1. Introduction

Institutions have their own concepts. This becomes immediately clear to us the moment we need to cope with legal systems, with economical frameworks, and even with formalized forms of religion. In all these contexts, we must learn the relevant concepts to act meaningfully, and these concepts are internal in a peculiar way, namely, for the most part they play a role only in the specific institutional setting they have been created for. In order to capture this peculiar feature of institutional concepts, an authoritative view in contemporary philosophy asserts that they are strictly relative to the rules of a given institution because they are constituted by those rules.

However, this is not the whole story. Institutions do not come out of nothing: They are inscribed in a social setting and this setting determines, at least in a broad sense, what is their nature, namely, whether they are legal, economic, or ritual, for example. Our social life therefore creates more or less defined contexts for meaningful institutional activities, and

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1 There is an important terminological question regarding my use of the term institution that must be clarified. In this paper, I borrow John Searle’s broad conception of institutions as “systems of constitutive rules” (Searle 1995, 27-8; cf. also Searle 2010, 10) even though I realize that not all phenomena falling under this category would be classified as institutional according to standard linguistic usage. For example, chess is an institution in Searle’s sense, but not so according to the ordinary meaning of this word.
these contexts in their own turn involve concepts. Hence, the view according to which the whole of an institutional activity can be explained in terms of concepts constituted by the institution’s rules needs to be amended: Other kinds of concepts can be relevant in institutional discourse. Rather, the relevant question becomes whether it is possible to categorize these other concepts and which kind of relation they have with the constitutive rules of an institution.

What holds for institutions in general holds for law in particular. All legal systems include concepts which are peculiar to those systems because they are constituted by their rules. Typically, this entails that there is a web of intertwined concepts of legal facts, acts, events, and the like, which we must know in order to engage in the actual practice of a legal system—and for this purpose we must have good acquaintance with the norms of that system. This is the distinctive perspective of law: A set of normative glasses or “schemes of interpretation” (in Kelsen’s words: Deutungsschemata) by means of which we become able to add a further layer of legal phenomena over the more or less “basic” layer of brute (natural and social) facts. However, it would be too restrictive to think that this is the only perspective that we can adopt when dealing with law. As in the case of other kinds of institutional rule-constituted phenomena, law is a practice with social significance, and some of its basic concepts depend on this practice more than on the peculiar features of this or that legal system. This entails that different perspectives are possible regarding law that are not restricted to the meaning of rule-constituted legal concepts.

In this paper I will distinguish between five kinds of concepts relevant for an institution, and I will show that, when applied to law, this distinction will make it possible to identify five different perspectives that can be adopted on legal phenomena. The structure of the paper is as follows. In Section 2 I treat rule-constituted institutional concepts, clarifying in what sense they are constituted by rules and showing that they correspond to a structural perspective on legal facts. In Section 3 I deal with meta-institutional concepts, distinguishing between teleological and axiological meta-institutional concepts and showing how these two kinds of concepts can be used when adopting respectively a teleological and axiological perspective on law. In Section 4 I introduce the category of para-institutional concepts, distinguishing between praxeological and idiomatical para-institutional concepts and showing how they can be used when adopting respectively a strategic and sociological
perspective on a given legal practice. Finally, in Section 5 I summarize my analysis and discuss a little bit further the relations between these different legal perspectives.

2. Institutional Concepts

In his recent *Making the Social World*, John Searle distinguishes between three different types of institutions. The first type he calls “creation of an institutional fact without an institution” (Searle 2010, 94): Here, members of a community simply assign normative consequences (what Searle calls “status functions”) to a given entity by virtue of collective acceptance, as in the case of a line of stones which is recognized as a boundary. The second type of institution includes status function attributions—and hence, attributions of normative consequences—on the basis of constitutive rules in the form “X counts as Y in context C”, as when a community “evolve a standard procedure for selecting the king” (Searle 2010, 96). The third type, which is the more complex case, has to do with constitutive rules which create institutional facts out of simple declarations without the need for a preexisting physical object or entity on which to impose the status function, as in the case of corporations and other abstract institutional entities (Searle 2010, 97-8).

Of these three types, only the second and the third clearly have to do with the creation of new concepts. Institutional facts of the first type, in fact, simply involve the attribution of normative consequences and import to an individual entity, while both the concept of these consequences and of the “brute” entity can very well be created independently from that particular institutional fact. When, for example, we assign by declaration the status of boundary to a given line of stones, we presuppose the concept of boundary rather than constituting it: We know what a boundary is, we know what it means to be a boundary, and we assign this status to the line of stones. Not so when we have to do with constitutive rules.

Searle clarifies that constitutive rules are standards for the attribution of status functions, standards that specify under which conditions a given status function—and hence, again, normative consequences—can be attributed: This is the role of the formula “X counts as Y in context C”, typical of constitutive rules, where we specify under which conditions status Y can be applied. But, as said, this status is in its own turn connected with a status function and this function is connected with “deontic powers” (in Searle’s own terminology), that is,
with normative consequences. Hence, if we were to specify the full constitutive rule of a
given institutional fact we should complement Searle’s “count as” formula with this
normative element, for example stating “X counts as Y, and Y entails status function Z, in
context C”. Now, this formula creates a new concept of Y because it fully specifies Ys’
conditions of identity: In particular, two Ys are the same Y if they correspond to the same X
and entail the same status function Z. We have to do here with a standard procedure for
selecting Ys in the world and for attributing them an institutional meaning: Thus, even if the
concepts of Z (the normative consequences) and X (the brute element) are already existing,
nonetheless here a new concept arises, namely, that of Y.

Searle’s example in this regard—that of a standard procedure for selecting a king—can be
misleading. In fact, one would be tempted to say that we already have the concept of a king,
and that with this concept we simply do the same thing we do in the case of institutional
facts of the first type: We attribute status functions and normative consequences without
any need to create new concepts. This is not so, however. In fact, if we set forth a
constitutive rule stating that the the king (Y) is a person selected in this and that way (X) and
having this and that power and/or obligations (Z), in this way we create a new concept of
“king” relative to our institutional setting—a “technical” concept, so to say, even though the
term king has a nontechnical meaning in ordinary language.

This is the main feature of what I will call institutional concepts, namely, that constitutive
rules are the necessary and sufficient conditions for their existence because they create them.
Chess is a typical example of a system of rule-constituted concepts. Terms such as king, 
queen, bishop and the like have in fact a distinctive chess-relative meaning—even though they
certainly have an ordinary and completely different meaning—and the system also includes
concepts (“checkmate”, for example) which are introduced by means of neologisms. The
constitutive rules of chess create these concepts by defining both their conditions of
fulfillment and the “deontic power” or normative consequences associated with them (in the
case of chess pieces, the rules set forth the pieces’ starting place on the chessboard, the

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2 This reformulation of Searle’s constitutive rules has been discussed at length by Frank Hindriks
and before him by Neil MacCormick: see (Hindriks 2005), (Hindriks 2009), (MacCormick 1986),
(MacCormick 1998).
discipline of their movement, and their power to take other pieces and possibly to attack the king).

Law has an abundance of institutional concepts. When we speak of “marriage” in a legal sense, for example, we deal with a technical concept that is constituted by rules (in Italy, Art. 79ff. of the Civil Code), a concept which certainly has affinities and relations with its ordinary counterpart but which nevertheless does not coincide with it. Marriage in the legal sense is something different, and more specific, than marriage in a social and looser sense, because it has to do with rights and obligations that find their place in the legal system and thus have an impact on other norms of that system. Or consider the concept of “age of majority”: Art. 2 of the Italian Civil Code states that a person attains age of majority at the age of 18, and that with age of majority a person acquires full legal capacity. This is a clear case of constitutive rule: “In the Italian legal system, the age of 18 (X) counts as (Y) the age of majority, and age of majority entails (Z) legal capacity”. Art. 2 sets down both the conditions for attainment of legal majority and its normative consequences, thus creating the relative Italian legal concept: Therefore, the strictly technical legal meaning of age of majority in the Italian legal system is constituted by rules.

As already mentioned at the beginning of this paper, these legal institutional concepts—that is, concepts constituted by the rules of a given legal system—hold a strict correspondence with the basic perspective that legal scholars and practitioners must be able to adopt over facts, acts and events. The following, well-known passage from Kelsen’s *Reine Rechtslehre* shows the point very well:

If one analyses a parliamentary enactment, say, or an administrative act, a judicial decision, a private law transaction, a delict—all of which are referred to as [belonging to the] law—one can distinguish two elements. There is an act perceptible to the senses, taking place in time and space, an external event, usually an instance of human behavior. And there is a specific meaning, a sense that is, so to speak, immanent in or attached to the act or event. People assemble in a hall, they given speeches, some rise, others remain seated—this is the external event. Its meaning: that a statute is enacted. Or, a man dressed in robes says certain words from a platform, addressing someone standing before him. This external event has as its meaning a judicial decision. A merchant writes a certain letter to another merchant, who writes back in reply. This means they have entered into a contract. An individual brings about the death of another, and this means, legally speaking,
mutter. [...]xternal circumstances are always a part of nature, for they are events perceptible to the senses, taking place in time and space; and, as a part of nature, they are governed by causal laws. As elements of the system of nature, those events as such are not objects of specifically legal cognition, and thus are not legal in character at all: What makes such an event a legal (or an illegal) act is not facticity, not its being natural, that is, governed by causal laws and included in the system of nature. Rather, what makes such an event a legal act is its meaning, the objective sense that attaches to the act. The specifically legal sense of the event in question, its own peculiarly legal meaning, comes by way of a norm whose content refers to the event and confers legal meaning on it; the act can be interpreted, then, according to this norm. The norm functions as a scheme of interpretation. [...] The aforementioned exchange of letters means that a contract has been concluded, and it has this meaning solely because these circumstances fall under certain provisions of the civil code. That an assembly of people is a parliament, and that the result of their activity is a statute (in other words, that these events have this ‘meaning’), says simply that the material facts as a whole correspond to certain provisions of the constitution. That is, the content of an actual event corresponds to the content of a given norm. (Kelsen 1992 (1934), 8-10)

Which kind of perspective is that described by Kelsen in this famous passage? It is the purely structural perspective according to which we simply qualify facts and acts in legal terms. This is the perspective in which we say, for example, “a legal transaction has occurred here”, or “the assembly voted”, or again “that boy has already attained the age of majority”: Legal assertions having as their content the subsistence of some rule-defined fact, act, event or property to which the legal system attach normative consequences. From this perspective we can also draw normative statements as conclusions from factual statements regarding the correct instantiation of an institutional fact as premises, as when we say “that boy has already attained the age of majority and hence acquired full legal capacity”.

What I would like to show now, however, is that it would be naïve to think (as one could be tempted to do in the light of a narrow interpretation of Searle’s theory of institutions) that the whole set of concepts relevant for law coincide with that of institutional rule-constituted concepts, so that the only relevant legal perspective would be structural. There are other kinds of concepts which are undoubtedly relevant but which are not strictly speaking constituted by rules, and hence are not institutional concepts in the sense above introduced. The fact that these concepts are relevant for institutions while not being
constituted by rules shows that other institutional perspectives can be important apart from the purely structural one.

3. Meta-institutional Concepts

Consider again the example of chess. When we play a match of chess, we try to checkmate our opponent by moving pieces in a way he does not expect, thus behaving in the light of several different institutional concepts, thinking about our actual possibility to realize them and trying to make good use of their normative import in the match. But a time comes when we, or our opponent, say “I have won”. This is an extremely relevant statement for chess players, one that immediately requires verification. But what is this concept of “victory” which emerges in our practice of chess?

I think it should be immediately clear that victory is not a rule-constituted institutional concept, on the same level of “castling” or “checkmate”. While the conditions of fulfillment of victory in a chess match are determined by rules because victory is the normative consequence of checkmate, whose concept is constituted by the rules of chess, the import of victory—what it means to win in chess—is not constituted by the rules of chess. This question, in fact, has not so much to do with chess but rather with the broader practice of competitive game-playing of which the game of chess is an instance. What it means to win in chess is something we know if we are acquainted with this broader practice in general, and hence with chess as an instance of a game, rather than in particular with chess as a system of constitutive rules.

This has also been noted by Amedeo G. Conte (Conte 1995 (1st ed. 1993), 530) and then by Giuseppe Lorini (Lorini 2003, 299).

A note on this concept of “broader (social or legal) practice,” which I will be using extensively in the rest of this paper. The distinction between an institution conceived as a system of constitutive rules, on the one hand, and the broader social meaning of that institutional activity, on the other, has been introduced for the first time by Hubert Schwyzer in discussing Searle’s concept of “constitutive rules” in terms of Wittgenstein’s concept of “grammar”: see Schwyzer 1969. The same distinction has been discussed at length, and with particular reference to law, by Giuseppe Lorini (as a distinction between an institutional praxis and a social practice: see Lorini 2000, 263ff.) and more recently by Andrei Marmor (in terms of his dichotomy between “surface” and “deep” conventions: }
But victory has a peculiar relation with this system of constitutive rules. In fact, the constitutive rules of chess must specify conditions of victory exactly because chess is a competitive game, otherwise we would not be able to understand in what sense it is competitive. Hence, it is the general meaning of chess as an instance of competitive game that which requires the inclusion of victory among its relevant concepts, so that the fundamental import of the concept of victory depends not on constitutive rules but on the general meaning of chess. This is why I call concepts like victory meta-institutional concepts: Because their relevance for the institution is entailed not by constitutive rules, as in the case of other institutional concepts, but on the overall meaning of the system of rules as an instance of a given social practice.\(^5\) This is a matter of conceptual entailment, like in the case of other institutional concepts: But while the content of institutional concepts is linked with constitutive rules, the content of meta-institutional concepts is connected with the concept of the general practice in which those constitutive rules play their role. Given that victory is the objective of the game, I will call meta-institutional concepts like victory “teleological.” Teleological meta-institutional concepts have to do with the distinctive outcome(s) of the general practice within which we perform institutional acts of a given kind.\(^6\)

Not all meta-institutional concepts are teleological, however: There are others not necessarily connected with the typical outcome of the practice. Consider, in chess, the example of cheating: During a match, I surreptitiously swap the black king with the black

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\(^5\) The expression meta-institutional, along with its concept, is not mine but can be found in a wonderful paper by Dolores Miller (Miller 1981), in which she discusses the example of victory in competitive game-playing in analogy with the role that the concept of obligations plays in Searle’s (1969, 63ff.) theory of the “essential rules” of speech acts.

\(^6\) There is a complexity here that should be mentioned. In a game, while victory can be conceived as the objective of the acts of players, it is not properly speaking the objective of the whole practice, because the general concept of a game calls into question the dimension of fun as a fundamental objective. Thus, we could say that competitive games are peculiar in this regard, because victory is the distinctive objective of competition but only in the general recreational environment that has fun as its main objective. See in this regard, among others, (Kolnai 1966).
queen, but you catch me and cry out, “You are cheating!”. It seems this is a relevant statement in our practice—indeed, in this case I should defend myself or quit the game dishonoured. But, as in the case of victory, the concept of cheating is not constituted by the rules of chess, rather being connected with some features of the general game-playing practice. Games, even competitive games, typically involve a cooperative attitude in players according to which they together accept to abide by the game’s rules, and cheating is a violation of this attitude, one which is sanctioned not because of the game’s constitutive rules but because of the general concept of game-playing. There is, however, a crucial difference between victory and cheating. While constitutive rules determine how to win in chess, they clearly do not determine how to cheat: You can cheat in many different ways, and none of these is set down in a rulebook. Thus, constitutive rules determine the conditions of fulfillment of cheating in a more indirect way than in the case of victory: By determining how to play, they are fundamental in determining how to cheat as well—you cannot cheat if not by knowing the constitutive rules of chess, and you must at least simulate a rule-following behavior in order to cheat properly.\footnote{One could note here that there are other kind of violations of the cooperative attitude among players that nevertheless do not entail any intention to win: I could play to lose, for example, and in the long run my behavior would be as uncooperative as it is in the case of cheating. Bernard Suits has discussed three different forms of non-cooperative attitudes in games: In particularly, he distinguishes between cheaters, who do not follow the rules but try to win, triflers, who play according to the rules in order to lose, and spoilsports, who neither have an interest in rule nor in winning (Suits 1978, 47). I will follow Suits’ view and consider cheating a particular case of non-cooperative attitude in games, one, however, which has proven so widespread that it has deserved an independent ordinary concept. To my knowledge, so far the best treatment of the problematic relation between cheating and the constitutive rules of a game has been made by Amedeo G. Conte: see (Conte 2003).}

Cheating is thus linked with the general social practice of competitive game playing, and constitutive rules only determine its conditions of performance for each game: As we have seen, these are the main features of meta-institutional concepts. However, cheating is not a teleological meta-institutional concept like victory. In fact, given that game-playing is connected with a cooperative attitude, and given that this kind of cooperation is connected with typical social values such as honest behavior and sportsmanship, cheating is typically a
value term denoting a kind of wrong and dishonest attitude. I will call meta-institutional concepts such as cheating “axiological”: Axiological meta-institutional concepts have to do with the main values and principles that are connected with the general social practice in which constitutive rules play their role, and thus emerge when we somehow evaluate the behavior of agents engaged in institutional practices.

Teleological and axiological meta-institutional concepts are extremely relevant for understanding institutions, and it is in a sense striking that Searle does not consider them in his systematic and extremely elaborated theory of institutional reality. Indeed I believe that, if we included these two kinds of concepts in Searle’s theory of institutions, we could further improve that theory in a significant way, particularly for what regards the relation between institutions and practical reasoning. Consider this passage from *Making the Social World*:

The system of statements making, ownership of property, and promising function only on the presupposition that, other things being equal, one can reasonably assume that one’s own utterances and the utterances of other people are attempts at stating the truth; that property ownership confers rights and duties on the owner; that the making of a promise, other things being equal, creates a reason for the agent to keep a promise. […] Only to the free agents do such systems make any sense, but precisely for free agents such systems are necessary. A system which did not have this capacity to create desire-independent reasons for action would collapse. (Searle 2010, 142)

Searle’s example of property in this passage is particularly relevant for our purposes because it is drawn from the legal domain. In Searle’s view, the main and crucial reason to accept and engage in the institution of property is that this institution—and institutions in general—can give desire-independent reasons for action connected with the status function that are attributed to institutional elements: It can, for example, give people reasons to stay out of my house even if they would like to occupy it.

I agree with Searle that one typically engages with the legal institution of property because of its capacity to confer rights and duties. However, it is crucial to understand here that, when Searle says “property ownership confers rights and duties on the owner”, the rule-constituted concept is that of property ownership, not those of rights and duties. “Right” and “duty” are general concepts through which law specifies typical legal outcomes: They represent in a sense the “grammar” of law, not only the peculiar outcome of property ownership. Hence, the concepts of right and duty are not on the same level as that of
property ownership, because the latter is a simple institutional rule-constituted concept, whereas the former two are not constituted by the rules of a specific legal system: They are not institutional but rather teleological meta-institutional concepts.

Further, in the above-quoted passage Searle seems to miss at least one crucial reason why people can find that the institution of property provides us with desire-independent reasons for action: In short, they can think that this institution is just. Justice can give people desire-independent reasons for action even if they do not aim at obtaining the deontic powers connected with institutional elements: I can, for example, embrace the institution of property for reasons of justice only, even if I do not plan to own anything. But, clearly, the concept of justice is not constituted by the rules of property ownership: It is the value concept typically connected with law in general and not with a particular institution in a given legal system. Hence, with regard to a given legal system, that of justice is a meta-institutional rather than institutional concept, and specifically it is an axiological meta-institutional concept used in evaluative statements.

This complex intertwining of legal institutional and meta-institutional concepts can be further exemplified by appealing to the example of norm-enacting procedures. Legal systems typically set down the main procedures by which to enact valid norms, and these procedures can be accounted for in terms of constitutive rules. In Italy, for example, the Parliament can enact valid statutes by fulfilling specific procedural steps: But the term for these statutes, namely, *legge*, is a technical term in the Italian legal system, because there are other sources of law which are not strictly speaking *leggi* (see Art. 1 of the Italian Civil Code). Hence, one can reconstruct this institutional framework by defining statutes in terms of constitutive rules, for example by stating that a text approved by both chambers of the Italian Parliament under a given procedure (X) counts as a *legge* (Y), and the institutional import of a *legge* is that of determining one or more legally valid norms (Z). Let us assume Kelsen’s conception according to which *valid* can be made to mean, among others things, legally *binding*, or *obligatory* (see Kelsen 1992 (1934), 12–3; 55ff.). It is clear that “validity” in this sense is nothing else than the fundamental concept of all kinds of norms-enactment procedures in law and not a simple rule-constituted concept relative to a specific legal system: All legal norms are produced to be “valid” in the sense of “binding within a given community.” Thus, while that of *legge* is an institutional rule-constituted concept because it is relative to the Italian legal system and its constitutive rules, the concept of “legal validity” is a
teleological meta-institutional concept which represents the typical outcome of legal norm-enacting procedures in general.

Apart from being “valid” in this sense, however, statutes can also be distinctively just or unjust, and norm-enacting procedures can be evaluated in the light of their capacity to realize substantive moral and political values such as democracy, for example. As in the example of property already discussed, however, when I make these evaluations—when I say, for example, that a given Italian legge is unjust, or that the whole system of norm-enacting procedures in Italy are not democratic in full—I do not compare an instance of institutional concept with another kind of institutional, rule-constituted fact internal to the Italian legal system: Rather, I consider to what extent that element of this peculiar legal system is coherent with some fundamental principle or value of law more generally considered, and in so doing I take into account, along with institutional rule-constituted concepts, axiological meta-institutional legal concepts relevant for many different rule-constituted institutions traceable to the general legal practice of norm enacting.

In the light of these examples, it should be clear that teleological and axiological meta-institutional concepts correspond to different perspectives on legal institutions. Basically, a teleological perspective calls into questions the institution’s essential point, objective or aim, while the axiological perspective takes into consideration its basic values and principles—and in both cases judgments are formulated by considering the institution as an instance of a more general legal practice. From a teleological perspective, I can make statements such as “The overall purpose of the practice of norm-enactment is to produce valid norms”, while the axiological typically involves statements such as “In its current legal form, the institution of property is just/unjust for this or that reason”.

A crucial point is that, even though these perspectives typically requires considering the institution as a whole—with particular reference to the more general legal practice in which that institution is inscribed—they also have a distinctive feedback on several statements that can be formulated in regard with specific legal acts or facts, making it possible to see different kinds of legal mistakes that cannot be traced simply to structural problems. Let me show how this happens. Consider a legge (again, a particular kind of statute in the Italian legal system) which is enacted in a formally correct way but which prescribes an impossible course of action. Here, the problem does not emerge from a purely structural perspective, because in the Italian constitution there is no provision stating that a legge must prescribe
only factually possible courses of action. But this is a trivial legal mistake nevertheless, and the reason emerges from the teleological perspective that qualifies that statute from the point of view of the general objective of the norm-enacting practice. If statutes are enacted in order to create binding norms, then a statute that cannot bind anyone is mistaken even if formally perfect. Thus, there is something paradoxical and self-defeating in the enactment of norms that for some reason cannot be binding, even if that instance of norm enacting is performed in perfect accordance with the constitutive rules of the legal system under consideration. This shows that some legal mistakes can emerge only if we adopt a teleological point of view on legal institutions, and hence do not limit ourselves to a purely structural one.

The second example is not mine but drawn from Robert Alexy’s “argument from correctness” (see Alexy 2002, 35ff.). According to Alexy, an act of constitutional norm-enactment like “X is a sovereign, federal, and unjust republic” is a peculiar kind of performative contradiction because it patently conflicts with the claim to correctness and justice implicitly raised by all acts of legal norm-enactment (see Alexy 2002, 38). Even though I have my doubts concerning Alexy’s argument—in particular, I am not sure whether the above-mentioned act of norm-enactment is indeed a genuine performative contradiction, nor whether the claim-to-correctness thesis can be derived from it as a general thesis about law—I agree with him that there is something conceptually wrong in that constitutional norm. More importantly for our purposes, it seems evident that mistakes of that kind can emerge only if we adopt a non-purely-structural perspective over the act of norm-enactment: In fact, the problem here is not that the procedures for enacting a constitutional norm have not been followed correctly, but rather than something wrong happens even if we are following those procedures correctly. Hence, in order to assess this problem or at least understand it, we must see how that act of norm-enactment is inscribed in a general practice with definite values, and how those values are conceptually interconnected with the inner structure of that practice: That is, we must adopt an axiological perspective on law distinct from the purely structural one.

One would be tempted to consider the teleological and axiological perspectives as second-order perspectives with respect to the structural one, because the question of aims, purposes and values underlying a legal institution seems to arise only when structural questions are already settled. Such a conclusion would be doubtful, however. On the one
hand, it can happen in law that teleological considerations overcome structural ones, as when a given legal act is considered as if it were correctly performed, even if it is not, for the sole purpose of preserving its intended purpose. In Italian private law, for example, under certain circumstances a contract which cannot have normative consequences for structural reasons can be “transformed” so as to have them (see Art. 1424 of the Italian Civil Code), and more in general all the clauses of a contract must be interpreted in a way that is structurally “charitable” for teleological reasons (that is, the interpretation according to which a contract’s clauses can have legal effects must be privileged: see Art. 1367 of the Italian Civil Code).

Further, and on the other hand, it is very difficult to sharply distinguish structural and axiological considerations in contemporary constitutional states: Indeed, one of the main points of contemporary legal theories on the connection between law and morality is precisely that of blurring this distinction. It would therefore be mistaken to attribute in principle logical priority to the structural perspective over a teleological or axiological one: They are on the same “level”, so to say, and all have to do with the concept of a given legal institution. When we consider an institution structurally, our focus is on the complex web of its internal technical concepts; when we consider it teleologically, our focus is on its purpose as a whole; and finally, when we consider that institution axiologically, our focus is on the values and principles underlying it. Among these different approaches none seems to have necessary logical priority: In the end, which perspective should prevail is a matter of the overall conception of law we adopt.

Teleological and axiological considerations about law are often intertwined in a peculiar way. First, at least on a very general level, all legal institutions inscribed in contemporary constitutional legal systems can be interpreted as having among their objectives that of fostering—or at least not conflicting with—the more or less substantial axiological content of the constitution to which they are subordinate, thus giving a distinctive teleological qualification to this substantial moral content. Further, particular conceptions of law can give a fundamental axiological value to the overall purpose of legal systems, thus endowing the very practice of law in all its aspects with an axiological meaning. The necessity of these

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8 This the so-called “principle of conservation” (principio di conservazione) of legal acts, which to my knowledge has applications not only in private law but also in administrative and procedural law, and which has equivalents not only in French and German law (actually it traces back to the Roman brocard “magis valeat quam pereat”), but also in the common-law tradition.
kinds of connection should be—and have been—argued independently and, again, arguments of this kind depend on the general conception of law we intend to adopt.

4. Para-institutional Concepts

Up to now, I have treated two kinds of concepts (meta-institutional teleological and axiological concepts) which, despite their obvious relevance for institutional reality, are neither constituted by the rules of a specific institution nor are specific of that institution, rather being typical of more general social practices in which rule-constituted institutions are embedded. Now I will instead discuss two other kinds of concepts which, while specific to rule-constituted institutions and hence different from meta-institutional concepts in this regard, are not constituted by the institutions’ constitutive rules just like meta-institutional concepts. To show how this is possible, I will start again from the example of chess.

Consider the following statements:

The *King’s Indian Attack* (KIA), also known as the *Barcza System* (after Gedeon Barcza), is a chess opening system for White, most notably used by Bobby Fischer. […] The KIA is often used against the *semi-open defences* where Black responds asymmetrically to e4, such as in the *French Defence*, *Sicilian Defence*, or *Caro-Kann Defence*. Yet it can also be played against Black’s more common *closed defences*, usually through a move order that begins with 1.Nf3 and a later *fianchetto* of the white-square bishop. For this reason, transpositions to the *Réti Opening*, *Catalan Opening*, *English opening* or even the *Nimzo-Larsen Attack* (after b3 and Bb2) are not uncommon.\(^9\)

We have here a list of several different terms which denote kinds of attacks, defences, and openings in chess. As is well-known, statements including similar concepts are not uncommon but rather normal in chess theory: Indeed, in this game you can make several different kinds of attacks and defenses, which are formalized through distinct concepts. These concepts are not institutional: In fact, they are not constituted by the rules of chess but rather denote different ways to use the institutional rule-constituted elements of chess. This does not mean, however, that these concepts are meta-institutional. The main reason that prevents them to be qualified as meta-institutional is that they do not depend on the

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\(^9\) The passage is drawn from Wikipedia: [http://en.wikipedia.org/wiki/King%27s_Indian_Attack](http://en.wikipedia.org/wiki/King%27s_Indian_Attack). Italics are added.
features of the general game-playing practice but rather on specific features of chess. Trivially enough, you cannot perform a King’s Indian Attack in another game. Hence, as anticipated, we have here concepts which, while not being constituted by the rules of an institution, are peculiar to that institution, namely, they emerge from the institution’s specific rule-constituted features.

I will call concepts of this kind para-institutional concepts, using the prefix para- in the same sense as it is used in terms such as paramedic, paralegal, or paralanguage, namely, as qualifying objects which are in a sense attached to more fundamental entities and which therefore “come after” these entities, thus being subordinate to them. The example of paralanguage can be particularly useful to explain what I intend here. Paralinguistics studies the non-strictly-formal linguistic factors that usually accompany utterances, such as volume or intonation, but all these factors come in a sense necessarily attached to utterances: Thus, linguistic utterances are the fundamental layer over which paralinguistic features can apply. This is the same with para-institutional concepts: They are used as part of descriptive sentences which already take for granted the instantiation of one or more institutional element. When, for example, I say that “Kasparov has performed a King’s Indian Attack”, the truth conditions of this sentence include the truth of other descriptive sentences such as “Kasparov has moved the knight”, “Kasparov has castled”, “Kasparov has moved two pawns”, etc., and these last sentences are structural in that they involve only institutional, rule-constituted concepts.

Para-institutional concepts do not necessarily denote strategies or performances, as in the case of attacks or defences. They can also denote peculiar features of the actual practice of a game, as distinguished by its rule-constituted structural features. Consider in chess, for example, the case of the so-called “first-move advantage”, namely, the white players’ typical advantage due to the fact that he moves first. The concept of “first-move advantage” is not constituted by the rules of chess but has to do with how chess turns out to be when it is actually played: It denotes a typical feature of chess in practice, distinct from the typical features set down by constitutive rules on paper. Just like the concepts which denote the different kinds of attacks elaborated in chess theory, that of “first-move advantage” depends on constitutive rules—it could not have any clear meaning if those rules did not define the constitutive elements of chess—but is not constituted by those rules: It denotes a sort of subordinate feature of chess entailed by its constitutive features. Thus, the concept of “first-
move advantage” is a para-institutional concept. However, the first-move advantage is not a strategy or performance you can make with institutional elements, like attacks or defences: It is rather a fact about chess, something which typically happens and not something which can be done. In order to capture this difference, I will distinguish between act-describing, or praxeological, para-institutional concepts and fact-describing, or idiomatical, para-institutional concepts: Praxeological para-institutional concepts denote kinds of actions, strategies or performance we can put into practice by instantiating one or more institutional concepts, while idiomatical para-institutional concepts denote peculiar features that emerge from the actual practice (as opposed to the rule-constituted structure) of that institution.\(^\text{10}\)

In *Making The Social World*, Searle has treated the problem of idiomatical para-institutional phenomena under the label “systematic fallouts”, and has underscored several crucial properties of these phenomena, the most important being that while institutional phenomena depends (in his theory) on collective acceptance, idiomatical para-institutional phenomena—systematic fallouts—do not depend on acceptance: They are “intentionality-independent facts about intentionality-relative phenomena” (Searle 2010, 117).\(^\text{11}\) Further, Searle notes that, while institutional elements typically have “deontic powers” or normative consequences, systematic fallouts do not have such consequences. Thus, systematic fallouts depend on “ground-floor institutional facts” and carry no distinctive deontology, to the point that participants in a given institutional practice can very well be unaware of them. Searle makes in this regard an example regarding baseball which is very similar to my example of “first-move advantage” in chess:

To take a trivial example, it has been discovered in baseball that, statistically, left-handed batters do better against right-handed pitchers, and right-handed batters do better against left-handed pitchers. This is not required by the rules of baseball; it is just something that happens. I propose to call these “third-personal fallout facts from institutional facts”, or more briefly, “fallouts” from institutional facts. They are “third-personal,” because they need not be known by participants in the institution. They can be stated from a third-

\(^{10}\) I use here the expression *idiomatical* as a neologism, thus avoiding any relation with the obsolete English equivalent of *idiomatic*. I use this term because it traces back to the Hellenistic Greek word *idioma*, which means “peculiar feature”.

\(^{11}\) Cf. also (Thomasson 2003, 275-6), (Andersson 2007, 105-26).
person, anthropological, point of view. They carry no additional deontology, and so no new power relations are created by fallouts. (Searle 2010, 117)

As Searle notes, systematic fallouts are typically described by economic theories:

As Searle notes, systematic fallouts are typically described by economic theories:

In economics the ground-floor facts are in general intentionality-relative. For example, so and so bought and sold such goods. But the facts reported by economists are typically intentionality-independent. For example, the Great Depression began in 1929. (Searle 2010, 117)

Concepts of this kind are also relevant for law, however, and for the different perspectives that can be adopted in the legal domain. Consider, again, the example of norm-enacting procedures in a Parliament, for which we have already argued the relevance of meta-institutional concepts. Here also para-institutional concepts can emerge, both praxeological and idiomatical. One example is the concept of “parliamentary obstructionism”, or “filibustering”. With these concepts, we denote typical parliamentary strategies that can be carried out while instantiating institutional rule-constituted concepts. During filibuster, we follow all the rule-constituted procedures set forth in the chambers’ regulations, but we do so as part of an overall strategy, like in the case of attacks or defences in chess: Hence, this is a typical case of praxeological para-institutional concept subordinate to the institutional concepts of a given legal system’s norm-enacting procedures. In some situations, filibustering can give place to “legislative gridlocks”, namely, situations in which actual parliamentary practice cannot have any significant normative outcome because no party has a filibuster-proof majority. This, too, is a non-rule-constituted para-institutional concept, because the constitutive rules of parliamentary procedures do not create the concept but are necessary to create the institution for which a legislative gridlock can happen. However, differently from the case of “filibustering”, with “legislative gridlock” we denote a typical state of affairs or situation produced by parliamentary practices and not a sort of

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12 One could object here that “filibustering”, considered as a concept relevant for law, seems to be more general than “King’s Indian Attack” in chess. I can certainly concede this point, but two things are worth noting in this connection. On the one hand, one could specify forms of filibuster typical of different legal systems, just as there are different forms of attack typical of chess. On the other hand, the concept of “attack”, too, is a para-institutional concept of chess, even though chess shares it with other games (but not all: in several competitive card games, for example, you cannot strictly speaking “attack”).
parliamentary action or strategy: Hence, this an idiomatical, and not praxeological, para-institutional concept.

What kind of perspective we adopt when using concepts like “filibustering” and “legislative gridlocks” in connection with the practice of norm-enactment in a given legal system? Given the subordinate status of these concepts, in this case we have to do with second-order perspectives, namely, perspectives consisting in statements that already take for granted the instantiation and normative outcomes of institutional acts and facts as they emerge from a purely structural perspective. That of praxeological para-institutional concepts is a strategic perspective, as when members of the House of Commons decide to practice filibustering to hinder the enactment of a given statute. From a strategic point of view, the main focus is not on the correct instantiation or performance of a given legal fact or act, as in the case of a structural perspective, nor on the fundamental objectives and values of legal practices, as with the teleological and axiological perspectives, but rather on the participants’ attempt to obtain results in the most effective way. The key concept here is indeed efficiency: The relevant question is not that some normative consequences derive from formalized procedures, but rather how I can obtain those consequences (or make it so that others do not obtain them) while minimizing my effort.

Idiomatical para-institutional concepts, instead, are typically used by somehow who describes the features of a given legal framework not structurally, that is, taking into account its constitutive rules only, but practically, namely, describing how that framework turns out to be when actually practiced. This, too, is a peculiar perspective that can be taken over legal practices: a sort of sociological perspective from which the features of legal systems as it is “in reality,” so to say, are conceptualized and described. And here, too, the structural features of an institutional framework are already given for granted: What matters is not what constitutive rules state but rather what happens in practice when those rules are followed—the expected or unexpected outcomes of that practice.

While a strategic perspective is taken by participants, a sociological perspective is taken by observers. This does not mean, however, that participants who act strategically cannot make good use of a sociological perspective: The peculiar outcomes of a given legal practice are essential when evaluating what to do from a strategic point of view. If for, example, I know that legislative gridlocks can happen in a given legal setting, and how they typically happen, I can use this information to act strategically toward the goal of new elections. And,
on the other hand, a good sociological description of how a given legal framework actually works in practice must be able to take into account the strategic reasoning of all actors. Thus, the two perspectives that typically involve para-institutional concepts—strategical and sociological—are intertwined in a peculiar way, as in the case of the teleological and axiological perspectives that involve meta-institutional concepts. However, while the connection between teleological and axiological considerations depend on the fact that both perspectives had to do with the concept of a legal practice in general, the connection between strategic and sociological perspectives stems from the fact that both consider that practice as it unfolds in reality—in action, so to say, and not only with regard to its concept.

Again as in the case of theological and axiological perspectives, strategic and sociological perspectives can have an impact on structural considerations. For example, one could want to change the structural features of a given norm-enacting process if he finds that some kind of strategy can be abused within the existing structural framework or if he wants to avoid a peculiar feature of the framework’s actual functioning as it has been ascertained sociologically. And, in extreme situations, phenomena that emerge from a sociological perspective and that have to do with the actual practice of a given legal institution can result in the death of that institution, particularly where those phenomena represent outcomes that are unacceptable or unbearable for the legal system as a whole (as for reasons of efficiency). This influence of strategic and sociological considerations on institutional structures can be striking if one takes into account the subordinate logical character of para-institutional concepts with respect to institutional concepts. Such an influence shows, however, that the relations of logical dependency holding among perspectives on law do not necessarily correspond to different degrees of importance.

5. Concluding Remarks on Perspectives

The main conclusion of this paper is that an accurate description of institutional, and hence also legal reality cannot take into account only rule-constituted concepts. Many other concepts are relevant when we consider an institution from different perspectives, and those concepts, when distinguished in kinds, can be useful in finding what are the different possible perspectives that can be taken with regard to institutions. This is what I have done in this paper with particular regard to law.
On the one hand, we can consider the more general social practice in which an institution is embedded: In law, the general legal practice, shared among different legal systems, that embeds particular legal institutions. Here emerge what I have called “meta-institutional concepts”, which can be teleological, when the overall purpose(s) conceptually tied with the practice is (are) under consideration, or axiological, when the focus is instead on the typical values and principles connected with that general practice.

On the other hand, we can point our attention to phenomena that emerge not from the structure but rather from the actual practice of a given institution. I have called “para-institutional” the concepts corresponding to these phenomena, and distinguished between act-describing or praxeological para-institutional concepts, when what is described is a typical action, performance, or strategy that we adopt in instantiating institutional concepts, and fact-describing or idiomatical para-institutional concepts, when what is described is a peculiar feature or state of affairs that can emerge when an institution is actually practiced.

These different kinds of concepts correspond to different perspectives on institutions: Let me summarize this difference with regard to law. First, institutional, rule-constituted legal concepts correspond to a structural perspective in which the only thing that matters is whether a given legal act or fact has been correctly instantiated and what are its normative outcomes. Second, teleological and axiological meta-institutional concepts respectively correspond to a teleological and an axiological perspective, in which the overall purpose and fundamental values of a legal institution (conceived as an instance of a general legal practice shared among different legal systems) are taken into account. Third, praxeological and idiomatical para-institutional concepts respectively correspond to a strategic and a sociological perspective, in which what matters is not how the legal institution is structured nor what is the concept of the general legal practice in which it is embedded, but rather how that particular institution turns out to work in practice, and what kind of actions one can do in order to maximize the effectiveness of his actions when actually engaged in that institutional activity.

It has been noted that all these perspectives are connected, but in different ways. The teleological and axiological perspectives simply broaden the scope of the structural one, placing the structure of institutional rule-constituted concepts in its wider context, namely, within the concept of a general and shared legal practice that comes with its purposes and values. On the other hand, the strategic and sociological perspectives do not broaden the
structural perspective on a conceptual level but rather add another layer of considerations to it, by considering how the structural web of rule-constituted concepts turns out to be when actually practiced in a given social context. Thus, if we start from a structural perspective on legal phenomena, it is possible to imagine two different dimensions on which to enrich it: a conceptual and a practical one. If I broaden the scope of a purely structural perspective on a conceptual level, then I will have to consider the broader concept of the general legal practice of which that institution is an instance, thus opening for a teleological and axiological perspective. Instead, if I focus my analysis of that institution by considering how it works in practice, then I will have to take into account an entirely new level of analysis, thus requiring a perspective that can be more or less strategic or sociological, depending on whether I am more or less a participant or an observer. The following diagram can illustrate these relations:

A final note regarding the “correspondence” I have envisaged in this paper between kinds of concepts relevant for a legal institution and kinds of perspectives on that institution. What sort of correspondence is this? It is important to stress that I am not arguing for any sort of strict or logical correspondence in the sense that, for example, adopting a teleological perspective should necessarily entail making statements that include teleological meta-institutional concepts: I can adopt a teleological perspective without using meta-institutional concepts (consider the statement “This way of framing the norm-enacting procedure is quite
clumsy and ineffective,” in which any explicit reference to the meta-institutional concept of validity is avoided). Nor am I maintaining that concepts of a given kind cannot be used outside the perspective which they “correspond” to: As already noted, for example, idiomatical para-institutional concepts typical of the sociological perspective can very well be used when adopting a strategic perspective, too. Hence, it seems that the use of concepts of a given kind does not entail adopting the correspondent perspective, nor the adoption of a given perspective necessarily entails the use of the correspondent kind of concepts. “What kind of correspondence is this, then?”, one may legitimately ask. My answer is that this is a heuristic correspondence: The kinds of concepts I have identified in this paper have simply proven to be useful heuristic tools for identifying several different kinds of perspective on institutions in a way that seems to be fruitful for further discussion.

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