

# Constitutive Rules: The Symbolization Account

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*Abstract.* Our aim is to provide an account of constitutive rules in terms of (1) the acceptance of regulative norms, and (2) a cognitive process we call “symbolization” (in an altogether different sense from what J. R. Searle means by this word). We claim, first, that institutional facts *à la* Searle boil down to facts concerning the collective acceptance of regulative norms in a given community. This, however, does not exhaust what institutional facts are. There is a residue, symbolization. Symbolization, as we understand it, involves a transfer of cognitive models from one domain to another. We introduce this notion by exploring different sorts of games, taking our cue from games of pretend play. In the context of this exploration, we introduce the idea of the significance—a matter of degree—of symbolization for a given institutional concept. In particular, we claim, symbolization may play, *vis-à-vis* a given institutional concept, a properly constitutive or a merely auxiliary role. We further argue that, in most legal concepts as conceived in our legal culture, symbolization plays a merely auxiliary role. A possible exception is the concept of political representation, at least on some understandings of it.

## 1. Introduction

Our aim in this paper is to provide an analysis of constitutive rules. We mean the term “analysis” in a literal sense: We will try to isolate the elements that constitutive rules are made of. These elements, we shall claim, are (1) the acceptance of regulative norms, regulating noninstitutional behaviour, and (2) a cognitive process we call “symbolization” (we mean by this, as we shall see, something deeply different from what Searle himself means by the same word). Symbolization, as we understand it, involves a transfer of cognitive models from one domain to another. Symbolization *vis-à-vis* a given institutional concept, we shall also claim, may be more or less significant in different historical contexts or for different agents—at the limit, it can be *constitutive* of the very concept at issue.

We proceed as follows. First, we claim that institutional facts *à la* Searle boil down to facts of a straightforwardly mundane, ordinary sort, namely, facts concerning the

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collective acceptance of regulative norms in a given community (Section 2). Second, the latter, however, does not exhaust what institutional facts, as fixed by constitutive rules, are. There is a residue: symbolization (Section 3). We introduce and illustrate the notion of symbolization by exploring different sorts of games, taking our cue from games of pretend play (Section 4). It is in the context of this exploration that we introduce the idea of the significance—a matter of degree—of symbolization for a given institutional concept. In particular, we claim, symbolization may play, *vis-à-vis* a given institutional concept, a properly constitutive or a merely auxiliary role (Section 5). On the basis of this distinction, we argue that, in most legal concepts as conceived in our legal culture, symbolization plays a merely auxiliary role (Section 6). A possible exception is the concept of political representation, at least on some understandings of it (Section 7). In the last section (Section 8), we summarize the conclusion of our analysis.

## 2. From Institutional Reality to Norms

Our reconstruction of the point and import of Searlean constitutive rules is premised on an assumption. This assumption is the upshot of a critical assessment of Searle's theory of institutional reality deployed in Celano 1997. We shall now state this assumption, and comment briefly on it. For a full-fledged argument supporting this reading of Searle's theory, the reader is referred to the said article.

Our assumption runs as follows. Institutional facts *à la* Searle boil down to facts concerning the collective acceptance, in a given social group, of norms, facts which may, or may not, also have a conventional dimension. In this paper, we shall leave this conventional dimension, or conventional facts generally, aside. Our focus will be on the normative dimension of institutional facts, that is, the collective acceptance of norms.<sup>1</sup>

By a *norm* we mean the ascription of a deontic property—obligatory, forbidden, or permissible (the basic deontic modalities)—to a given action.<sup>2</sup> A norm is collectively accepted in a group G, trivially, if, and only if, the members of G, generally, take the relevant pattern of behaviour as a standard for their own conduct and for the assessment of the conduct of the other members of G. The action qualified as obligatory,

<sup>1</sup> The fact that *p* is a *conventional fact* (as we understand this term) in a group G if, and only if, the members of G, generally, behave in a certain way under certain conditions because they expect the others to behave in that way, and they expect the others to behave in that way because the others behave in that way. In fact, a clear-cut distinction obtains between, on the one hand, facts that are *purely* conventional (e.g., the fact that a given pub is trendy: Everybody goes there because they expect others to go there as well, for this very same reason), and, on the other hand, facts concerning the collective acceptance of norms. The two kinds of facts, however, overlap. The collective acceptance of norms may itself have a conventional dimension (everybody complies with the norm because others comply with it as well, for this very same reason). Searle's account of "institutional facts" lumps together the normative and the conventional dimension (see Celano 1997). We shall not, in this paper, dwell on these complications.

<sup>2</sup> We use the term "deontic" in a broad sense, including the ascription to something of the property "correct" or "incorrect" (apart from imposing obligations or prohibitions *stricto sensu*). We use it, then, as a synonym for "normative." It is not clear to us what Searle himself means by "normative" and "deontic." At times he distinguishes sharply between the two—he does not, however, explain how the former term should be understood (Searle 2015). At other times, on the other hand, he ascribes to the domain of the "deontic" norms and rules which do not qualify as obligations or prohibitions *stricto sensu* (Searle 1995, 109: "everything turns out to be deontic"; Searle 2005, § 4). Moreover, he claims that, since everything, in institutional reality, "turns out to be deontic," "the term 'deontic' is no longer appropriate" (Searle 1995, 110). We simply do not understand what he means by this.

permitted, or forbidden may be either an institutional action (e.g., selling) or a brute one, namely, a kind of action existing, in Searle's words, "antecedently or [...] independently of the rule[s]" (Searle 1969, 33). In the last resort, however, the acceptance of norms of the former kind boils down to the acceptance of norms of the latter kind.<sup>3</sup> In the last resort, i.e., institutional facts boil down either to conventional facts or to facts concerning the collective acceptance of norms framed in terms of the ascription of deontic properties to noninstitutional behaviours. Norms of this kind are, apparently, regulative.

This, then, is our preliminary assumption. It is, it should be emphasized, the upshot of a criticism of Searle's account. We take it for granted, therefore, that Searle would not accept our conclusion. Very roughly, our argument supporting it is as follows.

According to Searle, the deep logical structure of institutional reality is rendered, not by the standard formulation "we collectively accept (X counts as Y in C)," but rather by the formula "we collectively accept (X has the power (X does A))," where "A" designates in the last resort (see n. 3 above) a noninstitutional action.

The relevant power, according to Searle, is not a physical power but a deontic one: positive (permission) or negative (requirement) (Searle 1995, 100 f., 104 ff.). Thus, Searle's celebrated formula for constitutive rules as opposed to regulative ones ("X counts as Y in C") turns out to be a way of expressing the content of regulative rules positing either positive or negative deontic powers, which is a convoluted way of saying that a given action of a given subject is characterized as obligatory or forbidden (negative power) or permissible (positive power).<sup>4</sup>

<sup>3</sup> Searle attempts to avoid this conclusion by adopting the strategy of "expanding the circle" of institutional concepts designating the content of norms (Searle 1995, 52–3). But, it is argued in Celano 1997, § 3.2, this attempt fails.

<sup>4</sup> One may be tempted to think that the gist of the distinction between regulative and constitutive rules lies in the difference between power-conferring norms and mandatory norms (norms phrased in terms of "obligatory," "forbidden," or "permissible"). The relevant distinction would, at bottom, be the one between the vocabulary of "rights" and the vocabulary of "duties" (the basic deontic modalities). In fact, Searle repeatedly emphasizes the enabling character—*Ermächtigung*, in Kelsen's words (Kelsen 1960)—of the rules underlying institutional reality (a particularly clear example is to be found in Searle 2005, § 4). If such a reading was correct, Searle's distinction would boil down to H. L. A. Hart's well-known distinction between power-conferring and duty-imposing rules (Hart 1961). But giving in to this temptation, would, however, lead us astray. According to Searle, constitutive rules express the ascription (to the X term) of a "status" (expressed by the Y term), to which a "function" is assigned, and that function, Searle repeatedly claims, is a matter of "deontic powers." Now, for one thing, this phrase ("deontic powers") flies in the face of the supposed distinction between power-conferring and mandatory (i.e., deontic) norms (if something ever is "deontic," mandatory norms are). And, for another thing, under the heading of "deontic powers," Searle lumps together, indiscriminately, on the one hand, "authorizations" and "rights," and, on the other, "obligations" (be they positive, i.e., "requirements," or negative, i.e., "prohibitions") and "permissions," on the same footing. One example among many: "Deontic powers are rights, duties, obligations, authorizations, permissions, privileges, authority and the like" (Searle 2003, 204). There is no hint of an antithesis. The difference between regulative and constitutive rules, then, is not the difference between the vocabulary of duties and the vocabulary of rights. Searle (2007b) suggests that *some*, but not all, constitutive rules express the creation of powers ("enablements"). In particular, in the set of "institutional powers"—powers conferred by constitutive rules—he includes "certifications" as well, namely, the ascription of the property "permissible" to behaviours existing "antecedently or [...] independently of the rule"! (Searle 1969, 33): "We need to distinguish those institutional powers which simply authorize, permit, or certify individuals to do something that they are able to do anyhow and those that actually enable or empower people to do things that they would not otherwise be able to do. [...] There is a crucial philosophical distinction between those cases where the action can be performed illegally, without benefit of the constitutive rules that provide permission, certification, and authorization, and those that can only be performed within a system of constitutive rules, because the constitutive rules define the act in question" (Searle 2007b, 27–8).

### 3. The Missing Piece: Symbolization

In the previous section, we have claimed that so-called “institutional facts” (*à la* Searle) can and should be reduced, trivially, to facts concerning the collective acceptance of norms, characterizing noninstitutional actions and behaviours as obligatory, forbidden, or permissible. It seems, then, that there is nothing to so-called “institutional reality” over and above the fact that in a given social group certain norms are collectively endorsed.

We think, however, that this account is incomplete: There is a residue which should be accounted for. There is more to Searle’s notion of a constitutive rule than Searle’s own account shows.

The move from the *X* term to the *Y* term in the formula “*X* counts as *Y* in *C*” is, according to Searle, a *linguistic* move, which he describes as “symbolization”: The *Y* term is a “symbol” for designating sets of ordinary, already known facts, *X*, in a new way (Searle 1995, chap. 3; 1999, 155; 2007a). This move enables a new way of thinking about a previously existing entity, *X*: *institutional* thinking. This, in turn, opens the space for a new kind of reality, *institutional* reality. The issue is: What does the novelty of this new way of thinking about previously existing and already known entities—*institutional* thinking—or the novelty of this new kind of reality—*institutional* reality—consist in, and what is its import? Searle’s answer to this question, we submit, boils down to this: The linguistic move we hinted at a few lines above (Searle’s “symbolization”) consists in introducing a new notational device, a mere label, the *Y* term, involved in a set of interrelated norms; thanks to this move, *X* is anchored to these norms.<sup>5</sup>

We claim that the step from the *X* term to the *Y* term does not reduce to the introduction of a mere label, a notational device. It is, as it were, the tip of an iceberg: In the background of this linguistic move (Searle’s “symbolization”), embedded in the *Y* term, is a peculiar cognitive operation which Searle’s account simply leaves out of the picture. Unfortunately, the only appropriate name for this cognitive operation that comes to our mind is the same as Searle’s: *symbolization*. But, as will be apparent in what follows, what *we* mean by “symbolization” is something altogether different from the linguistic move Searle dubs with the same word. *Symbolization*, as we understand it, involves the transfer, from one domain to a different domain, of cognitive models, that is, open-ended sets of representations, beliefs, and other attitudes and behavioural dispositions which are the stuff out of which ordinary concepts are made.

In order to explain what such a “transfer of cognitive models from one domain to a different domain” involved in *symbolization* amounts to, it is useful to start from a case of explicit *symbolization*: *pretence* and *pretend play*. Consider the following example. Mary, taking a book, says to John: “Let’s pretend that this is a ship.” And suppose that, having said this, Mary moves the book across the desk as if it were a

<sup>5</sup> What we have in mind, here, is a Ross-style, deflationary analysis of institutional terms as placeholders linking sets of norms (Ross 1957). Institutional terms are the consequents of disjunctive sets of conditional statements specifying the conditions of their application, and the antecedents of conjunctive sets of conditional norms. For instance, *X*, *Y*, or *Z* are alternative conditions for the application of the term “property,” and “property” is the antecedent of a set of conditional norms specifying the normative consequences (rights, powers, requirements, prohibitions) of something’s being somebody’s “property.”

ship on the surface of the sea. And then further suppose that, after a few seconds, Mary moves the book upwards above the table and downwards underneath it. John would be puzzled. A ship doesn't move like that, above and under the surface of the sea. In pretending that the book is a ship and in moving it across the surface of the desk, Mary activates a cluster of information—a cognitive model—concerning ships and the way they typically move, transferring it to the book. This cognitive model fixes the way—the *proper way*—in which a book-as-if-it-were-a-ship should move. But then, in moving the book upwards above the table and downwards underneath it, Mary does something which contradicts the cognitive model conveyed by the book-as-if-it-were-a-ship pretence. And this produces puzzlement, which may lead to the unravelling of the pretence (unless a specific explanation is provided: It is an airplane-submarine ship). As long as the pretence episode goes on, the book is, at the same time, two things in two different worlds: a book in the real world, and a ship in the pretend world. What the book-as-if-it-were-a-ship can do in the pretend world is determined by the cognitive model relating to real ships.

The transfer of cognitive models from one domain to another is considered by many to be a widespread feature of our cognition. Our conceptual framework, it is argued, is enlarged and improved, basically, through the extension of cognitive models pertaining to certain domains to entities in other domains. This is the case, for instance, with what Lakoff and Johnson call “metaphor”: the categorization of a given phenomenon in terms of an already known one (as in the metaphor “argument is war”).<sup>6</sup>

We are neither willing nor able to specify in detail what, if any, are the features which distinguish symbolization from other types of cognitive transfer, such as Lakoff and Johnson's metaphor. We think that, for our purposes, it is sufficient to provide an admittedly vague definition of symbolization as the mental operation through which an absent entity or process is made present by a different entity or process which “stands for” it. This mental operation can be viewed as a kind of objectively reinforced imagination: The absent entity or process is not simply conjured up in the imagination, but somehow embodied in an external, perceivable object, namely, the symbol, which acquires the power of activating (part of) the responses, including behavioural and emotional ones, normally elicited by the symbolized entity.<sup>7</sup>

In focusing our analysis on symbolization, understood in the sense specified above, we take ourselves to be following an insight of Hannes Rakoczy and Michael Tomasello.<sup>8</sup> Rakoczy and Tomasello take their cue from Searle's remark that institutional thinking involves the “ability to think about one object on two levels at

<sup>6</sup> Lakoff and Johnson 1980. In a different perspective, see also Churchland 2013, chap. 4. Also relevant in this context is the notion of “conceptual blending” (Fauconnier and Turner 2002).

<sup>7</sup> See Pitkin 1967, 96–7: “To say that something symbolizes something else is to say that it calls to mind, and even beyond that evokes emotions or attitudes appropriate to the absent thing. [...] When we speak of something as symbolizing [...] [w]e are calling attention to someone's reacting (or being supposed to react) to the symbol in a manner appropriate to its referent (kissing the Cross, saluting the flag).”

<sup>8</sup> Rakoczy and Tomasello 2007, 125–32. The idea that constitutive rules involve symbolization (in our sense) is also suggested in Brigaglia 2011, 262. D'Andrade (2006), too, insists on a “symbolization” condition. Presumably, however, he understands the word in the same sense as Searle.

once.”<sup>9</sup> In elaborating this vague idea, they point precisely to children’s games of pretend play with objects. Such games, they claim, share “the form of the status function assignment” (“This wooden block counts as an ‘apple’ in our pretense game”), and are therefore “one plausible cradle for the child to enter [...] into the world of [...] institutional facts.”<sup>10</sup> What Rakoczy and Tomasello have in mind here is, evidently, symbolization in our sense. We think, however, that their insight should be developed further. The role of symbolization in institutional reality goes beyond of what they seem to think, and surely far beyond of what Searle’s account implies.<sup>11</sup>

We will now sketch a very rough taxonomy of different forms of symbolization, pertaining to two different domains, namely, games and legal practices and concepts. We take this taxonomy to be a heuristic device, helpful in pointing out the main mental operations which, it seems to us, generate and support typical instances of constitutive rules and institutional phenomena.

#### 4. Symbolization: The Case of Games

Probably, the most basic form of symbolization is *mimetic*. A clear example of mimetic symbolization is *icons*: A given item X, the icon (say, the figure of a horse) captures some of the perceivable traits of a different item Y (the horse itself), so that the perception of X activates (part of) the cognitive models which would be activated by the perception of Y. X, that is, functions as a symbol of Y.

We can imagine a progressive departure from this basic form of symbolization developing along three different dimensions: (a) the move from “natural” (mimetic) to “conventional” (arbitrary) symbols; (b) the move from implicit normative constraints to explicit norms; and (c) the move from “constitutive” to “auxiliary” symbolization.

We illustrate these points through the example of different kinds of games. The former two points will be discussed in the present section, the third one in the next.

(1) *Mimetic pretend play*. A first kind of game is mimetic pretend play. Consider, for instance, soldier figures, which, in a children’s game, stand for real soldiers. Here, the symbolization relation is mimetic: It is based on a natural, perceivable similarity between the two objects, and, as such, it is spontaneously elicited. A war game with soldier figures can be played, by those who have some idea of how real battles are, without explicit norms. The very transfer of (part of) the cognitive models relating to

<sup>9</sup> Rakoczy and Tomasello 2007, 125, referring to Searle 2007a, 31.

<sup>10</sup> Rakoczy and Tomasello 2007, 128. Searle himself endorses Rakoczy and Tomasello’s claim that games of pretend play are, in Searle’s words, “the ontogenetic origin of the human capacity to create institutional reality” (Searle 2010, 121).

<sup>11</sup> In the passage referred to by Rakoczy and Tomasello (Searle 2007a, 31), Searle, once again, refers to *linguistic* symbolization. In order to have a language, he claims, you need to understand that a physical entity, a linguistic symbol, stands for something else, its meaning. It is quite clear that linguistic symbolization and the kind of symbolization involved in pretend play (symbolization in our sense) are different mental operations—even if they may both be covered by a generic formula such as “thinking about one object on two levels at once.” You do not handle the word “apple” as if it were itself an apple. Symbolization in our sense, we stress, is a kind of *objectively* reinforced imagination: a real entity which somehow *embodies* an absent one. At times (see, e.g., Searle 1995, 71) Searle comes close to “symbolization” in our sense, but his official doctrine concerns “symbolization” as the introduction of a set of (broadly understood) linguistic devices, designating the status expressed by the Y term (see n. 5 and the accompanying paragraph).



battles directly imposes implicit normative constraints which fix what is correct to do in the game (shooting, for instance), what consequences can be correctly produced by a certain move (a revolver's shot can kill only one soldier), and so on.<sup>12</sup> We do not necessarily need to explicitly agree on what can and what cannot be the case. The normative structure provided by the mimetic relation, albeit implicit, is—or better yet, *can* be—sufficient to play the game, and can also generate, in the absence of competitive attitudes, a remarkably spontaneous coordination.

Three observations are in order here.

(a) A few lines above we spoke of a transfer of cognitive models from a source domain (a real battle) which imposes implicit normative constraints on a target domain (a battle with soldier figures). There are, here, two possibilities. First, what is already a *normative* constraint in the source domain (e.g., “It is forbidden to bomb a Red Cross vehicle”) may simply be transferred to the target domain (it is forbidden to shoot on the toy Red Cross vehicle). Second, and more interestingly, what is a *de facto* necessity, impossibility, or possibility, in the source domain (e.g., a single revolver shot cannot, normally, kill more than one person) becomes a *normative* necessity, possibility, or impossibility (namely, obligation, permission, or prohibition) in the target domain (when a soldier figure shoots with a revolver, no more than one soldier figure should be removed from the pretend battlefield).<sup>13</sup>

(b) Pretence is characterized by what has been called “cognitive quarantine”:<sup>14</sup> The cognitive model pertaining to the symbolized item is not entirely transferred to the symbol, only partially. If I pretend to be a monster, and you pretend to be scared, I expect that your pretence involves acts such as screaming or fleeing, but not acts such as jumping through a seventh-floor window or killing me. Cognitive quarantine is what distinguishes pretence from false beliefs (see Rakoczy and Tomasello 2007, 128). It involves a mobile set of further implicit normative constraints that fix the loose border between what is a correct unfolding of the game and what is an incorrect, excessively realistic one.

Can pretence be described as a “fiction”? On the one hand, it can: One important aspect of the cognitive quarantine involved in pretend play is precisely the fact that pretence does not convert into reality—that the pretended world remains pretended, fictive. It is, however, a peculiar kind of fiction, a fiction which remains confined to the fringe of consciousness: In order to make the pretence unfold, we should let ourselves be deeply engaged in the pretended world, and to some extent forget that we are pretending; we should allow ourselves to be “possessed,” up to a point, by the pretended world (see Walton 1990, 243ff.). This is a necessary condition for the

<sup>12</sup> Rakoczy and Tomasello 2007, 128: “the wooden block, counting as an ‘apple,’ has to be treated appropriately, can be peeled, eaten, found disgusting, etc., but cannot be drunk or driven.”

<sup>13</sup> See, on this point, the insightful remarks of Roversi 2012, 189–92. Roversi distinguishes between two kinds of “normative mimesis” (*mimetismo normativo*), that is, the establishment of normative constraints on the basis of mimetic relations. The first kind of normative mimesis, which he calls “deontic” (*mimetismo deontico*), is the transfer to the target domain of normative constraints already existing in the source domain. The second kind of normative mimesis, which he calls “alethic” (*mimetismo aletico*), is the transformation from alethic modals in the source domain into deontic modals in the target domain.

<sup>14</sup> Nichols and Stich 2003, 26. The expression traces back to Leslie (1987), according to whom pretence is “quarantined” from ordinary beliefs.

spontaneous activation of the relevant cognitive models. We think that this is (part of) what differentiates symbolization from other kinds of transfer of cognitive models, such as analogy, metaphor (if understood as a rhetorical device), or allegory.

(c) A game of mimetic pretend play such as war with soldier figures is premised on basic, implicit normative standards concerning the fact that it is correct, it makes sense, to treat soldier figures as symbols for real soldiers, and pretend war acts as symbols for real war acts. That is, the game is grounded in implicit norms concerning the peculiar kind of mental operation we are calling “symbolization.” If we wanted to formulate these basic norms, it would be natural to use the standard Searlean formula for constitutive rules: “X (the soldier figure) counts as Y (a real soldier) in C (the game)” (Rakoczy and Tomasello 2007, 128). Or, better yet: “It is correct that (X counts as Y in C)” (see Brigaglia 2011, 262; a similar idea in Garcia 1987). Let us call this kind of norms “symbolization norms.” If you want, you can say that symbolization norms are “constitutive,” because they constitute the very possibility of the activity they regulate, in this case pretend play. This characterization, however, turns out to be misleading, if constitutive norms are taken to be different in structure from regulative ones. Symbolization norms can indeed be conceptualized as regulative norms, which, instead of motor actions, regulate a mental operation, that is, symbolization.

(2) *Conventional pretend play.* Let’s go back to the example of pretend play introduced above, the book-as-if-it-were-a-ship game. In this case, there is no mimetic relation between the symbol (the book) and what is symbolized (a ship). The relevant symbolization relation is not spontaneous. It is triggered by an intentional, deliberate act: the uttering of the sentence “Let’s pretend that this book is a ship.” This intentional, deliberate act can be plausibly seen as the issuing of an explicit symbolization norm, which makes the pretend play possible by setting a normative criterion which specifies a (more or less) arbitrary symbolization relation between the two terms (“It is correct that [this book counts as a ship in the context of the game]”). Once the symbolization relation is set up, it spontaneously triggers a set of further implicit normative constraints, as in the case of mimetic pretence.

The difference between mimetic pretence and natural symbols, on the one hand, and conventional pretence and arbitrary symbols, on the other, is a matter of degree.<sup>15</sup> On the one hand, there can be items which, given the very nature of our mind, invariantly and automatically—spontaneously—trigger the appropriate symbolization. On the other hand, there are items which can function as symbols of something only in virtue of an explicit agreement. But there can be also natural constraints on what can be a symbol of what (Azzoni 2003) (for instance, for X to be a symbol of Y in pretend play, some of X’s affordances should match Y’s affordances). There can be arbitrary symbols which are so deeply embedded in a culture, and so coherently transmitted, that they become “second nature”: They automatically and almost invariantly trigger the appropriate symbolization relations, without the issuing of any explicit norm.

(3) *Competitive games.* We have, as yet, focused on noncompetitive (or not necessarily competitive) pretend play, that is, games in which there is no winner or loser. The players are driven not by the goal of winning but by the very pleasure of pretending.

<sup>15</sup> See Searle 1995, 86, on the “scale [...] from freedom to necessity, from arbitrariness to reason, in the items selected for the status-functions.”



A competitive game requires something more. It needs a norm which specifies what kind of fact counts as “winning.” Let us call it a “competition norm.” A competition norm can be very simple: “The first who touches the tree down there wins.” What kind of norm is a competition norm? It does not prescribe a specific act. It prescribes the conditions under which it is correct to ascribe a peculiar status, the status of “winner.” We think that the ascription of this status can be interestingly understood as a form of largely unconscious symbolization (we assume that symbolization may also be unconscious). Fights and conflicts are characterized by cognitive models which include a set of emotional attitudes and behavioural dispositions (especially in terms of social ranking): positive for the winner (the “dominant” party) and negative for the loser (the “dominated” one). Winning symbolizes dominance in nonpretended fights and conflicts, transferring to the former condition part of the cognitive models attached to the latter, and quarantining other parts of it. As all of us know, this quarantine is fragile. The emotions—especially those elicited in the loser—and the ranking effects in competitive games may be as strong as in nonpretended conflicts, and therefore they may end up causing nonpretended, nonquarantined fights.

(4) *Codified games: the case of chess.* A “codified” game is a game in which a set of explicit norms specifies the moves that players are allowed to make and their consequences, and, in case of competitive games, which situation, achievable through those moves, counts as winning. Chess is a paradigm of an institutional practice, made possible by constitutive rules, and it is, at the same time, a standard example of a codified competitive game. In a game like chess the competition norm which assigns “victory” to the player who realizes, for instance, a checkmate is part of a system of norms which specifies the possible legitimate moves and their consequences. What kind of norms are they?

Our guess is that they can be simply depicted as regulative norms, fixing how to act under certain conditions, and the consequences that should be accepted, in the context of the game. These norms function, normally, in conjunction with the competition norm. The competition norm does something more than prescribe that the match has to be interrupted and the pieces put back in their starting position. The competition norm, as we said above, ascribes victory, and this ascription is, plausibly, a (somehow quarantined) symbolization of dominance. In a nutshell, the rules of chess are norms which prescribe what you are allowed to do in order to achieve the (supposedly desired) goal of winning the match.

We can speculate that the rules of chess, taken as a whole, maintain a symbolization relation with a certain situation: a battle. We can further speculate that, given how the cognitive structure of humans is designed, this relation, normally, plays an important role in the functioning of the game, because it somehow makes the dynamics of the game cognitively manageable by the players (we can understand the rules more easily because they somehow match the characters and movements of a real battle), and because it helps to motivate the players and to focus their attention on the game (the emotional attitudes pertaining to the cognitive models of a real battle are somehow activated by the pretended, white-and-black one). Suppose that this is the case, and that codified games like chess maintain a symbolization relation to this and other domains. Even then, codified games would still be deeply different from the uncoded games of pretend play discussed above. In a codified game like chess, the moves are not spontaneously produced by the symbolization norm which sets up the pretence, as would be the case for children, who do not know the

rules of chess, and started to use the pieces as soldier figures. In games like chess the rules are strictly codified, and this allows the game to be played even *in the absence* of the relevant pretence. A machine programmed to pursue a certain goal, that is, to achieve the situation which counts as victory through the allowed moves, can play chess even if it has no cognitive models relating to real battles, and also no cognitive models relating to victory.

## 5. Symbolization: Constitutive and Auxiliary

The discussion of various kinds of games in the previous section suggests the following conclusion: The significance of symbolization *vis-à-vis* a given game is a matter of degree. In fact, we have a wide spectrum of possibilities in which symbolization is more or less significant, and for any given game symbolization may be more or less significant for different players and in different contexts. At the two extremes we find, on the one hand, games where symbolization is *constitutive* of the game itself, like games of pretend play—the game cannot be played except by symbolizing. At the other hand of the spectrum, we find games (e.g., chess) where symbolization is dispensable. It may play some role, here and now, or it may have played a role in the past, but it is not constitutive of the game: The game can be played even in the absence of symbolization. In such cases, we shall say, symbolization is merely “auxiliary.”

Symbolization, it seems to us, may be more or less significant in at least three respects. First, as a factor contributing to the overall intelligibility of the game. Think, for instance, about games like Monopoly or Risk: Such games may be played with no symbolization, but the relevant activities become more intelligible if understood in light of a market economy in real estate and a world war, respectively.

Second, symbolization may be more or less significant in contributing to the motivation of the players. For instance, the aggressive drive of real battles may play some role in motivating players in a game of chess.

Third, symbolization may be more or less significant as a source of elements for supplementing, when needed, the explicit rules of the game. The case of chess is the case of a completely codified game. In most games, however, symbolization plays a (more or less significant) supplementing role: It evokes and makes salient further—with respect to the explicit ones—constraints and possibilities that hold in the source domain, which are now transferred to the target domain. In such cases, we shall say, symbolization plays—with respect to the explicit norms—an “interpretive” role. So, for instance, Risk is pretend war, subject to a number of explicit norms which specify the moves that players are allowed to make, as well as the consequences of those moves. However, even if Risk’s explicit norms do not mention the possibility of strategic alliances between the players, the existence of this possibility in the source domain makes it salient, and it also provides a kind of justification or legitimation of the permissibility of such strategic alliances in the game. In this sense symbolization plays an interpretive role: It provides cues for supplementing the set of explicit norms on the basis of constraints and possibilities provided by the source domain.<sup>16</sup>

<sup>16</sup> In a similar vein, see Brožek 2015 on the heuristic function of institutional concepts.

Symbolization may be more or less significant both (i) *vis-à-vis* different games in the same context, and (ii) *vis-à-vis* one and the same game in different contexts or for different players. In saying that symbolization may be more or less significant *vis-à-vis* one and the same game in different contexts or for different players, what we mean to suggest is that the concept of a given game and of its various components, and generally institutional concepts, may have, and usually do have, a history. In some historical contexts, for some agents, symbolization *vis-à-vis* a particular game may be very significant, to the point of being constitutive of the game itself, and be regarded as a component of the actual (a factual expectation) and the proper (a normative expectation) way of playing the game. We can imagine that, in some contexts, chess players are expected and required to play chess pretending that they are engaged in a real battle—for instance, a game of chess may be understood as the symbolization of a fight between the forces of Good and Evil. In other contexts, or for different agents, symbolization may have very little significance, to the point of being altogether dispensable. This, it seems to us, is the case of chess nowadays.

That the concept of a given game has a history, as do institutional concepts generally, and that the identity of these concepts is also fixed by the historical path through which they have become what they currently are, entails that, in many cases, there cannot be a yes or no answer to the question whether, when the significance of symbolization changes, what we have is the very same concept as before or a new one. Chess as it is currently played (Chess 1) and chess as a fight between Good and Evil (Chess 2) have an element in common: a set of explicit norms, the rules of chess. They differ, however, in a crucial respect: the significance of symbolization. When we look at the relation between Chess 1 and Chess 2 from the perspective of those who regard Chess 1 as the paradigm, for whom symbolization is dispensable, Chess 1 and Chess 2 are one and the same game, because they have in common what, to their eyes, is the sole distinctive feature of chess, namely, the rules of chess. But, on the other hand, for those who regard Chess 2 as the paradigm, for whom symbolization is not dispensable—i.e., it is constitutive of the game itself—Chess 1 and Chess 2 are two different games.<sup>17</sup>

Typically, it seems to us, games have, as their ingredients, both explicit norms and symbolization; and, we submit, typically, the significance of symbolization in a game is inversely proportional to the codification of the game *via* explicit rules. The more a game is codified, the less symbolization is significant. Namely, the more a game is codified, the less the players need, in order to understand what the moves available to them are and what their import is, a transfer of cognitive models from a source

<sup>17</sup> It may even be doubted whether the activity performed in Chess 2 does in fact match our concept of a “game.” Perhaps, Chess 2 is better described as a sacred rite. For the example of Chess 2, we have drawn inspiration from Schwyzer 1969, 456–7. We have, however, made deep changes to his example. Schwyzer describes a practice performed by an imaginary population, the Ruritians. This practice is, on the one hand, very similar to chess—the same pieces are moved on the same chessboard, according to the same rules. On the other hand, it is very different from chess, because it is not a competitive game (the Ruritians happen to lack the very notion of a competitive game). It is rather a sacred rite, celebrated once a year, whose outcome determines the future of the community for the following year: “[i]f white mates black, the community and the crops will flourish; if black mates white, there will be trouble.” Moreover, differently from our Chess 2, the Ruritians’ sacred rite is not a pretended battle (“chess is not a duel or a battle,” they explain), and it has, for this reason, no winner or loser.

domain—this is so even when, as a matter of fact, such a transfer of cognitive models originally played a major role in the process in virtue of which the game came into existence. The less a game is codified, the more the players need to rely on implicit normative constraints and possibilities made available by the cognitive models in the source domain.

## 6. Legal Concepts (I): Auxiliary Symbolization

In the last section, we claimed that symbolization, *vis-à-vis* a given institutional concept, is a matter of degree: It may be constitutive of the institution itself, or it may play an auxiliary, more or less significant role—at the limit, no role at all. We also claimed that this may also be a matter of the history of the concept.

In the legal domain—at least as far as Western-type legal systems are concerned—it seems to us, symbolization is *now* mostly auxiliary. We can, however, easily imagine contexts in which—just as in our Chess 2 (Section 5 above)—symbolization is constitutive of the relevant legal institution. In this section, we illustrate this point by providing a sketchy account of a typical institutional legal concept: *border*. In order to make somehow plausible the transition from the latter condition (constitutive symbolization) to the former (auxiliary symbolization) we cannot but offer contrived examples related to imaginary, exotic, and premodern contexts.

The institutional concept *border* can be understood, in the first place, as a placeholder linking a set of norms: X is a border if, and only if, it is an entity instantiating the consequent of a disjunctive set of norms with different antecedents and the antecedent of a conjunctive set of norms specifying what should be done in relation to X (“the line delimiting the area comprised within fifty steps from a given village is the border”; “if a community occupies an uninhabited land and erects a fence surrounding it, then the fence is the border”; “no person who is not a relative of a member of the community is allowed to cross the border, and if someone who is not a relative of a member of the community crosses the border, they should be sentenced to death”; etc.).<sup>18</sup> We cannot, however, rule out the possibility that, in some contexts, symbolization, too, plays an auxiliary, more or less significant role (this is probably true in some of the many strands of contemporary Western legal culture as well), in the three respects listed in the previous section.

First, it may be the case, for instance, that the relevant set of norms is made intelligible thanks to a transfer of cognitive models related to a physical barrier. A symptom of this is the plausibility of the representation of borders as symbolic (metaphorical), deontic barrier (recall Searle’s example of a wall now decayed into a line of stones) (Searle 1995, 39–40).

Second, it may be the case, for instance, that the motivation to respect borders is supported by the transfer of cognitive models from the biological drive to mark

<sup>18</sup> This is the gist of Alf Ross’s well-known account of such concepts (Ross 1957; see n. 5 and accompanying text). See also, along the same lines, the so called “status account” of constitutive rules provided in Hindriks 2009 (although Hindriks, as an anonymous referee suggests, “is not an eliminativist. And even if he is a linguistic reductionist, he defends a nonreductive ontology”). See also, in this connection, Brožek 2015. Brožek, too, believes, as we do, that Ross’s reductionist move leaves a residue; his diagnosis, however, is different from ours.

the boundary of your territory and to recognize the marked boundaries of others' territory.

Third, it may be the case, for instance, that the explicit norms relating to borders are supplemented by constraints and possibilities relating to the entity in the source domain: Since, if you have the key to the gate of a fence, then you can cross the fence, a new rule for crossing the border is created, a rule under which "anyone is allowed to cross the border if they are carrying with them a strip of leather bearing on it a drawing of a key issued by the chief of the community, and may do so even if they are not related to any member of the community."

It is important to stress that symbolization is auxiliary in contexts where it is *dispensable*. Think, once again, about the example of the drawing of the key given a few lines above. In this case, symbolization is auxiliary in contexts where it only works in making salient the possibility of granting a special permission to nonrelatives to cross the border (just as anyone who has the key can open the gate), or in making this idea more intelligible and intuitively plausible. We can, however, imagine contexts—different from our own—in which symbolization plays a constitutive, *nondispensable* role. So, for instance, we can imagine contexts in which the members of the community cannot even conceive the very possibility of letting nonrelatives cross the border *except* by symbolizing the opening of a gate by using a key.

The same could probably be said about many other contemporary Western legal concepts, such as the concept *property*. *Property* can be understood, first of all, as a placeholder linking a set of norms (Ross 1957). It cannot, however, be ruled out that—at least in some strands of contemporary Western legal culture—symbolization, too, plays an auxiliary, more or less significant role. Possible candidate source domains are, e.g., enclosures (Rousseau 1989 [1754], pt. 2); something being mine, just like my hand or my thoughts are mine;<sup>19</sup> and physical power over an object.

## 7. Legal Concepts (II): Constitutive Symbolization

The question now is: Are there, in contemporary Western legal cultures, concepts with respect to which symbolization is constitutive, rather than merely auxiliary?

Giving an exhaustive answer to this question is beyond our reach. It seems to us, however, that in our legal-political lexicon one such concept is *political representation*, or, at least, a certain view of political representation.

We are not claiming that, in our legal-political culture, there is only one concept of political representation, and that, with respect to this concept, symbolization is constitutive. Of course, the generic and largely open-ended concept of political representation may be specified and made precise in different ways. Different specifications lead to different concepts, or conceptions, of political representation. The main ingredients of most such concepts, or conceptions, however, are, it seems to us, precisely, (1) a set of norms and (2) symbolization.

(1) The phrases designating (political) representatives (for instance, "MP," "the President," "the King") are—the usual Ross-style analysis (Sections 2 and 6 above)—placeholders linking sets of norms. For instance, X is an MP if, and only if, X instantiates the consequent of a disjunctive set of norms with different antecedents and the

<sup>19</sup> See Waldron's reconstruction of Hegel's account of private property, in Waldron 1988, 353ff.

antecedent of a conjunctive set of norms specifying the normative positions (claims, duties, liberties, powers, immunities, and so on) pertaining to X: “X is an MP if she was elected according to the procedure specified in statute S, or if she was appointed as an MP by Y, and so on; if X is an MP, then she has the power to... and a duty to...”

(2) It is likely, we believe, that, even when a set of explicit, detailed norms is available, symbolization may play some role. (Political) representatives somehow *make present* the represented—to the point, at times, of representing (making present) the *unity* of the represented, a community or collective entity. This idea lies at the roots of the claim that the actions or will of representatives are owned by the represented, that is, that the represented is the author of the actions or decisions of the representative (Hobbes 1981 [1651], chap. 16). This leading idea—representation as making the represented present—can easily be framed as a matter of symbolization, that is, a transfer of cognitive models from the represented to the representative, so that, for instance, offending the representative counts as offending the represented community.<sup>20</sup> Crucially, what is transferred to the representative are the feelings and attitudes (fears, hopes, and so on) associated with the experience of a huge crowd of people as a unified, coordinated, powerful agent. (Think, for instance, of the experience of suddenly becoming the single focus of the joint, and hostile, attention<sup>21</sup> of a group of racists, and the colour of your skin is not the same as theirs.)

The experience of X as a symbol representing the community, or, at the extreme, the unity of the community, may have powerful effects—specifically, the effect of legitimising X’s power over the community.

In most of the specifications of the concept *political representation*, symbolization plays, probably, a merely auxiliary role. Experiencing X as a symbol of the community (or of its unity)—that is, symbolisation, with its underlying transfer of cognitive models—may be of some help in organising our understanding of a set of interlocking norms concerning the introduction and use of notational devices, or placeholders (“MP,” “the President,” “the King,” and so on: the usual Ross-style analysis, as we said a few lines above). It may contribute to the motivation for complying with these norms. It may provide us with a stock of possibilities and constraints, pertaining to the entity in the source domain, to be resorted to in supplementing the explicit norms concerning the entity in the target domain. In such cases, symbolization is, in principle, *dispensable*. It facilitates mastery of the relevant norms. But these norms, and compliance with them, are what really matters.

At times, however, (*political representation*) is understood in such a way that symbolization turns out to be constitutive of the very concept. Experiencing X as a symbol of the community (or of its unity)—with its underlying transfer of cognitive models—is now the very point and purpose of having and using the concept of (political) representation, and its attendant norms. It may be the case, that is, that regulating the activity of symbolising the community—establishing when and how this operation, taking X as making the community present, is correct and correctly performed—is precisely what matters most, due to the powerful effects that symbolisation of the community may have on the attitudes and behaviour of those engaged in it.

<sup>20</sup> Symbolization in political representation—that is, a transfer of cognitive models from the represented to the representative—roughly corresponds to what Hanna Pitkin calls “symbolic representation” (Pitkin 1967, chap. 5).

<sup>21</sup> “Joint attention” is here understood as defined in Tomasello 1999, chap. 3.



In other words. That human minds have a capacity to engage in symbolisation, and, specifically, the capacity to experience X as a symbol of the community, with its underlying transfer of cognitive models, is plain fact—a natural phenomenon. Engagement in this activity may deeply and powerfully affect the attitudes and behaviour of human beings. The concept of (political) representation, and its attendant norms, may work as a device for regulating this engagement, and its effects. When and how people symbolise—take X as a symbol of the community—and how they should behave as a consequence is, in this case, what really matters (Brigaglia 2011, 262).

In such cases, X's power is perceived as justified *because* X represents, is a symbol of, stands for, the community (something like that happens, for instance, when it is said that MPs are not liable to imperative mandate *because* they represent the nation as a whole). Such powerful legitimisation effects may become the object of a set of symbolization norms (Section 4 above), specifying the conditions under which it is correct, or even required, to take X as a symbol of the community. That is, norms regulating the very operation of symbolizing the community. These norms, if made explicit, may coincide with some of the norms which, according to a Ross-style analysis, belong to the disjunctive set in which the phrase designating the representative ("MP," "the President," and so on) is the consequent.

The alternative between an understanding of political representation as a matter of symbolization, on the one hand, and a reductionist, eliminativist, understanding of representation as purely a matter of norms, on the other hand, is not a merely theoretical possibility. It is in this light, we believe, that the difference between, e.g., Hans Kelsen's treatment of political representation in his account of democracy, on the one hand, and, on the other hand, Gehrard Leibholz's understanding of political representation (*Repräsentation*), becomes intelligible.

According to Kelsen, in contemporary democracies the idea that Parliament represents the body of constituents is a "fiction," because, given that imperative mandate is ruled out, MPs are not legally bound by the directives of their constituents (Kelsen 1929, chap. 3).

Specifically, in Kelsen's account, (political) "representation" is, at bottom, imperative mandate. Imperative mandate is a particular form of delegation of normative power. Delegation of power is, basically, a matter of norms—norms specifying who, and under what conditions, is a delegate of a given kind, and what the normative powers of delegates of that kind are. Imperative mandate is that kind of delegation of normative power in which the delegate—in this case a "representative" in the proper sense—is legally bound by the directives of the delegating party. In contemporary democracies, there is, in fact, delegation of power from constituents to so-called "representatives." But, given that imperative mandate is generally ruled out, so-called "representatives" are not representatives in the proper sense: (Political) representation turns out to be a fiction.

In this picture, (political) representation as a symbolic relation has no place. Probably because, for Kelsen, it is, more than a fiction, sheer nonsense—perhaps *useful* nonsense, but an illusion all the same: The "represented" falsely believe that through Parliament they are expressing their will, and this false belief supports the idea that the power of so-called "representatives" is legitimate. In the light of our analysis so far, the latter may perhaps be understood as a hint to the auxiliary role

that symbolization (rejected by Kelsen as something irrational, a false belief) may play in the workings of representation relations.

Gerhard Leibholz (1973), on the other hand, opposes weaker senses of representation, including a Kelsen-style concept of (political) representation, to representation in its full sense, which he dubs *Repräsentation*. *Repräsentation* is, precisely, making present something absent, and, crucially, something that has an ideal existence and can only be made present through a symbol—in the case of (political) representation, specifically, the ideal unity of the community, the nation. This is, it seems to us, a clear case in which symbolization is constitutive of the relevant concept of (*political*) *representation*.

## 8. Conclusions

We claimed (in Section 3 above) that the linguistic move from the X term to the Y term in Searlean constitutive rules is, “as it were, the tip of an iceberg.” This may now be cashed out as follows.

On the one hand, the institutional term, Y, is liable to a Ross-style analysis as a placeholder linking together sets of norms; embedded in the Y term, however, is often a further move, a symbolization in our sense. Specifically, Y functions as a symbolic operator: It captures cognitive models pertaining to a third term, Z, and transfer them to the X term.

Let us now consider, once again, the institutional terms involved in the two domains discussed in earlier sections: chess and political representation. “This piece of wood (X) counts as a king in chess (Y).” The phrase “king in chess” captures cognitive models pertaining to real kings (Z), and transfers them to the entity to which it applies: this piece of wood (X). As a result, this piece of wood stands for, becomes a symbol of, a real king. “Giovanni Rossi (X) counts as the President of the Republic of Italy (Y).” The phrase “President of the Republic of Italy” captures cognitive models pertaining to the represented community as a whole, the nation (Z), and transfers them to the person to which it applies, Giovanni Rossi (X). As a result, Giovanni Rossi stands for, becomes a symbol of, the community as whole.

The history of a given institutional concept determines whether or not it functions as a symbolic operator, and how significant the role of symbolization is.

For some concepts, or for some participants in the institutional practice, symbolization may be merely auxiliary—that is, contingent and dispensable. This happens, for instance, in the case of chess nowadays, or in some understandings of political representation in Western cultures. In such cases, symbolization may be helpful for the intelligibility of the game (providing, for instance, a way of making salient the role of the *king in chess* in determining the outcome of a game), or for supporting appropriate motivation (motivation for protecting the *king in chess*), but it is neither necessary nor required for the correct use of the institutional concept or for the correct unfolding of the institutional practice (chess may be played correctly even if no symbolization takes place—in fact, it is also played by machines that do not have any cognitive models pertaining to real kings).

For other concepts, or for other participants in the institutional practice, symbolization may be constitutive, nondispensable: Transferring cognitive models from Z to X—making X a symbol of Z—is part and parcel of the institutional concept Y, and the very point of the institutional practice it creates. An example of constitutive

symbolization in Western cultures is provided by some understandings of political representation such as Leibholz's. Here symbolizing the nation is the very point of the concept of political representation.

When symbolization is constitutive, it becomes normatively relevant. It is not simply a matter of fact, something that may or may not occur, but it is normatively regulated. Embedded in the Y term and in the set of norms specifying the conditions under which X counts as Y, is a set of symbolization norms, specifying the conditions under which it is correct, or even required, to take X as a symbol of Z: "Whoever satisfies conditions C1, C2, or C3 should be regarded as a President of the Republic of Italy, that is, as a symbol of the Italian nation."

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