

# A Model of Legal Acts

## Part 2: The Operation of Legal Acts

Jaap Hage<sup>1</sup>

Universities of Maastricht and Hasselt

e-mail: [jaap.hage@maastrichtuniversity.nl](mailto:jaap.hage@maastrichtuniversity.nl)

### Abstract

This paper aims at providing an account of legal acts that forms a suitable starting point for the creation of computational systems that deal with legal acts. The paper is divided into two parts. This second part of the paper deals in some detail with the operation of legal acts. Topics dealt with include: power and competence, capacity, form requirements; partial validity, avoidance and representation.

### *Keywords*

legal acts; existence and validity; illocutionary force; propositional content; power, competence; capacity; form requirements; illegal or immoral content; mandatory law; partial validity; avoidance; representation

## 7 Introduction to legal acts

In Part 1 of this paper (the sections 1-5) legal acts were situated in the ‘world of law’, the set of states of affairs whose existence is based on the operation of legal rules. The emphasis there was on static and dynamic rules and their interrelation in the constitution of facts. Dynamic rules attach changes in the world of law to events. These events include acts and therefore also legal acts.

Legal acts are acts to which the law connects legal consequences. The characteristic that sets of legal acts from other acts with legal consequences is that the consequences of a typical legal act are those which the actor wanted to bring about by means of his act. A legal system that offers its subjects the possibility to bring about intentional changes to the world of law acknowledges legal acts. Apparently, this holds for all modern legal systems.

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Although historically the notion of a legal act may have developed through abstraction from contracts and was – as is officially still the case in German law – limited to private law, the idea that the law offers its subjects the opportunity to bring about intentional changes is of much wider application than merely contracts and private law. Examples of legal acts in public law would be legislation (the intentional creation, modification, and derogation of legal rules), the granting of licenses, judicial verdicts, taking steps in a judicial procedure, and official decisions whether to prosecute suspects of crime. In all of these cases, the actor performs an act with the intention to bring about changes in the world of law and the law normally attaches the intended changes to this act, precisely because they were intended.

Different kinds of legal acts are subject to different rules, a phenomenon which should not surprise because the different kinds of legal acts were not developed as special cases of the general phenomenon legal act, but rather the other way round. Nevertheless it is possible to point out a number of characteristics which are shared by most legal acts. They include:

- that a legal act is an act,
- which may be subject to demands of form,
- by means of which the actor intends to bring about changes in the world of law;
- that the actor was competent to bring about the intended changes;
- that the actor had the capacity for performing (this kind of) legal acts;
- that performing the legal act was not illegal;
- that the intended results of the legal act are not illegal or immoral.

Moreover, it is quite common

- that a legal act has other legal consequences than only the intended ones;
- that the law assumes the presence of a legal act even though there was no intention to perform a legal act, or an intention to perform precisely the legal act that the law assumes to exist;
- that the law assumes the presence of a legal act even though the actor did not have the competence or capacity necessary to perform this kind of legal act or a legal act with this particular content.

In the next sections, these characteristics will be discussed at the hand of an analytical model of legal acts which builds on the account of the world of law

presented in part one of this paper. Some examples, from both public and private law, will be elaborated formally.

## **8. Legal acts: the basic picture**

The basic idea behind legal acts is that a legal act is an act performed with the intention to create legal consequences and to which the law attaches the intended legal consequences because they were intended. There are two steps involved here. First, a particular act must count as a legal act of a particular kind and with a particular content, and second the law must attach the intended consequences to this legal act.

### **8.1 Existence and counts-as rules**

Whether an act counts as a legal act of a particular kind and with a particular content is in part a matter of the interpretation of human behavior. To the extent that this is the case, an analytic, let alone a logical model is not well possible, because it is not easy to specify in an a priori fashion the conditions under which an event can count as a legal act with a particular content. The overall picture seems to be that a ‘normal’ legal act of a particular type sets a standard and that a ‘legal act’ that deviates too much from this standard does not even count as a legal act of that kind. An ordinary citizen, for instance, does not have legislative powers, and therefore ‘legislation’ performed by an ordinary citizen does not even count as legislation, not even as invalid legislation. If the official legislature of a country would write the text of a statute on a piece of waste paper during a lunch break and under the obvious influence of a lot of alcohol, this would not count as legislation either. It would not count as a last will if a person mumbled its contents to himself, without doing anything else, and a single person cannot contract, not even invalidly, on his own.

To some extent, however, the issue whether something counts as a legal act is governed by counts-as rules. In Dutch law there are rules that specify which acts count as the delivery of a good. Real estate, for instance, must be delivered by means of a notarial deed. A delivery is a legal act, which can in its turn, and under particular circumstances, count as the transfer of a good.

If there are counts-as rules which determine under which circumstances an act counts as a legal act of a particular kind, acts that do not satisfy the conditions

of these counts-as rules normally either do not count as a legal act at all, or are considered invalid legal acts. Normally, in neither one of these two cases, the intended legal consequences will obtain.

Nevertheless, the difference between these two is important, because an invalid legal act may at least in theory become valid after some reparative act was undertaken, while a non-existent legal act is irremediably lost. For instance, if a person acted as a representative of somebody else without being empowered to do so, legal acts on behalf of the represented person will normally be invalid. However, through confirmation by the represented person, the legal act can be made valid retrospectively. A logical account of confirmation will be given in section 15.4.

## **8.2 Illocutionary force, propositional content and interpretation**

A legal act is a means to bring about intentional changes in the world of law. To this purpose, the act must somehow indicate:

1. what kind of legal act is at stake; and
2. which changes are meant to be brought about by it.

These two elements correspond to what Searle (1979) called, in connection with speech acts in general, the illocutionary force, and the propositional content respectively.

Every legal act must have a propositional content which specifies the changes which the act aims to bring about. The transfer of the ownership of some good would therefore have as its propositional content that the old owner will not be the owner anymore and the new owner will be the owner. The *illocutionary force* of the legal act is that the performers of this act together by means of a *transfer* bring about that this propositional content will be realized. Therefore, every legal act must also somehow indicate which *kind* of legal act it is.

Often the propositional content of a legal act will be spelled out in the performance of the act. This is for instance obvious in the case of legislation, where the contents of the newly created rules are explicitly formulated in the text of the statute. In adopting this piece of legislation, the members of the legislature

adopt the rules as explicated in the text.<sup>2</sup> A similar phenomenon occurs if two parties enter into a contract which was explicitly spelled out in a document.

Sometimes, however, the propositional content of a legal act is not spelled out and must be determined by interpretation of the events which made up the legal act. This opportunity to ‘interpret’ is often used to make the contents of the legal act desirable according to some standard. (Kornet 2006) In fact, in the civilian tradition the ‘interpretation’ of legal acts is usually seen as a form of determining the legal consequences in a particular case. (Van Dunné 1971) Starting from the doctrinal notion of a legal act, however, the propositional content of a legal act is what the performer(s) of the legal act intended to bring about. This may require interpretation of what happened when the legal act was performed, but it remains the search for an intention, and it is not the search for what is desirable law.<sup>3</sup>

It is hard to say more in general about this form of interpretation and in general about the establishment of the propositional content of a legal act. We will therefore just assume that a legal act has a particular illocutionary force and propositional content.

### **8.3 Kinds of legal acts**

Any legal act belongs to a particular kind. Legislation is, for instance, one kind, judicial verdicts are another kind, and last wills are again another kind. The kind of a legal act is important, because it limits the propositional content which can validly be realized by means of it, and it is also co-determinative for whether a particular actor is competent or has the capacity to perform the legal act at issue. For instance, in the Netherlands a person has the capacity to make last wills at the age of 16, but for most other legal acts only receives the necessary capacity at the age of 18. Ordinary citizens lack the competence to make administrative dispositions, but have the general competence to perform legal acts. However, in the Netherlands they lack the competence to transfer ownership of goods by means of a contract, or to vote in elections by means of a deed. Some of these observations are so obvious that they may seem superfluous to make, but for an

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<sup>2</sup> This explains the common mistake (at least in the civilian tradition) that judges would apply a statute, instead of a rule created by means of that statute.

<sup>3</sup> Notice that this is merely a terminological point, not a proposal on how the consequences of legal acts should be established.

analytical account of legal acts it is necessary to observe that the nature of legal acts plays an important role in the determination of whether somebody can perform a particular legal act.

#### 8.4 Legal consequences

If a legal act is valid, this means that the legal consequences of the transaction take effect. The precise circumstances under which a legal act are valid will be discussed later. Assuming again the doctrinal notion of a legal act, the consequences of legal act are the intended consequences, specified in the propositional content of the transaction. We will see later that there may be more legal consequences than those specified by the propositional content, but we will assume that the *legal consequences in the narrow sense* are those of the propositional content. This simple model of legal acts and their consequences is represented graphically in Figure 10.

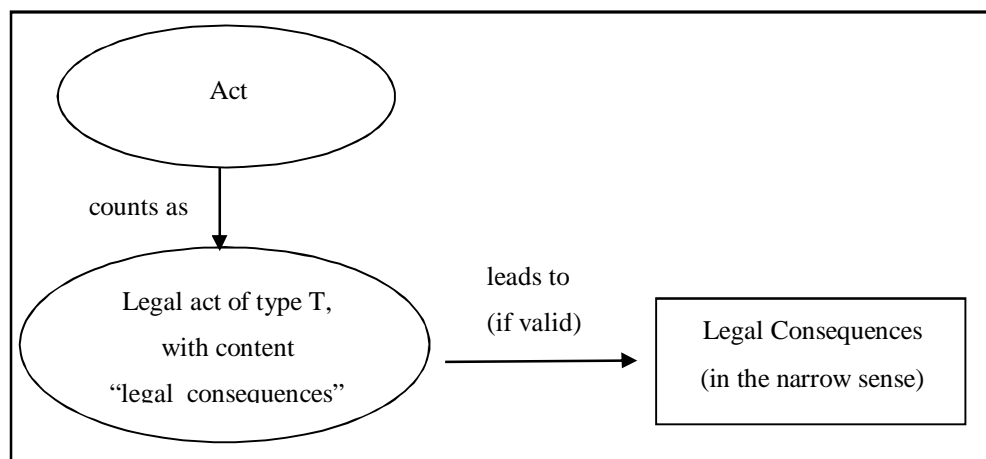


Figure 10

### 9 Power, competence, capacity and form

One major condition for the validity of a legal act is that the actor who performed this transaction was capable of doing so. One term to express this capability is 'power'. (Hohfeld 1978; Halpin 1996; Sartor 2005, Ch. 22). According to Lindahl (1977, 194) this term is the most fashionable with common law authors. Another term which is apparently more fashionable in the civilian tradition is 'competence' (Spaak 1994, 1-2).

Although linguistic usage is not uniform on this issue, we will stipulate a distinction between power and competence. The term ‘competence’ will be used to denote an intermediate and therefore also internal legal concept. The competence to perform particular legal acts is a status assigned by legal rules, and this status is a requirement for being able to bring about valid instances of the concerned legal acts.

The term ‘power’ will be used as a doctrinal concept that denotes the capability to bring about particular legal acts. Somebody who is competent to perform a particular kind of legal act and has the capacity to do so (we will return to capacities soon), will normally also have the power to do so.

This power is not something assigned immediately by legal rules however, but is rather an extra-legal characteristic that depends on one’s legal status, with competence and capacity being the most important determinants of this extra-legal characteristic. A competence is by definition linked to the performance of particular kinds of legal acts, while a power can also denote a capability which has nothing to do with legal acts, or even the law, at all. The power to jump eight meters is therefore comparable to the power to make a statute. In both cases the power stands for the capability to do something if one wants to.<sup>4</sup> So, although legal rules do not assign powers, they do determine powers by assigning competences and capacities.

To perform a legal act of a particular type and with a particular propositional content, an actor needs the competence to do so. This competence must relate both to the propositional content of the legal act and to the kind of the transaction. For instance an ordinary citizen lacks the competence to give judicial decisions, but a judge who has this competence generally still lacks the competence, for example, to grant pollution licenses in this way, because granting these licenses is an administrative, not a judicial task.<sup>5</sup> In the civilian tradition, judges lack the competence to create new rules, but on the common law tradition this is – to some extent - different.

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<sup>4</sup> Sartor’s distinction between generic powers and potestative rights (2005, Ch. 22) goes in the same direction as the present distinction between powers and competences, be it that Sartor only considers powers based on norms, while the present notion of a power can both be based on norms and causal laws.

<sup>5</sup> This does not exclude that sometimes judges can grant licenses as part of their decision making tasks, but that would be exceptional.

A logical analysis of competence must therefore distinguish between the kinds of legal acts an actor has the competence to perform and the kinds of propositional content an actor can realize by means of a legal act of a particular kind.

If a person lacks the relevant competence for the performance of a particular kind of legal act with a particular content, and nevertheless tries to perform such a legal act, the sanctions may vary from non-existence or nullity of the transaction, to avoidability or non-invocability.<sup>6</sup> It may even be the case that there is no sanction at all, for instance for the sake of legal certainty.

The competence required for the performance of a legal act relates to the kind of legal act and to its propositional content, and normally not to the actor of the transaction. There is, however, another legal status which focuses on the actor and this is called 'capacity'. In fact, capacity mostly figures in the negative sense of lacking the capacity to perform legal acts (of a particular kind). Typical situations in which persons lack the capacity to perform legal acts (of a particular kind) are when persons are still young, or suffer from mental deficiencies.

Capacity is a legal status, which means that the law decides when to withhold from an actor the capacity for particular kinds of legal acts. This usually means that 'artificial' actors such as legal persons and government agents never lack capacity – although they may lack competence – and that it depends on the kind of legal act under which circumstances a natural person lacks the required capacity.

Also the precise contents of a legal act may be relevant for the presence of the capacity to perform the transaction. For instance, according to the Dutch civil code, minors lack in general the capacity to perform legal acts unless it concerns transactions performed by a minor of a particular age, which are normally performed by minors of this age. (art. 1:234 section 3 BW) A child of ten years old would therefore have the capacity to buy an ice cream, but not to buy real estate.

If somebody attempts to perform a legal act for which he lacks the relevant capacity, sanctions may differ from one kind of legal act to another. The 'easiest' case is when the resulting legal act is either non-existent (e.g. a baby 'creates' a

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<sup>6</sup> In this paper we will ignore this last possibility, because an adequate account of non-invocability requires a dialectical setting. (Hage 2005a, 256/7)



statute), or nullity as is the case in Dutch law if a minor attempts to make a last will without assistance of his legal representative. Usually a lack of capacity is meant to protect the interests of the person lacking the capacity. Then a common sanction is that this person (or his representative on behalf of him) is given the competence to avoid the legal act. In still other cases, the legal act cannot be invoked against the person lacking the capacity. In a few exceptional cases, however, it may even be the case that the legal act is 'normally' valid, despite the lack of capacity.

Many legal acts must be performed in a particular way in order to be valid. In a number of cases, this demand is dealt with in the form of counts-as rules. A particular act can only count as the performance of a legal act if some demands of form are satisfied. Last wills are a case in point: if particular demands of form are not met, an event does not even count as the creation of a last will. Another example would be that the transfer of real estate does not even count as such if it was not performed by means of a notarial deed.

Often, however, demands of form do not prevent an event from counting as a legal act, but merely make that if the demands are not met, the legal act is void, or voidable. Elections would be a case in point. They are often meant to be secret, but if there are serious violations of this demand, they still count as elections but they may be void, or voidable.

## **10 Illegal and immoral legal acts**

If a legal act is valid, its legal consequences take effect. This means that if the consequences do not take effect, the legal act is invalid. The invalidity of a legal act can therefore not only be brought about because of some defect in its origin, but also because the intended consequences cannot be realized. There are at least two reasons why the intended consequences can invalidate a legal act. One reason is that these consequences make that the performance of the transaction falls under a legal prohibition. Examples would be a sales contract in a shop, made after the statutory closing time for shops, and a refusal by a government agency to give a driving license to a person who satisfies all the conditions for obtaining

one. Such legal acts may be invalid.<sup>7</sup> If this is the case, the prohibited nature of the legal act invalidates the legal act.

The other reason why the intended consequences can invalidate a legal act is that, although the performance of the legal act was not forbidden, the law withholds its intended consequences from taking effect. If a particular kind of behavior is immoral, the law may make it impossible for agents to undertake an obligation to perform that immoral behavior. A typical example would be a contract with a hired killer: no person can undertake by means of a contract the legal obligation to make a killing. If the creation of such an obligation is the intended legal consequence, this consequence does not take effect, and the contract which aimed to create the obligation is therefore invalid.

## **11 Mandatory law and partial validity**

The idea behind legal acts is that actors, be it citizens, private organizations or government agencies, are enabled to bring about intentional changes in the world of law. These changes may be new facts, but they may also be changes, including derogations, of facts that were already present. Moreover, these already present facts may be there because of already existing legal rules. For instance, the legislator may derogate a rule which existed because it was made by means of an earlier statute. A parent may, by means of a last will, bring about that her children inherit less than they would have inherited on the basis of the statutory regulations. A public officer may create an exception, usually in the form of a license, to a general prohibition of administrative law.

### **MANDATORY LAW**

Sometimes, however, the pre-existing law cannot be changed by means of a new legal act. For instance, it may be impossible to disinherit one's children completely, to create (statutory) rules which violate human rights, or to make a labor contract according to which a laborer is disallowed to take any holidays. Such legal states of affairs which cannot be derogated by means of (a particular kind of<sup>8</sup>) legal act are sometimes called 'mandatory law'. This expression,

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<sup>7</sup> In the Netherlands, it depends on the purpose of the prohibition whether the sanctions of the transgression include nullity of the legal act.

<sup>8</sup> It happens that a particular state of affairs cannot be changed by means of one kind of legal act, but can be changed by means of another type. For instance, the interests of laborers are protected by

mandatory law, is mainly used in connection with private law, but the phenomenon is not confined to private law, as the above examples from constitutional and administrative law illustrate. Therefore we will use the term more broadly, to refer to all those states of affairs in the world of law which cannot be changed by (a particular kind of) legal act. If the consequences of a legal act would bring about that such a mandatory state of affairs would be derogated, the legal act in question is invalid.

The conflict between the intended consequences of a legal act and pre-existing legal states of affairs is somewhat similar to a collision of rules. Just as it is impossible to co-apply colliding rules, it is impossible to retain the pre-existing legal state of affairs and to let the intended consequences of the legal act take effect. The way to deal with these conflicts is also similar: one must establish a priority relation between the old state of affairs and the intended new state of affairs and this priority relation determines whether the old state of affairs is preserved or the new state of affairs is realized.

#### PARTIAL VALIDITY

If the old state of affairs is preserved, this means that the intended consequences of the legal act do not take effect and that means in turn that the legal act is not valid. Sometimes, however, the invalidity of the legal act as a whole is too strong a sanction. Take for instance a statute which contains many rules. One of the rules violates a human right and is therefore invalid. Should this bring along the invalidity of the statute and with it of *all* the rules contained in it?

It may depend on the nature of the invalid rule and its relation to the rest of the statute, but it is at least possible that only one of the rules of a statute is invalid without thereby invalidating the statute as a whole. This phenomenon is called *partial validity*. The statute is partially valid, meaning that some of its intended legal consequences take effect (some of the rules which the statute was meant to create are valid), and some of the intended consequences do not take effect. A similar phenomenon occurs in private law, where it may be the case that a last will or a contract is only partially valid.

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mandatory law, which cannot be set aside in a labor contract, but which can be set aside through legislation. It is also possible that legal acts need to take a special form (e.g. in writing) if they are to bring about particular consequences.

A legal act which is ‘partially valid’ is in a sense a legal act which is valid, but which lacks some of its normal legal consequences. This means that a logical model of legal acts should allow the possibility that a valid legal act does not have all of its intended consequences.

## 12 Additional consequences

Actors can intentionally bring about legal consequences by performing a legal act to which the law attaches the intended consequences *because they were intended*. This does not imply, however, that the law *only* attaches the intended consequences to a legal act. A legal act is an event and the law tends to attach legal consequences to all kinds events, irrespective of whether these consequences were intended or not. Examples of events which may lead to unintended consequences are crimes which lead to punishability, torts which leads to liability, and earnings which lead to the duty to pay income taxes. This does not exclude that a person who earns money does so to become taxable (unlikely, but possible), or that somebody commits a tort, knowing and accepting that this leads to tort liability. In all these cases, however, the consequences do not depend on their being intended.

Also legal acts may lead to (additional) legal consequences which take effect independent of whether they were intended or not. Customers in shops must pay value-added taxes, application for a license creates for a government agency the duty to decide about the application within a particular term, giving a judicial verdict obliges the court to inform the interested parties about the decision, old statutory regulations which conflict with recent regulations lose their validity, etc.

A very common instance of this phenomenon is that contracts not only lead to the agreed obligations but also to additional obligations which were not part of what contract parties agreed about. For instance, a sales contract for consumer goods does not only create the duty to deliver the good, but also a duty to repair defects which originate within a particular term after the contract. Such additional duties may be set aside in the contract itself, but this possibility does not always exist. If the additional consequences can be set aside, they are called ‘terms implied in law’ (*règles supplétives*, *dispositives Recht*); if they cannot be set aside, they are called ‘mandatory law’.

## 13 Avoidance

Sometimes a valid legal act can be avoided. Depending on whether the avoidance has retroactive force, the validity of the legal act is taken away *ab initio* (the legal act is deemed to have never been valid; Von Bar 2009, 7:212) or from the moment of avoidance.<sup>9</sup> If the legal act has become invalid, no legal consequences can follow from it anymore, although it remains possible that the law attaches (partly the same) consequences to the presence of the invalid legal act.

If a legal act is avoidable, this means first and foremost that it is valid as long as it has not been avoided, and therefore that it has legal consequences. Second it means that some actor has become competent to avoid the transaction. This actor may be a judge, or some other government agency, but it may also be a person whose interests have been affected by the legal act. Examples from the Dutch law are that a judge can avoid an administrative disposition if it was given against the law, that the central government can avoid a decision of a lower governmental agency if that decision is deemed to violate the general interest, and that a contract party can avoid a contract if it was caused by threat.

Normally avoidance works retrospectively, and then the legal effects of an avoided legal act disappear retrospectively too. If this is to be taken into account in a logical model of legal acts, this means that some kind of *truth maintenance system* will have to be included. (Doyle 1979)

## 14 Representation

Representation occurs whenever an agent performs a legal act on behalf of another agent. Examples are that a sales representative sells goods on behalf of his employer, and that a public officer grants a license on behalf of the competent government agency.

Characteristic for representation is that the legal act performed by the representative *counts as* a legal act performed by the represented agent. This means that the represented agent must have the relevant competence. For instance, if some book shop owns book B, then the book shop is competent to alienate this book. Because the sale of the book by a seller from the book shop

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<sup>9</sup> It is also imaginable that the time from which the legal act is considered invalid differs from both the time at which the transaction was performed and the time at which it was avoided, but I am not aware of any such situation.

counts as a sale by the book shop, it is the competence of the book shop that determines whether the sale is valid.

In order to be able to represent some other agent validly, a representative must have the competence to represent this agent for the kind of legal act at stake and for the contents of the legal act at stake. For instance the seller of a book shop is competent to sell books on behalf of the shop, but lacks the competence to represent the book shop in a lease contract concerning the shop, and probably also to represent the book shop in a sales contract concerning a car owned by the shop.

## 15 Formalization

In a formal account of legal acts we must distinguish two aspects. First there are some characteristics of legal acts in general, of the doctrinal concept of a legal act so to speak. It is theoretically possible to give a precise logical model of these characteristics. However, second, legal acts also figure as internal-legal concepts which are defined by national legal systems. A formal account of legal acts in this sense almost necessarily boils down to an exercise in knowledge representation.

In the following I will try to steer between the Scylla of useless abstraction, and the Charybdis of equally useless specificity. I will do so by giving on the one hand an abstract account and relativizing it, and on the other hand by giving a representation of positive law which is then abstracted in such a way that makes it hopefully applicable to more than one legal system.

### 15.1 A simple model

If a valid legal act was performed with as propositional content that a particular state of affairs or a particular set of states of affairs will obtain, then the simple picture of legal acts implies from that moment on this state of affairs or set of states of affairs will actually obtain.

#### REPRESENTATION OF ACTS

To express this in a logical language, this language must make it possible to formulate rules about acts in general. For this purpose, acts will be treated as entities (logical individuals). This makes it possible to formulate rules about acts in general. The following rule of Dutch tort law illustrates the point:

$*\text{performed}(\text{actor}, \text{act}, \text{characteristics})_t \ \&$   
 $\text{illegal}(\text{act}) \ \&$   
 $\text{accountable}(\text{actor}, \text{act}) \ \&$   
 $\text{caused}(\text{act}, \text{damages}, \text{victim}) \Rightarrow$   
 $*\text{obligation}(\text{actor}, \text{pay}(\text{damages}), \text{victim})_{t+1}$

The Performed/3 predicate that is used in this example has three parameters. The first one specifies the actor(s) who performed the act, the second parameter denotes the act that was performed, and the third parameter is a list of characteristics of the way in which the act was performed. For instance, a sale may be performed in a shop, reluctantly, and on behalf of the shop owner. A murder may be performed gently, at dusk and with an axe.<sup>10</sup>

The same example also illustrates that another demand is realized, namely that it is possible to express that a particular act took place at moment t.

#### REPRESENTATION OF LEGAL ACTS

Legal acts are characterized by their illocutionary force and their propositional content. Both these two elements should be represented explicitly and to that purpose, legal acts are denoted by means of a function expression  $la/2$ , which has the type of illocutionary force and the transaction's propositional content as its two parameters.

As a tool to express the propositional content of a legal act, we will introduce the following convention.<sup>11</sup> Let  $*s$  denote a state of affairs. Then " $*s$ " denotes the propositional content corresponding to this state of affairs. For instance, " $*\text{owns}(\text{jones}, \text{blackacre})$ " would stand for the propositional content *that Jones owns Blackacre*.

Reference to a legal act, for instance a transfer, with as propositional content (amongst others) that Jones will be the owner of Blackacre, can then be made by means of the following function expression:

$la(\text{transfer}, \text{"*owns}(\text{jones}, \text{blackacre}) \ \& \ \dots")$

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<sup>10</sup> The inclusion is an act description of the way in which the act was performed also comes in useful for the avoidance of certain variants of the contrary to duty paradoxes, such as Forrester's paradox (gentle murder). These paradoxes result from the phenomenon that it is not a particular kind of action that is forbidden or prescribed, but 'only' a particular way to perform that action.

<sup>11</sup> The use of function expressions to denote propositional contents into which quantification is possible was inspired by related analyses in (Quine 1976) and in (Kaplan 1969).

A legal act is performed by one or more actors. It is desirable to denote these actors by means of a single parameter. For this reason, the actors who performed a legal act are denoted by means of an actor list, unless there is a single actor, who can be denoted by means of an ordinary term. The list is indicated by means of square brackets []. The following sentence then expresses that Smith and Jones performed this legal act at time t:

Performed([Smith, Jones],  
           la(transfer, "owns(jones, blackacre) & ..."), c)<sub>t</sub>

#### THE CONSEQUENCES OF CONSTITUTIVES

Given these conventions, it is possible to express in general that the propositional content of a legal act will become true after the legal act has been performed.

This is accomplished by the following sentence:

Effects\_legal\_transaction\_1:  
 $(\exists x)(x = \text{la}(k, \text{"*pc"}) \ \& \ \text{Valid}(x) \ \& \ \text{Performed}(a, x, c)_t \rightarrow$   
 $\text{Obtains}(*pc)_{t+1})$

which means informally that if a legal act of a particular kind and with a particular propositional content was performed at moment t, then the propositional content of this legal act has become a fact immediately afterwards.<sup>12</sup>

#### SEMANTICS

The following constraint on logically possible worlds represents the semantic side of the simple model of legal acts:

Let  $w'$  be the successor of  $w$  in some line of worlds  $WL_i$ . Moreover, let  $*pc$  denote some propositional content, and let  $\text{la}(k, \text{"*pc"})$  denote some legal act of kind  $k$  with propositional content  $*pc$  and let  $a$  denote the actor who performed this legal act. Then it holds that

if  $*performed(a, \text{la}(k, \text{"*pc"}), c) \ \& \ \text{valid}(\text{la}(k, \text{"*pc"})) \in w$ ,  
 then  $*pc \in w'$ .

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<sup>12</sup> This analysis assumes that the propositional content of a legal act is timeless, and not – for instance – that the buyer will *after a week* become the owner of the sold good. If the propositional content contains a time clause, the legal consequences will normally only take effect after the time mentioned in the clause. I will further ignore this complication.



## 15.2 Modifications of the simple model

As already indicated, the simple model of legal acts that was sketched above needs refinement and this refinement can only be made in general by abstracting from relevant details which differ from one legal system to another.

### CAPACITY AND COMPETENCE

Normally, a legal act requires for its validity that the actor who performed this transaction both had the capacity and the competence to bring about the intended legal consequences by means of this kind of legal act. The following two sentences express that some actor has the capacity, respectively the competence to perform a legal act of kind  $k$  and with propositional content  $pc$ :

$Capacity(actor, la(k, pc))$

$Competent(actor, la(k, pc))$

Normally<sup>13</sup> if an actor performs a legal act and if he does not lack the necessary competence or capacity, the legal act is valid:

$Performed(actor, la(k, pc)) \&$

$Capacity(actor, la(k, pc)) \&$

$Competent(actor, la(k, pc)) \rightarrow$

$Valid(la(k, pc))$

On the other hand, if the actor lacks this competence or capacity, the legal act may be invalid. Whether a lack of capacity or competence actually leads to the invalidity of a legal act depends on additional circumstances, which may vary from one legal system to another. To say something in general nevertheless, we have lumped these invalidating circumstances under the catch-all heading  $Invalidity\_conditions$ .

Given this catch-all clause it is possible to formulate conditionals which express that a legal act performed by somebody who lacked the relevant capacity and competence is invalid<sup>14</sup>:

$l = la(k, pc) \& Performed(a, l, c) \&$

---

<sup>13</sup> It is practically impossible to specify the relation between on the one hand competence and capacity to perform a particular legal act and on the other hand the validity of this legal act, without taking recourse to notions relating to defeasibility.

<sup>14</sup> Notice that the mentioned invalidity conditions need not be the same in both rules.

```
~Capacity(a, l) & Invalidity_conditions =>
~Valid(l)
```

```
l = la(k, "*pc") & Performed(a, l, c) &
~Competent(a, l) & Invalidity_conditions =>
~valid(l)
```

Sometimes - if the invalidity conditions are not satisfied, but conditions for avoidance are satisfied - lack of competence or capacity leads to avoidability of the legal act. In the case of lack of capacity, it will often be the (legal representative of) the capacity lacking actor who can, in the sense of 'has the competence to', avoid the transaction. The following conditional expresses this:

```
l = la(k, "*pc") &
Performed(a, l, c) & Valid(l) &
~Capacity(a, l, c) & Voidability_conditions =>
Competent(a, avoid(l), "~valid(l)")
```

Lack of competence can also lead to avoidability, but there is no general rule which specifies who is competent to avoid. Therefore a function expression `avoider/1` will be used to denote the actor who is competent to avoid the legal act:

```
l = la(k, "*pc") &
Performed(a, l, c) & valid(l) &
~Competent(a, l) & Voidability_conditions =>
Competent(avoider(l), avoid(l), "~valid(l)")
```

## FORM

In order to formalize that legal acts must be performed in a particular way (have a particular form) in order to be valid and not voidable, the logical formalism must exploit the third parameter of the `Performed/3` predicate, which specifies the characteristics of the way in which an act was performed. The following sentence expresses, for instance, that Jane entered into a security bond for the debts of Eric but that this was not done in writing:

```
Performed(jane, la(security-bond,
"*guarantor(jane, eric)"), [~in-writing])
```

Let us assume that the sanction if a security bond was not in writing is that the person who entered in this bond can (has the competence to) avoid the legal act. This might then be represented by the following rule:

```
*l = la(security-bond, "*content") &
      performed(p, l, [~in-writing]) =>
*competent(p, avoid(l))
```

If the legal act is invalid from the beginning, this can be represented by the rule:

```
*l = la(security-bond, "*content") &
      performed(p, l, [~in-writing]) => *~valid(l)
```

#### PROHIBITED AND IMMORAL LEGAL ACTS

Sometimes the performance of a legal act with a particular content is forbidden. If this is the case, the prohibited nature of the legal act invalidates the legal act.

Because the precise circumstances under which nullity occurs cannot be specified in general, we will again use the catch-all condition that invalidity conditions are satisfied:

```
*l = la(k, "*pc") &
      prohibited(l) & invalidity_conditions => *~valid(l)
```

If a particular kind of behavior is immoral, the law may make it impossible for agents to undertake an obligation to perform that immoral behavior. Because the precise circumstances under which nullity occurs cannot be specified in general, we will for the formalization again use the catch-all condition that invalidity conditions are satisfied:

```
*l = la(k, "*pc") &
      immoral(*pc) & invalidity_conditions => *~valid(l)
```

#### MANDATORY LAW

If a legal act aims at realizing consequences which conflict with mandatory law, this may lead to (partial) invalidity of the legal act. To handle the threatening conflict between the intended consequences of a legal act and pre-existing legal states of affairs we will use a two-place predicate `Prevails-over/2` that has two terms denoting states of affairs as its parameters. Intuitively, `Prevails-over(*soa1, *soa2)` means that state of affairs 1 prevails over state of affairs

2 in the sense that if the two are incompatible and one of them must obtain, state of affairs 1 obtains (is a fact) and state of affairs 2 does not obtain.

Compatible/2 is a two-place predicate, also with two terms denoting states of affairs as its parameters. Intuitively, `Compatible(*soa1, *soa2)` means that state of affairs 1 can co-obtain in one possible world with state of affairs 2, or – what boils down to the same thing – that there is at least one possible world in which both states of affairs obtain (see part 1, section 5).

By means of these two predicates, the relevance of mandatory law for the consequences of legal acts can be formalized as follows:

```
l = legal_act(k, "*pc") & Obtains(*soa) &
    ~Compatible(*pc, *soa) & Prevails_over(*soa, *pc) →
*~Valid(l)
```

In this formalization the mandatory nature of the pre-existing law is expressed by the statement that this pre-existing law prevails over the intended legal consequences.

#### PARTIAL VALIDITY

If the old state of affairs is preserved, this means that the intended consequences of the legal act do not take effect and that means in turn that the legal act is not valid. Sometimes, however, the invalidity of the legal act as a whole is too strong a sanction. Then the law may use the more limited sanction of partial (in)validity. In that case the legal act as such is valid, but not all of the propositional content takes effect.

We will illustrate this possibility by means of a somewhat complicated contractual example. It concerns a labor contract, where the law of a particular system entitles the laborer to ten holidays (a year).<sup>15</sup> Let us assume that A and B entered into a labor contract, with B as laborer. Then the entitlement to ten holidays can be represented by means of the following rule:

```
*valid(la(labor_contract, "*pc") &
    employer(a) & laborer(b) ⇒
    *obligation(a, allow_holidays(b, 10))
```

---

<sup>15</sup> It would be more realistic to assume that the laborer is entitled to *at least* ten holidays a year. This would complicate the formalization, however, without allowing the illustration of something that is important for the present purposes. Therefore the unrealistic assumption is made that exactly ten holidays conform to the default regulation.

Notice that this rule attaches legal consequences to the presence of a valid labor contract, irrespective of the precise contents of the labor contract. Now, let us assume that the employer and the laborer agreed that there would be only five holidays. This is less than the statutory allowance, and incompatible therewith:

$x \neq y \rightarrow$

~Compatible(\*obligation(a, allow\_holidays(b,x),  
\*obligation(a, allow\_holidays(b,y)))

If the statutory regulation is mandatory, the entitlement to the statutory amount of holidays prevails over the contractual entitlement amount of holidays. To formalize this, it is necessary to explicate what is contained in the contract. This can be done by means of the two-place predicate *Entails/2* which operates on two states of affairs. Intuitively *Entails(\*soa1, \*soa2)* expresses that the first mentioned state of affairs entails the second mentioned one (see part 1, section 5).

If a labor contract contains the clause that there will be five holidays, this can be expressed as follows:

(∃c)(c = la(labor\_contract, "\*pc")) &  
Entails(\*pc, \*obligation(a, allow\_holidays(b,5)))

The basic idea is that if a legal act has a propositional content which entails a state of affairs that is incompatible with what is statutory required, the statutory requirement prevails over the legal act. This might be expressed by an enhanced version of the conditional that deals with unwanted legal consequences:

l = legal\_act(k, "\*pc") &  
Entails(\*pc, \*soa1) & Obtains(\*soa2) &  
~Compatible(\*soa1, \*soa2) &  
Prevails\_over(\*soa2, \*soa1) →  
~Valid(l))

The problem with this solution is, however, that the invalidity of a single contractual clause invalidates all of the contract. To solve this problem, we need to introduce *partial validity*: a contract can be valid and lead to legal consequences, both intended and unintended ones, while one or more clauses of the contract are invalid and do not lead to legal consequences. This idea of partial validity can be expressed by saying that if a contract is (partially) valid, all states

of affairs which are entailed by the contract's propositional content will take effect, unless the clause which is responsible for some undesired state of affairs is invalidated. We should then distinguish between facts which invalidate the contract as a whole, and facts which only invalidate clauses from the contract. The predicate `Invalidated/1` can be used to express that a particular part of the propositional content of a legal act does not take effect. This possibility of partial validity is then realized by means of the following modification of the conditional `Effects_legal_act_1`:

`Effects_legal_act_2`<sup>16</sup>:

$$(\exists x)(x = \text{la}(k, \text{"*pc*"})) \ \& \ \text{Valid}(x) \ \rightarrow \\ (\text{Entails}(*pc, soa) \ \& \ \sim\text{Invalidated}(soa) \ \rightarrow \\ \text{Obtains}(soa))$$

The new version can be combined with the enhanced version of the conditional that deals with conflicts between the contents of a legal act and pre-existing law:

$$(\exists x)(x = \text{la}(k, \text{"*pc*"})) \ \& \ \text{Entails}(*pc, *soa1) \ \& \\ \text{Obtains}(*soa2) \ \& \ \sim\text{Compatible}(*soa1, *soa2) \ \& \\ \text{Prevails\_over}(*soa2, *soa1) \ \rightarrow \\ \text{Invalidated}(*soa1))$$

Together these two conditionals, in combination with the information that holidays of five and ten days are incompatible and that (if the law is mandatory) the ten holidays prevail over the five holidays, make that:

1. the labor contract as a whole can remain valid;
2. as a consequence the laborer is entitled to the statutory ten holidays;
3. as a further consequence the contractual clause of five holidays is incompatible with the statutory state of affairs of ten holidays which prevails over it;
4. as a still further consequence, the five holidays clause is invalidated and the contract is only partially valid.

---

<sup>16</sup> Because the issue of time is not at stake here, the clause about the time at which the legal act was performed is skipped.

### 15.3 Avoidance

For a logical account of legal acts, avoidance with retroactive force is particularly complicated. A legal act which was performed at time  $t$  is at time  $t+x$  deemed valid from time  $t$  on, but is at time  $t+x+y$  deemed invalid from time  $t$  on.

Take for instance a sales contract for a house. According to Dutch law, a sales contract only leads to an obligation to transfer the ownership of what was sold (and not yet to a transfer itself). Such an obligation is essential, though, meaning that without it, the ensuing transfer is invalid. Let us assume that the sales contract was entered into a time  $t$  and that it is valid. At time  $t+x$ , the ownership of the house is transferred by means of a notarial deed. This transfer can only be valid if the underlying sales contract is valid, but as long as the sales contract is valid, there are no problems and the buyer of the house becomes the new owner as the result of the valid transfer.

Let us assume now that the sales contract is avoided at time  $t+x+y$ . This means that it is deemed to have been invalid from moment  $t$  on, and this means also that the transfer was invalid from the beginning and that the buyer of the house has not become the new owner. So at time  $t+x$  the buyer became the new owner, but retrospectively, at time  $t+x+y$  he never became the new owner.

The use of single time tags as proposed above makes it possible to model simple cases of legal dynamics, but changes which work retrospectively cannot be dealt with by means of simple time tags. The problem can be solved, however, by the introduction of double time tags. The simplest way to show this is by means of an example.

Let  $b$  denote the buyer of the house, let  $s$  denote the seller of the house, and let  $h$  denote the house that was bought. Let  $sc$  denote the sales contract, and let  $tro$  denote the transfer of ownership based on this sales contract. Then

$*(performed([s, b], sc, [])_t)_{t+x} \ \& \ (valid(sc)_{t+x})_{t+x}$

denotes the state of affairs that from the perspective of time  $t+x$ ,  $s$  and  $b$  entered into a sales contract and this contract was valid. This means that at  $t+x$ , the transfer between  $s$  and  $b$  was valid too:

$(Valid(tro)_{t+x})_{t+x}$

and that the buyer was the owner, both immediately after the transfer, but also at the moment that the sales contract was avoided:

$(\text{Owner}(b, h)_{t+x+1})_{t+x+y}$

Let us assume that the seller avoided the sales contract at time  $t+x+y$  and that this avoidance is valid:

$\text{Performed}(s, \text{la}(\text{avoidance}, \text{"*\sim\text{valid}(\text{sc})_x\text{"}), [])_{t+x+y} \ \&$   
 $\text{Valid}(\text{la}(\text{avoidance}, \text{"*\sim\text{valid}(\text{sc})_x\text{"})_{t+x+y})_{t+x+y+1}$

This means that the transfer was at  $t+x+y+1$  invalid from the beginning and that at that time  $b$  had never been the owner of the house:

$(\sim\text{Valid}(\text{tro})_{t+x})_{t+x+y+1}$

$(\sim\text{Owner}(b, h)_{t+x+1})_{t+x+y+1}$

In this way it is possible to account for the facts that a particular transfer was valid at the moment it was performed, but that at a later moment, after the avoidance, it was invalid from the beginning, and that a person both was and was not the owner of a house at a particular time, depending on the moment in time at which the matter is considered.

Notice that, because of the different time tags, the following two states of affairs are meant to be *compatible*:

$(\text{Owner}(b, h)_{t+x+1})_{t+x+y}$

$(\sim\text{Owner}(b, h)_{t+x+1})_{t+x+y+1}$

This implies that the use of double time tags necessitates a revision of the definition of compatibility of states of affairs that was given in section 5. The implications will be left for future research.

## 15.4 Representation

In a standard case, in which a representative rightfully represents some other person, the legal act performed by the representative counts as the ‘same’ legal act performed by this other person. This means that the represented person performed this legal act.

This can be formalized by means of the following rule which is valid in legal systems which recognize representation<sup>17</sup>:

$\text{*performed}(r, l, [\text{on\_behalf\_of}(a) | c]) \ \&$   
 $\text{represented}(r, a, l, c) \Rightarrow \text{*performed}(a, l, c)$

---

<sup>17</sup> I use the traditional prolog-notation for the representation of lists with more than one element.



If  $r$  performed legal act  $l$ , on behalf of  $a$  and with possible other characteristics  $c$  and  $r$  represented  $a$  in performing  $l$ , then  $a$  performed legal act  $l$  with possible characteristics  $c$ .

A person represents another person if he performed a legal act on behalf of this other person and if he was competent to perform this legal act (both qua type and propositional content) on behalf of this other person<sup>18</sup>:

Performed( $r$ , la( $k$ , " $*pc$ "), [on\_behalf\_of( $a$ ) |  $c$ ]) &  
 Competent ( $r$ , la(represent( $a$ , la( $k$ , " $*pc$ "), " $*pc$ ")) →  
 Represented( $r$ ,  $a$ , la(represent( $a$ , la( $k$ , " $*pc$ "),  $c$ ))

If a person represented somebody else in performing a legal act, this legal act counts as being performed by the latter person:

Represented( $r$ ,  $a$ , la(represent( $a$ , la( $k$ , " $*pc$ "),  $c$ )) →  
 Performed( $a$ , la(represent( $a$ , la( $k$ , " $*pc$ "),  $c$ ))

Let us consider an example. Suppose that mayor and aldermen ( $m\&a$ ) of a municipality have the competence to grant building licenses, and that they gave a mandate to public officer  $P$  to exercise this power on behalf of them. This means that  $P$  is competent to grant building licenses on behalf of  $m\&a$ . Suppose moreover that Jones applied for a building license for a house.  $P$  grants this license on behalf of  $m\&a$  and as a consequence  $P$  has this license. As a government agency,  $m\&a$  never lack the capacity for any legal act. This might be formalized as follows.

The premises are:

- 1: Competent( $m\&a$ ,  
 la(building\_license, " $*permitted(x, build\_house)$ ") )
- 2: Capacity( $m\&a$ , la(*any*, " $*any$ "))
- 3: Competent( $p$ , la(represent( $m\&a$ ,  
 la(building\_license, " $*permitted(x, build\_house)$ "),  
 " $*permitted(x, build\_house)$ "))
- 4: Performed( $p$ ,  
 la(building\_license, " $*permitted(j, build\_house)$ "),  
 [on\_behalf\_of( $m\&a$ )] )<sub>t</sub>

---

<sup>18</sup> This is not a necessary condition in every legal system. Sometimes acts by an incompetent 'representative' are still ascribed to the allegedly represented person. This can be handled by means of counts as rules, analogous to the way in which competently performed representation is handled by means of counts as rules.

From 3 and 4 follows:

```
a: Performed(m&a,  
    la(building_license, "*permitted(j, build_house)"),[])t
```

From a, 1 and 2 follows:

```
b: Valid(la(building_license,  
    "*permitted(j, build_house)"))
```

And from b in combination with the rule about the effects of legal acts follows:

```
c: Permitted(j, build_house)t+1
```

Suppose now that P was not given the mandate to represent m&a in granting building licenses. Normally this means that his act does not count as a valid building license granted by m&a. However, such an act empowers m&a to confirm the 'license' and after confirmation, the act of P nevertheless counts as a valid act by m&a. The following premise is necessary to formalize this:

```
Performed(a, la(k, "*pc"), [on_behalf_of(p)]) &  
    ~Competent(a, represent(p, la(k, "*pc"))) →  
Competent(p, la(confirm,  
    "*performed(p, la(k, "*pc"), [])"))
```

With this formalization of a simple and a not so simple case of representation, I end my analytical and logical account of legal acts. It goes without saying that I have only scratched the surface, but hopefully it was an important part of the surface.

## 16 Related work

Given the central place which legal acts take within the law, it is surprising how little literature has been devoted specifically to these transactions. Most of the literature which is available has a background in deontic logic and deals with the issue how transitions between so-called 'normative positions' take place. (e.g. Lindahl 1977; Governatori, Rotolo and Sartor 2005) Since many of these transitions are brought about by legal acts, this literature touches on the topic of the present research. However, the analysis of legal acts remains relatively superficial.

By far the most extensive account that I know of is the one offered in Sartor 2005. In the chapters 20-24 of his intellectual tour de force, Sartor discusses many issues which are also dealt with in the sections 3-8 of the present paper. He does not discuss the more advanced issues that are dealt with in the sections 9 -12, however, such as prohibited legal acts, legal acts with an illegal or immoral content, the distinction between mandatory and facilitative law, partial validity, avoidance and its effects, and incompetent representation. Neither does Sartor discuss the differences between non-existence and invalidity (section 8.1 of this paper) and between the doctrinal and the legal-internal concept of a legal act (section 3). In the following, I will briefly run through Sartor's account, to point out both similarities and differences between our approaches.

#### VARIETIES OF NORMATIVE CONDITIONALS

In chapter 21 Sartor discusses seven different kinds of normative conditionals, namely conditionals which lead to:

1. deontic initiation;
2. deontic termination;
3. deontic emergence;
4. non-deontic initiation;
5. non-deontic termination;
6. non-deontic emergence; and
7. event emergence.

I have taken all initiation and termination conditionals together under the heading of dynamic rules, because the distinctions between these conditionals, real as they are, do not strike me as important from an (onto)logical point of view. All three kinds of emergence rules are what I have called static rules.

#### INTERMEDIATE LEGAL CONCEPTS

Sartor also discusses intermediate legal concepts, in more detail than is done in the present paper, but without connecting this discussion to MacCormick's theory about institutional facts.

## TIME, FLUENTS AND STATES OF AFFAIRS

Sartor's treatment of time is more sophisticated than that of this paper, and I agree with much of it but did not find its larger complexity necessary for the present treatment of legal acts .

Interesting is Sartor's treatment of fluents (433-435), which is similar to my treatment of states of affairs (fluents would be states of affairs which persist in time). Sartor does not pay much attention to the relation between sentences, states of affairs and facts, however. States of affairs are not without complications, for instance because they blur the difference between sentences with truth values and terms which denote entities (logical individuals), and because they allow kinds of self-reference which many logicians have tried to avoid. (Haack 1978, ch. 8) An investigation of these complications would be an interesting topic for additional research.

## POTESTATIVE CONCEPTS AND PROCLAMATIONS

Under the heading of potestative concepts, Sartor discusses issues which I have discussed under the heading of a power (section 9). Sartor distinguishes different kinds of power (generic power, action power, abstract power, enabling power, abstract enabling power, and proclamative power), where these powers differ in the states of affairs which their exercise brings about. However, Sartor limits this notion of power to cases where states of affairs are brought about through the application of rules (normative determination).

The notion of power as used in this paper comprises not only the different 'kinds' of powers distinguished by Sartor, but also causal powers. Moreover, I distinguish between competence as an internal legal concept, and power as a supervenient characteristic which may (but need not) be based on the presence of a competence. The notion of competence as used here most resembles Sartor's notion of a proclamative power, which is also tied to constitutives in Searle's sense (section 3).

## **17 Summary**

This paper is a hybrid of an analytical and a logical account of legal acts. In the first part, legal acts are given a place in the 'world of law'. This world of law is

characterized as a part of institutional reality and its mode of operation is sketched at the hand of dynamic rules and two kinds of static rules.

The second part of the paper focuses exclusively on legal acts. It starts with a brief overview of phenomena in connection with legal acts which need to be given account of. Then follows a brief account of how legal acts ‘work’. This account focuses of the main idea behind legal acts, namely that they allow to bring about intentional changes in the world of law. In real life, legal acts as internal-legal phenomena are much more complicated. It turned out to be necessary to distinguish between existence and validity of legal acts, between the kind of a legal act and its propositional content, and between powers, competences and capacities.

Even if a legal act is performed correctly, it may still be invalid, because its performance is illegal, or its content is ‘wrong’ (illegal or immoral). Additional complications arise if a legal act is partially valid, meaning that the transaction as such is valid, but some of its intended legal consequences nevertheless do not take effect, if a legal act is avoided, with retrospective force, and if a legal act is performed by a representative, in particular if this representative lacked the necessary competence.

The existing literature covers the standard cases quite well, with Sartor’s *Legal Reasoning* (Sartor 2005) as the most elaborate study available up to date. To my knowledge, the less than standard cases have until now received little attention, and I hope that this study has at least made a beginning in remedying this.

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