

# Why Not All X-Rules can be Constitutive

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## Introduction

Conte has introduced<sup>1</sup> the distinction between what he called X-rules and Y-rules in the realm of what can be pressed into the “canonical”<sup>2</sup> linguistic form of a constitutive rule:

X counts as Y in context Z<sup>3,4</sup>.

He then went on to claim, following an earlier observation by Maria-Elisabeth Conte, that the rule

(1)“promising counts as the undertaking of an obligation”<sup>5</sup>,

the paradigmatic example of a constitutive rule in early Searle, the Essential Rule, as Searle has called it, was not constitutive at all<sup>6</sup>. This is disturbing, because Searle meant his Essential Rule to be a, or even the, paradigmatic example of a constitutive rule. Yet not just Conte has had doubts about (1)’s being a constitutive rule<sup>7</sup>.

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<sup>1</sup> For instance in A.G. Conte, “Idealtypen für eine Theorie der konstitutiven Regeln”, in *Vernunft und Erfahrung im Rechtsdenken der Gegenwart. Reason and experience in contemporary legal thought*, T. Eckhoff, L.M. Friedman, J. Uusitalo (eds.), (Rechtstheorie, Beiheft 10.), Duncker und Humblot, Berlin 1986, 243-250, 245f.

<sup>2</sup> Searle is more than his admirers and imitators aware that this form is not really canonical and that we should not try to press everything in it, see e.g. J.R. Searle, *Speech acts: An essay in the philosophy of language*, Cambridge University Press, Cambridge, 1969, 36f.

<sup>3</sup> J.R. Searle, *Speech acts: An essay in the philosophy of language*, Cambridge University Press, Cambridge, 1969, 35.

<sup>4</sup> I am making abstraction from the seldom-raised problem of the scope of the “in context Z” part. Is the counting as Y in context Z, or is Y alone in context Z? Or possibly both? I shall occasionally make reference to this ambiguity, however.

<sup>5</sup> In the context of such cultures as know the very institution of promise. See M. Ricciardi, *L’isola che non c’è. Un saggio sulla necessità della promessa*, Edizioni ETS, Pisa, 2012 against the erstwhile popular idea that there might be cultures that do not.

<sup>6</sup> A.G. Conte, “Deontica wittgensteiniana”, in *Filosofia del linguaggio normativo. II. Studi 1982-1994*, Giappichelli, Torino 1995, 519-561, 536f.

<sup>7</sup> See e.g. W. Żelaniec, “Fathers, kings, and promises: Husserl and Reinach on the a priori”, *Husserl Studies*, 1992, 9, 147–177.

Conte observes<sup>8</sup> that in some Searlean control examples, such as

(2)“the situation on the chess-board in which the king is under attack and has no legal way of escaping counts as checkmate (in the context of chess)”

the term standing for the *constituendum* (the object to be constituted) occupies the Y position, whereas in the case of the Essential Rule the term standing for the *constituendum* occupies the X position in the above schema. (2) can best be construed, Conte claims, as an answer to the question “what counts as a checkmate?” whereas (1) is best thought of as an answer to the question “what does promising count as?”

In other words, as I have submitted elsewhere<sup>9</sup>, the *theme* (topic, logical subject<sup>10</sup>) of (1) is mentioned in the X position, whereas the *theme* (topic, logical subject) of (2) stands in the position of Y. This might suggest the idea that (the (term(s) for) the *constituendum* are at the same time (the term(s) for) the theme or topic of the sentence which expresses the constitutive rule in question. This idea enlightens reason, because, typically, a constitutive rule tells us something about its *constituendum*, the object to be constituted. However, Conte rejects the notion that (1) is a constitutive rule. As he does so somewhat apodictically and without much argument, the issue will bear some scrutiny. This is going to be the scope and purpose of this paper.

## The argument

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<sup>8</sup> A.G. Conte, “Idealtypen für eine Theorie der konstitutiven Regeln”, in *Vernunft und Erfahrung im Rechtsdenken der Gegenwart. Reason and experience in contemporary legal thought*, T. Eckhoff, L.M. Friedman, J. Uusitalo (eds.), (Rechtstheorie, Beiheft 10.), Duncker und Humblot, Berlin 1986, 243-250, 246.

<sup>9</sup> W. Żelaniec, *Create to rule: Studies on constitutive rules*, LED, Milano, 2013, 54ff.

<sup>10</sup> In English, the theme usually stands at the beginning of the sentence, or is pre- or rather circumfixed by something like “As far as ... is concerned”; in Korean and Japanese there are obligatory grammatical markers for it. In Korean the standard way of saying “Korea is a peninsula” is “한국은 반도입니다” (“*Hangukūn pando imnida*” in Latin characters), which is, literally, “As far as Korea is concerned, it is a peninsula”. The theme-marker “은” (“*ūn*”) cannot be left out or suppressed. Similarly Japanese, “日本は島です” (“*Nihon wa shima desu*”) means literally “as far as Japan is concerned, it is an island”, i.e. Japan is an island. The theme marker “は” (“*wa*”) cannot be dispensed with, either.

Observe that (2) could, too, natural though it be to interpret it in the way just indicated, be construed as an answer to the question “what does the situation on the chess-board etc. count as?”, that is, as a sentence whose theme or topic is expressed by the terms standing in its X, or *grammatical* subject, position. That is, though (2) is normally understood as saying (with constitutive force and the pertinent consequences) what is a checkmate—that is, what shall henceforth have the value of, “count as”, it<sup>11</sup> (i.e. checkmate)—it could, too, be understood as an answer to the question “What does/shall the situation on the chess-board etc. count as?” Both rules are constitutive, I should propose; they differ in function and in location in the hierarchical structure (*Aufbau*) of the (constitutive) rules of chess. The former (the Y rule) tells us what “is cast in the rôle” of checkmate, or what “does the job” of one, or what is the “etic” implementation of the “emic” entity “checkmate”, to use Kenneth Pike’s conceptual apparatus<sup>12</sup>; the second tells us what chess-value that particular (type of) ludic status, the situation on the chess-board in which the king is attacked and so on, has. We should probably, for the constitution of chess, not need both simultaneously; but it would conceivably be contingent on the circumstances and tactical considerations which one we should choose to pick and actually employ for constituting or reconstituting the game. The building block of making the situation on the chess-board etc. fill the rôle of checkmate (theme-*constituendum* in the Y position) is quite useful if the latter (checkmate) has already been assigned a rôle in the game, viz. that of victory<sup>13</sup>; the building block of assigning this rôle to the situation etc. (theme-*constituendum* in the X position) is meaningful if the rôle of checkmate will be assigned a rôle of its own later on. In any case, the very fact that (the term for) the presumed *constituendum* fills the X position does not by itself militate against the constitutive character of the rule in hand (or put better: the sentence in hand’s being an expression of a constitutive rule).

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<sup>11</sup> “Is”=“shall be”, which is not the same as “will be”; “*esto*” in Latin, in the context of constitutive rules, see H. Spiegelberg, *Gesetz und Sittengesetz. Strukturanalytische und historische Vorstudien zu einer gesetzesfreien Ethik*, Max Niehans, Zürich und Leipzig, 1935, 74ff. and C. Kahn, *The verb “be” in ancient Greek*, Reidel, Dordrecht, 1973, 108, n. 28 for the “nuncupative use” of the Greek verb “*εἶναι*”. Cf. Shakespeare’s “He that sheds his blood with me *shall be* my brother, be he ne’er so vile”, from the celebrated St. Crispin’s day speech (*Henry V*, IV.3).

<sup>12</sup> K.L. Pike, *Linguistic concepts: An introduction to tagmemics*, University of Nebraska Press, Lincoln, 1982.

<sup>13</sup> See G. Lorini, “Can constitutive rules create a practice?”, *Praxis Filosófica*, 2012, 2012 (no. 34), 139-148 and the paper by Dolores Miller, Miller D. , “Constitutive rules and essential rules”, *Philosophical Studies*, 1981, 39 (no. 2), 183-197 referred to therein, on the “meta-institutional” character of the concept of victory.

There are other constitutive X rules, too. (3) “PLN<sup>14</sup> counts as money”, or (4) “the bills issued by the National Bank of Poland count as PLN”<sup>15</sup>. They can both be regarded as constitutive of both of what their respective X and their respective Y terms stand for, with the significant difference that (3) must not be seen as constituting money exclusively (other things, e.g. CHF, or KWD, do, thank goodness, count as money too)<sup>16</sup>. By the same token, both sentences can be regarded as featuring their theme (topic, logical subject) now in the X, now in the Y position.

But it is not the case that the same holds true of (1)? Can’t it, *pace* Conte, be interpreted as an answer to the question “what counts as an undertaking of an obligation”<sup>17</sup>? It certainly can, with the qualification that an “among other things” would have to be added to it. But the same is true of (3), too, whose status as a constitutive rule seems less dubious. (“What counts as money? PLN does, among other things”.) Promisings are not the only things, and far from that, to count as origins of obligations, others being oaths, vows, other forms of agreement, such as contract, or breach thereof, or tort; but promisings are certainly, amongst other things, such sources too. In both cases, the rules may be said to co-constitute the designates of their respective Y positions. A significant difference, however, seems to consist in this, that obligations (or undertakings or obligations) are not, or not evidently, an entirely rule-constituted domain; there must be “natural” sources of obligations, otherwise, as I have argued elsewhere, it would be a miracle that anyone should have felt obliged to abide by the very first rule agreed upon. But there is no “natural money”<sup>18</sup>; money is a cultural artefact usually fathered on Croesus, the famously rich king of Lydia; at any event, it is a relatively late invention.

If all (or some) *p* are *q*, however, then (unless we are talking about an empty domain), some *q* are *p*. If Athenians are Greeks, then some (though presumably not all) Greeks are Athenians.

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<sup>14</sup> Polish (new) złoty, legal currency in the Republic of Poland only, to the best of my knowledge.

<sup>15</sup> Cf. Searle’s “Bills issued by the Bureau of Engraving and Printing count as money in the United States”, J.R. Searle, *The construction of social reality*, Free Press, New York, 1995, 28, which seems to squeeze two rules analogous to (3) and (4) above into one.

<sup>16</sup> “PLN counts as money in Poland” does not have this ambiguity. As observed in footnote 4, however, it is ambiguous between “PLN counts in Poland as money” and “PLN counts as money-in-Poland”. Luckily, it is not just in Poland that it counts as money-in-Poland!

<sup>17</sup> A question to be asked by someone who desired to incur a new obligation, or to make someone else to undertake one more obligation, or similar.

<sup>18</sup> Very much depends, of course, on the exact definition of “money”; there might be natural money if “money” is understood as any means of exchange or paying debts or of accumulation. In the author’s childhood, small grocery shops when running low on small change coins would occasionally give change in sweets, or matches, or pickled cucumbers.

If “counts as” is a kind of “is”<sup>19</sup>, that is, if it expresses one of the many senses in which that latter word is employed<sup>20</sup>, then the rules here listed should be, perhaps with a suitable proviso expressing the “some” quantifier, similarly invertible. But given that the X’s and Y’s that often flank “counts as” stand for a species and a respective genus (“Turkey counts as a European/Asian country”) it may seem absurd to as much as put forward the idea of their inversion for examination. A European country certainly cannot “count as” Turkey or Liechtenstein or France, not even “amongst other things”, can it...? Well, this surely is not the received way of speaking, but don’t let us be misled by the “idiotism of idiom” (Arthur Prior). Besides, X and Y are not always species and genus. If white people counted or still count in some racist systems as the “supreme race”, the “supreme race” (or some subgroup thereof) can count as—rather than simply be—composed of white people, too. The Japanese, for instance, counted as white in the one-time racist Republic of South Africa<sup>21</sup>. Also, in association football goals count as points, but in some circumstances, on the strength of the “away goals rule”, one point counts as two goals, to break a tie.

(2) is, in fact invertible, with the flaw that the inverted version it has a comical ring to it: a checkmate not merely *counts as*, but squarely *is* (by definition) the (type of) situation on the chess-board where the king is under attack and cannot escape by any legal move. There is no knowing that a given ludic status in chess is a checkmate *except* by establishing if it is one *as* which it is presented, by (2) inverted, as counting, hence the tautological and comical flavour of (2) inverted. Similarly for (3): “Money counts, in certain countries, as PLN”. Money does not merely *count as*, but *is* purely and simply PLN in certain countries by definition and a respective statute. (3) inverted could, perhaps, be imagined put to non-jocular use in a situation where someone desired to know what name and external form money parades under in the diverse countries, or where some extremely ingenuous person was familiar with money in Poland from day-to-day transactions but did not know what it was called, what laws entrenched

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<sup>19</sup> There is, since recently, a formal logic of this pseudo-copula, D. Grossi, J.-C. Meyer, F. Dignum “Classificatory aspects of counts-as”, *Journal of Logic and Computation*, 2006, 16 (no. 5), 613-643, D. Grossi, J.-C. Meyer, F. Dignum, “Counts-as: Classification or constitution? An answer using modal logic”, *DEON*, 2006, dblp:conf/deon/grossim2006, 115-130, and D. Grossi, J.-C. Meyer, F. Dignum, “The many faces of counts-as: A formal analysis of constitutive rules”, *Journal of Applied Logic*, 2008, 6 (no. 2), 192-217, for instance.

<sup>20</sup> “Τὸ ὄν [...] λέγεται [...] πολλαχῶς”, Arist. *Metaph. Z*, 1003a 33.

<sup>21</sup> M. Osada, *Sanctions and honorary whites: Diplomatic policies and economic realities in relations between Japan and South Africa*, Greenwood Press, Westport, CT, 2002.

its legal status and so on. Given that in virtue of (3) PLN (and only PLN) counts as money in Poland, money could hardly “count as” (that is, be) anything else in that country and it takes a truly and seriously underinformed person to ask “what does money in Poland [known to him simply under the general and abstract description “money in Poland” or alternatively as colourful pieces of paper and metal circulating amongst the Polish] count as?”, which (3) inverted must most naturally be taken as an answer to. (This presupposes that “money” is the theme/topic in (3) inverted; if “PLN” should be it instead, the corresponding question would have been “what counts as PLN”, to which the answer would be “Money in Poland does”<sup>22</sup>.)

The closest to true invertibility (non-jocular, non-stylistic-variation etc.) we get here is with (4). PLN counts as bills printed at the behest of the Polish National Bank. Yes, it certainly does count so, but *is* it really such bills? This is an empirical question. We are not talking about money-forgery here, but about a situation in which genuine specimens of Polish currency come into being in some other way, not the classical one, despite their continuing to count as coming into existence in that way (perhaps the National Bank of Poland has outsourced, as has recently become fashionable, this activity to a private enterprise, without informing the public about it, while maintaining the legal fiction that *it* still has the bank-notes printed). This is at the very least a conceivable situation.

How does, then, (1) fare in this respect? Can there not be undertakings of obligations that count as promising under definite circumstances? There are obvious cases and less obvious cases. As with (2) inverted, it would be a philosophical joke, at best, to say that those undertakings of an obligation that are ones, and are identifiable as ones, on the strength of the Essential Rule merely “count as” as promising. If Peter promises Paul to pay him five quid tomorrow, being in his right wits, talking seriously etc. and Paul understanding him, it then would be putting the cart before a horse to say that this counts as an act of promising *because* an obligation incumbent on Peter has arisen from it. But suppose that Peter has not quite conformed with the Searlean non-essential rules of promise, maybe he did not say “I promise” or anything remotely like that at all, he only “dropped signs” on Paul that he considered himself under the obligation to pay him the amount, or maybe he expressed solemn regret not to have

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<sup>22</sup> The ambiguity mentioned in footnote 4 is germane here.

paid it to him earlier, or used some vaguely “promising language”<sup>23</sup>, all the while swearing to himself that he will pay to Peter five pound for a favour, let’s imagine, rendered to him in the past by the latter or the like—if consequently the existence of an obligation can be independently established, Peter’s words may be *ex post* regarded to have been an act of promising<sup>24</sup>. But it would be more than just “regarded as” such in the sense in which our hypothetical bills regarded as issued by the National Bank of Poland are *merely* so regarded, as a legal fiction to be carefully, for whatever reasons, maintained; the speech acts of Peter’s would be regarded as truly and seriously having been promisings, albeit in an unusual guise. But neither would they be regarded as promisings in the “lazy”, rule-dependent way in which money in Poland is regarded as PLN (what else could it be regarded as?). The abductive (in Peirce’s sense) reasoning from the existence of an obligation to there having been a promising is synthetic (does not rely on any man-made rules and least of all on semantical rules, meanings of words) and has the flavour of a scientific explanation.

Or perhaps Peter said something that at first sounded as a threat (a source of obligation, in a sense, too), but then he later on realised that Paul actually preferred his making good on the threat and from that moment on he must consider it as a promise rather than as a threat. This is much more than just a different name, because a promise, as Reinach has seen and Searle hasn’t, gives rise not just to an obligation (on the side of the promissor) but to a claim too (on the part of the promisee)<sup>25</sup>.

Note well that this sets (1) distinctly apart from (2): In chess there is no chance that something should first be identified as a checkmate, and only then as a situation where the king is attacked and cannot escape; that is why (2) inverted sounds so weird.

The above are all cases in which there first is a promising (perhaps only *ex post* acknowledged as such) and then an arising of an obligation, the ontological priority of the

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<sup>23</sup> R. Craig, *Promising language: betrothal in Victorian law and fiction*, SUNY Press, Albany NY, 2000.

<sup>24</sup> Reinach, whose theory of promise as a speech act (social act, in his parlance) is much more sophisticated than Searle’s, sees clearly that a speech act, to be efficacious, is “in need of being heard” (*vernehmungsbedürftig*) (A. Reinach, J.F. Crosby (tr.), “The a priori foundations of civil law”, *Aletheia*, 1983, 3, 1-142, 19) and recognised as such (“cast towards another person in order to fasten [itself] in his soul”, *ibidem*, 20), but he wisely does not commit himself to any too restrictive position as to what *specific kind* of speech act the given one is to *immediately* be recognised as. It might thus happen that a speech act is immediately heard as a threat, say, only to later reveal itself as a promise.

<sup>25</sup> I owe this suggestion to my students at the University of Gdańsk, Miss Hanna Tamkun and Prof. Jerzy Zajadło.

former is preserved, it is inverted only epistemologically; this is possible because (an arising of) an obligation is—or so it would seem—a kind of non-natural effect of an act of promising<sup>26</sup>, not just a different value given to the latter in virtue of a “magical” constitutive rule. This is why we can abductively reason from the presence of an obligation to a corresponding promise’s having been made. Such an epistemological inversion is possible neither with checkmates nor (let’s get serious) with money in Poland, which is why neither (2) nor (3) are really invertible. (4) is, in a sense, invertible, as we have observed above, but again, if saying that PLN counts as bills printed upon the mandate of the NBP<sup>27</sup> should be more than just an elaborate and roundabout way of saying that PLN simply *is* such bills, this is due to the existence of laws which turn non-NBP-authorisation printed bills to NBP-authorisation printed bills by dint of letting the former count as the latter. Their status would be similar to that of promisings which came into being in virtue of a constitutive rule conjoining a speech-act like “I solemnly oblige myself to *A* and sincerely believe that that will be to your good” with a promise to do *A*. Such undertakings of an obligation would in fact just “count as” promisings without actually being ones. For such cases, the ontological priority of promises over against obligations would no longer hold—but they would be no cases of promises constituted by means of (1) anymore.

But are such hypothetical cases as the ones alluded to above of a promise which does give rise to an obligation but in such a way that that obligation is recognisable (ascertainable) as such before the promise is at all possible? Well, as we know from Prince Hamlet, “There are more things in heaven and earth, Horatio/Than are dreamt of in your philosophy” (*Hamlet*, I.5). Promises are made, typically, in such a way that the promissor knows what he is doing (viz. promising) and the desire to conform to the constitutive rules is one of his motives<sup>28</sup>; but interestingly enough, neither is listed as a constitutive rule of promise by Searle. But there are untypical promisings as well, which not just “count as” promisings on the strength of another

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<sup>26</sup> Just as it is one of tort, say. The obligation to redress a tort is a result of the tort, not the tort itself under a different name, nor something attached to the tort conventionally. As opposed to that, see the Azzonian “epithetic rules” (G.M. Azzoni, *Il concetto di condizione nella tipologia delle regole*, CEDAM, Padova, 1988, 59) which just bestow new fancy names on things known, without adding anything to the things’ ontological make-up.

<sup>27</sup> Narodowy Bank Polski, Poland’s Central Bank.

<sup>28</sup> On “self-referential intentions” in similar contexts see S. Colloca, *Autoriferimento e antinomia nell’ordinamento giuridico (con un saggio di Claudio Luzzati)*, CEDAM, Padova, 2008 and W. Żelaniec, “Truth-value and self-reference. Against the spectre of the ‘Revenge Liar’”, in *The value of truth/the truth of value. Proceedings of the international seminar “Nomologics I”*, S. Colloca (ed.), LED, Milano 2013, 59-89.



constitutive rule like the one described above, but yet are recognisable as promises only after their obligation-generating character has been recognised<sup>29</sup>. Or imagine two Sardinian shepherds, Efisio and Gavino, in a conflict<sup>30</sup>. Efisio has just sworn revenge (whence an obligation), but Gavino would in fact welcome being harmed, perhaps as an expiation for a past sin or crime or dishonourable act, and that precisely in the form in which Efisio has threatened to harm him. When they both realise this, it becomes clear to both that Efisio's threat has, in fact, been a promise, from which Gavino can very well derive a claim. We should then say: there was a promise from the outset, yet only by the intermediary of the ensuing obligation was it ascertained and acknowledged as such.

## Conclusion

Be it as it may with this or that particular example, constitutive rules characteristically create something (new forms of behaviour, social facts, states of social affairs and the like) which without them would not at all have existed. "PLN counts as money in Poland" constitutes (with the *constituendum* in the X position) PLN as money in Poland (which it is not by itself) and money in Poland (with the *constituendum* in the Y position) as "played by" PLN (by which it would not be "played" without this rule). On both readings it is presupposed that the occupier of the Y position (money in Poland, in this case) is as yet nothing definite and that there is free room to "cast" something else (which is something definite already) as it (on the second reading), or constitute something else as the bearer of the property expressed by the term in the Y position (on the first reading). This explains why "Money in Poland counts as PLN" sound so clumsy and why it takes such a lot of imagination-stretching to think of a meaningful use of it (the extremely ingenuous person who knew money in Poland "by acquaintance" only and wished to know what it officially counted as).

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<sup>29</sup> See, again, R. Craig, *Promising language: betrothal in Victorian law and fiction*, SUNY Press, Albany NY, 2000 and W. Vitek, *Promising*, Temple University Press, Philadelphia, 1993.

<sup>30</sup> See G. Lorini, M. Masia (eds.), *Antropologia della vendetta*, CUEC, Cagliari, (forthcoming).

Nothing like that is the case with promises and obligations. Obligations can be ascertained independently of the promises which have given rise to them; they are not shadowy “emic” (in Pike’s sense) slots waiting for something else to be inserted into them; on the other hand, promises give rise to obligations more or less automatically, without waiting for a constitutive rule like the Searlean Essential Rule to be applied to them. This is why they can do their obligations-generating jobs and yet pass unnoticed, to be discovered only afterwards, “ah, so that was a promise”. This is not possible for a promise constituted in virtue of a rule like the indicated above: “All acts of the form ‘I hereby oblige myself to do *A* believing sincerely that that will be to your good’ shall count as promises”: for this rule to work, an act of the form “I hereby oblige myself etc.” cannot pass unnoticed. But promises are a different case.

## Literature

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