GUGLIELMO FEIS

Università degli Studi di Milano

guglielmo.feis@unimi.it

UMBERTO M. SCONFIENZA

Tilburg University

u.m.sconfienza@tilburguniversity.edu

CHALLENGING
THE CONSTITUTIVE RULES
INVIOLABILITY DOGMA

abstract

According to Searle (1969) a constitutive rule creates the very possibility of the entity it rules. Later on, other scholars - such as Benoist (2003), Conte (1983), Guastini (1983) - pointed out the inviolability of constitutive rules.
In this paper we want to challenge the inviolability dogma by asking the following question: is it possible to have violations of constitutive rules? *We will argue that a parametrical approach to constitutive rules can do away with the inviolability dogma. As a result, our approach allows for violations and introduces two different ways of exiting a game (semantic exit vs. practical exit).*

CHALLENGING THE CONSTITUTIVE RULES INVIOLABILITY DOGMA

G. FEIS *Università degli Studi di Milano,* U. M. SCONFIENZA *Tilburg University*

Introduction

This paper concerns the problem of the inviolability of constitutive rules (CRs). The problem of constitutive rules inviolability is the unavoidable fallout of what we call the standard theory of constitutive rules[1].

Several rhetorical devices are usually employed in order to justify the standard theory and its fallout against the criticisms that is possible to move against them to the extent that is possible to deem "dogmatist" the position of those who employ those devices. This paper has two main aims: firstly, it tries to debunk the dogmatist position by showing the ontological problems that such a position entails; secondly, it tries to put forward an alternative theory of constitutive rules that does away with the inviolability fallout.

This paper has 4 sections: in section 1, we introduce the main concepts and theories that we are going to deal with: constitutive rules, the inviolability dogma and some criticism and rejoinders on both side of the debate (in support and against the dogmatist position); in section 2, we challenge the dogmatist position by sketching our parametrical theory and we try to understand whether or not our parametrical theory of constitutive rules can replace the standard theory of constitutive rules; in section 3, by comparing the two theories, we analyze some of the positive consequences of our proposal (i.e. when and how violations occur and a theoretically meaningful new division between different ways of exiting a game). A conclusion in which we acknowledge the possible criticisms that such a new approach may raise will follow in section 4.

**1.
Constitutive
Rules and
Inviolability:
The Inviolability
Dogma (ID)**

By inviolability dogma (ID) we mean the thesis according to which changing something regarding a constitutive rule is not a violation of the rule but the creation of another rule-constituted type that has no relation with the first type.

We want to show that the issue of violation is twofold: on the one hand it is possible to violate the codified constitutive rule of a game by way of

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1   We will call standard theory the way of approaching the constitutivity issue along the line of Searle (1969) according to which constitutive rules create the very possibility of new behaviors - as in the rules of chess. The Italian legal philosopher Amedeo G. Conte exploited a full and complex taxonomy out of the Searlean and Rawlsian - see Rawls (1955) - intuition of constitutive rules. His main idea was to investigate CRs both as conditions of possibilities and as conditions of conceivability of the objects they rule. He further articulated his taxonomy working out different kind of conditions. See his volumes of collected papers Conte (1989, 1995, 2001).

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modification (think about playing soccer 12 vs. 12 instead of 11 vs. 11); on the other hand it is possible to go too far away and, instead of modifying a game, changes go too far and we exit the game (we will distinguish a semantic and a practical way of exiting a game).

We claim, against the ID, that violations as modifications occur and that, when a theory of CRs reconstructs two games as unrelated types - i.e. the classic move of the standard theory to deny that CRs' violations happen - there is a much more complicated story to dig into that concerns different ways exiting a game[2].

1.2
Two Facets of Constitutive Rules

The debate whether constitutive rules are inviolable or not is a consequence of two different characteristics of constitutive rules. On the one side CRs are, as the name itself suggests, rules, i.e. they display a prescriptive element that tells how a certain entity, object or person, has to act or behave. On the other side, CRs are constitutive, i.e. the object ruled by the constitutive rule essentially depends on it and cannot be shaped otherwise.

As *rules*, CRs, prescribe a certain behavior as something that ought to be followed as opposed to something that ought to be avoided. This fact entails, at least *prima facie*, that there could have been a different stipulation according to which the constituted object X could have been characterized by property P1 instead of property P2. In this sense - i.e. as rules in general - CRs, are breakable because once a certain property is chosen, you prevent the ruled object from having some other properties that are not the ones you are ascribing to it through *that* CR.

As *constitutive*, CRs are not ordinary rules, like "do not smoke" or "drive on the left side of the road", indeed, they are sort of stipulative definitions, they do not only rule over a certain entity but they create that very entity out of nothing. Take for example the CR "the bishop moves only diagonally", this CR does not only tell us how the bishop should move, it tells us also how the bishop should move *in order to be a bishop.* In this sense, then, CRs cannot be broken because not following them means failing to create the very entity the rule is supposed to rule over.

1.3.
Inviolability as a Source of Rigidity for Social Practices

The inviolability dogma poses major challenges; all the more if we use CRs in order to explain rule-based social practices or if we want to explain social

2   It is far beyond our scope to state that there was an *Ur*-game that has been modified several times in order to create all the actual games we may experience nowadays.

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practices by means of reference to the rules that constitute and regulate them. Constitutive rules are constitutive as a whole - i.e. it is the totality of the rules that is constitutive of a practice - so, different sets of rules end up constituting different practices. If a practice like "giving a lecture as plenary speaker" is determined by inviolable constitutive rules, then we end up with a practice that is too rigid, i.e. every minor departure from the constitutive rule results in a practice that is no longer "giving a lecture as plenary speaker". Imagine that one of the CRs that creates the practice "giving a lecture as plenary speaker" is that the speaker has to lecture in front of her audience. Assume now that the speaker, for the whole duration of the talk, speaks from behind the audience: given this situation, would we say that she is still "giving a lecture as a plenary speaker"? Probably not. However, if she goes talking from behind the audience only from time to time (maybe because she is a nervous walking-speaker), then our perception would be different.

Closely related to the rigidity of a practice, comes the problem of *the multiplication of the practices that are too rigid.* Given the link between the set of CRs and the object constituted, we are forced to claim that there are a lot of different unrelated types for all the spectrum of the very similar lecturing practices.

1.3. Inviolability as a Source of Rigidity for Social Practices

Here we will refer to single CR as "constitutive". Nonetheless, in the theory of CRs, this is somehow controversial because, properly speaking, CRs are constitutive only in a certain context of rules, i.e. it is the system of rules that is constitutive as a whole.

Taking this observation seriously will involve sorting out whether there are rules whose constituted object is more or less dependent on the rest of the system in which the rule is embedded. This research has never been carried out. Take the two following constitutive rules inside their system: "castling" in the game of chess and the article that constitute the Italian flag (art. 12 of the Italian Constitution) in the Italian constitution. We think that, if we analyze the dependence of those single rules within the rest of the system, castling appears more connected to the rest of the system than the Italian flag.

Note as well that this assumption of "constitutivity relativized to systems" dramatically diminishes any presupposed constitutive powers of CRs and decreases the possibility of the existence of anything such as eidetic-constitutive rules (i.e. rules that defines the essence of a rules-dependent object): essences are not supposed to be related to a system of rules!

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Summing up: a dogmatic CRs theory cannot reject our proposal using a strict "constitutivity relativized to systems" approach because the same approach, literally taken, will demolish many of the achievements of the CRs theory.

1.4. Cheating: An *Ad Hoc* Counterexample to the ID?

The most intuitive reply to the inviolability dogma is the observation that you can actually cheat in CRs-based game. Take the abused example of chess: what if I move the bishop as a queen and you do not recognize my move? Can we say that there was a violation of a CR?

The standard reply to that from the dogmatist will run as follows: "*Strictly speaking*", the inviolabilist says, "we are not playing chess when cheating occurs but something else" - for example (Ross 1968, 54)[3] - without any detail on what this "something else" is. Further, as we have seen, this reply has compromising ontological consequences related to type multiplication.

Despite this, we think the following reply makes a good point against the *strictly speaking* mysticism: suppose we are playing chess, I try to cheat and you spot me. You will probably say that what I am doing is something illicit related to a CR and not that I am trying to move into a different game (without your consent)[4].

Another way to back up the *strictly speaking* reply is to develop a theory of what the "something else" is. Amedeo G. Conte developed the concept of nomotrophism or acting-with-reference-to-rules[5]. The idea is that, even when we cheat, we are guided by some (others) CRs, especially the rules of the game constituting the victory in that game, i.e. the rules that makes it worth for us to try to cheat.

The issue of nomotrophism is really interesting but it fails to prove that a violation of a constitutive rule has never occurred: even if we admit that I am cheating because of some other CRs, this fact is not enough to say that there was no violation of the CR I violate in order to have an act of cheating.

2. Do We Really Need the Constitutive Rules Inviolability Dogma?

It seems, from the examples of the previous section, that the thesis according to which CRs are inviolable has some major flaws that not only

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3   This passage is quoted by (Roversi 2007, 101) as well. He then observes that (Ross 1968, 24) contradicts himself by claiming that "to cheat in any game is to make a 'move' which violates the constitutive rules of the game, with the intention that the other players, unaware of the violation, should take it as a regular move".

4   This sort of reply is to be found in (Żełaniec 2003, 164-165).

5   Conte's first work on the topic is Conte (2000).

jeopardize our ontology (type explosion) but also our grasping of what really goes on in the social practices (rigidity)[6].

We need to take seriously into account the somehow paradoxical question: are there breakable constitutive rules?

Our proposal is then to do without the ID and elaborate a different theory of constitutive rules according to which it is possible to violate CRs. Our theory will revolve around the concept of parameter.

Considering that CRs are the products of human acts, and therefore, subjected to human creativity, discussion and agreement, we think it is likely that there will be more ways to implement CRs.

Intuitively speaking, for the time being, it is possible to play soccer even if we are not 11 vs. 11, the different ways can be sorted out through a variable in which different value can be entered. Some values (12 vs. 12) will comply with the CR performing its task, some will not (0 vs. 0)[7].

2.1.
A Sketch of a Parametrical Theory of Constitutive Rules

Here we sketch how the parametrical constitutive rule theory works in order to deal with the problems of the standard theory outlined above.

The main argument runs as follows[8]:

> 1.   In the standard theory, every value not complying with the range set by the parameter is "out of the game" (it defines another game) – and this is a problem, because in this way games and social practices are too rigid and too many. The standard theory sees an excess of conceptual economy using only types and tokens. We would like to add a third element to the theory: a structure derived from the recognition of the elements of the game disciplined through parameters.

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6   In a forthcoming paper we tackle in more details all the problems of the CRs standard theory and give more details about our parametric approach. Here we want to go further showing how this approach can be used against the ID, enabling us to have breakable CRs.
7   We think that our proposal can be seen as the first step of a full development of Snyder's intuition according to whom "The notion of somebody breaking the rules constantly but yet playing chess does not make sense. We can make no sense of the notion of a chess player who *always* makes illegal moves. (But, of course, *occasional failure* to observe the rules is not a ground for disqualification as a player)". See (Snyder 1971, 171, emphasis added).
8   For a better development of our parametrical theory see our forthcoming paper *Structuring constitutive rules: a parametric shift. Creating a new game vs. Modifying a game.*

2. We should rather conceive the possibility of violating the rules while standing "within the game".

3. Hence, let us introduce the new concept of a parametrical constitutive rules that, through different values that can be assigned to a parameter, enables a lot of different practices which would seem deviant to be accounted as standing within the game because they are in accordance with the parameter and hence with the rule.

4. Violations here arise only when (i) we are not playing according to the codified CR and yet (ii) we do not fall outside the range of possible values for a certain parameter.

5. Outside the range of values the game changes. However, this is not a problem anymore for two reasons: (i) when we fall outside a game, according to the parametrical CRs theory, it will be a different game and not only a variation of a previous game starting from its codified CRs; (ii) given the empirical imprinting of our theory, we are nonetheless able to cope also with the historical evolution and the comparison of different games rather than considering them different unrelated token as the it was in the standard theory.

Now consider the rule (officially codified by FIFA) related to the number of players (call it "N° CR"):

(N° CR) soccer is played 11 vs. 11.

Now, we try to isolate its parameter. From (N° CR) we obtain:

(*N° CR) soccer is played X vs. X.

In (*N° CR) the variable X stands for a range of possible values according to which we are still allowed to say that this game is soccer.

The arguments in favor of such a revision come mainly from the ontological perspective: we claim that, with our modified parametrical CRs theory, you can avoid the rigidity of social practices and the explosion of types, i.e. the addition of one player does not entail – if within the parametrical range - the automatic creation of a new type of soccer. On the other hand, this approach, by forcing you to investigate dynamic games played for real (i.e. token of games, real life matches) brings into account more methodological and epistemological complexities.

Another example is the following: consider the rule that constitutes the size of a tennis court: in case you have a rule saying that the surface of the tennis court is the same as the universe you are not (only) constituting another game – universal tennis – but you are going into a new game by entering the wrong value into one of the parameters of a CR (i.e. the CR that rules the tennis court size).

2.1.
A Sketch of a Parametrical Theory of Constitutive Rules

Our new parametrical framework enabled us both to modify a game without exiting the type by way of changing the value of the parameter according to the range and to allow for violations of CRs (i.e. for breakable CRs). The theoretical move is to say that violations occur when the value that we choose does not fall out the range of the parameter itself but is different from that value of the parameter that is specified by the codified constitutive rule.

This feature of the theory enables us not only to allow for CRs' violations but also to classify the possible ways of exiting a game. From the standpoint of view of the gaming practices, we will distinguish a semantic exit vs. a practical exit.

3.1.
Ludic Point of View: Semantic Exit vs. Practical Exit

Consider again the rule concerning the numbers of the players in soccer in its parametrical form:

(*N° CR) soccer is played X vs. X.

Now consider the following examples:

(1*) soccer is played 1 vs. 1;

(2*) soccer is played 100 vs. 100;

and compare them with what, in our theory, is a violation of the codified soccer rule concerning the number of the players (11 vs. 11), e.g.:

(3*) soccer is played 12 vs. 12;

(1*) is a *semantic exit* from the game of soccer because it goes against the definition of soccer played *as a team sport*[9].
(2*) is a *practical exit.* Suppose we manage to play something like a soccer

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9   You may still say that 1 vs. 1 can be training to play soccer and so is 1 vs. 0 (say when you practice shooting corner kicks). Nonetheless, in order to say this, a theory to explain training as a subgame is needed.

game: all the FIFA official rules apply except for the fact that we play in 100 vs. 100. The game will be much different from the FIFA soccer as we know it, dribbling will become less useful and the whole game will be much more "crowded", a sort of scrum in rugby. Playing the game in 100 vs. 100 is not impossible nor it goes against the definition of soccer as a sport team, but it will create many physical and practical problems in order for the game to go on as we expect it to go. We label such a way of stretching too far a parameter, *practical exit.* Practical exits lead to a new an interesting question: what are the right parameters for soccer (and the other games in general)? How do we recognize them[10]?

(3*) is, as we know already, a violation of the codified 11 vs. 11 soccer rule concerning the number of the players. Nonetheless, it is not enough to exiting the game. All violations, in fact, are nothing but variations of the codified value of the parameter, but they do not fall out of the value assignment for it.

3.2. Comparing Theories

Comparing how the different theories deal with inviolability, we can say that there is a violation when - in our parametrical theory - the value assigned to a parameter departs from the value that corresponds to the codified version or the most played version (in soccer 11 vs. 11).

In that way our new theory admits as a well-formed rule what was an impossible violation in the previous theory. Consider 7 vs. 7 soccer: this was not a violation in the standard theory, it was not even soccer but another new type of game with no connections to 11 vs. 11 soccer. In our parametrical theory 7 vs. 7 is soccer and, given the historical prospective our methodology opens to us, we can see it as a violation of the original rule of 11 vs. 11 that is now included in soccer.

We agree with the standard theory that, in some cases, we go too far and exit a game. With this regard, our theory distinguishes a semantic exit from a pragmatic exit.

4. Conclusion: Vagueness in the Parametrical Constitutive Rule Theory

We showed that a framework in which CRs are breakable and we provided

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10   This is a rather complicated question deserving a whole methodological discussion. Here we will give just a short answer regarding soccer as a team game. The least number is 3 because even in 2 vs. 2 there are chances for the game not to be the real team game of soccer: the team will have a goalkeeper and a field player, but practically this amounts to 1 vs. 1 shooting towards a keeper (we may say it is 1 +1 vs. 1 + 1). So we need at least 3 players per team so that the two players remaining - not counting the keeper - are able to play as a team. The upper bound is set to 15 by way of looking at the number of players that other similar sports played on similar fields have: Gaelic soccer, rugby, hurling are all played 15 vs. 15 all involves having some sort of ball crossing a line and are played on a field with approximately the same length as the soccer pitch.

examples for it. We also addressed the new topic of exiting a game. Now it is time to consider some criticisms to our account.

One of the possible objections that can be raised to our approach is that we did not provide examples in the domain of chess that, in the history of philosophy, is somehow the paradigmatic example of practice constituted by rules and we relied instead only on soccer and tennis[11].

We claim that this "argument" clearly misses the target. Chess are a sort of naturally rigid practice (they can be perfectly played in absence of any physical structure - i.e. blind chess) so, if you conceive all the gaming practices as chess-like practices, CRs will hardly have a chance of being violable.

For the chess maniacs we can, nonetheless, provide two (thought experiment) examples: the first will show that *there are* parameters even in chess; the second will show that, not only there are parameters in chess, but that there are some value assignments that count as wrong assignments.

Imagine you are playing chess and that you are asked to play with a 7x7 chessboard or a 10x10 chessboard. This is enough to show that there can be parameters in the CRs of a game (the default value for the number of squares is 8x8).

Now reflect on your reactions to this proposal: you may regret 7 or 10 as a correct the value for the parameter: this proves that there are parameters in chess and that some wrong assignment that may lead to a violation or even to exiting the game.

To reinforce the point that even in chess it is possible to have an assignment in the parameters that counts as a violation of a rule (and so, according to our theory, which does not entail exiting the game), consider a game of chess where both the players invert the parameter of the starting position of the king and the queen. King and queen have a starting position parameter that in official chess are – from the white's player viewpoint – 1D (Queen) and 1E (King). In this new version you play chess with 1D-King and 1E-Queen. Despite the fact that you are switching parameters, it is still a game of chess where all chess moves are possible

11   To be more accurate, chess are paradigmatic in the prehistory of the concept of constitutive rules and in the legal philosophy development. Searle uses pretty often examples from American football such as the touchdown or the realm of institutions (creating money, being a president, etc).

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and chess strategies are the same. You may need to adjust some of them to the new starting position (think about castling) but it is not the case that some moves are going to be impossible[12].

With the new parametrical theory of constitutive rule we are proposing, problems of vagueness will obviously arise as a direct consequence of having replaced a precise value with a parameter to which we assign a range of values. Of course it is possible to debate on the range of values tolerated by the parameters before you fall out of the type of a game and it is worth investigating the rules of a game which are more affected by vagueness. The very possibility of discussing these issues proves that our work is going in the right direction[13].

12   Compare this to playing something similar to chess where you switch the king with the pawn in front of it. Here you will lose any chance to castle.
13   We would like to thank the audiences of the "Workshop Society and Values" and "SIFA 2012" conferences as well as the anonymous referee of this journal for helpful comments and objections to our paper.

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