

What is a legal transaction?

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1 A FIRST IMPRESSION

Neil MacCormick has, in the course of his rich academic career, written on many central issues of both legal philosophy and jurisprudence. From the point of view of this paper, his work on the institutional theory of law has been crucial. In this paper I will focus on a phenomenon which is, in my opinion, best elucidated by means of this institutional theory of law, namely the phenomenon of legal transactions.

The notion of a legal transaction (legal act, act-in-the-law, Rechtsgeschäft, acte juridique) does not play an important role in the common law tradition, but in the civil law tradition of the European continent it is one of the basic legal notions. Legal transactions are the means by which legal subjects can change the legal positions of themselves or other persons intentionally. Examples from private law are contracts, terminations of contracts, last wills, transfers of rights, and the creation of rights in rem such as usufruct and mortgage. Examples from public law are legislation, and dispositions.

The notion of a legal transaction was probably abstracted from the more specific notion of a contract. In connection with contract formation, an elaborate doctrine has developed in the course of many centuries. The observation that a contract is normally formed on the basis of will (intention) and declaration of it turned out to be useful for understanding other transactions in private law, and then also in public law. And this has led to a general doctrine about legal transactions, which on the continent plays a crucial role in the doctrines of private law and a somewhat less central role in those of public law. In the relatively recent civil codes of Germany and the Netherlands, legal transactions appear explicitly, with the Dutch code

¹ The author thanks Andrew Halpin and the other participants in the Edinburgh symposium on Neil MacCormick's *Institutions of Law* for their comments on his presentation and an earlier version of this paper. They made it possible to express his views on legal transactions more clearly. He also wants to thank Neil MacCormick for inviting him to his symposium, thereby stimulating him to write this paper in the first place.

even containing a special part about legal transactions (sections 3:32-59 of the Burgerlijk Wetboek). Although this regulation is mainly intended for application in property law, it can be applied analogously in other fields which lend themselves to it.

In the common law tradition, the notion of a legal transaction was hardly developed, but obviously the phenomena that count as legal transactions in the civil law tradition also occur in the common law countries. What seems to be lacking is the general notion of a legal transaction and rules and doctrine that deal with legal transactions in general, rather than with specific phenomena such as contracts and transfers, which count as legal transactions on the continent.² In legal theory, however, the idea of a legal transaction has received ample, although implicit, attention in the work of Hohfeld who distinguished between a group of legal concepts centred around duties and rights and a group centred around powers and liabilities. This second group derives its relevance for this paper from its close connection with legal transactions.

The Hohfeldian distinction was repeated by Hart, who emphasised the distinction between duty-imposing rules and power-conferring rules. And the still implicit theory about legal transactions was further developed by the distinction, made by MacCormick, between on the one hand institutive and terminative rules, which deal mostly, but not exclusively, with legal transactions, and on the other hand consequential rules, which deal with legal consequences that are not attached to events (MacCormick and Weinberger 1986, 52-3).

Although there is a lot of legal doctrine about legal transactions, in particular in the continental doctrine of private law, a general theory about legal transactions that abstracts for the specific regulations of the subject in national law still seems to be lacking. In this paper I try to make a start with remedying this shortcoming and in doing so, I will take my starting point in the institutional approach to law³ and will compare my view with the strongly related views of MacCormick on powers and validity, as presented in his *Legal Institutions*.

² Arguably the notion of (the exercise of) a legal power takes the place in the common law doctrine, which is taken by the notion of a legal transaction in the continental doctrine. See for instance the analysis of such exercise in Halpin 1996 and in Spaak 2003.

³ This approach is described in, amongst others, MacCormick and Weinberger 1986, Lagerspetz 1995, La Torre 1999, Ruiters 1993 and 2001, and MacCormick 2007.

2 THE WORLD OF LAW

We are all familiar with the physical world. It consists of a large number of “things”.⁴ Big things such as stars, galaxies, somewhat smaller things, such as seas and mountains, and small ones, such as viruses, molecules, and quarks, and very much in between, including human beings. These things have characteristics and stand in relations to each other. That things have these characteristics and stand in these relations to each other, are *facts*. The facts in the physical world obtain to a large extent independent of human beings. Think in this connection of the existence on earth of seas, mountains, and many kinds of living things, including those who appeared on the surface of earth before there were humans. And where the facts depend on humans, this is because of the physical interaction between the human body and other physical things.⁵ Think, for instance, of the existence of buildings, roads and artefacts. The social world, or social reality, does not only depend on what is physically the case, but also - and to a large extent - on what people believe the social world is. A fact in the social world can obtain because sufficiently many members of a social group believe it obtains and also believe that (sufficiently many) other members of the group have the same belief, both about this fact and about what the others believe.⁶ Jane may, for example, be the leader of an informal group, because most members of the group take her to be the leader and believe that the others take her to be the leader too and believe that the other members do the same. Some rules exist as legal rules because sufficiently many people that participate in a legal system accept these rules as legal rules and believe that others do the same.

In modern societies, however, most legal rules derive their existence and status as *legal* rules from being made in accordance with rules that specify how to make legal rules. They exemplify a second way in which facts in social reality can obtain, namely through the operation of social rules, including legal rules. Social rules deal with how people should behave towards each other, but also with the proper use of language, with the definitions of games, and with the membership of socially defined sets, such as the set of legal rules. If the

⁴ Intuitively, “things” may be taken to be everything denoted by nouns (e.g. “table”, and “rule”), proper names (e.g. “Jane”), or identifying descriptions (e.g. “the mayor of New York”, “the rights of minorities”).

⁵ That the physical world is in part the result of causal interaction with the human body does not exclude that the same holds for the social world. The difference that I want to point out is that the social world is not exclusively the result of physical interaction with the human body, where the physical world - to the extent that it depends on humans - is.

⁶ This theme is extensively elaborated in Tuomela 2002, chapter 5. See also the discussion in MacCormick 2007, chapter 1.

conditions of these rules are satisfied, their consequences hold in social reality. The part of social reality that is the result of the application of social rules is called the *institutionalised part of social reality*. Typical phenomena within the institutionalised part of the social world are the existence of money, promises, the law and everything created through the law, such as officials, legally defined organizations and most legal rules. Let us call the mode of existence in the institutionalised part of the social world *existence as institutional fact*.⁷

The two modes of existence in the social world do not exclude each other. On the contrary, the point of existence as institutional fact is that it generates acceptance. For instance, if somebody is appointed to prime minister, this person derives her status as prime minister from the appointment and the rules that deal with it. To this extent, her status of prime minister belongs to the institutionalised part of the social world. The point of the appointment, however, is that she will be recognised and accepted as prime minister, and if this point is realised, her status will be based on social acceptance too.⁸

The world of law is part of the social world. In fact, most of the world of law belongs to the institutionalised part of the social world. The existence of large parts of the law is based on the operation of rules which lead to the existence of these facts as result of legal transactions and other events with legal consequences.⁹ However, the law also contains parts which only exist because they are believed to exist.¹⁰ Judge-made law in the civilian tradition, customary law, and other unwritten parts of the law, including many legal principles¹¹, illustrate that not all of law is institutionalised.

⁷ This expression is somewhat infelicitous in the case of “things” (instead of facts) that exist in the institutionalised part of the social world. I take it that the advantage of having a simple expression for this mode of existence outweighs the disadvantage of imprecision.

⁸ In fact, there is a problem if the institutional mode of existence is not matched by the acceptance-based mode of existence. The discussions about the validity of unjust legal rules can well be interpreted as dealing with this very issue. More on the relation between acceptance-based existence and existence as institutional fact in Ruiter 1993 , 52-54.

⁹ As is well-known, this is one of the major themes of Hart’s conception of law. See Hart 1997, 77-96.

¹⁰ An interesting illustration of this phenomenon is that judge-made law plays a role in civil law systems that is quite similar to that in common law systems, although the former, in contrast to the latter, do not have stare decisis. The fact that a judge has adopted a particular rule in her decision is in the civilian tradition no legal reason why this rule has become a legal rule. But it is, under suitable circumstances, surely a cause why such rules are accepted as legal rules, and it is maybe also a non-legal reason to accept such a rule as a legal rule.

¹¹ That legal principles are part of the law, but nevertheless do not belong to the institutionalised part of it because they cannot be identified by means of their pedigree, is the main point of Dworkin’s initial criticism of Hart’s version of legal positivism. See Dworkin 1978, chapter 2.

3 CHANGING THE WORLD OF THE LAW

An illuminating way to look at legal transactions is to see them as intentional modifications of the world of the law. Changes in the world of the law can come about in two main ways, related to the two ways in which this world exists, namely acceptance-based and as institutional fact. Changes in acceptance-based facts cannot be brought about merely by the (expression of the) intention to do so; changes in the set of institutional facts can, but not all of these changes are the outcome of intentional action. To see things in a proper perspective, it is useful to divide up the institutionalised part of the law in subsets, depending on the ways in which these institutional facts come about.

A first division is between facts that are the immediate result of changes in the world and facts that supervene on other facts. An offer and the acceptance thereof are events, in the sense of changes in the world. These events normally¹² lead to the existence of an institutional fact, namely a contract between the two parties. That is why the existence of a contract exemplifies *event-based institutional facts*. If there is a valid contract, the parties are legally obligated to do what they agreed to do. This legal obligation does not follow from an additional event, but supervenes on the presence of the valid contract. Therefore the obligations from a valid contract are *supervening institutional facts*. As will be clear from this example, supervening institutional facts may be the indirect result of events. Contractual obligations are the result of the offer and acceptance thereof that lead to the valid contract. The reason why these obligations are nevertheless categorised as supervening institutional facts is that their relation to the offer and acceptance is mediated by an intervening event-based institutional fact.

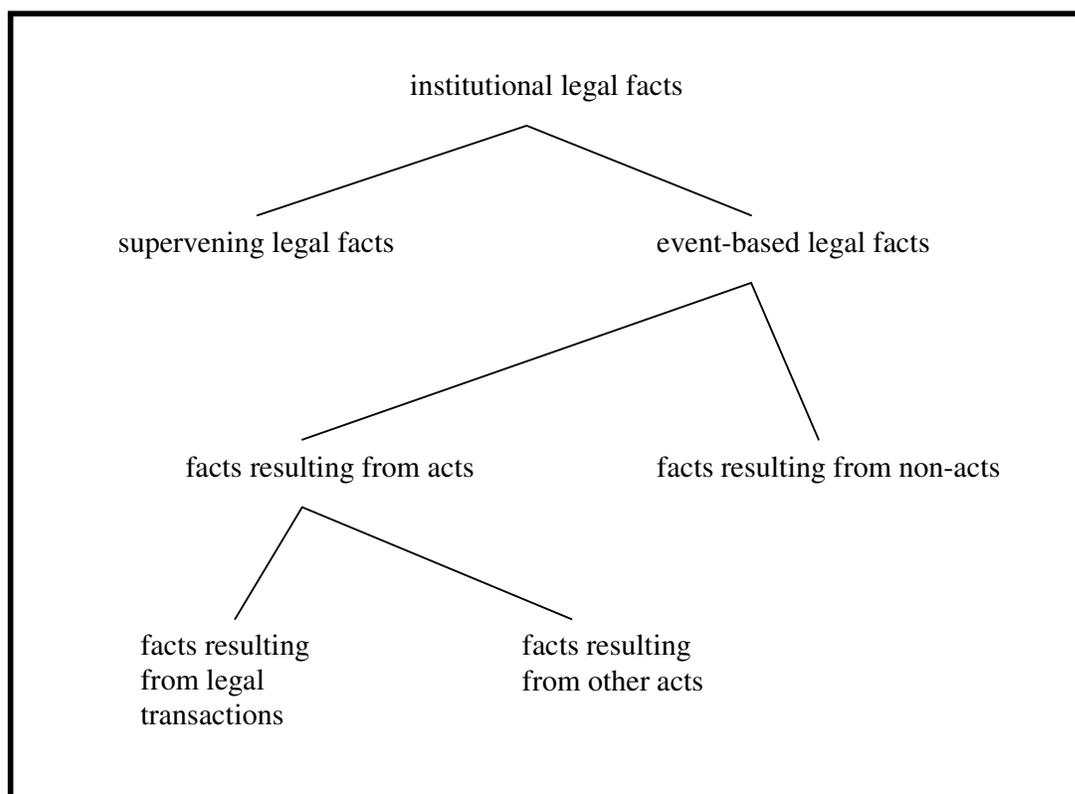
The events that lead to changes in the institutionalised part of the world of law can be subdivided into acts and non-acts. If the owner of a building dilapidates it, and the building collapses as a consequence, with casualties as a further consequence, the collapse is an event that leads for the owner to event-based liability for the damages. This collapse is not an act. If the driver of an automobile causes an accident through his fault, he becomes liable for the damages too, this time as the result of an act. This act is not a legal transaction, however. It

¹² Changes in the institutionalised part of the legal world are the result of the application of rules. Because rules are amenable to exceptions, not all changes in the world of law that would normally come about are actually realised. Hence the insertion of “normally”. From now on, I will ignore the possibility of exceptions and skip the resulting use of “normally”.

would still not be a legal transaction, if the driver caused the accident on purpose, with the intention to become liable for the damages.¹³ The reason why this is not a legal transaction is that the liability does not depend on the intention to create it. A legal transaction takes place, if somebody performs an act with the intention to create particular legal consequences (changes in the world of law), and the law attaches the intended legal consequences to this act precisely *because* they were intended.¹⁴

Legal transactions are acts, performed with the intention to bring about changes in the world of law (legal consequences), to which legal rules attach the intended consequences because they were intended.

The following schema provides an overview of the division of institutional legal facts based on the different ways in which they come about.



¹³ Cf also MacCormick 1991, 74 and Spaak 2003.

¹⁴ It may be argued that sometimes contracts are not based on offer and acceptance, but on reliance. In such cases there would, allegedly, be a legal transaction even though the relevant intention is lacking. I would say that in such cases, the legal consequences of a valid contract hold, but that these consequences are not the result of a legal transaction. See Hage 2007a. For a similar argument, but then to the effect that these legal consequences are not the result of the exercise of a power, see Halpin 1996.

4 CONSTITUTIVE ACTS

In his paper *A taxonomy of illocutionary acts* Searle (1979b) made distinctions between types of speech acts which are useful for a better understanding of legal transactions. An auxiliary distinction in this connection is that between directions of fit. It is illustrated by the following example. Suppose I make a shopping list that I use in the supermarket to put items in my trolley. A detective follows me and makes a list of everything that I put in my trolley. After I am finished, the list of the detective will be identical to my shopping list. However, the lists had different functions. If I use the list correctly, I place exactly those items in my trolley that are indicated on the list. My behaviour is adapted to what is on my list. In the case of the detective it is just the other way round; the detective's list reflects my shopping behaviour. If we consider my behaviour as (part of) the world, we can say that my shopping list has the world-to-word direction of fit, because my behaviour must fit the words on the list. The detective's list, on the contrary, has the word-to-world direction of fit, because his list must fit the world (my behaviour).

The direction of fit holds between the propositional content of a speech act and the world. The illocutionary force of a speech act determines which direction of fit is involved. Searle distinguished five main kinds of speech acts:

- *Assertives* commit the speaker to something's being the case. For instance, the sentence "It's raining" can be used for an assertive speech act. Assertives have the word-to-world direction of fit; they are successful if they are true.
- *Directives* are attempts of the speaker to get the hearer to do something. For instance, the sentence "Give me your money" can be used for a directive speech act. Directives have the world-to-word direction of fit, and are successful if they are effective.
- *Commissives* commit the speaker to some future course of action. They have, according to Searle, also the world-to-word direction of fit. For instance, the sentence "I promise to lend you my car" can be used for a commissive speech act. The difference between commissives and directives is, according to Searle, that directives direct the *hearer*, while commissives commit the *speaker*.
- *Declarations* bring about a correspondence between the speech act's propositional content and the world. They have, what Searle calls, a double direction of fit, because the world is

made to fit the propositional content of the speech act, while that content comes to fit the world. For instance, the sentence “I hereby give you my car” can be used for a declaration.

- *Expressives*, finally, express the speaker's psychological state. For instance, the sentence “I thank you for lending me your car” expresses the speaker's gratitude. Expressives have no direction of fit, because they express, rather than describe the speaker's psychological state.

Searle's analysis of different kinds of speech acts by means of the difference in directions of fit provides a suitable starting point for the analysis of legal transactions. For that purpose it needs to be amended, however. My first amendment is merely terminological. Declarations in Searle's sense are speech acts by means of which facts are created. Searle's own examples include that somebody gets appointed as chairman and that somebody's position is terminated. Since these acts are constitutive (in the case of the termination in a negative sense), I propose to call these speech acts by means of which the world is changed *constitutive acts*, or *constitutives*.¹⁵

By the way, it is not necessary that constitutive acts are real *speech* acts. The only thing that is required is that constitutive acts have a propositional content, because that is what is to be made true in the institutional world. Moreover, this propositional content is always determined conventionally, which implies that in theory any event can be attributed any propositional content (cf. Ruiter 2001, 78/9 and Hage 2005).

The second amendment concerns the direction of fit of constitutives. According to Searle they have a double direction of fit, because the world is altered to fit the propositional content of the speech act by representing the world as being so altered (Searle and Vanderveken 1985, 53). This expression 'double direction of fit' is somewhat misleading, because it suggests that both directions are equally important. If somebody copies the file which contains the text of this paper, his file comes to be identical to mine, and mine comes to be identical to his. However, his copy of the file comes to be identical to my copy in a more basic sense than the other way round, because his copy of the file is adapted to my copy and not the other way round. Approximately the same holds for the double direction of fit: the words come to fit the world only because the world has been adapted to the words. Therefore I propose to speak, in the case of constitutives, of a world-to-word direction of fit.

¹⁵ Constitutives as acts that bring about changes in the institutionalised part of the social world are made possible by constitutive rules. In a sense, both these rules and the constitutive acts based on them constitute the changes in the social world. Their roles are strongly related, mutually dependent, but nevertheless different.

However, the world-to-word fit of constitutives is not the same as the world-to-word fit of directives. An order is a typical example of a directive in Searle's sense. In the present context I use the notion of an order in a technical sense, which makes an order different from a command. Where a command requires a setting in which the commanding person has some authority over the person that is commanded, such a setting may be lacking in the case of orders. Everybody can order anybody. An order will normally exercise some psychological pressure on the hearer to do what he is being directed to do. However, there is no guarantee that the order will be obeyed and that the world will actually come to correspond to the directive's propositional content.¹⁶ That is why Searle writes about the fit of *successful* directives, and "successful" means in this context *effective*.

Constitutives also need to be successful to create the world-to-word fit, but their success is not the effectiveness but rather the *validity* of the speech act. Searle correctly remarks that declarations (my constitutives) normally require an extra-linguistic institution, a system of constitutive rules, in order that the declaration may successfully be performed. For instance, there are rules that lay down how the appointment of a chairwoman should take place. If these rules are followed in a concrete case, the appointment in question is valid. The institution not only defines when constitutive acts are valid, but also connects consequences to valid constitutives, for instance that somebody has become the chairman. These consequences are *changes* in the institutionalised world, that account for the world-to-word fit of constitutives.

To distinguish between the world-to-word fit of constitutives and of directives, I call the world-to-word fit of constitutives *direct*, because these effects are the immediate consequence of the performance of the speech act. I call the world-to-word fit of directives *indirect*, because this fit only obtains if the speech act is followed by the behaviour that it directs the hearer to perform.

The third amendment concerns the analysis of commissives. According to Searle, commissives have the world-to-word direction of fit, which would - in my terminology - be

¹⁶ In fact, the very idea that an order in the technical sense used here, has a propositional content, seems questionable. Suppose that somebody orders me: "Shut the door!." According to Searle, this order has the propositional content that I shut the door. Going purely by the formulation, however, the order has only an action type (shutting of the door) in an imperative mood as its 'content'. If we interpret the imperative mood as a sign for the illocutionary force, the 'propositional content' would merely be "shutting the door", not that I shut the door. Apparently the difference between orders and commands goes even deeper than what is suggested in the main text. Since orders do not belong to the set of constitutive speech acts in which I am interested in this paper, I will further ignore the issue.

the indirect world-to-word fit. This means that a commissive would only be successful if the behaviour to which the speaker committed himself was actually performed. However, if I make a promise, and nothing extraordinary is the case, I immediately come under the obligation to do what I promised to do. In other words, making a promise has a direct world-to-word fit. Therefore I prefer to treat promises as a species of constitutives, rather than as a separate category of commissives. In general it seems to me that commissives are a kind of constitutives and therefore need not be a special category.¹⁷

Commissives have a counterpart in constitutives that impose obligations on others than the speaker. For instance, an officer in the army gives a command to a subordinate soldier. In that way he imposes on the soldier the obligation to do what was commanded. Let us call these constitutives, which require a setting of rules, *commands*. Commands can then be opposed to orders that do not require such a setting. Anyone can order anybody, and the success of the order only depends on whether it is obeyed. Orders have an indirect world-to-word direction of fit. In opposition to orders, valid commands have the direct world-to-word fit. Their success lies in bringing about an obligation, and only in a derived sense in bringing about behaviour.¹⁸ Where orders are directives, commands are constitutives.

5 LEGAL TRANSACTIONS AS CONSTITUTIVES

Legal transactions can very well be taken as a special kind of constitutive acts. They have the direct world-to-word direction of fit, meaning that if a legal transaction is valid, its propositional content becomes true in the world of law as a consequence of the transaction. It might be objected that the consequences of a legal transaction are “really” brought about, not by the constitutive itself, which is merely an event, but by the constitutive rules that attach the consequences to the constitutive act. In a sense this objection is correct. However, it is correct in the same way in which the breaking of the window is not caused by the brick that was thrown against it, but by the physical laws that made the window break when the brick was thrown against it. The brick made the window break because of the underlying physical laws.

¹⁷ Essentially the same point was made by Ruiter 1993, 67f.

Notice, by the way, that a similar misguided difference between imposing duties on somebody else and on oneself is presupposed in the definition of a power as the capability to modify *somebody else's* legal position by (declaration of) will. Cf Halpin 1996.

¹⁸ Ruiter 1993, 70f makes the same distinction.

In the same way a legal transactions brings about its legal consequences because of the underlying legal rules.

The view that the legal consequences are “really” caused by the exercise of the power to bring them about seems less happy to me. As I will argue in section 6, powers are not independent things, but rather supervene on the presence of a competence, of rules that attach legal consequences to a particular kind of acts, and the capability to perform these acts. The exercise of a power is on this view nothing else than the performance of a relevant kind of act. It is this performance, the legal transaction, which, thanks to the underlying rules, leads to the legal consequences. The power has no independent explanatory force.¹⁹

Obvious as the view that if a legal transaction is valid, its propositional content becomes true in the world of law as a consequence of the transaction, may seem at first sight, its implications are far-reaching. A couple of examples may illustrate the point.

APPOINTMENTS

Legal transactions can be used to provide persons or organizations with a special legal status. A simple example would be the appointment, by means of a last will, of a person to one's heir. The consequence of this appointment, if it is valid, is that the person in question has become an heir. The rules that define the consequences of this status - presumably that the heir inherits if the testator dies - become applicable to the appointed person.

In this connection, MacCormick has distinguished between three kinds of rules (MacCormick and Weinberger 1986, 49-76; MacCormick 2007, 49/50). *Institutive rules* define how a particular status (institutional fact) comes about. *Terminative rules* specify how the status is lost, or the institutional fact comes to an end. *Consequential rules*, finally, attach further consequences to the existence of the status or the institutional fact.

The example about the last will illustrates two important phenomena in connection with legal transactions. The first is that a legal status, for instance that of an heir, by itself does not imply anything in the normative sphere, at least not immediately. Any normative

¹⁹ Maybe it is possible to take the notion of a legal power as a primitive and to define legal transactions and constitutive legal rules in terms of (the exercise of) powers. That would be comparable to defining causes and causal laws in terms of the power to bring about effects. As this comparison makes clear, I am not charmed by this alternative way of conceptualising legal transactions and powers.

consequences that are attached to this status are attached by consequential rules which make other institutional facts supervene on the fact that somebody is an heir.²⁰

The second important phenomenon is already given with this last observation, namely that the impact of a legal transaction is very often defined by rules which do not refer directly to the legal transaction itself. The rules that determine the legal consequences of being an heir need not refer to the way in which one has become an heir. It is not necessarily so that the consequences of being an heir by last will are different than those of being an heir by statutory provision.

CONTRACTS

In the common law tradition, contracts are often seen as mutual promises.²¹ With due respect to the common law tradition, that is a mistake. The point of making promises is to undertake obligations. Although it is possible to undertake obligations by means of contracts, contracts can be also used for other purposes that cannot be achieved by promises. It is for instance possible to appoint by means of a contract an arbiter who is empowered to decide over conflicts that might arise in connection with the execution of (the rest of) the contract. Although it is possible to construct such an appointment as undertaking the obligation to do what the arbiter decides, this would misrepresent the nature of such an appointment.²²

Although contracts do not necessarily lead to obligations, they often do. Surprisingly, few people see this as involving some variety of the naturalistic fallacy. Nevertheless contracts bridge the “gap” between is and ought, and apparently the possibility to create obligations by means of a contract shows that this gap is not really there.²³

It might be objected that contracts can only bridge the gap between is and ought because the obligation to do what was contracted is based on the rule that contracts ought to be

²⁰ As Andrew Halpin pointed out to me, the rules that attach consequences to being an heir cannot have any content, on pain of the status not being that status *of an heir* anymore. I agree, but this shows that the nature of a *particular* legal status is strongly connected with a particular set of legal consequences (and possibly also with a particular set of institutive and/or terminative rules). It does, however, not show that consequential rules cannot or should not be marked off from institutive rules.

²¹ Cf. section 1 of the Second American Restatement on Contracts: “A contract is a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty.” Quoted from Beale (et al) 2002, 3. See also Fried 1981 and Kimel 2003.

²² Cf. Hart’s discussion of the reconstruction of power conferring rules as duty imposing rules, in Hart 1997, 38-42.

²³ In fact, Searle used the example of promises to argue that there is no such gap. See Searle 1969, 132-136.

followed. It is, however, questionable whether such a rule exists. The point of contracts is that the facts established by means of the contract hold between the contract parties. The rule that what parties agreed to holds between the parties, in itself does not impose any obligations. That obligations result from most contracts is because by means of most contracts the contract parties *create* obligations between themselves. Note the emphasis on “create”. The obligations were not yet there before the contract; they are the result of the contract. The presumed obligation to obey one’s contracts is superfluous. If the contract does not create obligations there is nothing to obey, and the rule would not make sense. If the contract does contain obligations, the rule would be that one ought to do what one is obligated to do. That is a tautology which does not make much sense either. So there is no role for the rule that contracts ought to be obeyed, and the obligation to do what one contracted to do does not derive from such a rule. The obligation is created by means of the contract and it is a new obligation that did not yet exist before the contract, not even in the more abstract form of an obligation to obey one’s contracts.²⁴

RULE CREATION

In the next section we will see that legal transactions are governed by rules. An important point about legal transactions, however, is that they can also be used to create, derogate or modify rules.²⁵ To keep the discussion relatively simple, I will confine myself to the creation of new rules.

The first thing to notice is that newly created rules may be duty-imposing rules. The creation of rules can therefore lead to the creation of new duties. This should not come as a surprise after the discussion of the previous paragraphs, because it is in a sense the same point that was made there.²⁶ But nevertheless it may be worthwhile to notice that legal transactions can lead to new duties or obligations in more than one way.

²⁴ That some people, mostly logicians, make such a fuss about the gap between “is” and “ought” is that they identify this gap with the impossibility to derive “ought” from “is”. It is impossible to derive “ought” from “is” indeed, at least if the only valid type of derivation is considered to be deduction. But first, it is questionable to restrict valid derivation to deduction, even if this is done by definition. (See Hage 2005, 7-32.) And second, there is no need to treat the constitution of new facts as a kind of logical derivation, so the impossibility of logical derivation does not prove the impossibility of constitution.

²⁵ This is the central theme of Hage 2007.

²⁶ The main difference is that contracts lead to duties for concrete persons or sets of persons, while rules impose duties abstractly specified, and therefore in principle open, sets of persons.

The second thing to notice is that newly created rules very often are *not* duty-imposing rules. This means that there is nothing in the sphere of duties or obligations involved in the creation of rules as such. If the creation of new rules leads to duties, this is because the rules that were created impose duties, not because the creation of rules involves the duty to obey the newly created rules. This is an additional argument, next to Hart's²⁷, against the Kelsenian analysis of power-conferring rules as an oblique kind of duty-imposing rules.

The third thing to notice is that newly created rules may modify the institutional facts that supervene on other facts. As a result, the indirect legal consequences of legal transactions can be changed. For instance, if a new rule is created to the effect that the seller of a good with a price in excess of € 1000 has to guarantee the proper functioning of this product during five years, the indirect consequences of a sales contract are modified.²⁸ It is even possible to make rules that redefine the ways in which legal transactions are to be performed and who have the capacity to perform them. In this sense, legal transactions can define themselves (see also MacCormick 2007, 155).

6 THE RULES THAT GOVERN LEGAL TRANSACTIONS

As discussed above, a legal transaction is an act with a propositional content to which the law attaches the consequence that the propositional content of the act is made true in the world of law. This does not sound very simple, but the practice of legal transactions is even more complicated. Not everybody can perform every legal transaction, not every legal transaction can be brought about in the same way, and not every propositional content can be made true. A legal system must have several kinds of rules in order to make legal transactions possible.

MacCormick discusses a number of these rules under the heading of legal powers. He distinguishes no less than nine kinds of rules dealing with the conditions of legal empowering, namely rules that specify (MacCormick 2007, 156)²⁹:

- a. which person(s) have the power
- b. what capacity or competence they need

²⁷ See footnote 22 above.

²⁸ Remember that the direct consequence of a contract (in the sense of a special kind of constitutive act) is that a valid contract (in the sense of a “thing” in the world of law) comes about.

²⁹ I have rewritten the conditions to formulate them as conditions for valid legal transactions, rather than conditions for the exercise of legal powers. This difference in form should not make a difference in substance.

- c. what circumstances are required for the legal transaction
- d. what circumstances need to be absent
- e. which special procedures or formalities are required
- f. by means of which act the legal transaction can be performed
- g. which persons can be affected by the legal transaction
- h. which general capacity these persons should have
- i. which legal change is brought about by the legal transaction.

All of these factors are relevant, but maybe they can be summarised under three headings³⁰:

- 1. *Who* can perform
- 2. *which* legal transaction
- 3. in *what* manner?

Of these three questions, the second one is – not only literally – the central one. Every legal transaction has by definition a propositional content which indicates what change in the world of law the transaction aims to bring about. The nature of this change can be very diverse. Some changes affect the person who performed the transaction himself, for instance if he waives a right. Other changes affect somebody else, for instance if somebody is made an heir, or receives a license. And there also changes which do not affect anybody in particular, at least not directly. Legislation is a case in point, because the legal consequence of legislation is that one or more rules are created, modified or abrogated. These rules affect the legal positions of human beings and therefore legislation indirectly changes the legal positions of those humans, but this is an indirect effect of the legislation, the direct effect being “merely” a change in the set of valid rules. It depends on the contents of these rules whether individual legal positions are thereby changed.³¹

For obvious reasons, the nature of the changes brought about by a legal transaction influences who is competent to perform this transaction. In general, changes that affect the public at large require a public competence, while transactions that only affect the persons

³⁰ Obviously, these three questions are not directly related to the threefold division of rules into institutive, consequential and terminative rules. It looks as if both institutive and terminative rules deal with all of these three questions and that consequential rules are not directly related to legal transactions.

³¹ MacCormick makes a similar point when he writes that although power-exercising acts purport to change the legal position of some person in some way, it is not always necessary to have the relational character of power in mind. I would state it somewhat stronger: *powers need not be relational*. In Brouwer and Hage 2007, the position was defended, against Hohfeld, that duties are not relational either.

involved in it usually merely require that the involved persons have sufficient mental capacities. Despite these differences, all legal transactions have in common that they require that the persons who perform them have the competence to do so. This competence may be granted by private law - for instance to all human beings and some organizations - or by public law, and is (almost) always connected to a particular legal status, such as the status of a legal subject (the minimal condition), or a public officer.³²

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

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

On this analysis, competence is a necessary condition for having the power to perform a legal transaction. Since it does not make sense to confer this competence to somebody who is not capable to perform the required behaviour, or to perform the competence for a legal transaction that does not exist, competence will normally go together with the power to use this competence. Nevertheless, the notions of power and competence are different ones and it is possible to imagine cases where somebody is competent but unable to perform the behaviour required for the legal transaction.³³

Moreover, contrary to competence, which is a legal status conferred by competence-conferring rules, power is not a separate legal status, but rather something that supervenes on the presence of a set of rules. If the rules in the world of law are such that the three conditions for P having the power to perform legal transaction T are fulfilled, then P has the power to

³² MacCormick (2007, 156/7) distinguishes in this connection between capacities, based on private law, and competences, based on public law. I agree that there are different grounds for capacities, but I do not see why this would lead to a difference between capacities and competences. Therefore I use the word “competence” to deal with the possibility to perform legal transactions as granted by the law.

³³ An example would be a person who is unable to write and therefore cannot perform a legal transaction which requires writing performed in person. I would say that such a person has the necessary competence, but lacks the power to do what she is competent to do. Those who are attached to ascribing a power to such persons can use the notion of a legal power. Somebody then has a legal power to perform a particular kind of legal transaction if there are no legal hindrances for this person to perform that kind of legal transaction. Personally I see no real advantage of distinguishing along these lines between powers in general and special legal powers, especially not because I see a power as a status that supervenes on other facts and characteristics.

perform T. There cannot³⁴ be a separate rule that grants this power to P, although there must be a rule (or a set of rules) that confers on P the competence to perform T.³⁵

Depending on the contents of a legal transaction, there will be demands on the form in which the transaction must take place. These demands may be minimal, like the demands made in the Dutch Civil Code that there is an intention and a form-free declaration thereof³⁶, or more complicated such as the Dutch procedure for making a formal statute, which includes several steps, some of which involve group decision making (voting).

In this connection it deserves attention that being a legal transaction is a legal status itself, which is assigned by the law to one or more events. The rules that assign this status make that these events *count as* the performance of a legal transaction, and only in this status of legal transactions do these events have the intended legal consequences. These *counts-as rules*, as I will call them, specify what should be done in order to perform a legal transaction of the intended kind, and which additional circumstances are needed, or – on the contrary – should be absent, in order for this action to achieve the intended status of legal transaction.³⁷ If all the positive and negative conditions of the relevant counts-as rule are satisfied, the act in question counts as a *valid* legal transaction, and then it normally has the intended legal consequences. Validity in this connection does not mean anything more than that the act in question and its circumstances satisfy all the conditions required for a legal transaction of the intended kind.³⁸

³⁴ “Cannot”, because it is not up to the law to grant physical or mental capabilities.

³⁵ A similar point is made by MacCormick (2007, 160), who emphasises that powers are not based on a single power-conferring rule. My point would be that there cannot even exist such a thing as a power-conferring rule, although one or more rules together may have the supervening characteristic of creating a power. Moreover, this power is not a special legal status (like competence) but rather “the ability to cause or prevent change in some prevailing state of affairs” (MacCormick 2007, 153). Apparently this ability is sometimes (partly) the effect of rules, but when this is the case, the *nature* of the power is not different than when this is not the case. Only the *grounds* of the power are different. So I see no need to make a principal distinction between on the one hand legal powers, or – more in general – powers to modify the institutionalised part of the social world, and on the other hand purely physical or psychological powers, such as the power to influence somebody else’s behaviour, or to break a brick with one’s bare hands.

³⁶ Section 3:33 BW.

³⁷ These are the conditions c-f mentioned by MacCormick.

³⁸ Validity in this sense is a potential characteristic of all rule-governed activities, including goals in soccer and arguments in logic. It should be distinguished from validity as the mode of existence of rules. Confusingly, this latter kind of validity often depends on the validity in the first sense of legislative acts. A similar point is made by MacCormick (2007, 160/1), although MacCormick hesitates to use the word “valid” for the mode of

Arguably, the validity of a legal transaction not only depends on the underlying act and its circumstances, but also on the intended legal consequences. If these consequences are unlawful, or immoral, the legal transaction may be held invalid. For the evaluation of this view it is necessary to distinguish two questions. One question is whether a particular event counts as a valid legal transaction; the other question is what the legal consequences of the transaction are. If the intended legal consequences are unlawful or immoral, this might be considered as a reason why these consequences should not occur. There are at least two ways in which this result can be obtained. One way is to make the lawfulness and moral suitability of the intended consequences a condition for the validity of the legal transaction. The other way is to make these into conditions for the occurrence of these intended consequences as the result of an otherwise valid legal transaction. Take for instance a contract in which A hires B to commit a murder. Let us assume that this “contract” does not impose the duty on B to commit the murder. One way to reach this result is to declare the contract invalid; the other way is to say that the contract is valid, but nevertheless does not lead to the duty to commit the murder. Under the first construction the contents of a legal transaction are a factor that determines whether the transaction is legally valid. Under the second construction, the general rule that legal transactions make their propositional content true in the world of law has exceptions.

If the two issues, validity of the legal transaction and occurrence of the intended legal consequences, are clearly distinguished, as they should be, it seems strange to make the validity of the transaction dependent on the desirability of its intended consequences. From a conceptual point of view, the construction that the transaction is valid and that its intended consequences do not follow seems more attractive than the construction that a legal transaction is not valid if its consequences would be undesirable. At the same time, the idea that a legal transaction is valid, although its main objective does not succeed may seem to have drawbacks too. The intermediate “solution” that a legal transaction is invalid if its main objective is not acceptable, while it is valid if only a detail does not impose duties because of its undesirable nature, seems to suffer from inconsistency.³⁹ Personally I prefer the view that:

existence of rules, because of the (wrong) Kelsenian association of this kind of validity with bindingness. Rules do not bind, and neither do obligations. Obligations do not bind, unless this bindingness only means that the obligation is an obligation. Rules do not bind, unless this means that they have effects upon social reality (that they are operative).

³⁹ And yet this is the ‘solution’ chosen in Dutch law.

- the desirability of the intended consequences should normally not influence the validity of a legal transaction;
- the validity of a legal transaction provides a contributory reason why its intended legal consequences hold;
- the undesirability of the intended legal consequences provide a contributory reason why these consequences should not hold;
- whether the consequences hold should be the outcome of balancing the contributory reasons for and against.⁴⁰

On this construction, there is no *rule* that brings about the world-to-word correspondence of legal transaction, or – more in general – of constitutives, but merely a “principle” that leads to a contributory reason why the world should match the content of the constitutive. The implications of this view on constitutive acts go beyond a discussion of the nature of legal transactions.

7 CONCLUSION

This paper provides a first outline of a general theory of legal transactions. To this purpose it abstracted from Searle’s classification of speech acts to identify the category of constitutive acts. These constitutives operate within a setting of rules and are characterised by the facts that they have a propositional content assigned to them and that their purpose is to make this propositional content true in the institutionalised part of the social world.

Legal transactions are, so it is argued, a special case of these constitutives. Their function is to provide participants in the legal systems with the power to bring about intentional changes in the institutionalised part of the “world of law”. Since these consequences include the presence of duties, legal transactions, and – more in general, constitutives – make it possible to create duties where previously there were none. *In this sense*, they make it possible to bridge the alleged gap between “is” and “ought”.

There are several kinds of rules governing legal transactions. These rules specify who is competent to perform which kinds of legal transactions and by means of which acts and under what circumstances these transactions are to be performed. They operate against the background of the rule – or, as I argued, rather the principle - that the propositional content of a legal transaction becomes true in the world of the law. The *competence* to perform a

⁴⁰ More on balancing contributory reasons and the logic that deals with it in Hage 2005, 69-86.

particular kind of legal transaction should not be confused with the power to do so.

Competence is a special legal status, usually attached to some other status (eg that of legal subject, or of public officer), which is a precondition for performing legal transactions of a particular kind. The *power* to perform a legal transaction involves a combination of factors, including the presence of rules that make the kind of transaction possible, the competence to perform this kind of transaction, and the physical and mental capability to perform the necessary act. The power to perform legal transactions is not assigned by some rule, but is a characteristic that supervenes on all the mentioned factors.

The abovementioned subjects do not exhaust the subject of legal transactions. It seems in particular worthwhile to explore how legal transaction as reasons for their intended consequences play a role in the law as “sources” of legal rules and obligations. Another interesting subject that was only mentioned in the passing is the possibly conventional nature of the “contents” of a legal transaction. Are these contents completely determined by the intention of the legal subject that performed the transaction? How, then, is the content determined in the case of collective intentionality, or in case the expression of the intention deviates from the “psychological” intention? These subjects are not only relevant from the point of view of legal theory, but also play a considerable role in traditional doctrine.

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