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Remarks on The Ontology and The Normative Aspect of Constitutive Rules[1]

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ABSTRACT
After some introductory remarks on constitutive rules I proceed to one problem still insufficiently handled in the constitutive rules research: that of how coordinate the definitional exigence that constitutive rules should define new (types of) activities and, on the other hand, the claim that constitutive rules should be a disjoint class with that of regulative or prescriptive rules. I analyse briefly several examples, such as promises or interest-charging, or 'sprezzatura', and set out a number of problems and complexities inherent in these examples. Yet I also indicate commonalities shared by all of them.Short of offering a solution, I put forward the hypothesis that constitutive rules may in some cases be in rerum natura bound up with prescriptive norms and can be divided from them only in virtue of a theoretical analysis.

1. *Introduction*

There are things known for the most part as 'constitutive rules'[2]. In the words of Amedeo G. Conte, "A rule is constitutive if it is a *prius* of that around which it revolves. A classical case: the rules of chess. [...] The rules of chess do not revolve around an activity that preexists them and which exists independently of them. On the contrary, it is these rule themselves that render the game thinkable and possible. [...] In constitutive rules there is a paradoxical inversion of the relation between the rule and the entity governed by it: It is paradoxical that rules govern that which is their *posterius*; it is paradoxical that such rules should be both an (eidetic) condition of conceivability and an (alethic) condition of possibility of an activity."[3]

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[1] Based on the text of the lecture delivered on the 12. of January 2010 at Facoltà di Filosofia, Università Vita-Salute San Raffaele, Milan, Italy.

[2] Some very general information on constitutive rules was disseminated by the present author during the XXI World Congress of Philosophy in Istanbul, Turkey, in 2003, see www.wcp2003.org/humanrights/wojciech_Zelaniec.rtf.

[3] 'Costitutiva è una regola la quale sia il *prius* di ciò su cui essa verte. Caso classico: le regole del gioco degli scacchi [...]. Le regole degli scacchi non vertono su un'attività che ad esse preesista e che sussista indipendentemente da esse. Al contrario, sono le regole stesse a

The concept of a constitutive rule is associated in many minds with the name of John R. Searle, but the phenomenon itself was first discovered in the 'twenties of the twentieth century, by Czesław Znamierowski, a Polish philosopher of law and social ontologist.[4] Searle did not either invent or pretend to invent it; yet he made it (relatively) well-known. But while constitutive rules are relatively well-known as a class of phenomena, they are still not so well understood; not even the exact delimitation of this class is uncontroversial, still less the internal articulation of all the various things falling within that class. It is a purpose of this essay to explain some problems with what might be called the ontological aspect of the constitutivity of constitutive rules. A comprehensive setting out of the problems will be, as is to be hoped, a first step to solving at least some of them.[5]

Searle, while making the now classic distinction between constitutive and regulative rules disclaimed originality and in the spirit of what may seem somewhat excessive modesty, claimed to be reintroducing a distinction made by Kant,[6] who, however, did *not* make it. Kant's was only the distinction of constitutive and regulative principles and the use thereof; 'constitutive' and 'regulative' being understood in sense quite distinct from Searle's.[7] However, due to Searle's influence, it has become part of the common notion of a constitutive rule that it, whatever else it is, is *not* a regulative rule. A regulative rule, in Searle's sense, is roughly one that prescribes, 'regulates', tells what someone may, ought to, or must not do.[8] In his essay 'How to Derive `Ought' from `Is'" Searle says: "The distinction I am trying to make was foreshadowed by Kant's distinction between regulative and constitutive principles, so let us adopt his terminology and describe our distinction as a distinction between regulative and constitutive rules. Regulative rules regulate activities whose existence is

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rendere e pensabile, e possibile il gioco. [...] Nelle regole costitutive v'è una paradossale inversione del rapporto tra regola e regolato: è paradossale che delle regole ordinino qualcosa che, logicamente ed ontologicamente, è un *posterius* di esse; è paradossale che, di un'attività, le regole stesse siano e condizione (eidetica) di pensabilità, e condizione (aletica) di possibilità.' [1], p. 239.

[4] Znamierowski used the Polish expression '*norma konstrukcyjna*' or 'construction norm'. Not too much attention should be, in this field, attached to terminological variation; 'constitutive rule' seems, in any case, the most common term of art. On Znamierowski see e. g. [2]. In Italian, there are two texts by him: [3] and [4]; a valuable source of information on Znamierowski (in Italian) is: [5].

[5] [6], p.33.

[6] [7], p. 55. More to the point, Searle refers back to the distinction between 'summary view' and 'practice conception' made by Rawls in [8]: [7], p. 55.

[7] For a nearly exhaustive discussion of the problem of constitutive rules in Kant see [9].

[8] All of which belongs to the province of 'deontic logic', see [10]. The discipline was 'invented' by G. H. v. Wright, see [11]. For a historical sketch see also [12], [13] and [14].

independent of the rules; constitutive rules constitute (and also regulate) forms of activity whose existence is logically dependent on the rules."[9]

At another *locus classicus* in his *Speech Acts,* Searle explains: "I want to clarify a distinction between two different sorts of rules, which I shall call regulative and constitutive rules. I am fairly confident about the distinction, but do not find it easy to clarify. As a start, we might say that regulative rules regulate antecedently or independently existing forms of behavior; for example, many rules of etiquette regulate interpersonal relationships which exist independently of the rules. But constitutive rules do not merely regulate, they create or define new forms of behavior. The rules of football or chess, for example, do not merely regulate playing football or chess, but as it were they create the very possibility of playing such games. The activities of playing football or chess are constituted by acting in accordance with (at least a large subset of) the appropriate rules. Regulative rules regulate a pre-existing activity, an activity whose existence is logically independent of the rules. Constitutive rules constitute (and also regulate) an activity the existence of which is logically dependent on the rules."[10]

Much has been said on these lines;[11] I shall add nothing by way of comment or elaboration upon these *loci classici;* neither shall I dwell on the historical aspect of things; it has been treated separately elsewhere, even though a comprehensive history of the research on the problem is still lacking.[12] Instead, I shall proceed to the core of the matter.

A constitutive rule is a rule that is constitutive in the sense of 'giving rise to', or 'creating' that of which it is a rule. So what is a 'rule', to begin with? The famous Aristotelian adage 'being is said in many ways'[13] seems to be true of rules, too. There is no 'canonical' definition of a rule. There is, to be sure, an entry in Isidor's *Etymologies,* XIX, 18, 2, viz. *Regula dicta quod sit recta, quasi rectula, et inpedimentum non habeat,* a 'rule is called so because it is straight and has no impediment' but it pertains to building tools and defines, if anything, rather 'ruler' (measuring stick) than 'rule'. In later dictionaries, the corresponding entries (if any) are more often than not short and concise, as if in keeping with the sense of '*regula'* in Roman Law: '*regula est, quae rem quae est* breviter *enarrat'*, or with the explanation for '*regula'* in Goclenius' *Lexicon Philosophicum* of 1613: '*brevis rerum praeceptio'*, for brief they are, indeed. Abbagnano, in his *Dizionario di filosofia,* says that a rule is a name for any and every prescriptive proposition, '*Si chiama regola qualsiasi proposizione prescrittiva',*

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[9] [7], p. 55.
[10] [15], pp. 33f.
[11] For instance, in [16].
[12] But see for instance [17], [18] or [19]. A very valuable source on the history is, too, [20].
[13] *Metaphysics* VII, 1003a, 33.

under the name of 'rule' goes any prescriptive proposition.[14] Then he adds: *'Il termine è generalissimo e comprende le nozioni più ristrette di norma, massima e legge',* the term 'rule' is most general and includes those more restricted ones like 'norm', 'maxim' or 'law'. Probably with this excuse in mind the *Enciclopedia filosofica* refuses to place an entry on 'rule', referring the reader to such entries as 'law', 'maxim' or 'principle'.[15] At least the *Enciclopedia Einaudi* features an extensive entry on *norma* by Norberto Bobbio. In a recent English-language lexicographic publication, the highly authoritative-looking *Encyclopaedia of Philosophy* published by Routledge and edited by Edward Craig, there is no entry for 'rules' at all. Its predecessor in the Anglo-Saxon world, the *Encyclopedia of Philosophy* edited by Paul Edwards, sported at least a not-so-brief article on 'rule' by the American Wittgenstein-scholar Newton Garver. A laudable exception to this – should we say – near-rule is the *Historisches Wörterbuch der Philosophie,* edited by Joachim Ritter and Karlfried Gründer with Amedeo G. Conte's sub-entry on 'rule'.[16] But that sub-entry pertains to constitutive rules only. There is also a remarkable study by Gregorio Robles, [24].

In the context of constitutive rules, one point concerning the general notion of a rule deserves, perhaps, particular attention. It is that of the linguistic formulation of a rule. Is it necessary for every rule to have a linguistic formulation and articulation? There are 'silent' or 'tacit' laws, for instance those studied by Roberto Sacco (his *atti muti*[17]), so why should there be not silent rules, including constitutive rules? This is a real problem, because, if a constitutive rule should 'create' something (i. e., bring into being something not previously existing) then it must itself come into existence and/or become accessible at a certain point of time, in a way in which, for instance, natural law (as traditionally conceived) has not, being coeval with human race and having always been known (however vaguely) to human beings.[18] And being accessible in a linguistic form is a preferred form of being accessible for such entities as rules. However, for the moment, let us assume that rules are, if not always actually formulated in a language, then at least susceptible of a formulation in a language. The truly philosophical quest for that which a thing really is, the

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[14] [21], p. 718.
[15] [22], p. 1922.
[16] [23].
[17] See [25]. See [26], pp. 26f.
[18] But similarly, it was St. Augustin's view that the Commandments have been 'engraved on people's hearts' (*De spiritu et littera*, c. XIVf., *Patrologia Latina*, vol. XLIV, col. 215f., *Enarratio in Bibliam,* c. LVII, n 1.; *Patrologia Latina,* vol. XXXVI, col. 673ff.), cf. also Irenaeus, *Contra. Haereses*., 1, IV, c. XIII; *Patrologia Graeca,* vol. VII, col. 1006ff., Tertullian, *Adversos Judaeos,* c. II; *Patrologia Latina,* vol. II, col. 600; a similar strand of thought is to be found in the Jewish tradition, as well.

Aristotelian 'τί ἐστι', is here best suspended in favour of a tentative and hypothetical identification of a rule with its linguistic formulation; no claim is made to the effect that rules simply 'are' their linguistic formulation, but only, that they are conveniently managed under the guise of such formulations, if and whenever such are available.

Students of constitutive rules have often insisted on a double distinction delimiting their object from other rules. One part of the distinction is that already mentioned one between constitutive and 'regulative' or prescriptive rules.[19] The other part is the distinction between constitutive and descriptive rules. Descriptive rules state what happens or is the case 'as a rule', 'on a regular basis', 'most often' or 'always'. 'As a rule, nights in the desert are chilly'. They range from naive empirical generalisations to scientific laws, such as 'Platinum boils at 4100 grades Kelvin'.[20] That which a descriptive rule describes exists already, in one form or another; and that which a prescriptive or regulative rule regulates exists already, otherwise the prescribing would be pointless.

Now the claim – seldom explicit in the corresponding studies – that constitutive rules, i. e. those that by definition 'constitute', 'create' or 'give rise to' that which they are rules of, are neither descriptive nor prescriptive is, on closer reflection, not so obvious as it might first seem. It does not easily, or at all, follow from the very concept of a constitutive rule as that of a rule which 'creates' its own object. It would be all good if we had a clear dividing line between, on one hand, all descriptive and all prescriptive rules and, on the other hand, a third domain of rules of which all constitutive rules would be a proper

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[19] In his [27] ([28], p. 157), one of the very first of his texts in which he (without reference to predecessors) speaks of 'constitutive rules', Amedeo G. Conte says that the 'validity criterium of regulative rules is not itself a regulative rule (a rule in terms of *Sollen* [ought]), it is a *constitutive rule* (a rule in terms of *Sein)*' (italics in the original). I take this to mean that a rule, if it is constitutive, by the very same token cannot be regulative. Also, on a different plane, there are what Amedeo G. Conte calls 'deontic constitutive rules', i. e. those which have the form of a prescriptive proposition, for instance, 'the bishop (in chess) ought to move diagonally'. See for instance [1], p. 243, or [29], p. 55. Conte mentions this concept in virtually all of his numerous publications on constitutive rules. As Conte notes with Aristoteles, however, 'that which ought to be done' (τὸ δέον) is said in numerous senses no less than 'being' (τὸ ὄν): [30], p. 104. For Searle's project of deriving Ought from Is it is crucial that at least certain constitutive rules (such as those constituting the institution of promise, for instance, should *not* be also regulative; [20] for that (in [31], which is an earlier version of [20], pp. 88f.). Searle's formulation such as 'constitutive rules constitute (and also regulate)' ([7], p. 55) are careless, at best.

[20] Abstraction is made here from all contrary-to-fact undertones and explanatory functions of scientific laws, see for instance [32] for that.

or improper subset.[21] But such a dividing line – this is the 'demarcation problem' for constitutive rules – is not so easily found.[22]

Starting off with a rather easy example: The Decalogue rules are *not* constitutive,[23] because those aspects of human conduct which they (more or less successfully, as we know from universal history) attempt to regulate could have arisen and did arise independently of the Decalogue. People had gone on (not) honouring their parents for millennia, for instance, before they learned that it was mandatory for them to honour, rather than not to honour, their parents. But street traffic rules are a somewhat subtler or 'trickier' example, perhaps, because it is not clear that there once was a time when there was street traffic but no street traffic rules (both might have arisen at the same time; this is an empirical, not a philosophical question). Yet, it seems to be plausibly acceptable that there at least *could have been* street traffic without any rules thereof, and those who have visited certain countries (for understandable reasons to remain nameless in this essay) claim that there in fact is such rule-free traffic, in these countries. But on the other hand, those very same persons testify, sometimes with an air of terror in their voice, that such rule-free traffic is a quite different kind of traffic from that regulated by the familiar traffic code of home. Thus, regulative rules can, too, in a sense be constitutive. Part of the problem is that we are dealing with 'forms of behaviour' which, whatever else they are, do not belong in the category of substance in the Aristotelian ontological framework and therefore do not have a proper essence and definition in either the Aristotelian or any other rigorous sense;[24] so we are not, and cannot be, certain when a given 'form of behaviour' is, or is not, sufficiently 'new'. How unlike all 'forms of behaviour' hitherto existing must a form of behaviour be to count as 'substantially' or 'really' new? This is not an easy question if we are dealing with non-substantial entities.

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[21] Well, rather proper, given that there are, too, technical rules which do not seem to be prescriptive, descriptive or constitutive (e. g. [33], pp. 292f.). See [34].

[22] See also [35].

[23] *Pace* Searle, who ([7], p. 57, [15], pp. 186f) mentions the rules 'You ought not to steal', 'You ought not to tell lies' and 'You ought to pay debts' as examples of constitutive rules. Conte justly remarks that these rules are not constitutive even by Searle's lights, [36], pp. 538f. In fairness to Searle, however, it must be noted that Searle only says that such rules 'can be taken' (to mean, i. e. understood, interpreted) as constitutive rules of the institution of private property, assertion and debt, respectively. That is, they could be rewritten, in Searle's language, as something like 'Private property of someone else counts as something which one must not dispose of without that person's consent' and so on. This brings back the problems of the relation between a rule and its linguistic expression, the ontological status of a rule and similar, mentioned above.

[24] For this see *Metaphysics* VII, esp. ch. 4.

2. *Some examples*

In order for philosophical reflection not to work in the void or be all-too-abstract, let us consider a few examples of situations in which constitutive rules might be surmised to be involved. The very issue of 'constitutivity', 'creating' (that which a given rule is a rule of) or 'giving rise to' being a difficult problem in itself, I shall make clear that in what follows I am focussing on the 'ontological' aspect the constitutive power of constitutive rules, that is, their faculty of bringing things into existence. There are other aspects, no less important, such as the epistemological and the semantical one: constitutive rules make certain kinds of knowledge (the knowledge of that which they are rules of) possible; they assign, too, meanings to words and expressions (viz. those designating the things which they constitute and their components).[25] I shall prescind from these other aspects of constitutivity for merely tactical reasons (one cannot speak of all things at once), not because I consider them less important or interesting.[26]

Searle and those influenced by him speak of 'activities' or 'forms of behaviour'. So what is a 'form of behaviour', to begin with?[27] If this question sounds a little too abstract, let us consider another one: in what kind of cases should we say that a form of behaviour is 'new' and could have been given rise to in virtue of rules of some sort, be they written or tacit? I think every person with a certain experience in travelling and living in foreign countries for more than just a few days or holidays (and most persons in the Academe have this kind of

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[25] See for instance [1] , p. 239, where the ontological and logical aspect of the constitutivity of rules are being treated on a par. See, too, [17], p. 354 for the semantical sense of constitutivity, explicitly mentioned. For all three aspects (ontological, epistemological, semantical) see [37] and [38]. Cf. also [39], pp. 72–4, where, too, the epistemological and semantical aspects seem to be placed much emphasis on.

[26] Contrary to what one may suspect, the preoccupation with epistemological and semantic aspects of what might first and foremost be an ontological issue is not restricted to contemporary or modern philosophers, those after the Cartesian or the linguistic turn. For instance, in ch. 19 of Book XIX of his *City of God* St. Augustine argues that a bishop interested in eminence rather than in service is simply not a bishop, this sounds very much like a classic quotation from a contemporary student of constitutive rules (cf. [33], p. 293: 'whoever not follows deontic eidetic-constitutive rules while playing chess is not playing chess poorly; he is simply not playing chess'). But for his claim, St. Augustin invokes a semantic argument: '*episkopos*' or 'bishop', is derived from a Greek work for 'superintend'; he, too, imputes to St. Paul (1 Tim., 3, 1) the desire to explain what 'episcopate' meant, and sees therein a further argument for his claim.

[27] Amedeo G. Conte gives serious thought to this issue and brings a form of behaviour in relation with the Wittgensteinian concept of 'form of life' (*Lebensform)*, so important for Wittgeinstein's theory of a language-game: [40], p. 317.

experience) knows the problem of inviting or getting invited to one's home. In different cultures and countries this is handled in a different way, and subtle nuances distinguish the way in which a 'form of behaviour' like that is cultivated even in cultures that seem quite alike. In certain situations the foreign scholar abroad awaits in vain an invitation to a colleague's home which he thinks is due or overdue and he takes its non-coming to be a sign of insensitivity, distrust or non-appreciation; in other cases, on the contrary, he is surprised by an invitation he[28] thinks quite unexpected, uncalled-for, inopportune... . What is at issue is not spending some time together, discussing some topics, drinking tea or taking a meal in each other's company (all of these things can be done at other places), but precisely this: inviting or getting invited to somebody's or one's own home. Precisely this is the subject of concern or astonishment. The foreign scholar is likely to think of it as a 'form of behaviour' and think it new, certainly not absolutely, but as it is defined and cultivated in the country of his stay and as compared to his own country. Characteristically, this form of behaviour is embedded in a larger context: that of things done when invited or otherwise to somebody's home: drinking tea, discussing things work-related or otherwise, showing each other family photographs, and so on.

It is perhaps not very frequent but it can well happen that a scholar abroad should start thinking that certain forms of behaviour are 'new' in his host-culture to the extent that they are not at all known in this culture. And in some cases they really are unknown, for various reasons. For example, one very important social 'rite' in Poland, called '*bruderszaft*'[29] is the stepping-down from the formality of addressing one another as '*pan(i)*' (sir, madam) to the informal '*ty*' form of address, which does not and simply cannot exist in an English-speaking country, there being no analogous distinction in the form address in English. In these countries, there is just one neutral form of address, 'you', and being on first-name terms as distinct from using a formal way of address (Mr. Smith, Dr. Pearce, Rev. Hobotham) is regulated in a way not requiring any 'rite of passage' (saying 'Call me Judy' by a Dr. Pearce is not a 'rite' in the way in which Polish *bruderszaft* is). In this case we should say an objective constraint (a peculiarity of the language) makes a form of behaviour impossible.

But it would be ludicrous to claim that an 'objective constraint' like that prevents one from showing or not showing how much effort one usually in-

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[28] Throughout this essay, the pronouns 'he', 'his' and 'him' are meant to refer to no less female than male persons.

[29] An obvious adaptation from German '*Bruderschaft*' or 'brotherhood', the adequate English word might well be 'fraternisation'. In German-speaking countries there used to be a rite of '*Bru-*' or '*Brüderschafttrinken*', yet it does not seem to be cultivated any more.

vests in an activity which by its very nature does require at least some effort. Yet, as observation teaches, in different cultures effort is spent with different degrees of ostentation, the degrees considered 'correct' being a matter of cultural code. At Italian Renaissance courts prevailed a rule, called '*sprezzatura*' or 'negligence', which in a sense (which is an important qualification here, as we shall presently see) prescribed that things should be done as if without any effort at all. As Castiglione says: "But, having often thought with my self whence this Gracefulness could proceed, I find one general Rule, which I think holds good in all Cases, and that is, that a Man should as much as possible avoid, as a dangerous Rock, too much Exactness, but make use of a certain kind of Negligence, and do every thing easy, and, as it were without minding it. And this I really believe is the Cause of it";[30] viz., of the Gracefulness, which Castiglione observed in his courtiers.

There is a difference, though, between the two examples. The rite of *bruderszaft,* even though simple (or simplified recently) is so complex that it is not likely that it could be carried out without any knowledge of its rules; and even if it had once been so carried out, the persons involved could not be truly said to have carried it out; just as little as a Polish person saying '*tak, tak*' ('yes yes', 'yes of course') can be truly considered to be expressing gratitude in Danish ('*tak*' meaning 'thank you' in Danish).[31] In the case of *sprezzatura,* however, it is quite thinkable that someone should behave in the way defined by the rule, without knowing the rule and without knowing that the way he is behaving is called '*sprezzatura*'.

Another instructive example is that of interest (in the sense of fee paid on borrowed assets).

If we are to believe Tacitus, the ancient Teutons did not know it, still less did they know the concomitant institution of usury. For this reason, he thinks, no prescriptive rules (edicts etc.) against either would have been necessary. Tacitus says in ch. 26 of his *Germania*: '*Faenus agitare et in usuras extendere ignotum; ideoque magis servatur, quam si vetitum esset*', or 'To loan out capital

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[30] [41], p. 43 (Robert Samber's translation). In Italian: 'Ma avendo io già più volte pensato meco onde nasca questa grazia, lasciando quelli che dalle stelle l'hanno, trovo una regula universalissima, la qual mi par valer circa questo in tutte le cose umane che si facciano o dicano più che alcuna altra, e ciò è fuggire quanto più si po, e come un asperissimo e pericoloso scoglio, la affettazione; e, per dir forse una nova parola, usar in ogni cosa una certa sprezzatura, che nasconda l'arte e dimostri ciò che si fa e dice venir fatto senza fatica e quasi senza pensarvi. Da questo credo io che derivi assai la grazia […]' Baldassare Castiglione, *Il cortegiano,* libro I, xxvi.

[31] The difficulty is that both Poles and Danes say their respective '*tak, tak*', very often and at a great variety of occasions – this being clearly a matter of the respective national culture codes – in their different meanings; a Danish person in Poland or a Polish person in Denmark is quite often confused, as a result.

at interest and extend it into interest payments is unknown, and for that reason more effectively guarded against than if it had been banned.'[32] Tacitus does not stop to speculate, to be sure, if taking interest had, indeed, been banned, Teutons would still not have known what, actually, was banned; instead, he clearly asserts, in the indicative, that *since* Teutons do not know the institution in question, they do not put it into practice.

Since interest and usury are institutions far more important than degrees of formality of address or an Italian courtier's '*sprezzatura*' (with all due respect for the Italian Renaissance), their history has amply been investigated (by von Mises, Keynes and many others) and so it is a matter of scholarly debate just to which peoples and at which epochs they were known. From the philosophical point of view it appears plausible to say that a culture cannot practice charging interest and usury without knowing of these institutions, although their names will be different in different languages. The situation is very unlike that of '*sprezzatura';* the latter you can all-but-practice, virtually practice, with the sole difference to the Italian courtier that you are not aware of it and its rules (nor of the name '*sprezzatura'),* while no human practice can 'come close' to interest-charging if the agents are not at least vaguely aware of its rules, just as no practice can 'come close to' playing chess if rules are chess are not at least vaguely known and borne in mind by the agents involved.[33] '*Sprezzatura*' is similar to Molière's 'speaking prose', though it is not quite like it: M. Jourdain *had* been speaking prose unbeknownst to him, he had not 'come close' speaking prose. But interest-charging is not at all similar to 'speaking prose', and neither is chess: you cannot practice either if you are not aware of a set of rules.

Yet another example is the institution of promising; in fact one 'primordial' for the whole constitutive rules research, as it was in its context that Searle started talking about constitutive rules. Strange though this may seem, the institution is not universally known, it is not a cultural universal. Some 'savage' cultures do not know it,[34] and in diverse 'civilised' ones it is put into prac-

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[32] [42], p. 87.

[33] '*Vaguely* borne in mind' might seem too little in the case of chess. Yet, the author recollects having participated, as a young boy, in games of chess or even chess tournaments – it was in a boys' summer camp – where at least some players had a very incomplete knowledge of the rules.

[34] See e. g. [6], pp. 3ff. See also [43]. DuBois does not say explicitly that the Alorese did not know the institution of promise, but describes a society in which such 'promises' (as may be known) are as a rule not kept and in which no-one expects them to be kept. See for instance p. 236. On pp. 121f. we read: 'I have seen youths in their late teens and early twenties send boys on fool's errands and deceive them with false promises of rewards for services, and then guffaw with laughter when the crestfallen child returned.' If we are to

tice in different modes, especially with respect to the degree to which promises are (believed to be) generally kept.[35] Now this example is different from all the above, because in the institution of promise the very word 'promise' (or its equivalent in a given local language) is an essential constitutive component. There is no question of acts of promising without the awareness (however inarticulate) of the rules of promise, one of which is that one ought to, while promising, say 'I promise', '*obiecuję*', '*prometto*', or something like that. One cannot promise in the way M. Jourdain had been speaking prose, nor can one 'virtually promise' in the sense in which one can virtually practice '*sprezzatura*' without the knowledge of the corresponding rules and of the name itself. And similarly, one cannot either be playing chess or 'virtually' be playing chess without at least a vague notion of the rules and the name of what one is doing.

3. *Morals from the examples: delimitation of the constitutive, its relation to the regulative*

It is not without a reason, it might therefore seem, that Searle and other students of constitutive rules have picked promises and other speech-acts, as well as games and sports, as their paradigmatic examples of 'forms of behaviour' or 'activities' brought into being and governed by constitutive rules. It is in this context that Searle introduces a very important, pivotal point of his conception of constitutive rules, namely that of 'counting as'. Typically, he tells us, constitutive rules, if formulated in a language (this is one of the places where the problem of expressibility comes in) have the form '*X* counts as *Y* in context *Z*'.[36] The utterance of a promise 'counts as' as the undertaking of an obligation.[37] This is, in Searle's eyes, the most central constitutive rule.[38]

The issue of 'counting as' would require a separate study in its own right. On the face of it, things that 'count as' other things may, but need not, be them, so 'count is' looks like a pseudo-copula, neither intensionally nor exten-

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believe Prof. DuBois, the life of the Alorese was quite literally permeated with untrustworthiness, distrust and frustration.

[35] In Poland, for instance, if my observation is any guide, there is certain widespread scepticism towards, not the binding force of promises, but the likelihood of a given promise's being kept. There is no indication, to my knowledge, that promises are kept in Poland to a lesser degree than elsewhere but the scepticism gives the institution, as practiced in Poland, a particular local 'flavour'.

[36] [15], p. 35.

[37] [15], p. 63.

[38] He calls it 'the essential rule', [15], p. 63.

sionally identical with the classical copula, i. e. 'is' (in English).[39] The issue of '*X* counting as *Y* in context *Z*' has already become a separate field of study within that of constitutive rules;[40] I have hypothesised that if certain things[41] can 'count as' other things (in certain contexts), by virtue of a constitutive rule, without really being those other things, then a particular mark of constitutive rules could consist in what I not very felicitously called the 'ontological meagreness' which they presuppose in, or impute to, those things which should 'count as' something else. A constitutive rule expressible in the form '*X* counts as *Y* in context *Z*' prescinds from various properties of *Y*, instead of exploiting them (which is typical of prescriptive or regulative rules), though it is obviously not true that everything can count as everything else.[42] Yet, in many cases there is considerable room for what an *X* may be or not be, its 'counting as *Y*' remaining thereby unaffected. My proposal was criticised, to a large extent justly, by Ottonelli.[43] However, in the context of promises, the quite peculiar difficulty consists in this, that once a promise has been made according to its other, non-essential rules, it is not clear as what else it could 'count', rather than as the undertaking of an obligation, nor how it could possibly *not* count as the undertaking of an obligation. In other words, someone who is behaving in accordance with the other (than the essential one) constitutive rules of promise as set out by Searle, is not just 'all but' undertaking an obligation, or 'virtually' undertaking an obligation, but is undertaking an obligation

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[39] St. John put his finger on this problem as he wrote 'Behold what manner of charity the Father hath bestowed upon us, that we should be called, and should be the sons of God' (Douay-Rheims) or 'How great is the love the Father has lavished on us, that we should be called children of God! And that is what we are!' (New International Version), 1 Jn, 3, 1. There is a world of difference between being just called something (and possibly for this reason counting as that something or passing for it) and actually being that very thing one is called. The Greek text reads 'Ἴδετε ποταμὴν ἀγάπην δέδωκεν ἡμῖν ὁ πατὴρ ἵνα τέκνα θεοῦ κληθῶμεν, καὶ ἐσμέν' The last two words, which mean 'and we are' are not, interestingly, included in all oldest manuscripts of the 1st letter of John.

[40] See for instance [44], ch. 6. Recently, there have been attempts to construct a logic for the 'counts as', see [45].

[41] Called by Searle 'brute', after [46].

[42] Acts in which accomplishments beyond the powers of the promissor are promised justly do not 'count as' promises. On the other hand, in some 'tricky' cases certain things 'count as' other things not despite the fact that they are *not* those other things, but exactly because of that fact. For instance, according to the Constitution of the Federal Republic of Germany, art. 116 (2) determines that Former German citizens who between 30 January 1933 and 8 May 1945 were deprived of their citizenship on political, racial or religious grounds, and their descendants, shall on application have their citizenship restored. They shall be deemed never to have been deprived of their citizenship if they have established their domicile in Germany after 8 May 1945 and have not expressed a contrary intention.

[43] [47].

purely and simply. The Searlian 'essential rule' does not, therefore, appear to be necessary at all. For this reason, Maria-Elisabeth Conte set this kind of 'counting as' (i. e., the utterance of a promise as the undertaking of an obligation) apart from other kinds of 'counting as' and regarded the rules of promise as not constitutive at all.[44]

So, even the case of promises (a 'focal case', to use a convenient term by G. E. L. Owen[45]) is not without its problems. Returning to the broader perspective afforded by the other examples adduced above, one realises, on reflection, that they all – not just promises or games and sports – have certain peculiarities in common which set them apart from clearly prescriptive (and thereby non-constitutive) rules, such as the Decalogue. The most striking similarity is that no-one has a *prima facie* obligation to either go through the *bruderszaft* rite or display *sprezzatura,* or charge interest, or promise anything to anyone. True, such obligations may, and usually do arise in particular circumstances, but it is due to these circumstances that they do arise, if they do. There are other circumstances in which it very well possible to engage in one of above 'forms of behaviour' but in no way obligatory, and, moreover, such circumstances are by no means exceptional, non-standard, 'weird'. Once one has done any of the above, one may well have a *prima facie* obligation to do something, for instance, to keep the promise, but that is a different matter. And also, there might be situations in which one has a conditional obligation to do something, such as for instance display *sprezzatura,* namely if one is a courtier and desires to be considered a good courtier. But there is only such a *conditional* obligation to it, no more.

Another similarity is that in most (with the possible exception of interest-charging, to which I shall return) examples the purpose of engaging in the activity concerned consists in achieving a certain end not in any way whatever, but in a particular way, defined by the rules of the activity. Switching from formal to informal form of address, for instance, is achievable in a variety of ways, even in Poland, less expensive than the rite of *bruderszaft*. The purpose of promising is giving the promisee a degree of confidence, but this again can be achieved in a simpler way. The purpose of displaying *sprezzatura* is, roughly, being a good Renaissance Italian courtier, but, although in this case it cannot be fulfilled in any other way than, among other things, displaying

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[44] At least not in the (fairly broad) sense of what Amedeo G. Conte calls 'eidetic-constitutive rule'; see [18], p. 536. The point is that while formulas like 'this piece of paper counts as legal tender' clearly assign a role to the *X* in question (the piece of paper in this case), a rule like 'Saying `I promise [this or that]' counts as the undertaking of an obligation' makes explicit the sense of the act of saying 'I promise', so, they say *as what* the act counts, whereas rules of the former sort say *what counts as* the *Y* in question, legal tender in this case. Amedeo G. Conte calls them *X*-rules and *Y*-rules, respectively.

[45] [48], p. 169.

sprezzatura, the latter is an essential, a constitutive component of the purpose. This sets our examples apart from street traffic and its rules. It is true that street traffic with and without rules are rather different, and the difference is in many existential dimensions quite significant; yet the purpose of participating in street traffic is simply to get to one's destination; the conformity to traffic-laws is here secondary and has at best instrumental significance. This explains why we so often do not conform to the laws regulating street traffic. It is possible to 'make it on time' to an important appointment without speeding, but if not, we speed and forget the rules; they 'get in the way' of our achieving our aim in driving, instead of being a necessary path to that aim, let alone its part.

Such teleological considerations seem, thus, to be helpful in both demarcating constitutive from non-constitutive rules and in improving our understanding of what constitutive rules are in and by themselves. Credit where credit is due: the inspiration comes clearly from Aristotle and the opening lines of his *Nicomachean Ethics*, but in the context of constitutive rules particular attention to the function of function and goal in the analysis of constitutive rules was given by the Bari school: Angiola Filipponio[46], Antonio Incampo[47] and others. Interestingly, as noted by Schwyzer,[48] in many cases the purpose of the activity defined by constitutive rules is not itself defined by them, and seems to lie outside of them. Constitutive rules of chess, for instance, as standardly conceived, do not encompass 'winning',[49] and since winning in chess is (as observed above) not a *prima facie* obligation of anyone, it may seem hard to see why anyone should engage in a game of chess. But an easy answer is that 'winning in chess' is a human possibility, not prescribed or directly defined by the rules of chess, but created (here, again, some light is thrown on the ontology of rules-constitutivity) by the rules themselves, by their very existence and being known, and quite frequently taken advantage of precisely because of the peculiar way in which it must be achieved. And this 'peculiar way' most definitely is directly defined by the rules of chess as constitutive rules.

What of interest-charging, however? The purpose thereof is clearly making profit, in a typical case, at least. And does it make a difference to an aspiring

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[46] See for instance [49], [50], pp. 177ff.

[47] See for instance [39], pp. 85ff., or [51].

[48] [52], p. 464. This reference has been brought to my awareness by Prof. Lorini of Cagliari University. See [53], p. 118. See also [5].

[49] To be sure, the laws of chess as formulated by FIDE (World Chess Federation) do define the placing the opponent's king under attack in such a way that the opponent has no legal move (http://www.fide.com/component/handbook/?id=124&view=article, under 1.2). But this is neither extensionally nor intensionally the same as 'winning'. Had FIDE not expressly defined chess as a game, the 'placing the opponent's king' etc. could have been practiced in a non-game-like fashion, for instance, as a religious rite.

profit-maker in what way he accomplishes his goal? It famously and proverbially does not, we should be tempted to say. And yet, in a sense, it clearly does: The aspiring profit-maker wishes to make profit in the most efficient, 'economical' way possible; this is all but 'built in' into the definition of profit. In a given case, a person desiring to make profit on his capital has a certain range of possibilities open to him; lending his capital and charging interest on it is one of them, if it is at all known to that person and at least some of his prospective partners (as it was not among ancient Teutons, if we are to believe Tacitus). He cannot take advantage of that possibility without 'putting to practice' or implementing the rules of interest-charging, however this institution is called in his culture and language, and however he or his partners personally call it among themselves; just as little as a person desiring to give his partner confidence on a future act of his by way of promise has any choice but to promise. A person desiring to get from home to work by car has, by contrast, the choice of doing so in a traffic-law conforming or non-conforming fashion. There may be, and in most cases presumably there are rules governing interest-charging which are clearly and purely regulative or prescriptive (what one may or must not do while charging interest, e. g. what the maximal interest-rate must be and similar) and in some particularly complex cases there might doubts as to whether such regulative rules do not regulate to the point of constituting, or rather 'destituting' (abolishing) the practice of interest-charging in general; this appears to be exemplified by the debate concerning the permissibility or otherwise of interest in Islam.[50]

Things are not simple. One's mind, while pondering such cases as that of interest-charging, is easily brought to much more fundamental issues. It could seem, for instance, that helping persons in distress, such as victims of street accidents, *is,* as distinct from charging interest or showing *sprezzatura,* a *prima facie* obligation of everyone, and in many penal codes failing to give aid to such persons is even defined as a crime. Yet, one occasionally reads reports from non-European countries (for understandable reasons neither the reports nor the countries will be named here) where the default 'form of behaviour' in the case of a street or road accident seems to be robbing its victims of their valuables and running off. Whether true or not (not true, it is to be hoped) such reports suggest a different strategy in the research of constitutive rules. Rather than look for a clear demarcation line between rules constitutive (on one hand) and regulative (on the other) one should face the possibility that in social life they may be rule-complexes from which the ones and the others may

[50] See for instance [54]. The issue is whether in Islam all interest-charging is prohibited, or just excessive interest-charging, i. e. usury. If the only permissible rate of interest is zero, all interest-charging (as known in the 'Christian' world) is usury.

be produced or disengaged by means of philosophical analysis.[51] Here is the possibility – the 'mere' possibility, of which you have up to now simply known nothing – of running to the rescue of accident victims, it is done like this and like that (this is the constitutive rule); and there is the unconditional obligation of taking advantage of that possibility (the 'parasitic' regulative rule). A similar strategy was proposed by Ramsay and Carnap for disentangling synthetic (empirical) and analytic components from meaning postulates for theoretical terms of natural sciences.[52] It will, however, not be pursued in this essay.

References

[1] Conte, Amedeo G. 'Regola costitutiva in Wittgenstein.' *Filosofia del linguaggio normativo. I. Studi 1965-1981*. Ed. Amedeo G. Conte. Torino: Giappichelli, 1989.
[2] Czepita, Stanisław. 1999. Czesław Znamierowski's concept of constitutive rules. *Ratio Juris* 3: 399-406.
[3] Znamierowski, Czesław. 'Atti tetici e norme costruttive (tr. by Giuseppe Lorini).' *Filosofia del diritto*. Ed. Paolo Di Lucia. Milano: Raffaello Cortina, 2002. 75-80.
[4] Znamierowski, Czesław. 2006. 'Norma costruttiva ed atto thetico' (tr. by Giuseppe Lorini). *Rivista internazionale di Filosofia del diritto* 83: 283-285.
[5] Lorini, Giuseppe. 2000. *Dimensioni giuridiche dell'istituzionale*. Padova: CEDAM.
[6] Di Lucia, Paolo. 1997. *L'universale della promessa*. Milano: Giuffrè.
[7] Searle, John Rogers. 1964. 'How to derive 'Ought' from 'Is''. *The Philosophical Review* 73: 43-58.
[8] Rawls, John. 1955. 'Two concepts of rules'. *The Philosophical Review* 64: 3-32.
[9] Conte, Amedeo G. 2004. 'Konstitutive Regel in Immanuel Kant'. *Rivista internazionale di filosofia del diritto* 81: 537-548.
[10] Åqvist, Lennart. 'Deontic logic.' *Handbook of philosophical logic*. Ed. Dov M. Gabbay; F. Guenthner. Vol. 2. Synthese library, 165. Dordrecht: Reidel, 1984. 605-714.
[11] Wright, Georg Henrik von. 1951. 'Deontic logic'. *Mind* 60: 58-74.
[12] Kalinowski, Georges. 1972. *La logique des normes*. Paris: Presses universitaires de France.

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[51] Which is *not* the same problem as there being kinds of 'prescriptive constitutive rules', such as 'the bishop (in chess) ought to move diagonally'; the problem mentioned in footnote 19.
[52] See [55].

[13] Kalinowski, Georges. 1973. *Einführung in die Normenlogik*. Frankfurt/M: Athenäum.
[14] Ziemba, Zdzisław. 1971. 'Deontic syllogistic'. *Studia logica* 28: 139-159.
[15] Searle, John R. 1970. *Speech acts*: Cambridge University Press.
[16] Ruben, David-Hillel. 1997. 'John Searle's The Construction of Social Reality'. *Philosophy and Phenomenological Research* 57 (2): 443-447.
[17] Conte, Amedeo G. 1985. 'Materiali per una tipologia delle regole'. *Materiali per una storia della cultura giuridica* 15: 345-368.
[18] Conte, Amedeo G. 'Idealtypen für eine Theorie der konstitutiven Regeln.' *Vernunft und Erfahrung im Rechtsdenken der Gegenwart. Reason and Experience in Contemporary Legal Thought*. Ed. Lawrence M. Friedman, Jyrki Uusitalo, Torstein Eckhoff. (Rechtstheorie, Beiheft 10.). Berlin: Duncker und Humblot, 1986. 243-250.
[19] Guastini, Ricardo. 'Six concepts of 'constitutive rule''. *Vernunft und Erfahrung im Rechtsdenken der Gegenwart, Rechtstheorie*. Ed. T., Friedman, L. M., Uusitalo, J. Eckhoff. Vol. Beiheft 10. Berlin1986. 261-269.
[20] Roversi, Corrado. 2007. *Pragmatica delle regole costitutive*. Bologna: Gedit.
[21] Abbagnano, Nicola. 1964. *Dizionario di filosofia*. Torino: Unione Tipografico-Editrice Torinese.
[22] Centro di studi filosofici di Gallarate (ed.). 1957. *Enciclopedia filosofia, vol. III*. Venezia-Roma: Istituto per la collaborazione culturale.
[23] Conte, Amedeo G. 'Regel.' *Historisches Wörterbuch der Philosophie*. Ed. Karlfried Gründer Joachim Ritter. Vol. 8. Basel, Darmstadt: Schwabe, Wissenschaftliche Buchgesellschaft, 1992. col. 427-450.
[24] Robles, Gregorio. 1986. 'Was ist eine Regel?' *Rechtstheorie* Beiheft 10: 325-338.
[25] Sacco, Rodolfo. 1993. 'Il diritto muto'. *Rivista di diritto civile* 39: 689-702.
[26] Di Lucia, Paolo. 2003. *Normatività*. Torino: Giappichelli.
[27] Conte, Amedeo G. 'Codici deontici.' *Intorno al `codice'. Atti del terzo convegno della AISS Associazione italiana di studi semiotici (Pavia, settembre 1975)*. Firenze: La Nuova Italia, 1976. 13-25.
[28] Conte, Amedeo G. 'Codici deontici.' *Filosofia del linguaggio normativo. I. Studi 1965-1981*. Torino: Giappichelli, 1989. 147-161.
[29] Conte, Amedeo G. 'Regola eidetico-costitutiva vs. regola anancastico-costitutiva.' *Ricerche di filosofia del diritto*. Ed. Lorenzo Passerini Glazel. Torino: Giappichelli, 2007. 48-68.
[30] Conte, Amedeo G. 'Deontisch vs. anankastisch.' *Rechtssystem und praktische Vernunft*. Ed. Robert Alexy u. Ralf Dreier. Archiv für Rechts- und Sozialphilosophie, Beiheft 51, 1993. Stuttgart: Franz Steiner Verlag, 1993. 102-109.
[31] Roversi, Corrado. 2006. *La costituzione di costitutività*. Milan: PhD dissertation, University of Milan, Italy.

[32] Fraassen, Bas C. van. 1990. *Laws and symmetry*. Oxford: Clarendon.
[33] Conte, Amedeo G. 'Paradigmi d'analisi della regola in Wittgenstein.' *Filosofia del linguaggio normativo. II. Studi 1982-1994. Con una lettera di Norberto Bobbio.*: Giappichelli, 1995. 265-312.
[34] Azzoni, Giampaolo M. 1991. *Cognitivo e normativo*. Milano: FrancoAngelli.
[35] Żełaniec, Wojciech. 'Sull' idea stessa di regola costitutiva.' *Ontologia sociale*. Ed. Paolo Di Lucia. Macerata: Quodlibet, 2005. 155-179.
[36] Conte, Amedeo G. 'Deontica wittgensteiniana.' *Filosofia del linguaggio normativo. II. Studi 1982-1994*. Ed. Amedeo G. Conte. Torino: Giappichelli, 1995. 519-561.
[37] Conte, Amedeo G. 2006. 'Axiotica in Norberto Bobbio'. *Rivista internazionale di filosofia del diritto* 83: 53-62.
[38] Conte, Amedeo G. 2006. Axiotica in Norberto Bobbio. *Rivista internazionale di filosofia del diritto* 83: 53-62.
[39] Incampo, Antonio. 2001. *Validità funzionale di norme*. Bari: Caducci.
[40] Conte, Amedeo G. 'Fenomeni di fenomeni.' *Filosofia del linguaggio normativo. II. Studi 1982-1994. Con una lettera di Norberto Bobbio*. : Giappichelli, 1995. 313-346.
[41] Castiglione, Balthasar Count. 1724. *The Courtier*. London: A. Betters-worth, E. Curli, J. Battley, J. Clarke and T. Payne.
[42] Tacitus, Cornelius. 1999. *Germania. Translation with Introduction and Commentary by J. B. Rives*. Oxford: Clarendon Press.
[43] DuBois, Cora. 1944. *The people of Alor*. Minneapolis: University of Minnesota Press.
[44] Hindriks, Frank A. 2005. *Rules & Institutions*. Rotterdam: Haveka BV.
[45] Lorini, Emiliano, Longin, Dominique, Gaudou, Benoit, and Andreas Herzig. 2009. The Logic of Acceptance: Grounding Institutions on Agents' Attitudes. *Journal of Logic and Computation* 19 (6): 901-940.
[46] Anscombe, G. E. M. 1958. 'On Brute Facts'. *Analysis* 18 (3): 69-72.
[47] Ottonelli, Valeria. 'Funzioni di status, linguaggio e regole costitutive.' *Ontologia sociale. Potere deontico e regole costitutive*. Ed. Paolo Di Lucia. Macerata: Quodlibet, 2003. 309-331.
[48] Owen, G. E. L. 'Logic and Metaphysics in Some Earlier Works of Aristotle.' *Aristotle and Plato in the mid-fourth century: papers of the Symposium Aristotelicum held at Oxford in August, 1957*. Ed. I. Düring and G. E. L. Owen. Göteborg: Elander, 1960. 163-190.
[49] Filipponio, Angiola. 'Struttura, funzione, scopo nel diritto.' *Seminari di filosofia del diritto*. Ed. Bruno Romano. Torino: Giappichelli, 1997. 329-358.
[50] Filipponio, Angiola. 1999. *Le enunciazioni performative e il linguaggio del legislatore*. Bari: Adriatica.
[51] Incampo, Antonio. 'Regole costitutive di funzione.' *Ontologia sociale. Potere deontico e regole costitutive*. Ed. Paolo Di Lucia. Macerata: Quodlibet, 2003.

287-297.
[52] Schwyzer, Herbert. 1969. 'Rules and Practices'. *The Philosophical Review* 78: 451-467.
[53] Lorini, Giuseppe. 2008. *Oggetto e atto*. Torino: Giappichelli.
[54] Noorzoy, M. Siddieq. 1982. 'Islamic Laws on Riba (Interest) and Their Economic Implications'. *International Journal of Middle East Studies* 14 (1): 3-17.
[55] Carnap, von Rudolf. 1958. 'Beobachtungssprache und theoretische Sprache'. *Dialectica* 12 (3-4): 236-248.