

What Does it Mean that Constitutive Rules Are in Force?

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Abstract

The aim of this paper is to shed some light on the issue of how we can understand constitutive rules as being in force for participants *S* in some rule-constituted practice. We take a look on complicated team-games that are broadly conceived as model example of rule-constituted practices. We claim that rules of games are dependent on mental states of participants in that practice. More precisely, they are in force for the participants *S* of such games if these participants jointly meet the following conditions: (1) every *S* has a working knowledge of the rules, (2) every *S* intends to and actually conforms to the games' hard core rules and (3) every *S* respects the remaining rules (i.e. in the case of an alleged rule violation a player asks him or herself what decision an ideal referee would have made in those circumstances, and conforms to that decision).

Keywords: Constitutive Rule, System of Rules, Existence of Rules, Games, Ideal Referee.

Introduction

John R. Searle (1969: 33-41) explicitly made the famous distinction between 'regulative' and 'constitutive' rules (it should be noted that Searle was neither the first nor the only philosopher to use a distinction of such type, as von Wright (1963) or Rawls (1955) also stressed the difference between these rules, yet the Searlean account seems to be the most influential one). The notion of constitutive rules is widely discussed in the philosophy of language (e.g. Gluër and Pagin 1999, Williamson 1996) or in the philosophy of law (e.g. MacCormick and Weinberger 1986, Marmor 2009). Roughly speaking, regulative rules are imperatives, i.e. they tell us what to do or how to behave in certain circumstances. A paradigm example of regulative rules are the rules of etiquette, e.g. "During an official dinner, officers should wear a tie". Rules of this kind regulate antecedently existing activities or practices. This means that it is possible to describe these practices independently of the existence of such rules. We can describe a dinner as a dinner even if there are no rules of etiquette concerning what one should wear during that dinner. Rules of this kind will not be a part of my investigation in this paper.

Now let us have a look at Searle's constitutive rules. These rules are not imperatives (according to Searle they do not have an action-guiding function) but instead 'create' new forms of activities or practices.¹ Constitutive rules are metaphysically prior to the practices or activities they 'create', i.e. some practice or activity could not exist at all without these rules. How is this to be understood? Suppose that twenty-two people are running around on the grass and making such moves as the members of football² teams usually make. Is it possible to describe their behaviour as that of a football match? The answer is in the negative, unless we know that the football rules are *in force* for these people. Playing football is not a matter of, to use Searle's words, the 'brute facts'—that somebody is kicking a round object or hitting it with his/her head. The existence of football rules makes it possible to describe the moves of twenty-two people as playing football.

Of course, it is not the case that constitutive rules are simply 'out there', that we can take their being in force for granted without caring about some social or psychological context that is necessary for these rules to appear. As noted by Pagin, "[t]he being in force of a rule depends ultimately on acceptance, on regarding the rule as in force" (1987: 15), because rules are not physical objects, they do not have their very existence regardless of any recognition by the subjects of these rules. In my paper I will not investigate closely that deep metaphysical question of recognition of constitutive rules, I am not particularly interested in the question of what brings rules into existence in the 'last instance'. Rather I will focus on the more prosaic issue of what is the relationship between any given Jane's or Joe's (who is a participant of a rule-constituted practice) commitments (motivations, intentions etc.) towards previously enacted rules. I take the existence of rules for granted and then ask what needs to be true for any given Jane or Joe in order to justifiably claim that she or he is a participant of a practice constituted by rules. At first glance, there are three main possibilities for the relationship between a set of constitutive rules *R* and a participant *S* in some practice *P* (cf. Pagin 1987: 12-33; Gluër and Wikforss 2015):

1. Participant *S* is motivated (intends, is committed) to act in accordance with *R*,
2. There is no link between *R* being in force and *S*'s mental state (*R* is in force regardless of *S*'s intentions, motivations, commitments),
3. *S* is motivated (intends, is committed) to act in accordance with only some subset of the set of rules *R*.

At first glance, it might appear that some form of 2. is the most plausible option, but is it the case? In order to answer this question I will look carefully at some

¹ As Gluër and Wikforss claimed, "[a]ccording to Midgley (1959) and Searle (1963, 33ff), constitutive rules typically, and naturally, can be put into the following form:

(CR) In *C*, doing *X* counts as doing *Y*.

[...] [T]his characterization of constitutive norms is too narrow – there are prescriptions that are constitutive of certain games (for instance, it's constitutive of ice hockey that spearing is forbidden). A wider characterization of constitutive norms or rules thus counts rules or norms as constitutive of a certain action, or activity, *A* iff *A* cannot be performed, or engaged in, unless these norms are in force" (2015).

² The term for this game is 'football' as used and understood in Europe or South America, not in the USA, i.e. to denote association football.

complicated practices established and governed by rules. The paradigm example of such practices are games. Philosophers have hitherto mainly analysed the game of chess (e.g. Marmor 2006), which seems to me not to be the best choice. The game of chess comprises a relatively small number of rules and admits no violation of its rules (e.g. moving a rook diagonally seems to be something “outside the game” or even entails the termination of the game). Hence, if we take a game of chess as our model we will come to the conclusion that a participant in the game of chess incurs commitment to act in accordance with all (or almost all) rules of that game. Nonetheless, we have rather a strong intuition that the rules of games are quite frequently violated (there are multiple fouls and other ‘illegal’ moves within the game of basketball or football), so the game of chess, which is unforgiving when it comes to violating its constitutive rules might not be representative for rule-constituted practices at all. I am convinced that if we look carefully at more complicated games (e.g. basketball, football, rugby) that easily allow for a violation of rules without termination of the game, it is possible to obtain more credible knowledge about the relation between participants (their intentions, commitments etc.) of rule-constituted practices and constitutive rules, hence we will know more about the social and psychological context within constitutive rules operate.

1. Why Focus on Rules of Games instead of Legal Norms?

One may ask if constitutive rules in general are very different from, for instance, legal norms. It is not difficult to notice that legal norms also perform the constitutive function, i.e. without some set of legal norms there would be no such institution as a limited liability company, pledge, mortgage or inheritance. Sometimes legal norms actually create some forms of activity or practice, e.g. inheritance, which is the practice of passing on property, debts and obligations upon the death of an individual. We have a system of precise rules that determine who is entitled to receive a share of the deceased person’s property or obligations and under what conditions, yet obviously there are serious differences between legal norms constituting such an institution as inheritance and constitutive rules in general. What are they?

First, legal norms are in force for all people regardless of their attitudes, desires or intentions. When one dies, his or her property, obligations and debts are passed on to some other subjects due to inheritance law. Of course, the norms of inheritance law may, and in fact usually do, make it possible to write down a will. We are normally allowed by the authorities to express our will concerning the distribution of our property after our death. However, one must note a critical fact—we can create our will only because inheritance law, enacted in a proper procedure by the proper authorities, allows us to do so.³ Hence, when it comes to such a legal institution as inheritance we only have a certain amount of liberty that was given to us by the legal norms (e.g. in some countries, such as France, there is a system of forced heirship that allows the testator to freely dispose only half of his or her property; in many other countries the testator is not subject to

³ Of course, it may be the case that something similar to the practice of last will preceded any legal systems, as a part of a custom or some religious system. But it was not the same institution as the contemporary testament, which is, obviously, determined by legal rules.

such a limitation). Of course, we can change the legal system we are subject to by simply moving from one country to another, but we are always subject to some legal system (when we are on international waters or in space the Law of the Sea or Space Law is respectively in force). Our mental states play no role in this situation—these norms are in force whether we like it or not, but in the case of other practices or institutions created by rules, such as chess, our intentions or desires do indeed play some important role, i.e. we can choose whether we would like to participate, for instance, in a game of rugby, but we cannot choose to ‘participate’ in a legal system.

Second, legal norms are *usually* associated with the whole apparatus of coercion. In the case of the violation of a legal norm there is a wide range of instruments that the state can use to punish the offenders. The police can use force; we have a criminal court trial that can convict the offenders and a penitentiary system that can imprison them—all of these could be legitimately applied by the state to bring order and the rule of law. In the case of other ‘institutions’ constituted by rules, things seem to be different. For instance, when we violate a rule of a game, we will not be fined, prosecuted or put into jail.

Legal norms can sometimes perform a creative function, but they are not a good model for constitutive rules in general, because they have some features that seem to be unique to them, for instance, the whole apparatus of coercion legitimately tries to ensure that the law is not violated. Moreover, there are intimate connections between law and politics and law and morality. All these factors seem to be absent in the case of games (and probably in the case of other rule-constituted practices, e.g. types of illocutionary acts). Hence, it appears that despite there being broad literature concerning the constitutive character of legal norms, these considerations cannot be easily used to make claims about constitutive rules in general. Therefore, it appears that our plan to investigate the rules of games in order to acquire knowledge concerning constitutive rules in general seems to be justified. Analysis of rules of games, that are broadly conceived as great examples of rule-constituted practices, can give us a portion of knowledge on constitutive rules that might be subsequently extrapolated to some issues in social ontology or philosophy of language.

Let me state clearly at this point, I do agree with the claim that many legal norms are constitutive. I only have doubts as to whether these rules are representative for constitutive rules in general, and so whether any knowledge that comes from analysis of legal norms might have very limited application to other rule-constituted practices.

2. Constitutive Rules and Commitments

We have noted that there are some differences between constitutive rules in general and legal norms. The former are, in some sense, dependent on one’s mental states, and the latter are independent of the subject’s mental state⁴ (one cannot say

⁴ Of course, in some sense constitutive rules are *ultimately* mind-dependent. For instance, the rules of football that are listed in official rulebook would not come to exist if there were no will to enact them by certain people that work in FIFA. Or to phrase it differently, there would be no rules of football, or football matches in their present form without the decision to formalise and enact the game’s constitutive rules, by relevant associations. Let me

“I do not have intention/desire/motivation to follow the rules of highway code, so they are not in force for me”). It seems that, despite being somehow dependent on one’s mental states, constitutive rules are not to be changed freely or invalidated by one’s intentions or desires. Now is the time to look closely at games such as football or basketball in order to figure out what the relation between one’s mental states or commitments and constitutive rules looks like.

The first question I would like to address is whether participants in a practice are committed to conform to its constitutive rules. One may think that the very concept of participation in some activity without being committed to the rules of that activity is bizarre. It seems natural to think that when we play, for instance, football, we are committed to act in accordance with its rules; but this is not always the case. Consider the notion of a ‘tactical foul’, which is an intentional violation of the rules of the game in order to interrupt an opponent’s action (that kind of rule violation can be considered an “illegal” move within the game, that is it is a violation that brings consequences within the game—penalties, free kicks, yellow cards; the difference between a tactical foul and a usual one is that the former is made deliberately and its purpose is to prevent the opposite team from scoring a goal whereas the latter is usually a result of lack of skill). Sometimes it is beneficial to foul an opponent by, for instance, holding him or her by the shirt and thus preventing the opponent’s team from scoring points (in the case of basketball) or a goal (in the case of football). Hence it is clear that playing ‘correctly’ (i.e. in accordance with all the rules of the game) is sometimes less effective than playing ‘incorrectly’ (i.e. by violating some rules of the game in order to win). There are many rules that could be violated, one after another, without termination of the game. Suppose that a basketball team’s players perform the following consecutive actions: travelling, double dribble, lane violation, five-second violation, and carrying. During these five consecutive actions they have violated five different rules of basketball, but it is not the case that with every such violation they began to stop playing basketball and started to do something else. They are just terribly bad players.

It seems that some player *S* can play a game and violate the rules of that game either via some sort of inability or intentionally. The violation of rules that occurs because of the players’ mistakes or lack of skills is quite uncontroversial; it is reasonable to think that when both in the case of football and basketball the defending player is trying to pick up the ball from the player of the opposite team but fails to do so because he or she is, for instance, not fast enough, that defender actually does not question the rules that forbid tripping or pushing his or her opponent. There is no huge mystery here. The case of the so-called tactical foul is far more interesting because it proves that it is *not necessary* for a player to be committed to or to intend to conform to all of the rules of the game; on the contrary, the player has the intention to violate the rule(s).

At this stage the following question arises: Can a player intentionally violate any rule of the game? I believe that the answer is negative. It seems reasonable to assume that the constitutive rules could differ from one another and the system of

remind you that in this article I am not particularly interested in above-mentioned origin of the rules or ultimate ‘rule of recognition’, rather I am investigating the relation between states of mind of participants (commitments, intentions etc.) and the rules (after they have been enacted).

constitutive rules of the game consists of rules, so to speak, of different importance. There is a ‘hard core’ of the game, which is a very small number of rules that cannot be violated and a much larger set of rules that could be violated without any *serious* consequences. Violation of the rules of the former type, i.e. those rules that form the hard core of the game, entails termination of the game. Violation of the rules of the latter type is, therefore, considered a fault, a somehow ‘incorrect move’, but this would not entail the fact that we terminate playing the game. An example of such a constitutive rule of football could be the rule that forbids holding one’s opponent by the shirt. Behaviour that counts as violating such a rule is considered to be a foul, but such an act certainly does not mean that the player terminates playing football. There is no risk of termination of one’s participation in the game, but there are other, far less serious, consequences—free kicks, yellow cards etc. This is because rules are interconnected—a rule that forbids kicking the opponent is interconnected with the rules that states what the consequences of kicking the opponent are.

However, things are different in the case of rules that form the hard core of the game. It appears to me that it is essential in such a game as football that there be a goal and that we be trying to put the ball into it by using our legs or head; in the case of basketball we are trying to put the ball into the basket by using our hands. If some football player started passing the ball to his or her teammates, and *not* with his or her foot but with his/her hands, he or she would, of course, terminate playing football, i.e. it would just not be a football match anymore. If someone started kicking the ball into the basket this would not be a basketball game anymore either. Now it is clearer what it means to play a certain game—we play a game if we act in accordance with the rules that form that game’s hard core. If we violate some of its other rules we just make a foul, make an ‘illegal move’. Hence players are committed to only a very small number of rules that constitute the game, and they sometimes have the intention to violate the rest of its rules.

3. The Role of Deep Conventions

But is it the case that a mere lack of violating a small set of the most important rules is a sufficient condition of playing a game? In my opinion the answer is in the negative. It is possible to play a certain game without intending to act in accordance with *all* of its rules, but surely it is not possible to play a game without intending *to play it*. What I mean by this is, basically, the same as the remarks that were expressed by Hubert Schwyzer:

Promising and asserting and the others are *practices* or *institutions*, like chess or basketball, or making a will, or performing civil matrimony. They are *systems of rules*, and the rules *define* them. Alston, Rawls and Searle make much of this analogy with games and institutions in their discussion of the concepts of these sorts of acts. [...] I shall argue that in the relevant sense rules *do not*, and *cannot*, *define the nature of an activity*; the rules of chess, for example, *do not explicate what it is to play chess* (Schwyzer 1969: 452-53).

If I get things correctly the argument that Schwyzer provides on the pages following that passage is as follows: rules of the game cannot define the nature of the activity which is constituted by those rules. In the case of games it is possible to

perform all of the moves or actions that the players typically make without playing the game in question. It is not so difficult to imagine that a group of people is behaving like players, but after the game is over one 'team' looks relieved and one is terrified because of the 'result'—they believe the gods will punish them or something of the sort. The crucial point is that the mere fact that some people behave like players normally do, i.e. that their actions are in accordance with the rules of the game, is insufficient to see them as players because they might perceive their activity as a part of some sort of, for example, religious ritual. People who do not have the concept of a game, particularly of sport, cannot participate in the game of football, basketball or any other. A very similar point was attributed to Michael Dummett (1978) by Anandi Hattiangadi:

Dummett draws an analogy between the concept of truth and that of winning at a game such as chess. He observes that you could specify all the rules of chess, specify how all the pieces move, what constitutes winning or losing the game, and still something would be left out: that the whole point of the game is to win (Hattiangadi 2009: 191-92).

Generally speaking, I agree with the remarks made by Schwyzer and those attributed to Dummett. Constitutive rules alone are not sufficient to establish any 'institution', there must be something in the social background that, together with the rules, makes the 'institution' possible to appear—for instance it is not possible to play football without having the concept of playing a competitive game (cf. Marmor 2007). Below I intend to provide a few examples that I hope might make these points slightly clearer.

Suppose that you are a spectator of the boxing fight between Muhammad Ali and George Foreman that took place on 29 October 1974 in Kinshasa, Zaire. There are about sixty thousand people watching the fight in the stadium. All of these people are watching Ali and Foreman punching each other. Now you can ask yourself why nobody is calling the police.

Now suppose that you are in the stadium watching a football match. The player of the first team makes a tackle in order to take the ball from his or her opponent and he or she fails to do so; moreover, the consequences of this very poor tackle are huge—the player of the opposite team gets seriously injured, e.g. his/her Achilles tendon is torn and he or she needs to undergo surgery and some rehabilitation. Why is the player that made the unfortunate tackle not subject to criminal charges concerning serious damage to his/her opponent's body? Why does the injured player have no possibility to press charges against the unfortunate defender for reimbursement of the rehabilitation costs?

Or to provide you with another example of the importance of *deep conventions*, suppose that basketball players actually do not commit any fouls, there are no lane violations etc, but they do not make any attempt to score points, their moves do not violate any rules of the game, so that the referee has no justification for any intervention but still they are not participating in the practice of playing the game, because the whole point of the practice of playing a competitive game is to win.

I believe that the above-mentioned examples could help one to understand what the point is. One may know all of the rules of boxing, chess or football, and yet one will not understand many crucial things, e.g. that the point of the game is to win. Moreover, the game is something different than ordinary life (and of

course it is also distinct from, for example, religious rituals or an art performance) and it has some specific nature. That is why the legal consequences of injuries are different within the game of football or a boxing match and in ordinary life. Roughly speaking, there is something that might be called a *deep convention* that underlies the games (but also other practices—religious rituals, art performances etc). It is a necessary condition of playing the game of football or basketball that the very concept of *playing a competitive game* be known by the members of a certain society. And that deep convention consists in knowing that games are rule-governed activities, the point of the game is winning and that games are quite detached from other types of practices (like art) and ordinary life (cf. Marmor 2006, 2007).

It is now a good moment for a small recapitulation. First, the rules that constitute such complicated games as basketball or football are not very similar to legal norms because (1) there is no apparatus of coercion that ensures the enforcement of these rules or any direct link between rules and morality, and (2) legal norms are in force for all people in a certain territory regardless of one's mental states or commitments while the rules of the games are in some sense mind-dependent. Second, constitutive rules create an activity, they define some actions and determine which moves are allowed, forbidden and required but do not determine the socio-cultural sense that a society ascribes to that activity. It is a necessary condition of playing a competitive game that the very concept of playing a competitive game be known by the members of the society. Third, the participants of a game do not have necessarily an intention or desire to conform to all the rules of that game; however, they necessarily have the following intentions: (1) to participate in the game (i.e. to treat a game as a game, not as a religious ritual, etc.) and (2) not to violate the rules that form the game's hard core.

4. Respect for Rules and the Role of the Referee

Now we know some facts about rules constitutive for games but we mostly know in what respect they differ from legal norms, yet still we know very little about them being in force for the players or, to formulate it another way, what it means that the players are subject to constitutive rules. It is clear that the rules of popular games (football, basketball, rugby, handball, etc.) are listed in the official documents enacted by the respective sports federations. But the very fact that a certain federation issued a document concerning the rules of the game is insufficient to make an assumption that these rules are in force. Paper endures all, but although something is written that does not mean that anybody cares about it. As was noted above, there is the police force or a similar apparatus of coercion that could enforce the legal norms, wherein in football or basketball there is no police that could legitimately use force. There also seems to be no link between morality and, for instance, a set of football rules that define an offside. And, as it was noted above, there is no necessary relation between players intending or desiring to conform to *all* rules of such games such as basketball or football. Hence the question arises as to how it is possible that the rules of the games are in force for the players.

It is not so difficult to notice that in any professional match there is a referee who carefully looks for fouls, awards free kicks, starts and finishes the match, etc. However, he or she does not have similar means as the police and the justice system do. What might be equally important is that when amateurs play basketball or football then, typically, there is no referee. These issues raise the question

of the importance of the referee in the process of rule enforcement. There are two possibilities—either these activities (professional and amateur matches⁵) are not basically the same thing, i.e. a professional and an amateur match only looks similar, but there is some deep difference between them, or the physical presence of the referee is not as important as it looks. Some philosophers like to think that indeed there is an important difference between professional competitions and amateur versions of these games (Marmor 2009). This could be tempting, but I shall argue that in fact the difference between professional and amateur versions of games such as football or basketball are rather insignificant, particularly with respect to the position and physical presence of the referee and the existence of constitutive rules.

First, I would like to say that indeed the figure of the referee is crucial to understanding the nature of the rules that constitute games, but I do not think that we should focus on some individual that is actually on the pitch. All real referees are only human beings, i.e. they become distracted, do not follow the actions, have problems with visibility and make many mistakes. Importantly, they only have a whistle and they do not have guns or truncheons so, as was stated before, their ability to enforce behaviour that is in accordance with the rules is very limited. Moreover, it would be peculiar to assume that their on-pitch decisions in some sense bring rules into being (or to state that there are no rules, just real referees' decisions). Acceptance of the claim that because of the actual referees' decisions the players are subject to the rules of the game would, at best, mean that the existence of constitutive rules is basically non-distinguishable from the existence of legal norms in the sense of the old-fashioned doctrine known as American legal realism (cf. Llewellyn 1962) that reduces the law to decisions made by judges and authorities (and it looks like this doctrine has its best years behind it because of criticism made, among other authors, by Hart 1961 and Dworkin 1977). In the case of rules of games, this would mean that basically all rules are completely irrelevant because the referees' decisions constitute the games. Such a view would entail that all amateur matches without a referee are not matches at all, and that seems very odd.

Hence, it seems that some Joe or Jane who is actually refereeing a match is not the 'source' of the force of constitutive rules—it must be something else. Let us assume that a critical role in bringing the constitutive rules into existence is not played by a physical referee but rather by some ideal referee that is in cognitively optimal conditions, is free of emotions and does not get tired or distracted. This may look bizarre. It was stated that a real person who is refereeing a match is insufficient to ensure rule enforcement and to provide the basis for the statement that the players are subject to rules, so how could such an abstract construct as an ideal referee in optimal cognitive conditions do the trick? This is actually quite simple, as the rules are in force for some player because of his or her *respect* for the rules. But what does this mean? I should like to propose that the crucial point is that it is the expectations of the participants that in some sense constitute the ideal

⁵ By “professional” matches I mean those that are part of a system of regular competition under the auspices of a relevant sport association (e.g. Deutscher Fußball-Bund, National Hockey League, Association of Tennis Professionals etc.). The players' participation in such events is what they do for a living, while “amateur” matches are organised by just for fun and health benefits.

referee, although the participants do not need to have intentions or desires to conform to all of the rules and in fact violate these rules quite frequently.

Suppose that you are a part of an amateur football match and you have just grabbed a member of the opposite team by his or her shirt. This was a tactical foul—you did it because you wanted to stop a dangerous action coming from the opposite team. It is clear that you did not have the intention to act in accordance with the football rule that forbids holding opponents by the shirt, but it is still possible to ascribe to you respecting that rule. How is this possible, you may ask.

First, let me state that the necessary condition for respecting a rule is knowledge of that rule. Of course, this is not necessarily an explicit type of knowledge, though children, amateurs or even many professionals actually play, for instance, football without the ability to recite the exact form of all the rules that are listed in the official rulebook. Sometimes we know the exact form of some rules, but in the vast majority of cases we rather have a practical, working knowledge of the rules. I am not going to investigate the subject of knowledge of rules in a more in-depth fashion, I suppose that it is intuitively clear enough for our purposes at this time. Let me go back to the main theme. You held your opponent by his or her shirt in order to prevent the opposite team from making a very dangerous move that could result in a goal. Obviously, the players of the opposite team start to protest—they wave their hands, shout ‘Foul!’ and so on. The next step is, typically, your team’s accepting their protests, i.e. your team acknowledges that your behaviour was a violation of the rule and that the other team should, in consequence, start the game with a free kick or, if your foul took place in the penalty area, with a penalty kick. You and your teammates are willing to acknowledge what you did and to face the consequences.

There is no real referee on the pitch, yet you act as if there were, i.e. the opposite team is awarded a free or penalty kick. You can ask yourself what a fair, unemotional, competent referee would do in a certain situation and then you act in accordance with this ‘decision’ made by such an ‘ideal referee’. This is a similar situation to a hypothetical scenario where there are no road police and people do not risk going to jail or face other sanctions for violating the highway code but still voluntarily pay to some appointed recipient some amount of money each time they drive too fast. In real life this scenario would rather be unlikely. It is not metaphysically impossible but it is not so easy to imagine a society that would work this way. Yet when we play such a complicated rule-constituted game such as football (or basketball), this seems to be the case. To sum up, we do not need to have the intention or the desire to conform to all of the rules of the game. Indeed, we violate them quite frequently, but when such a violation is observed we ask ourselves what an ideal referee would do and act in accordance with his or her decision.

It looks as if we are ready to put things into a clearer perspective. It appears that some player *S* is subject to the set of constitutive rules *R* of some complicated team game *G* if:

- 1) *S* knows that he or she is participating in the game (knows the deep convention of playing a competitive game) and intends to play,
- 2) *S* has working knowledge of the rules of *G*,
- 3) *S* intends to act in accordance with some small subset of *R* that forms *G*’s hard core,

- 4) *S* respects the other rules of the game, i.e. in case *C* of a supposed violation of any rule that is not a part of *G*'s hard core:
 - i. *S* asks him or herself what decision *D* an emotion-free referee in optimal cognitive conditions would have made in *C* (and answers this question),
 - ii. *S* conforms to *D*.

It appears that such an account could be viewed as a unification of both amateur and professional types of games—in my opinion they are pretty much the same with respect to the rules and mental states of the players towards these rules. What is probably more important is that it offers an explanation of the statement that players are subject to constitutive rules of games, which are a paradigm example of rule-constituted practices.

5. Reply to Possible Objections

One may have some questions about the account sketched out above; I will try to address some of them. First, one may ask about the relation between the actual referee's decisions and the ones made by the ideal referee. This is, I suppose, quite easy. Decisions made by an ideal and actual referee could diverge because, by definition, the actual referee is not an emotion-free⁶ person in cognitively optimal conditions. Hence any real referee can, and sometimes actually does, make mistakes, as only an ideal referee can apply the rules of the game correctly in every situation. This raises the question about the very figure of the ideal referee. One might wonder, given that decisions made by the actual and ideal referee diverge every now and then, if my account is not too 'metaphysical' in that it promises to give an accurate and empirically adequate explanation regarding the question about players being subject to constitutive rules and relies on the very unempirical notion of an ideal referee. Does that kind of reliance not make such an account implausible? I do not think so.

Although the actual person that is refereeing the match has little to do with the ideal referee, that factor seems to be irrelevant. Of course, an actual referee makes mistakes, almost exclusively because he or she is not well positioned, things are happening too quickly or something is impossible to notice with the naked eye. That is the reality, but all of these factors could possibly be eliminated by introducing some electronic devices or making video replays (including slow motion) that would be available to the referee. Proper training and the use of technology (microchips that allow to state if there actually was a goal in the football match or video verification in rugby are already in use) will make the difference between real and ideal referees almost obsolete. Technological progress in the near future will make referees nearly faultless. Moreover, I believe that such an idealisation is permissible in this context. Making idealisations and counterfactuals are just philosophical tools that are commonly used. If one thinks that the figure of an ideal referee is somehow faulty he or she should make an argument against it.

⁶ I mean by this that the referee is not carried away by his or her emotions or sympathies, and does not get influenced by the pressure of the audience, media etc. In some cases the ability to read the players' emotions and intentions might be useful for a referee, for instance in distinguishing a deliberately brutal foul from an unintentional one.

Of course, the introduction of technological devices probably would not eliminate all controversies. Some things are hard to judge even when technological assistance is provided, for instance, in order to determine whether a penalty kick should be awarded, we sometimes must decide if the relevant member of the defending team was pushing or merely touching his or her opponent. These situations might be tricky and some disagreement among well trained professional referees that have access to technological devices can occur. But this appears to me rather a question of the vagueness of the terms that occur in the rules. It seems that everybody agrees that, for instance, pushing the opponent is forbidden and in cases when such an event occurs the free/penalty kick ought to be awarded. The disagreement is about whether in the certain situation there was really a push or merely a touch.

Another issue is that players sometimes question the actual referee's decisions or, in the case of an amateur match, the two teams disagree over some decision to be made on the pitch. In order to adequately address that issue one must note that such a situation can have multiple causes: (a) the players do not know a rule, (b) the players question the referee's decisions for tactical reasons, e.g. to put pressure on him or her and, in effect, to obtain a favourable decision, or (c) they do not have proper knowledge of the facts because they are not in cognitively optimal conditions. Let me address these issues.

There are two possibilities if the player does not know the rules, i.e. either he or she does not know some rule at all or, alternatively, does not know the rule sufficiently. In the case of any rule that forms the game's hard core a player that does not know that rule does not play the game. That seems obvious. But sometimes players do not know the rules (the ones that do not form the 'hard core' of the game) precisely enough and only have some working knowledge of the rules, yet they lack the ability to, for example, quote the appropriate passage from the rulebook. This kind of situation might appear every now and then, but it does not seem to undermine the account I have sketched, for two reasons. First, it was stated that players do not need to know the exact form of all rules but rather need to have a practical, working knowledge of the rules. Intuitively, that kind of knowledge leaves room for some inaccuracy, as a working knowledge might just be slightly slack. Second, a player is subject to the rule if he or she respects the rule (i.e. if he/she asks him or herself what decision would be made by an ideal referee). Hence, in this case, he or she does not challenge the rule itself, but rather has a false image of the decision of the ideal referee because of his or her inaccurate knowledge of the rule.

When we look at case (b), i.e. that players are arguing with the referee (or with members of the opposite team in the case of an amateur match) and hoping that the pressure will result in a beneficial decision, it is clear that there is no threat for my account. In this case the players do not actually question the rule itself but are trying to convince others that the facts were different than they appeared, e.g. they are not questioning the rule that forbids kicking the opponent, as indeed they acknowledge that if there was a kick then there should be a free or penalty kick, but they are just pretending that there was no kicking of the member of the opposite team. They are trying to fool the referee or other team in order to win the game.

The last case, (c), seems to be even more obvious than the previous ones. Clearly there is no disagreement regarding the rules, and everybody respects them, but people could have different opinions as to what the decision made by

the ideal referee would be because of their poor positioning, lack of a clear view of the incident, very dynamic character of the event, etc. Hence the dispute is about the facts (for instance, if the member of the attacking team was offside or not) but not about the rule (in this case the set of rules that define the offside). If I am correct, the account of constitutive rules being in force as presented above is able to accommodate common situations that occur during matches, i.e. it seems to be empirically adequate.

6. Conclusions

In this paper I have tried to determine what it means that rules constitutive for certain type of practice are in force for participants of that practice. It appears that the rules of complicated team games (which are paradigm examples of rule-constituted practices) such as football or basketball are dependent on the mental states of the people that participate in these activities, yet they cannot be changed freely. I have argued that the rules of games are in force for the participants *S* of such games if these participants jointly meet the following conditions: (1) every *S* has a working knowledge of the rules, (2) every *S* intends to and actually conforms to the games' hard core rules and (3) every *S* respects the remaining rules (i.e. in the case of an alleged rule violation a player asks him or herself what decision an ideal referee would have made in those circumstances, and conforms to that decision). In sum, once constitutive rules are enacted, some facts about the participants in the rule-constituted practice, as well as about the society in which the practice takes place, must be true in order for these rules to be in force. Conditions (1), (2) and (3), however, cannot arise without a specific social context, that is to say, they are unthinkable in a society that does not know the deep convention of playing competitive games.

Of course, my account of some person *S* being subject to a set of constitutive rules *R* (or, to put it differently, a set of constitutive rules *R* being in force for person *S*) is based on games. They, without a doubt, are good examples of activities constituted by rules. The account presented in this paper relies on the notion of an 'ideal referee'. Though, there are also rule-constituted practices where, at first glance, there seems to be no referee (for instance, types of illocutionary acts), which raises the question as to how precisely an account presented in this paper could be applied to other rule-constituted activities. However, this issue lies beyond the scope of this paper.⁷

References

- Dummett, M., 1978, *Truth and Other Enigmas*, Cambridge, MA: Harvard University Press.
 Dworkin, R. 1977, *Taking Rights Seriously*, Cambridge, MA: Harvard University Press.

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- Gluër, K. and Pagin, P. 1999, "Rules of Meaning and Practical Reasoning", *Synthese*, 117, 207-27.
- Gluër, K. and Wikforss, A. 2015, "The Normativity of Meaning and Content", in E. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Summer 2015 Edition.
- Hart, H.L.A. 1961, *The Concept of Law*, Oxford: Oxford University Press.
- Hattiangadi, A. 2007, *Oughts and Thoughts. Rule-Following and the Normativity of Content*, Oxford: Clarendon Press.
- Llewellyn, K., *Jurisprudence: Realism in Theory and Practice*, Chicago: The University of Chicago Press, 1962.
- MacCormick, N. and Weinberger, O. 1986, *An Institutional Theory of Law*, Reidel: Dordrecht.
- Marmor, A. 2006, "How Law Is Like Chess", *Legal Theory*, 12, 347-71.
- Marmor, A. 2007, "Deep Conventions", *Philosophy and Phenomenological Research*, 74 (3), 586-610.
- Marmor, A. 2009, *Social Conventions: From Language to Law*, Princeton: Princeton University Press.
- Midgley, G.C. 1959, "Linguistic Rules", *Proceedings of the Aristotelian Society*, LIX, 271-90.
- Pagin, P. 1987, *Ideas for a Theory of Rules*, doctoral dissertation, Stockholm University, <https://stockholmuniversity.app.box.com/s/p3t9nzbfgfl216fursvzibpsgiby26hxx>
- Rawls, J. 1955, "Two Concepts of Rules", *The Philosophical Review*, 64, 3-32.
- Schwyzler, H. 1969, "Rules and Practices", *The Philosophical Review*, 78, 451-67.
- Searle, J.R. 1969, *Speech Acts: An Essay in the Philosophy of Language*, Oxford: Oxford University Press.
- Williamson, T. 1996, "Knowing and Asserting", *The Philosophical Review*, 105, 489-523.
- Wright von G.H. 1977, *Norm and Action: A Logical Enquiry*, London: Routledge & Kegan Paul; New York: Humanities Press.