



MASTER IN ANALYTIC PHILOSOPHY
MASTER'S THESIS
September 2018

From Searle's Constitutive Rules to the Law
by Alba Lojo Caride

Under the supervision of:

DR. Genoveva Martí (UB)

DR. Lorena Ramirez Ludeña (UPF)



UNIVERSITAT DE
BARCELONA



**Universitat
Pompeu Fabra**
Barcelona

Universitat
de Girona

1. Introduction

John R. Searle is the philosopher that introduces the distinction between constitutive rules and regulative rules for the first time¹. He uses them to theorize about philosophy of language and about social ontology. In this paper, I will try to show the importance of the figure of constitutive rules to understand some aspects of the legal field. I will propose to focus in two key elements to understand how to apply Searle's theory to the law, and the advantages and disadvantages that this application has. I will also introduce some theories of philosophy of law related, and I will connect them with my proposal.

The paper is organised as follows. In the first section, I will present the two theories where Searle presents and uses constitutive rules, and their main problems. In the second section, I will show the general problems of connecting Searle's theory with the legal field, and some theories that have tried to relate them. In the third section, I will defend that the assignment of a function and the collective acceptance are the two key elements of Searle's theory that solve most of his problems, and they allow us to understand how to apply his theory to the legal field. Finally, I will reflect about the importance that both elements have in the theories previously explored, and about the general advantages and disadvantages of applying Searle's theory to the law.

2. Searle

Speech Acts is the doctoral thesis where Searle explores the difference between constitutive and regulative rules. He uses it to explain some aspects of the pragmatics of language following the inquiries formulated by J. L. Austin. Years later, he uses the same distinction to articulate a theory that explains what social reality is and how we create it in his book, *The construction of Social Reality*. Now, I will explain the main arguments defended in both books in order to understand the whole importance that Searle gives to the figure of constitutive rules.

2.1. Constitutive VS Regulative Rules in *Speech Acts*

In his first book *Speech Acts*, Searle defends that:

Speaking a language is engaging in a (highly complex) rule-governed form of behaviour. To learn and master a language is (inter alia) to learn and to have mastered these rules.

(Searle 1969: 12).

Searle understands natural language as a complex system of rules that affects speech acts and the semantic meaning of any language. The characteristic action associated with language is to communicate, and it is necessary that the hearer and the speaker understand each other to have an

¹However, It was J. Rawls who established the difference between constitutive and regulative principles for the first time in his paper "Two concepts of rules" (1955).

ideal conversation. For that reason, Searle focus his explanation of natural language on speech acts, and specifically on a kind of them: the illocutionary acts.

Speech acts represent whatever speakers can do with language when they want to communicate something, while the semantic content is the conventional meaning associated to any linguistic element. As Searle says: “for any possible speech act there is a possible linguistic element the meaning of which (given the context of utterance) is sufficient to determine that its literal utterance is a performance of precisely that speech act” (Searle 1969: 20-21). For example, the speech act of question and the linguistic form of interrogative sentence. That way, Searle mixed semantics and pragmatics opening a new line of research².

This rule-governed form of behaviour can be guided by two different kinds of rules: constitutive and regulative rules. But the central ones are the constitutive: they create the patterns that any speaker of natural language should follow to communicate correctly. Searle says that “regulative rules regulate antecedently or independently existing forms of behaviour (...) regulate a pre-existing activity whose existence is logically independent from the rules” (Searle 1969: 33-34) and he also affirms that they usually take the form of imperatives, and the formula of “Do X” or “If Y do X”. In contrast, the constitutive rules “create or define new forms of behaviour (...). Constitutive rules constitute (and also regulate) an activity whose existence is logically dependent on the rules” (Searle 1969:33-34); and they usually take the form of a tautology or an analytic truth, and the formula “X counts as Y” or “X counts as Y in context C”. Why have I said that constitutive are the central ones? Because they offer a relation between two concepts that are not naturally linked. Conventionally, the users associate a name to a relation: for instance, we call “rainbow” the conjunction between raining and sunlight; as long as “arcoiris” in Spanish or “arco da vella” in Galician. If we do not call it by a name, the “rainbow” will happen anyway, and we will have to say “the conjunction between raining and sunlight” to describe it. The name chosen is a convention between the English or Spanish users. That case is not a constitutive rule because the fact is independent from it. On the contrary, if we want to talk about an “assertion” that someone has made, and we only describe it as “a set of words”, we will miss important information related to the fact, and we will probably misunderstand the idea. The concept “assertion” is not independent from its constitutive rule, because without it, it cannot receive certain specifications or descriptions dependent on the existence of that rules (Searle 1969: 35). The convention in this case lies on the mere existence of the relation, and it is articulated by constitutive rules. As Searle says: “not only are languages conventional, but certain kinds of illocutionary acts are rule governed” (Searle 1969: 40).

²To develop this point see: M. Victoria Escandell (1996) *Introducción a la pragmática* or Franca D’Agostini (2000) *Análíticos y Continentales: guía de la filosofía de los últimos 30 años*.

Speakers and hearers are not necessarily aware of those constitutive rules while they are using them, but they are the essence of any linguistic act³. To show that, Searle identifies a list of necessary and sufficient conditions that reveals how to realize correctly a certain illocutionary act. An illocutionary act is the meaning added to an expression by the intention of the speaker, and he focuses in the case of promises⁴. From those conditions, Searle derives a set of rules that are the basis of any illocutionary act (for that reason he calls them rule-governed acts). Whoever wants to make an assertion, a question or a request, they need to know the preparatory conditions required, the propositional content needed, keeping the intention that the sincerity condition demands, and knowing the essential condition. If they do not follow them, the communicative exchange will fail. For instance, if a subject wants to make a promise, it is necessary to achieve the following conditions: the propositional content has to be a future act X, for instance ‘ I promise you I will bring you tea next time’ ; the preparatory condition demands that the subject is able to do X but in normal circumstances it is not something expected or usually to do, namely, that time she only brings coffee but next time she will achieve tea to bring; the sincerity condition requests that the hearer wants the subject do X, as ‘to bring tea next time’ in our example, and the essential condition demands the aim of the subject to do X, that is, the aim to bring tea. If one of the conditions could not be achieved, the promise will fail. That is the case if it is practically impossible to bring tea. Following Searle's words, the act will be “defective” (Searle 1969: 54).

It is precisely the last group of rules, the essential conditions, which represent the role of constitutive rules in Searle's theory: it explains the essence of what means *to emit* an assertion, a question or a request. The rest of the conditions are regulative rules: They create the perfect situation to make an illocutionary act.

2.2. The function of constitutive rules in *The Construction of Social Reality*.

The Construction of Social Reality is the book where Searle goes deep on the ontology of social reality. He develops his initial idea about how constitutive rules construct new forms of behaviour and translate it into institutional facts: constitutive rules allow collective agreement to create facts that are not naturally caused and that depend on them. He needs three elements to conform institutional facts: assignment of function, collective intentionality and constitutive rules.

Firstly, the assignment of function is the first step to analyse social reality and to create institutional facts. Humans and some animals attribute different utterances to objects that involve

3 As we will see, Searle requires the existence of collective intentionality, and the existence of constitutive rules to create a certain institutional fact. However, he recognizes that it is not necessary that all the users of that new institutional fact realize its dependence of a certain constitutive rule. Neither is it necessary to explicit acceptance of that rule: they accept its existence while they are using the institutional fact.

4 See Chapter 3 of J. Searle (1969).

criteria of assessment that are never intrinsic to the object. Besides, some attributions of functions depend entirely on our perspective: they do not occur independently from our practical intentions, and they cannot be even assigned because of its brute physical characteristics (Searle 1996: 13-23). That is the case of meaning or symbolism. Namely, that a white flag means defeat does not occur if there is none watching it or if the one who is watching it is an alien: the physical features of a white flag do not suppose its meaning, and the function of symbolizing emerges only due to the fact of our attribution of meaning. Consequently, the continuing attribution of that function by a community, in this case represents defeat, is the key to establish the assignment permanently. Searle differentiates between institutional and brute facts. In the example given, the brute fact is the white piece of fabric: it exists independently of any human institutions. Alternatively, the institutional facts require special human institutions for their very existence, and they exist only within systems of constitutive rules. They are content-dependent of the constitutive rule. In the case given, the relation between “white piece of fabric” and “defeat” creates a non-natural symbolism. The adscription of meaning is an institutional fact, which depends on the institution of language. In this case, the comprehension of white flag means defeat, depends directly on the constitutive rule that assigns meaning.

Secondly, Searle introduces the collective intentionality as the element necessary to affirm the existence of an institutional fact. He defines it as the possibility that agents “share intentional states such as beliefs, desires, and intentions” (Searle 1996: 23) when they assign functions to entities that cannot perform those functions without that imposition. Collective intentionality develops a role that can be interpreted in two stages: when the constitutive rule is being created, it acts collectively assigning a new function, and when the constitutive rule is created, it represents the stability of the institutional fact created: the efficacy of the institution created is dependent of the collective acceptance obtained through the collective intentionality. As Searle explained: “the key element in the move from the collective imposition of function to the creation of institutional facts is the imposition of a collectively recognized status to which a function is attached” (Searle 1996: 41).

And thirdly, Searle develops the importance of constitutive rules, and specially focus on the “counts as” of the paradigmatic formula of constitutive rules “X counts as Y in the context C”. It means a change of the meaning that is currently associated to X. That is to say, “count as” is an assignment (to X) of a new “status” (Y) from the observer perspective. That status involved different functions assigned to X in the context C.

Therefore, agents create institutional facts through the formula “X counts as Y in context C”, where X is any element with some specific characteristics that under context C has the status

collectively assigned of Y. The institution survives and becomes strong through time only because its collective intentionality recognizes the status Y. It is typical the case of money, but we can associate it to any institutional fact as a testament: a piece of paper with certain characteristics of authority, time and deposit, counts as a testament or acquires the status of testament, which implies the function of being the last choices of a person, and the set of rules to follow to divide his patrimony; among other functions. And always in the context C, which means, in the community where there is a collective agreement about the assignment of the status Y to those characteristics X.

2.3. Problems of Searle's theory of constitutive rules.

During his academic life, Searle expanded these initial ideas to different philosophical areas. With that aim, Searle created a strong position in the philosophy of language and social ontology, but also in the philosophy of mind and philosophy of action. Consequently, the number of criticism related with his theory is considerable. In the next lines, I will present the most important criticism strictly related with his theory of constitutive rules.

2.3.1. The “count as” formula

Searle proposes different ways to identify a constitutive rule. The most famous is through the formula “X counts as Y in context C”. Even though Searle is not strict with its necessity⁵, different authors have criticized its mere existence. They defend that it cannot even be a possibility to identify the constitutive force due to the fact that the regulative rules could be expressed with the same formula. Corrado Roversi explains how the count-as formula can be regulative: for instance, a rule written in a board in front of a public garden “civilized people respect flowers and flowerbeds” does not constitute the concept of civilized people⁶. Searle proposes a differentiation: the formula will identify constitutive rules when the term Y is not an appraisal (Searle 1969: 36). But that clause is not enough: for instance, if we are preparing an omelette, and we don't want to use eggs, we can say “chickpea flour counts as eggs in this omelette”, but we are not constituting a new meaning of eggs: we are regulating a circumstantial situation for the omelette that we want to prepare. In conclusion, as Roversi says “the logical structure of a rule is not relevant for its constitutive nature: any kind of rule can be constitutive, if used in the constitutive way” (Roversi forthcoming : 9).

5 He exactly affirms that 'within systems of constitutive rules, some will have this form, but some will have the form of “X counts as Y”, or “X counts as Y in context C”' (Searle 1969: 224)

6 To develop this point, check Roversi's argument (Roversi forthcoming: 10).

2.3.2. Constitutive force

In Searle's theory, constitutive rules generate institutional facts. Are their constitutive forces enough to create the whole meaning of institutional facts? Following the previous critique it seems that the formula is not a clear manner to identify meanings neither constitutive rules. But, Searle proposes another important feature: their capacity to create or define new forms of behaviour. As we have said, there is a relation of dependency between the creation and the constitutive rule: "when the rule is constitutive, the behaviour can receive specifications or descriptions which it could not receive if the rule did not exist" (Marmor 2009: 32-33). In that sense, the change is conceptual: before the constitutive rule, the behaviour exists, and after it, the behaviour becomes a different figure: a new specification, a new approach. Raz is against this conception: he defends that following Searle's theory both kinds of rules are constitutive and regulative at the same time, so they are the same. In particular, he says that from each action we can make a description according to the "brute facts" which corresponds to a regulative rule, and a description according to the "institutional facts" which corresponds to a constitutive rule. For instance, we can imagine a situation where an elder woman is writing her last wish. We can make a description conforming the brute facts, independent from a rule: "she is writing her last wish", or we can make a description according to the institutional fact and depending on a constitutive rule "she is writing her testament". Raz derives from it that the rule that constitutes what is a testament is regulative and constitutive simultaneously because we can derive two different descriptions (natural and institutional) from the same conduct and according to the same constitutive rule⁷. That is to say, he defends that all rules are constitutive and regulative at the same time, so there is no such classification.

2.3.3. Context

The third element of the formula is where most of the authors focus less, but it has an important potential. It could resolve some of the previous problems, and open new ones, but in both cases they are possibilities that Searle has not explored.

As George P. Fletcher explains: "the context consists in circumstances required for application of the constitutive rule" (Fletcher 2003: 91). On the one hand, there is an interesting problem about the dividing lines between the element X or the brute fact, and the element C or the context. The more specifications we add to what is X to count as Y, the less is needed by the context. However, if we prefer to characterize X as a brute fact, we should add numerous limits in the context to limit the meaning of the institutional fact created. For instance, a piece of paper written by hand could be a testament or not. It has to accomplish certain features to become a

⁷ To develop this interesting discussion check D. Lagier (2003).

testament. We can add to the piece of paper or to the context the necessary circumstances: to be signed, to be the last document that includes her last wish, etc. Another problem emerges when the non-compliance with certain circumstances means not counting as Y, or it could mean counting as Y but with exceptions. This is the problem of the possibility of sanction due to the non-compliance with the constitutive rules that I will abord in the next chapter, making reference to the legal field.

On the other hand, the context represents the necessary framework to complete the meaning of the institutional fact created by the constitutive rules. Roversi explores that possibility and concludes that the practice within which constitutive rules are developed is part of the meaning created. He defends that it is necessary to combine a close-up view that shows “a sort of formal axiomatic system yielding well-defined formulas” with a bird’s eye view that enables us to see the practice within which these rules are framed “to appreciate how these connections established by constitutive rules can create meaning”(Roversi 2010: 231). For instance, to understand the teleological element of chess, we need to realize the features of any competitive game. The aim will be winning the game, and this aspect is not something that constitutive rules of the chess have explained. In other words, the context allows us to understand the explaining force that constitutional rules have.

2.3.4. Ontologic problem and acceptance

Finally, another important problem emerges from the consequences of Searle's theory. In what situation rest the facts or the descriptions created through constitutive rules? Are they mere constructions of the language? Are they ontologically objective or subjective?

Following Searle, the existence of an institutional fact depends on language and on the collective acceptance acquired. However, it seems that institutional facts are something more than mere speech acts. In fact, Searle defends that each constitutive rule is constructed over a brute fact: they are new descriptions or interpretations of brute facts. For that reason, language is needed and they can be understood as a construction of language. Is ontological subjectivity implied from it? Searle defends that institutional facts are ontologically subjective but epistemically objective. We can accept that its ontology can be subjective, due to the fact that they depend on collective intentionality, or at least, on a kind of human convention. They are observer dependent and the function assigned is not any intrinsic feature. However, they are epistemically objective due to the fact that “the truth or falsity of the judgments about them does not depend on attitudes, opinions or points of view of those who judge” (Moural 2002: 272).

Nevertheless, the degree of collective acceptance becomes a problem from the epistemic perspective, because it challenges the objective access to the institutional facts, especially while it does not achieve a certain grade of social acceptance. Then, how much acceptance should be

necessary to say that a constitutive rule is established? Can the situation where knowledge of certain rights becomes only a subjective approach be possible? It seems intuitive to accept the subjective ontology of institutional facts because of the way they have been created (serving human purposes), but it is problematic to consider them to be observer-dependent and epistemically subjective, due to the social and historical importance that they have achieved. For instance, H.L.A Hart believes that it is possible to determine whether a particular rule is or not is a rule of law by determining whether it derives from a “rule of recognition”⁸.

3. Law and Constitutive Rules

Once in the legal field, I will start presenting the main problems that Searle’s theory of constitutive rules has to confront to be adapted to a practical normativity as the law is. Then, I will explain some of the most interesting legal approaches made following Searle’s theory of constitutive rules.

3.1. Specific problems with direct application of Searle’s theory

Here, I will introduce four problems that affect very different aspects of the legal field: from the moment a law is enacted in the parliament to the constitutive force of the judges, exploring the possibility of sanctions and the different kinds of norms that have relation with the constitutive rules.

3.1.1. From acceptance to validity: the role of collective intentionality

As we have seen, Searle’s theory requires the existence of collective intentionality to assign statutory functions and to get the new function permanently accepted. It acts as the legitimation of the new description. But, when we try to apply these elements to the law, some weakness arises. As Fletcher explains: “this way of thinking about institutional facts runs afoul of one of the basic premises of modern legal culture: (...) the evolution of validity as a substitute for acceptance as a criterion for a law’s having force” (Fletcher 2003: 98). With this sentence, the author wants to remark how, in current legal systems, it is difficult to find collective acceptance. Specifically, it is not required to enact a law: it is enough with procedural justice, a process that justifies the legitimacy and validity of the law. Namely, Hart’s rule of recognition, which establishes the constitutional order. Consequently, the constitutive force that Searle assigns to constitutive rules does not necessarily take place because of collective acceptance, at least in the legal sphere, but because of the validity of the enactment process.

Maybe we can find the element of 'collective intentionality' in legal systems in an exact moment of the enactment process. Following Searle, in the process of creation of “collective

⁸ There is a good development of the discussion through the history of the philosophy of law in Fletcher 2003: 94.

intentionality” each actor should be aware of other's acts and see her action as an aspect of the entire effort: they have to create a “we intention”⁹. When the members of the parliament have to pass a law, they participate in a coordinated action: while voting, they have to agree with certain part of the camera to acquire a minimum quorum to pass a law. So, maybe they act through a “we intention” assigning functions and offering the collective acceptance needed. However, the parliamentarians do not act unitarily: they negotiate their positions and their individual interest until they acquire some agreement. They create a common intention from each individual interest, which is exactly the opposite of collective intentionality.

3.1.2. Constitutive force of the rules VS constitutive force of the authority: the judges

It seems that in law judges have constitutive force. They create meaning through their interpretations of the rules. In some cases, we can imagine how they apply the formula “X counts as Y in C”, when for instance, they specify the meaning of alimony “alimony counts as the necessities that children or the spouse have in our society: housing, dress, food, healthcare...”.

The concept of authority plays an important role in those cases. As Searle recognises, it is founded by a constitutive rule as well: someone becomes an authority when it is assigned a statutory function and that is recognized by the collective intentionality . In the cases of judges, they need to have recognised the concept of authority: they have it formally, through the rule of recognition and different legal processes, and they can have it “informally” when they have socially recognized their statutory functions, and consequently their interpretations have consequences over the social interpretation of the law¹⁰.

That is to say, the constitutive force of the rules creates institutional facts, and the constitutive force of the judges creates the meaning of some legal figures. They use the same formula as the constitutive rules: they assign a new description or behaviour over a legal figure, and make it become a “new” one; and they base the collective intentionality needed on the authority that they have recognized.

Despite this, there is an important difference between these constitutive forces: judges can dictate judicial acts that break the characteristics of the institutional fact established, making use of their authority, and it generates judicial consequences, while it is not possible through the

9 I develop the controversial idea of collective intentionality in the next section.

10 It is important to notice this difference: whereas the “informal” concept of authority only refers to certain power to exercise influence over social opinion, and it is the social opinion which can constitute a new institutional fact through the collective intentionality; the formal concept of authority allows them to create legal institutions through the judicial interpretation. Searle claims the importance of this informal power in relation with the political leaders that even after having left its position, they have power to influence other's actions. See: Searle (2005).

constitutive force of the constitutive rule due to their conceptual relationship. In the next section, I will focus on this difference between legal systems and Searle's theory.

3.1.3. Sanctions

Following Searle, the tautology character associated to constitutive rules means that their violation is something difficult to imagine. He characterizes as analytic the relation between constitutive rules and the social fact created. For instance, if we do not move the king in the way stipulated by the chess rules, we are simply not playing chess. However, Searle recognizes that “which does not, of course, mean that a slight change in a fringe rule makes it a different game; there will be degrees of centrality in any system of constitute rules” (Searle 1969: 34). Amadeo Conte, one of the first iusphilosophers in applying the theory of constitutive rules to the law field, agrees with the inviolability thesis of constitutive rules. He finds it inherent of their own nature: “in order for something to break a rule, that something must be an instance of that kind of thing the rule is about” (Roversi forthcoming: 11).

However, this rationality becomes problematic when it is applied to the law: it seems that the inviolability thesis denies the possibility to develop “wrongly” institutional facts. But, as Manuel Atienza and Juan Ruiz Manero (2005) explain, there are irregular normative acts that have normative consequences. It is the case of the constitutive force of the judges mentioned before. They can emit a verdict that break with some aspect of the constitutive rule, for instance some feature of the X, but due to their power to apply the “count as”, the X becomes a Y anyway. Furthermore, if no other superior court issues a different sentence, the incorrect application of the formula will have legal consequences.

An explanation that helps to understand this peculiarity of the law is the differentiation between sanction and nullity: when the violation is of a regulative rule, the penalty will be a sanction, while when the violation is of a constitutive rule, the penalty will be considering the normative act as void. This thesis is attributed to Hart and it derives from the difference between the primary and the secondary rules: “the failure to follow the (*secondary*) rules does not result in a sanction, but merely in a failed performance: no Y is produced” (Fletcher 2003: 96). This last possibility reflects how the act has normative effects but it can be considered void if another tribunal recognizes the violation of the constitutive rule. Namely, if we want to assign the function of a testament to the last wish of a subject, we will need all the conditions that the constitutive rules stipulated. If we legally use the document but it misses the signed condition, the document and their consequences will be void over a tribunal. Besides, if a tribunal emits a verdict that recognizes that testament as a correct one, even when it misses the signed condition, the testament will have legal consequences until another superior tribunal voids that initial verdict. And if there is no superior

tribunal or any part appealing to it, that testament will have the same legal consequences as the one that accomplishes all the legal requirements.

3.1.4. **Technical rules & constitutive rules**

Finally, another important problem derives from the application of constitutive rules: if the constitutive rule indicates what is needed to X count as Y in the context C, what is the difference with a technical rule? Why has this rule constitutive force instead of being a guide to find the legal solution required?

This problem emerges due to the excessive general parameters in which Searle configures constitutive rules. Following the theory of Amadeo Conte, Carlos Alarcón (1991) shows us the importance of differentiating the crucial features of each rule: if it prescribes the necessary conditions to be an institutional fact, it is a constitutive-eidetic rule; if it sets forth the necessary and sufficient conditions of validity, it is an anankastic-constitutive rule; and finally, if it is indicating how to achieve a certain end, it is a technical rule. Maybe the three kinds of rules are mentioning the same conditions, but their natures are different: the first case is a classical constitutive rule, the second case is a constitutive rule but with regulative force, and the last one is a mere regulative rule. Only the first and the second possess constitutive force¹¹. That is to say, they are the only ones that create institutional facts. In fact, the content established by a technical rule depends on a previous constitutive rule: it presupposes its conditions. It presupposes the means to achieve certain end and the end looked for. As Von Wright has explained, technical rules use the modal verb “must”, which is a “technical ought”, instead of “ought”, which is a “deontic ought”. For instance, if we think of a constitutive rule as the art. 1544 Spanish Civil Code: “*En el arrendamiento de obras y servicios, una de las partes se obliga a ejecutar una obra o prestar a la otra un servicio por un precio cierto*”, we can easily see “the X counts as Y in C”, but the same article stipulates which means are necessary to achieve the end. To avoid the confusion between technical and constitutive rules, we can reformulate the article as a technical rule: “If you (renter) want to rent a service (end) you must agree a price, and the lessor would offer you the service”. This last translation presupposes the truthfulness of the art.1544CC.

The main problem comes because sometimes the technical rules and the eidetic-constitutive rules share the same structure (and even content), and it helps to confuse their nature as Alarcón (1991) explains. That is the case of Searle's problem with the formula of constitutive rules that we have mentioned before¹².

¹¹ In fact, Roversi critic this difference (forthcoming: 7). He defends that there is no ontological difference between the eidetic and the anankastic constitutive rules. This is not a problem to my presentation due to the fact I focus on the differences with technical rules, and again the difference between constitutive and regulative rules in the law.

3.2. Authors proposals

In this second part of the section, I will present different proposals that have tried to apply the constitutive rules to the legal field, following Searle's theory or following a similar intuition.

3.2.1. Von Wright

G.H. Von Wright developed the first theory of deontic logic. His famous book *Norm and Action* is previous to the Searle's theory, and there he proposes a classification of norms very close to Searle's constitutive and regulative rules. He has been an enormous influence for the philosophers of law.

It is generally accepted that language has two functions: descriptive or prescriptive. The descriptive use has a direction of fit *mind to world*, and conditions of truth that accredit its falsity or veracity. It is the kind of use of the language necessary to inform. The prescriptive use has a direction of fit *world to mind* and its aim is to change the world, make the world as the words want. For that reason this use does not have conditions of truth. It is the one used to order.

Von Wright criticises the classical¹³ idea that all rules could be analysed through the prescriptive function of language. He thinks that it would be too restrictive due to the fact "the meaning of norm is vague and heterogeneous" (1963). He renounces to develop a general theory of rules and prefers to focus on a general theory of prescriptive rules.

Von Wright claims that there are three main kinds of norms: definition rules, technical rules and prescriptions. But they are not subclasses of the common class "norm": they are different senses of the term "norm". This difference is important because Von Wright defends a unique ontology of the norm whose constitutive force, in some occasions, takes more importance, whereas in other occasions the main one is its regulative force.

The definition rules would occupy the same position that the constitutive rules in Searle: they are rules that do not have a descriptive nor prescriptive function. They determine the existence of the activity or action cited. But they are not descriptive because, as Lagier (1995 : 240-260) explains, they have a regulative force at the same time: they determine the conditions that allow its existence as long as they determine how to develop it correctly. As we have seen, Searle shares this characterization: he agrees that constitutive rules have regulative and constitutive force. Lagier develops this common point of Searle and Von Wright and conclude that even admitting a

12 That would be an explanation about how regulative and constitutive rules could be written with the formula "count as" but in one case it has constitutive force and in the other it does not.

13 The classical idea comes from John Austin's theory of law, which understands it as a system of prescriptive rules whose force is based on the authority and the sanctions. H.L.A Hart changed this view with the internal point of view and the existence of secondary rules in *The concept of law*.

differentiation between constitutive and regulative rules, that would be a simply matter of degree (Lagier 1995 : 263).

Prescriptive rules are equivalents to regulative rules: their meaning is purely prescriptive, their direction of fit is *world to mind*, and both use deontic verbs to express their content. The feature characteristic of Von Right's view is that it is a necessary element of the prescriptive rules that they are prescribed by an authority.

Finally, technical rules shows what are the means needed to achieve the end or the desired look for the agent. They contrast with the anankastic propositions which have a descriptive use of language which express a relation means-end. The anankastic propositions stipulate the content from where the technical rules base the means-ends relation. The technical rule specifies the instruction for a certain case according to the subject's intention or desire¹⁴. In other words, anankastic propositions share similarities with Searle's constitutive rule, but they only describe the conditions needed to constitute (and not regulate). As in the case mentioned before, to obtain a rent of services, both parts have to accomplish certain conditions (art. 1544CC) . The norm that describes which conditions are necessary is the anankastic norm, while the norm which stipulates how to achieve a rent of services in a certain situation is a technical norm.

In conclusion, Von Wright tries to identify different senses in which a norm acts. Definition rules and prescriptive rules have similar characteristics to constitutive and regulative rules. But as we have said, the work of Von Wright is mainly focused on prescriptive rules, and consequently, he did not answer the problems associated with the identification of the definition rules, or their distinction.

3.2.2. Jose Juan Moreso and Josep Maria Vilajosana

In their book "*Introducción a la teoría del derecho*", the Spanish philosophers of law Jose Juan Moreso and Josep Maria Vilajosana introduce Searle's theory of constitutive rules into the classic study of legal norms. They agree with Von Wright's idea that there are not subclasses of norms, they are only senses in which the different norms act. They introduce two senses: prescriptive norms and constitutive norms.

On the one hand, prescriptive norms use the prescriptive function of language. They try to guide human behaviour, and for that reason they appear in the legal texts establishing a relation between a description of a situation, action or object, and the legal consequences attached. They make it through an obligation, a permission or a prohibition.

¹⁴This differentiation is very criticised and unclear. To follow the discussion sees Lagier 1995: 264.

On the other hand, constitutive norms use neither a prescriptive function of language nor a descriptive. They use the illocutionary force of the language, introduced by Searle in his book “*Speech Acts*”. It combines the two directions of fit: *world to mind*, when for instance, the judge declares that someone is responsible of the consequences of certain action, and her answer has constitutive force in the context of that legal system (she has changed the world); or *mind to world*, when after the judge declaration another superior tribunal check the kind of intention of the agent established in the legal norm to assign liability for an action, that is to say, check the conditions of truth to verify the actual liability.

This is interesting for the previous problem announced, due to the possibility to understand constitutive norms with the two directions of fit; they will solve the problem of the coexistence of both kinds of constitutive force: the one that comes from the authority who applies the constitutive norms and the one which comes from the constitutive norms themselves. Furthermore, they appear in the legal texts establishing a relation between a description of a situation, action or object, and another description of a situation, action or object which normally is an institutional fact. They usually make it through definitions, or through relations of inclusions. An example would be the competency norms: they are norms that regulate how to introduce or eliminate norms. The authors defend that they are constitutive rules, due to the fact that they do not order neither forbid any behaviour: they only establish which are the validity conditions of the norms¹⁵ to be part of the legal system. As the authors explain, that is the case of “if the organ O, with the process P, emits a norm N about X, then the norm N will be valid” (Moreso & Vilajosana 2004 : 85) which could be part of the Searle formula “X(a norm emitted by the organ O with the process P) counts as Y (valid norm), in the context C (the legal system where the norm has been emitted)”.

3.2.3. Amedeo G. Conte

To conclude, I will present the most important application of the Searle’s theory of constitutive rules. Amedeo Conte develops his own theory of constitutive rules in the legal sphere. Along with Gaetano Carcaterra, both develop an important discussion on constitutive rules in Italian legal philosophy which have left a big impact over their successors.

The main feature in Conte’s theory is his focus on the necessary and sufficient conditions that include each kind of constitutive rules. As Alarcón (1991: 276-277) explains, Conte understands constitutive rules from an ontological view: they constitute the conditions of existence and the praxis, and from a semiotic view: they determine the connotation of the term constituted.

¹⁵There are different positions about that: some authors believe that competency norms are mandatory norms, and others believe they are permissive norms. To see the three positions developed : Moreso & Vilajosana 2004: 83-89.

Conte follows the conception of Searle's constitutive rules: he understands the relation between the constitutive norm and the fact created as a relation of logical dependency, which implies that constitutive rules cannot be unaccomplished, due to their conceptual relation, and there cannot exist constitutive rules that are antinomies, namely, "X counts as Y in C" and "X counts as No Y in C". The author claims that if there are antinomies, it is because the Y has different senses in each constitutive rule (they are not equivalents Y).

Conte claims that "constitutive rules either *are* or *set forth* a condition for the behaviour they regulate, and that this condition can be necessary, sufficient or necessary and sufficient" (Roversi forthcoming: 2). This sentence sums up Conte's theory and his original classification. It shows two levels of classification of constitutive rules: the first level, between "*be*" a condition or "*set forth*" a condition, and the second level with a classification according to the kind of conditions included: necessary, sufficient or necessary and sufficient conditions.

On the one hand, Conte establishes an initial differentiation difficult to appreciate¹⁶. He refers to two kinds of constitutive force: the first one "being a condition of" explains the conditions of possibility, the conditions for thinking about the fact created, and the second one "setting forth a condition" indicates the conditions for the performance of the thing created. He defends an ontological difference between them, and he considers that "being a condition" is closer to Searle's constitutive rules while "setting forth a condition" is a kind of Von Wright's anankastic norms, in particular, he calls them anankastic-constitutive rules. Conte wants to differentiate between the authentic rules that create institutional facts, and in their content establishing the necessary and sufficient condition as the formula "X counts as Y in C"; and the rules that show what conditions are necessary to achieve or create a certain end. So, he tries to solve the problem previously announced of the difference between technical rules and constitutive rules.

On the other hand, he presents the classification of eidetic, thetic and noetic constitutive rules which is much clearer. In this case, these three kinds of constitutive rules are made up of "being a condition of" classification. The eidetic contains the necessary condition of what it regulates; the thetic contains the sufficient condition of what it regulates and the noetic contains the necessary and sufficient conditions of what it regulates. The eidetic constitutive rules follow the same definition as Searle's constitutive rules: they establish the necessary conditions to create the fact described. They establish the possibility to imagine, to think about the new fact created. They are the individual norms that forms part of a system of norms. The whole system of eidetic constitutive rules of a certain fact, as for instance the system of rules of chess, represents the necessary and sufficient conditions to constitute chess. On the contrary, the thetic constitutive rules

¹⁶To follow the discussion, see Roversi forthcoming: 2-7

are conditions for the actuality (Roversi forthcoming: 3) of what they are about: they established the sufficient conditions to develop the fact, but by themselves they cannot constitute the existence of an institutional fact. In other words, the eidetic constitutive rules are the norms that establishes how to create a *type*, for instance how to have a testament, and a thetic constitutive rules are the norms that generates a *token*, namely, the sentence that recognizes certain piece of handwriting paper as a testament. Finally, the noetic constitutive rules represents the rules that individually are enough to constitute an institutional fact: they are sufficient and necessary conditions to enact a institutional fact, they are not part of a system of rules as in the case of the eidetic-constitutive rule¹⁷.

In conclusion, Conte develops a theory that tries to differentiate diverse aspects of Searle's constitutive rules. He focuses on the logical relations between norms and the institutional fact created, and he shows how in the legal field it is necessary to make a more concise study than in Searle's approach.

4. **How to identify Searle's constitutive rules in the law**

We have seen Searle's theory and its main problems, and how different problems take place when that theory is applied to the law. We have seen some proposals about how to connect Searle's theory with the law. Now I would like to explore two possibilities that allow us to identify constitutive rules in the law: the first one consists in trying to find constitutive rules through one of the main characteristics of the Searle's theory: the assignment of the function, and the second one consists in trying to find institutional facts in law through collective intentionality.

4.1. **Through norms: Functional analysis.**

As we have seen, the main indicator of Searle's account on constitutive rules is the formula "X counts as Y in C". However, it could be problematic since regulative rules can be expressed with the same structure but without having constitutive force. To avoid that problem, I'm going to focus only on the key part of the formula, the locution "count as", which means to assign a new function. "Count as" represents the change from X to Y, and that change comes with the assignment of a new function to X, to become Y.

Searle understands the function from a biologist point of view: the function represents the role that Y plays in a social system. It is a new role that the X does not have. He goes further with this analysis and specifies that to create an institutional fact, the function has to be a status function. What is the status function?

The "count as" change shows how the assignment of function is always observer-dependent, namely, it implies agentive functions. That is to say, the "assignment" is a social construction: there

¹⁷ To develop this classification, see Alarcón 1991: 278-280.

is no natural relation between X and the new function. In that sense, the relation is never causally related. For instance, the function of the eyelash is to protect the eye. In this case there is a causal relation between the eyelashes position and its power to prevent any kind of flying thing from coming into the eye. There is not an agentive function because there is a natural relation. But we need an agentive function if we want to use some reeds to separate two lands: the physical features of a group of reeds allow us to recognize the new function assigned, but there is not any causal relation between them.

The main feature of the agentive function that Searle refers to with the term “status function” is that there is no relation between the X and the new function, not even through its physical characteristics. For that reason, the assignment of the new function is totally dependent of the language. The language works as a symbol: it is a necessary means to get the new function socially recognized¹⁸. For instance, there is a status function between being a green paper (X) and to being money (Y). If we do not construct the concept “money”, an independent observer who sees an exchange between green papers and meat, he will not be able to understand the function assigned to that green papers in the society as a general means of exchange.

It is important to notice that Searle recognises that institutional facts normally have more than one status function assigned, and that they work together to serve some general purposes¹⁹

Another important point to notice here are the implications that the ascription of function has. As Searle mentions in his books, to say that the function of the heart is pumping blood implies a normative claim about perceiving survival as something good²⁰. As Papayannis (2013) explains, this model of functional explaining requires “defining the function of the item as its contribution to a general capacity that happens to be beneficial for the containing system”²¹. Assuming this, I will try to identify the constitutive rule of the institution of legitimacy.

The legitimacy is a legal figure that consists in keeping a part of the inheritance to the descendants. The art. 806 of the Spanish Civil Code says “*Legítima es la porción de bienes de que el testador no puede disponer por haberla reservado la ley a determinados herederos, llamados por esto herederos forzosos*”. In this case, it seems that the legitimacy has a new function that the Spanish civil code associates to a part of the inheritance. It is observer-dependent and not causally

18 There is a very good explanation about the different kinds of functions in Lucena Cid (2009).

19 That way, Searle introduces the possibility to understand two kinds of institutional facts: the ones that allow us to promise or to lend and the ones to constitute the school or the police (Faigenbaum 2000:166).

20 This is a controversial sentence, I only explain Searle's opinion at this point (1996: 13-23).

21 Papayannis uses this model of functional explanation to analyse The Planning Theory of Law of Scott Shapiro (Papayannis 2013: 118-123).

related because the concept “legitimacy” is necessary to understand the difference between any part of the inheritance, and the qualified part. Maybe, the legitimacy has different functions associated but in the present norm it is very clear what function follows: guaranteeing that some part of the inheritance will be directly reserved to a special group of people called “herederos forzosos”. The normative claim above this function is that protecting this group of people is beneficial for the legal system, in this case, for the values that the legal system wants to protect.

Accordingly, the assignment of function offers solutions to avoid some of the problems associated with Searle's theory. For instance, we can focus in the change from X to Y as the central identifier of constitutive rules but only guided by the assignment of a new function instead of the “count as” formula as a logical structure. Following this functional explanation, we can solve the constitutive force problem as well: the difference between “writing her last wish” and “writing her last testament” rests on the different function assigned to “last testament” against “last wish”. The former needs language to be recognized by the observers of the fact, due to the fact that there is not any relation between the brute fact of writing words and the institutional fact of writing a testament. Neither the consequences of being a testament can be derived from that fact, so the constitutive rule is the only that offers a constitutive function assigned to the brute fact. Related to the importance of the context, it is important to notice that functions need the context to have the necessary framework to understand them and recognize them. Namely, if we assign a function to create “the legitimacy” but we don't count with the context of the rest of the inheritance's rules, we cannot understand part of its meaning, in the case of “herederos forzoso”, neither its normative claim (to protect them). Also, the functional explanation offers an interesting solution to the ontological problem: on the one hand, the dependence between the function assigned and the language is admitted but on the other hand, the normative claim implicit in the function offers a reason to follow the institutional fact created, and to be recognized even if its ontological subjectivity is questioned. Finally, identifying constitutive rules in the law through their functional explanation offers some solutions to the problems to apply Searle's theory to the legal field. For example, it helps to solve the sanctions question: we can understand that if we do not meet all the requirements about what is legitimacy, we cannot recognize the legal figure as Searle usually understands for constitutive rules. Mainly, if there is not some part of an inheritance, there is no legitimacy: there is no fact to be qualified with a function. However, it helps us to understand the Atienza- Ruiz Manero (2005) position about void acts: if the testator distributes previously some goods that have to be part of the legitimacy, and because of that the distribution of the legitimacy becomes smaller, that legitimacy would have legal effects, but it would be a void act too if the heirs proof the previous distribution. The act has legal effects because it develops the function assigned to protect a special collectivity, but it is a void act too, because it is not saving the part specified by the constitutive

rule. We can derive from here an explanation of judges' constitutive force: their constitutive force rests on their power to determine which function is implied in the constitutive rules of the law. They follow that criterion to determine when it is a void act but with legal effects or when it is not an institutional fact because it has not accomplished its function and consequently it has not become the institutional fact looked.

4.2. **Through institutional facts: the collective acceptance.**

In *The Construction of Social Reality* (CSR) Searle explores the creation of institutional facts through constitutive rules. As he says:

So the application of the constitutive rule introduces the following features: The Y term has to assign a new status that the object does not already have just in virtue of satisfying the X term; and there has to be collective agreement, or at least acceptance, both in the imposition of that status on the stuff referred to by the X term and about the function that goes with that status.

(Searle 1996: 44)

Hence, as we have seen before, the assignment of a status function is a necessary step to create an institutional fact. Notwithstanding, there is a key element represented by a "we intention" to affirm and consolidate the new creation.

This "we intention" is manifested through the collective intentionality: an action performed by a plurality of individual agents that have the relevant propositional attitude in an irreducible "we-form"²². It is not the addition of different individuals' attitudes, as individualism affirms; Searle defends a limited supraindividualist theory: the group shares the same propositional attitude and it implies an idea of cooperation. I say "limited" because the author recognizes the existence of individual and supraindividual intentions, but in any case, individual actions are derived from these intentions. That is to say, he defends individual actions even inside supraindividual intentions.

Following Tuomela, we can define a "we-attitude" to be "a psychological propositional attitude a person has toward something, say p, if and only if: this person has the attitude A towards P; she believes that the others have that attitude and she believes that there is a mutual belief among the members of the collective that the members have that attitude" (Tuomela 2002 : 298).

Accordingly, collective intentionality is the element that generates the key actions of creating and maintaining social institutions to finally achieve the collective acceptance: institutions exist only in so far as they are collectively believed to exist. Namely, "if everybody always think

²²There is a controversial debate about the existence of these supraindividual attitudes and their consequences. Searle defends an intermediate position: he claims the existence of a "we intention" (he belongs to the anti-reductionist camp) but he does not want to embrace supraindividualism as the existence of a super-agent that is the possessor of any given we-intention. To develop this point, see Miller, S. 2014.

this sort of thing is money, and they use it as money, and treat it as money, then it is money” (Searle 1996: 32). Consequently, collective acceptance becomes part of the constituent power of constitutive rules. It is a necessary condition to create institutional facts²³.

Searle realizes the importance of collective acceptance and he proposes in CSR an alternative formula to the “count as”: “We accept (S has power(S does A))” (Searle 1996: 104). This formula represents “how the creation of a new status function confers some new power of the sort that cannot exist without collective acceptance” (Moural 2002: 274). That is to say, the formula represents firstly, the relevance of collective acceptance and secondly, the deontic status that Searle assigns to institutional facts (the power to create rights and obligations). For instance, we can translate the classical example of money “X (this green piece of paper) counts as Y (a five dollar bill) in context C” into the power formula “We accept (S, the bearer of X, has power (S uses X as a five dollar bill))”²⁴.

My aim with this theoretical explanation is to avoid misunderstandings with the term “institutions” once we want to look for institutional facts in the law. I am not looking for “institutions” in the classic sense of the structure where norms arise, namely, The State or The institution of Civil Law²⁵. To find constitutive rules in the law, I should focus on social institutions where a new deontic status and status function is conferred by members of a collective. There are legal figures that depend on constitutive rules, and consequently, to collective acceptance, to exist. A particular example of this is the Spanish legal figure of “*cañada*” or Cowpath . The cowpath is codified in the art.570 of the Spanish Civil Code and it refers to a certain part of a field where the cattle needs to walk to have access to the street.

This necessity is recognized by the collective intentionality of a certain group of people which decide to create the legal figure of the *cañada*. It assigns a new deontic status function to a certain part of a private field, which consists in being the path that allows cattle to go to the street. This function is deontic because it includes rights to the owner of the cattle and duties to the owner of the field. The necessary condition of collective acceptance is accomplished, firstly, due to the we-attitude of the collective: the cowpath exists because each member of the collective thinks that it exists, and they believe that there is a mutual belief among the members of the collective about its existence. It is this collective intentionality which allows the creation of the cowpath and to maintain the rights and duties implied through the time, due to the collective acceptance generated.

23Tuomela argues that it is a necessary and sufficient condition. Here, I only accept the necessity of the collective acceptance, since it requires argumentation and exclusion of certain kinds of commonly known social institutions to be a sufficient condition. To see the argument, check Tuomela 2002: 303.

24The main problem of this formula is that Searle has no developed his potential, neither the relations between the two formulas as Moural (2002: 280) explains.

25I’m refereeing to the classic theory of institutionalism of Santi Romano or Hauriou (Lucena Cid, 2009)

We can translate the cowpath into the logical formula of power: “We accept (S has power(S does A))” = “We accept that S, the owner of the cattle, has power (right to the cowpath) due to the fact that S manages its cattle through a certain part of a private field that is not hers”.

Furthermore, as we have seen in the case of assignment of a function, focusing on the necessary condition of collective acceptance allows us to resolve some problems that we initially attribute of how Searle’s theory can be applied to the legal field. I have shown how we can find institutional facts in the law, and how they came from the collective intentionality and its collective acceptance. On the one hand, the validity that acts as a substitute of the acceptance in the modern parliaments does not refer to Searle's collective acceptance: Searle refers to the community that create and maintain institutional facts as the community that constructs its social reality and give force to is institutional facts through its common use. It is neither the case that in the parliament has to be collective intentionality to enact a institution: following Searle, legal figures as the *cañada* only survive through time because people still think in the existence of the we intention, and not because of the law. If no owner of the cattle demands her right to the *cañada*, the right will disappear and the piece of field will return to be a plainly private field. On the contrary, if the owner of the field systematically denies the existence of the *cañada*, the courts will be plenty of owners, and the law will finally change to adapt to the lack of the *cañada*. The maintenance of an institutional fact depends entirely on the collective acceptance. On the other hand, It helps us to understand the constitutive force of judges: it is true that they can prescribe certain new aspect of a rule, but they cannot create a new legal figure. Even though, if they change the function assigned to a certain institutional fact and there is no collective intentionality behind that change, there are only two solutions: the institutional fact does not accomplish with the necessary condition and it results in the no social recognition of their existence; or that it is an institution as norm-governed social practice, but not the kind of social institutions that Searle considers in his theory.

Finally, related with the problem of sanctions in constitutive rules, collective acceptance offers us two explanations. Firstly, it manifests the normative aspect of the collective acceptance: due to the “we intention” each member of the group expects that the rest shares the same belief and develops their own part of the we-intention²⁶. They even can impose social sanctions to control people's activities. Secondly, the deontic status function of the institutional fact assigns rights and duties that have power even if the institutional fact only receives some part of the collective acceptance due to the non-compliance with one of his features. That is to say, the collective acceptance account will affirm the Atienza-Ruiz Manero (2005) idea about the irregular normative acts that have normative consequences.

²⁶ In some cases, it is possible to derive different individual ought duties to develop the same we-intention. Lucena Cid (2009) uses the example of a game, and the duties derive to in winning that collective game.

5. Final stages

I have proposed two possibilities to identify Searle's constitutive rules in law. The assignment of a function and the collective acceptance are necessary conditions to distinguish constitutive rules as the examples of the legitimacy and the cowpath have shown. Furthermore, they solve or at least offer alternatives to avoid most of the problems presented related with Searle's theory and with its application in the law. Now, I would like to explore, firstly, the relations between the two conditions defended and the proposals from Von Wright, Jose Juan Moreso and Josep Vilajosana and Amadeo Conte, and secondly, what advantages and disadvantages Searle's theory has in his application into the legal field.

5.1. Necessary conditions and classical legal proposals

On the one hand, the necessary conditions presented confirm the distinction defended by Von Wright between definition and prescriptive rules. Von Wright claims that not all rules are defined by the prescriptive function of language. There is a sense in which the norm is prescriptive and in those cases it is necessarily prescribed by an authority. On the contrary, there is a sense of norm which is neither prescriptive, nor descriptive: the definition rules. These keep similarities with the constitutive rules because Von Wright identifies them as the ones which determine the conditions that allow their existence. This suggests that the definition rules can include the assignment of the function to conform its meaning, as it happens in the case of constitutive rules. Besides, the fact that Von Wright connects the prescriptive rules with the prescription of an authority implies how collective acceptance is not necessary to conform regulative rules, the ones which develop the prescriptive function. But he leaves the door open to the condition of collective acceptance in the case of definition rules.

On the other hand, Jose Juan Moreso and Josep Vilajosana agree with Von Wright in his distribution of the functions of language: the prescriptive norms use the prescriptive function while the constitutive norms, the name they give to the other sense of the norms, employ neither the prescriptive, nor the descriptive. It uses the illocutionary force of the language: as long as the collective acceptance needs language to represent the collective creation and as an instrument to guarantee the recognition by the rest of the members of the group; the constitutive norms use language to declare the existence of a new fact. Furthermore, the description the authors give to constitutive norms agrees with the assignment of function as a necessary condition to have a constitutive rule: they claim that constitutive norms establish a relation between a description of a situation, action or object, and another description of a situation, action or object which is normally an institutional fact. If we interpret the "description" as an attribution of a new function, it becomes the same structure needed to assign an agentive function Y to X. As we have seen before, even in

the example they find in the legal field, the case of competency norms, it seems that we can find a “new status-function” assigned to a previous object, which makes it have new deontic functions. Namely, “X(a norm emitted by the organ O with the process P) counts as Y (valid norm), in the context C (the legal system where the norm has been emitted)”.

Finally, related with Amadeo Conte's proposal, our two conditions of necessity are recognized due to the fact that he shares with Searle the main features of the constitutive rule. Conte claims that the constitutive rules, or the eidetic-constitutive rules, constitute the activity about what they talk about, and besides, they determine their meaning. They include their conditions of existence and they establish a relation of dependency between the constitutive rules and the fact created. He also said that there cannot be two opposite constitutive rules: one that allows and one that forbids an action. This conception is consistent considering the assignment of the function as a necessary condition: it is only through the assignment of a new function that X acquired a new status, which establishes a relation of creation and of dependency. It is even consistent with the necessity of the collective acceptance due to its power to create meaning: this meaning needs the recognition for the collective affected to guarantee its maintenance.

5.2. Advantages and disadvantages of the relation between Searle's constitutive Rules & the legal field

Searle's account of constitutive rules is very useful to identify the different senses or kinds in which a norm could be developed. It allows a further comprehension of the normative phenomenon, making a distinction between the classical prescriptive aspect of the rules, represented by the regulative rules, and the declarative or constitutive aspect, represented by the constituted rules.

Furthermore, his theory explains how certain institutional facts are created, and he gives especial importance to the assignment of function and the collective intentionality. In the legal field, a lot of legal figures have been created through the tradition, and Searle's theory could perfectly explain how they have finally arisen to the legal field.

The main problem of the theory is that it is a theory constructed to explain relations of the social sphere, as language or social institutions that are not “fixed”. As we have explained through the collective acceptance, the constitutive rules live and depend on the collective affected: if a subject is referring to a constitutive rule behind a person who is not part of the collective, maybe he cannot recognize the figure and the effects of the deontic status will lose their power. Similarly, if some people in the collective stop using the institutional fact created, or they use it but with another function assigned, it would probably affect its existence. It is a sociological explanation of certain features of social life that depend entirely on the society that has created them.

As I have said, even when those aspects are very important, especially in relation with the customs or with the internal point of view that Hart recognized in the rules, the essence of the norms in the legal field is that they are codified. The main disadvantage of applying Searle's theory to the legal field is that he does not reflect about the changes in the essence of a constitutive rule when it is codified. I think that once codified, the rules can still remain the necessary condition of the assignment of a function, but it will lose the necessary condition of having collective acceptance. The collective intentionality can still be required in the creation of the institutional fact, due to the fact that it depends on the source where that law has merged. But the collective acceptance is totally substituted by the force of the law, and the deontic status has power because of the law and not because of the collective recognition. It requires a change in Searle's second formula of "We accept (S has power(S does A))". Namely, "we recognized in a law (S has power(S does A))". Moreover, this recognition of the law derives from the recognition of the jurisdictional system through the rule of recognition. Another important aspect here is related with Searle's theory: some authors think that the essence of Searle's constitutive rule rests on the rule of recognition, which is the rule where the rest of the system emerges, and where the validity and recognition rest.

6. Conclusion

To sum up, along this paper I have tried to show the possibilities that Searle's concept of constitutive rules offers to understand some important aspects of the law. With that aim, I have proposed two key elements to identify constitutive rules in the law: the assignment of the function, and the collective intentionality, which helps us to find institutional facts in law. Looking for constitutive rules through those elements has allowed me to solve some of the problems cited of Searle's theory. Besides, both are part of the theories of philosophy of law explained. Finally, I have concluded the paper citing the main virtues and weaknesses of the application of Searle's theory of constitutive rules to the legal field.

I have conceptualized this paper as an initial stage of a further research. The aim of this paper allows the readers to understand a general outlook of what means to apply the Searle's theoretical ideas to a practical and normative field as the law is. This translation from a theoretic sphere to a practical sphere implies different problems that I have avoided to enter, but that are important and they need a further research. Besides, one of the most important points concluded from this paper is how Searle explicitly leaves aside the problem of the codification of constitutive rules. This aspect needs a further research since it seems to mean a change in the ontology of constitutive rules resulting from the disappearance of the element of collective acceptance and how the force of the law occupies its place.

7. Bibliography

- Alarcón, C. (1991) “Sobre el concepto y la tipología de las reglas constitutivas”, *Anuario de Filosofía del Derecho* 6: 273-295.
- Atienza, M. & Ruiz Manero, J. (2005) *Las piezas del derecho: teoría de los enunciados jurídicos*. Barcelona: Ariel.
- Faigenbaum G. (2001) *Conversaciones con John Searle*. Libros en Red Ed.
- Fletcher, G. P. (2003) “Law” in Smith B. (ed.) *John Searle*. Cambridge: Cambridge University Press
- Gonzalez Lagier, D. (2003) “Clasificar acciones. Sobre la crítica de Raz a las reglas constitutivas de Searle”, *DOXA* 13: 265-276.
- Gonzalez Lagier, D. (1995) *Acción y Norma en Von Wright*. Madrid: Centro de estudios constitucionales.
- Lucena Cid, I. V. (2009) *La ontología política de John R. Searle. Un análisis sobre la teoría de los hechos institucionales*. Sevilla: Aconcagua Ed.
- Marmor, A. (2009) *Social Conventions: From Language to Law*. Princeton: Princeton University Press.
- Miller, S. "Social Institutions", *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition), Edward N. Zalta (ed.), URL = [<https://plato.stanford.edu/archives/win2014/entries/social-institutions/>](https://plato.stanford.edu/archives/win2014/entries/social-institutions/)
- Moreso, J.J. & Vilajosana J. M. (2004) *Introducción a la teoría del derecho*. Barcelona: Marcial Pons.
- Moural, J. (2002) “Searle's theory of institutional facts: A program of critical revision” in Grewendorf, G. and Meggle, G. (eds.) *Speech acts, mind, and social reality : discussions with John R. Searle*. Dordrecht (NLD) : Kluwer Academic: 271-286.
- Papayannis, D. (2013) "Legality: Between Purposes and Functions" in Canale, D. and Tuzet, G. (eds) *The Planning Theory of Law. A Critical Reading*. Dordrecht (NLD): Springer-Verlag.
- Roversi, C. (2010) “Constitutive Rules in Context”, *Archives for Philosophy of Law and Social Philosophy* 96 (2): 223-238.
- Roversi, C. (forthcoming) *Six Heresies on Constitutive Rules*.

- Searle, J. R. (1969) *Speech Acts. An Essay in the Philosophy of Language*. Cambridge: Cambridge University Press: 85-101.
- Searle, J. R. (1996) *The Construction of Social Reality*. London: Penguin. (1st ed. 1995.)
- Searle, J. R. (2005) *Libertad y Neurobiología: reflexiones sobre el libre albedrío, el lenguaje y el poder político*. Barcelona: Paidós.
- Tuomela, R. (2002) “Searle, Collective Intentionality, and Social Institutions” in Grewendorf, G. and Meggle, G. (eds.) *Speech acts, mind, and social reality : discussions with John R. Searle*. Dordrecht (NLD) : Kluwer Academic: 293- 307.
- Wright, G. H. Von (1963) *Norm and Action: a logical enquiry*. Routledge & Kegan Paul.