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THE SEMANTIC CONCEPTION OF EFFICACY AND CONSTITUTIVE RULES: MAPPING A TOUGH RELATIONSHIP¹

abstract

This paper attempts to answer whether the property of “efficacy” can be attributed to constitutive rules. In particular, according to Di Lucia, I will point out some problems that the “semantic conception of efficacy” has concerning constitutive and regulative rules. Then, the main goal of the paper will be to reflect on the possibility of the efficacy of constitutive rules by means of a complex case that the semantic conception seems to disregard: The case of the cheater. Does the action of the cheater show the inefficacy of constitutive rules? Does she play the game while breaking the rule? Can the semantic conception of efficacy explain this situation, or do we need a more flexible concept of efficacy that takes nomotropism into account? These are some of the questions I will try to answer.

keywords

efficacy, constitutive rules, nomotropism, semantic conception of efficacy, cheating

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**1. Introduction:
The “Semantic
Conception of
Efficacy” (SCE)
and Constitutive
Rules**

According to Paolo Di Lucia’s characterization (2010, pp. 84-86), the “semantic conception of efficacy” (SCE) adapts Tarski’s theory of truth as correspondence to the efficacy of norms.¹ As a result, this conception holds that “(j)ust as a statement ‘p’ is true or false depending on whether it corresponds or not to a state-of-affairs *p*, a norm *Op* is efficacious depending on whether it corresponds or not to a state-of-affairs *p*” (Di Lucia, *forthcoming*). Thus, a norm is said to be efficacious if it corresponds to an agent’s actual behaviour *p*, while it is said to be inefficacious if it does not.²

The property of efficacy has been widely studied in relation with prescriptions or commands. However, there is another type of norms or rules³ which also deserves to be considered: constitutive rules.

John Searle presented his classic distinction between constitutive and regulative rules in his first book *Speech Acts: an essay in the philosophy of language* (1969), focusing on three main aspects which I have called (Lojo, 2022): the argument from the referred object, the argument from syntax, and the argument from rule breaking.⁴ Here, I will focus on the last argument. The rule-breaking argument shows that only regulative rules can be broken. An agent can easily break a regulative rule by simply acting against the prescribed behaviour. But how can I checkmate without moving the pieces on the board in such a way that the king is threatened and cannot defend itself? It seems logically impossible, “indeed, it is not easy to see how one could even violate the rule as to what constitutes checkmate in chess, or touchdown in football” (Searle, 1969, p. 41). Thus, agents can fulfil or break a regulative rule, while they can only fulfil the constitutive rule, or not being playing the game or interacting with an institution.

1 I will use the noun “efficacy” and the adjective “efficacious” because I want to analyse how this property is attributed to certain norms. However, some other authors prefer the use of the terms “effectiveness” and “effective”, which, in contrast, is more commonly used for normative systems. In this case, I will follow Burazin (2019) and make no distinction between the two options.

2 This concept of efficacy is also followed by various legal theorists, see for example: Moreso and Navarro (1996, p. 120), Hierro (2003, pp. 75-76) or Vilajosana (2010, p. 180). In fact, Di Lucia attributes this conception to Kelsen (1945).

3 In the rest of the paper, I will use the terms norm and rule interchangeably.

4 In general, Searle is the main reference talking about constitutive rules. However, it is recognized that the origins of the concept are from earlier in time, for instance Znamierowski (1924) and Rawls (1955), and they have been deeply studied by other areas apart from social ontology, like legal theory. See Conte (1986/1995; 1988), Roversi (2007) or Marmor (2023).

The main goal of this paper is to reflect on the possibility of the efficacy of constitutive rules by means of a complex case that the semantic conception seems to leave aside: the action of the cheater. Does the action of the cheater show the inefficacy of constitutive rules? Is she playing the game while breaking the rule? Can SCE explain this situation, or do we need a more flexible concept of efficacy that takes *nomotropism* into account?

Imagine that I am a chess player and I decide that my priority is to defend my king, and so I exchange the squares of my rook and king, following the rules of castling. After that, the game continues, and the other chess player makes her moves. After a few moves, however, my colleague realises that I have overlooked an important condition: At that moment, I had already moved my rook and thus “lost” my right to castling as stipulated by the rules of FIDE (Art. 3.8.b.). She accuses me of cheating, but she wants to continue the game. What can we do in this situation?

According to the classic rule-breaking argument, one possible answer is to understand that “[t]o fail to comply with a constitutive rule is simply to fail to engage in the activity subject to that rule” (Marsili, 2019, p. 4). Then, the main consequence of this situation is that I neither castled nor defended my king throughout the game. I will call this approach “the orthodox account”.⁵

However, it seems that at least in the moves before my colleague noticed the mistake, my king was defended by my rook.⁶

An alternative answer was offered by Williamson.⁷ Based on his concept of the constitutive rule of assertion, he states that “a rule will count as constitutive of an act only if it is essential to that act: necessarily, the rule governs every performance of the act” (Williamson, 2000, p. 239), Williamson argues that the unique necessary condition is the normative guidance of the rule. Consequently, “when one breaks a rule of a game, one does not thereby cease to be playing that game” (Williamson, 2000, p. 240). That is, false assertions are still assertions: “failing to satisfy the rule involves being liable to criticism, rather than not asserting” (Marsili, 2019, p. 5). The only caveat Williamson points out is that “some sensitivity to the difference -in both oneself and others- between conforming to the rule and breaking it presumably is a necessary condition of playing the game” (2000, p. 240).

With the aim of developing this last idea, García-Carpintero (2021) distinguishes between generating *abuses* or *misfires*, according to the Austinian terminology, while playing a game. Only when a player, like a spoilsport, commits a *misfire*, the activity is no longer a chess game. García-Carpintero suggests evaluating the intentional attitudes of the players to be rationally committed with the rules as a distinct criterion between *abuses* and *misfires*. Thus, the behaviour of spoilsports is incompatible with *being answerable* to the norms as a consequence of his potential game-termination: they want to ruin the game.⁸

2. The Rule-Breaking Argument Under Examination

a. *The Case of the Cheater*

b. *The Orthodox Account*

c. *Other Approaches: Williamson and García-Carpintero*

5 According to Marsili (2019).

6 As García-Carpintero said, this is one of the obvious failures of the descriptive account of constitutive rules (2021, p. 14).

7 Williamson develops an original account of constitutive rules and attempts to answer what the rule of assertion is. His proposal has sparked a lively philosophical debate, especially in the field of philosophy of language, but not only. See: García-Carpintero (2021), Kelp and Simion (2019), Marsili (2019) or Moreso (2022).

8 In a very similar sense, von Wright affirms “Of a person who does not play in accordance with the rules of chess, we would say either that he plays *incorrectly* or that he does not play *chess*. We would say the first, e.g., if he wanted to follow the rules but did not know or understand what they demanded of him. Or we would say it if he is trying to cheat his opponent. We would say the second, e.g., if he did not care about following the rules, or consciously and

The case of the cheater is a clear example of an *abuse*: I have broken a constitutive rule of the game about castling, but I maintain my intentional commitment to being answerable to constitutive rules. I may be an inept player or a tactical rule-breaker, which would affect my motives and compatibility with the values of the game, but my action is still compatible with “rationally having the intention of being answerable to the norms and being committed to obeying them” (García-Carpintero, 2021, p. 22).

3. Why the Semantic Conception is Not Sufficient

In the preceding sections I have outlined the main elements that will form the core of my considerations: What is SCE, what are constitutive rules, and how is the case of the cheater explained by the orthodox account and by alternative accounts. In this section, I will explore what the limits of SCE are and, in particular, whether it can be applied to constitutive rules and to the case of the cheater.

a. Limits of the “Correspondence” Between Norm and Action

Di Lucia (2010, forthcoming) criticises SCE on several grounds: Both its presuppositions and its categorization turn the efficacy into a too *narrow* property.⁹ First, because of its presuppositions (reducing the normative to the deontic, and the deontic to the obligatory) and second, because of its limits (the correspondence between norm and behaviour is a necessary and sufficient condition for norms to be efficacious). Therefore, it excludes kinds of normativity that are not deontic and considers the obligatory/forbidden as the unique deontic category. For instance, it excludes abrogative or permissive norms.

Moreover, the concept of “correspondence” is also too narrow: It considers the norm to be efficacious only if the behaviour *p* corresponds exactly to the content of the norm.¹⁰ Di Lucia (forthcoming) presents several examples where certain behaviours occur because of norms but are not in a strict correspondence relationship, such as the professor who does not stand by the faculty council in order not to reach the quorum, or the act of eating on Yom Kippur (the holy day of atonement for which fasting is the most important rule) by anarchist and social democratic Jews: an act that is only understandable against the background of the rules of Yom Kippur.¹¹ Another good example of cases that are not considered under this conception is the idea of “nomotropic behaviour” or *nomotropism* developed by Conte (2001), which refers to subjects who are oriented *according with* or *in-function-of* a norm (or a normative order).¹²

Moreso and Navarro (1997) have also considered what states of affairs count as evidence of the efficacy of a legal norm. In their paper, they propose two concepts of applicability (internal and external) that constrain the conceptual network of norm efficacy. They conclude that “‘N is effective’ is neither true nor false when N is not applicable” (1997, p. 211). Thus, they answer the question suggesting that “a state of affairs is relevant to the effectiveness of a norm if and only if it is regulated by its spheres of validity [personal, material, spatial, and temporal]” (1997, p. 216).¹³ However, as they also recognised, the problem of asymmetry between the role

consistently played according to different rules” (1963, p. 5).

9 The justification for this narrowness stems from the idea of using “efficacy” for imperatives as an analogy to “truth” for propositions and establishing the relation between language and the world through the parameter of “correspondence”.

10 There is one sense in which the conception is too wide: it also includes cases of coincidence where conformity occurs not because the agent follows the rules, but for some other, completely independent reason. On the difference between fulfilment/compliance and coincidence, see Vilajosana (2010, p. 180) and Hierro (2003, pp. 75-83).

11 The example is developed by Cover (1983, p. 8).

12 Due to that, Di Lucia concludes that another, more comprehensible concept of efficacy is preferable, such as efficacy as impactfulness (from norm to action), which includes various cases of nomotropic behaviour.

13 That is, when it is internally applicable.

of personal and material sphere of validity remains: Only the complementary class of actions of the material sphere is relevant for inefficacy. According to von Wright (1996), they note that the asymmetry “seems to stem from the fact that it makes sense to attribute effectiveness or ineffectiveness to a conditional norm only when its antecedent is true” (1997, p. 217). As a result, if a mother orders to her son “if you go out, you should take your coat”, and the son decides not to go out because he cannot find the coat, we cannot consider the order as efficacious despite our intuition, because the antecedent is not true during the action.¹⁴

The above features of SCE complicate the possibility of applying it to constitutive rules.¹⁵ First of all, constitutive rules do not necessarily contain a deontic clause that provides the possibility to act against the behaviour prescribed to determine the inefficacy of norms. We can, however, conform our behaviour to the one described in the norm to achieve the appropriate institutional outcome. Thus, when an agent fails to fulfil a constitutive rule: What happens then? It may not be a situation of disobeying the rule, but it seems that it could be a situation of violation of the rule.

b. Is It Possible to Apply SCE to Constitutive Rules?

Some authors have argued that correspondence between norm and behaviour is necessary for constitutive rules: if the behaviour does not fulfil the norm, the normative consequences would simply not be achieved.¹⁶ For example, in the case of the rule that constitutes marriage, the index of correspondence is always equal to one, since there is no marriage that does not fulfil the conditions set out in its constitutive rules (Hierro, 2003, pp. 81-82).¹⁷ This possibility reminds us of the orthodox account we saw earlier. Basically, the orthodox account states that we cannot play the game of chess if we break some of its (constitutive) rules. That is, the index of correspondence is equal to one: you play chess (and satisfy all its rules) or you play some other game.

i. The Orthodox Account

As we have seen, Williamson’s idea of a constitutive rule of assertion, which García-Carpintero also follows, consists in the formula “(The C Rule) One must: assert p only if p has C”, where “[t]he rule unconditionally forbids this combination: one asserts p when p lacks C. The combination is possible, otherwise it would be pointless to forbid it” (Williamson, 2000, p. 241). His proposal thus allows for the possibility that “[w]hen one breaks a rule of game, one does not thereby cease to be playing that game” (idem) and that the cheater was thus playing the game while committing an *abuse*.¹⁸ So let us take our example: when I switched the squares of my rook and king, I violated the rules of castling, but I still had the intention of being answerable to the norms. The moment

ii. The Account of Williamson and García-Carpintero

¹⁴ Moreso and Navarro (1996, pp. 120; 134-135) use this example from Dummett to illustrate the difficulties in determining the relevant actions in this other earlier work.

¹⁵ For example, as Moreso and Navarro (1997, pp. 214-215) affirm, if we consider the rule of recognition as a constitutive rule, the fact that the rule of recognition has no external applicability (there is no other norm in a given legal system that prescribes its application) makes it neither efficacious nor inefficacious (also, the rule of recognition can neither be obeyed nor disobeyed).

¹⁶ See González Lagier (1993, p. 268) or Hierro (2003, p. 81).

¹⁷ Hierro (2003, p. 78) suggests measuring the gradual character of efficacy as correspondence (from 0 to 1) through the formula: Index of efficacy = N. behaviours with conformity / (N. individuals affected · N. times applied). Apart from the problems of this formula, which Hierro and others also point out (see Vilajosana, 2010, p. 193), it is useful to see the necessity in the case of constitutive rules: Their efficacy is absolute because there is no possible behaviour without conformity.

¹⁸ Due to the fact that cheating is still compatible with “rationally having the intention of being answerable to the norms and being committed to obeying them” (García-Carpintero, 2021, p. 22).

my colleague noticed the mistake, I realised that I had made an *incorrect* castling. In this case, according to Williamson, I broke the rule, and my behaviour did not conform to the norm, but I was still governed by the constitutive rules of chess. Then the application of SCE would admit the inefficacy of the castling norm in this particular situation, but also the general acceptance of the rules of chess due to the commitment of the cheater and the correspondence between norms and behaviour through the rest of the moves. Only a misfire would show a complete inefficacy of the chess rules.¹⁹

iii. The Possible Answer of Searle

So far, we have seen an argument against the possibility of using SCE to explain constitutive rules, namely the one followed by the orthodox account, and an argument in favour of this possibility followed by the alternative account of constitutive rules. I will now develop what answer Searle might give to this question.

The orthodox account is based on the traditional distinction between constitutive and regulative rules that Searle develops in his first book (1969). However, in his books on social ontology (1995, 2010), the author deepens his notion of constitutive rules and develops a more complex theory based on collective intentionality. This change is important for the possible answer Searle would give to the application of SCE to constitutive rules.

SCE proposes to examine how the world is in order to attribute efficacy or inefficacy to norms. Specifically, how are certain aspects of the world that correspond to the spheres of validity (personal, material, spatial, and temporal) of the norm. Therefore, we can claim that for SCE, the relevant direction of fit is mind-to-world.²⁰

However, Searle considers that constitutive rules represent the structure of collective intentionality when it assigns and maintains a status function thanks to collective acceptance (1995, pp. 113-114). And collective intentionality has a double and self-referential direction of fit (2010, pp. 29; 34-35): on the one hand, it depends on 1) I/we accomplish the content of our mental state (direction world→mind) and, on the other hand, that 2) the world coincides with the content of our mental state (direction mind→world). For instance, if we have the collective intentionality: These green papers count as money, then we need that 1) everyone uses the green papers as a means of exchange, and 2) the green papers have been recognized as money, in order to satisfy the mental state and achieve that the constitutive rule has been applied. As a result, SCE only considers the variable of mind→world, and even if this aspect is crucial for the possibility that the institutional outcome is achieved, the condition world→mind must also be fulfilled. This is the case with marriage: the sentence “I declare you wife and husband” from the mayor counts us as being married if we act as if we are now married (direction world→mind), and if the world is like most of the people recognises or accepts our new status (direction mind→world). However, we can not only hardly consider the constitutive rule efficacious, if the direction of fit world→mind is not satisfied, but also it complicates the possibility that the direction of fit mind→world could be satisfied due to its self-referentiality.^{21,22}

19 With a similar intuition, Conte asks, “how does the behaviour of a cheater differ from the behaviour of someone who acts in a way that does not conform to a regulative rule?” (1986/1995, p. 334). Conte recognises that, on the one hand, cheating is possible and conceivable only during the game (following the general rules of the game), but on the other hand, the action of the cheater does not correspond to the action included in one rule (*idem*).

20 I.e., what are the conditions to adequate the propositional content to the reality.

21 To achieve success of fit, the world is thereby altered to fit the propositional content by representing the world as being so altered.

22 Of course, anyone can go to the courts to seek legal recognition of our marriage so to have access to all the legal rights and duties that go with it. However, I am pointing out the social dimension and consequences of not acting as having the new status, and how that can affect the satisfaction of the second direction of fit (e.g., having anyone

Under these circumstances, I do not think it is possible to apply SCE to Searle's concept of constitutive rules, because it ignores a very important aspect of them.

Be that as it may, there are reasons to explore other conceptions of efficacy that may be more appropriate to explain this property of constitutive rules.

There is an elementary intuition about institutions and efficacy: if we have constitutive rules that generate institutions, but no one follows or recognises the institution, then constitutive rules seem to have been inefficacious in some sense. The conception of efficacy as success, developed by Hierro (2003, pp. 82;160) and followed by Vilajosana (2010, p. 195), attempts to provide an answer to this intuition by analysing the instrumental capacity of norms to give rise to the appropriate state-of-affairs.

Focusing on the case of the cheater, the proposal of efficacy as success would admit that the constitutive rules of chess have reached the appropriate state-of-affairs (the game has evolved according to the rules), so they have been efficacious. Even in the case of the constitutive rule of castling, it was efficacious: I made a mistake, by not respecting one of its main conditions (not to castle when the king or rook has already moved), but when my colleague realised this, we both recognised the mistake (the wrongness of my action) and that I must bear the consequences: According to the rules of FIDE "the position immediately before the irregularity shall be reinstated" (Art.7.4.a).²³

This conception is also consistent with the double and self-referential directions of fit of the constitutive rules indicated by Searle: it includes the general intention to pursue the new state-of-affairs of the constitutive rules (direction world→mind), and also the recognition of the new state-of-affairs by the community (direction mind→world). That is, we need the general intention to follow the rules, and the general recognition of what does it mean.²⁴

Di Lucia (2010) proposes the conception of efficacy as impactfulness as an alternative to SCE:²⁵ a norm has efficacy when behaviour is developed directly or indirectly because of the norm. This conception allows him to include all cases of *nomotropism*, i.e., all the attitudes of the subjects that act in function of a norm but not necessarily acts in accordance with the norm (Conte, 2001, p. 910), and to evaluate norms as efficacious or inefficacious accordingly. Following one of the examples seen, this conception would consider the norms of Yon Kippur as efficacious when the anarchist Jews ate publicly.

In the case of the cheater, this conception also considers the rules of chess and castling efficacious: the act of cheating is conceivable only on the basis of these rules, and their efficacy

4. Alternative Positions: How Can We Explain the Efficacy of the Constitutive Rules?

a. *Efficacy as Success*

b. *Efficacy as Impactfulness*

in town recognize our marriage as a "real" marriage, apart from what the judge says; for instance, not be invited to Christmas dinner, acknowledgment as heirs...).

23 Someone might say that committing a mistake is different from cheating. From an external perspective, both have committed the same action, but from an internal perspective, only the second has acted knowing that it is a violation of the castling rule. In the case of the cheater described above, this point is not clarified, but, according to García-Carpintero, although the motives of the cheater and the inept player are different, the central aspect is *rationality* having the intention of being answerable to the norms. For this reason, it is fundamental to know whether the cheater or the inept player will eventually apply the FIDE's art.7.4.a.

24 That it is to say, the conception of efficacy as success solves one of the main problems of the semantic conception of efficacy to evaluate constitutive rules: not only the behaviour matters, but also the attitude.

25 Originally, the term used by Di Lucia (2002) is "*efficacia come operanza*", translated into Spanish (2010) as "*eficacia como operación*". However, I will follow Fittipaldi's convincing suggestion here and translate it as "impactfulness", as the English term is closer to *praxeotropismo* (the complementary idea of *nomotropismo*: *nomotropico* is a predicate for behaviours, while *praxeotropico* is a predicate for norms). See Fittipaldi (2017) for a historical reconstruction of the use of the term by different authors.

is proved by my behaviour when I tried to defend my king while playing the game (and fulfilling the other rules).

Before concluding my reflections, a clarification is necessary: we can distinguish this conception from the previous one. As Hernandez Marín (1989, p. 302) points out, efficacy or inefficacy is a property of norms while fulfilment or unfulfilment is a relation between the agent and the norm. In the conception of efficacy as impactfulness fulfilment includes all possible behaviours in which the norm has shaped the background of the action, while in the conception of efficacy as success, fulfilment requires certain normative attitudes of intention and recognition or acceptance by the agent and/or the community. Consequently, only this last conception requires an acknowledgment of the institution.

5. Conclusions

In summary, in the first two sections I have presented the SCE, the constitutive rules, and the central example that has guided the reflections: the case of the cheater. I have also presented the orthodox account and the alternative account that dispute the interpretation of this case. In section three, I then explored where the general limits of SCE lie, and in particular the positions that arise when it is applied to constitutive rules: the orthodox account that denies this possibility, the alternative account that admits it, and Searle's position. Finally, I have proposed to pursue two other conceptions of efficacy that have more explanatory power to illustrate the case of constitutive rules.

Several conclusions could be drawn. First, we have seen in several examples that the limits of SCE are different when applied to regulative rules (or commands) or to constitutive rules: For example, the coat's command leads to inaction to avoid unfulfillment while the case of the cheater shows an action that unfulfills one rule while fulfilling the others. In general, however, I have described it as a too narrow conception: In both cases, SCE leaves aside actions that were produced because of the norm but not in a strict relationship of "correspondence".

Second, a coincidence between the behaviour and the norm is problematic for SCE and could be considered a "false positive". However, this is not a problem for the other conceptions seen: merely "acting in accordance with" by the rest of the community is a sufficient condition for efficacy as success; and similarly, acting within the framework without knowing it is sufficient for efficacy as impactfulness.

Finally, based on the different positions examined, it seems plausible to conclude that the possibility of applying SCE to constitutive rules depends mainly on the conception of constitutive rules managed. For example, the orthodox account, which conceives constitutive rules as definitions or analytic truths (Searle, 1969, p. 34), and which denies the possibility of breaking a constitutive rule and still playing the game, holds that SCE is inapplicable because correspondence is necessary: if the behaviour does not fulfil the norm, the normative consequences would simply not be achieved.²⁶ In contrast, the alternative account of Williamson and García-Carpintero admits the possibility of applying SCE to constitutive rules: Their proposal allows for the possibility that the cheater acts and still plays the game, and holds that she has only committed an *abuse*, since the only necessary condition is the normative guidance of the rule. Consequently, SCE attributes inefficacy to the castling rule because there is no correspondence, but also efficacy with respect to the rules of chess. Lastly, the conception that constitutive rules are intentionally collective mental states with normative attitudes does not allow for the applicability of SCE because of the double and self-referential conditions of satisfaction of constitutive rules. This option requires a more

²⁶ It seems that the orthodox account directly refuses the possibility that constitutive rules have the property of efficacy.

comprehensive conception of efficacy, as proposed in the last section: efficacy as success and efficacy as impactfulness.

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