CONCEPTUAL TOOLS FOR LEGISLATORS
PART 1: RULES AND NORMS

JAAP HAGE*

Abstract

This paper aims to contribute to the precision of legislative language. Through the analysis of a number of central legal concepts and a discussion of the mutual relations between these concepts, it aims to provide legislators with conceptual tools that facilitate precise legislative drafting.

The present paper is the first of a projected series of four papers and deals with rules and in particular with a subset of them, norms. The other three projected papers are to deal with legal positions, including rights, with juridical acts such as contracts, legislation and administrative dispositions, and with the 'logic' of rules, such as rule conflicts, the relation between rules, principles, rights, and values, exceptions to rules, and analogous rule application.

The present paper starts with a foundational section that discusses the relation between language and reality. As a follow-up, the nature of rules is addressed, and a distinction is made between three main categories of rules. Then the focus moves to norms as a subcategory of rules. In this connection much attention is devoted to the so-called *deontic facts*, which are brought about by norms. Finally, the findings are summarised and related to the topics of the other three projected papers on conceptual tools for legislators.

Keywords

static rules, dynamic rules, counts-as rules, fact-to-fact rules, regulative rules, norms, deontic facts, duty, obligation, being obligated, ought, factual counterparts of norms, material actions, formal actions, deontic modalities

---

* Jaap Hage holds the chair of Jurisprudence at the University of Maastricht. He can be reached on e-mail-address jaap.hage@maastrichtuniversity.nl.

Jaap Hage thanks Pauline Westerman and Mauro Zamboni for their comments on an earlier version which made him improve the account of in particular the distinction between regulations and rules. Any remaining errors or unclarities remain his own responsibility.

A. Introduction

1. An example from the Common European Sales Law

On October 11, 2011, the European Commission released its proposal for a regulation on a Common European Sales Law (CESL). Article 29 section 1 CELS reads:

> "A party which has failed to comply with any duty imposed by this Chapter is liable for any loss caused to the other party by such failure."

This regulation makes it relevant to know which other regulations from Chapter 2 CESL impose duties on a party to a sales contract. For instance, it is important to know whether Article 25, section 3, imposes such a duty. It reads:

> "The trader must indicate clearly and legibly on its trading website at the latest at the beginning of the ordering process whether any delivery restrictions apply and what means of payment are accepted"

This section tells a trader what he "must" do, and the heading of Article 25 tells us that this Article deals with "Additional *requirements* in distance contracts concluded by electronic means".[1] Is it a duty if the trader must do something, or if he is under a requirement?

Article 23 section 1 is in this respect much clearer. It reads:

> "Before the conclusion of a contract for the sale of goods, supply of digital content or provision of related services by a trader to another trader, the supplier has a *duty* to disclose by any appropriate means to the other trader any information concerning the main characteristics of the goods, digital content or related services to be supplied which the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party."

Must we reason e contrario in interpreting Article 25 section 3 and assume that since this section does not explicitly mention a duty, while Article 23 section mentions the duty explicitly, the former regulation does not impose a duty, but 'merely' something that the trader *must* do (systematic interpretation)? Or must we take Article 24, section 2 as an example and assume that the framers of the regulations use the expressions "duty", "must", and "requirement" (almost) interchangeably? The header of Article 24 speaks of "Additional *duties* to provide

[1] Italics added in this and the following citations.

information in distance contracts concluded by electronic means", while section 2 of this Article reads:

> "The trader *must* make available to the other party appropriate, effective and accessible technical means for identifying and correcting input errors before the other party makes or accepts an offer".

Probably the legislator uses the expressions interchangeably, but this does not contribute to the clarity of the CESL, in particular not since Article 29, section 1 attaches special legal consequences (liability) to the violation of a *duty* imposed by Chapter 2 of the CESL.

2. Conceptual tools

A legislator's main tool is language. No matter whether a piece of legislation is used to create rules, to found an organisation such as the EU, to approve the government's budget, or to change a person's name, it must use language both to make clear what it aims to bring about (the propositional content of the legislative speech act) and to bring this actually about (publicity). The precise use of language is crucial for a good legislator, as was illustrated by the example about duties, musts and requirements in the previous subsection.

As is well-known, natural language may be a flexible and versatile instrument, but it is not very precise. Words can be ambiguous, have underdefined scopes of application, or may even require extra-linguistic standards to determine what they stand for (open terms). Sentential constructions which make use of these words do not only inherit all the ambiguity and vagueness of the words they employ, but may even add to it through syntactic ambiguities or less than careful formulations. Although this vagueness of language also has advantages - even legislators may under particular circumstances be happy with vague or ambiguous texts - it is in general a phenomenon that should not have too much influence on legislation. A legislator should find in language a tool that allows her to make the law she wants, and most of the times precision and clarity are for this purpose virtues, not vices.

It is in this spirit that the present paper wants to contribute to the precision of legislative language. Through the analysis of a number of central legal concepts and a discussion of the mutual relations between these concepts, it aims to provide legislators with conceptual tools that facilitate precise legislative drafting. This paper is the first of a projected series of four papers which together elaborate and expand the research project on the use of central legal concepts for legislators

that was initiated in an earlier paper *Building the World of Law*.[2] The other three projected papers are to deal with legal positions, including rights, with juridical acts such as contracts, legislation and administrative dispositions, and with the 'logic' of rules, such as rule conflicts, the relation between rules, principles, rights and values, exceptions to rules, and analogous rule application.

This paper deals with rules and in particular with a subset of them, norms. It starts with a foundational section (section B) that discusses the relation between language and reality. In section C, the nature of rules will be addressed. Moreover, a distinction will be made between three main categories of rules. Section D focuses on norms as a subcategory of rules. In this connection much attention will be paid to the so-called *deontic facts*, which are brought about by norms. Section E summarizes the findings and relates them to the topics of the three projected papers on conceptual tools for legislators.

B. Language and Reality

1. Rules, rule formulations and regulations

In this paper I will distinguish between *regulations*, *rule formulations*, and *rules*.
A *regulation* is a (part of a) legislative product by means of which a single rule is made. The provisions from the CESL that were quoted in section A.1 are all regulations. These regulations are linguistic entities.
Rule formulations contain the conditions and the conclusion of a rule. Because we can only formulate these conditions and conclusion by means of language, rule formulation seem to be linguistic expressions which often look like descriptive sentences. That appearance is deceptive, however, because the same rule, with the same conditions and conclusion, can be rendered in different languages. The rule formulation is neutral with regard to these different renderings, and can therefore not be a linguistic entity. The term "rule formulation" suggests the opposite, though and is therefore somewhat misleading. It is maintained here only because it is a customary expression. Rule formulations differ from regulations, because regulations are tools by means of which rules are made, while rule formulations give us the contents of a rule.
Rules themselves are obviously not linguistic entities. Otherwise than linguistic entities, they exist in time, can be created and abrogated, and they can lead to facts such as the punishability of criminals, and the existence of obligations. Rules differ from regulations, the tool by means of which most rules have been

---

[2] JC Hage, "Building the World of Law", (2007) 1 *Legisprudence*, 359-379.

created.[3] Rules also differ from their formulations, because rules are things which exist or not, while the formulations of the rules are not things which exist or not, but which specify the contents of the rule. The relation between a rule and its formulation is a bit like the relation between a book and its content. We need to know the content in order to know with which book we are dealing, but it is possible to talk about a book with a particular content, even if this book does not actually exist.

As this distinction between regulations, rules and rule formulations illustrates, a thorough understanding of rules requires that the relation between on the one hand language and linguistic entities, and on the other hand reality and the entities in reality, including rules, is explored. This exploration will be undertaken in the present section.

2. The uses of language

The smallest linguistic entities which can be used independently are sentences. The use to which a sentence is put is traditionally called a *speech act*.[4] Although not all uses of sentences are cases of speech - legislation provides a good illustration of non-speech language use – I will adhere to this tradition.

Within a speech act, two aspects can be distinguished: propositional content and illocutionary force. The propositional content indicates what the speech act is about, for instance mayors having the power to create emergency regulations. The illocutionary force indicates what 'happens' with this content. Is it for instance described ('mayors have this power'), is it prohibited ('mayors shall not have this power'), or is it brought about ('mayors are hereby given this power')? Legislation does not describe anything, not even if rule formulations look like descriptions. By means of legislation, the legislator almost always brings about changes in the 'world of law'.[5] If the legislator is taken in the broad sense which includes the framers of treaties, the United Nations were created by means of legislation, the death penalty was (in many countries) abolished by means of legislation, and – for this paper the most important – many rules were created through legislation.

As the example about the death penalty illustrates, the effects of legislation may be indirect. The abolition of the death penalty will usually have taken place in the form of the derogation of the rule which allows the death penalty. This

---

3 But notice that there are also rules, in particular customary ones, which were not created, and which therefore have no corresponding regulation.

4 Cf John L Austin, *How to do things with words*, 2nd ed, edited by O Urmson and Marina Sbisà (Oxford University Press, 1975) and J Searle., *Speech Acts* (Cambridge University Press, 1969).

5 More on this 'world of law' in Hage, *Building the World of Law*, supra note 2.

derogation is the illocutionary force of the legislative speech act. The derogation of this rule effectively amounted to the abolition of the death penalty. Such indirect effects of speech acts, whether they were intended or not, are called *perlocutionary effects*.[6] Legislation tends to be important, not primarily because of its illocutionary force, but because of its perlocutionary effects. The abolition of the death penalty is more important than the derogation of a particular rule of criminal law.[7]

3. The world: facts and individuals

As Strawson has pointed out, facts depend on language.[8] A fact is always the fact that …, where the dots stand for a phrase expressed in some language. It is for instance a fact that 'it is not raining here and now'. However, facts also depend on the world, because it is the world, not language, that determines which facts exist, whether it rains here and now. A language determines which facts can be expressed, the world determines which of the expressible facts actually exist.

It is useful to distinguish between expressible facts and actual facts. An expressible fact will be called a *state of affairs*. States of affairs are what is expressed by sentences with truth values.[9] For instance, the sentence "It's raining" expresses the state of affairs that it is raining. Some states of affairs *exist* in the actual world; these are called *facts*. A sentence that expresses a fact is *true*. False sentences express *non-facts*, states of affairs that do not exist.

4. Terms

In most declarative sentences it is possible to distinguish one or more *terms* which denote entities in the world. Next to these terms there will be *predicators* by means of which something is said about the denoted entities. For instance, in the sentence "John walks" the word "John" denotes John, while the predicate term "walks" is used to say something about John. Logicians call the entities in the world *individuals*, and the expressions used to denote them *terms*. Terms should be distinguished from full declarative sentences. Declarative sentences are true or false; terms are not. So there is, from a logical point of view, a

---

6 Austin, *How to do things with words*, supra note 4, 101-132.

7 For those in doubt: consider the case that the rule is derogated, but that the death penalty is maintained because of some other rule.

8 PF Strawson, "Truth", (1950) *Proceedings of the Aristotelian Society*, Supplementary Volume. Also in PF Strawson, *Logico-Linguistic Papers* (Methuen, 1971), 190-213.

9 The clause "with truth values" is meant to exclude non-descriptive sentences, such as commands, but also descriptive sentences that have terms on referential positions that have no object of reference, such as 'The king of France is bald'. For the rest of this paper, I will ignore declarative sentences which lack a truth value.

fundamental difference between sentences and terms. Sentences which are used to make statements have truth values. Terms, on the contrary, have no truth values, but denote, stand for individuals.

For the purpose of legislative drafting, it is useful to see that terms can have different grammatical shapes. *Proper names* are one such a shape, as in "John walks". Proper names can stand for persons, but also for buildings ("the Empire State Building"), cities ("Paris"), and events ("the Olympic Games of 2012").

Definite descriptions, like "the earliest possible opportunity" are a second shape of terms, as in "The form is to be completed at the earliest possible opportunity", which has two terms: "The form" and "the earliest possible opportunity". Definite descriptions are combinations of predicators (in the example "earliest possible" and "opportunity") in a construction which makes it clear that one or at most a definite number of entities are denoted. Such a construction is often created through the use of a definite particle ("the").

Function expressions like "the mayor of London" are a third shape of terms. A *function expression* is a term which is defined by means of one or more other terms. "The mayor of London" is defined by means of the term "London" which is itself a proper name. Another example would be "the oldest child of the King and the Queen". In this last example, "the King" and "the Queen" are both elliptical function expressions, denoting the present King and Queen of a particular country.

Characterizations of *actions* are fourth kind of definite descriptions. Examples are "to steal" as in "It is forbidden to steal".

5. Predicators

Predicators are expressions which are typically used to say something about one or more individuals. They usually are verbs or contain a verb in combination with predicates and or nouns. Examples of predicators are "bribes" as in "If a person bribes an official …", "created a law" as in "When Parliament has adopted a Bill, it has created a law", and "is defect", as in "If the sold good is defect, the seller must replace it".

A predicator must (almost) always be combined with one or more terms to create a grammatically correct sentence. It depends on the predicator how many terms are required. Predicators which require only one term, such as "is defect" are called "predicates". Predicators which require two or more terms, such as "… must replace …" stand for *relations*.

6. Sentences and propositions

If a predicator is combined with the appropriate number of terms, the result is a *sentence*. Sentences are linguistic entities which (usually) have a meaning. This meaning is often called a *proposition*.

Propositions are quite similar to sentences, be it that they do not belong to a particular language, while sentences necessarily are sentences of a language. For example, the English sentence "The King has died" expresses the same proposition as the French sentence "Le roi a mouri".

Although it may seem that propositions are a kind of statements, this is not necessarily the case. Propositions provide the content, the *propositional content*, of speech acts. What kind of speech act has this content is determined by the illocutionary force of the speech act. "Did the King die?" is a question with the same propositional content as the order "Die" directed at the King, and the statement "The King has died".

Propositions can also be parts of rule formulations, as in "If he King has died, his oldest son will be the new King". Earlier it was stated that rule formulations are *like* linguistic entities. Now we can see why rule formulations are merely *like* linguistic entities. The rule is the same, whether it is formulated in German or in Dutch. The content of a rule does need some formulation and therefore the rule formulation is like a linguistic entity, but the language does not matter. Therefore it is better to say that rule formulations are based on propositions, rather than on sentences. Of course, the propositions themselves need to be expressed by means of sentences of some particular language, and so need the rule formulations.

C. Rules

1. Rules and regulations

Rules should be distinguished from regulations. In this connection regulations will be defined as those (parts of) legislative products by means of which individual rules are created, such as provisions in treaties, statutes, or by-laws. An example of such a regulation is article 3 section 4 of the Treaty on European Union[10], which reads:

[10] Just like in Hage, *Building the World of Law*, supra note 2, I will use European Union law to draw examples from, because these documents are easily accessible for readers from different countries.

> "The Union shall establish an economic and monetary union whose currency is the euro."

This provision is part of a legislative product, the Treaty on European Union. Moreover, by means of this provision a single rule is created, namely the rule [The Union shall establish an economic and monetary union whose currency is the euro].[11]

We have seen that rule formulations are on the level of propositional content, not on that of linguistic expressions. However, if the formulation of a rule is expressed in the same language as that of the regulation by means of which the rule was made, the thus expressed rule formulation will often be identical to the regulations by means of which the rule was created. But that is not necessarily the case. Take for instance the following, fictitious regulation:

> "Sellers of eggs shall only supply standard brown eggs."

There are at least two rules that might have been created by means of this ambiguous regulation, namely the rules [Seller of eggs shall only supply standard eggs of the colour brown] and [Seller of eggs shall only supply eggs of the colour standard brown].

If a regulation is ambiguous it is not on beforehand clear which rule was created by means of it, but the rule formulation must be different from the regulation. This is a direct consequence from the assumption that rules are not linguistic entities. The ambiguity of regulations is a matter of language. This ambiguity is removed if the step is taken from the regulation tot the rule that was created by means of it. Rules cannot be ambiguous, because they are not linguistic entities. When people speak about ambiguous rules, they must be interpreted as speaking about ambiguous regulations.

Although rules cannot be ambiguous, because ambiguity necessarily relates to linguistic entities, rules can be 'vague' in the sense that the scope of application of rules is not sharply delimited. Take for instance article 6 section 4 of the Treaty on European Union, which reads:

> "The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties."

This regulation creates a rule with the same formulation, and this rule imposes on the European Union the duty to pursue its objectives by means which are 'appropriate'. The vagueness of this rule and the duty that follows from it are not

---

[11] Rule formulations will be indicated by means of square brackets.

a linguistic matter. The issue at stake is which measures count as 'appropriate'. It is a matter of classification of measures, and the 'vagueness' of the rule is nothing else than the problematic nature of making this classification.

A somewhat surprising conclusion from the above is that rules never need to be interpreted. The interpretation that is needed to find the precise conditions of the rule, their logical relation, and the rule conclusion, is interpretation of the regulation. The rule is the outcome of this interpretation, not the thing that needs to be interpreted. The 'interpretation' that is needed to delimit the application scope of the rule conditions is actually decision making on whether facts are to be classified as falling under the rule conditions. This 'interpretation' is interpretation (in the sense of classification) of facts, not of rules.[12] An immediate consequence of this observation is that semantics is hardly a relevant discipline for legal decision makers. Legal decision makers are not interested in word meanings, but in decisions on whether a rule should be applied to a particular constellation of facts

2. Rules as constraints[13]

Although rule formulations and regulations often are very similar to descriptive sentences which express states of affairs, rules themselves are not states of affairs but individuals in the logical sense (cf. section B.6). Like other immaterial things they exist in time but not in space[14], they can be created (by means of legislation or judicial decisions) and destroyed (derogated), and they can have characteristics such as being to the benefit of all people, or being detested by members of the upper class.

However, unlike most things, rules impose constraints on the facts which exist in the world. In this respect, rules resemble physical laws as they are commonly

---

[12] Westerman pointed out to me that it may be necessary to determine the purpose of a rule in order to decide whether the rule should be applied to a particular case. This determination of the rule's purpose would be an example of interpretation of the rule itself, not of the regulation underlying the rule. Whether this observation is correct depends on what is still counted as interpretation. In JC Hage, *Reasoning with Rules* (Kluwer, 1997), chapter III, I distinguished between the applicability of a rule and the decision whether to apply the rule. A rule is applicable to a case if the case satisfies the conditions of the rule. If a rule is applicable, this is a contributory reason to apply the rule, and if the rule is not applicable this is a contributory reason against application. The purpose of the rule may also provide a contributory reason for or against application. I would prefer to use the concept of interpretation only for the applicability issue, not for the application issue. If this preference is followed, a rule needs no interpretation, although it may be necessary to establish the purpose of a rule in order to decide whether to apply it or not.

[13] This subsection is a summary of Hage, *Building the World of Law*, supra note 2, section B3.

[14] However, the operation of rules can be limited in space.

interpreted.[15] Physical laws 'force' the facts of the physical world into particular patterns. The law of gravity, for instance, '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.

Rules are for the world of law what physical laws are for physical reality. They are individuals and their existence – which is called 'validity' in the case of rules – is a fact. Valid rules impose constraints on world of law. For example, the validity of the rule [Thieves can be fined] has implications for the facts in the world of law, namely that the fact that somebody is a thief necessarily goes together with the fact that this person is liable to be fined. The rule [A sales contract places the buyer under the obligation to pay the price of the sold good] makes that the existence of a (valid) sales contract leads to an obligation for the buyer.

3. Dynamic and static rules

Rules have much in common with ordinary individuals (in the logical sense): they exist in time, they can be created and derogated, they can have characteristics such as effectiveness, etc. They have also a lot in common with descriptive sentences: they have a propositional content and they can in some sense 'correspond' with facts.

However, in this correspondence lies also a major difference with descriptive sentences. Descriptive sentences are 'successful' in the sense of 'true', if they match the facts. Rules are successful in the sense of 'valid', if the facts match the rule. With this match I do not mean that the rule is obeyed, but that the content of the rule is reflected in the world. For instance, the rule that thieves are punishable is reflected in the world if (because of this rule) thieves are punishable. Valid rules impose themselves on the world. They have the world to word direction of fit[16] because they constrain the world in the sense that not all combinations of facts are possible. As a consequence, rules bring about facts; they are *constitutive*.

Constitutive rules are usually opposed to regulative rules.[17] As we will see shortly, it is questionable whether this is a proper distinction. Arguably, all rules are constitutive, and regulative rules only regulate by constituting facts which

---

[15] The precise nature of physical laws is object of philosophical disagreement. See, for instance, Rom Harré, "Laws of nature", in WH Newton-Smith, *A Companion to the Philosophy of Science*, (Blackwell, 2000), 213-223.

[16] More on direction of fit and the literature in which this phenomenon is discussed on http://en.wikipedia.org/wiki/Direction_of_fit (last consulted on 30-4-2012).

[17] The distinction between regulative and constitutive rules can be traced back to at least J Rawls, "Two Concepts of Rules", in (1955) 64 *Philosophical Review*, 3-32 (also in John Rawls, *Collected Papers* (Harvard University Press, 1999), 20-46), and to John R Searle, *Speech Acts,* supra note 4, 33-42.

obligate behaviour, such as duties and obligations. To see why, it will be necessary to distinguish between two main kinds of constitutive rules, namely between dynamic and static rules.

Dynamic rules

Dynamic rules attach new facts, or modify or take away existing facts as the consequence of an event. An event is a chance in the set of all facts, any change in the world. Examples are that it starts to rain, that John promised Richard to give him €100, and that Eloise was appointed as chair of the French Parliament. At least the last two of these events have consequences attached to them by dynamic rules. John's promise has the consequence that from the moment of the promise on John is under an obligation to pay Richard €100. The appointment has as its consequence that from the starting point of the chair's new term on, Eloise will be the chair of the French Parliament.

Dynamic rules may be conditional, in which case their consequence is only attached to the event under certain conditions. An example is the rule that if it is dark, the occurrence of a car accident obligates the drivers to place a light on the road next to the cars.

Fact-to-fact rules

Whereas dynamic rules are a relatively simple category, because they all attach a change in the set of all states of affairs to the occurrence of an event, static rules come in at least two flavours. One kind of static rule attaches a fact to the presence of some other fact. I will call them *fact-to-fact rules*. An example is the rule which attaches to the fact that P owns O the fact that P is competent to alienate O. For example, if Smith owns Blackacre, she is competent to transfer her property right in this real estate to Jones. Another example is the rule which makes that if P is an inhabitant of the Netherlands, then P has the duty to pay Dutch income tax.

Fact-to-fact rules may be conditional too. An example is the rule that the mayor of a city is competent to evoke the state of emergency in case of emergencies. This rule attaches the fact that some person has a competence to the fact that this person is the mayor under the condition that there is a state of emergency.

Counts-as rules

The second kind of static rules consists of the so-called *counts-as rules*. They have the structure: Individuals of type 1 count as individuals of type 2. These 'individuals' may be human beings, such as in the rule that the parents of a minor

count as the minor's legal representatives. Often, however, the 'individuals' that count as another kind of individual are events. For instance, under particular circumstances, causing a car accident counts as committing a tort, or offering money to another person counts as attempting to bribe an official.

Usually counts-as rules are conditional, meaning that individuals of type 1 only count as individuals of type 2 if certain conditions are satisfied. An example from Dutch law (art. 3:84 of the Civil Code) would be the rule that the delivery of a good counts as the transfer of that good if the person who made the delivery was competent to transfer and if there was a valid title for the transfer.

Regulative rules, duties and obligations

Many rules have nothing to do with obligating behaviour. Rules that confer a competence, such as the competence to issue emergency regulations, are perhaps the best-known example of non-obligating rules. Counts-as rules, including statutory definitions, provide another example of rules that do not obligate. And, as a final example, rules that specify procedures do not obligate either. Admittedly they tell people what to do, but without obligating them to do so. If a barrister must take certain steps in order to start a court procedure, the necessity to take these steps is merely conditional on the desire to start the procedure.

Regulative rules create either duties or obligations, and in that way obligate people to act in a particular way. Duties and obligations are not the same things. A *duty* to do something is what one is obligated to do as a consequence of a particular position or role.[18] Duties are connected to positions or roles by means of fact-to-fact rules (discussed earlier in this section). It is for instance, the duty of a judge to apply the law, and the duty of a house-inhabitant to clear away the snow from the pavement before the house.

Where a duty is connected to a position or role by means of a fact-to-fact rule, *obligations* are the consequences of events, to which they are connected by means of dynamic rules (also discussed earlier in this section). Some obligations are undertaken voluntarily, most notably by making promises. Then the event that P promised Q to do A leads to the fact that P is under an obligation towards Q to do A. Other obligations are not undertaken voluntarily. An example would be that P by accident caused damage to Q. This event results in the obligation to compensate the damage. As these two example illustrate, obligations are always *directed*. A person P is under an obligation towards person Q to do A. Normally this goes together with a *claim* of Q against P that the obligation is performed.[19] If a person P is under an obligation to do A, P is obligated to do A.

---

[18] Alan R White, *Rights* (Clarendon Press, 1984), 21-26.

[19] The law knows some exceptional circumstances where such a claim is lacking, for instance in the case of *obligationes naturales* and *stipulationes alteri*. Cf Reinhard Zimmerman, *The Law*

Although duties and obligations are not the same things, they have in common that they constrain the behaviour of the person who is under the duty, cq. the obligation. This common element can be expressed by saying that a person who is under a duty or under an obligation to do A is *obligated* to do A.

Given this notion of being obligated, it is possible to define regulative rules as rules which obligate behaviour. Regulative rules obligate behaviour by attaching the *fact* that a person P is obligated to perform an action of type A to either an event (in the case of an obligation), or to another fact (in the case of a duty). Facts of the types that a person is under a duty, under an obligation, or obligated to perform some action will be called *deontic facts*.[20] A proper understanding of these deontic facts is crucial for insight into the nature of regulative rules, and therefore these facts are the main topic of the next section.

D. Deontic Facts and Norms

1. Intermezzo: the possibility of deontic facts

If regulative rules are rules which bring about deontic facts, it should be possible that there are deontic facts. This possibility is often disputed. Is not there a gap between is and ought, and do not facts belong to the realm of is, while deontic 'things' belong to the realm of ought?

Natural language seems to provide counter-evidence against the idea that there is a gap between the realms of is and ought. Sentences that tell one what to do often take the form of declarations. For example, the sentence "You ought to go to the supermarket" looks very much like the sentence "You will go to the supermarket". Is this similarity misleading, covering up a kind of order as a description? Or does the former sentence stand for a state of affairs, and even – if it is true – for a fact?

I will argue for the latter view, but in order to do so it will be necessary to get some possible misunderstandings out of the way.[21] One misunderstanding is that a

---

of Obligations. Roman Foundations of the Civilian Tradition (Oxford University Press, 1996), 7-10 and 34-45.

[20] The term "deontic" stems from the Greek δεόντως, which may be translated as "as it should be" or "duly" (Dagfin Føllesdal and Risto Hilpinen, "Deontic Logic. An Introduction" in Risto Hilpinen (ed), *Deontic Logic: Introductory and Systematic Readings* (D Reidel, 1971), 1-35. It is easier to give examples of what is 'deontic' than to define what it is. Cf. http://plato.stanford.edu/entries/logic-deontic/ and http://www.sil.org/linguistics/GlossaryOfLinguisticTerms/WhatIsDeonticModality.htm

[21] A more elaborate version of the present argument can be found in my paper "What is a norm?" in Jaap C Hage, *Studies in Legal Logic* (Springer, 2005), 159-202.

sentence such as 'You ought to go to the supermarket' is 'really' a kind of order or exhortation, rather than the description of a fact, because it is - or can be - used to make somebody do something. This line of argument has been attacked by Geach[22] and Searle[23], basically because the speech act which can be performed with a sentence does not determine the meaning of the sentence. The sentence "That is what I ought to do" means the same if it stands on its own as when it is used the conditional sentence "If that is what I ought to do, I will eat my hat".

A variant on the same misunderstanding is based on the assumption that facts cannot guide behaviour. The argument then runs that if somebody ought to do something, or – probably better – if somebody is aware that he ought to do something, this guides his behaviour. Because facts cannot guide behaviour, it cannot be a fact that somebody ought to do something. However, a similar argument can be used to argue that it cannot be a fact that your house is on fire, because that fact or the awareness of it will guide your behaviour. Clearly, facts, or the awareness thereof, can and do guide behaviour.[24] Therefore it cannot be a reason against the existence of deontic facts that such facts would guide behaviour. Normative or deontic facts are typical cases of behaviour guiding facts.

A second misunderstanding, which may have inspired the first one, is that a 'real' fact cannot depend on what we humans think, believe, project, accept or recognise. On the assumption that standards for goodness, and for what should or ought to be done, are mind-dependent, this misunderstanding becomes that 'real' facts cannot depend on standards. Perhaps the clearest expression of this idea can be found in the work of Mackie, who claimed that facts involving an ought (and other normative 'facts') are ontologically 'queer'.[25] This misunderstanding is essentially that of applying the assumption that facts must be mind-independent to domains for which it is less suitable. One such domain is that of social reality, because social reality depends to a large extent on what people accept or recognise about it.[26] If facts can be mind-dependent and therefore also dependent on standards, there is no good reason why there cannot be normative or deontic facts. It may be a fact that one should visit the dentist in case of a tooth-ache. This facts presupposes a standard for prudence, but there is no good reason why such presupposition of a standard makes the existence of facts impossible.

---

22 E.g. PT Geach, "Good and Evil", in 1956) 17 *Analysis*, 33-42. Also in Ph Foot, *Theories of Ethics* (Oxford University Press, 1967), 64-73.

23 *Speech Acts*, supra note 4,136-140.

24 This theme is explored in more detail in Jaap C Hage, *Feiten en betekenis* (Facts and meaning), PhD-thesis Leiden 1987, 117-120.

25 JL Mackie, *Ethics. Inventing Right and Wrong* (Penguin Books, 1977), 38-42.

26 Cf JR Searle, *Making the Social World* (Oxford University Press, 2010), 8.

Because normative judgments can very well, and often are, expressed by means of declarative sentences, the appearance is that there are deontic facts which are expressed by these sentences. Two possible objections against the view that there can be deontic facts have been rebutted and apparently there is no reason to deny that there can be and actually are deontic facts.

2. Kinds of deontic facts

Many rules and facts are expressed by means of terms which are somehow deontic. These terms include "ought", "shall", "duty", "obligation", "obligated", and "required". The precise relations between the meanings of these terms, or between what these terms stand for is far from clear, and the use of the terms in common parlance is not without ambiguity. Still, for a proper and unambiguous use of these terms in legislation, some insight in the differences between, for instance, "duty", "obligation", "obligated" and "ought" is useful. For that reason, this section will make an attempt to create some clarity. 'Create' because there are no obviously correct analyses in this field. The work must necessarily be somewhat stipulative in this ambiguous field of semantic and conceptual relations.

The difference between duties and obligations, and the relation between these two and being obligated was already discussed in section C.3. An ought is related to being obligated in the sense that it depends for its existence on other deontic facts. A person P cannot be obligated to do A if he is not under a duty or an obligation to do A. The obligatoriness of A for P is the 'outflow' of the duty or obligation to do A. In a similar way, an ought is the outflow of other deontic facts. The difference between a person P being obligated to do A, and a person p owing to do A is that the former is based on a single duty or obligation, while the latter is the result of a number (one or more) of obligating facts.

An example may clarify this difference. Suppose that there is a rule R1 which imposes on agriculturists the duty to combat thistles which grow on their land. Because of this rule, agriculturist P is under a duty to combat the thistles growing on her land. This duty involves that P is obligated to combat the thistles. Suppose moreover that the only effective way to combat the thistles is to use herbicide H. Then, arguably, P is obligated to use H to combat the thistles, still because of the duty that was created by means of rule R1.

Suppose moreover that there is a rule R2 which prohibits the use of herbicide H. Because of this rule, everybody is under a legal duty and therefore also obligated not to use H.

Agriculturist P is both obligated to use and not to use herbicide H. This is *not contradictory*. It is possible to have conflicting duties and obligations and therefore to be obligated to do incompatible things. What is impossible, however,

is that somebody *ought* to do incompatible things. So in our example P either ought to use H or ought to refrain from using H, but not both.[27]

In an ought-judgement, the results of a number of duties and obligations are combined into a single outcome, indicating what ought to be done.[28] This number of duties and obligations may be limited to a single duty or obligation and then a person ought to do what she is obligated to do on basis of this single duty or obligation. If there are conflicting duties and obligations, the ought somehow is the result of the interaction between these duties and obligations.[29]

Because being obligated and owing to do something are the result of duties and obligations, a legislator does not have to use these former concepts in regulations. She can confine herself to drafting rules which create duties or obligations. She can also create rules that govern the potential conflict between duties and obligations, but such rules do not impose duties or obligations themselves, and will therefore not be discussed in this paper.

3. Norms

The term "norm" is highly ambiguous[30], and arguably its use should be given up and replaced by less ambiguous terms. It is, however so popular (because of its ambiguity?) that the hope that the term will be abandoned is probably in vain. Therefore I will use the term too, but I will choose a single meaning for it: the term "norm" will be used for rules which either through their mere existence, or through their application lead to a deontic fact.

An example of a norm which through its application leads to a deontic fact is the norm that whoever unlawfully causes damage for somebody else is under an obligation to compensate this damage. If this norm is applied to a particular case of a tort, it imposes on the tortfeasor the obligation to pay damages.

---

[27] I assume that the two duties do not cancel each other, with as result that the situation becomes legally indifferent.

[28] It may be tempting to conclude that an ought is therefore an ought all things considered. This temptation should be resisted. An ought is by definition an ought relativized to the duties and obligations that were taken into consideration. It 'transcends' these individual duties and obligations, but is still relativized to those duties and obligations that were taken into consideration. The idea of an 'ought all things considered' attempts to overcome such a relativity, but in this attempt it ignores the essentially relative nature of every ought. The mistake is essentially that of taking a conclusion which is defeasibly justified by true premises as unconditionally true.

[29] The logic of such a conflict is the logic of contributory reasons. This logic is described in my *Studies in Legal Logic*, supra note 21, chapter 3.

[30] Kelsen writes, for instance, that the word "norm" in the first stands for a command, a prescription, or an order (as if these were the same), but that there are also norms which empower, permit, and abolish. (H Kelsen, *Allgemeine Theorie der Normen* (Manzsche Verlags- und Universitätsbuchhandlung, 1979), 1).

An example of a norm which leads to a deontic fact merely through its existence (validity) is the norm "It is forbidden to commit a murder" which leads to the fact that it is forbidden to commit a murder. Notice that the sentence which expresses the fact has the same formulation as the norm. Still the two are different. The norm can exist, or – which boils down to the same thing – it can be valid, but it is not true or false. The descriptive sentence is either true or false, but cannot exist in the sense of being valid.[31] In fact, all norms lead through their existence to deontic facts which are described by the norm formulation. Such facts may be called *factual counterparts of norms*.

Even if the use of the term "norm" is confined to rules which through their existence or application lead to deontic facts, there are still many different kinds of norms.

Duty-imposing and obligation-creating norms

The first distinction between kinds of norms is between duty-imposing and obligation-creating norms. Duty-imposing norms are static rules, which attach the existence of a duty to being an actor of a particular kind. Typical examples of duty-imposing norms are:

[House-owners are obligated to keep the pavement before their house free of snow] and
[Foreigners must dispose over a staying permit].

Somewhat less typical is

[Everybody is to assist people in need]

because it attaches the duty to assist not to a particular status, such as being a house-owner or being a foreigner, but to being an actor (human being) alone.

The phenomenon of duty-imposing norms raises a conceptual issue, namely whether these norms are conditional or not. On the one hand it may be said that through their existence they create an unconditional duty for the norm-addressees. For example, the norm [Foreigners must dispose over a staying permit] creates the unconditional duty for foreigners to dispose over a staying permit. On the other hand, one may analyse the norm as a conditional one, namely as imposing the duty the dispose over a staying permit on the condition that one is a foreigner. For practical purposes, this issue does not have much importance. It is obvious

[31] Obviously, sentences can exist in the sense of being correct sentences of a particular language.

that concrete persons are only affected by this norm, conditional or not, if they are foreigners.[32]

Typical examples of obligation-creating norms are:

[The conclusion of a contract obligates the contract partners to fulfil all the contractual obligations] and
[Everybody who negligently causes damage to anybody else must compensate this damage].

Both duty-imposing norms and obligation-creating norms lead to deontic facts.

Deontic facts

In a deontic fact three elements can be distinguished, namely the actor(s) or 'norm-addressee(s)'[33], the deontic modality – whether an action is obligated (mandatory), prohibited or permitted – and the indication of the action type or the performance mode: what must be done, or in which way something must be done.

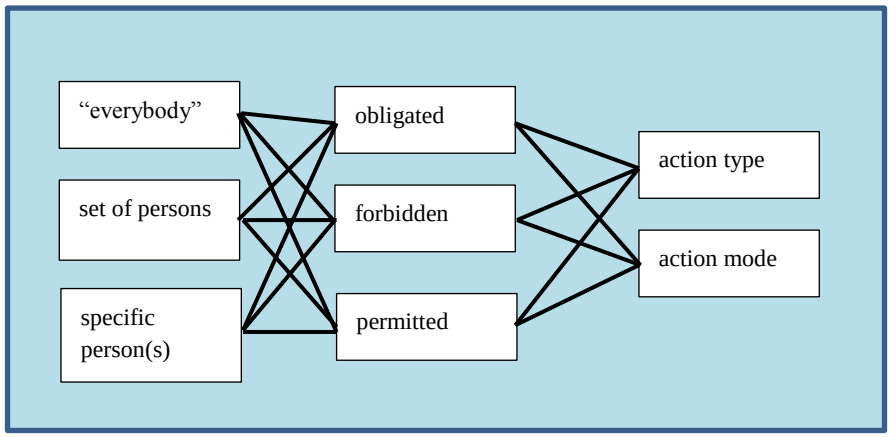
The actor may be one or more specific persons (directed requirements or permissions), a set of persons (dedicated requirements or permissions), or everybody persons (universal requirements or permissions).

There are three deontic modalities: obligatory, prohibited and permitted. I will use the term *requirement* for a norm which either involves that the actor is obligated or prohibited to do something.

And there are two kinds of 'things' which can fall under the deontic modality, namely action types such as whistling and closing a window, and modes of performing an action, such as whistling *in the dark*, and closing a window *smoothly*. In schema the analysis of a deontic fact looks as follows:

[32] On theoretical grounds which lie beyond the scope of this paper, I prefer the analysis according to which norms as the discussed one are not conditional.

[33] The traditional term "norm-addressee" is confusing, because it is not the norm which addresses potential actors, but the deontic fact that is created by the norm.



4. Examples

In this subsection we will take a closer look at some examples of deontic facts.

Universal duty to perform bring about a result

An example of an universal duty to bring about a result is the duty for everybody to post every Christmas card he wrote.

Notice, to begin with, that although there can be universal (and dedicated) duties, there cannot be universal or dedicated obligations. The reason is that an obligation arises as the result of some event and that this event determines which concrete person or persons have incurred the obligation. For example, in the case of a tort, the tortfeasor(s) will be the addressee(s) of the obligation to compensate the damage. In general, obligations will always be directed, while duties may also be general or dedicated.

The duty is a duty to perform some type of action. All deontic facts relate to action types, not to concrete acts.[34] The reason is that concrete acts only exist as soon as they have been performed. From the perspective of guiding behaviour, it makes little sense to prescribe or prohibit a concrete act, because the prescription must then by definition refer to some act which already took place.[35] All this does not stand in the way of very specific action types, such as posting a Christmas card at 8 in the evening on a Saturday in the third week of December. However

[34] I will use "action" for types, and "act" for tokens - concrete instances of action types.

[35] Because norms are also used to evaluate behaviour that took already place, it may be 'useful' to prohibit acts in the past. That would for instance make it possible, ignoring the demands of legality, to punish these acts which became 'illegal' retrospectively.

even such very specific action types allow at least in theory that they can be performed in different ways. That is what makes them action types, rather than act tokens.

Notice also that what is required is a kind of action, not a particular way of performing an action. Moreover, the action is defined in terms of a result that must be brought about. It is not possible to perform this kind of action and to comply with the duty without bringing about the result that the Christmas cards are posted. Such actions – I will call them *material actions*[36] – can often be performed in very different ways, by doing different kinds of things. It is for example possible to post Christmas cards by putting them in the mail box yourself, but also by hiring somebody to post them for you, or by throwing them in the air if it happens that the wind blows the cards precisely in some mailbox. An extreme example is that sometimes things can (and perhaps even must) be brought about by making regulations. Think in this connection for instance of EU directives which impose duties upon states to regulate particular subjects in a prescribed way.

Dedicated prohibition to do something in a particular way

An example of a dedicated prohibition to do something in a particular way is the prohibition for inexperienced skiers to ski outside the slope. Because it is a dedicated prohibition, it must be a duty. However, it is not a duty to refrain from an action type (skiing), but a prohibition to perform a type of action in a particular way (outside the slope).

Notice that a prohibition is the same as a requirement to refrain from doing something, in this case the requirement to refrain from skiing outside the slope.

Directed permission to perform some kind of action

An example of a directed permission to perform some kind of action is the permission for James Bond to carry a particular secret gadget. Such a permission is nothing else than the absence of a prohibition. Possible everybody is permitted to carry this gadget, for instance because there are no norms which forbid this.

Often a permission means more than merely the absence of a prohibition. One may think in this connection of the license which James Bond has to kill. This license is the result of an explicit permission. The consequence of this permission is that the normal prohibition to kill does not apply to James Bond, with as result

---

[36] The terminological distinction between *material actions*, which are defined in terms of bringing about a particular result, and *formal actions* which are the other action kinds, the 'rest', stems to my knowledge from Dutch criminal law theory.

that for James Bond the deontic situation is the same as it would be if there were no prohibition.

Some 'permissions' go even further, being rights to do what one is permitted to do. The right to free speech would be a case in point. Such rights involve a permission to do what one has a right to do, but they involve more than merely that permission. What else is involved in such a right falls beyond the scope of this paper.[37]

Notice, finally, that the kind of action James Bond is permitted to perform does in this case not involve that a particular result is brought about. Carrying a gadget is in this respect comparable to walking, writing, and diving. Such *formal actions* are much more specific about what is to be done. One can only walk by walking, dive by diving, and carry a gadget by carrying a gadget. A legislator who prescribes, forbids of permits formal actions is more precise and gives better guidance for behaviour than a legislator who prescribes, forbids of permits material actions. At the same time, the latter legislator leaves the norm addressees more leeway to comply with the law.[38]

E. Conclusion

Language is the legislator's main tool, and despite some exceptions, the use of clear language is one of a legislator's virtues. The availability of a set of sharp, unambiguous concepts should therefore be a useful contribution to the legislator's toolkit. This paper is the first of a set of four papers which aim to fill the legislator's toolkit with useful instruments. It contains a large number of conceptual distinctions which relate to legislation, rules, norms and deontic facts. I will briefly recapitulate the distinctions.

Legislation is the way in which a legislator acts. Most legislative acts are means to bring about changes in the world of law. Amongst the most influential changes are those which create, modify, or derogate legal rules. These changes are so influential because they reach, in a manner of speaking, beyond themselves. If the legislator creates a rule, the coming into existence of the rule is not the only change that is brought about. Through its existence, the rule influences the structure of the world of law, somewhat analogous to the way in which causal laws influence the structure of physical reality.

---

37 In this connection, one may think of Dworkin's theory of rights as 'trumps'. Cf. R Dworkin, *Taking Rights Seriously* (Duckworth, 1978), 184-197.

38 The pros and (mostly) cons of regulating by imposing goals has been the subject of continued research by Westerman. One example is P Westerman, "Governing by Goals: Governance as a Legal Style", (2007) 1 *Legisprudence*, 51-72.

Rules constrain the combinations of facts which are possible, mainly by attaching new facts to events (dynamic rules) or to existing facts (fact-to-fact rules), but also by making that some things also 'count as' other things (counts-as rules).

Norms are rules that lead to deontic facts. Obligation-creating norms attach the presence of an obligation to the occurrence of an event. A typical example is the rule of tort law which attaches the obligation to pay damages to unlawful behaviour that caused damage. These norms are therefore dynamic rules.

Duty-imposing norms attach the presence of a duty to a particular role or status. These norms are static rules of the fact-to-fact type. An example would be the rule that imposes on the government the duty to present to Parliament a budget for the next year at the beginning of the parliamentary year. This duty adheres to the function of the government.

Characteristic for norms is that they lead to deontic facts. The existence of deontic facts may seem problematic because of the 'gap' between is and ought. However, because facts can guide behaviour and can be mind-dependent, the 'gap' between is and ought does not have to imply that there cannot be deontic facts.

A typical deontic fact consists of three elements. The first element is an indication of the persons(s) which are affected by the fact, the so-called 'norm-addressees'. Universal deontic facts apply to everybody (within the norm's territorial and temporal scope of application). Dedicated deontic facts apply to a set of persons, which is specified by one or more characteristics. Directed deontic facts apply to one or more specific persons.

The second element indicates whether the fact either makes something obligatory or is a prohibition (both are called 'requirements') , or that it is a permission.

The third element indicates whether the fact relates to a particular action kind, or to a particular mode of performing an action. Action kinds can be subdivided into material actions (defined as bringing about a result) and formal actions (which are not so defined).

Useful as the above distinctions may be, they are far from exhausting the conceptual tools that can be made available to the legislator. We have briefly looked at obligations, as opposed to duties, but almost completely ignored that obligations go together with rights in the sense of claims. Claims and other rights are typical examples of legal positions which need to be dealt with separately.

One important aspect of many rights is that they create a power for the right holder to bring about changes in the world of law by means of so-called 'juridical acts'. Legislation is also an example of a juridical act. Juridical acts, and the concepts that are relevant in their connection such as 'power', 'competence', and 'capacity', also deserve separate treatment.

And finally, there are logical relations between facts. In this paper we have seen some of them in the discussion of how the existence of norms leads to deontic facts, and the relations between deontic facts such as the existence of duties, obligations, and being obligated and owing to do something. These logical relations make that the work of a legislator has ramifications which may not be directly visible, but which are important nevertheless. They deserve separate treatment too.

All this is for future research.