

CONSTITUTIVISM AND SOCIAL REALITY

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1 Introduction

According to Michael Smith (2015)

‘Constitutivism is the view that we can derive a substantive account of normative reasons for action [...] from abstract premises about the nature of action and agency’.

Millgram (2020) gives a similar description:

‘A wave of recent philosophical work on practical rationality is organized by the following implicit argument: Practical reasoning is figuring out what to do; to do is to act; so the forms of practical inference can be derived from the structure or features of action’.

This chapter aims to do four things. First, in section 2, it will be explained why there seems to be a problem that constitutivism purports to solve. Second, in section 3, it will be explained how this problem can be, and actually was, rendered as a logical problem about the possibility to derive Ought from Is. This second explanation at the same time indicates the direction of where the solution to the problem can be found. This solution was, not very explicitly, adopted by constitutivism. Third, by means of an account of social reality and the crucial role in it of rules, the question is addressed in section 4 to what extent this possible solution is desirable. The relevance of this all for law is briefly discussed in section 5, at the end of the chapter.¹

2 Constitutivism and its background

2.1 Some conceptual background

Human beings form a mental representation of the world they live in. A large part of this representation is unconscious (Bargh 2017), but a small part of it is conscious. Let us call this conscious part the image a person has of the world. Typically, the image a person has of the world can be expressed by means of language. Humans often communicate with other human beings, first and foremost with persons who live in their own social group, but increasingly also on a global level. The image that persons form of the world is, as a result, very much the result of social interaction (Richerson and Boyd 2006). Moreover, this image evolves in the course of time, influenced by the results of science, which is itself a relatively recent kind of social interaction.

Because the image of the world that humans have is to a large extent the result of social interaction, the individual images of individual human beings have a substantial overlap. Moreover, they ‘see’

¹ This chapter could not have been written without the support and the sometimes critical comments of Stefano Berteà. Most likely, he still does not agree with all of its content, but that is less important. Thank you, Stefano!

elements of the world as good or bad, beautiful, or ugly, just, or unjust. They do so, even if they disagree about what is good or bad, ... etc. Humans also use deontic words such as 'ought', 'duty', 'obligation', and 'being obligated', to denote normative positions, even though different persons or groups of persons may disagree about what precisely ought to be done, or ought to be the case.

An interesting aspect of this shared conceptual framework is that the applicability of many concepts is seen as dependent on the applicability of other concepts. Philosophers have a technical term for this phenomenon. They say that some characteristics *supervene* on other characteristics (McLaughlin and Bennett 2021), that these latter characteristics 'ground' the former (Bliss and Trogdon 2021), or that the conditions for applicability of some concepts include the applicability of other concepts (Carnap 1947). Notice, in this connection, the close interrelation between the existence of characteristics and the applicability of concepts. This interrelation is no coincidence, but a consequence of the fact that we are talking about two sides of the same coin: the ontological side, which deals with the presence of characteristics, and the conceptual side, which deals with the applicability of concepts. We might even identify a third 'side', namely the inferential one. From the presence of some characteristics, we can 'derive' the presence of another characteristics. For example, from the facts that something is a vehicle with four wheels that is propelled by a motor, we can derive that it is a car. From the applicability of the concepts 'vehicle', 'four-wheeled', and 'motor-propelled' we can derive the applicability of the concept of 'car'. In general, ontology, concepts and derivation are closely connected to one another.

Especially in connection to value judgments (judgments about what is good or bad, beautiful or ugly), to do) and deontic judgments (judgments about what an agent ought, or ought not, to do), the phenomenon of grounding is important. If something is good or bad, there must be reasons why this is so (Hare 1952, section 5.2). Something similar holds for deontic judgments and facts: if somebody ought to do something, there must be a reason for it. This reason is a reason for action.

2.2 Some historical background

Humans form an image of the world around them and in first instance they must have assumed that the world corresponds to this image. In modern terminology, we would say that the world was originally assumed to exist objectively and that the image people formed of this world was assumed to be objective as well. The objectivity of the world, ontological objectivity, means in modern philosophical terminology that the objective world is mind-independent. The objective world exists independent of the existence of minds and if there are mental images of it, the world does not depend for its existence on these images. The objectivity of the image that humans have of the world is epistemic objectivity. It is objectivity of knowledge about the world rather than objectivity of the world itself. An image of the world is objective to the extent that it reflects the world as it 'really' or objectively is (Hage 2022a).

Most likely, humans initially assumed that the world exists objectively and that they had an objective image of the world. But this dream cannot have lasted very long. Images of the world that change with the circumstances, or that are different for different persons, cast doubts on respectively ontological and epistemic objectivity. For example, if a stick that seems bent if it stands in a pool of water seems right when it is taken out of the water, the idea that the world objectively exists as it is experienced must be abandoned. Moreover, if well-meaning and well-informed persons seriously disagree about

whether some action is right or wrong, the idea that all knowledge reflects the world as it really is, must be abandoned. Apparently, not all knowledge can be objective.

As soon as it is recognised that appearances do not necessarily reflect reality, two questions arise. The first question is what the world is, if it does not have to be what it appears to be. And the second question is what, if any, the role of the world is in producing appearances. In Europe, starting from the Middle Ages, an important development took place: the replacement of a phenomenological account of the world by a realist account.

2.3 The phenomenal and the realist account of the world

The phenomenological account of the world takes its starting point in human experience. In our experience, the world contains coloured and heavy objects, good and bad deeds, beautiful and ugly sculptures, ought-facts, and other modal facts.²

Being coloured or heavy are examples of so-called ‘secondary qualities’ (Bolton 2022). These qualities are assumed not to exist in the objective world, but to be the result of how we perceive the world. A red object is an object that, under ideal circumstances, reflects electromagnetic waves that have a wavelength in between 620 and 750 nanometres. In our brains these waves produce the experience of seeing red. A heavy object is an object that has gravitational mass. If we have to carry it, we experience this mass, under the influence of gravity, as the weight of the object.

Being good or bad, beautiful or ugly, are examples of evaluative characteristics. These characteristics are often experienced as resting in the actions or objects that good, bad, beautiful, or ugly, not in our minds: it is the vase that is beautiful, or this action that was bad. Nevertheless, presently we tend to believe that these evaluative qualities do not rest in the things themselves but are mental additions to the objective characteristics in which they are grounded.

Modal facts are facts that are variants on ‘ordinary’ facts. They come in different types. Necessity and (im)possibility (‘9 is necessarily bigger than 7’) are sometimes called ‘anankastic modalities’, or ‘alethic modalities’ (Von Wright 1963, p. 10; Hilpinen 1971, p. xi). Ought (not) and permission (Petra is permitted to drive her bicycle’) are ‘deontic modalities’ (Hilpinen 1971, p. xi), while certainty and, again, but now in a slightly different sense, possibility (Possibly, the train will arrive late’) are ‘epistemic modalities’ (White 1975, pp. 59-101). Also modal facts are often experienced as being elements of the world, but it is difficult to find a basis for them that does not include a mind.

In the 17th century a process began to gain speed in which the phenomenal world – that is: the world as it is experienced – stopped to be seen as objective. The developing physical sciences looked for the world as it ‘really’ exists, independent of how it is perceived. In other words: the physical sciences strove for a realist, rather than a phenomenological account of the world. In this process leading from a phenomenological to a realist account, layers of meaning were peeled of the phenomenological world, in search of facts and things that exist independent of human minds. The layers of meaning became to be seen as human (mental) additions to the ‘real’ (objective, mind-independent) world.

In the work of David Hume we can see how this process worked out. Normativity is not a part of the real world anymore, but is added by human minds, in particular by the passions. A direct consequence

² There is a close connection here with the phenomenological work on the notion of a life world (*Lebenswelt*). See for instance Barber 2022 (on Alfred Schutz) and Beyer 2022 (on Edmund Husserl).

of this view is that information about the real, objective world by itself cannot suffice to draw normative conclusions. To arrive at these conclusions, it is always necessary to add a normative premise to the information about the objective world. The added premise would contain the mental addition to the 'real' world. This necessity has become known as the 'gap between Is and Ought', or as 'Hume's guillotine'. The existence of this gap has, in the course of centuries, almost become a holy grail of the humanities (Moore 1903; Kelsen 1934; Brecht 1959).

If normativity is a human addition to the objective world, it is not objective and it is tempting to conclude that therefore it must be subjective (Del Mar 2016). You may believe that abortion is in general wrong, but if I believe that if a mother wants abortion, this abortion is in principle right, my belief is just as good as yours. Moreover, this goodness depends on our personal preferences and desires, and not on the facts in objective reality, as there are no evaluative facts in objective reality.³ A similar argument can be given for deontic facts, such as the fact that I ought to refrain from theft, or that my lessee has the duty to pay the monthly house rent. To reasons for action the same story applies: they cannot be found in the objective world and therefore, it seems, they must be subjective.

2.4 Smith's constitutivism

The idea that normativity is a subjective matter is not to everybody's taste. Moreover, our social practice, in which we debate on normative issues as if there were a true answer that holds for all opponents in the debate, does not treat normative issues as a subjective matter. This explains why the search for a more solid foundation for normativity has continued, even in a society in which the scientific, realist, image of the world takes a central place. It should therefore not come as a surprise that theories were developed which assign normativity a place which is not merely subjective. The most influential group of these theories rests on the idea that what an agent should, or ought to do, is a matter of reason, rather than of preference or desire. Kantian ethics is a main representative of this rationalist tradition.⁴ It focuses on what an agent would do if she were purely rational. Since reason is assumed to be the same for everybody, Kantian ethics abstracts from personal desires or preferences.

In a similar vein, Smith (2015) tries to find an account of what it is for an agent to have reasons for actions in certain circumstances. He suggests that this is a matter of what is desirable relative to the agent in these circumstances. In other words, what an agent has reason to do depends on the circumstances of the case and on the desires of the agent. For example, if the agent is thirsty (circumstances) and does not want to be thirsty (desire), the agent has a reason to drink. However, it is not the actual desires of the agent that count, but the desires of the agent's ideal counterpart (cf. Lewis 1989). To expand the example a bit. Suppose that the agent suffers from a disease and that the treatment requires the agent not to drink for half an hour. Then the thirsty agent does not have a

³ Many readers will have noted that I made the step from normative to evaluative judgments. The distinction between normative (deontic) and evaluative is important, even though it is often ignored (Hage 2016b). However, for the debate on the implications of the step from a phenomenological to a realist account of the world, normative (deontic) and evaluative judgments are on a par.

⁴ The rationalist natural law tradition, with its main source in the work of Aquinas, is the main alternative for Kantianism.

reason to drink, even if he actually desires to do so. The ideal counterpart of the agent would not desire to drink and that is decisive.

Smith elaborates. According to him, an agent is the sort of 'thing' whose function it is to realize its desires. She can fulfil this function well, if she fulfils her desires. She fulfils her function badly, if she does not succeed in fulfilling her desires. Therefore, an agent as such has reason to fulfil its idealized desires as well as possible.

For any agent, to realize its desires optimally, it must, still according to Smith, have and exercise two capacities. First, it must have and exercise the capacity to have knowledge of that part of the world that is relevant for how the agent can fulfil her desires. And second, the agent must have and exercise the capacity to be at least locally instrumentally rational. In other words, the agent must be able to determine what she needs to do to fulfil her idealized desires and she must use this ability.

This is not all. Smith continues that further capacities that make an agent's ideal naturally spring to mind. And then he continues by listing further capacities and arguing for them. For my argument, the details do not matter. The point that I want to make is that Smith assumes that agents are functional kinds – they are there to fulfil certain functions – and that arguments about how the functions of agents are best fulfilled lead to conclusions about what reasons for action an agent has, whatever the original desires the agent may have had. We see here a move that strongly resembles the move that Kant aimed to make: abstract from all the particular details of a real human being and try to find reasons for action that an agent would have to the extent that she is a purely rational being. The details may differ between Kant and Smith, but the general project is the same: find reasons for action that hold for rational beings as such.

The attraction of this project is clear. If reasons for action cannot be found in the world itself, and if the subjectivity is to be avoided that threatens if reasons for action are made dependent on the preferences and desires of actual persons, it seems necessary to look for universality of reasons outside the world of actual beliefs and desires. It is tempting to believe that universal reason is the place to look for objective reasons for action. But is there such a thing as universal reason?⁵

2.5 Wrapping up

In section 2 a bird's eye view was given of two radically different views of the world, the phenomenological view, and the realist view. Characteristic for the phenomenological view is the existence of a network of concepts and a corresponding set of characteristics that has its roots in

⁵ For the main line of my argument it is not important, but it may nevertheless be relevant for a proper understanding of constitutivism to point out that the observation that agency is a functional kind is not about an objective (real) kind of fact. If Smith's project is to arrive at normative conclusions on the basis of objective facts and constitution, the case of agency as a functional kind is not the best possible support. A similar objection would hold against arguments based on the assumption that law is a functional kind (Fuller 1963; Moore 1992). It is not essential for constitutivism, however, that it starts from the fact that something is a functional kind. Therefore, the objection is not an objection against constitutivism as such, but only against the variants that start from functional kinds.

human minds. In this network, the concepts and their corresponding characteristics are closely connected, giving rise to supervenience where the presence of one characteristic presupposes the presence of other characteristics. This leads to the possibility to derive the existence of one characteristic from the existence of other characteristics. One example of this possibility, which became problematic, is the derivation of value judgments from non-evaluative judgements. For instance the derivation of the conclusion that a heart is good because it succeeds in pumping blood through the body. A second example is the derivation of ought judgments from premises that do not contain an ought. For example, from the fact that this is a heart it can be derived that this ought to pump blood through the body.

Such derivations become problematic if the phenomenological view of the world is replaced by the realist view. In the latter view, everything that is mind-dependent is banned from the 'real' world. This does not mean that value and normativity do not exist, but that their existence is a human addition, 'projection' some would say, on the real world. Value and normativity do not exist objectively.

For many, this is not a palatable conclusion and attempts were made to show that normativity is more objective than the realist view of the world suggests. A main philosophical tradition has tried to find a foundation for normativity in reason, which is then assumed to have a universal standing. An example would be that there are things than an agent has reason to do, whatever her personal and subjective desires. But is there such a thing as universal reason?

Some would say that deductive logic is the paramount example of what universal reason might be. However, in section 3 I will show that deductive logic, especially in the formal shape it received in the beginning of the 20th century, is not suitable to account for good arguments that reflect constitution. In section 4, I will then investigate to what extent reason can be restored in its role of measure for the quality practical reasoning by delving into the theory of social reality.

3 The boundaries of deductive logic

The purpose of this section on deductive logic is twofold. First, it will show why deductive logic in the formal shape it received in the first half of the 20th century, is unsuitable for modelling arguments that reflect constitution (sections 3.1 and 3.2). This first aim will be pursued at the hand of propositional logic, a relatively simple kind of logic, which makes it especially suitable for dealing with philosophical issues.⁶

And second, it argues that the boundary between logic and factual information about a domain – e.g. the domain of practical reasoning – is fluid and that therefore it is not clear what counts as logic (section 3.3). It also argues that this is relevant for the plausibility of constitutivism (section 3.4).

3.1 Logical possibility

Deductive logic deals with inferences that are deductively valid. An argument is deductively valid, if and only if it is logically impossible that the premises of the argument are true, while the argument's conclusion is false. The crucial elements of this definition are the truth (or falsity) of the premises and

⁶ Logicians are requested to overlook the complications in the examples that result from not using quantifiers.

of the conclusion of the argument, and logical necessity. From here on, when I write about validity, I mean deductive validity unless the contrary is explicitly mentioned.

Both premises and conclusion of an argument are propositions. Propositions are either true or false, depending on the facts. Since truth and falsity are determined by the facts in the world, this logical impossibility reflects an impossibility of what is the case in the world.

Logical theory developed so-called ‘model-theoretic semantics’ to answer the question of what logical (im)possibility precisely is.⁷ Logic deals with propositions, such as the proposition that it is raining or the proposition that the sun is shining. These two are examples of elementary propositions, which do not contain a logical operator. There are also compound propositions, which contain one or more logical operators. Examples are that it is not raining, or that either it is raining or the sun shines. It is a bit clumsy to mention the full propositions when discussing logical relations between them. Therefore I will follow the traditional convention to use capitalised letters to abbreviate elementary propositions:

A	=	It is raining
B	=	The sun shines

I will use the traditional symbols for the logical operators by means of which elementary propositions can be included in compound propositions:

$\sim A$	=	It is not raining
$A \vee B$	=	It is raining, or the sun shines
$B \ \& \ A$	=	Both the sun shines and it is raining

Every elementary proposition is either true or false, not both. Moreover – and this is very important – the truth values of the elementary propositions are logically independent of each other. So, the combinations

- A is true and B is true
- A is true and B is false
- A is false and B is true
- A is false and B is false

are logically speaking equally possible. In the real world, the combination that it is raining while the sun shines may be less plausible, but logically speaking there is nothing wrong with it. Running ahead of the main line of this section’s argument, we can already see here that the close connection between states of affairs on which constitutivism is based has no counterpart in propositional logic which treats elementary propositions as independent from each other.

⁷ The account of model-theoretical semantics that is presented in this chapter is quite philosophical. A more technical account can be found in, amongst many others, Smith 2012.

Whereas the truth values of elementary proposition are independent of each other, the truth values of compound propositions are defined in terms of the truth values of their components and their logical operators.✓

$\sim A$ is true	if and only if	A is <i>not</i> true (false)
$A \vee B$ is true	if and only if	either A or B is true <i>or</i> if both are true
$A \& B$ is true	if and only if	A is true <i>and</i> B is true

Suppose that we have a set, possibly a very large set, of elementary propositions. Each of these propositions is either true or false. All the states of affairs that match these elementary propositions are compatible with each other, as the truth values of the propositions are independent from each other. The world as the collection of all these states of affairs is logically possible because the truth values of the elementary propositions are independent of each other, allowing every combination.

A very simple world would consist of a single elementary fact: [the sun shines]. This world does not contain the elementary fact that it is raining, and therefore it should also contain the compound fact that it is not raining [$\sim$ It_is_raining]. In principle it holds that the compound facts in a world depend on the elementary facts in that world. So if a world contains the elementary facts that the sun shines [B] and that it rains [A], it should also contain the compound facts [B&A] and [$A \vee B$]. Moreover, it does not contain the compound facts [$\sim A$], [$\sim B$], or [$A \vee \sim B$].

If the compound states of affairs in a world do not match the world's elementary states of affairs, this world is logically impossible. If the compound states of affairs match the elementary ones, the world is logically possible. A logically possible world contains all those compound states of affairs that it logically ought to contain given the elementary states of affairs and does not contain any compound state of affairs that logically speaking it ought not to contain. The elementary facts in a logically possible world determine all the facts in that world, so also the logically compound ones.

3.2 Logical validity

With the notion of a logically possible world in place, it becomes easy to define logical validity. An argument is valid, if and only if there is no logically possible world in which all of the arguments premises are true and in which the conclusion of the argument is false. By constructing the set of logically possible worlds that matches the elementary propositions in an argument, it is possible to determine whether the argument is valid. In this connection the logical operators, by means of which elementary propositions can be combined into compound propositions, play a crucial role.⁸ They determine how the truth values of the elementary propositions translate into the truth values of the compound propositions.

As most real-life arguments use compound propositions, the question of which logical operators exist and how they are defined determines to a large extent which real-life arguments count as logically valid. I will use a very simple example to show what I mean.

Jane or Peter took the pencil away.

Jane took the pencil away.

⁸ This is the method of truth-tables, well-known to logicians.

Therefore, Peter did not take the pencil away.

This argument seems valid, but if formalised in propositional logic the matter turns out not to be so easy. Take the following formalisation (A stands for 'Jane took the pencil', B for 'Peter took the pencil')

$A \vee B$

A

Therefore, $\sim B$

In the possible world in which both Jane and Peter took the pencil away, both premises are true, and the conclusion is false. So, the argument as formalised is invalid. However, in its original natural language-formulation the argument seemed valid. What went wrong?

The usual answer is that the word 'or' is ambiguous. It stands either for a so-called 'exclusive or' which means that precisely one of the two possibilities is realized (either Jane or Peter, but not both, took the pencil away). Or it stands for the 'inclusive or', which means that at least one of the two possibilities is realized, but perhaps even both. The argument in natural language presupposed the exclusive or, while the logical operator used to formalize 'or' stands for an inclusive or. Therefore, the argument was incorrectly formalised and that explains why it is invalid in its incorrect formalisation. The correct formalisation of the argument would have been:

$A \vee B$

$\sim(A \& B)$

A

Therefore, $\sim B$

The premises of this new argument are only all true in the world in which Jane, but not Peter, took the pencil away and in that world, the conclusion is also true. In other words, in its new formalisation the argument comes out valid.

3.3 The fluid boundary between logic and domain knowledge

The manner in which the seemingly invalid argument about the pencil was shown to be valid after all, namely by adding a premise to the argument that is assumed to be true, represents a technique that can be used to turn any invalid argument into a valid one.⁹

Any invalid argument can be made valid by adding one or more premises to it. Adding the conclusion of the argument to the premises, for instance, will always do the job. If any invalid argument can be made valid by amending its premises, the question arises what the use of logic is. If the set of premises is considered as fixed, logic can distinguish between valid and invalid arguments. However, as soon as it becomes possible to meddle with the premises because the addition of one or more premises does

⁹ Strictly speaking, the addition of a premise does not turn the argument from invalid to valid. By adding a premise, the old invalid argument is replaced by a new valid argument. However, psychologically, the mere addition of a premise, especially if this premise is obviously true, will feel as modifying the original argument a bit.

better justice to the argument as it was formulated in natural language, the role of logic becomes less clear. Does it distinguish between valid and invalid arguments, or is it a tool to determine which unmentioned premise(s) are presupposed in an argument as formulated in natural language? Moreover, the vagueness of the role of logic translates into a corresponding vagueness of logic's nature. What counts as logic?

The premises of an argument contain a certain amount of information about the world. Logic is the means by which it can be established whether this information also contains the information of the conclusion (Hage 1994). If it does, the argument is logically valid; if not, the argument is invalid. The premises and the logic together determine what conclusions follow.

If a conclusion does not follow, and the argument is invalid, there are in principle two ways to make the argument valid after all. We have already seen one way: it is possible to add one or more premises, thereby increasing the amount of information in the premises. The other way is to make the logic more powerful. In doing so, it becomes possible to derive more conclusions from the information provided by the premises. This may seem strange to some readers who believe that there is just one logic. However, the history of logic in the 20th century has provided abundant examples of different systems of logic, the one more powerful than the other (Haack 1978; Priest 2008). Let us consider an example of an argument that is invalid under propositional logic, but which is valid under a suitable form of deontic logic.

Laura is not permitted to park her car here.

Therefore, Laura is obligated not to park her car here.

Formalised in the language of propositional logic, this argument becomes:

A

Therefore B

This argument is obviously invalid, as the truth values of A and B are independent. The argument can be made valid, even under propositional logic, by adding the premise $\sim A \vee B$. However, it can also be made valid by formalizing it in deontic logic¹⁰:

$\sim$ Permitted (Laura, park_car_here)	Laura is not permitted to park her car here
Obligated(Laura, $\neg$ park_car_here) ¹¹	Laura is obligated no to park her car here

To make this argument logically valid, the deontic logic in question must have the following constraint on possible worlds:

$\sim$ Permitted (a, b) if and only if Obligated(a, $\neg$ b)

¹⁰ For this example it is unavoidable to move from propositional to predicate logic. I hope this move is understandable without additional explanation.

¹¹ The symbol $\neg$ is used to turn a type of action into the refraining from that type of action. So, $\neg$ park_car_here stands for not parking the car here.

which reads in ordinary language: an agent *a* is not permitted to perform an action *b*, if and only if *a* is obligated to refrain from *b*. Given the meanings of the words ‘permitted’ and ‘obligated’, this is quite ‘logical’.

The details of this example do not matter, but its main message does:

There can be more than one logic and it depends not only on the premises of an argument whether the conclusion follows, but also on the logic.

This insight has inspired the adoption of predicate logic, several systems of modal logic including deontic logics, temporal logics, many-valued logics, nonmonotonic logics, and so on ...

However attractive this solution of adopting a stronger logic may seem, it immediately raises the question of what systems can still count as logics. By allowing more than one logic, the question of what a logic is, or – better – what can count as a logic, becomes urgent.¹² Take the following example:

Peter is a thief. (A)

Therefore, Peter ought to be punished (B)

This argument is invalid under propositional logic. It can be made valid by adding the premise $\sim A \vee B$ (either Peter is not a thief, or Peter ought to be punished). It can also be made valid by adding a constraint on possible worlds to propositional logic, thereby creating a more powerful logic:

B if A

The former solution has the disadvantage that the truth or falsity of the premise that needs to be added can only be established by assuming the truth of the argument’s conclusion. Only if we already know that Peter ought to be punished, can we know that Peter, who is a thief either is not a thief or ought to be punished. This necessity to know beforehand that the conclusion of the argument is true does not sit well with our intuition that the argument establishes that Peter ought to be punished. In other words: that Peter is a thief constitutes that Peter ought to be punished. This constitution cannot be modelled by an argument of which one of its premises presumes the constituted fact.

The alternative is to add the constraint on logically possible worlds that if a world contains the fact that Peter is a thief, it must also contain the elementary fact that Peter ought to be punished. However, if this constraint is added, an important starting point of traditional propositional logic is abandoned. This is the assumption that the truth values of elementary propositions are independent of each other. In the examples discussed above about rain and sunshine, it seemed well possible to assume that whether it rains and whether the sun shines are independent of each other. Logically independent, that is, because meteorologically speaking there is a connection between rain and the

¹² For example, the question has been raised, and answered in the negative, whether nonmonotonic logics are still logics or theories about how to adapt the premises of an argument (belief revision). See Israel 1980. Running ahead of the section on social reality, one might argue that whether something counts as logic is a matter of constructivist fact.

absence of sunshine. In a similar way, there is a legal connection between being a thief and owing to be punished.

Should this legal connection be raised to the level of a logical connection? A clear test which connections count as logical and which ones as meteorological, or legal, or whatever, is not available. By deciding that a connection, for instance between being permitted and being obligated, counts as logical rather than legal or moral, a choice is made to treat something as a matter of logic.

3.4 Back to constitutivism

Constitutivism tries to provide a solution for the problem that results when the phenomenological view of the world is replaced by the realist view and layers of meaning are stripped from our image of what the world includes. If the objective world is devoid of meaning, normative conclusions cannot be based on knowledge of the world alone. The step from hard knowledge about the world as it is independent of human colouring to knowledge of what an agent has reason to do requires the addition of a normative premise. For instance the premise that an agent who is thirsty has reason to drink. This addition of a normative premise is comparable to making an argument valid by including more information in the premises. Moreover, on the realist view of the world, this information is not information about the world, but a mental addition to the 'hard' facts. If this addition is considered to be subjective, all normativity threatens to become subjective.

However, we have seen that there is an alternative for adding a premise, namely making the logic more powerful. Adopting constitutivism, in any form, is like strengthening the logic. The relation between on one hand what it is to be an agent or to be an action, and on the other hand to what an agent has reason to do is in constitutivism lifted from a contingent and subjective additional premise to a logic-like relation between agency and reasons for action. If this move is made, the logical gap between the hard facts of the objective world and deontic (or other modal) facts has disappeared and normativity is not purely subjective anymore.

Should this move be made? Should constitutivism be adopted and the information about the relation between agency and reasons for action be lifted to a kind of necessity which is very much like, if not a special case of, logical necessity? When should this be done? What relations between kinds of facts are sufficiently 'necessary' to include them in logic, instead of treating them as contingent information? To answer these questions, we must change course, leave the philosophy of logic behind, and turn to the mode of existence of social reality.

4 Social reality and constitutivism

Are there any reasons for action that can be derived logically, or which follow in a different way necessarily, from the nature of agency or the nature of action? Constitutivism assumes there are, but how is that possible if the real world only contains objective, in the sense of mind-independent, facts and if reasons for action are not objective in that manner? Perhaps the answer can be found if we do not assume that subjectivity is the only alternative for objectivity.¹³

¹³ Much of this section on social reality is based on a theory that was developed in a series of papers, three of which have already been published: Hage 2022b, 2022c and 2023.

4.1 Objective, subjective, and social

People distinguish between what is objective or subjective, but they also recognize a third category: what is social, or intersubjective. The distinction between objective, subjective and social can be applied to states of affairs. In that case it is based on two characteristics which may be present or not. The two characteristics are whether the state of affairs is:

1. mind-dependent; and
2. the same for everybody.

Objective states of affairs are (1) not mind-dependent and (2) the same for everybody. An example would be the fact that Mount Everest is a higher mountain than the Vaalserberg (the highest 'mountain' of the Netherlands).

Subjective states of affairs (1) depend on what individual persons think they are and are mind-dependent, and (2) are therefore not the same for everybody.¹⁴ An example would be the 'fact' that Mozart was a better composer than Brahms.

Social states of affairs are somehow in between objective and subjective states of affairs: (1) they depend on what the members of a social group recognise and are in that sense mind-dependent, and (2a) they are the same for the members of a group, but (2b) not necessarily the same between groups. A possible example is the law of a country. The law depends on what the legal subjects of a country recognise as law and is the same for these legal subjects. However, different countries may have different laws, and what is the law for a Frenchman may not be the law for somebody in China.

Social facts come in two main kinds. There are facts which I will call 'conventional'. They depend on their broad recognition in a social group. There are also 'constructivist' facts. They depend on the rationality of their recognition, but indirectly they also depend on what is recognised in a social group.

4.2 Conventional facts

The 'social world' is the collection of all social facts for a group. A proper understanding of the social world starts with conventional facts. Conventional facts exist in a social group if most members of that group recognise that they exist. This collective recognition is the final word about what conventional facts are. For instance, Henrique is the leader of the Maastricht Cycling Club (MCC) if sufficiently many members of that club recognise Henrique as their leader. Another example is that the verb 'rain' stands for a particular meteorological phenomenon. That 'rain' has this meaning is because the speakers of the English language on a large scale recognise it as having this meaning. They might have used a different word, such as 'Regen', but as it is, they use the word 'rain' and therefore 'rain' has this meaning. So, it does not make sense to argue that the convention is wrong. If a state of affairs is recognised as being conventional (see section 4.5), the mere existence of a relevant convention suffices for the state of affairs being a fact, disregarding the value of the convention. The eventual willingness to take the value of the convention into account suggests that the kind of state of affairs is considered to be constructivist, rather than conventional.

¹⁴ That is why their status as facts is often contested; many people would not even call subjective facts 'facts' at all.

In this connection, the notion of recognition is crucial. The notion is used here in a technical sense: a person recognises a fact if he:

- a. believes that the fact exists, and
- b. tends to act in accordance with this belief.

Two other conditions for the existence of a conventional fact, which will only be mentioned here¹⁵, are that:

- the club members should not only recognise Henrique as their leader; they should also believe that sufficiently many other members also recognise Henrique as leader of the group, and that these other members have the same beliefs about their fellow cyclists.
- states of affairs of that kind are considered to be conventional. (This condition will be elaborated in section 4.5.)

Conventional facts are the same for all members of a social group, even for those members who do not recognise them. If Petra does not recognise Henrique as the leader of MCC, she makes a mistake, and other members of MCC may criticise or even sanction her for this mistake. In this respect, conventional facts are very much like objective facts. The only difference is that conventional facts depend on the views of the members of a social group. In this latter respect, conventional facts are like subjective facts. To state it briefly: from within a group, conventional facts are like objective facts, and from the outside, conventional facts are like subjective facts.

4.3 Conventions and other rules

Social reality does not only contain facts, but also rules.¹⁶ The most basic form of existence for rules is existence as a convention. It is worthwhile to emphasize the difference between a convention and a conventional fact. A convention is a connection between facts. The formulation of a convention, such as 'Coins count as money', is not a statement. For that reason, it is not true or false. A conventional fact, in contrast, can be expressed by means of a true description, such as 'This (coin) is money'.

A convention exists in a group if sufficiently many members of the group are disposed to recognise the consequence of the convention if they believe the facts of its conditions and if they tend to justify their recognition by mentioning their belief or the convention.¹⁷ For instance, if most people in Belgium are disposed to recognise certain pieces of metal as money and justify this recognition by saying that the pieces of metal are coins, the Belgian people have the convention that coins count as money. Conventions and conventional facts are mutually dependent for their existence. The convention exists because the facts of its conclusions exist as conventional facts. The conventional

¹⁵ For a more extensive discussion of the first condition, see Hage 2022c.

¹⁶ In this contribution I use a broad conception of rules, according to which rules are, in the first instance, mental connections between kinds of facts. More details about this conception of rules can be found in Hage 2015, 2018 chapter V and 2022c.

¹⁷ There are more requirements for the existence of a convention. See Hage 2022c.

facts in turn exist because their recognition is dependent on a convention and its conditions. Very simply stated, conventions are rules that exist because they are used.¹⁸

If a convention exists in a group, this has normative consequences. If the Belgians recognise coins as money and some Belgian refuses to accept coins as money, doubting that they are real money, this person may be blamed for denying the obvious ('everybody' knows that coins represent money), and may even be obligated to recognise payments by means of coins. Analogously, if a group recognises the convention that if either A or B, then A should be the case, or B, but not both (exclusive or), somebody who claims that A or B is the case, if they are both the case (inclusive or) makes a mistake and may in some circumstances even be accused of misleading others. The meanings of logical operators are conventional, just like money.

We have seen that the motives behind constitutivism include the desire to find a more solid basis for normative judgments than the wishes, preferences, or whatever subjective dispositions of individual persons. Conventions and conventional facts form such a more solid basis. One interpretation of constitutivism would therefore be that facts about agents or actions conventionally support facts and judgments about what reasons for action an agent has.

Conventional support is stronger than the merely subjective fact that an agent desires to bring about a particular result, such as quenching her thirst, a desire that turns the fact that drinking water quenches thirst into a reason to drink water. However, conventions are still linked to social groups and a convention that exists in one group may not exist in another group. For example, if one group has the convention that cyclists ought to drive on the right, this leads to a reason to drive on the right in the group that has this convention, but not in another group. Many would like reasons for action not to be relative to social groups. Moreover, many would not like conventions to be decisive for reasons for action, as some conventions might be 'wrong'. Only 'right' conventions should lead to reasons for action, and if they are right, there is not even a need for a convention. If it is right to assist asylum seekers, this would still provide a reason for action even if there is no broad consensus in society about the desirability of providing such assistance. People who think this way will not accept a conventional basis for constitutivism. However, they might be satisfied by a constructivist basis.

4.4 Constructivist facts

Not all social facts are conventional. There is a second category, constructivist facts, where an existing broad consensus is, perhaps the first but, not the final word on what the facts are. Suppose that the members of MCC take a vote on what was the best cycling trip they made this year. They decide unanimously that the trip to Arcen was the best trip. Does this mean that the Arcen trip really was the best? No, even if all club members agree on what was the best trip, this does not mean that it *really* was the best trip. It remains possible to raise the question of whether all members of the club were mistaken about the best trip.

There appears to be a difference between what most or even all members of the group recognise as the best trip and what really was the best trip. States of affairs such as the fact about what was the best cycling trip of the year are not objective, because they depend on how people 'feel' about things.

¹⁸ Other rules exist because their existence is attached to some facts by another rule. These rules are rule-based rules, also called 'institutional rules' (MacCormick and Weinberger 1986). In this chapter, I will not go in details about these institutional rules, which are more important for law than for constitutivism.

Neither are they merely subjective, as it makes sense to argue about them. And, finally, they are not conventional either, because a broadly shared belief about them is not the final word. I will call such facts *constructivist facts*.

Constructivist facts are social facts, which are open to serious questioning. This combination is possible if the social practice of a group does not only recognise the existence of these states of affairs, but also the possibility to question them. For instance, *prima facie* it may be a social fact in MCC that the trip to Arcen was the best trip of the year. However, the members of MCC agree and know that the others also agree that, theoretically speaking, everybody might be mistaken. If somebody came up with convincing reasons that another trip was even better, this other trip would be better. Moreover, it would have been better from the very beginning, not merely because the members of MCC changed their minds. If an argument makes people change their minds about constructivist facts, they change their minds about what the facts already were.

Constructivist facts are characterized by the possibility to have a *serious* debate about them. ‘Serious’ means in this connection that the participants in the debate believe that it is possible to disagree about these facts without thereby showing a misunderstanding of what the debate is about. They also believe that there is a correct answer to the question what the facts are, independent of what people actually believe it is. For instance, if Joanna and Frédéric disagree about whether red wine is better or white wine, while they believe it is just a matter of taste, they consider the issue at stake to be a merely subjective one. There is no right answer as to what the best wine is, and their disagreement is not serious. If two members of MCC disagree about whether Henrique is their leader, while both know that practically all members of the club recognise Henrique as their leader, their disagreement is not serious either. The reason is that not believing that Henrique is the leader while also believing that ‘everybody’ recognises Henrique as the leader, shows misunderstanding of the conditions for leadership, which is a matter of convention. The example about the best cycling trip of the year illustrates that it is possible to disagree seriously about what was the best trip. The seriousness of the debate becomes manifest in the assumption of all participants that there is a right answer to the question, even though it is not a matter of objective fact, and that this right answer does not change if people merely change their minds about what the answer is.

How is it possible that constructivist facts are social facts, even though broad social recognition is not the final word about what they are? The answer is that constructivist facts are what the best possible argument says they are. This answer seems only to push the issue backward. The question of whether a particular constructivist fact exists – for instance of whether the trip to Arcen really was the best trip – has no objective answer. How, then, can there be a best possible argument if this argument does not lead to the objectively true answer? There must be a standard that determines what the best possible argument is, and this standard cannot refer to objective truth. This standard can only be found, I claim, in the social practice of the group in which arguments are produced. A constructivist fact is a fact that ought to be recognised as a result of the rational reconstruction of the set of objective facts and of the social facts that are recognised in a social group, including the standards for good argumentation that exist in the group.¹⁹

¹⁹ There is no room in this chapter to further develop the notion of rational reconstruction. As a very short alternative, I suggest that rational reconstruction of a set of beliefs and recognitions is making the set ‘integrated coherent’ (Hage 2005, pp. 33-68; 2013; 2016a).

Rational reconstruction may involve no change for a particular social fact, and then that fact continues to exist as a social fact in the group because it was already recognised. An example would be that the members of MCC group believe that the cycling trip to the castle gardens of Arcen was the best trip of 2020 and that this belief survives a rational reconstruction of their belief set, for instance because nobody sees a reason to question it.²⁰ Then the belief that the cycling trip to the castle gardens of Arcen was the best trip is an element of the rationally reconstructed belief set, because it was already in the original belief set and nothing changed in this respect. It deserves emphasizing here that if there are no reasons to modify the original belief set, the set as it originally was remains unchanged. So there is a conservative bias in this rational reconstruction, which strengthens the idea that constructivist facts are still social facts, even if they are to a substantial degree determined by reason.

Reconstruction may also involve the inclusion in the belief set of a particular social fact, and then that fact already existed as a social fact in the group because it ought to be recognised according to the rational reconstruction. An example would be that Dutch law initially seemed not to have the right of adopted children to know their birth parents, but that the existence of this right (the 'right to know') is included in the rationally reconstructed set and the right therefore already existed as a matter of constructivist fact.

Finally, reconstruction may involve the removal of a particular social fact from the belief set, and then that fact did not exist as a constructivist fact in the group because it ought not to be recognised according to the rational reconstruction. If the members of MCC group ought not to have recognised the trip to Arcen as the best one, the belief that the cycling trip to Arcen was the best trip is not part of the rationally reconstructed belief set anymore and the trip to Arcen was, all things considered, not the best trip.

Rationally reconstructing a set of recognitions or beliefs leads to a judgement on what ought to be recognised, *given the original beliefs*. The recognitions in the reconstructed set are what the believer of the original set rationally ought to recognise. Constructivist facts are the conclusions of the best possible arguments. These arguments determine what ought to be recognised, but *ipso facto* they also determine that part of social reality. Perhaps this is the most important thing to remember about constructivist facts: *constructivist reality is what rationally ought to be recognised as real*.

4.5 The layered structure of the social world

A conventional fact exists if it is broadly recognised, but only if states of affairs of that kind are in the group considered to be conventional facts. This means that the group members should not consider those kinds of states of affairs to be objective, or merely subjective. Take the following example. Let us assume, perhaps contrary to the truth, that during the early Middle-Ages, most people recognised that Earth was flat. This would not mean that Earth was flat as a conventional fact in those days, because even in those times people would recognise that the shape of Earth is something objective.²¹

²⁰ Perhaps a better formulation would be: 'if there is no good reason to question it'. The issue at stake here is whether rational reconstruction should be interpreted as an actual procedure, even if it is executed under ideal circumstances, or as a logical operation which takes its input from what the members of a group recognise.

²¹ People may not have recognised that the shape of Earth is a social fact in these terms, as they may have lacked the necessary conceptual distinctions. People would not need to use the word 'social' for conventional

This means that a conventional fact, such as the fact that 'rain' stands for rain, requires recognition on (at least) two levels. First, states of affairs about the meanings of words should be considered to be conventional, and second the word 'rain' should be recognised as standing for rain.

The meta-recognition of conventional states of affairs as conventional does not only mean that conventional states of affairs should be seen as social, and not as objective or subjective, facts. It also means that they are not recognised as constructivist facts.

Constructivist facts are social facts that are open to serious questioning. This combination is possible if the social practice of a group does not only recognise the existence of these states of affairs, but also the possibility to question them and that questions about these facts have a correct answer that is not objectively true, but which does not depend on the opinions of the majority either. Only if these characteristics of constructivist states of affairs are recognised in a group, does this group have constructivist states of affairs.²² Concrete states of affairs of a particular kind, for instance the moral state of affairs that torture is wrong, can only be constructivist if moral states of affairs are constructivist as a matter of social fact.

The picture that arises from this discussion of how social states of affairs exist is that their existence depends on two levels in the social world. On the more abstract level there are social facts, conventional or constructivist facts, about what kinds of states of affairs are objective, subjective, conventional or constructivist.²³ This level is self-referring, as it also determines for the metalevel facts themselves to what category they belong. For instance, it is a matter of social fact whether legal states of affairs are conventional. On the more concrete level, social facts exist if they are broadly recognised (conventional facts), or if they are the conclusions of the best possible arguments (constructivist facts).

4.6 Constructivism and constitutivism

The central idea behind constitutivism is that there are some facts which lead necessarily to conclusions about reasons for action or to other normative conclusions. The more popular facts in this connection are facts that deal with the function of an agent and how that function is best realised, or with the nature of actions. The connection between the constituting facts and what they constitute should not be coincidental, or what philosophers call contingent. It should somehow be necessary, perhaps even logically necessary.

Is there such a necessary connection? Objectively speaking not, as necessity is not a part of objective reality. Subjectively speaking also not, as subjective connections between kinds of states of affairs cannot provide the required necessity. If constitutivism is to cut ice, the relation between the constituting facts and the reasons for action, or the normative facts, which they constitute must rest in social reality. It is a matter of social fact whether the relation would exist as a convention, or as a rule that exists as a matter of constructivist fact. The issue is so complicated that the existence of a

facts, but in the terminology introduced here, the group members should recognise conventional facts as social facts.

²² It is not always a matter of convention to what category a particular kind of state of affairs belongs. It may also be a matter of constructivist fact. In this chapter there is no room to further discuss this important issue, however. For details, see Hage 2023.

²³ For all kinds of states of affairs – not only for social ones – it holds that their existence presupposes that facts of these kinds are recognized as objective, subjective, conventional, or social.

broad consensus – that is: a convention - about constitution is unlikely. So, it should be a matter of constructivist facts whether the required inference rule exists that allows to conclude from premises about agents or actions to conclusions about reasons for action. Should we, rationally speaking, recognise that, for instance, agents have a reason to collect knowledge about how to fulfil their desires, as Smith claimed? If that is the case, the theory about how social reality exists explains why constitutivism works.

More in general, if a rule exists in social reality, either as a convention or as a matter of constructivist fact, this rule supports logic-like inferences. If the conditions of the rule are satisfied, it is *pro tanto* rational to accept the rule's conclusion. The notion of a rule in this connection is very broad, including legal rules, moral principles, values and other socially accepted goals, inference rules, conceptual rules, and also constitutive rules. Constitutivism works, not because it is very special but because it is one of the many cases where connections between kinds of facts exist in social reality. Whether such connections are also called 'logical' in the narrow sense of deductive logic is itself a matter of social (conventional or constructivist) fact.

5 The relevance for law

There are many kinds of legal rules, such as rules that impose duties or obligations, rules that assign competences, rules that impose sanctions, or rules that underlie classifications. Many of these rules as such do not lead to reasons for action, although they play a role in a larger system that does provide reasons for action. For instance a rule that makes the municipality council of Maastricht competent to create bylaws in itself does not provide the council or anybody else with a reason for action. However, the competence can be used by the council to create mandatory rules, which in their turn lead to reasons for action. Mandatory rules typically do provide reasons for action, and it seems that constitutivism can be helpful to understand how at least some legal rules can create normativity.

In this connection it is important to distinguish between two kinds of normativity: legal normativity and the normativity of reason. If a rule of the municipality of Maastricht imposes on all of its inhabitants the obligation to pay a tax to the municipality, the created obligations are so many reasons for action. This is legal normativity.

Next to this legal normativity – what an agent legally speaking has a duty or obligation, or ought to do – we have the normativity of reason. This normativity addresses the issue of what an agent ought to recognise, believe, or desire, given what else he recognizes, believes, or desires. For example, a pupil ought to arrive at the answer 6 when asked what the sum of 4 and 2 is. Or she ought to desire to drink some water if she is thirsty, wants to quench her thirst, and believes that drinking water will do the job.

This normativity of reason also plays a role in law. If a legal subject believes that a particular mandatory rule is valid, for instance the rule about municipal taxes in Maastricht, and if she also believes that the rule is applicable to her situation, she rationally ought to recognise that she is under an obligation to pay the tax and therefore legally ought to pay the tax. As it is the point of legal obligations to be reasons for action, she rationally ought to believe that she has a reason for action. And this means that it is a matter of constructivist fact that, *pro tanto*, she has this reason. This is how law leads to reasons for action, which is a case of legal normativity. There is a close connection between (the

existence of) legal rules and the existence of reasons for action. This connection is not merely contingent, but exists as a matter of social fact, conventional or constructivist. The legal mechanism in question provides an example of how constitution operates in law.

6 Conclusion

In the world as we daily experience it there are many connections between different kinds of facts (Tahko and Lowe 2020), and these connections make us recognise the presence of some facts on the basis of recognising other facts. For instance, we recognise the validity of some legal rule because we believe that the rule was made by means of a statute. We use these connections in argumentation, as when justifying to others what one recognises. For instance, we justify our belief that it will rain tomorrow by mentioning the weather forecast.

These connections are the products of human minds and do not exist objectively. For instance, it depends on human minds that there is a connection between the fact that a rule was made by means of a statute and the validity of this rule. Moreover, the connections cannot easily be fitted in a system of deductive logic if that system only recognises the connections based on a small set of logical operators. To return to the example about the rule: it is not a matter of deductive logic that rules made by means of statutes are legally valid.

Both this non-objectivity and not fitting in the system of deductive logic are captured in Hume's guillotine. This metaphorical guillotine separates normativity from what is objective and disallows the deduction of normative propositions from merely non-normative ones. Hume's guillotine sits well in a realist world view, but not in a phenomenological view. It should therefore not come as a surprise that attempts were made to bring back normativity to the place it has in the life world of most people. The Kantian tradition in ethics is a prominent example of a philosophical attempt to do so. The same holds for constitutivism.

The leading idea that underlies constitutivism is that some facts make it the case, constitute, that other facts are the case. If the former facts exist objectively, so would the latter. If the latter facts are normative, while the former are not, it is shown that Hume's guillotine is not always efficacious.

However, constitutivism must still make sense of the idea that some facts 'constitute' other facts. Here the theory about social reality comes into play. Facts in social reality can exist because they are broadly recognised (conventional facts) or because they ought to be recognised, given what is already broadly recognised (constructivist facts). This theory about social reality explains how social facts can be constituted.

It cannot explain why normative facts exist objectively. However, if the possibility is assumed that normative facts exist in social reality (Hage 2022c), we do not only have explanations of how normative facts exist, and why they are not subjective, but we can also explain how some facts can constitute other facts and why constitutivism can elucidate how normative facts are grounded in non-normative facts. Whether constitutivism adds much to the theory about social reality is under that assumption a different matter.

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