PETER HULSEN*

# BACK TO BASICS: A THEORY OF THE EMERGENCE OF INSTITUTIONAL FACTS

ABSTRACT. In order to account for the mode of existence of social rules and norms, the author develops a theory of the emergence of institutional facts. Just as other kinds of institutional fact, rules and norms are meanings. Therefore, insight into the emergence of social rules and norms can be achieved by studying the recognition and the communication of meanings. Following accounts of meaning and factuality, institutional facts are characterized as unquestionable shared typifications. It is argued that, in becoming an institutional fact, a typification goes through two phases. First, it becomes a social habit. Second, this habit turns into an obligation by being objectified.

## 1. INTRODUCTION

In this article, an attempt is made to contribute to the development of a realistic theory of legal validity by analyzing the emergence of social rules and norms. The theoretical problem presented by legal validity will never be resolved within the boundaries drawn by a juridico-theoretical paradigm in which the legal system is conceived of as a a closed set of formal rules of which only the most fundamental rule or norm is positively grounded on social practice. In contrast, a theory of the existence of law requires an understanding of how any valid rule or norm is rooted in mental and social processes.

In order to determine the general features of rules and norms, it is necessary to abstract from the formal procedures regulating the

creation of legal rules and norms. Only by studying how rules at the most basic social level *come into* existence and how they change, will we get a hold on how legal rules *do* exist. Scientific fields that can contribute to a realistic theory of the existence of rules and norms are those concerned with the recognition and transmission of meanings. For it is in essence by expressing and comprehending meanings that humans create rules and norms and make them subsist in the course of time.

## 2.  MEANING AS A SOCIAL PHENOMENON

Meaning is the difference between making sounds to communicate things and just uttering sounds, writes John R. Searle.[1] When we say '*x* means *y*', this amounts to saying that the sign *x* represents the object *y*. In order that this meaning can be understood, the sign *x* should not be chosen at random, but in conformity with current social practices. A meaning is a social construction: it is a matter of rules or conventions. '[O]ne's meaning something when one utters a sentence is more than just randomly related to what the sentence means in the language one is speaking.'[2]

Following H.P. Grice, Stephen R. Schiffer understands meaning as the intention of the sender of a message to produce in some person a certain type of response.[3] In line with this conception, his account concentrates on an integration of the notion of meaning in a theory of speech acts. Searle rejects this Gricean approach because it would mistakenly define meaning in terms of effects on the hearer, whereas a mere understanding by the hearer of what the speaker intends suffices.[4] For a speaker already succeeds in producing a meaningful expression when his audience recognizes what he tries to effectuate, without its being necessary that the audience acts on it.[5] For instance, success in greeting someone 'will be achieved in general

---

[1] John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969 (1990)), p. 42.

[2] *Ibid*., p. 45.

[3] Stephen R. Schiffer, *Meaning* (Oxford: Clarendon Press, 1972 (1974)), *passim*, but esp. p. 49.

[4] Searle, *supra* note 1, pp. 43–50, esp. p. 46.

[5] *Ibid*., pp. 47 and 48.

if the hearer understands the sentence 'Hello', i.e., understands its meaning, i.e., understands that under certain conditions its utterance counts as a greeting.'[6] No further effect is required. Expressing a legal imperative – to take a more salient example – succeeds if the audience understands the expression as establishing a legal obligation. Whether they actually comply with it or not is irrelevant in this context.

Analogously to Searle, the focus in this study will be on the comprehension of meanings by addressees, since this is the position taken by the subjects of legal norms in relation to the agents issuing them. Consequently, I more or less reverse the Schifferian model, by modelling the transmission of meaning from the perspective of the addressee of the message.[7] The foundations of a model of this kind can be found in the later – posthumously published – writings of Ludwig Wittgenstein, notably *Philosophical Investigations*. In this typescript, Wittgenstein expounds the view that meaning is located in the function of words as 'signals' passed back and forth between people in the course of purposeful and shared activity.[8] Wittgenstein conceives of commonly used systems of meanings as 'language games', by which he understands 'languages complete in themselves, (. . . ) complete systems of human communication'.[9] The game-like nature of systems of this kind consists in the fact that 'the *speaking* of language is part of an activity, or of a form of life'.[10] Language games share with genuine games the typical feature of resting on rules of the type '$x$ counts as $y$'. Just as in the game of soccer being presented with a red card by a referee stands for being excluded from the game, in the language game called 'law' the phrase 'you're under arrest' pronounced by a police-officer stands for one's being taken in custody. Apart from this structural correspondence, systems of meaning resemble games in that the ability to

---

[6] *Ibid*., p. 49.

[7] Cf. John R. Searle, *The Construction of Social reality* (Harmondsworth: Allen Lane, 1995), p. 21.

[8] Ludwig Wittgenstein, *Philosophical Investigations* (Oxford etc.: Basil Blackwell, 1953 (1992)), §180; cf. David Bloor, *Wittgenstein: A Social Theory of Knowledge* (London and Basingstoke: Macmillan, 1983), p. 22.

[9] Ludwig Wittgenstein, *The Blue and Brown Books* (Oxford etc.: Basil Blackwell, 1958 (1997)), p. 81.

[10] Wittgenstein, *supra* note 8, §23 (italics in the original).

speak a language is not given, but is achieved only by training – just as one is only able to play a game after practice.[11] To Wittgenstein this means that the nature of meaning must be understood from a nominalistic perspective: words do not reflect objective essences, but can be related to any possible point of reference. In other words, 'words are ultimately connected to the world by training, not by translation'.[12]

The ability of human beings to construct meanings, as well as to communicate and to interpret them rests on the faculty of imagination. The imaginative person, however, is not a *tabula rasa*. He or she does not invent meanings at random. Neither can he or she recognize them without advance knowledge. One's conception is largely determined by the language of the community to which one belongs. Therefore, the aforementioned formula '*x* means *y*' must be supplemented with the frase 'in context *c*' in which the variable *c* stands for a certain language.

Since one can acquire a conceptual framework only by learning it from others, the words one uses take their meanings from the language community to which one belongs.[13] From this perspective, a language can be understood as the 'sediment' of the meanings used in a community.[14] This is not to say, however, that language games are static. As Wittgenstein concluded, meaning is created by 'acts of use',[15] rather than being intrinsic. As a consequence of this, the evolution of the meaning of a word is a continuous process. To show why this is so, we first have to keep in mind that, in using a word, one interprets it subjectively – i.e. a word means something different to all participants in a language game. Next, we have to take into account that in any communication, together with the message expressed, one's personal interpretation of the words employed to express the message is imparted to the adressee(s) of the message as well. Because of this, any instance in which a word is used influences the meanings the speaker and his audience will ascribe to

---

[11] Wittgenstein, *supra* note 9, p. 77.

[12] Bloor, *supra* note 8, p. 28.

[13] Cf. *ibid.*, pp. 18–21.

[14] Cf. Peter Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Harmondsworth: Penguin, 1966 (1991)), p. 56 and pp. 85–87.

[15] Bloor, *supra* note 8, p. 25.

that word in the future. Rephrasing Wittgenstein, we should perhaps say 'meanings are *re*-created by acts of use'. Thus, the meanings of words develop continually – and, what's more important, there's no such thing as objective meaning. With respect to language games, it should be noted that the explained mechanism is not only operative with respect to particular concepts, but also with respect to the rules of the game themselves. Since these are as much subject to interpretation as the words used in playing the game, the rules of the game evolve while it is being played.

A view contrary to the one set out above is held by the Swedish philosopher Aleksander Peczenik, who denies the possibility of a reality dependent on language.[16] Peczenik bases his position on the observation that the reality described by our words is objective.[17] Different languages do not constitute divergent realities. They merely present different pictures of one and the same reality. Peczenik's view is exemplified by the following quotation:

> I do not believe that an Eskimo *sees* more kinds of snow than an European does. A European would see any snowflake an Eskimo had seen. An Eskimo would divide snow in more kinds, since he knows more names. But a European whom an Eskimo showed examples of these kinds, would see differences between them, although he is unable to quote their names.[18]

It is clear that Peczenik does not accept that it is only on the basis of an adequate conceptual apparatus that one can interpret a visual image of a white mass as snow, or even as a particular type of snow. However, contrary to what Peczenik maintains, an African visiting Alaska – to carry his example into extremes – could only perceive snowflakes if he knew what he was looking for. Otherwise, he would just observe one big white mess. To distinguish the types of snow supposedly (for this 'fact' actually seems to be an urban legend) perceived by Eskimos, he would have to be able to name those distinctions one way or another. To that end, he must be in command of the precise vocabulary Eskimos apply to name those types.

---

[16] Aleksander Peczenik, "Empirical Foundations of Legal Dogmatics", *Logique et Analyse* 12 (1969), pp. 32–64, especially at pp. 59–64.

[17] *Ibid.*, pp. 60–62.

[18] *Ibid.*, p. 61 (italics in the original).

So types of snow are only real when you are in command of a conceptual apparatus that distinguishes them. As Berger and Luckmann write in *The Social Construction of Reality* of 1966, 'language realizes a world, in the double sense of apprehending and producing it'.[19] Apparently, language structures not only communication as such, but, most importantly, also the worldview of its users. Our reality is conceptually determined. Language offers a conceptual framework that structures our perception. In other words, 'human experience is linguistically prestructured.'[20] By the gamut of meanings it offers, as well as by the rules stipulating how these can be associated with each other, language determines how things can be seen. This implies that perception would be impossible without the faculty of language, because aspects of the world can only be observed if one disposes of a word or an expression denoting them.

So far, I have emphasized the subjectivity of meaning. Nevertheless, the common practice of language confronts us with a remarkably high level of intersubjectivity – to illustrate this with but one telling example: no speaker of English will in earnest assert that 'woman' stands for 'male human being'. Theoretically, meaning is a subjective phenomenon on the individual level. In reality, however, any individual experiences language as a facticity external to himself and constraining in its effects on him. For speaking a language implies being compelled to accept the patterns followed by all others, who in turn undergo exactly the same experience. 'As a sign system, language has the quality of objectivity', Berger and Luckmann conclude.[21] In fact, a common language is only feasible because of the possibility of this kind of objectivity. For otherwise, we would be unable to interpret one another's intentions.

Berger and Luckmann conceive of signs as objectifications serving as indexes of subjective meanings.[22] The human production of signs they name 'signification'. Language creates semantic fields

---

[19] Berger and Luckmann, *supra* note 14, p. 173.

[20] Richard Tarnas, *The Passion of the Western Mind: Understanding the Ideas that Have Shaped our World View* (New York: Harmony Books 1991), quoted in Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Oxford etc.: Clarendon Press, 1997), at p. 4.

[21] Berger and Luckmann, *supra* note 14, p. 53.

[22] *Ibid*., p. 50.

or zones of meaning that are linguistically circumscribed.[23] The continuity of the reality defined by these zones is maintained by ongoing reaffirmation in the individual's interaction with others.[24] In these processes, 'significant others' fulfil a leading role – '[l]ess significant others function as a sort of chorus'.[25]

The most important vehicle of reality-construction and reality-maintenance is conversation.[26] For, as Berger and Luckmann write, '[i]n conversation the objectifications of language become objects of individual consciousness'.[27] In the face-to-face situations of individual existence,

the fundamental reality maintaining fact is the continuing use of the same language to objectify unfolding biographical experience. In the widest sense, all who employ this same language are reality-maintaining others.[28]

So reality-maintenance is not produced intentionally – it is implicit in conversation.[29] 'Most conversation does not in so many words define the nature of the world. Rather, it takes place against the background of a world that is silently taken for granted.' Continuous repetition is an important catalyst. 'Thus the subjective reality of something that is never talked about comes to be shaky.'[30]

Because it determines our perception, the influence of language exceeds the realms of mere thought and communication. Language also touches on human action in that it provides man with possible courses of conduct, as well as the undisputed backgrounds against which these courses can be carried out. In illustration, I might elaborate the example of filling out a tax form. Obviously, one can fulfil this duty only if one understands the preprinted text on the form. Moreover, one must master a certain vocabulary to be able to fill in one's name, address, etc. Accordingly, the undisputed background against which one performs the job of filling out a tax form consists in the assumption held by both the tax inspector and the

---

[23] *Ibid*., p. 55.
[24] *Ibid*., p. 169.
[25] *Ibid*., p. 170.
[26] *Ibid*., p. 172.
[27] *Ibid*., p. 173.
[28] *Ibid*., p. 173.
[29] *Ibid*., p. 172.
[30] *Ibid*., p. 173.

taxable person that both give the same interpretation to the general preprinted text, as well as the special text and figures inserted. Only thus does it make sense, for instance, to speak of honesty in the context of filling out a tax form.

After having discussed reality at large, we are now in a position to pass on to an account of facts.

## 3. INSTITUTIONAL FACTS

### 3.1. *A Fact is a Fact is . . .*

Basically, two types of singular fact can be distinguished. First, those relating to constellations of physical matter, such as, for instance, a horizontal rectangular piece of wood vertically supported by four poles. The second type covers all immaterial states of affairs. Examples are traffic rules, beliefs and legal competences. These are situations that are or can be the case, but that are not composed of physical matter.

Sharp as the distinction between physical and non-physical reality may seem, the demarcation line between facts relating to physical matter and those concerning immaterial states of affairs is not sharp at all. For a physical state of affairs can appear meaningful only by mediation of a non-physical element, *viz.* knowledge making possible an interpretation of it as having a meaning. Only in this manner may we come to understand a horizontally positioned rectangular piece of wood vertically supported by four poles as something generally used to sit at – instead of *on* – and to comprehend, in addition to this, that sitting at the table is the appropriate thing to do during meals. Without the relevant knowledge, there exists no restriction to interpreting a state of affairs satisfying the above description as a piece of art, a house altar or as a Martian. So one can only conclude to the fact that one is actually observing a table by making reference to something non-physical, since a piece of physical matter can only appear to us as a fact if it is associated with a meaning.

Something immaterial, on the other hand, can only be recognized as a fact if its being the case is signalled by a piece of physical matter usually taken to denote this immaterial state of affairs, i.e. a sign. Let me illustrate this practice of signification with a simple example too.

Take, for instance, the rule of Dutch traffic law that for one category of free-ways the speed limit is 100 kph, while on roads of another type the speed limit is 120 kph.[31] To someone who is using a certain Dutch free-way for the first time it is a *factual* question to which category this road belongs. Having acquainted himself with Dutch traffic law before he left home, he knows one of the two speed limits must apply, but which one? The driver will find the correct answer to this question by looking for relevant traffic signs: if there are small yellow signs with '100' printed on that are positioned on the crash barrier, the speed limit is 100 kph – otherwise one is allowed to drive 120 kph.

We see that one becomes acquainted with the existence of a norm – 'you are not allowed to drive more than 100 kph on this road' – by means of a traffic-sign expressing this norm. In other words, there is no other way to gain knowledge as to the existence of a non-physical – though non-subjective – entity than by mediation of certain physical entitities. Yet, the sign indicating a social fact is not part of the fact itself, for it is quite possible that a social fact is the case without being signified – only it will remain unobserved. It may well be the case that a speed limit of 100 kph had been issued for a particular stretch of Dutch free-way, but that the relevant authorities had failed to give notice to install the corresponding yellow signs. The speed limit then exists but cannot be observed by the drivers.[32]

So far about types of fact. It is now time to determine what we actually mean when we use the term 'fact'. Among the many senses attributed to 'fact' in *The Oxford English Dictionary*, the following comes closest to its ordinary meaning:

Something that has really occurred or is actually the case; something certainly known to be of this character; hence, a particular truth known by actual observation or authentic testimony, as opposed to what is merely experience, or to a

---

[31] Article 21, sub a, of the Dutch Statute on Traffic Rules and Traffic Signs 1990.

[32] At this point, it should be noticed that even when the yellow signs are put in place, recognition of the speed limit is not certain, since drivers will only do so if they have *learned* to perceive the signs as indicating a speed limit – and not conceive of them as, say, a kind of flower apparently thriving on exhaust fumes. We do not address this aspect of institutional facts in this context, however, because this would require a change of perspective from facts to signs.

conjecture or fiction; a datum of experience, as distinguished from the conclusions that may be based upon it.[33]

Ota Weinberger employs the German word 'real' in relation to everything that exists over time.[34] However, there is not one single reality. Weinberger distinguishes two spheres of reality: the realm of matter and the realm of ideas. These spheres relate to different criteria for the recognition of existence.

Regarding material realness, cognition is in the end grounded in sense experiences. When thought-objects are studied, their realness is based on their connection to the sphere of material reality and on the fact that thought-objects are understood as parts of the actual course of affairs, as something which enjoys existence in time, because they influence, in a certain way, the processes taking place in reality.[35]

It is not Weinberger's intention to reintroduce idealism. Accordingly, he does not conceive of the elements of the 'Ideenwelt' as objectivities. Instead, he puts them on a par with material facts as individual observations of intersubjectivities. In Weinberger's view, there are two ways to conceive of ideal entities: first, as thought-contents with a certain meaning and a certain structure; secondly, as real entities with temporal coördinates.[36] In the second conception, ideal entities are connected to material objects and physical systems. That is, they appear to serve as interpretations of physical occurences by ascribing institutionally determined connotations to them. In a word, ideal entities in the second sense are *institutional facts*. Thus, Weinberger is able to conclude that as a criterion for

---

[33] *The Oxford English Dictionary* (Oxford: Clarendon Press, second edition, 1989).

[34] Ota Weinberger, "Das Recht als Institutionelle Tatsache: Gleichzeitig eine Überlegung über den Begriff des Positiven Rechts", *Rechtstheorie* 11 (1980), pp. 427–442, at p. 436.

[35] *Ibid*., p. 436 (present author's translation – the original German text reads as follows: 'Wenn es um materielles Realsein geht, wird sich die Erkenntnis letzlich auf Sinneserfahrung stützen; wenn ideelle Gegenstände betrachtet werden, wird ihr Realsein durch die Bindung an die Sphäre der materiellen Realität begründet sein und durch die Tatsache, daß die Idealentitäten als Bestandteil des realen Geschehens, als etwas in der Zeit Daseiendes erfaßt werden, weil sie in gewisser Weise auf die Verhaltensabläufe in der Realität einwirken.').

[36] *Ibid*., p. 437.

existence *existence over time* leaves room for both physical and institutional facts.

In *The Construction of Social Reality* of 1995, John R. Searle designates the ordinary meaning of 'fact' as 'that in virtue of which a true statement is true'.[37] Facts *are* not objects, Searle states, nor linguistic entities, but 'conditions in the world that satisfy the truth conditions expressed by statements'. Because of this, we can formulate expressions of the following kind:

> 'Snow is white' is true if and only if snow is white.

Sentences of this kind, Searle terms 'T sentences', because they are about truth. As Searle notes, the sentence quoted in this example is true just in case it describes what is the case, i.e. when *unquoting* it produces an empirically correct description.[38] The method used in this kind of reasoning Searle calls 'disquotation', since a test of the truth of the sentence quoted can be made by taking away the quotes. Any assertive statement 'determines a truth condition as requirement, and if satisfied there will be something in the world as the thing required'.[39] 'Facts don't need statements in order to exist, but statements need facts in order to be true.'[40] This coincides with what we all know intuitively: that truth is a matter of correspondence to facts.

Based on the above, 'fact' can be defined as: 'A noun or noun phrase to name all those conditions that make sentences true, all those truth makers on the right hand side of T sentences, in virtue of which sentences are true, if they are true.'[41] As for the notion of correspondence, Searle notes that

'[c]orresponds to the facts' is just a shorthand for the variety of ways in which statements can accurately represent how things are, and that variety is the same as the variety of statements, or more strictly speaking, the variety of assertive speech acts.[42]

---

[37] Searle, *supra* note 7, p. 211. Searle does not mention Berger and Luckmann's *The Social Construction of Reality* in this book. Is it possible that he has not been aware of the similarity between the two titles?

[38] *Ibid*., p. 201.

[39] *Ibid*., p. 211.

[40] *Ibid*., p. 218.

[41] *Ibid*., p. 201.

[42] *Ibid*., p. 213.

With the above, Searle pretends to have developed a solid account of truth, fact and correspondence that is compatible with the intuitive idea of truth as agreement with facts. In the context of the present study, the most important element of this model is the notion of a fact as a condition, because this discharges one from the duty of taking a stance in the classical debates concerning issues such as the existence of classes and objects. 'Sentences are made true in virtue of satisfying a condition that stands outside the sentence', Searle asserts.[43] 'Period', one would like to add. Conditions can be universals, as well as particulars, and, moreover, they can be conceived of as existent or non-existent in the sense of obtaining or not obtaining, respectively. So, with this concept, Searle has shown a way out of a number of traditional philosophical controversies.

Searle conceives of the perception of a fact as the assignment of a function.[44] Both material and immaterial facts are constituted by ascribing a function to a piece of physical matter. Searle speaks of an 'agentive function' when agents intentionally put an object to a certain use.[45] Thus, a table is not just a horizontally positioned rectangular piece of wood vertically supported by four poles. More important is that it is *intended* – and interpreted accordingly – to be used to sit at. It is because of this that also round pieces of wood vertically supported by four poles can be interpreted as tables, while some rectangular pieces of wood actually fulfilling our circumscription are, nonetheless, identified as carports.[46]

In perceiving immaterial facts, according to Searle, a function is assigned by making a physical object represent something else.[47] Thus, the red card presented to a player by a referee in a game of soccer represents the fact of the former's exclusion from the game. In those cases, Searle speaks of 'symbolism'. The red card I wrote of possesses a meaning in a way a table does not. The same holds for language, traffic signs, etc. Instances of these types are not simply pieces of physical matter with an ascribed function. It is quite the reverse. These types are chosen to represent immaterial conditions

---

[43] *Ibid*., p. 202.
[44] *Ibid*., pp. 13 ff.
[45] *Ibid*., p. 20.
[46] Cf. *ibid*., p. 14.
[47] *Ibid*., p. 21.

of a kind that exist independently of their symbols. Searle concedes that functions are never intrinsic – 'they are assigned relative to the interests of users and observers'.[48] Thus, both material facts and immaterial facts can be understood on the basis of the Searlian formula '*x* counts as *y* in context *c*'.

We have seen that all facts necessarily comprise non-physical elements. In this respect, all facts have institutional aspects. What does the term 'institutional' mean? 'Institutionalization' refers to the event by which a meaning-content becomes a fact – an institutional fact – by means of its being *actualized* as a practice. Such a practice amounts to a state in which the members of a community – or at least the greater part of them – acknowledge the fact in their behaviour. That is to say that they behave *as if* the proclaimed institutional fact were a material fact, for that is precisely the way in which they render the institutional fact actual. Let me illustrate this with the example of the red card presented by the referee in a game of soccer. In itself, a red card is just what it looks like: a red-coloured rectangular piece of paper – not a thing to worry about when it is shown to you by a person dressed in black. Things change, however, when this person in black, as well as the opposing party, your team-mates and – last but not least – you yourself interpret this card as a sign expressing that you are out of the game. Then the odds are that you are indeed out of the game, simply because everyone – including you yourself – treats you as such.

There is more to it, however. Presenting a red card, or watching the presentation of a red card, is not simply a case of consciously observing the rule that a red card means that one is sent off in soccer. For that would not so much produce an automatic expulsion, as an investigation on behalf of you – the suspect – or the referee as to how many of the other people present are of the opinion that you must indeed leave the field. In that scenario, you might just as well behave as if nothing had happened as long as nobody actually coerces you to retreat. For, although you did commit a foul, you still want to take part in the game and help your team to win it.

This is perhaps how things go in the case of the infringement of a moral rule or a breach of good manners, but not so in the context of the instantiation of an institutionalized practice. What truly turns the

---

[48]  *Ibid*., p. 19.

presentation of a red card into an institutional fact is that you and all others present identify the red card as an exclusion, instead of as a mere attempt to exclude you. The crux of the matter in this is that the red card indeed *constitutes* an expulsion, precisely because everyone *believes* it does. Everyone familiar with the game of soccer at one time internalized the rule that a red card counts as being sent off. Therefore, you are out of the game, even when you remain within the lines of the field.

### 3.2. *The Facticity of Institutional Facts*

According to MacCormick and Weinberger, institutional facts 'are facts in virtue of being statable as true statements'.[49] This conforms to Searle's definition of 'fact' that I discussed in the previous section. However, there is one important difference. In the case of an institutional fact,

> what is stated is not true simply because of the condition of the material world and the causal relationships obtaining among its parts. On the contrary, it is true in virtue of an interpretation of what happens in the world, an interpretation of events in the light of human practices and normative rules.

Implicit in this quote is that feature of institutional facts which is central to the argument in this study: an institutional fact is statable by a true statement, not because it is a situation that is the case, but in virtue of an interpretation – mirrored by acts of conduct, choices or attitudes – of events in the light of a common belief that the situation is the case. Whereas in the case of physical matter, acceptance as a fact follows on observing a situation, the opposite is the case in relation to institutional facts. Institutional facts are facts, not because they *are* states of affairs, but because they are *generally accepted as* states of affairs. In other words, an institutional fact is a meaning-content which achieves intersubjective existence simply and solely by being generally accepted as such.[50]

Rational-choice theorists such as Elinor Ostrom and Nicholas Rowe, and also theorists of Institutional Legal Positivism such as MacCormick, Weinberger and Ruiter advocate the opinion (mostly

---

[49]  Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Posivitism* (Dordrecht: D. Reidel, 1986), p. 10.

[50]  Cf. Searle, *supra* note 7, p. 1.

tacitly) that the requirement of acceptance in the sense of a genuine belief in the reality of an institutional fact is too stringent, for in their eyes acting-as-if leads to the same results as internal acceptance. Although this may be true, we cannot truly speak of institutional facts in cases in which all people concerned only act as if. This can easily be demonstrated with the example of a practice in which acting-as-if plays a prominent role: the rituals having to do with the fictitious person 'Santa Claus'. We all know the game-like habit of pretending that Santa Claus is a real person while, at the same time, being aware that all of one's conversation partners are adults, who are bound to know that Santa Claus is a fiction. Can one say that Santa Claus is an institutional phenomenon in such a context? Yes, I would say, in so far as the rituals relating to this fiction are institutionalized – the yearly habit of acting as if, that is. Santa Claus himself, however, remains a mere fiction, since none of the persons present really believes that Santa Claus is a real person. In other words, he is not factual to them. For that reason, Santa Claus does not have the status of an institutional fact in a conversation between adults. Would a person dressed as Santa Claus enter the scene, he would jovially be treated as if he were Santa Claus indeed, but none of the persons present would treat him as if he really were a man coming from Lapland in his sleigh.

Now we move the camera to a conversation about Santa Claus in a family with children. Again, the adults only act-as-if, but this suffices to instill the children with a worldview in which Santa Claus is as real as their mother or their father. To those children, the person of Santa Claus can be said to be a fact. That is, it is incontestable to them that they are witnessing a unique person – an age-old man from Lapland famous for dispensing gifts on the night before Christmas – whenever they see a white-bearded person clothed in a red suit trimmed with white fur.

We see that the facticity of an institutional fact depends on its being internalized by the members of a group. For it is only on this condition that an institutional fact can have the same kind of incontestability as a brute fact. In short, it is only in this way that an institutional fact can be a *fact*. To use the example of being sent off once again, whether or not you actually leave the field, your removal from the game is a fact if so many of the people concerned consider

you to have actually been removed that there can be no doubt about your status. For the word 'fact' as we use it means something that is taken to hold incontestably.

In order to avoid misunderstandings it is perhaps useful to emphasize that your removal's being an institutional fact does not depend on whether people consider you worthy of removal on account of the offence you committed. We are only interested in whether they think you to have been removed because the referee has shown you a red card. Moreover, it should be stressed that the 'people concerned' I spoke of in the last paragraph comprises not only you yourself, the referee, your fellow players, etc., but also any person to whom the story of your removal can be told afterwards. For the community of people who share the notion of producing a removal in soccer by the referee's producing a red card comprises not only the people actually playing the game of soccer at a certain point in time and space. Say, you would continue to take part in the game after the referee had shown you a red card and all the people present had consented to this. Then your removal could afterwards still prove to be considered as an institutional fact – for instance when people who are told about the matter react by asserting that by staying in the field you have completely invalidated that game in which you have been taking part.

An institutional fact is a fact simply and solely because it receives acceptance as a fact. It exists because we act on the belief that it exists. Searle explains this characteristic on the basis of the phenomenon of collective intentionality.

[human beings] not only … engage in cooperative behavior, but … they [also] *share intentional states* such as beliefs, desires, and intentions. In addition to singular intentionality there is also collective intentionality.[51]

Thus, it can be understood how people are able to play a game together, or to perform a piece of music collectively. In cases such as these, one person is doing something *only as part of* the collective's doing something, as Searle notes:

So if I am an offensive lineman playing in a football game, I might be blocking the defensive end, but I am blocking only as part of *our* executing a pass play.[52]

---

[51]  Searle, *supra* note 7, pp. 23 ff. (italics added, ph).
[52]  *Ibid*., p. 23 (italics in the original).

The characteristic social aspect of institutional facts consists in the requirement that the imposition of a status function be done *collectively*.[53] It is most typical of institutional facts that this process may proceed without the participants being *conscious* of the fact that a status is being assigned.[54] Thus, it is possible that the members of a community accept banknotes as standing for a certain sum of money without being aware of the fact that a banknote is in itself a worthless piece of paper that has value only because it has been assigned to it on the basis of a status function.

Also in *creating* an institutional fact, one need not be aware of the form taken by the collective intentionality one invokes in imposing functions on objects. As Searle notes, '[a]s long as people continue to recognize the *x* as having the *y* status function, the institutional fact is created and maintained.'[55] So, to create a valid contract, you do not have to realize that you are creating an institutional fact while writing down your signature. The validity of the contract is not even hampered by inaccuracies in your perception of it. Whether you relate the contract to a religious belief that one ought to keep one's promises, or understand it from a strategic perspective intending to secure your position in future transactions is a matter of indifference – by signing the contract, you create an institutional fact.

According to Searle, most other attempts to explain collective intentionality reduce 'We intentionality' to 'I intentionality' plus something else, usually *mutual beliefs*.[56] This approach is unsuccessful because collective intentionality is not reducible to 'I intentions'. It is a phenomenon *sui generis*. 'The crucial element in collective intentionality is a sense of doing (...) something together, and the individual intentionality that each person has is derived *from* the collective intentionality that they share.'[57] Thus, in Searle's terminology, a football player has an individual intention not to be presented with a red card, but he has that intention only as part of a collective intention to win the game.

---

[53] *Ibid.*, pp. 39 ff. and p. 90.

[54] Cf. *ibid.*, p. 47.

[55] *Ibid.*, p. 47.

[56] *Ibid.*, p. 24.

[57] *Ibid.*, pp. 24–25 (italics in the original).

Simply my 'believing that you believe, that I believe, etc., and your believing that I believe that you believe, etc., (...) does not add up to a sense of *collectivity*.'[58] It is not because each of us believes that all the others believe – etcetera! – that a red card means that one is sent off, that a red card indeed produces one's removal. The true factors producing this result are that we, *primo*, have established that arrangement together or joined it later, *secundo*, accept the consequences of its operation as facts and, *tertio*, tend to criticize each other when we detect that the rules are disregarded.

Later on, we will see that Searle is of the opinion that institutional facts can be accounted for on the basis of the notion of unconscious rule-following. In contrast, it is my contention, as I will show in the next Section, that the social origin of institutional facts must be found in linguistic concepts such as discussed in Section 2. In the next section, the process by which institutional facts come about is explored. This will produce a conception of institutional facts as incontestable interpretations of the outside world. In Section 5, this article will be concluded by formulating definitions of the terms 'institutionalization' and 'institution'.

## 4.  THE EMERGENCE OF INSTITUTIONAL FACTS: INSTITUTIONS AS CONCEPTS

*Step 1: Perception of Institutional Facts Implies Employment of a Conceptual Framework*

Evidently, the incontestability of institutional facts grounds in the language-determined nature of reality discussed in Section 2. An individual is capable of noticing a certain institutional fact because it fits in with his conceptual framework. An institutional fact is not just a possible interpretation of the outside world, but – to the person perceiving it – the one and only interpretation. He cannot interpret the situation observed in any other way, since he does not have the concepts at his disposal to do so. This is what causes him to conceive of his interpretation as the incontestable truth. Bertrand Russell once put this fact into words by saying that 'a definition

---

[58]  *Ibid*., p. 24 (italics in the original).

ceases to be arbitrary when one postulates the existence of the object defined'.[59]

In theory, however, there is no hindrance to interpreting the presentation of a red card as a sign that it will start raining in a few minutes, or as a symptom of the deterioration of a referee's mental well-being. Facts have no 'built-in or inherent' objective meaning. The realm of meaning is a democratic one, concludes Tamanaha.[60] Yet, no soccer player will feel the need to start a discussion about the meaning of a red card. All of them are certain that it means that somebody is being sent off. This is so because their conceptual framework provides them with only this interpretation of their observing a man dressed in black holding up a red-coloured rectangular piece of paper during a game of soccer. Owing to the exclusivity of this interpretation, other interpretations can be evaluated as wrong, whereas the 'correct one' appears as an objectivity.[61]

A concept is the notion of a fact-type.[62] If a concept forms part of our worldview, we are able to perceive actual facts of that type – as long as we do not have a particular concept at our disposal, we cannot recognize the corresponding facts. Concepts are essentially semantic. They are expressed by complexes of words. We can only interpret things – fit them in with our worldview – if we are able to name them, as the discussion of Peczenik's European encountering snow in Section 2 has shown.

By using concepts, we apply the rules of language games. This, for instance, also goes for 'red card'. Applying this concept partly defines what is permitted in soccer and what is not. In turn, we learn the rules of a game such as soccer by acquiring the necessary conceptual framework. That means that learning to play a game involves actually playing it. It is a cyclical process of 'trial and error'.

With the aid of concepts, the rules of soccer are learned in the context of social environments as families and schools.[63] When, for

---

[59] The source of this remark is a letter, dated 9 May 1899, to the French philosopher Louis Couturat, quoted in Ray Monk, *Bertrand Russell: The Spirit of Solitude* (London: Vintage, 1996 (1997)), at p. 124.

[60] Tamanaha, *supra* note 20, p. 81.

[61] *Ibid*., p. 82.

[62] MacCormick and Weinberger, *supra* note 49, p. 11.

[63] Cf. Wittgenstein, *supra* note 8, §§6 ff.

instance, a sports teacher introduces 'the red card' to a new levy of pupils, he shows them a red-coloured rectangular piece of paper and tells them that someone is out of the game the moment one is shown this piece of paper by a referee. Thus, by learning concepts, the children come to know the rules of soccer. Whenever they see a red card in the context of an actual game, they will know how to interpret it henceforth. Consequently, the person to whom the red card is shown, is indeed generally considered to be out of the game – by experienced, as well as by first-time players.

### Step 2: Regularity Over Time in Sign-Meaning Connections is the Effect of Habituation

On a small scale, the example of learning the rules of soccer shows how a conceptual framework is established and how it defines our reality. Reaching this point of my argument, it is useful to take stock of what we so far have achieved in this article. Basically, the previous sections were dedicated to investigating the structural characteristics of institutional facts. That is, I tried to define the elements common to all institutional facts. To this end, I identified the term 'concept' as designating the basic elements of the linguistic framework human beings use in perceiving facts. However, this device does not enable us to understand all aspects of institutional facts. For what I still miss, is an explanation of the invariability of the meanings institutional facts of a certain type represent over time. Why is it, for instance, that in any game of soccer[64] – be it played in 1972 on Wembley in London, just a few weeks ago on the grounds of A.A.C. in Altforst in the Netherlands or, I dare to predict, in the year 2000 in the King Baudouin Stadium in Brussels – a red-coloured rectangular piece of paper, named 'the red card', shown to one of the players by the referee means that the former is out of the game as of that very moment? Rephrasing the latter question in more general terms: How can the similarity characteristic of institutional facts of a certain type be explained?

To fill in this gap, we should take notice of a characteristic of human behaviour so fundamental that we easily overlook it: habitu-

---

[64] To justify my certitude, I should perhaps add the condition that it was – or will be – conducted by an official referee. Besides, the red card has been generally introduced in soccer in 1970.

ation. Habituation – or 'habitualization' as Berger and Luckmann term it – is a technique people employ – often unconsciously – in making their behaviour as efficient as possible.[65] An illustrative example of this is presented by the way people brush their teeth. Instead of determining time and again where to start and what course to follow in order to take care of all of their teeth, people instead base themselves on a fixed routine already developed during their youth. It is because of this, that they are able to brush their teeth without having to think about it and as fast as possible, without running the risk of neglecting a single one.

Habituation not only takes place in purely individual actions – such as brushing one's teeth –, but also on the level of reciprocal behaviour. That is, it also plays a role in the creation and the subsistence of institutional facts. As we have seen, in order that the creation of an institutional fact be successful it must be interpreted correctly. This will only happen if the sign referring to it and the meaning this sign designates strongly resemble previous sign-meaning connections of the same type. So the creation and the recognition of institutional facts require prior knowledge. Habituation helps us significantly in reducing the amount of conscious thought necessary to recall the sign that is normally used to express a certain meaning and, the other way around, the meaning a sign designates.

Basically, habituation in the context of institutional facts does not differ from the evolution of one's personal manner of brushing one's teeth, except for one important aspect: it is not a solitary affair, but a cooperative effort. This means that, instead of everyone developing his or her own habits, a community develops common habits. These provide the direction and the channelling of mutual activity lacking in man's individual biological equipment.[66] By developing habits, 'the individuals are constructing a background, (...), which will serve to stabilize both their separate actions and their interactions.'[67] Essentially, habits restrict choices. Shared habits thus increase the chances of successful interaction. According to Berger and Luckmann, the most important gain of habituation is that each will be

---

[65] Berger and Luckmann, *supra* note 14, pp. 70 ff.
[66] *Ibid*., p. 71.
[67] *Ibid*., p. 75.

able to predict the other's actions. 'Concomitantly, the interaction of both becomes predictable.'[68]

We see that, apart from promoting efficiency, habituation on the social level has the advantage of opening up the possibility of complex forms of communication. For, essentially, language is nothing but an elaborate and intricate complex of social habits consisting of relations between utterances or written signs (or traffic-signs) on the one hand and meanings on the other. Social communicative habits offer mutually endorsed typifications of the actions habituated. As Berger and Luckmann note:

> In terms of the meanings bestowed by man upon his activity, habitualization makes it unnecessary for each situation to be defined anew, step by step. A large variety of situations may be subsumed under its predefinitions.[69]

This means that, in speech or writing, we can rely on a common basis of expressions – a 'shared language'[70] –, instead of having to develop this from scratch any time we encounter a new conversation partner.

The notion of habitual reciprocal typifications developed above shows striking similarities with the notion of a concept formulated earlier on: both consist of complexes of relations between fact-types and actual facts. A concept is the notion of a fact-type, which, by means of social habituation[71] can be turned into a habitual reciprocal typification – i.e. a *shared* concept –, and, subsequently, linked to certain signs so that it can be spoken or written about. From this, it follows that shared reciprocal typifications constitute a subspecies of concepts in general.

### Step 3: Habits Turn into Obligations by Being Objectivated

So far, I have regarded habits as recurrent patterns of behaviour, without asking whether people have indeed consciously adopted them as social habits – or whether they are the unintended social outcomes of their choosing their own individual courses. Neither

---

[68] *Ibid.*, p. 74.

[69] *Ibid.*, p. 71.

[70] Tamanaha, *supra* note 20, pp. 77–78.

[71] For a comprehensive investigation of this phenomenon, see Berger and Luckmann, *supra* note 14, pp. 74 ff.

did I ask whether people indeed always act habitually, instead of varying their interpretations and their actions for strategic reasons or just in order to prevent their life from becoming a monotonous affair.

Obviously, in practice no habit is a strict regularity – otherwise, people would be machines. Nevertheless, habits are not just theoretic *Idealtypen* – they play an important part in life. Apart from the efficiency-aspect already mentioned, this is so because the patterns of behaviour to which they amount often reflect a norm that ought to be complied with. It is difficult to identify the causes of this coincidence. Berger and Luckmann attempt to explain the obligatory quality habits often possess in terms of the objectivity they appear to radiate.[72] Above, I have already proposed a conception of institutional facts based on the idea of the objectivity of social phenomena. In general, we do not feel the need to contest the meaning of institutional facts, as it is the only interpretation at our disposal for the signs at hand. Since there are no competing interpretations, the one we apply appears to us as an objectivity – it becomes a *fact*. The next step in the process is that members of the community who, for some reason or other, did not take part in this process of objectivitation are *pressed* also to accept this interpretation because they are otherwise punished for disobedience.

Essentially, the same goes for social habits: over time, habits often change from 'a possible way to attain objective *a*' into 'the one and only way to attain objective *a*'. In the terminology introduced above, this transformation implies that one habitual interpretation of the way to attain *a* achieves objectivity. Compliance becomes a requirement – a *norm* emerges. Thus, norms are a special type of institutional facts, the interpretation of which involves performing actions in the context of objectivated habits. As Berger and Luckmann word it:

The objectivity of the institutional world 'hardens' and 'thickens' (. . . ). The 'There we go again' now becomes 'This is how these things are done'. A world so regarded attains a firmness in consciousness; it becomes real in an evermore massive way and it can no longer be changed so readily.[73]

---

[72] Berger and Luckmann, *supra* note 14, p. 76.

[73] *Ibid*., pp. 76–77.

Being external to the individual, habits that have turned into institutional facts resist attempts of individuals to change or to evade them. 'They have coercive power over him, both in themselves, by the sheer force of their facticity, and through the control mechanisms that are usually attached to the most important of them.'[74]

A probable additional explanation of the normative force habits develop builds on the fact discussed above that people tend to rely on habits for reasons of (mental) efficiency. Regularity is preferable to irregularity because it saves the time and the energy required to cope with changes. Therefore, the argument runs, habits obtain normative force once they have structured behaviour for some time because the mere *possibility* of deviance already generates inefficiency. To this, Gilbert adds the psychological argument that people tend to conform to the regularities they perceive, because they are anxious to count as *normal*.[75]

In *The Construction of Social Reality*, Searle develops an account of institutional facts in which the role accorded to habituation by Berger and Luckmann is taken over by the notion of unconscious rule-following. Creating institutional facts and dealing with them is a matter of individuals following rules unconsciously, Searle asserts.[76] At first sight, one would perhaps presume that rules can only be followed *consciously* – for if an individual behaves unknowingly in accordance with a rule, one might say that it is of no avail to explain this by arguing that he observes that rule unconsciously. This reasoning Searle rebuts by stating that, indeed, 'in many cases the rules are not even the sort of rules that we *could* be conscious of'.[77]

In explaining the phenomenon of unconscious rule-following, Searle bases himself on the notion of 'the Background', i.e. 'the set of nonintentional or preintentional capacities that enable intentional states of function'.[78] Searle argues the importance of this notion by stressing the role of the Background in the apprehension of verbal or written locutions:

---

[74] *Ibid*., p. 78.

[75] Margaret Gilbert, *On Social Facts* (Princeton: Princeton University Press, 1989 (1992)), p. 404.

[76] Searle, *supra* note 7, p. 128.

[77] *Ibid*., p. 128 (italics in the original).

[78] *Ibid*., p. 129.

The simplest argument for the thesis of the Background is that the literal meaning of any sentence can only determine its truth conditions or other conditions of satisfaction against a Background of capacities, dispositions, know-how, etc., which are not themselves part of the semantic content of the sentence.[79]

We all have a certain knowledge of how the world works, Searle says. It is this knowledge which primarily structures our interpretation of locutions – not the semantic content of these locutions. In general, '[a]ny intentional state only functions (...) against a set of Background abilities, dispositions, and capacities that are not part of the intentional content and could not be included as part of the content.'[80]

In Searle's view, use of the Background evolved as a practical shortcut to interpretation: '[w]e normally just see an object or understand a sentence, without *any* act of interpreting'.[81] That is, we generally do not perform a conscious and deliberate act of substituting the sounds we hear or the objects we see with an element of our knowledge.

According to Searle, understanding of the causal relations between the structure of the Background and the structure of systems of social rules must be based on the insight that the Background can be causally sensitive to the specific forms of the rules that are constitutive of institutional facts, without actually containing any beliefs or desires or representations of those rules.[82] 'One develops skills and abilities that are, so to speak, functionally equivalent to the system of rules, without actually containing any representations or internalizations of those rules.'[83] Individuals can, therefore, pick up a rule – and consecutively apply it – without being aware of this.

To tie this down to a concrete case, we should not say that the experienced baseball player runs to first base because he wants to follow the rules of baseball, but we should say that because the rules require that he run to first base, he acquires a set of Background habits, skills, dispositions that are such that when he hits the ball, he runs to first base.[84]

---

[79] *Ibid*., p. 130.

[80] *Ibid*., pp. 131–132.

[81] *Ibid*., p. 134 (italics in the original).

[82] *Ibid*., p. 141.

[83] *Ibid*., p. 142.

[84] *Ibid*., p. 144.

Surveying his argument, it appears that, in fact, it is not the observance of *rules* which Searle investigates. His actual object of study is conformation to *social habits*. As a consequence, what Searle terms 'unconscious rule-following' is actually the outcome of a process of social habituation *tout court*.

The feature missing in Searle's analysis is the mandatory character of rules and norms – the obligation to consider the line of conduct specified as the one and only correct mode of behaviour. Only by taking this into account as well could an explanation based on the notion of unconscious rule-following be of any help in answering questions such as why it is that members of a community consider it to be *right* that all of them follow rule *r* spontaneously. In a Searlian world the addressees of rules are at a loss to answer this question. They are unable to recognize that they are following rules, let alone to imagine such rules as ideals the observance of which can be conceived as a moral requirement. In other words, Searle does not model people, first, as conceiving of institutional facts as objectivated conceptual objects and, second, as identifying their normative character. As a consequence, the question of how institutional facts come about and how rules and norms exist is, from the Searlian perspective, meaningless.

We have to conclude that Searle – by contending that institutional facts are his true objects of study – neglects the normativity of institutional facts. His model can only help us in gaining understanding of normative systems if we supplement it with an account of the normative force of norms and rules.

## 5. RECAPITULATION: INSTITUTIONALIZATION

The process by which concepts turn into social habits and thus acquire normative force I term 'institutionalization'. In line with this, an institution is then a concept that the members of a community generally consider to be the only possible typification of a certain class of situations for the reason that this typification – by habituation – has attained objectivity.

The latter definition strongly resembles Berger and Luckmann's characterization of what they call 'historical institutions'. According to Berger and Luckmann, institutions are shared reciprocal typi-

fications of habituated actions by types of actors.[85] They attain objectivity '[w]ith the acquisition of historicity' – that is, as soon as they are conveyed from one generation to another.[86] Then, the younger generation experiences the institution 'as existing over and beyond the individuals who 'happen to' embody them at the moment'.

In other words, the institutions are now experienced as possessing a reality of their own, a reality that confronts the individual as an external and coercive fact.[87]

Institutions not only embrace shared typifications, but also an idea that these are the only correct interpretations. For an *idealtypische* institution is deemed by the members of the relevant community to provide the only possible interpretation of a certain state of affairs. The interpretation it offers is *unquestionable* to them.

The above could be illustrated in many ways, but perhaps it is useful to return to Santa Claus, since he offers the opportunity to consider both sides of the coin. A child grown up in a Western country will, as noted, conceive of any white-bearded person clothed in a red suit trimmed with white fur as Santa Claus. By themselves, they will never recognize a person dressed this way as their father. That is, as long as the latter plays his role well – a popular Christmas song from the fifties teaches that he sows suspicion by kissing Mummy beneath the mistletoe. In other words, to children the notion of Santa Claus is an institution. Not to their mother, however. For why would Mummy kiss a white-bearded person clothed in a red suit trimmed with white fur if she only recognized him as Santa Claus! Obviously, she is able to recognize her husband in disguise as playing the role of Santa Claus, but this is not the sole typification she has at her disposal. Therefore, she is capable of alternating interpretations: towards the children she acts as if the man in red were Santa Claus, but in her own approach to him she indubitably recognizes him as her husband.

The unquestionability of an institutional interpretation implies that the members of a community regard the institution itself as an objectivity. To them, it possesses a reality of its own. In other words,

---

[85] Berger and Luckmann, *supra* note 14, p. 72.

[86] *Ibid.*, p. 76.

[87] *Ibid.*, p. 76.

an institution is 'a reality that confronts the individual as an external and coercive fact'.[88] Thus, to children the existence of Santa Claus is beyond any doubt even when they are not actually seeing a white-bearded person clothed in a red suit trimmed with white fur. In the case of institutions that can have more instances than the one to which Santa Claus is restricted – according to truly believing children –, the objectivity mentioned consists in the conviction of people that the institution exists over and beyond the individual objects that 'happen to' embody it.[89] This can, for instance, be illustrated with traffic-signs. As an example, I take the round sign that is completely red, except for a horizontal white rectangular. Most of us, can easily produce a list of four or five particular roads at the sides of which signs of this kind are positioned.

Of course, we know that each of these particular traffic-signs expresses the norm 'You may not enter this street from this side, except by foot'. But: *how* do we know this? In other words, how do we know the meaning of each of these particular signs? Basically, because we once learned that all signs *of this type* express the norm 'You may not enter this street from this side, except by foot'. In fact, it is an element of objective knowledge to us that plates of red metal with a horizontal white rectangular are not just metal plates, but also signs expressing a particular norm. This element of knowledge – this abstract institutional fact – exists independently of the particular plates by which it is instantiated.

## REFERENCES

Berger, Peter and Luckmann, Thomas, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Harmondsworth: Penguin, 1966 (1991)).

Bloor, David, *Wittgenstein: A Social Theory of Knowledge* (London and Basingstoke: Macmillan, 1983).

Gilbert, Margaret, *On Social Facts* (Princeton: Princeton University Press, 1989 (1992)).

MacCormick, Neil and Weinberger, Ota, *An Institutional Theory of Law: New Approaches to Legal Posivitism* (Dordrecht: D. Reidel, 1986).

---

[88] *Ibid*., p. 76.

[89] *Ibid*., p. 76.

Peczenik, Aleksander, 'Empirical Foundations of Legal Dogmatics', *Logique et Analyse* 12 (1969): 32–64.

Schiffer, Stephen R., *Meaning* (Oxford: Clarendon Press, 1972 (1974)).

Searle, John R., *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969 (1990)).

Searle, John R., *The Construction of Social reality* (Harmondsworth: Allen Lane, 1995).

Tamanaha, Brian Z., *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Oxford: Clarendon Press, 1997).

Weinberger, Ota, 'Das Recht als Institutionelle Tatsache: Gleichzeitig eine Überlegung über den Begriff des Positiven Rechts', *Rechtstheorie* 11 (1980): 427–442.

Wittgenstein, Ludwig, *Philosophical Investigations* (Oxford: Basil Blackwell, 1953 (1992)).

Wittgenstein, Ludwig, *The Blue and Brown Books* (Oxford: Basil Blackwell, 1958 (1997)).

University of Twente
Faculty of Public Administration and Public Policy
P.O. Box 217
7500 AE Enschede
The Netherlands
p.a.j.hulsen@bsk.utwente.nl