BUILDING THE WORLD OF LAW

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Abstract

The general purpose of this article is to provide a conceptual framework in terms of which more detailed studies of different types of legal rules, and their roles in legislation, can be performed. The first part of the article sketches a picture of legislation as a kind of legal transaction by means of which the world of law is partially (re)built. The second part discusses norms (prescriptive, prohibitive and permissive rules), competence conferring rules and powers, and rules that deal with legal status (entry, exit and consequential rules) as abstract building blocks of the world of law.

Keywords

Functions of legislation, rules, norms, power, competence, legal status, social reality.

A. INTRODUCTION

There are many ways to look at legislation. One way, for example, is to see legislation as a means to improve society. Another way is to see is as the outcome of a political process, and yet another view is legislation as an alternative for case law. In this paper I will offer a rather abstract view of legislation, namely legislation as a means to (re)build the world of law. The basic idea is that the law is a specialized, institutionalized part of social reality, the "world of law", and that legislation is a means to modify this part of social reality. The specific perspective is that legislation can be compared to building and from this perspective I will

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sketch the main building blocks that are used in building the law. With this paper I hope to contribute to an awareness of the tools by means of which the world of law is constructed, and I expect that such awareness can improve the quality of legislation.

In the first part of this article (A-E) I will develop the view of the law as a specialized, institutionalized part of social reality[1], introduce some terminology and make an important distinction between two kinds of elements of the (legal) world, namely facts and constraints. Moreover, I will characterize the familiar phenomenon of legal transactions as the means to bring about intentional changes in the institutionalized part of the world of law. Legislation is a special kind of legal transaction.

The second part of the article (F-L) is devoted to a summary sketch of the main building blocks of the legal world. After a brief discussion of the two main functions of the law, guidance of human behavior and empowerment to perform legal transactions, I will characterize rules and norms, powers and competences, and conceptual networks.

B. THE WORLD OF LAW

We are all familiar with the physical world. It consists of a large number of "things".[2] Big things such a stars, galaxies, somewhat smaller things, such as seas and mountains, and small ones, such as viruses, molecules, and quarks, and very much in between, including human beings. These things have characteristics and stand in relations to each other.

1. The world, facts and states of affairs

That things have these characteristics and stand in these relations to each other, are facts. It is possible to define the whole physical world as the collection of all

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[1] This aspect of the paper places it in the tradition of law as institutional fact, a tradition represented by—amongst others—the following books: N MacCormick and O Weinberger, *An Institutional Theory of Law*, (Dordrecht, Reidel, 1986), E Lagerspetz, *The Opposite Mirrors*, (Dordrecht, Kluwer Academic Publishers, 1995), M la Torre, *Norme, Instituzioni, Valore: per una teoria instituzionalistica del diritto*, (Rome, Laterza, 1999), D W P Ruiter, *Institutional legal Facts* en *Legal Institutions*, (Dordrecht, Kluwer Academic Publishers, 1993 and 2001), and N MacCormick, *Institutions of Law*, (Oxford, Oxford University Press, 2007).

[2] Intuitively, "things" may be taken to be everything denoted by nouns (e.g. "table"), proper names (e.g. "Jane"), or identifying descriptions (e.g. "the mayor of New York").

things, or as the collection of all facts.[3] Wittgenstein in the beginning of his *Tractatus* chose for the second option, when he wrote:

> "1. Die Welt ist alles, was der Fall ist.
> 1.1 Die Welt ist die Gesamtheit der Tatsachen, nicht der Dinge.
> ...
> 1.2 Die Welt zerfällt in Tatsachen."[4]

I will follow Wittgenstein in this approach, and define the world as the collection of all facts.

Facts are expressed by means of (declarative) sentences.[5] All sentences express possible facts, which are called states of affairs; sentences that are true express actual facts, sentences that are false express non-facts.

2. The social world and the world of law

The facts in the physical world obtain to a large extent independent of human beings. Think in this connection of the existence on earth of seas, mountains, and many kinds of living things, including those who appeared on the surface of earth before there were humans. And where the facts depend on humans, this is because of the physical interaction between the human body and other physical things.[6] Think, for instance, of the existence of buildings, roads and artifacts.

The social world, or social reality, does not only depend on what is physically the case, but also—and to a large extent—on what people believe the social world is. A fact in the social world can obtain because sufficiently many members of a social group believe it obtains and also believe that (sufficiently many) other members of the group have the same belief, both about this fact and about what the others believe.[7] Jane may, for example, be the leader of an informal group, because most members of the group take her to be the leader and believe that the others take her to be the leader too and believe that the other members do the

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[3] Theoretically it is also possible to define the world as the collection of all things and all facts, but this has the disadvantage that the things are "counted" twice, because they occur in the facts too.

[4] L Wittgenstein, *Tractatus logico-philosophicus*, (Frankfurt am Main, Suhrkamp 1984).

[5] In the remainder of this paper, when I write about sentences, I mean declarative sentences, unless the opposite is indicated.

[6] That the physical world is in part the result of causal interaction with the human body does not exclude that the same holds for the social world. The difference that I want to point out is that the social world is not exclusively the result of physical interaction with the human body, where the physical world—to the extent that it depends on humans – is.

[7] This theme is extensively elaborated in R Tuomela, *The Philosophy of Social Practices*, (Cambridge University Press, 2002), chapter 5.

same. Some rules exist as legal rules because sufficiently many people that participate in a legal system accept these rules as legal rules and believe that others do the same.

In modern societies, however, most legal rules derive their existence and status from being made in accordance with rules that specify how to make legal rules. They exemplify a second way in which facts in social reality can obtain, namely through the operation of social rules, including legal rules. Social rules deal with how people should behave (towards each other), but also with the proper use of language, with the definitions of games, and with the membership of a socially defined set, such as the set of legal rules. If the conditions of these rules are satisfied, their consequences hold in social reality. The part of social reality that is the result of the application of social rules is called the "institutionalized part of social reality".[8] Typical phenomena within the institutionalized part of the social world are the existence of money, promises, the law and everything created through the law, such as officials and legally defined organizations.

The world of law is part of the social world. In fact, most of the world of law belongs to the institutionalized part of the social world. The existence of large parts of the law is based on the operation of rules which cause the existence of these facts as result of legal transactions and other events with legal consequences.[9] However, the law also contains parts which only exist because they are believed to exist. Customary law and other unwritten parts of the law illustrate that not all law is institutionalized.

I assume that the world of law, and—more in general—the social world consists of a collection of facts. The world of law is the collection of all legal facts, where legal facts are those facts which are the result of the application of legal rules, such as the fact that the mayor of Amsterdam is competent to make emergency ordinances, or the fact that Jones owns Blackacre.[10]

3. Facts and constraints

The world, both in its physical and in its social aspect, consists of facts. Part of these facts concern the existence of 'things' in a very broad sense, such as the

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[8] In my experience, the terminology around institutionalization and institutional facts is far from uniform. Compare, for instance, P Berger and Th Luckman, *The Social Construction of Reality*, (Harmondsworth, Peregrine Books, 1979, 1st ed, 1966), 70-85; N MacCormick and O Weinberger, Introduction, in *An Institutional Theory of Law*, 1-30; J Searle, *The construction of social reality*, (New York, The Free Press, 1995), 27-29; Tuomela, *The Philosophy of Social Practices*, supra n 6, 156-200, and the additional literature mentioned there.

[9] As is well-known, this is one of the major themes of Hart's conception of law. See H L A Hart, *The Concept of Law*, (Oxford, Clarendon Press, 2nd ed, 1997, 1st ed 1961), 77-96.

[10] A different use of the expression "legal fact" is to denote events with legal consequences.

existence of galaxies, tables, human beings, and quarks, but also numbers, thoughts, feelings, and rights, duties, competences and rules.[11]

A very special kinds of things are what I will call "constraints".[12] A typical example of constraints are physical laws as they are commonly interpreted.[13] A physical law 'forces' the facts of the physical world into particular patterns. Take for instance the law of gravity. This law 'makes' that two objects with gravitational mass exercise a force upon each other which is proportional to their mass and inversely proportional to their squared distance. The existence of this force is an additional fact, next to the facts that these two objects have gravitational masses and that this physical law exists. This force does not exist just like that; because of the physical law it exists necessarily given the gravitational masses of the bodies.[14]

The law of gravitation exemplifies a necessary connection between states of affairs (that bodies have gravitational masses on the one hand and that they exercise forces upon each other on the other hand) which is a-temporal. Other laws 'bring about' necessary temporal relations between states of affairs. An example of such temporal laws would be the laws of collision, which 'cause' the movement of objects after a collision as a consequence of their masses and velocities at the moment of their collision. If two objects with a certain masses and velocities collide under a certain angle, they move after the collision in directions and with velocities which are necessitated by the laws of collision.

Physical laws in their common interpretation are themselves 'things', and their existence amounts to facts. A physical law that exists forms a constraint upon the world in which it exists; it makes that some other facts necessarily go together or exclude each other.

Rules are for the institutionalized part of social reality what physical laws are for physical reality. They are 'things' and their existence—which is called

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[11] Notice that things themselves are not facts, but that the existence of a thing is a fact. E.g. the rule [Thieves can be fined] is a "thing", not a fact, but if this rule is valid (the form in which rules exist), it is a fact that it is valid.

[12] Since constraints include physical laws and rules, they are obviously very different 'things' than tables, mayors, and even non-physical "things" such as ideas or love affairs. What constraints have in common with these other things is—from a linguistic point of view—that they are denoted with expressions similar to those used for these other things, and also—from a non-linguistic point of view—that they are countable.

[13] As is well-known, the precise nature of physical laws is object of serious philosophical disagreement. See, for instance, R Harré, "Laws of nature", in W H Newton-Smith, *A Companion to the Philosophy of Science*, (Oxford, Blackwell, 2000), 213-223.

[14] It should be noted in this connection that the necessity is a consequence of the constraint, and not the other way round. The constraint does not describe a relation between states of affairs that independently holds both in the actual world and in (physically) possible worlds, but rather adds necessity to a relation that it imposes upon the actual world. Moreover, it defines which worlds are physically possible relative to the world in which the constraint holds.

'validity' in the case of rules—is a fact. Rules impose constraints on the institutionalized part of the social reality in which they are valid. For example, [Thieves can be fined] formulates a rule.[15] This rule may be valid in a particular legal system or not. If it is valid, this is a fact about this legal system. In that 'world of law', the rule [Thieves can be fined] is valid. Moreover, if this rule is valid, this has implications for the other facts in that world of law, namely that the fact that somebody is a thief necessarily goes together with the fact that he is liable to be fined.[16]

Just like there are temporal and a-temporal physical laws, there are temporal and a-temporal legal rules. In the second part of this paper, several kinds of rules will be discussed in more detail. Running ahead of this discussion I mention the rule that somebody becomes owner of inherited goods when his testator dies as a temporal rule, and the rule that owners have the competence to transfer the owned goods as example of an a-temporal rule.

C. LEGAL TRANSACTIONS AS CONSTITUTIVE ACTS

Temporal rules play an important role in connection with changes in the institutionalized part of social reality, because they attach these changes to events in either the physical or the social world. In the previous section I gave the example of the rule that somebody becomes owner of inherited goods when his testator dies. This rule attaches the consequence that Mary becomes owner of her father's Buick when her father dies, assuming that Mary inherits her father's goods. Another example is that if John Doe contracts with Richard Roe to fix his computer, John Doe incurs the obligation towards Richard Roe to fix his computer, or at least to make an effort.

A function of temporal rules which is particularly important for the purpose of this paper, is that they make it possible to bring about deliberate changes in the world of law. These deliberate changes are usually called legal transactions (*Rechtsgeschäfte*; *actes juridiques*). Legal transactions are the legal variant of the more common phenomenon of constitutive acts. Such constitutive acts are possible in social reality if there are rules which specify:

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[15] I use square brackets to indicate that what is in between the brackets is a rule formulation.

[16] For the purpose of this paper I make the simplifying assumption that valid rules have no exceptions. This assumption is in my opinion false. See for instance J Hage, *Reasoning with Rules*, (Dordrecht, Kluwer, 1997), 106-109. Nevertheless, this has no major consequences for the message of this paper. In my paper 'Rule Consistency' in J Hage, *Studies in Legal Logic*, (Dordrecht, Springer, 2005), 135-158, I show how exceptions to rules can be combined with the view that rules impose constraints on possible worlds.

- how modifications of the institutional part of the social world can be brought about;
- what the consequences of the modifying acts are; and
- who are competent to perform such acts.

Adapting an analysis of Searle[17], I distinguish two aspects of a constitutive act, namely its propositional content and its illocutionary force. Constitutive acts have an illocutionary force, which determines what kind of speech act it is. They also have a propositional content, which indicates what the act is about. The propositional content exists of references to one or more entities, normally extra-linguistic, and predication applied to the referents of the referring expressions. Different constitutive acts can have the same propositional content. For instance, the sentence 'Madeline will be the chairwoman of the women's business club' expresses a decision with the propositional content that Madeline is the chairwoman of the women's business club. The sentence 'I promise that Madeline will be the chairwoman of the women's business club' expresses a promise with the same propositional content. The first constitutive act has as its consequence that Madeline has become chairwoman; the second that the promisor must see to it that Madeline will become chairwoman.

Speech acts with the same illocutionary force can have different propositional contents. Eg the decisions 'Madeline shall be the chairwoman of the women's business club' and 'Jane shall be the chairwoman of the editorial board' are different constitutive acts, because of their different propositional contents.

If a constitutive act is performed according to the rules, by somebody who was competent to do so, it is said to be valid. A valid constitutive act normally brings about a change in social reality: a new fact[18] is created or an old one abolished or modified. More in general, the propositional content of the constitutive act is imposed on the world. If this content is that Madeline is the chairwoman, a successful constitutive act with this content, a valid appointment, makes the propositional content obtain in the world: Madeline has become the chairwoman. If this content is that a particular rule is valid, the rule becomes valid as consequence of the valid rule creation.[19]

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[17] J Searle, *Speech Acts*, (Cambridge University Press, 1969), 29-33 and Id, *Expression and Meaning*, (Cambridge University Press, 1979), 1-29.

[18] Such a new fact may involve the existence of a new thing, an organization for example. In this way, intentional modification of social facts may involve modification of social "things".

[19] The term "valid" has at least two different meanings in English. That some thing is valid may mean that it has come about according to the applicable rules (eg a last will) or that it satisfies the applicable criteria (eg a valid argument). In the case of rules, validity also stands for their mode of existence, as pointed out by Kelsen. That a rule is valid and that it exists boil down to the same thing. There is a risk of confusion in the case of rules that were intentionally made, because then the validity of the constitutive act is a condition for the rule's validity as its mode

D. TYPES OF LEGISLATION

Historically, the idea of a legal transaction has probably been abstracted from that of a contract and it is still not uncommon to associate legal transactions with private law.[20] When legal transactions are treated as constitutive acts, however—and there seem to be all reasons of the world to do so—there is no ground to confine the role of legal acts to private law. Testaments, contracts, legislation, and administrative decisions have in common that they are acts by means of which the world of law is intentionally changed. Moreover, they are all governed by rules that specify:

- how they should be performed;
- who is competent to perform them; and
- what the legal consequences of successful (valid) performances are.

The term 'legislation' both refers to the creation of rules by officials ('material' legislation) and a special form of decision making ('formal' legislation). Formal legislation can be used for constitutive acts, but also for different purposes, such as expressing intentions or feelings of respect.[21] Moreover, when formal legislation is used as a constitutive act, it may consist of material legislation, but also lead to particular facts. Let us look at some examples from the EC Treaty to see in which ways legislative acts can lead to changes in the world of law.[22] I will assume that this treaty, although a contract in form, can be interpreted as formal legislation. Article 1 of the EC treaty reads:

> "By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN COMMUNITY."

By means of this article, the contracting parties do not make a rule, but create an organization, namely the European Community.

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of existence. MacCormick makes a similar point in MacCormick, *Legal Institutions*, supra n 1, 160-161, but he seems to assume that the two meanings of "validity" compete for being the one correct meaning.

[20] See, for instance, W Flume, *Das Rechtsgeschäft*, , (Berlin ea, Springer, 3rd edition 1979, 1st edition 1965), 41-44.

[21] See, for example, Ruiter, *Institutional Legal Facts*, supra n 1, 83-88. This book has also inspired the use of the EC Treaty for examples of forms of legislative acts and has in general influenced my thought about the uses of legislation.

[22] Obviously it is not possible to provide here even an approximate enumeration of the possible uses of constitutive legislation. The examples are merely meant to illustrate some of the main uses of legislation.

Article 17 section 1, the first part reads:

> “1. Citizenship of the Union is hereby established….”

By means of this article section, the contracting parties create a particular legal status, namely European Union citizenship.

Article 33 section 1 reads:

> “1. The objectives of the common agricultural policy shall be:
> (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production, in particular labor;
> (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
> (c) to stabilize markets;
> (d) to assure the availability of supplies;
> (e) to ensure that supplies reach consumers at reasonable prices.”

By means of this article section, the contracting parties officially assign objectives to the EC common agricultural policy.

Article 37 section 1 reads:

> “1. In order to evolve the broad lines of a common agricultural policy, the Commission shall, immediately this Treaty enters into force, convene a conference of the Member States with a view to making a comparison of their agricultural policies, in particular by producing a statement of their resources and needs.”

By means of this article section, the contracting parties impose a legal duty on one of the EC organs. Notice that a duty that holds for one or more specific individuals is not a rule. It is not a constraint on the world of law, but rather a normative fact in it.

Article 11 section 1 reads:

> “1. Member States which intend to establish enhanced cooperation between themselves in one of the areas referred to in this Treaty shall address a request to the Commission, which may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so.”

By means of this article section, the contracting parties create a rule which specifies the procedure that must be followed to establish enhanced cooperation between member states. By means of this rule it can be established whether an attempt to create enhanced cooperation is valid (successful). In this way the rule imposes a constraint on the world of EU law.

Article 19 section 1, the first part reads:

> "1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.…"

By means of this article section, the contracting parties create a rule which assigns a right to Union citizens. Notice that the right 'reaches' the citizens in two steps. The first step is the creation of a rule. This is the establishment of a new fact, namely that a rule exists, in the world of EU law. Because of this step, adoption of article 19 section 1 was a constitutive act. The second step is that this rule imposes a constraint on the world of EU law, by only allowing (in the sense of making possible) states of affairs in which Union citizens have the right to vote etc. In a more usual terminology: the rule gives the citizens the right to vote.

Article 17 section 2 reads:

> "2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby."

By means of this article section, the contracting parties create a rule which, amongst others, imposes a duty on Union citizens. Notice that this duty 'reaches' the citizens in the same two steps as mentioned above: rule creation and imposition of the duty by the rule.[23]

As these examples illustrate, legislation can be used to bring about all kinds of changes in the world of law. Possibly the most interesting changes deal with the body of legal rules, because these rules exercise influence on the rest of the world of law by imposing constraints on it.

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[23] By the way, this rule may also be interpreted as defining the scope of the duties that are imposed by other rules created by the Treaty. These duties hold in principle only for citizens of the Union. Under this interpretation, the rule itself does not impose duties.

E. INTERMEDIATE SUMMARY

One way to look at legislation is to see it as a means to change an institutionalized part of social reality, namely the world of law. This world consists of a set of legal facts, subjected to a number of constraints. Legislation can be used to perform many different kinds of acts, but for the purposes of the present article, the most important type of acts are legal transactions. By means of legal transactions, the facts in the world of law are intentionally modified. Legislation is one of the ways in which a legal transaction can be performed.

One particularly important type of fact in the legal world concerns the existence of constraints, or—to say it in terminology more familiar to lawyers—the validity of rules. Because rules influence the facts in the world of law by bringing about legal consequences, changes in the set of rules automatically lead to other changes in the world of law. As a consequence, legislation which leads to changes in the set of valid rules has implications for the world of law which go further than merely these changes in the set of rules.

The operation of some rules is a-temporal. These rules bring about a-temporal connections between states of affairs in the legal world. An example would be a rule which attaches the competence to grant licenses to the status of being a public officer of a particular type. The operation of other rules leads to legal consequences that follow events in time. An example would be the rule that attaches liability for damages to the event that a tort was committed.

F. TWO MAIN FUNCTIONS OF THE LAW

The rest of this article will be devoted to a discussion of rules and the constraints they impose upon the world of law. Because of their role as constraints, rules are a powerful means to structure the world of law and can therefore be put to use as 'building blocks' of this world.

The interrelations between rules can be quite complex, because the legal consequence of one rule is often a condition for the application of another rule.[24] Together the rules in the world of law create a complicated network and it is easy to loose the overview of the result. To avoid losing track, it is helpful to consider that the law fulfils two main functions. The first one is to guide behavior by

[24] Another important type of interrelation is when one rule influences the operation of another rule. One example is the use of so-called 'limiting clauses' in the definition of human rights in the European Convention on Human Rights. See in this connection M Borowki, "Limiting Clauses" (2007), 1 Legisprudence. Another example is when a rule makes an exception to another one. Because exceptions to rules are not treated in this paper, I will skip a discussion of this relation between rules.

imposing duties and prohibitions, and by granting permissions. The second function is to create powers which actors in the world of law can use to bring about changes in this world. Because these changes may involve duties for state organs, for instance the duty to enforce a contractual obligation, to imprison a criminal, or to pay an announced subsidy, the exercise of these powers also leads to changes in the physical world, assuming that state organs fulfill their duties.

These two main functions of the law are supported by a third function, namely the creation of a complex conceptual network by means of which the conditions of applicability of rules are defined in terms of concepts in their ordinary daily life meaning. The rule [Thieves can be fined], for instance, empowers state organs (which are not explicitly mentioned) to impose fines on thieves. To apply this rule it is necessary to have clarity which persons (or even non-persons) count as thieves for the purpose of this rule. The world of law may contain a rule which defines thieves as persons who took away a good from somebody else with the purpose of illegal appropriation.[25] This new rule makes use of additional concepts with special legal meanings, however. What counts for the purpose of this new rule as purpose, and when is appropriation illegal? These questions may be answered by additional rules, which in turn make use of concepts, etc. This regress of new rules that make use of new concepts, which are defined in new rules, which make use of … must stop with concepts that are used in their ordinary daily life meaning, whatever that may be. A third important, ancillary, function of the law is to connect the conditions of duty imposing and power conferring rules to these concepts used in their ordinary, non-legal sense.

G. CONDITIONAL AND CATEGORICAL RULES

Through the use of rules, a legislator can impose constraints on the world of law. A constraint can be compared to a mould in which the facts of the world of law are given shape. The set of rules fixes the possible combinations of facts, both which facts can or cannot go together at a particular moment, and their relation in time, which facts succeed other facts.

It is sometimes assumed that all rules have a hypothetical structure, with a condition part that specifies when the rule is applicable, and a conclusion part that indicates what the legal consequences are, if the rule is applicable.[26] This analysis of rules is very useful for expository and educational purposes, but is strictly speaking only correct for conditional rules. There are also categorical rules which

[25] Cf article 310 of the Dutch Penal Code.

[26] For a recent example, see MacCormick, *Institutions of Law*, supra n 1, 25.

can only be reconstructed as conditional rules. Let us take a second look at article 11 section 1 of the EC-Treaty.

> "Member States which intend to establish enhanced cooperation between themselves in one of the areas referred to in this Treaty shall address a request to the Commission, …."

This rule specifies how Member States can establish enhanced cooperation between themselves. It is a procedural rule, indicating what should be done to obtain a particular result. The rule is directed to "Member States which intend to establish enhanced cooperation between themselves" in general, which gives the rule the generality that is characteristic of rules. It is not hypothetical, however. In particular it does not state:

> "If Member States intend to establish enhanced cooperation between themselves in one of the areas referred to in this Treaty, then they shall address a request to the Commission, …."

This analysis mistakes the generality of the rule for conditionality.[27] The difference between generality and conditionality becomes clearer if we consider a rule that is both general (which rules are by definition) and conditional (which many rules are not). Take article 71 section 1 of the Vienna Convention on the law of treaties:

> "1. In the case of a treaty which is void under article 53 the parties shall: (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; …."
>
> This regulation imposes a duty on the parties to the Treaty in general, which accounts for the generality of the rule. The rule is also conditional, because this duty only exists if a treaty is void under article 53 of the Vienna Convention.

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[27] This mistake is stimulated by the traditional predicate logical analysis of universal predication, which makes use of the material conditional. According to this analysis, the general "*All* x's are y's" is analyzed as "*If* something is an x, *then* it is a y".
As long as this analysis is treated as the technical solution for dealing with arguments based on substitution of individual terms for variables, which it is, there is no problem. When the analysis is treated as elucidation of the sentence meaning, this meaning is distorted by the limited expressive power of the logical apparatus.

Despite their difference, generality and conditionality of rules both contribute to the function of rules as constraints. Categorical rules impose constraints between characteristics in the legal world. A categorical norm might for instance create a connection between the characteristics of being a car driver and of being obligated to turn on the car lights when it gets dark and makes that the former necessarily goes together with the latter. A "counts-as rule"[28] may create a connection between the characteristics of events as being an offer and an acceptance and the characteristic of these events together as being the entering into a contract.

Conditional norms impose constraints between states of affairs. They bring about a necessary connection between the type of state of affairs specified in the rule conditions and the type of state of affairs specified in the legal consequence of the rule. Take article 71 section 1 of the Vienna Convention. This rule connects the state of affairs that a treaty is void to the state of affairs that the contract parties are under a duty to take certain abstractly specified measures.

H. TEMPORAL AND A-TEMPORAL RULES

Categorical rules are always a-temporal. They create connections between characteristics that are timeless. Conditional rules, however, may be temporal in the sense that they attach to the state of affairs mentioned in the rule condition legal consequences that appear in time after the state of affairs of the rule condition has appeared. For instance, if parties enter into a contract, they are under obligations towards each other after this event. Temporal rules are conditional rules of which the condition is that a certain type of event has taken place. Their legal consequence is that after this event has taken place, certain changes in the world of law take place. These changes may be that new facts come into existence, or that existing facts are changed or appear. For instance, after they have entered into a contract (event), the contract parties are under an obligation towards each other to do what they agreed (new fact). After a party has performed (event), he is no longer under the obligation to perform (disappearance of fact).

Temporal rules deal with constraints between events and their consequences for the facts in the world of law. In this connection, they often interact with a-temporal rules. Suppose, for instance, that Jones transfers the ownership of Blackacre to Smith. This event is primarily controlled by a temporal rule, which makes that this event brings about that Jones is no longer the owner of Blackacre (disappearance of a fact) and that Smith has become the owner (a new fact). But

[28] "Counts-as rules" are discussed in section K.

this is not the whole story, because there are a-temporal rules which connect additional facts to the new fact that Smith is the owner of Blackacre. Smith now has the power to transfer the ownership of this real estate to somebody else, and he has permission to use Blackacre for his cattle. As this example illustrates, the introduction of a temporal rule into the world of law, may bring about more changes in that world than follow from this temporal rule alone, because a-temporal rules connect legal consequences to the new facts that result from application of the temporal rule.

I. NORMS

One of the main functions of the law is to guide human behavior by prescribing or prohibiting it. The law fulfils this function by means of a special kind of rules, called "norms".[29] By adding norms to the body of rules, the legislator can make particular forms of behavior obligatory or illegal for a certain class of people. By abrogating norms, or by making exceptions to them by granting permissions[30], the legislator can take this status away again.

Like other rules, norms can be subdivided into categorical norms and conditional norms. A categorical norm has three main elements. There is a deontic modality, which specifies whether the norm is prescriptive ('ought', 'must'), prohibitive ('forbidden', 'ought not', 'shall not'), or permissive ('may', 'allowed', 'can'[31]).

Then there is a specification of the action type that is prescribed, prohibited, or forbidden. Norms always refer to action types, because they aim to regulate behavior, and act tokens are acts that have already been performed and can therefore not be guided anymore.[32]

The action type with which a norm deals may take different forms. It may be an activity, as in the norm [It is forbidden (for everybody) to whistle in the dark]. It may be to bring about a particular state of affairs, as in the norm [The

[29] Because the term "norm" is used in so many different senses, I prefer to abandon it altogether. (For my reasons, see Hage, "What is a norm?", in Id, *Studies in Legal Logic*, supra n 15, 159-202.) My experience is that most legal theoreticians and lawyers are too fond of the term to give it up. Therefore I will use it and explain in which sense I use it.

[30] Because this paper does not deal with exceptions to rules and because the primary role of permissive norms is to make exceptions to prohibitions, I will limit the discussion of permissive norms to a minimum.

[31] Sometimes legislation uses the word 'can' or analogues to express a permission. This may be misleading, because this blurs the distinction between permissions and competences.

[32] This does not exclude that it is possible that act tokens are ex post *evaluated* as obligatory, prohibited or permitted. But a judgment like 'What you did yesterday was not allowed' does not express a norm, but an evaluative judgment.

government ought to provide everybody with sufficient medical care]. It may be to see to it that a particular state of affairs is present or absent, as in the norm [The inn keeper sees to it that no drugs are dealt in the inn]. Or it may be to make an effort to perform any of the above mentioned action types, as in the norm [The license holder must prevent emission of pollutants as much as reasonably possible].[33]A special type of norm does not prescribe a particular type of behavior, but rather the way in which (including the place or time) a particular type of behavior should be performed. An example would be [Car drivers ought to drive on the right as much as possible].

Finally, a norm also specifies the norm addressees, the persons for whom the norm holds. This specification is general in the sense that it does not mention one or more concrete persons, but rather all the persons who have particular characteristics, such as all car drivers, all farm keepers, or—to give an example of how 'concrete' an general specification may be—all left-handed persons, who tend to take walks in the evening in the neighborhood of the Saint Paul Cathedral.[34] The most general category of norm addressees is when the norm addresses everybody, such as the norm that it is forbidden to kill. A typical categorical norm would for instance be [Car drivers ought to drive on the right hand side of the road]. This norm is directed to all car drivers. It is a prescriptive norm, and it deals with the way in which behavior (to drive) ought to be performed, namely on the right hand side of the road.

If a norm is conditional, the requirement, prohibition, or permission is subjected to a condition. An example would be [When it is dark, car drivers ought to turn on the car lights].[35] It is not always easy to distinguish a conditional norm from a norm that specifies how an action type should be performed. The norm [It is forbidden to drive a car on a car free Sunday] might be interpreted as a conditional norm, but also as a norm that specifies at what times one ought not to drive a car.

It may seem that there are norms that prescribe or forbid the presence of some state of affairs.[36] These norms would have no norm addressee, nor do they refer to

[33] For a discussion of this type of norm, see P Westerman, "Governing by goals. Governance as a legal style" (2007) 1 Legisprudence, 51-72

[34] This means that I use the term 'norm' for what Von Wight calls 'general prescriptions', where the generality concerns the subject of the norm (the 'norm addressee'). See G H von Wright, *Norm and Action*, (London, Routledge and Kegan Paul, 1963), 78.

[35] A conditional norm should be distinguished from a conditional statement concerning the existence of a duty. For instance, "If this act is adopted, it is forbidden to smoke in public places" does not express a norm but is a statement about the effects of the adoption of a particular act.

[36] For instance, MacCormick, *Institutions of Law*, supra n 1, 25 explicitly recognizes this type of norm.

an action type.[37] An example of such a norm would be the first sentence of article 269 of the EC- Treaty: “Without prejudice to other revenue, the budget shall be financed wholly from own resources.”

Despite the appearance that this norm is not directed to anybody and does not prescribe any action type, such a provision should be interpreted as an incomplete formulation of a norm as analyzed above. Were it otherwise, it could not guide any behavior, because neither would it be clear whose behavior is guided, nor in which sense it is guided. The most probable interpretation of provisions like this one is that it directs people to establish the mentioned state of affairs and addresses the persons who are in the (formal) position to bring this state of affairs about. In case of this example, the norm might be reformulated as: [The Commission and the European Parliament ought to see to it that the budget is financed wholly from own resources.]

J. RULES THAT MAKE LEGAL TRANSACTIONS POSSIBLE

As discussed above, a legal transaction is an act with a propositional content to which the law attaches the consequence that the propositional content of the act is made true in the world of law. A legal system must have three kinds of rules in order to make legal transactions possible.[38]

The first and most obvious kind of rules are the consequential rules. These rules attach legal consequences to a valid legal transaction. A typical example of such a consequential rule is the rule that if A validly transfers the ownership of a good G to B, A has lost her ownership, while B has become the owner. Notice that this rule not only attaches legal consequences to the transfer of a good, but that it also defines what a transfer amounts to and in this sense makes transfers possible.

A second kind of rules in connection with legal transactions are the rules that specify how legal transactions are to be performed. Typical examples are the rules that specify how to pass an act and the rule that a contract is concluded through

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[37] In the literature on deontic logic, these norms are referred to as ‘ought-to-be’ norms, which are opposed to the ‘ought-to-do’ norms that I characterize in this paper. See H N Castañeda, “On the semantics of ought-to-do” in D Davidson and G Harman (eds), *Semantics of Natural Language*, (Dordrecht, Reidel, 1972), 675-694.

[38] MacCormick distinguishes in this connection nine different conditions for legal transactions. See MacCormick, *Legal Institutions*, supra n 1, 156. Some of these nine conditions have to do with the fact that he treats legal transactions as dealing with the legal positions of other persons who are or are not susceptible (“liable” in Hohfeld’s terminology) to undergo changes in their legal positions. In my analysis the persons of which the legal position is changed is accounted for in the type of the legal transaction.

offer and acceptance thereof. These rules can be read in two 'directions'. In one direction they tell us how to perform a particular kind of legal transaction. In the other direction they are used to classify events as legal transactions. For instance, adopting an act in two legislative chambers, followed by a signature by the head of state, counts as passing an act. Because these rules make that certain events count as legal transactions, I will call them "counts-as rules".

Although adults are generally competent to perform legal transactions in most legal systems, not every adult is competent to perform every kind of legal transaction. Most people are, for instance, not competent to pass laws or even to participate in the law making progress.[39] Who is competent to perform which legal transactions is dealt with by a third kind of rules, namely the competence conferring rules.

The notion of competence is closely related, but not identical to the notion of power. A person P has the power to perform a legal transaction T if three conditions are satisfied:

1. There must be rules that make legal transactions of type T possible in general;
2. P is physically and mentally capable to perform the behavior that counts as performing T;
3. P is legally competent to perform T.

On this analysis, competence is a necessary condition for having the power to perform a legal transaction. Since it does not make sense to confer this competence to somebody who is not capable to perform the required behavior, or to perform the competence for a legal transaction that does not exist, competence will normally go together with the power to use this competence. Nevertheless, the notions of power and competence are different and it is possible to imagine cases where somebody is competent but unable to perform the behavior required for the legal transaction.[40]

Moreover, otherwise than competence, which is a legal status which is conferred by competence conferring rules, power is not a separate legal status, but rather a characteristic that emerges from the presence of a set of rules. If the rules in the world of law are such that the three conditions for P having the power to perform legal transaction T are fulfilled, then P has the power to perform T. There

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[39] I assume, of course, that participation in electing the members of the legislative chambers does not count as participation in legislation itself.

[40] An example would be a person who is unable to write and therefore cannot perform a legal transaction which requires writing performed in person.

cannot[41] be a separate rule that grants this power to P, although there must be a rule (or a set of rules) that confers on P the competence to perform T.

K. LEGAL STATUS AND MEANING RULES

Having the competence to perform a type of legal transaction is a status which the law confers on persons which has no counterpart in the physical world. The law specifies who is competent to do what under which circumstances, it can also specify how this competence is lost (if it can be lost) and it specifies what the legal consequences of having a competence are. (Normally that one is in a position to perform legal transactions of the type with which the competence deals.) Competence is not the only legal status. Minority is such a status too, just like being the head of the state, being a European citizen, being a suspect in the sense of criminal law, being a last will, counting as a vote, and – probably the most prominent example of legal status - having a right.[42]

Characteristic for a legal status is that the law specifies who or what has this status, and what the legal consequences of having this status are. The rules that specify who or what has a status often take the form of rules that indicate how the status is acquired and how it is lost. For instance, the law contains rules which indicate how the status of owner of a good is acquired, and how it is lost again. Moreover, the law contains rules which indicate what the legal consequences of ownership are.

Status may depend on the presence of some other characteristic which may be a legal status itself. For instance the tax law may attach the status of being 'real estate taxable' to the status of ownership of real estate. In that case the law has one or more rules that connect the presence of this status to these other characteristics. If status is acquired through some type of event, the law contains rules that specify the kinds of event through which the status is acquired. If status is lost through some type of event, the law contains rules that specify the kinds of event through which the status is lost. And finally there are rules that indicate what the legal consequences of having this status are. The first and the last type of rules are similar in that they both attach legal consequences to the presence of certain characteristics, and I will call such rules "consequential rules". The second type of rules, indicating when a status is acquired, will be called "entry rules", and the third type of rules, indicating when a status is lost, "exit rules".[43]

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[41] "Cannot", because it is not up to the law to grant physical or mental capabilities.

[42] B Brouwer and J Hage, "Basic Concepts of European Private Law" (2007), 15 European Review of Private Law, 3-26, contains a discussion of legal rights as legal status.

[43] Notice that entry and exit rules are always temporal rules in the sense of section H, while consequential rules may be either temporal or a-temporal.

Substantial parts of the law deal with status, how it is acquired and lost, and what the consequences of its presence are. The private law legislation of many countries contains extensive regulations of how property is acquired and lost. All these rules deal with the status of ownership. Moreover, ownership is a condition of many other rules, and all these rules are consequential rules which build on the presence of ownership. An example of legal status in administrative law is the availability of a license to do things which are not allowed without a license. There are entry rules which specify how a license can be acquired. There are exit rules indicating how a license can be lost again. And there are consequential rules, including permissive rules that indicate that a general prohibition does not apply to license holders. Another consequence of having a license might be that the license holder must pay every year a sum of money to prolongate the license.

Entry rules indicate how a particular legal status is acquired and in that way they determine when status concepts such as 'owner', 'suspect', or 'license holder' are applicable. They are in this function exceptional, because they do this without at the same time giving meaning of these status concepts. To know how one acquires a license is not the same as knowing what 'license holder' means. This is different for many other rules which both give meaning of legal concepts, and *ipso facto* also the conditions of applicability for these concepts. Typical examples of such meaning rules can be found at the beginning of statutes that contain a definition part. Article 2 of the Draft articles on Responsibility of States for internationally wrongful acts, for instance, defines internationally wrongful acts of a state:

> "There is an internationally wrongful act of a state when conduct consisting of an action or omission:
> a. Is attributable to the State under international law; and
> b. Constitutes a breach on an international obligation of the State."

The difference between rules like this and the entry rules for legal status is that this rule specifies what an internationally wrongful act of a state is, while the entry rules only specify when the status concept applies.[44] Despite this difference, both types of rules often fulfill the same role in legal reasoning, because they specify (part of) the conditions under which another rule is applicable.

[44] This topic is discussed more extensively in J Hage, 'The meaning of legal status words', in preparation.

L. CONCLUSION

This article aims to offer a particular view of legislation, namely legislation as a means to (re)build the world of law. To this purpose, it was argued that legislation can be used, amongst others, as a legal transaction by means to intentionally change the world of law. One particularly important type of change concerns modifications in the set of legal rules, rules which function as constraints on the facts in the legal world. By making, changing, or abrogating rules, a legislator does not merely bring about changes in the set of rules, but also in those facts in the world of law that depend for their existence on these rules.

From the perspective of legislation as a kind of building, the question arises what the building blocks of the legal world are. In this connection, three kinds of rules were distinguished, namely norms, which create legal duties, competence conferring rules, which are necessary (but not sufficient) to create the power to perform legal transactions, and rules that deal with legal status, namely entry, consequential and exit rules. Although there are other kinds of rules, these three types make up a very large proportion of all legal rules, and a proper understanding of their role in the law is crucial for good legislation.

This article has necessarily been quite abstract, and could therefore not contain sufficient detail to generate such an understanding from scratch. However, it contains a conceptual framework by means of which more detailed analyses of rule types can be organized.