independent of all human representations'.¹⁶

Both share, in the sense of 'ontology' as the study of the essence of things, the idea that, among what exists, there are ontologically objective things and ontologically subjective things. The 'mode of existence'¹⁷ of the first ones, their essence, is independent of our representations: ontologically objective things (simplifying: nature) are described by natural sciences. The 'mode of existence' of the second ones, their essence, is dependent on our representations: ontologically subjective things (simplifying: society) are described by social sciences.¹⁸

I insist that both Kelsen and Searle are social constructivists since they affirm that social facts are "constructed" by men, and they are not completely reducible to natural facts.

There is not time enough now to do it, but I think that Kelsen's ontology could be translated, without serious difficulties, in terms of Searle's ontology. For example, we could affirm that, according to Kelsen, the law is a complex network of brute facts to which we have imposed the status of "normative coercive order",¹⁹ that has the function of guiding human behaviors.

On the other hand, Searle's epistemology looks different from Kelsen's, still influenced, in the second edition of *Reine Rechtslehre*, by neo-kantianism. Searle, I think, would not accept, for example, the kelsenian use of *a priori* categories as conditions of intelligibility of legal facts *qua* legal facts, as in the case of "basic norm": 'Insofar as only the presupposition of the basic norm makes it possible to interpret the subjective meaning of the constitution-creating act (and of the acts established according to the constitution) as their objective mean-

ing, that is, as objectively valid legal norms, the basic norm as represented by the science of law may be characterized as the transcendental-logical condition of this interpretation, if it is permissible to use by analogy a concept of Kant's epistemology.²⁰

Both Kelsen and Searle are nonreductionists, since they do not believe that (the language of) natural science suffices for a description of the whole reality. If they are dualists in epistemology, however, their dualism is rather different.

Kelsen distinguishes between causal and normative sciences: on the one hand, the sciences which are concerned with what is (by nature or by convention); on the other hand, the sciences which are concerned with what *ought to be*. On the one hand, the sciences which use as explanatory tool the principle of causality; on the other hand, the sciences which use the principle of imputation.²¹ Kelsen, therefore, puts together, from an epistemological point of view, natural sciences and empirical social sciences. And he carefully distinguishes both of them from legal science. Kelsen, at least in his long neo-kantian phase, seems to be a constructivist also from the epistemological point of view: 'It is [...] true that, according Kant's epistemology, the science of law as cognition of the law, like any cognition, has constitutive character – it "creates" its object insofar as it comprehends the object as a meaningful whole. Just as the chaos of sensual perceptions becomes a cosmos, that is, "nature" as a unified system, through the cognition of natural science, so the multitude of general and individual legal norms, created by the legal organs, becomes a unitary system, a legal "order", through the science of law. But this "creation" has a purely epistemological character. It is fundamentally different from the creation of objects by human labor or the creation of law by the legal authority.'²²

This kelsenian constructivism lives together, in his

mature works, with descriptive attitudes, and sometimes it enters into a state of tension with them. The interpretation I am providing may look “strained”, but I would say that, in Kelsen’s epistemology, there is the idea of “two levels of reality”. The first level is that of legal materials that are not “constructed” by legal science: they are a product of social construction because they are dependent on human acts and are described by social sciences. The second level is that of legal norms that are “constructed” by legal science *qua* its object of inquiry.

In conclusion, Kelsen, in addition to being a social constructivist, is also an epistemological constructivist,²³ and, particularly, a scientific one: it is legal science, not people at large, that “constructs” legal reality, that is the legal order and legal norms.

Searle’s dualism, on the contrary, is the dualism between all natural sciences (the language of physics and chemistry) and the social sciences, or, perhaps, the philosophy of society. In my opinion, we cannot label Searle as an epistemological constructivist. Unless we are using ‘constructivist’ in a very weak sense, to which would thus apply to all scientists and philosophers, because they use, to describe reality, a language partially “constructed” or reconstructed by themselves. In this weak sense, Searle too would be an epistemological constructivist: for example, “fact”²⁴ and “action”²⁵ seem to me, in his work, theory-dependent terms, the meaning of which is constructed inside the very theory he works out.

C. Facts and norms

Kelsen and Searle agree, from an essence-relative ontological point of view, that in the world there are “things” different from, and not completely reducible to, physical entities.

If we limit our inquiry to the legal field – for the reasons mentioned above – these “things” are for Kelsen, basically, meanings;²⁶ for Searle, basically, institutional facts. Hence there is a family resemblance between the two positions.

This resemblance is concealed by the different epistemological approach of the two authors and by the different lexicon they use. Since it is impossible to deal with ontological questions without using language – language, in a sense, cannot be transcended – radical linguistic differences usually make us to believe that there are radical differences in the two authors’ ontologies. But, as I said above, this is not the case. Nevertheless, there are some differences left in Kelsen and Searle’s nonreductionisms. I shall try to show briefly a few similarities and differences in their positions on the puzzling question of institutional reality.

Let us consider the passage by Kelsen I quoted above: ‘People assemble in a large room, make speeches, some raise their hands, others do not – this is the external happening. Its meaning is that a statute is being passed, the law is created’. We have certain human acts, certain physical entities, some “brute” facts, on the one hand, and their objective legal meaning (the enactment of a statute), on the other hand. Those acts of will – in Kelsen’s words – have the objective legal meaning of the enactment of a statute because they conform with the content of a valid norm. Namely, the validity of a norm – its ‘specific existence’ in Kelsen’s words – attributes an objective legal meaning to the acts that conform to its content, and it constructs those acts as the enactment of a statute: ‘That an assembly of people is a parliament, and that the result of their activity is a statute (in other words, that these events have this ‘meaning’), says simply that the material facts as a whole correspond to certain provisions of the constitution. That is, the content of an actual event corresponds to the

content of a given norm.²⁷ If that norm had not existed – or if it had not been valid, what for Kelsen is equivalent – the same acts would not have had that objective legal meaning: they would only have had a subjective one. Same acts, two different meanings.²⁸

Searle, faced with the same example, would say that ‘X (those human acts) count as Y (enacting a statute) in C (the context of a parliamentary legal system)’. This is a constitutive rule that imposes the status of enacting a statute to the acts of that group of persons, with the associated function, for example, of guiding behaviors. Therefore, given X, in the context C, collective intentionality – the shared belief that Y is enacting a statute – constructs the institutional fact Y. If collective intentionality does not obtain, then X does not count as Y. The same acts could obtain, but the institutional fact Y would not exist. Same acts, two different facts.

Up to now I have stressed some similarities between Kelsen and Searle’s solutions. Now I would focus on two main differences.

a) According to Kelsen, the objective legal meaning of an act depends on a (regulative) norm which has a different structure from the (constitutive) rule that, according to Searle, imposes status and function on a fact. The structure of a norm, according to Kelsen, is ‘If X, then Y ought to be’; the structure of a rule, according to Searle, is ‘X counts as Y in C’.

This sharp difference can be weakened if we interpret (at least) the kelsenian basic norm, from a dynamic point of view, as a constitutive rule, that could have roughly this formulation: ‘What is determined by the supreme original power in a society counts as the first constitution in that society’.

Two differences, however, would nonetheless persist. First, even if we interpret the basic norm as a constitutive rule, according to Kelsen there would be, in a legal system, only one constitutive rule that attributes objec-

tive legal meaning to human acts; all other norms, that carry out the same function, are regulative. Whereas, according to Searle, all the rules that construct institutional facts are constitutive (or they have, at least, a constitutive element). Second, for Kelsen the sole constitutive rule (the basic norm) is a presupposition of the legal science, a transcendental-logical condition of intelligibility of the whole legal order; for Searle, on the contrary, all constitutive rules that contribute to produce institutional reality seem to be socially constructed and/or accepted.

b) The above-mentioned collective acceptance of the imposed status and function constitutes, I would suggest, the second main difference between Kelsen and Searle.

According to Searle, the collective acceptance, 'within systems of constitutive rules',²⁹ is a necessary and sufficient condition for the existence of institutional facts.³⁰ Whereas for Kelsen it seems to be neither a necessary nor a sufficient condition.

But, in this case too, the differences are less sharp than they appear at a first sight.

It is true that for Kelsen the existence of every objective legal meaning only depends on the very existence of a valid legal norm, and, therefore, social acceptance, collective intentionality, social beliefs, and so on, are totally irrelevant on this point. They can only determine the subjective meaning of an act, not the legal objective one.

Kelsen's epistemology prevents him from taking into systematic account the notion of "efficacy" – a notion that, for him, properly belongs to causal sciences and not to the normative ones: even if collective acceptance makes effective a status and function imposition on some act, this acceptance is nevertheless not sufficient to ascribe an objective legal meaning to that act.³¹

But it is also true that in Kelsen's work we find the

idea according to which a necessary condition of the existence of a legal order in a society is its overall efficacy, namely the (institutional) fact that such a legal order is socially considered, as a whole, the law of that society. This is a pre-analytical condition of the existence of law that constitutes, as it is well-known, a very problematic point of *Reine Rechtslehre*.

In conclusion, roughly speaking, the opposition between objective legal meanings and institutional facts, as building blocks of institutional reality, is less sharp than it appears: on the one hand, Searle would regard kelsenian norms and objective legal meanings of acts as different sorts of institutional facts; on the other hand, Kelsen would regard at least an important part of Searle's institutional facts as norms or objective legal meanings of acts.

III. Some open questions

Now I would point out two open questions in Kelsen and Searle's theories. These questions have to do with a basic ontological tenet of both authors: the need to postulate a specific mode of existence of institutional reality. A mode of existence that would make true some statements which do not refer to physical entities.

Let us start with Searle. In some passages of his book, he admits that collective intentionality, which creates and maintains institutional facts, could be based on false beliefs: '[...] in extreme cases they [the participants] may accept the imposition of function only because of some related theory, which may not even be true. They may believe that it is money only if it is "backed by gold" or that is a marriage only if it is sanctified by God or that so and so is the king only because he is divinely authorized [...]. As long as people continue to recognize the X as having the Y status function, the institutional

fact is created and maintained. They do not in addition have to recognize that they are so recognizing, and they may hold all sorts of other false beliefs about what they are doing and why they are doing it.³²

Searle's strategy, in my view, consists in keeping separate the belief which creates the institutional fact from the false belief which functions as justification of the first belief. There are cases, however, in which the second belief collapses on the first one. In such a situation, I think, some difficulties arise for Searle's theory.

Let us take the following example. Let us suppose that in antiquity the application of a constitutive rule according to which "Blindness counts as a divine sanction" had created the institutional fact named "divine sanction". People collectively accept this rule, which imposes to blindness (a brute fact) the status of a divine sanction, and then the function of punishing blind persons, with associated normative consequences for them, such as to be considered blameworthy, to be marginalized, and so on. The normative background could be, for example, that constituted by the natural law doctrine in the antiquity.

If a divine sanction is an institutional fact, then it is true – atemporally or plainly true, according to von Wright's definition³³ – a statement like "the blindness of Oedipus is a divine sanction", which corresponds to that institutional fact. This statement should not be confused with other true statements, according to which, for example, 'The ancient Greeks shared the belief that "Blindness of Oedipus is a divine sanction"', 'The ancient Greeks accepted the constitutive rule "the Blindness counts as divine sanction"', and so on. We do not need assuming the existence of any institutional fact to affirm the truth of these last statements. But the very point of Searle is that institutional facts make true – in the sense of truth as correspondence – the statements referring to them.

On the other hand, in our example, the content of ancient Greeks' belief, which functions as justification of the belief which creates the institutional fact, is just that "Blindness is a divine sanction", that is to say it is exactly the same belief which creates the institutional fact. In other words, the 'related theory' that justify the status and function imposition on blindness is that "Blindness is a divine sanction". Well, I suppose that Searle would agree, on the basis of modern natural sciences paradigms, that ancient Greeks' theory is false, that blindness is an illness and not a divine sanction, namely that the ancient Greeks' belief according to which "Blindness is a divine sanction" is a false belief. Then, I guess, Searle should conclude that a statement like "the blindness of Oedipus is a divine sanction" is false, atemporally false.

The amazing conclusion is that the same statement ("the blindness of Oedipus is a divine sanction") would be atemporally true, as corresponding to an institutional fact, and atemporally false, according to the paradigms of natural sciences, which, for Searle, describe '[...] the most fundamental features'³⁴ of our only world. If this conclusion is sound, there is, I guess, a serious problem for Searle's theory.³⁵

It seems to me that Kelsen faces an analogous dilemma when he deals with the subject matter of irregular norms. The problem is the following.

From a dynamic point of view, in Kelsen's *Stufenbau* a norm is valid if and only if it was enacted by an authorised organ, that is an organ that was empowered to enact that norm by a superior valid norm. The legal system is thus necessarily consistent, because every valid norm (except the basic one) conforms to a superior one. Dealing with the conflict between norms of different levels, for example between a statute and a judicial decision, as well as between the constitution and a statute, Kelsen writes: 'A "norm contrary to a norm" [...] is

a self-contradiction; a legal norm which might be said to be in conflict with the norm that determines its creation could not be regarded as a valid legal norm – it would be null, which means it would not be a legal norm at all.³⁶ Then, what about irregular norms? What about, for example, a statute enacted by an unauthorized organ, or whose meaning-content contradicts the meaning-content of a superior norm? If and when that statute is annulled by a competent organ (for example a constitutional court), there is no problem. But it happens sometimes that such a statute is not annulled and remains in force. According to Kelsen, in this case the statute which is deemed to be against the constitution maintains its validity till it is repealed.

Here again, as in Searle's case, we meet a statement, for example "The statute X is valid at time t in the legal system S" which is atemporally false, because the statute conflicts with the constitution, and it is atemporally true, because the statute is not (yet) repealed by the constitutional court.

Kelsen is aware of the existence of this problem inside his own theory, and tries to overcome it by resorting to the so called "tacit alternative clause":³⁷ the question is answered affirming that the previous statement is atemporally true and not false. His solution is of course highly problematic, even if I tried, elsewhere,³⁸ to argue for the consistency of Kelsen's idea with the whole structure of pure theory.

Is there also any solution for the analogous problem that, in my opinion, affects Searle's theory?

IV. An alternative? Alf Ross's approach

A possible way out,³⁹ but obviously not acceptable for Searle, would be rejecting the mode of existence of institutional facts and to reduce institutional facts to

brute facts. This solution, in the legal field, is presented by Scandinavian legal realism and by Alf Ross, who deny the need to postulate the existence of institutional facts in order to formulate true statements referring to the same phenomena that, for Searle, are institutional facts.⁴⁰

As it is well-known, Ross analyses legal terms such as ownership, right, territory, marriage, nationality, etc., as a 'technique of presentation [...] which is highly important if we are to achieve clarity and order in a complicated series of legal rules.'⁴¹ In my opinion, something like that seems maintained also by Searle, when he says: 'The word "money" functions as a summary term or as a place holder for being a medium of exchange, a store of value, a payment for services rendered, a measure of value of other currencies and so on.'⁴²

But, Ross adds, these terms connect 'a cumulative plurality of legal consequences [...] to a disjunctive plurality of conditioning facts.'⁴³ And these terms are completely hollow: '[...] they are words without meaning, without any semantic reference, and serve a purpose only as a technique of presentation. Nevertheless, it is possible to talk with meaning about rights, both in the form of prescriptions and assertions.'⁴⁴ If we adopt this perspective, institutional facts are not partially constructed by language: they simply do not exist. And believing in their existence would show, following Ross: '[...] a considerable structural resemblance to primitive magic thought concerning the invocation of supernatural powers which in turn are converted into factual effects. Nor can we deny the possibility that this resemblance is rooted in a tradition which, bound up with language and its power over thought, is an age-old legacy from the infancy of our civilization.'⁴⁵ And that would be so, not only for people who share common beliefs about such supposed institutional facts and socially accept them, but also for scientists and philosophers who claim they are making true statements about them.

Accordingly, the terms which, in Searle's opinion, would refer to institutional facts would be but void words, without any semantic reference.

Hic Rhodus, hic salta.

Notes and references

- 1 J.R. Searle (1996). *The Construction of Social Reality*. London, Penguin Books.
- 2 H. Kelsen (1978 [1960]). *Pure Theory of Law*. Berkeley, Los Angeles and London, University of California Press.
- 3 *Ibid.*, p. 2.
- 4 *Ibid.* Cf., in the same sense, the first edition of *Reine Rechtslehre*: H. Kelsen (1992 [1934]). *Introduction to the Problems of Legal Theory*. Oxford, Clarendon Press, pp. 8–9.
- 5 Cf. V. Villa (1999). *Costruttivismo e teorie del diritto*. Torino, Giappichelli, p. 45.
- 6 H. Kelsen, *Pure Theory of Law*, quot., p. 106.
- 7 Kelsen presents, for the first time, these ideas in *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatz*, Tübingen, Mohr, 1911, and in *Über Grenzen zwischen juristischer und soziologischer Methode*, Tübingen, Mohr, 1911.
- 8 H. Kelsen, *Introduction to the Problems of Legal Theory*, quot., p. 7.
- 9 *Ibid.*, p. 11.
- 10 H. Kelsen, *Pure Theory of Law*, quot., p. 70.
- 11 J.R. Searle (1998). Social Ontology and the Philosophy of Society, pp. 143–58 in *Analyse & Kritik*, 20, at p. 143.
- 12 Cf. J.R. Searle (1969). *Speech Acts: An Essay in the Philosophy of Language*. Cambridge and New York, Cambridge University Press; J.R. Searle (1979). *Expression and Meaning: Studies in the Theory of Speech Acts*. Cambridge and New York, Cambridge University Press.
- 13 Cf. J.R. Searle (1983). *Intentionality: An Essay in the Philosophy of Mind*. New York, Cambridge University Press; J.R. Searle (1992). *The Rediscovery of the Mind*. Cambridge, Mass. and London, MIT Press.
- 14 J. R. Searle, Social Ontology and the Philosophy of Society, quot., pp. 156–57: 'We are talking about how society organises power relations. It normally does it through the institution of

status function. Somebody is the boss and somebody else an employee, somebody is an elected president, somebody is defeated and so on. And all of this is designed precisely to intersect with other elements of the society. So, in order to have money you have to have a system of rights and obligations. You have to have the ability to buy and to sell, to store value in the form of money as payment for services rendered. So, that is the reason for the interlocking complexity. That's what we have the system for. It is designed and has developed to enable people to cope in complex social groups, in power relations.'

15 Searle labels this position as "social constructionism", and defines it as 'the view that reality is socially constructed, that what we think of as "the real world" is just a bunch of things constructed by groups of people', J.R. Searle, *The Construction of Social Reality*, quot., p. 183.

16 *Ibid.*, p. 155.

17 Cf. *ibid.*, p. 8.

18 Cf. *ibid.*, esp. pp. 190–91.

19 Cf. H. Kelsen, *Pure Theory of Law*, quot., p. 44.

20 *Ibid.*, p. 202.

21 Cf. *ibid.*, pp. 75–91.

22 *Ibid.*, p. 72.

23 But not a radical one: cf. V. Villa, *Costruttivismo e teorie del diritto*, quot.

24 Cf. J.R. Searle, *The Construction of Social Reality*, quot., p. 211: 'On this account facts are not complex objects, nor are they linguistic entities; rather, they are *conditions*, specifically, they are conditions in the world that satisfy the truth conditions expressed by statements.'

25 Cf. J.R. Searle (1997). Responses to Critics of *The Construction of Social Reality*. *Philosophy and Phenomenological Research*, LVII, 2, 1997, pp. 449–58, at pp. 455–56, where he affirms that David-Hillel Ruben, in his criticism, 'makes a mistaken and question begging identification between physical movements and actions. Ruben simply assumes that "same physical movements" implies "same action", that an "action per se" is just a physical movement and that everything else is "relative to a description"'. But one thing we can learn from my account is that this is false. In one case movements of a certain physical type constitute the action of scoring a touchdown. In the other case movements of the same physical type do not. Same movements different actions. The fact that the actions are

different will indeed generate different descriptions because there are different facts that the descriptions must describe. Different true descriptions correspond to different actions. Furthermore, it is not only false but question begging to identify action with bodily movement alone because the distinction I am making is that between actions which are made possible by the existence of the rules and those which are not. The fact that those physical movements *count as* the action of scoring a touchdown can only exist because of the rules of football.'

- 26 I am following here the standard English translation of the German word *Sinn*, as it is used in these contexts by Kelsen. 'Meaning', namely, is not here the translation of the German word *Bedeutung*; Kelsen is not speaking of a semantic notion.
- 27 H. Kelsen, *Introduction to the Problems of Legal Theory*, quot., p. 10.
- 28 Cf. *ibid.*, pp. 9–10: 'It is necessary, then, to distinguish between the subjective and the objective meaning of an act. The subjective meaning may, but need not, coincide with the objective meaning attributed to the act in the system of all legal acts, that is, the legal system. The act of the famous Captain from Köpenick was to have been – its subjective meaning – an administrative directive. Objectively, however, it was not an administrative directive but a delict. When members of a secret society, intending to rid their country of undesirables, condemn to death someone they regard as a traitor, they themselves consider their act, subjectively, to be a pronouncement of the death penalty. They call it that, and instruct their agent to kill the condemned party. Objectively – in the system of objective law – the killing is murder by secret tribunal, and not the carrying-out of a death penalty. And this is so even though the external circumstances of the act cannot be distinguished from those of carrying out a death penalty.'
- 29 J.R. Searle, *The Construction of Social Reality*, quot., p. 28
- 30 *Ibid.*, p. 51: 'The point is that the Y term must assign some new status that the entities named by the X term do not already have, and this new status must be such that human agreement, acceptance, and other forms of collective intentionality are necessary and sufficient to create it.'
- 31 It is worth to notice, however, that for Searle too not every single act or fact should be socially accepted in order to become an institutional fact. Cf. J.R. Searle, *The Construction*

of *Social Reality*, quot., p. 32: '[...] we need to distinguish between institutions and general practices on the one hand and particular instances on the other, that is, we need to distinguish between types and tokens. A single dollar bill might fall from the printing presses into the cracks of the floor and never be used or thought of as money at all, but it would still be money. In such a case a particular token instance would be money, even though no one ever thought it was money or thought about it or used it at all.'

- 32 *Ibid.*, pp. 47–48. The same passage is the very object of a deep and brilliant criticism by B. Celano (1999). Collective Intentionality, Self-referentiality, and False Beliefs: Some Issues Concerning Institutional Facts, *Analyse & Kritik*, 21, 2. The conclusion of Celano's argument is that '[...] institutional facts being belief-dependent is not compatible with people having false beliefs about them'. I shall not discuss here his argument.
- 33 Cf. G.H. von Wright (1984). Truth, Knowledge, and Modality. *Philosophical Papers – volume III*. Oxford, Blackwell, p. 5.
- 34 J. R. Searle, *The Construction of Social Reality*, quot., p. XI.
- 35 An obvious solution could be to reject the nature of institutional fact attributed, in the example, to the divine sanction: blindness, even if people believe it to be a sanction imposed by God, because of such a belief being false, remains but a brute fact. In this case, however, I guess that Searle's very definition of institutional facts should be partially modified. In the legal domain, at least according to legal realism, there is, in fact, plenty of cases in which people share false beliefs on the existence of supposed institutional facts (rights, duties, contracts, etc.): if blindness as a divine sanction is not deemed by Searle to be an institutional fact, then neither legal rights, duties, contracts, etc., would be institutional facts, contrary to Searle's explicit tenet.
- 36 H. Kelsen, *Pure Theory of Law*, quot., p. 267.
- 37 Cf. *ibid.*, pp. 267–76.
- 38 Cf. P. Comanducci (1997). Taking Kelsen Seriously, pp. 165–82 in E. Garzón Valdés, W. Krawietz, G. H. von Wright and R. Zimmerling (eds.), *Normative Systems in Legal and Moral Theory*. Berlin, Duncker & Humblot.
- 39 There are of course other solutions: a very interesting one is offered by the conventionalist approach. Cf. at least: D. Lewis (1969). *Convention*. Cambridge, Mass., Harvard University Press; E. Lagerspetz (1995). *The Opposite Mirrors. An Essay on the Conventionalist Theory of Institutions*. Dordrecht, Kluwer.

- 40 For a smart analysis of both Ross' and Searle's solutions to the question of institutional reality, cf. B. Celano (1999). *Institutional Facts: The Realist Approach*. Manuscript.
- 41 A. Ross (1957). Tû-Tû. *Harvard Law Review*, 70, 5, pp. 812–25, at p. 821. Cf. also A. Ross (1958). *On Law and Justice*. London, Stevens & Sons, pp. 170 ff. and *passim*.
- 42 J. R. Searle, *Social Ontology and the Philosophy of Society*, quot., p. 155.
- 43 A. Ross, Tû-Tû, quot., p. 820.
- 44 *Ibid.*, pp. 821–22.
- 45 *Ibid.*, p. 818.

Ota Weinberger

DEMOCRACY AND THEORY OF INSTITUTIONS

I. Defining the notion of democracy

The task of defining the notion of democracy is confronted with three logical and methodological problems:

(i) The methodological problems of real definitions in general. If we have a class of objects which are interesting for research in a certain field we may try to specify the essential or defining features of all objects of this class. The methodological peculiarity of this task arises from the fact that the class of objects whose essential features are sought are not given ostensibly, but the objects are determined as members of the class by a set of common criteria defining the class-membership. Generally speaking, the search for essential features in order to arrive at a so-called real definition is circular.¹ Only a constructivist approach can be successful. In our case of defining the notion of democracy, we cannot start with a list of the main – or all – democratic states and look for their common characteristics because the membership in the list must be justified by the criteria of subsuming an object under the notion of democracy.

From this consideration it follows that we cannot

arrive at an appropriate definition of democracy by an empirical analysis of a class of actual States, but that we should introduce the notion of democracy through a suitable conceptual convention.

(ii) A modern society and a modern State are very complex entities. To characterise them as democratic, less democratic or undemocratic is a qualification dependent not only on one simple quality. It seems, on the contrary, that the democratic character of a ruling system – or the degree of its democratic character – depends on a plurality of features. Figuratively speaking, we can say that the characteristic of being democratic is not only a feature of different degrees but, so to speak, a multi-dimensional feature. This means that the characterisation of a ruling system as more or less democratic is an evaluation of its character in different respects. Therefore it would not be justified to rank different States as democratic in different degrees on one line of intensity.

(iii) The notion of democracy and the characterisation of being democratic or undemocratic often plays the role of a recommendation or of a criticism, more than a purely descriptive characterisation of the institutional reality of the State. Democracy is often used as the expression of a political ideal which is defined only approximately, and in more or less figurative terms. Social philosophy has the task of specifying the essential features of the ruling in society and in the State which could satisfy the ideal purposes of the democratic rule.

II. The basic ideas of democratic ruling

The difficulties with the definition of the notion of democracy imply that it would be futile to try to present an exact definition of democracy. What we can do instead is to explain the main ideas and intentions that

lie at the basis of democracy as the watchword of the political programme called democratic form of life.

Lincoln's famous formula may in some way sketch the direction of these ideals: 'Democracy is the government of the people, by the people, and for the people.' Nobody really believes that Lincoln's formula constitutes a definition of democracy or an appropriate description of the democratic State or that it defines guidelines for the organization of democratic life. The formula expresses implicitly that in the democratic conception the State is not the dominium of any ruler or of any institution whether profane or sacred. But the essential question how the collective will of the people is established remains unanswered.

A structural analysis of the will formation of a collective shows that this process is always composed of two parts: (i) the proposal of an action programme; and (ii) the assent or rejection of the proposal by a collective vote. Additionally, rules must be established defining the procedure of voting.²

The elaboration of an action programme is always a product of the ideas of leading personalities and never the result of a genuinely collective process. Only interpersonal consultations are kind of transpersonal processes in generating political action programmes. But, indeed, even in these processes elites generally take the essential role. We can see that the intellectual leading function is not collective in the strictest sense, but only open to a bit of collective interaction.

In the practice of political parties – even of democratic societies – the ideal of openness often is not much stronger than in churches. The conception of the leading personalities is not subjected to critical considerations (cf. the idea of party discipline).

Democracy accepts in principle the notion that political action and democratic ruling should serve people's interest, yet the decision on what is peoples' inter-

est is a matter of standpoints and largely diverges between classes of the people and among political parties.

The general framework of democratic ideas does not unambiguously determine what is democratic, but there remains a broad field of open questions which can be decided in different ways.

III. A formal or material characterisation of democracy?

There is a strong tendency in the theory of democracy to characterise democracy by formal criteria or to state a single purpose for democratic ruling, namely the maximisation of freedom in society.³ I doubt whether these tendencies are sound.

The majority principle, the existence of different concurrent parties, the periodicity of elections are examples of the formal characteristics of democratic ruling. But our historical experience shows that the formal principles of democracy can easily be transformed or misused in such a way that very undemocratic structures may be introduced. Dictatorship, for example, can be introduced by majority vote, discrimination against minorities can be the effect of a majority decision, etc. Therefore the conclusion, that purely formal criteria cannot guarantee democratic forms of life, seems justified to me.

It is tempting to hold that the essential purpose of democracy is only the maximisation of freedom. Freedom as the ideal of liberal democracy is of course not unrestricted, but limited by the condition that the same freedom must be guaranteed to all people.⁴ But the problems of freedom are in fact much deeper. Freedom as a political postulate is not one single idea, but a rather complex cluster of different and often divergent claims,

so that the postulate to maximise freedom within the limits of the same freedom for all other people is not a clear nor even a consistent idea.

The freedom of conscience, for example, is a nearly universally accepted right in our cultural sphere. Yet the actual content of religious norms may be in conflict with other postulates of freedom. A person who decides to leave a religious community can be threatened with death penalty, the position of genders may be rather unequal, marriage with persons of another faith may be forbidden, etc. We see that elements of freedom can be in flagrant conflict with one another.⁵

Political aims designated as liberties have, of course, a strong suggestive power – for example, the liberties established in the European Union: liberty of residence, of goods traffic, of capital and of services. But, in my opinion, we should carefully analyse the social and economic effects of these liberties and not take only an emotional standpoint on these liberties.

Neither formal criteria alone nor a single universal ideal – namely the ideal of maximising freedom – can establish or safeguard the democratic form of life. Democracy is based both on certain formal principles and on a class of material principles essential for the democratic style of life.

The necessity of this dual basis of democracy in formal and material principles is shown *inter alia* by considering the role of human rights in the democratic State.

There is not a pre-established harmony between the ideals of human rights and the content of democratic majority decisions. If we conceive democratic decision making as a decision by majority vote, there is no guarantee that the decisions will be in accordance with human right principles. Majority groups will perhaps accept discrimination in their favour or even processes of expulsion of minorities in order to establish national (or ecclesiastical or other ideological) imperia (cf. the

ideas of "Großdeutschland", "Large Serbia", "theocratic society", etc.). Even genocide may be a result of a formally democratic majority vote.

Therefore, we have to find a theoretically and practically acceptable solution for the possible conflicts between free democratic majority decisions and the protection of human rights.

I shall try to find an answer to this vexing problem from the standpoint of the neo-institutionalist theory of institutions combined with the ideas of discursive democracy.

IV. Neo-institutionalism and democracy as an institution

The democratic State is an institution with a specific character. It is the fundamental thesis of the neo-institutionalist conception of institutions that every institution is built on the basis of certain *idées directrices*, which is a class of practical information determining the work of function to be achieved by the institution and the value standards to be applied in the institution.⁶

We hold that democratic systems are characterised by two defining elements: Firstly, by rules of collective will formation mirroring the prevailing will of the people and by rules of checking democratic ruling; and secondly, by an open class of leading ideas expressing the material principles of democracy.

The explanatory principle of the democratic society follows our general theory of institutions, and is of course not a mere *ad hoc* construction. I believe that through this approach we can properly characterise the relation between the material principles of democracy, this means *inter alia* the binding nature of human rights, and the autonomy of democratic will formation.

Democratic will formation is in principle autonomous to the effect that by using due processes of will formation which are established in the society under consideration accepted valuations and consented political measures are valid. But the processes of democratic will formation are by no means arbitrary, but subjected to argumentation. There are different levels of argumentation and different social processes of justifying value standards, fixed purposes and decisions on how to act.

In democratic societies there is a class of principles which are considered as essential to democratic life and which are therefore binding restrictions for possible democratic decisions. The situation leads to the following effect: The class of democratic leading ideas is not closed and not fixed once and for all. It is subject to social discourses, and therefore also subject to a kind of development. We can call the results of these discourses the humanisation of the principles and ideals of democracy. But, on the other hand, the actual conception of general democratic ideas is binding and therefore means a postulated restriction on permissible will formation in democratic processes.

At first sight it seems to be an insoluble conflict: (i) Democratic will formation is autonomous and the decisions obtained in due processes are valid. (ii) Democratic decision, will formation in legal or political issues, is bound to be justified by actual democratic principles acknowledged as *idées directrices* of the democratic system.

I believe that this conflict is in fact only apparent, but in reality a specific feature of democratic life in which processes of discourses take place on different levels and are realised by different persons or parts of society. The discourses on democratic principles and human rights take place so to speak in theoretical and moral discourses; argumentation about specific political measures or on legal decisions concern given problem situ-

ations and must be justified both by considering the usefulness and effectively of the choices and decisions as well as the postulates of democratic ideas which exclude some possible, but morally or politically impermissible solutions.

V. The idea of discursive democracy

The system of multilevel discourses is typical for modern democratic life and the source of a discursive dynamism. This is, in my opinion, a useful process with a tendency towards developing democratic ideas and applying them in practice, but it does not provide an effective guarantee that democratic leading ideas will always be realised in political practice.

The institutionalist view that I tried to expose demonstrates that democratic life is connected as well in theory as in practice with discourses. I recall president T.G. Masaryk's saying that 'Democracy is discussion' which concerns this feature of modern democracy. In contemporary political philosophy, there are two rather different conceptions of discursive democracy, the conception of Jürgen Habermas and my less optimistic and more critical view.

Habermas and I share some opinions and tendencies. We are both convinced that democracy must be developed as an open society in which political and ideological discourses have an essential influence on public affairs. We both plead for human rights and social justice and for the active participation of the people in controlling political issues. But our philosophical backgrounds are quite different, a fact which implies important differences in our conception of discursive democracy.

Habermas's teaching is rooted in his discourse philosophy, a methodological conception which I regard

as fundamentally misleading.⁷

Discourse philosophy is a philosophical doctrine elaborated by Habermas and Karl-Otto Apel. Its central theses are:

1. Rationality is conceived of as a collective process. Discursive rationality is put in opposition to the individual – solipsistic thought in Apel's terminology⁸ – and only those views are rational which are achieved by universal consensus in (ideal) interpersonal discourses.

But I am convinced that argumentation is quite independent of the individual or collective process of arguing. The validity of an argumentation is determined only by the logical relations and by the methods of empirical testing, but not by collective processes and consensus.

2. Ideal discourses which are defined as free of power relations (*herrschaftsfrei*), open to everybody concerned, and unlimited in time, are unrealisable. The essential point *herrschaftsfrei* is neither given in any society nor decisive to the result of the discourse.⁹ Therefore the notion of ideal discourses is an inappropriate idealisation. Actual discourses should not be judged by the criterion of similarity to this ideal, but subjected to criticism concerning the actual dangers of mistakes and shortcomings. We need an appropriate organisation of places for open discussion and critical analyses of eristic features of argumentations.

3. Habermas's notion of the so-called 'consensus theory of truth' is not well founded and leads our endeavour in a false direction.¹⁰ Truth, in the sense of Habermas's concept, is defined as the quality of a thesis which is accepted by universal consensus in an ideal discourse. There are at least the following objections against the consensus theory of truth: (i) There is no valid transition from the subjective opinions of the participants in discourses to objective validity (which is supposed in the notion of truth). (ii) Truth is here defined as a limit of argumenta-

tive processes. The notion of such a limit is meaningful only if the steps of such discourses would necessarily approach just one thesis. But in fact there is no guarantee that the steps of discourses will come always closer to just one limit. Therefore the introduction of such a limit-entity is logically not justified.

4. The collectivistic view on rationality and the aim to achieve a consensus leads research in a false direction. It is not the discussion of effective methods of enquiry and argumentation that are sought, but the methods of gaining assent. This is detrimental to both the natural sciences as well as political discourses.

5. Habermas defines good arguments as those which evoke assent in a given audience¹¹ and in doing so he mixes up two different things: the real validity of arguments and the convincing effect of an argumentation. There may be valid arguments which do not convince the present audience, and invalid (deceptive) arguments may have convincing effects. To understand the essential difference between good (valid) arguments and effective arguments – in the sense of actually evoking convictions and assent – is essential for the construction of a reasonable theory of argumentation.¹²

6. Concerning practical questions consensus is not a proof that the accepted solution is in fact correct or the best one. Consensus is only a sign of a democratically accepted view and therefore an appropriate basis for actual action, but not a proof that the decision is the best solution in an objective sense.

7. Discourse philosophy presupposes that there are some immanent suppositions of every communication, namely truthfulness and the readiness – and duty – to defend every thesis that we communicate. But to tell something does not imply the duty to defend the thesis in discourses, and we often believe and communicate in fact theses that we are not willing or able to defend discursively.

It is a consequence of discourse-philosophical views that Habermas is optimistic and presupposes that discourses will lead to good solutions of democratic ruling. He defines legitimacy and the acceptability of legal rules by the communicative procedure by which they are – or could be – established. ‘All persons which form the legal community are entitled to test as participants of rational discourses whether the norm under consideration will find or could find assent in the class of persons which could be concerned by it.’ ‘And on the post-traditional level of justification only such a law is legitimate that could be accepted by all members of the legal community in a discursive process of formation of opinion and will.’¹³

In my opinion, Habermas’s conception of legitimacy is neither clear nor useful. Is legitimacy bound to assent in a real discourse or is it sufficient that we can presuppose that assent could be achieved? Every political system declares itself and its laws to be legitimate. I wonder whether it is appropriate to restrict legitimacy to the existence or possibility of discursive assent, because often in political reality historical rights or actual facticity justify validity. It would be an illusion to declare all laws which are not justified by discursive assent to be illegitimate. If we take peace and peaceful evolution as the most important political ideal then we have to start from the actual political situation and we must acknowledge existing legal relations as *prima facie* legitimate. Such a view allows, of course, the struggle for a more democratic political system, but not simply by defining the actual political state as wholly illegitimate.

Habermas believes – without a convincing reason – that human rights will be established automatically by the democratic procedures of will formation.¹⁴ Yet a majority can be reached in decisions which essentially contradict some human right principles, such as a ma-

majority may vote for discriminating measures.

Habermas does not have a clear standpoint against the doctrine of natural law. This becomes evident, for instance, in the following quotation: '[...] a legal order can be legitimate only if it does not contradict moral principles.'¹⁵ Such a thesis, which is reminiscent of a natural law position, is hardly compatible with Habermas's subsequent theses, namely that moral principles have no hierarchical preference over law, and that autonomous morality stands to positive law in the relation of a supplement.¹⁶ To be *übergeordnet* or 'hierarchically stronger' means just to have the capacity to exclude the validity of another norm: here the capacity of morality to exclude the validity of law. In my opinion, morality and law are complementary just insofar that they both motivate the behaviour of people in society, but not in the sense that morality is able to supplement missing legal rules.

Habermas's discourse philosophical consequences in his theory of democracy are not convincing to me. Some examples of his problematic theses are:

(i) Practical questions can be judged impartially and decided rationally (*ibid.*, 140).

As the solution of practical problems depends essentially on value standards and preferences (which, of course, can be divergent) there is not a unique and impartial rational solution of all practical questions.

(ii) All norms of action (moral or legal norms) are valid that can be agreed upon by all persons potentially affected that participate in rational discourses (*ibid.*, 138).

The class of all persons potentially affected by an enactment is controversial in principle (e.g., future generations may have a justified interest in our actual decisions regarding our economic activities, but they cannot be participants in our rational discourses). There is no good reason for the supposition that universal agree-

ment will be reached on a proposed enactment.

(iii) Every attempt to arrive at an agreement on validity claims is a rational discourse if it takes place under the conditions of communication within a public realm established by illocutionary duties which makes possible free discussion about topics and contributions, information and reasons (ibid. 138 f.).

Rational discourse cannot be defined by formal procedural rules alone; it depends on appropriate methods of argumentation and on effective methods of enquiry, and in the realm of practical philosophy also on accepted value standards and preferences.

(iv) In moral discourses, the rule of argumentation has the form of the rule of universalisation (ibid., 140).

The principle of universalisation is, of course, neither uniquely determined (it is not stated which elements shall be subject to universalisation) nor is it sufficient by itself to underpin all moral argumentation.¹⁷

(v) Principles of democracy and of morality can be distinguished on the levels of external and internal considerations (1992, 142).

In my opinion it is not very illuminating to back up the distinction between morality and law by the old idea that in morality only inner views are relevant, while in law only external views are applied.

(vi) On the basis of rational morality (*Vernunftmoral*) the individual tests the validity of norms under the presupposition that they will be in fact fulfilled by everybody (ibid., 148).

Such a contrary-to-fact supposition – it is also held by other authors – is neither necessary nor useful. In arguing for rules and for the acceptance of moral principles we should take a realistic position.

It is a dangerous illusion to conceive of social discourses as processes in which all persons play the same role. A realistic sociological view on the social processes of argumentation and of producing convictions is

not shaped by such a conception of equality.

Habermas's supposition restricts his analysis in such a way that the most important problems are not analysed; in the first place the role of elites; and secondly, the multiplicity of dangers which can destroy the value of democratic processes (e.g., deceptive propaganda, slogans or the use of marketing-like methods in political practice).

If I interpret Habermas correctly he conceives legal processes – such as a lawsuit – as discursive processes. But in fact these argumentations are not orientated to find truth or practical principles, but to arrange and to balance interests. Discourses, and discourses of a specific form, are only a part of legal procedures.

VI. My conception of discursive democracy

In my conception of discursive democracy, discourses are useful hermeneutic tools which give us the opportunity of melioration of public affairs, but they define neither truth nor correctness nor value optimisation.

Essential to democratic life is that discourses should take place on different levels: as the preparation and critical checking of public action, as the work of the mass media and – last, but not least – of the social sciences.

In my conception of discursive democracy there is no place for the romantic optimism that holds that collective discourses automatically imply justice and prosperity and the freedom of people. On the contrary, I believe that democracy is always in danger, and therefore we must discuss political problems, fight for the realisation of the social presuppositions of an open society and criticise deceptive argumentations.

We actually live in an information society where everybody has broad access to information.¹⁸ But there is

also another side of the information society, namely nearly unlimited possibilities of indoctrination and a dangerous concentration of the mass media into few hands. This may become dangerous for the realisation of an open society precisely in borderline situations.

There are important possibilities for the development of universal political conceptions and a universal moral culture. But democracy also means the right of differentiation and freedom in the sense of choosing a specific lifestyle.¹⁹ In this respect there are many open questions in the European political reality.

Let me conclude with the following remark: The actual reality of the European Union should be analysed from the point of view of an institutional and discursive conception of democracy. From this analysis important reformative ideas could be derived.

Notes

- 1 Cf. Weinberger 1989, p. 364.
- 2 Weinberger 1979.
- 3 Kelsen 1929.
- 4 Kant 1956.
- 5 Weinberger 1978.
- 6 Hauriou 1965.
- 7 Habermas 1981; Apel 1973; Weinberger 1996.
- 8 The term "solipsistic" is here not appropriate. The thesis of solipsism concerns another problem, namely the epistemic view that only my own experience is possible and that there is no way to obtain intersubjective knowledge. Cf. Weinberger 1992a, p. 258, fn. 8.
- 9 Dissidents were able to argue convincingly and to develop reasonable views in a society of strong ideological oppression.
- 10 Cf. Habermas 1973; Weinberger 1996; *ibid* 1992a, esp. pp. 257 and 260 s.
- 11 Habermas 1973, where the author defines the quality of arguments as the 'power to reach consensus in discourse'.
- 12 Weinberger 1995.

- 13 Habermas 1992, p. 134 and 169.
- 14 There is a tension between facticity and validity, peoples sovereignty and human rights, but Habermas believes without strong argument that 'the normative content of human rights leave its mark on the realisation of peoples sovereignty' ('[D]er normative Gehalt der Menschenrechte geht vielmehr in den Modus des Vollzugs der Volkssouveränität selber ein.') *Faktizität und Geltung*, p. 131.
- 15 Habermas 1992, p. 137.
- 16 Habermas, loc. cit., p. 137.
- 17 Weinberger 1992b, esp. pp. 244–246.
- 18 Weinberger 1998.
- 19 Rescher 1993.

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ISBN 951-39-0704-X

THE MATHEMATICAL AND THEORETICAL REALITY

EDITED BY EERIK LAGERSPETZ, HEIKKI IKÄHEIMO & JUSSI KOTKAVIRTA

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