
ADRIANA PLACANI

Karl-Franzens-Universität Graz
adriana.placani@uni-graz.at

CONSTITUTIVE AND REGULATIVE RULES: A DISPUTE AND A RESOLUTION*

abstract

This paper examines the distinction between constitutive and regulative rules by way of the philosophical dispute between John Searle and Joseph Raz. These theorists disagree inasmuch as Searle claims that constitutive and regulative rules represent distinct types, while Raz argues that such a differentiation is untenable. This work acknowledges the merits of Raz's position, but argues that Searle's distinction between constitutive and regulative rules is sound given certain refinements. The paper argues that the distinction between constitutive and regulative rules should be grounded on the rules' distinct capacity for guidance (i.e., whether or not the rules themselves constitute normative reasons for action for subjects).

keywords

constitutive rules, regulative rules, Searle, Raz, normative reasons, action guidance

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1. Introduction Constitutive rules constitute and regulative rules regulate. This assertion seems uncontroversial if based solely on the qualifiers *constitutive* and *regulative* that are used to distinguish them. Whether there are other, non-linguistic grounds, for distinguishing between the two kinds of rules has proven more contentious. Perhaps the most pronounced disagreement is embodied by the opposing positions of John Searle and Joseph Raz. Whereas Searle claims that constitutive and regulative rules represent distinct types, Raz contends that no such differentiation can be made.

It seems to make sense to claim that not all rules are of the same sort, but it is not evident how and which divisions can be made. The dispute between Raz and Searle aids in the revelation of one method for distinguishing between rule types, which centers on the analysis of how agents use rules and how rules guide practical reasoning. This method helps to resolve the disagreement between Raz and Searle, which is the aim of this paper.

My position acknowledges the strengths in some of the claims of each camp, not all of which are mutually exclusive. Nevertheless, this paper stresses that Searle's distinction between constitutive and regulative rules is tenable, but only if certain clarifications and refinements are made to it. This, then, does not mean that Raz's position is fully refuted, nor Searle's views fully embraced. My claim is that the criterion by which the differentiation between constitutive and regulative rules should be made is not clearly explicated by Searle. I argue that the distinction is better conceived in terms of these rules' distinct capacity for guidance (i.e. whether or not the rules themselves constitute normative reasons for action for subjects).

2. Constitutive and Regulative Rules: Searle's Distinction and Raz's Challenge The distinction between constitutive and regulative rules is most famously associated with John Searle.¹ As described by Searle in his book, *Speech Acts: An Essay in the Philosophy of Language*, constitutive rules "create or define new types of behavior" (Searle, 1969, p. 33). They create the very possibility of engaging in certain kinds of conduct (Searle, 1969, p. 33). For Searle the formal way of thinking about constitutive rules is the following:—"X counts as Y in context C" (Searle, 1969, p. 35). On the other hand, regulative rules regulate antecedently or independently existing forms of behavior (Searle, p. 33). They require or permit, certain acts and characteristically take the form of:—"Do X" or—"If C do X" (Searle, 1969, p. 35).

¹ Other philosophers have also distinguished between these rules — most prominently H. L. A. Hart (1961), J. Rawls (1955), J. G. Warnock (1971), and M. Black (1962).

Prototypical examples of constitutive rules are rules of games such as: castling in chess, dunking in basketball, performing a corner-kick in soccer, and so on. To use one of these examples in Searle’s formula for constitutive rules, we would say that: transferring the king from its original square two squares towards the rook on its original square, then transferring the rook to the square the king has just crossed (X) counts as castling (Y) in a game of chess (C). Notice that while the same conduct may be displayed, for instance someone can move the rook three squares to the left and the king two squares to the right, the conduct will only count as castling in a game of chess. Even from this simple example it is easy to notice that specific constitutive rules may, and often do, depend on other constitutive rules in a system of rules (e.g., the rule that says: the piece that has the shape of a tower with battlements counts as a “rook”). Still, what is important for the present purpose is that the rule of castling in chess defines and constitutes castling. So, absent the rules of chess and the rule of castling itself one could never, ever castle.

Regulative rules regulate antecedently or independently existing forms of behavior—that is, behavior that exists without reference to the rule (Searle, 1969, p. 33; Smith, 2003, p. 9). As a consequence, the behavior is logically prior to the rule that regulates it (Schauer, 1992, p. 6; Rawls, 1955). Eating etiquette is an example of the sort of behavior that is prior to regulating rules. Consider the following example of such etiquette: “When cutting food, hold the knife in the right hand” (Searle, 1969, p. 34). Bear in mind that this is a regulative rule because eating with a knife itself exists independently of the rules of polite table behavior (Smith, 2003, p. 9). In contrast to Searle, Joseph Raz holds that every constitutive rule also has a regulative side.² Further, he claims that what follows logically from Searle’s argument is that all rules are both regulative and constitutive (Raz, 1975/1999, p. 109). Raz’s argument starts with the following comparison between two pairs of act descriptions:

	A		B
1	'Giving £50 to Mr. Jones'	And	'paying income tax'
2	'Saying: "I promise"'	And	'promising'

In Raz’s example, there is a law about paying ones’ taxes and a rule about promising. One can pay one’s income tax by giving Mr. Jones, who is the HM Inspector of Taxes, £50 (Raz, 1975/1999, p. 109). Also, one can promise (to pay £50 to Mr. Jones) by saying “I promise” (Raz, 1975/1999, p. 109). 1A and 2A provide descriptions of actions that would accord with the rules about paying taxes and promising regardless of whether such rules existed (Raz, 1975/1999, p. 109). In conformity with Searle’s account, this makes the rules regulative (Raz, 1975/1999, p. 109). 1B and 2B describe actions in accordance with the rules in a way which could not be given if there were no such rules (Raz, 1975/1999, p. 109). It follows that the rules are constitutive as well. Raz claims that because a similar pair of act descriptions is available for every rule it follows that all rules are both constitutive and regulative (Raz, 1975/1999, p. 109). Searle, by contrast, argues that regulative rules regulate pre-existing activities whose existence is logically independent of the rules, while constitutive rules constitute activities whose existence is logically dependent on the rules (1969, p. 34). He illustrates this with the help of the following example: It is possible, he says, for twenty-two men to go through all

² But see Bulygin (1992).

the physical movements as two teams playing football would go through, but if there were no rules of football, then the twenty-two men would not be playing football (Searle, 1969, p. 34). Raz answers to this by making use of the distinction between a normative act description and a natural act description (Raz, 1975/1999, p. 110).

Normative act descriptions are those for which a complete explanation must include reference to a rule (Raz, 1975/1999, p. 110). By contrast, descriptions for natural acts may be given without reference to a rule (Raz, 1975/1999, p. 110). Following the example from the above table, going through the motions of paying income tax (1A) is not paying income tax unless an income tax law exists (Raz, 1975/1999, p. 110). This, then, requires a normative act description. However, that does not mean that the rule itself (the tax law) is constitutive. In Raz's conception, while a difference between acts is possible, it does not need to correspond to a difference between types of rules (Raz, 1975/1999, p. 110). Further, as Raz says, "every rule regulates action which can be described without presupposing the existence of that rule (though sometimes it regulates only actions done with the intention of invoking the rule). Similarly every rule 'creates' actions which can be described only in ways which presuppose its existence" (Raz, 1975/1999, p. 110).

3. The Capacity for Guidance of Rules

Searle's distinction between constitutive and regulative rules has intuitive appeal, even if Raz (rightly) believes it to be misleading. Others have leveled criticisms similar to those of Raz (Warnock, 1971; Giddens, 1984; Ruben, 1997). Nonetheless, distinguishing between different types of rules is important. It may simply be the case, as I suggest, that Searle does not clearly explicate the criteria by which the differentiation between constitutive and regulative rules can be made.

We would do well to return to Searle's original description in order to source the limitation in his distinction:

Where the rule is purely regulative, behavior which is in accordance with the rule could be given the same description or specification (the same answer to the question "What did he do?") whether or not the rule existed, provided the description or specification makes no explicit reference to the rule. But where the rule (or system of rules) is constitutive, behavior which is in accordance with the rule can receive specifications or descriptions which it could not receive if the rule did not exist (1969, p. 35).

In order to illuminate the distinction, Searle relies, at least in part, on that which follows from having regulative and constitutive rules (i.e., certain otherwise unavailable kinds of act descriptions in the case of constitutive rules). As Raz indicates, the problem with that approach is that both rules can bear descriptions according to which they are at the same time regulative and constitutive. In order to make the distinction acute one would need to rely on something else; my claim is that the fact that constitutive and regulative rules stand in different kinds of relationships relative to their subjects and the actions that they reference can keep this distinction alive while answering and acknowledging some of Raz's criticisms. The crucial distinction between constitutive and regulative rules is, then, the difference between these relationships, which manifests itself in the rules' capacity for guidance. Before setting off with the analysis, some additional definitions are in order. First, a rule's capacity for guidance depends on whether the existence of the rule is a normative reason for action for subjects of that rule. Second, I take a normative reason for action to be a kind of consideration that counts in favor of or against performing a specific action (Scanlon, 1998). Finally, the fact that an agent has a normative reason to perform a certain action, ϕ , means that there is some normative requirement or obligation that she ϕ , which, in turn, means

that the agent's ϕ -ing must be justified from the perspective of the normative system that generated that requirement (Smith, 1994, p. 95).

The distinction between rule types becomes readily apparent when Searle's formal characterization of constitutive rules — "X counts as Y in C"—is compared with the formal characterization of regulative rules — "If C do X".³ For both types of rules, the variable X stands for the action to be performed.⁴ However, for constitutive rules X describes or specifies an action, while for regulative rules X represents an action that is demanded (e.g., do or don't X). Raz is correct in that there are two distinct types of acts that Searle's rules regard, but the rules themselves stand in different kinds of relationships vis-à-vis those acts, which makes them distinguishable.

First, consider the constitutive rule of chess called castling: "This is a move of the king and either rook of the same color along the player's first rank, counting as a single move of the king and executed as follows: the king is transferred from its original square two squares towards the rook on its original square, then that rook is transferred to the square the king has just crossed." (FIDE Laws of Chess 2008, Article 3.8). Next, consider a regulative rule about speeding that stipulates: "Maximum speed on the highway for all motor vehicles is 90 kilometers per hour". Looking at how these two rules stand in relation to the action that they reference, it becomes apparent that the rule of castling is not prescribing castling, meaning that it is not recommending, commanding, or claiming that one ought to castle in a game of chess. In turn, it is clear that the speeding rule is setting the speed limit for motor vehicles on the highway. The rule, then, states that all drivers ought to stay within this limit. It makes clear that one ought not to drive faster than 90 km/hour.⁵

There are multiple ways in which one can both violate and abide by the above speeding rule. Every speed between 0 and 90 km/hour is in accordance with the rule, while anything greater than 90 km/hour violates it. By contrast, there is only one precise way (or two) in which a player can castle. The rule that specifies what amounts to speeding puts up a barrier, raises an obstacle on the range of available legal options of driving on the highway. But the rule that specifies what amounts to castling in chess does not try to rein in something that people were beforehand free to do. The rule makes castling possible because the possibility of castling (now) exists according to the rule of castling. Further, the rule specifies the exact way in which castling is to be done. However, the rule does not say that a player ought to castle. Note that the rule of castling creates the possibility that players, if they choose to, can castle. Does this mean that the rule is instead permissive (i.e., the rule allows players to castle)? I believe such a description would be inadequate for it would be pointless to permit that somebody "forsmink" when "forsminking" did not exist. So, the rule of castling creates "castling", thus creating the (ontological, not deontic) possibility of castling.

When a subject is faced with a constitutive rule the performance of actions referenced by the rule depends on the subject's prior reasons in the sense that, more often than not, an agent will invoke a constitutive rule only when she has reasons to do so. In this sense, if a subject has prior reasons (e.g., strategy) to move her king two squares in a game of chess then she will invoke the rule of castling and act accordingly. However, the rule *qua* rule does not provide the

3 The paper's treatment of regulative rules includes prohibitions (e.g., don't do X), but avoids the complicated matter of rules that permit action (e.g., an agent may or is allowed to X). It is not clear whether permissions are an independent category from prescriptions and prohibitions because permissions can be defined as the absence of prohibitions. See von Wright (1983).

4 In the case of constitutive rules, 'X' need not be an action like in the rule: "This paper counts as money", but in the case of regulative rules "do X" is, necessarily, an action.

5 The rule, as it is formulated, allows for different interpretations that can give rise to exceptions to the claim.

subject with a normative reason for doing so. On the other hand, after a decision to castle is made it is no longer optional for the subject to choose how she will castle. The rule governing how to castle is antecedently defined. The same reasoning applies to constitutive rules outside the prototypical examples from games. Classic models of constitutive rules from law, such as laws about making contracts or wills, are not normative reasons in favor of making either wills or contracts. These legal rules are similar to their relatives from the game examples because what they do is create the ontological, but not deontic, possibility of making contracts and wills (still less so the obligation).

When a subject is faced with a regulative rule like the speeding law, the performance of actions that are in conformity with the rule is not conditional on the subject's prior reasons to perform the actions, or her evaluation of the content of the rule. Irrespective of the subject's reasons, there is now a normative reason to perform the action(s) that the regulative rule specifies. This reason is the fact of the existence of the rule demanding the action. This does not mean that a subject has a conclusive reason for action as there may be reasons that can defeat the rule. Nevertheless, a subject now has a new normative reason where there previously may not have been one. In the speeding example, there is a spectrum of available options for subjects, but this need not be the case. A regulative rule that says: "All children must wear blue shoes" does not allow for a multitude of available actions that conform to the rule.

Joseph Raz's examples of promising and paying income tax are vulnerable to an objection that follows from the above analysis. A law demanding that subjects pay income taxes is a reason for them to pay income tax. Paying the HM inspector £50 and paying income tax may describe the same action, but the rule about income taxes that stipulates that taxes ought to be paid stands in a peculiar relationship vis-à-vis its subjects. This relationship consists in the fact that the rule itself is a reason for action for subjects, a reason to do as the rule stipulates. On the other hand, the rule about promising is not in itself a reason to start making promises. Raz describes two actions — saying: "I promise" and Promising. Both of these may be accurate descriptions of the same conduct, but there is no relationship between the rule about promises (let's say the rule that says promises are made by saying: "I promise") and its subjects such that the rule is itself a reason for action — a reason why subjects ought to make promises. On the other hand, a rule saying that "promises ought to be kept" constitutes a normative reason for subjects to keep their promises. This is because the latter rule is regulative.

One might be tempted to say that the regulative rule "promises ought to be kept" is in fact constitutive of promising. It seems that without such a rule promising does not mean what it typically does (i.e., declaring to undertake a commitment). I don't think this is accurate. Saying 'I promise' constitutes the formal way in which somebody makes a promise, but the normativity of the promise — captured by the rule "promises ought to be kept" — is subject to further conditions. For instance, promises ought to be kept when one is not coerced into promising, when that which is promised is not impossible, or, most importantly, when a promise has actually been made. This means that the regulative rule can only show its force once a promise has been made, and the promise is not annulled by disqualifying considerations. Under these and further conditions, the rule about keeping promises will be in force and will guide that which happens after or once the act of promising is completed. This shows the rule to be regulative since it regulates a previously existing act.

Moreover, constitutive rules such as the rules of chess cannot be violated in the same way in which one can violate regulative rules like "promises ought to be kept". As Searle writes, "it is not easy to see how one could even violate the rule as to what constitutes check mate in chess, or touchdown in football" (1969, p. 41). If a player were not to perform the correct actions while playing chess (e.g., the player chose to castle with pieces other than the rook and king) it would not be the case that the castling rule was violated or castling was ill-performed. It

would simply be the case that the player, who did not perform the actions in the right way, did not castle. This is because the X in “X counts as Y in C” describes the “how-to” of Y-ing in a basic definitional sense. On the other hand, if somebody made a valid promise that they did not honor, then this would constitute a violation of the rule about keeping promises because a promise had been made.

The above analysis provides reasons why the distinct capacity for guidance of constitutive and regulative rules is an important point of differentiation between the rule types. To summarize, the preceding addressed the rules’ capacity for guidance in terms of the existence of the rules providing or not providing normative reasons for action for subjects. It has been shown that both types of rules regard action, but they regard it in different ways. Regulative rules demand that a certain action be performed. As such, they are normative reasons for action that compete with other reasons on the balance of reasons of an agent, which makes them violable. In turn, constitutive rules qua rules do not provide agents with reasons, but merely identify the “how-to” of bringing something into existence. Constitutive rules are, therefore, inviolable as they do not face reasons that might stand against them on the balance of reasons. In these ways, the guiding capacity of constitutive rules is presented as a highly specialized function. Although Joseph Raz offers strong arguments in favor of the indistinguishability of regulative and constitutive rules, his position ultimately misapprehends the narrow scope and particularity of constitutive rules’ limited guiding capacities. For now, it might be enough to say that there are clear reasons to take Searle’s position as the ruling one.

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