

Nevertheless, sentences such as ‘Thieves ought to be punished’ seem to be true or false, and yet they also seem to express deontic rules. Do not sentences like this illustrate that deontic rules can have truth values? My answer to this argument is that it mixes up rule formulations and the descriptive counterparts of rules. Descriptive counterparts of rules are sentences expressing states of affairs that obtain thanks to the application of a rule. To clarify the difference between rules and their descriptive counterparts and to distinguish between the descriptive counterparts of deontic rules and other assertive deontic sentences, I will say a little about the meaning of referring expressions.

We use referring expressions to identify a subject we want to say something about.⁷¹ The simplest case of a referring expression is a proper name that rigidly denotes the object of reference. The proper name needs not have any meaning, otherwise than standing for what it names.⁷²

The use of definite descriptions is somewhat more complex, because their linguistic meaning plays a role in identifying their object of reference. Definite descriptions can be used in a referential and in an attributive way.⁷³ If a definite description is used in a referential way, its descriptive component is used - in combination with the context of its utterance, including the beliefs of the audience - to identify the object of reference for the audience. Any descriptive expression that succeeds in making this identification suffices. For instance, if I want to refer to a long-haired *man* with a glass of *white wine* in his hands, I may succeed in identifying him by referring to the *lady* with a glass of *sherry* in her hand. The linguistic meaning of a definite description that is used referentially is not essential. This meaning is only an additional means, in combination with the circumstances of utterance, to identify the referent for the audience. As the example shows, there is no need for the definite description to be true of the referent.

The opposite is the case when a definite description is used in an attributive way. In that case the description is used to refer to those persons of objects that satisfy the description. For instance, the description ‘the murderer of Jones’ is used attributively if I say ‘The murderer of Jones must be insane’, when I am not acquainted with the murderer, but infer his insanity from the terrible way in which he mutilated Jones' corpse.

Often when an attributive use is made of a referring expression, what we want to say about the thing(s) to which we refer depends on the

⁷¹ Searle 1969, Ch. 4.

⁷² Cf. Kripke 1972.

⁷³ Cf. Grayling 1997, 114f. and Donnellan 1966.

characteristic used in the referring expression. We ascribe insanity to Jones' murderer at least partly because of his being the murderer. In general (and by definition) it holds that if a descriptive phrase is used for attributive reference, the objects of reference possess the quality expressed in the descriptive phrase.

The distinction between referential and attributive use also holds for referring expressions that are not definite descriptions. In fact, it is rather common to use terms attributively if one wants to say something about all members of a class *as such*. For instance, the sentence 'Birds can fly' is about birds as such and not about all things that happen to be birds.⁷⁴

Attributively used terms play a crucial role in the formulations of rules. Consider the following examples of rule formulations:

- *Thieves* are punishable.
- *Murderers* ought to be punished.
- *Stealing* is forbidden.
- *The municipality council* can levy taxes on real estate.
- *Cars* are four-wheeled vehicles propelled by a combustion engine.

In each case, the italicized phrase consists of an attributively used expression.

Rule formulations must refer to the subject of their regulation attributively, because rules attach legal consequences to the subject *because of these characteristics*. Thieves are punishable, precisely because they are thieves. Acts of stealing are forbidden, because they are acts of stealing. And four-wheeled vehicles propelled by a combustion engine are cars, just because they are four-wheeled vehicles propelled by a combustion engine. One reason why rule formulations refer attributively to their subjects is that rules impose structure upon the world by creating connections between *types* of facts. Another reason why rule formulations must refer to their subjects attributively is that referential use of referring expressions presupposes a context of utterance. Such a context is absent in the case of rule formulations, which - in contrast to rule-creating speech acts - are not uttered at all.

The relations between facts that are constituted by rules can be described by assertive sentences. Since these relations exist between *types* of facts, the facts are referred to by terms that are used attributively. For instance, the

⁷⁴ If all birds happen to be painted red, one cannot express this by saying 'Birds are painted red', but one should use the sentence 'All birds are painted red'. It is, however, possible to express that birds can fly by using the sentence 'All birds can fly'. This last sentence is ambiguous between using the expression 'all birds' referentially and attributively. The subject-term 'birds' without prefix can only be used attributively.

connection created between being a thief and being punishable is described by the sentence ‘Thieves are punishable’. The referring expression in this sentence, ‘Thieves’, is used attributively. The sentence does not deal with everybody who happens to be a thief, but with thieves because they are thieves. The description describes the relation between being a thief and being punishable and this description of relations between classes can be carried out by referring attributively to the members of the class. Notice that the sentence that describes the relation between being a thief and being punishable has the same formulation as the rule that makes thieves punishable. Without context, it is impossible to determine whether sentences such as ‘Thieves are punishable’ are formulations of rules which have the world-to-word direction of fit, or sentences that describe the effects of rules and which have the word-to-world direction of fit.

Sentences that describe the relation between class members by referring attributively may be called universal attributions⁷⁵, and - if they correspond to a similarly formulated rule - *descriptive counterparts of rules*. Often, when a universal attribution is true, this is because the corresponding rule exists. For instance, thieves are punishable, because of the rule that thieves are punishable. This is not necessary, however. Sometimes relations between class members as such hold⁷⁶ without a corresponding rule. In that case there will be other rules, or – more generally and more accurately, constraints - that cause this relation to obtain. For instance, suppose that in some country owners of a crowbar are punishable. It seems that in that country a rule must exist to the effect that owning a crowbar is punishable. However, the same effect can also be obtained by the existence of the rules that (amongst others) owners of a crowbar are considered to be a threat to the public order and that it is punishable to be a threat to the public order.

The descriptive counterparts of rules do *not* describe rules. For instance, the descriptive counterpart ‘Thieves are punishable’ does not mean that the rule that thieves are punishable exists. Descriptive counterparts describe the *effects* of rules.

⁷⁵ Some of these universal attributions are case – legal consequence pairs (CLCPs) in the sense of chapter 1, section 3.3.

⁷⁶ There are also relations between class members which happen to exist, such as the relation between being a Belgian citizen and being shorter than four meters. These relations are not relations between class members *as such*.

9. WHAT IS A NORM?

It becomes time to return to the question with which I began this chapter: What is a norm? In the course of my argument I have distinguished several kinds of entities that more or less qualify for the status of a norm. I will briefly repeat what I had to say about them.

In connection with the command theory of norms, I distinguished two kinds of ‘normative’ speech acts, that is orders and commands. An *order* in the sense in which I used this term, is a speech act intended to move somebody else to perform, or to refrain from performing, some kind of behavior. If the order is successful, the intended behavior takes place. There are no other consequences of an order.

Commands, again in the technical sense in which I used the term, are speech acts by means of which an obligation is imposed on somebody else. Commands require a setting of rules that empower the commander to issue commands with this effect, and make the commanded persons liable to have obligations imposed on them in this way. Commands that satisfy the conditions of such a framework are said to be valid, and the normal consequence of a valid command is that the corresponding obligation comes into existence. A command is successful if the intended obligation arises; it is not necessary for a successful command that the resulting obligation is fulfilled, although such a fulfillment will normally be intended by the commander.

Commands are an example of what I called ‘constitutives’, speech acts by means of which states of affairs are brought about. Other examples are juridical acts, and among these, *legislative acts* take a special place. Legislative acts that satisfy the conditions of the rule framework within which they take place are said to be valid. Valid legislation has as its consequence that some piece of legislation is made and thereby that one or more rules are created, modified, or abrogated. If new rules are validly created, or existing ones validly modified, the resulting rules will normally be valid too.

Rules are constraints on possible worlds; they create through their existence (validity) necessary connections between states of affairs, or – if they are conditionless rules – they call states of affairs into being. *Deontic rules* are rules that have deontic consequences; they bring deontic states of affairs about, or they create exceptions to other deontic rules (permissive rules).

Deontic states of affairs are states of affairs that have prescriptive or prohibitive meaning. Recognition of such states of affairs will normally motivate the person in question to act in accordance with them.

Deontic states of affairs are expressed by *deontic descriptive sentences*. These sentences are true or false, dependent on whether the deontic states of affair expressed by them obtains or not. Some of these sentences are the *descriptive counterparts of deontic rules*. Their formulation corresponds to the formulations of deontic rules and they are often true because their corresponding rules exist (are valid).

Does it make sense to distinguish norms next to these categories, or to identify norms with one or some of them? Terminological conservatism pleads for maintenance of this popular term. However, the popularity might well be explained by its vagueness and its ensuing usefulness in divergent situations. My fear that this is the case makes me propose to ban the term 'norm' from theories about normative systems and practical reasoning.

Chapter 7

LEGAL STATICS AND LEGAL DYNAMICS

1. MODELING THE LAW

In this chapter I will present an abstract model of the law to account for two crucial characteristics of the law. The first characteristic is that the law is dynamic; regulations change, contracts are signed, property rights are acquired, etc. The second characteristic is that the elements of the law are not independent of each other, but hang together in a rule-like way: Legislation leads to valid regulations; the signing of a contract gives rise to obligations.¹ The model of the law as presented in this chapter can be summarized as follows:

- The law is a *system of states of affairs*.
- The law is *dynamic*: the states of affairs that obtain are subject to change due to the occurrence of events.
- The law is *interconnected*: there are (directed) connections between the states of affairs that obtain, based on what I will call *rules*.

The model uses three primitives:

- *States of affairs*. A state of affairs can be circumscribed as a possible part of the world as expressed by a (descriptive) sentence. An example

¹ These phenomena are analyzed from a jurisprudential point of view in chapter 6.

is the state of affairs that the contract has been signed as expressed by the sentence ‘The contract has been signed’.²

- *Events*. An event causes a change of the obtaining states of affairs. An example is the event of signing some contract by which the state of affairs that the contract has been signed starts to obtain.³
- *Rules*. A rule is a directed connection between states of affairs. An example is the rule that, if a contract is signed, obligations of the contractors towards each other emerge.

I start with a description of the abstract model in the sections 2 to 5. The core of this chapter consists of the sections 6 to 12 in which I illustrate the uses of the model by analyzing some basic legal concepts.

2. TWO TYPES OF CONNECTIONS BETWEEN STATES OF AFFAIRS

The model presented here distinguishes between two types of connections between states of affairs: *causation* and *constitution*. Both terms, ‘causation’ and ‘constitution’, are used here in a technical sense. Causation occurs when a state of affairs comes about, or is changed as a consequence of an event.⁴ Causation involves the lapse of time, while constitution is timeless. Suppose that A sells his car to B by signing a sales contract. The signing of the contract is an event which creates a contractual bond between A and B. The relation between the signing of the contract and the existence of the contractual bond between A and B is one of *causation*, because the contractual bond comes into existence because of an event, namely that the contract is signed.

The existence of the contractual bond brings with it that A is obligated to transfer the ownership of his car to B and that B is obligated to pay A the price of the car. The relation between the existence of the contractual bond and the obligations of A and B towards each other is one of *constitution*, because the existence of the contractual bond is a state of affairs, not an event, and the relation between it and the obligations of A and B is timeless.⁵

² More about states of affairs in chapter 3, section 2.1 and in section 3 of this chapter.

³ The notions of states of affairs and events as I use them are related to, but not fully identical to those used by Von Wright (1963, 25f.).

⁴ Notice that this use of the notion of causation is broader than pure physical causation. It also includes what Kelsen called imputation (*Zurechnung*). Cf. Kelsen 1960, 79f.

⁵ That the relation between the existence of a contractual bond and the obligations is timeless does obviously not imply that the contractual bond and the obligations themselves

In the case of causation, an event changes which states of affairs obtain. States of affairs appear or disappear. Graphically, causation is depicted as a horizontal connection between states of affairs (figure 1).

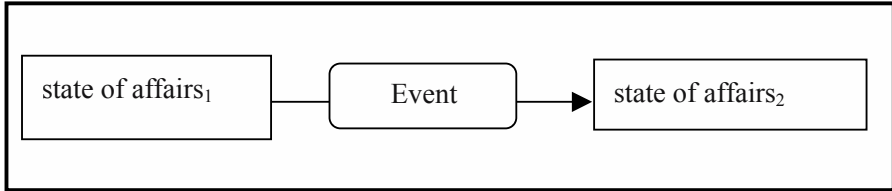


Figure 1: Causation

In the case of constitution, a state of affairs obtains thanks to another state of affairs that obtains. There is a rule that connects the states of affairs. Graphically, constitution is depicted as a vertical connection between states of affairs (figure 2).

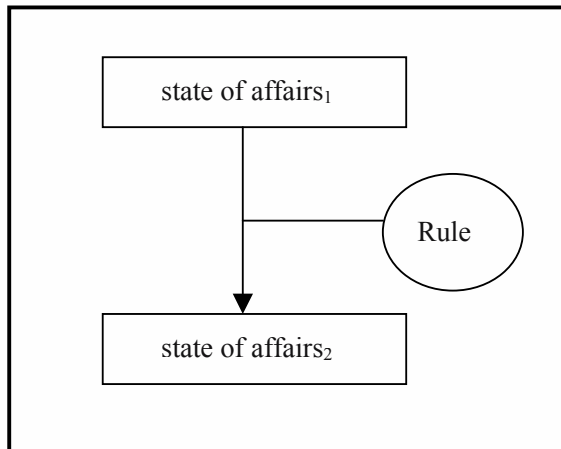


Figure 2: Constitution

In section 5 I show that there are not only rules of constitution, but also rules of causation. In the rest of this chapter, I elaborate the abstract model of the law based on the distinction between constitution and causation and show it to be helpful for understanding the law.

are timeless too. Neither does it mean that this relation will always exist. In theory the law might change in a way that the existence of a contractual bond does not involve obligations anymore. This topic is discussed, in different terminology, in chapter 6, section 8.

3. STATES OF AFFAIRS

It is possible to see the law (and the rest of the world) as a system of states of affairs. A *state of affairs* can be characterized as a possible part of the world expressed by a (descriptive) sentence. I take the notion of a state of affairs rather broadly. Examples of states of affairs are that:

1. It is raining.
2. George Washington was the first president of the USA.
3. The sun will rise tomorrow.
4. John has taken away Gerald's car.
5. John is a thief.
6. Meryl is under a contractual bond toward Jane to pay her \$100.
7. Meryl ought to pay Jane \$100.
8. A minor cannot make a valid will.
9. It is uncertain whether O.J. Simpson killed his wife.

As the examples illustrate, states of affairs can be in different tenses (examples 1-3), can supervene on each other (examples 4/5, 6/7), and can have different modalities (examples 7-9).

Obviously, some states of affairs obtain, while other ones do not obtain. E.g., the states of affairs that $3 + 4$ equals 7 obtains, while the state of affairs that George Washington is the president of the USA does not obtain (anymore). States of affairs that obtain are called *facts* and are expressed by true sentences. States of affairs that do not obtain are called *non-facts* and are expressed by false sentences.

3.1 Temporary and durable states of affairs

The examples of states of affairs 1-3 above are in different tenses. The law is a *dynamic* system of states of affairs: it changes over time. For instance, the state of affairs that George Bush is president of the USA obtains today (January 2005), but did not obtain in 1967. Some states of affairs can stop or start obtaining, others cannot. For instance, the state of affairs that George Washington was the first president of the USA obtains and will always obtain, since it is a state of affairs about the past.

States of affairs that can stop or start obtaining are said to be *temporary*, the other ones are *durable*. An example of a temporary state of affairs is that it is raining; an example of a durable state of affairs is that the French Revolution took place in the 18th century. States of affairs that deal with the past are always durable, because the past does not change (although history does). Temporary states of affairs that only obtain for a moment are

momentary. A momentary state of affairs is for instance that John hits Gerald.

Temporary states of affairs which deal with the present, such as the state of affairs that it is raining, are called *states*. In section 8, I show that having a rights can be thought of as a state.

3.2 Supervenience

In the examples above, state of affairs 5 depends on state of affairs 4. The state of affairs that John is a thief obtains *due to* the state of affairs that John has taken away Gerald's car. It is said that the state of affairs that John is a thief *supervenes* on the state of affairs that he has taken away Gerald's car.⁶

Supervenience of a state of affairs on another state of affairs is a rather common phenomenon. It can, amongst others, be based on definitions. For instance, something counts as a motor vehicle in the sense of the Dutch Traffic Law (Wegenverkeerswet) if and only if it satisfies a number of conditions.

In general, modal states of affairs, discussed in the next subsection, always supervene on other states of affairs. For instance the state of affairs that Meryl *ought* to pay Jane \$100 (example 7 above) supervenes on the state of affairs that Meryl is under a contractual bond toward Jane to pay her \$100 (example 6 above).

3.3 Modalities

The examples 7-9 illustrate different modalities. I distinguish three categories of modal states of affairs: anankastic, deontic and probabilistic states of affairs. (Here I do not regard tense as a modality.)

Anankastic states of affairs⁷ have to do with the necessary, the possible and the impossible. For instance, the state of affairs that the released stone *must* fall, is anankastic. Other examples are the states of affairs that hydrogen and oxygen *can* react, that the Democrats *cannot* win the elections, and that the conclusion of a deductively valid argument with true premises is *necessarily* true. A specific anankastic state of affairs in the law has to do with competence. To perform particular acts in the law, such as to engage into a contract, to issue a governmental order, or to legislate, the person who performs the act must have the competence to do so. If the competence is lacking, the particular juridical act cannot exist at all, or is void and has no

⁶ Jones 1995.

⁷ Cf. Von Wright 1963, 10.

legal consequences. In other words, competence has to do with what an actor can or cannot do.⁸ I return to juridical acts in section 9.

Deontic states of affairs have to do with the obligated, the forbidden and the permitted. Examples are that Meryl ought to pay Jane \$100, that smoking is prohibited in public buildings and that John is allowed to take a day off.⁹ Two basic categories of deontic states of affairs are usually distinguished: deontic states of affairs of the *ought-to-do* type and of the *ought-to-be* type. Examples of the first category are that car drivers ought to drive on the right hand side of the road, that public officers are prohibited to accept bribes and that John is permitted to walk in the park. Examples of the second category are that car drivers ought to be sober and that it is forbidden that high public officers are members of Parliament. Deontic states of affairs should be distinguished from the non-modal states of affairs on which they supervene. An example is the state of affairs that there is a contractual bond between two parties, which underlies the state of affairs that one party ought to pay the other.

Probabilistic states of affairs have to do with the probable, the certain and the uncertain. Examples of probabilistic states of affairs are that it will probably rain, that the train definitely will be late, and that Jane might pay her bill. Probabilistic states of affairs should be distinguished from anankastic states of affairs: the reasons why something is necessary are not those which make something probable or certain. The announcement that the train will be late makes it highly probable that the train will be late, but does not make it necessary, because the announcement has only impact on our beliefs about the train, not on the train itself.

4. EVENTS

Events cause changes in the total set of obtaining states of affairs. For instance, if it starts to rain, the state of affairs that it is raining starts to obtain. Other examples of events are

⁸ In the law, competence is sometimes assumed to be a state of affairs of the deontic modality. On that assumption, competence is considered to imply primarily the *permission* to perform an act in the law. However, it is better to consider the *capability* to perform the act as the primary modal state of affairs implied by competence. Since such capabilities are useless if their holders are not permitted to exercise them, the permissions to do what one is capable to do may be seen as the secondary modal state of affairs implied by competence.

⁹ Deontic states of affairs are discussed more extensively in chapter 6.