

TWO KINDS OF NORMATIVITY

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Abstract: There are at least two kinds of normativity. They can be distinguished easily, but nevertheless they are sometimes confused. This article aims to clarify the distinction and thereby to prevent more confusion. The one kind of normativity has to do with what ought to be done, or what ought to be the case. The other kind of normativity has to do with facts that exist as the result of applying a rule. Being deontic and being rule-based do not exclude each other, but being deontic is not a subcategory of being rule-based, and neither is it the other way around.

Keywords: deontic, direction of fit, duty, obligation, rule-based

1. Introduction

There are at least two kinds of normativity. They can easily be distinguished, but nevertheless they are sometimes confused. This article aims to clarify the distinction and thereby to prevent more confusion. The one kind of normativity has to do with what ought to be done, or what ought to be the case. It is exemplified by sentences such as:

1. Jan ought to pay Michel €100.
2. Antonia is under an obligation toward Dieter to wash his car.
3. There ought to be a stamp on this letter.

In connection with this kind of normativity, I will use the word “deontic”, a term which is traditionally used in the logic for ought-to-do and ought-to-be.

The other kind of normativity has to do with facts that exist as the result of applying a rule. It is exemplified by sentences such as:

- a. For the Traffic Law, this skate board counts as a vehicle.
- b. Antonia is under an obligation toward Dieter to wash his car.
- c. Donald Trump is the president of the USA.

In connection with this kind of normativity, I will use the word “rule-based”. Rule-based facts are also known as “institutional facts”.¹ As the sentences 2 and b illustrate, some rule-based facts are also deontic.

2. Facts and rules

2.1 Facts and language

To facilitate a clear and unambiguous discussion of normativity, I will introduce a conceptual framework. The most elementary parts of this framework are language and facts.

Sentences are the central elements of a natural language. They can be used to perform different kinds of speech acts, such as describing, creating, asking questions, and ordering. Here I will focus on the descriptive use of sentences only, and the sentences that will be considered are all descriptive.

Propositions are the meanings of descriptive sentences. Strawson rightly observed that all facts are 'the fact that ...', where the dots express a proposition, such as 'it is raining'.² Since propositions are language-dependent, languages are ontologically speaking prior to facts. Facts depend on what is the case, but also on languages that allow us to express what is the case.

Propositions, states of affairs and facts can be defined in terms of each other. The world can be defined as the set of all facts.³ A fact is a part of the world that is expressed by a true proposition, while a proposition expresses that some state of affairs obtains in the world. If the proposition is true, this state of affair actually obtains, and then the state of affairs is also a fact.

Since facts are states of affairs and therefore language-dependent, the world is language-dependent too. This does not mean that with a language all the facts are given. All states of affairs are given with a language, but the world makes a selection of the states of affairs that actually obtain. For instance, given the English language, it is a state of affairs that all horses have wings. However, given the world, this state of affairs does not obtain, and it is not a fact that all horses have wings.

Unlike propositions, terms are not true or false, but they stand for (denote) 'things' in the world. Logicians call these 'things' which are denoted by terms, individuals. Examples of individuals are President Trump, Mount Kilimanjaro, the house in which I live, the piece of music to which I am listening, or the smallest prime number.

Essential for this article is that rules are also individuals, no matter what their content is. For example, the rule that car drivers must carry a driver's license is not a sentence that expresses a proposition, but an individual.⁴ The rule-formulation "Car drivers must carry a driver's license" is a term that denotes this rule. While rules are individuals, it is a state of affairs – and possibly a fact – that a particular rule exists. There is nothing deontic about such a state of affairs, not even if the rule itself is deontic. However, the existence of a deontic rule may have deontic consequences, such as duties or obligations.

2.2 Objective facts and brute social facts

Some facts are objective in the sense that they are independent from anyone's beliefs. These objective facts would include that Mount Everest is a mountain and that it is higher than the *Zugspitze*, and that there are lions and other kinds of animals. If objective facts are mind-independent, they are the same for everybody. Something is an objective fact or not, but it cannot be an objective fact for you but not for me. However, one person may believe a fact to be objective, and therefore the same for everybody, while somebody else believes it to be subjective, and therefore potentially different for different persons.⁵

Some facts are purely subjective, in the sense that they depend on personal tastes and preferences only. Examples would be that chocolate tastes better than cauliflower, and that paintings by Miro are more beautiful than paintings by Mondriaan. Some other facts depend for their existence on what the members of some social group think the facts are. I will call the latter facts 'social facts'. If we are satisfied with a very coarse categorization, social facts may be described as facts which exist because the members of some group collectively recognize or accept them as existing.

Not all kinds of facts lend themselves to existence through collective recognition. Physical facts are a case in point, because collective recognition as such does not influence physical reality. However,

many kinds of non-physical facts exist through being recognized. Law abounds with examples of non-physical facts, such as people having obligations, or the possession of a particular legal status such as that of the Dutch king. Also outside law there are non-physical facts, many of which exist through collective recognition. These include that somebody is the leader of an informal group, that somebody is blameworthy, or that somebody is a hero.

Social facts depend on recognition, and this recognition can only exist within a group of people. The group ranges from two persons as one extreme, to everybody as the other extreme. This means that all social facts are facts within a group, and relative to a group. They are therefore not objective. However, they do not depend on the recognition of individuals persons either. Whether precedents count as law depends on their recognition as such by courts and other legal decision makers, but for every individual court in the common law tradition it is a given fact that precedents count as law.

There are two variants on collective recognition. In the case of what I will call 'brute social facts' the facts themselves are recognized by the members of a social group, while in the case of 'rule-based facts' the facts are the result of a rule that exists in the group. I will return to this distinction in section 3.

2.3 Directions of fit

Often the notion of a rule is connected to the guidance of behavior: rules indicate what we should do. Typical examples of such rules are the rule that prescribes home-owners to remove the snow from the pavement in front of their homes, or the rule that attaches the obligation to pay damages to the unlawful causation of damage. However, there are also rules whose primary function is not to guide behavior, and which cannot be followed in the sense of doing what the rule prescribes. Examples would be the rule that gives the municipality council the competence to make parking regulations for the city and the rule that makes persons against whom a serious criminal suspicion exists, into criminal suspects.

It may be claimed that competence conferring rules and classificatory rules also prescribe behavior, because failing to apply these rules is a mistake. However, even though non-application of an applicable rule may constitute a mistake, this does not prove that the rule that was not applied prescribes behavior or is in some other sense deontic. If the mistake proves that some rule was violated – but I doubt that it does - the violated rule was the rule prescribing to apply applicable rules, or something in that vein. Such a rule would be deontic, but that does not say anything about the deontic nature of the non-applied rule.

If it is not the function of all rules to guide behavior, one may ask whether there is a function that all rules share. The answer is that rules have in common that they attach the presence of facts to the presence of other facts. A proper understanding of this common characteristic requires that we pay some attention to what will be called the "world-to-word direction of fit" of rules, and oppose it to the "word-to-world direction of fit" of descriptive sentences.

Sentences that are used descriptively consist of words that aim to fit the world. The propositions that they express are true, and the speech acts in which they are used are successful in the sense of truthful, if and only if the facts in the world correspond (fit) to what these propositions express. This is called the word-to-world direction of fit.

For the world-to-word direction of fit, we must distinguish between three kinds. One kind is when the words function as a *directive*, as when Louise shouts 'Henry, stop!' when she fears that her young boy will cross the busy street. This order aims at making Henry stop, and if the order is successful in

the sense of “efficacious”, Henry will stop and the facts in the world will fit the content of the order. In this case the relation between the utterance of the order (the performance of the speech act) and the facts in the world is causal. I will therefore write about the “causal world-to-word direction of fit”.

A second form of the world-to-word direction of fit manifests itself in constitutive speech acts. Constitutive speech acts are speech acts performed with the intention to bring about a particular change through the operation of a rule or convention. Examples of constitutive speech acts are the baptism of a ship (“I hereby baptize you the Herald of Free Enterprise”), granting a competence (“You can consider every promise made by Janet on my behalf as a promise made by me”), or the issuing of a command (as distinguished from an order). The result of the baptism, brought about by a convention, is that after the baptism, the ship bears the name that was given to it by means of the constitutive action. The result of granting the competence is that the person who was given the competence - in the present case Janet - can bind the speaker by making promises on the speaker’s behalf. This result is brought about by a rule that makes it possible for speakers to grant competences by announcing that they do so. In both cases, the facts in the world fit the content of the speech act, but in contrast to the operation of directives, the result is brought about by a rule or convention, and not through a causal connection. In connection with constitutive speech acts I will write about the “constitutive world-to-word direction of fit”.

The result of a successful command, such as “I hereby forbid you to cross the street” directed by Louise to her son Henry, is that a duty enters into existence. In this case it is the duty of Henry not to cross the street. If such a prohibition is successful, the facts in the world come to match the content of the speech act and Henry has from that moment on the duty not to cross the street. Also in this case, the relation between the speech act and the facts in the world is constitutive by nature; the performance of the speech act constitutes the duty. The speech act is successful, here in the sense of being valid, if its intended consequences set in.

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

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

2.4 Rules as constraints

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

adapt themselves to the rule, and that is what is meant by the world-to-word direction of fit of rules, or - more in general - the world-to-word direction of fit of constraints.

Logicians, and in particular those who focus on logical semantics, work with the notion of possible worlds. A possible world is a collection of facts that together satisfy a set of constraints. For example, a logically possible world satisfies the constraints of logic, while a physically possible world satisfies the constraints (the “laws”) of physics. Constraints impose themselves on possible worlds and have in that sense the world-to-word direction of fit. However, this should not be interpreted as if constraints force worlds into a bodice, as if the constraints would exercise some force on worlds to make them possible. Constraints are rather a precondition for making understandable the difference between what is contingently the case and what is necessarily the case. The ideas of necessity and of constraints on possible worlds complement each other.

Constraints on possible worlds do not only support necessity and possibility judgements, but also conditional judgements (conditionals). For example, the conditional statement “If this metal bar would be heated, it would expand” is true because of the physical constraint that metals expand when heated. Semantic conventions also support conditionals such as “If this is a skate-board, it is a vehicle in the sense of the Traffic Act”, and counterfactuals such as “If this vehicle would have had a motor, it would have counted as a car”.

The last two examples concern semantic constraints that also could have been legal rules. Rules can be seen as constraints on possible worlds. In a world in which a rule exists, the rule imposes itself on the facts of that world with the world-to-word direction of fit that other constraints also have. If some possible world contains the rule that thieves are liable to be punished, then thieves are liable to be punished in this world. Moreover, in this world it is not merely a contingent fact that thieves are liable to be punished, but a necessary one, because being a thief *makes* one liable to be punished. The rule also supports conditional and counterfactual judgements: if John had been a thief, he would have been liable to be punished. Rules have so much in common with other constraints that they can fruitfully be seen as constraints themselves.

Legal rules also have a characteristic that is not shared by all other constraints: legal rules only apply locally, both from a territorial and from a temporal perspective. The laws of one country, for example, differ from the laws of another country. The necessity of rule-based judgements is therefore merely local: in Belgium bicycles count as vehicles and are therefore necessarily vehicles, but that does not have to be the case in another country. Moreover, some kinds of behavior, such as hate speech, that were permitted a century ago, are now prohibited. This is different for logical and physical laws, which seem to have a universal scope of application.

2.5 The consequences of rules

Rules constrain the world in which they exist by attaching new facts to existing facts. Many rules operate in time and attach consequences to the occurrence of some event. Examples are the rules of private law that determine which damage-causing events lead to liability, the rules of procedural criminal law that define when somebody becomes a criminal suspect against whom investigative measures may be taken, and the rules of administrative law that indicate when a person receives permission to perform an action, such as building a house. These rules will be called “dynamic rules”. For law, a particularly important kind of dynamic rule is the rule that attaches the existence of new rules to the creation of legislation.

Where dynamic rules govern the succession of facts in time, static rules govern the co-existence of facts. One kind of static rules is the fact-to-fact rule, which makes that one kind of fact goes together with some other kind of fact. An example is that the fact that somebody is the mayor of a city goes together with the fact that this person is competent to issue an emergency regulation. Another kind of static rules is the counts-as rule. Counts-as rules have the following structure: Individuals of type 1 count as individuals of type 2. These 'individuals' may be human beings, as in the rule that the parents of a minor count as the minor's legal representatives, or the rule that the king of the Belgians is the commander in chief of the Belgian army. Often, however, the individuals that count as another kind of individual, are events. For instance, under particular circumstances, causing a car accident counts as committing a tort, and offering money to another person counts as an attempt to bribe an official.⁶

3. Rule-based facts

Rule-based facts are a subcategory of social facts, and like other social facts their existence depends *in last instance* on being recognized by the members of a social group. However, where the distance between being recognized and existing as a social fact is short in the case of brute social facts, it may be quite lengthy in the case of rule-based facts. This has to do with the phenomenon that the rule that underlies rule-based facts may itself exist as a matter of brute social fact or as a matter of rule-based fact.

3.1 Social rules

If the members of a social group normally recognize the duties imposed by the leader of the group, whoever that may be, the group has the rule that the group leader has the competence to impose duties. This rule exists by being recognized and therefore as a matter of brute social fact. Such a rule is a social rule.

Given this definition of what a social rule is and when a social rule exists, the facts that are generated by social rules will be broadly recognized within the group in which the rule exists. However, the existence of a social rule has more implications than the mere recognition of the facts generated by the rule. If Jack is a member of a group in which the rule exists that men should wear a hat, Jack is also required to wear a hat if he personally does not recognize the requirement. Although Jack will not be motivated to wear a hat, other group members still expect him to do so, and non-compliance may evoke admonishments, reproaches, and perhaps even informal sanctions.

These examples illustrate that social rules, like other rules, work 'automatically' in the sense that they attach their consequences to facts even where these consequences are not always recognized by everybody. Obligations and competences may also exist if not everybody addressed by them also acts upon them. However, in the case of social rules there needs to be broad recognition, because if that would be lacking, the rule would not exist (anymore). If only Jack does not recognize the requirement to wear a hat, this does not affect his duty or the existence of the rule. However, if hardly anybody would recognize the duty, neither the duty nor the rule underlying it would exist.

3.2 Rule-based rules

Sometimes the existence of a rule is the new fact that another rule attaches to a fact situation. In such a case, we speak of a "rule-based rule". The relation between the existence of rules and the

recognition of the consequences which rules attach to facts that satisfy the rule-conditions, is different for these rule-based rules.

Suppose that Henriette is the leader of a social group and that, as such, she has certain competences, based on social rules which attach these competences to being the group leader. Let us assume that one of these competences is to make rules on who is to pay taxes. One day, Henriette announces that group members who received an inheritance must pay taxes. Starting from the moment that Henriette announces the rule, the rule exists. Moreover, the rule creates duties for the group members who received an inheritance.

It is worthwhile to take a closer look at the duties based on the rules that Henriette makes, the recognition of these duties, and the existence of the rules. Since the rule-making competence of Henriette is based on a social rule, this competence does not need to be recognized by all group members. Let us assume that Violet received an inheritance, and is for this reason a duty holder. However, she neither recognizes the competence of Henriette to make rules in general or to make this rule in particular, nor her duty to pay taxes. If the rule that grants the power to Henriette is a social rule, Henriette still has the competence to make rules for the group, even if Violet does not recognize them. Violet has therefore the duty to pay taxes, even if she is not at all motivated to do so and does not feel obligated either.

Assume now that Violet is not the only one who has problems with the inheritance rule, and that most group members think that Henriette should not have made this particular rule. In other words, the rule that Henriette made is not broadly recognized. However, this rule is not a social rule, and it does not depend for its existence on recognition. Therefore the inheritance rule still exists, and the designated group members still have the duty to pay taxes.

Things would be different if the group members stop recognizing the rules that Henriette makes in general. That would mean that they no longer recognize the social rule that gives the group leader the competence to create rules.⁷ Since this rule was a social rule, it stops existing as soon as it is no longer recognized. As a result, the rule about inheritance taxes no longer exists as a rule-based rule, which means that it does not exist anymore at all.

As can be seen from the example, the fact that some rule exists is an immaterial fact like many others. This fact is not principally different from – for example – the fact that a particular car is a vehicle. Like other immaterial facts, the existence of a rule can obtain as a brute social fact, or as a rule-based fact. In the former case, the existence of the rule is broadly accepted in a social group, where the acceptance of the rule consists in the acceptance of the rule's consequences if the rule is applicable. In the latter case, the existence of the rule is attached by some other rule to – typically – a legislative event. Depending on whether the rules on which they are based exist as social rules or as rule-based rules, the existence of rule-based facts is more, or respectively less remote from their being accepted.

4. Deontic facts

4.1 The difference between being deontic and being rule-based

If Mary, as a car-driver, has the duty to carry a driver's license, it is a fact that she has this duty. If Dieter and Antonia contracted that Antonia will wash Dieter's car against payment of €10, the facts are that Antonia is under an obligation towards Dieter to wash his car, and that Dieter is under an obligation towards Antonia to pay her €10.

All these facts are deontic. They happen to be also rule-based, but their deontic nature has nothing to do with that, or the other way around. We have already seen many examples of rule-based facts which are not deontic. Rule-based facts include the fact that this skate-board counts as a vehicle in the sense of the Traffic Act, or that George, who owns Blackacre, has the competence to transfer this real estate. There are also deontic facts which are not rule-based. One example is the fact that Gérard has the moral duty to assist an old man in crossing the busy street. Another example is that Cécile must perform bar-service in the student association, because she is from the people present the one who did not perform bar-service for the longest time. In both cases I assume that there are no rules prescribing the behavior. The point of the examples is that there can be duties even in the absence of duty-imposing rules.⁸

Being rule-based and being deontic are (onto)logically speaking distinct characteristics, just as being a balloon and being blue are (onto)logically speaking distinct characteristics. The only thing that connects being rule-based and being deontic on the semantic level is that they are both sometimes denoted by the ambiguous word “normative”. Nevertheless, it may be illuminating to see how some deontic facts are also rule-based, and therefore I will briefly discuss duties, obligations, being obligated and owing to do something in the following subsections. However, I cannot sufficiently emphasize that the phenomenon that many deontic facts are also rule-based facts does not demonstrate any intrinsic connection between being deontic and being rule-based.

4.2 Duties and obligations

There are basically two ways in which an agent can be obligated to do something or to refrain from doing something. The agent can have a duty, and then there is no other person towards whom this duty exists, although it is possible that some other person is the main beneficiary of the duty. This is different in case of obligations; obligations are by definition directed.⁹ If Louise contracted with Klara to lend her the copy of *Wuthering Heights* that Louise owns, then Louise has an obligation towards Klara to allow her the use of this book. Klara has a corresponding right (a claim) against Louise.

Most duties are connected to the possession of a particular position, role or status.¹⁰ It is for instance the duty of a judge to apply the law, and the duty of a car-driver to carry a driver’s license. The most general legal duty is a duty that holds for ‘everyone’, such as the duty not to commit murders. This duty is connected to the status of being a legal subject.

Legal obligations have their main role in private law, although there may also be tax- and other administrative obligations.¹¹ Unlike most duties, obligations are not attached to a particular status, role, or position, but they are the outflow of events, to which they are attached by dynamic rules. These events, which are sometimes called the ‘sources’ of obligations, determine who the creditors and the debtors of the obligations are and what the content of the obligations is.

4.3 Being obligated and owing to do something

Although being under an obligation and having a duty are different things, they have in common that they both provide a reason why somebody ought to do something. This common element in obligations and duties will be expressed by the word ‘obligated’. ‘Obligated’ is an artificial term, since it seems that the English language does not have a word to denote the common element of duties and obligations.¹² Being under an obligation and having a duty both involve that the addressee of the duty or the debtor of an obligation is obligated to do what he has the duty or is under the obligation to do.

The word 'ought' has in the literature become a stand in for everything that is deontic. However, it is better to assign it a more limited role. Consider the following case. Dieter contracted with Antonia that she would wash his car and now Antonia has an obligation towards Dieter to wash the car. However, it is possible that legally speaking Antonia ought not to do so. This might be the case if there is a shortage of water and therefore a general prohibition to wash cars. The obligation makes that Antonia is legally *obligated* to wash the car. However, the question whether Antonia legally speaking *ought* to wash the car depends on all the legal reasons for and against washing the car. The general prohibition against washing car conflicts with the obligation based on the contract and also trumps it. Therefore we have the situation that simultaneously Antonia is under a legal obligation to wash the car and legally speaking ought not to wash the car.¹³ A legal ought is based on the balance of all legal reasons pro and con a particular kind of action.

4.4 Are deontic facts rule-based?

We have seen that there are different kinds of deontic facts. Ought-facts result from the balance of all reasons mandating and disallowing behavior. As such they are never the direct outcome of a rule. The same holds for being obligated. If an agent is obligated to do something, this means that (s)he has a duty or is under an obligation. Being obligated can only be the indirect result of rule-application, but even that is not necessarily the case. There is no conceptual or otherwise necessary connection between on the one hand the existence of duties or obligations and on the other hand the application of rules. There can be duties that are not rule-based and therefore it is possible that an agent is obligated or ought to do something without this being based on a rule. The conclusion must therefore be that although many deontic facts are rule-based, many others are not and there is no intrinsic connection between the two. Normativity in the sense of being deontic and normativity in the sense of being rule-based are not necessarily connected.

5. Kelsen on norms and the legal ought

In the very first section of the first edition of the *Reine Rechtslehre* Kelsen set out his research program.¹⁴ The Pure Theory of Law strives for cognition of its object, the law. It aims to answer the questions what the law is and how the law is made, and not what the law ought to be or how the law ought to be made. The purity of the Pure Theory of Law consists in the fact that this theory aims to free legal science of all foreign elements. These foreign elements would include - on the factual side - psychology and biology, and - on the normative side – ethics and theology.

The Pure Theory of Law presupposes two distinctions.¹⁵ The one distinction is between the normative and the factual. Based on this distinction, legal science and ethics are separated from factual sciences such as biology and psychology. The second distinction is between law as the object of legal science and morality as the object of ethics. Kelsen strongly emphasizes that law is not a branch of morality. He distinguishes between the moral and the legal ought and assumes that law deals with what legally ought to be done or ought to be the case. Kelsen himself uses in this connection the term 'imputation' (*Zurechnung*). He draws a parallel between on the one hand the imputation brought about by positive laws and on the other hand causation as brought about by physical laws:

“Just as laws of nature link a certain material fact as cause with another as effect, so positive laws (...) link legal condition with legal consequence (...) If the mode of linking material facts is causality

in the one case, it is imputation in the other, and imputation is recognised in the Pure Theory of Law as the particular lawfulness, the autonomy, of the law. (...) the legal consequence (the consequence of an unlawful action) is linked by imputation to the legal condition. (...) Expressing this connection, termed 'imputation', and thereby expressing the specific existence, the validity, of the law – and nothing else – is the 'ought' in which the Pure Theory of Law represents the positive law. That is, 'ought' expresses the unique sense in which the material facts belonging to the system of law are posited in their reciprocal relation. In the same way, 'must' expresses the law of causality."¹⁶

Kelsen distinguishes a special legal ought, a category of the law, by means of which legal norms¹⁷ attach legal consequences to legal conditions. At first instance, the reader of Kelsen may be tempted to believe that when Kelsen writes about the legal ought, he merely means that legal norms have deontic conclusions, that they impose duties or obligations. It seems that this is at least one of the things Kelsen had in mind, because why else would he have used the word 'ought'? However, in the quoted fragment Kelsen emphasizes that the legal ought represents the way in which legal condition and legal consequence belong together. The legal ought allegedly expresses a connection, analogous to the way causal laws connect cause and effect. This relation seems to be something altogether different from the deontic nature of law, and rather expresses that law leads to rule-based facts. It seems therefore that Kelsen runs the two kinds of normativity – deontic and rule-based – together.

6. Searle on the world-to-word direction of fit

The distinction between the word-to-world and the world-to-word direction of fit has played a major role in Searle's work since the 1970's. Searle introduced the distinction in his article *A taxonomy of illocutionary acts*, to distinguish between different kinds of speech acts.¹⁸ His attempt to distinguish between kinds of speech acts by means of the distinction between directions of fit was not in all respects successful,¹⁹ but here I will focus on only one aspect of Searle's analysis.

Searle opposed assertives to directives, commissives and declarations. Assertives are descriptions of the world and they are characterized by the word-to-world direction of fit. No problem here.

Directives are attempts of the speaker to get the hearer to do something. According to Searle, they have the world-to-word direction of fit. This is correct, but ambiguous. A directive in Searle's sense may be a directive as I described it above, but also a command.²⁰ In the former interpretation, the world-to-word fit is not guaranteed, because not all orders are obeyed. Moreover, if it exists, it is based on a causal connection between the performance of the speech act, and the behavior which the speech act causes. In the latter interpretation, the world-to-word fit is almost certain, because the duty that results from the command is the result of a dynamic rule.²¹ The existence of this rule guarantees that the duty is attached to the performance of the speech act. However, there is no guarantee that the duty that was created by the command will be complied with.

Commissives are by and large promises or contracts. They lead to obligations as the result of a dynamic rule. Also here, the world-to-word fit is almost certain, because the obligation that results from the commissive speech-act is the result of a dynamic rule. Moreover, there is no guarantee that the obligation that was created by the commissive speech-act will be performed.

Declarations are speech-acts by means of which states-of-affairs are explicitly created. An example would be the baptism of a ship: 'I hereby baptize thee the "Herald of Free Enterprise"'. According to Searle such speech-acts have both directions of fit. They describe what is happening, and in doing so

they also make it happen. This is correct, and the world-to-word direction of fit of declarations is brought about by a dynamic rule which attaches consequences to the speech-act, based upon the propositional content of the speech-act. The ship receives the name that was given to it in the speech-act of baptizing.

If we take a closer look at commands (in my technical sense of the term), commissives and declarations from the perspective of their world-to-word fit, we see three times the same mechanism at work. There is a speech-act with a particular propositional content, and there is a dynamic rule which attaches to the performance of the act, the state-of-affairs indicated in the content of the speech-act. A command leads to the duty specified in the command, a promise leads to the obligation specified in the promise, and a baptism leads to the name specified in the baptism. Whenever this mechanism is at work, and the dynamic rule that attaches consequences to a speech act is a legal rule, we speak of a "juridical act."²² The first two examples illustrate that this mechanism based on a dynamic rule may lead to deontic facts, but the third example about the baptism illustrates that this is accidental, not necessary.

"In his article *A taxonomy of illocutionary acts*, Searle makes a fruitful distinction between the world-to-word and the word-to-world directions of fit, but he restricts the former direction of fit to speech-acts, which is the topic of his article. However, he does not clearly distinguish between the causal and the rule-based world-to-word direction of fit. In particular the neglect of the distinction between the causal and the rule-based world-to-word direction of fit may be seen as the cause of the confusion between deontic and rule-based facts that we encounter in Searle's later philosophy. The rule-based world-to-word direction of fit has as such little to do with actions and influencing them. The causal world-to-word direction of fit that Searle uses in his analysis of directives is, on the contrary, defined in terms of influencing behavior. By not distinguishing these two properly, Searle is prone to seeing something deontic in the rule-based world-to-word direction of fit.

In his second book on social reality, *Making the social world*,²³ Searle returns to directions of fit. In his book *Intentionality*, he had already extended the use of the distinction to intentional states, such as beliefs, wishes and – obviously – intentions.²⁴ In *Making the social world* he goes a step further and uses the notion of the world-to-word direction of fit to characterize constitutive rules as standing declarations. Counts-as rules – because these are Searle's typical constitutive rules – make that something is the case by representing it as being the case. For example, the rule that the oldest surviving son of the deceased king is the new king makes this son into the new king. This is similar to the theory exposed above that rules function as constraints on possible worlds. However, there is a major difference: Searle sees constitutive rules as a kind of generalized speech acts ('standing declarations'), while in my opinion, constitutive speech acts such as legislation and promises can only function because of dynamic rules. Where speech acts are the more primitive category in Searle's view, in my view this role is reserved for rules, and – as far as constitutive actions are concerned - in particular dynamic rules.

The purpose of having rules which lead to new facts – rules which "assign status" in Searle's terminology – is, according to Searle²⁵, that they increase human power in many different ways. Searle is right, because dynamic rules that create obligations make it possible for agents to undertake obligations. Moreover, because of the counts-as rule which makes that cars count as vehicles for the purpose of the Traffic Act, car-drivers can also drive vehicles. The first example illustrates that rules can give agents powers to undertake obligations. The second example illustrates that constitutive rules also create powers that have nothing to do with obligations. Other examples can be given to

show that dynamic rules also empower people to impose duties. In other words, dynamic rules can lead to deontic facts, and the power to create such facts might be called a 'deontic power'.

'Deontic power' is a term which plays a crucial role in Searle's account of institutional facts. In fact, he claims that "the whole point of the creation of institutional reality is not to invest objects or people with some special status valuable in itself but to create and regulate power relationships between people".²⁶ The powers in question are deontic powers. However, the second example above, the one about the power to drive a vehicle is structurally similar²⁷ to the example about undertaking an obligation, but has no deontic ring at all. Driving a vehicle, and not merely driving a car, is a rule-based activity, because a rule makes a car into a vehicle in the sense of the Traffic Act. However, driving a vehicle is not something with a specific deontic status.

Searle is attached to calling rule-based powers 'deontic powers', but he is not very clear about what distinguishes deontic powers from other powers. He does not define these powers, but only gives an example when he writes that deontic powers "carry" rights, duties, obligations, requirements, permissions, authorizations, entitlements, and so on". From this list, at least two elements – rights and entitlements – do not necessarily have a deontic aspect, because they may be limited to the competence, rather than a duty or obligation, to perform juridical acts, such as legislating or starting judicial procedures.

The general picture that arises from Searle's work – however impressive it may be otherwise – is that Searle does not distinguish well enough between the causal and the rule-based down direction of fit of speech acts, and that he does not see that many rule-based facts are non-deontic. Although these two oversights are logically independent, the first one easily leads to the second one, because the world-to-word direction of fit of rules may be seen as an attempt to influence the behavior of people if it is identified with the world-to-word direction of fit of directives.

7. Conclusion

Many facts are deontic: they concern what agents are (not) allowed to do, or have the duty, are under an obligation, are obligated, or ought to do. These facts are not objective; they exist in social reality, either as brute social facts, or as rule-based facts. This means that *in last instance* they depend for their existence on what human beings accept or recognize.

Many facts are rule-based. They exist because they are attached by rules to other facts. Sometimes facts just go together, as when the competence to issue emergency regulations goes together with being the mayor of a city in times of emergency. Sometimes facts also count as facts of some other kind, as when the president of the US also counts as the Commander in Chief of the US army. And sometimes the occurrence of some event leads to a new fact, as when Désirée reaches the age of eighteen and is (count as) an adult from then on. Rule-based facts are a subcategory of the facts that exist in social reality. This means that also rule-based facts depend *in last instance* on what human beings accept or recognize.

In the three examples of rule-based facts, I made some effort to mention non-deontic rule-based facts. That had to do with the central claim of this article, namely that being rule-based and being deontic may coincide, but are logically and conceptually speaking independent from each other. There are deontic facts which are not rule-based and there are rule-based fact which are not deontic. If one has a clear understanding of what deontic facts and rule-based facts are, the difference between being deontic and being rule-based is as clear as can be. And yet, as the examples of Searle and Kelsen illustrate, it is easy and perhaps even tempting to confuse the two.

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¹ See Anscombe 1976, MacCormick 1986, and Searle 2010.

² Strawson 1950.

³ Wittgenstein 1984, 1.1.

⁴ This is the reason why rules have no truth-values; not that they are deontic or a kind of commands. Many rules are not deontic, and do not even resemble commands, but these rules have no truth-values either.

⁵ The discussion between realists and emotivists in ethical theory exemplifies such a difference in opinion.

⁶ Actually, the difference between fact-to-fact rules and counts-as rules is not very strict, and it is well possible to categorize counts-as rules as a sub-kind of fact-to-fact rules. One reason to discuss counts-as rules separately, is that they have received much attention in the literature on social reality and legal theory.

⁷ An alternative interpretation would be that they do not recognize Henriëtte as their leader anymore.

⁸ Typically the ground for the duty in such cases is that the existence of the duty is 'reasonable'. Positivists may reject the possibility of duties that exist solely for the reason that this is reasonable. This is not the place to enter into that discussion, however.

⁹ The account of obligations that is presented here is based on the tradition of Roman law. In the common law there is no sharp distinction between, for instance, contractual obligations and duties that are not directed specifically towards some person. As a consequence, the meanings of "duty" and "obligation" in the English language hardly differ.

¹⁰ White 1984, 21-26.

¹¹ Obligations also play a role in morality, for instance as the result of promises or damage causing behavior, but here I will ignore this moral part of the story.

¹² In the deontic logic literature, the notion of a *prima facie* duty or obligation plays a role which is highly similar to the role of being obligated.

¹³ It is possible that even in such a case of *force majeure* the obligation continues to exist, and that instead of perform the obligation, the debtor must compensate damage. Whether this is the case is up to the law, not to logic.

¹⁴ Kelsen 1992.

¹⁵ These two distinctions were identified by Stanley Paulson in his Introduction to the English translation of The Pure Theory of Law's first edition (Kelsen 1992).

¹⁶ Kelsen 1992, 23-5.

¹⁷ In sections that deal with the work of Kelsen, I will adapt my terminology to Kelsen's habit to call rules "norms".

¹⁸ Searle 1979.

¹⁹ For a more elaborate discussion, see Hage 2005, 165-170.

²⁰ Given Searle's explanation, the interpretation as a directive is the more feasible one, but Searle does not make clear-cut distinctions in his paper and his examples are sometimes open to both interpretations.

²¹ The remaining uncertainty exists because of the possibility to make exceptions to rules.

²² In the European continental legal tradition, there are many terms for these juridical acts. The category of juridical acts has not received much attention in the common law tradition, however, and as a result there is no fixed English terminology.

²³ Searle 2010.

²⁴ Searle 1983, 7-9.

²⁵ Searle 2010, 105.

²⁶ Searle 2010, 106.

²⁷ Similar, not the same, because undertaking an obligation is based on a dynamic rule, while driving a vehicle is based on a counts-as rule. This difference does not make a difference for the argument, however.