Chapter Nine:
Conclusions and Challenges

9.1 Introduction

A legal rule is traditionally conceived as a valid norm enacted in a general form, involving a normative content and expressing itself in reality through observable conduct. According to this view, law is dualistic in character; it is valid and factual, ideal and real. A legal rule is ‘a manifestation of validity in reality’ through empirical acts. This observation clearly expresses the distinction and the connection between the normative and the real components of law. In this study I have analyzed the pragmatic aspects of the process of legal communication, in the light of the dual character of the law and the linguistic elements of the legal rule as bearers of meaning in their relationship to observable acts, taking as a starting point the question of whether the classical approach to law as a unilateral top-down command, governed by the principles of the rule of law, is still a suitable concept.

Is the relationship between norm and fact indeed predominated by a one-sided flow of information, which produces an effect in reality, i.e., the materialization of the rule’s meaning content? Or do we have to adapt this classical concept of law and legal communication by introducing reciprocally operating ‘bottom-up’ elements and interaction, including the internalized models and codes of particular semiotic (here, professional) groups. At what point within the dualistic character of law is meaning constructed: in the linguistic or in the extra-linguistic realm? Can we even turn the presumed linear causality between rule and act into its opposite? Based on these questions the relationship between rules and acts was examined on the basis of several models of legal communication which try to uncover the reasons for the generally recognized inadequacy of state regulation.

9.2 Models of Legal Communication

Three models of legal communication offer explanations of failing governmental steering through law. The idea that goal-oriented state legislation determines society from the moment it comes into force is the starting point of and the central thesis in these models. ‘Governmental steering’ as a metaphor is...

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suggestive of a simple picture in which a commander gives an order to shift the helm, with the consequence that the ship changes course as ordered. Today’s complex society challenges this metaphor: the ship has its own momentum, so the results of steering manoeuvres become unpredictable.

Despite various differences, communication models are basically constructed upon the classical concept of law as a linear causality, i.e., upon the unilateral flow of communication of legal rules and their instrumental function towards behaviour. These models, however, criticize any one-sided concept of the flow of information, reveal its defects and replace some parts of it. They focus on the capacity of self-organization and the relative closedness of autonomous groups in society that are partly open to legal information. The information of state law is reconstructed and even distorted as an internal process within the group. Owing to internal codes and meanings, cultures and moralities or due to the pressure of social conditions like the necessity to allocate scarce resources of labour, capital and business deals, a group generates its own self-regulation or reconstructs state law on the basis of its own internal framework, distinct from other functional groups.

Although these models provide helpful insight into the shortcomings of state legislation and, in particular, its incapacity for or even the relative absence of legal communication by naming the elements that caused the so-called ‘regulation crisis’, they give no answer to the more specific, preliminary question of what legal language refers to in the world of facts, taking ‘truth’ as a basic principle in this relationship. For instance, can legal terms such as ‘rights’, ‘duties’, ‘contracts’, etc. be pointed out in the real world, in the way that words like ‘table’ and ‘house’ can? Although the classical models concentrate on (in)effective behaviour, they hardly pay attention to what ‘legal effect’ is and how meaning is constructed from the picture projected by the words of the rule. Moreover, the models ignore the question of how we can ‘see’ and ‘know’ the normative meaning content of a written rule, which is an ideal entity, a ‘thought object’. This viewpoint has much in common with questions about the role and function of legal language, since we necessarily consider law as a linguistic phenomenon. This study therefore focuses on the pragmatic aspects of the process of legal communication, in the light of the dual character of the law and the linguistic elements of the legal rule as bearers of meaning in their relationship to observable acts and as a representation of the non-linguistic world.

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9.3 Law as institutional fact and fictitious entity

By adopting the concept of law developed by the Scandinavian Realists and the Institutional Theory of Law, and by emphasizing legislation as a linguistic phenomenon, language and processes of meaning construction become the focal point. Unlike descriptive language that purports to represent the facts as they are (a representation of the real, factual world), prescriptive language purports to present the facts as they ought to be. A much cited example can be found in the biblical Book of Genesis: ‘And God said, “Let there be light”’; and there was light. In this example, the effect of the imperative is physical. However, there is an important distinction between the biblical speech act, in which the creation is purely physical in nature, and the effect of legal imperatives that bring about ‘legal effects’ which are not physical in character: they bring about rights, duties and legal qualities. This raises the central question: How do legal rules relate to the world?

In the approach of the Scandinavian Realists, the legal rule is a mental entity that has to be ‘thought of as real’. It is an ‘ideal entity, available not to direct observation, but only to the understanding’. It cannot be observed as an empirical fact. Moreover, the effects of legal rules are not physical in character: they bring about ‘legal effects’ that cannot be pointed out as ‘brute facts’.

The debate about the question of what legal effects are has kept legal scholars busy for decades. Some of them viewed rights and duties as ‘fictitious entities’, others recognized them as metaphysical notions or as prophecies and stated that they have to be redefined in terms of reality. The Scandinavian Realists, however, had a consistently anti-metaphysical tendency. Alf Ross took a prominent place in the discussion. He describes the phenomenon called tū-tū, which is very difficult to explain, and states that it is nothing but an illusion, a word without semantic reference, which is analogous to modern legal terms such as ‘rights’, ‘contracts’, or ‘ownership’. From this viewpoint, a legal rule and its inherent legal concepts can be identified as an indiscernible intermediary link between observable conditioning facts and observable consequential facts. This ‘fact-rule-fact’ structure can also be found in the approach of the Institutional Legal Theory. MacCormick conceives of the existence of law in the context of a distinction between legal and social institutions, between legal rules and institutional facts.

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3 Genesis 1:3.
4 Ross (1968), p.12.
Legal institutions involve duration over time. They are instituted by institutional facts and have consequences expressed by consequential facts. Institutive facts and consequential facts are mutually connected with the normative institution: the legal rule. The legal rule is an indiscernible entity; it reveals its meaning content in observable conduct, that is, in the interplay with the two types of facts here mentioned.

9.4 A new model of analysis

Comparing Ross’s and MacCormick’s schemes, it can be observed that, in both, the legal rule is regarded as the indiscernible intermediary between two types of observable facts: conditioning/institutive facts and consequential facts. In this tripartite model of analysis, only facts are observable. The legal rule itself is an indiscernible construct; it is thought to be the basis of the two other subsystems. In other words, the imaginary status of the rule’s message can be distinguished in its perceptible conditioning/instituting facts (acts that bring about the legal effect) and consequential facts (acts that may undo the legal effect: the rules’ application by officials and by judges). In this way, the meaning of legal rules can be observed in use and in acts: an activity that produces legal meaning. In the tripartite framework of analysis, involving a fact-rule-fact structure, facts play a very important role with respect to the substantive meaning of the rule, which is shaped and reshaped in the extra-linguistic world of facts – in its use.

This framework prompts an analysis of legal communication from a different angle and puts the classical models of linear causality into perspective: the one-sided flow of legal information also involves reciprocal aspects. However, the question of how meaning is created in these processes of use and communication has remained underexposed in the framework. Approaches and ideas developed in legal semiotics can fill this gap and make the framework operational.

9.5 Legal language, image and action

It is widely recognized that acts and language have the same function: both are vehicles of representation by way of the images they project. It is also generally recognized that acts, images and language can be seen in terms of an evolutionary development through time, from concrete and observable phases (actions) to more abstract ones (images of actions) and finally into the most abstract form (language). This viewpoint is shared by various authors in academic literature. Bruner, for instance, speaks of “the successive emergence of action, image and
Language is acquired in the interaction in which the words are learned; indeed, it finds its very basis in the action itself. Here we are confronted with the evolutionary development of language, which stems from interaction and behaviour. From unreflective gestural interactions between two individuals, a new stage can be attained in which gestures are no longer unreflective, but rest on pre-established ideas and meaning. Once it is separated from its original action-context, a gesture as a ‘significant symbol’ referring to an idea or meaning, like a raised fist as a symbol for anger, can become an independent sign. This stage is the beginning of abstract ‘language’.

9.6 Semiotic groups

Meaning is a culturally mediated phenomenon that depends on the prior existence of a shared symbolic system. The semantic learning of words and linguistic rules takes place in a dialogical context within relatively closed groups or cultures that have the capacity to produce and maintain their own internal codes for meaning construction. In these groups, meaning is constructed in the operational functioning of language: meaning is shaped by use.

At this point, communication starts between individuals, a conversation consisting of abstract signs that are ‘internalized as significant symbols, because they have the same meaning for all individual members of the given society or social group’. Here, the existence of particular groups is recognized, groups that are dominated by internal distinctions and codes, generating a meaning distinct from other groups. Applied to legal language, we can see similarities with what Jackson calls ‘semiotic groups’. In the broadest of terms, the definition of a semiotic group is ‘a group (professional, national, etc.) which makes sense of law in ways sufficiently distinct from other groups.’ The concept of semiotic groups, although different in some respects, comes close to the theory of autopoiesis developed by Teubner. Functional ‘social subsystems’, i.e., groups defined by profession or disciplines, are relatively closed in their self-organization, but partly open to information. If legal information ‘enters’ a subsystem, it will be

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transformed by the system’s own framework of codes and meanings. Compared with MacIntyre’s understanding of ‘practices’, defined as ‘any coherent and complex form of socially established cooperative human activity’ and bound by rules, the similarity between Jackson’s ‘semiotic groups’ and Teubner’s ‘social subsystems’ within his autopoiesis theory is striking. Every practice creates ‘internal goods’, that is, immaterial goods that cannot be known or acquired in any way other than by participation in that particular practice. On this view, particular practices differ from each other, since practices create their own internal frameworks for interpretation.

Based on these ideas, we may argue that the group’s own codes and internal framework determine the visualization of the rule’s images as internalized significant symbols. They have the same meanings for all members of the social group: a meaning acquired by participation in the group, that is, by use and by empirical acts that can be observed in the social context of the group.

Since the relationship between acts, images and language can be seen as an evolutionary development through time from concrete and observable phases (actions) to more abstract ones (images of actions) and finally into the most abstract form (language), images form the crucial link between perceivable acts in the extra-linguistic world and indiscernible acts prescribed in language as the linguistic representation of the extra-linguistic world. With respect to legal language, as stated above, the indiscernible rule is the intermediary between two kinds of observable facts: conditioning/institutive facts on the one hand, and consequential facts on the other. We have applied the ‘fact-rule-fact’ structure of the model as an instrument of analysis to four case studies.

9.7 Case Studies

9.7.1 Sanctity of the home and bodily protection

The first case study (Chapter Five) focused on the fundamental rights laid down in Articles 12 and 11 of the Netherlands Constitution, i.e., the sanctity of the home, which is one of the oldest human rights codified in the Constitution, and the right of bodily integrity, which is the most recent right, codified in 1983. In this case study, as in the others, the processes of conceptual shifts and sense creation were described in detail: how did they proceed, by whom were they initiated, adapted, decided on, and what were the final results and legal consequences?

In the Netherlands, it is difficult to revise the Constitution. Many detailed procedures in the legislative process are required, as well as new elections, in order to give the people an extra say in constitutional revisions. The Constitution is the basis of the Dutch legal system and, therefore, a rather rigid document. This aspect may suggest that changes in and additions to the Constitution, needed in a dynamic society with developing technologies, are exclusively made by the legislature. The case studies show, however, that this is not the case. Legal and non-legal institutions take part in processes of sense construction. The legislature is just one of them and apparently not the most important one.

The text of Article 12 of the Constitution obtained its final form in 1887. The text of the Article remained unchanged, but its meaning changed fundamentally. Analyzing the case by using our analytical framework resulted in the following remarks.

The imaginary meaning of the Article – the sanctity of the home – becomes manifest in discernible facts: the framework’s institutional/conditioning facts and consequential facts. For instance, the former may be a man in great anger and causing serious trouble in his home, yelling in rage with a knife in his hands. Is a police officer who does not enter the house, but only sticks his arm through the open door, in order to pull the man outside, violating the sanctity of the home? If a conflict arises on the institutional meaning of Article 12, the judiciary (consequential facts) has the competence to give the final meaning to the indiscernible rule in this case.

Analogous cases can be found. Is a police officer allowed to use heat sensors on the outside of a house in order to detect whether cannabis is being cultivated inside? Or is the consequential fact to be considered a violation of the sanctity of the home? From both types of facts, conditioning/institutional facts and consequential facts, the meaning of the Article was determined. The same goes for the monitoring of conversations that take place inside a home by means of microphones installed outside: is it a violation of the sanctity of the home? Whenever an executive officer acts and a court comes to conclusions with respect to these issues, the sanctity of the home – a right of an incorporeal nature – obtains institutional meaning by virtue of those acts, while the text remains unchanged. Thus, the image projected by the legal rule becomes manifest and obtains meaning in observable facts, in terms of use and communication. Within the reciprocity that can be observed between rule and facts, the facts for a significant part determine the institutional meaning of the rule, even if the legislature’s meaning differs strongly from the sense constructed in use and communication.

For instance, both technical developments in Information and Communication Technology (ICT), and changing patterns of behaviour – such as the accepted practice in the Netherlands, under certain conditions, of treating squatters as the legal occupants of the house they live in – can be observed in social practices.
Neither the use of ICT nor the policy of treating squatters as occupants of the house were originally included under Article 12 of the Constitution and may be regarded as ‘illegal practices’ not projected by any legal rule. Nevertheless, these conditioning/institutional facts were accommodated under Article 12 by way of decisional facts of officials and judges. Here we see that the influence of acts and use to a great extent determine the meaning in Article 12. In the same way, modern technology and ICT undermine the sanctity of the home: the once protective walls of the home seem to have become virtually transparent. Here, too, new technology provides the changing patterns of behaviour, which in turn will influence the meaning construction of the Article.

Article 12 is one of the oldest fundamental rights, having been codified in the 18th century. But we may also ask what the consequences will be when the analytical framework is applied to a new fundamental right, such as the protection of bodily integrity (codified in Article 11 of the 1983 Netherlands Constitution), in particular in the period before its codification. Our analysis focused on this period, i.e., the period during which a written constitutional rule protecting the right of bodily integrity was absent.

As noted above, no general and fundamental right to bodily integrity existed – as a codified legal rule – in the Netherlands Constitution before 1983. Thus, no constitutional rule existed which, in terms of our model, projected its image of the integrity of the body, except for rules that were indirectly connected with this issue, viz. the examination of the body – including a body cavity search – of a relatively small and specific group (criminal suspects) under a specific criminal law. In court cases, judges came to their decisions on the basis of Articles 56 and 195 of the Code of Criminal Procedure and defined the limits of these Articles on the basis of unwritten rules: taking blood from an accused is ‘a wrongful violation of the suspect’s bodily integrity’. Operating on the brains of an accused person without his consent is not allowed, because a doctor is not authorized to treat a patient without his consent, even if the patient is a mentally disturbed accused person detained under a hospital order for life. In a similar case, the courts decided that forced psychotherapeutic treatment was not allowed without the consent of the accused, because of the right of self-determination with respect to the body, even for those detained under a hospital order.

Finally, the famous civil law case, the Fluoridation case (1973), affected all citizens, involving as it did the distribution of water, one of the primary necessities of life. The court’s decision was formulated on the basis of the legal principle that the exercise of state power needs previous and democratic legislation. The Supreme Court concluded that the decision to add fluoride to drinking water is ‘so far-reaching in character’ that it could not be taken without the legal basis of an Act of Parliament.

Unlike the conceptual model, in which the meaning of the legal rule becomes
clear and manifest through its use, in this case study the reverse was found: institutional facts are created, not related to any codified legal rule, but formulated on the basis of unwritten rules and on the basis of legal principles. Moreover, on the basis of unwritten rules and principles and the underlying common sense reflected in the argumentation of judges, an imaginary reality of ‘bodily integrity’ was created, which was later (in 1983) codified as a fundamental right in the Constitution.

Two conclusions may be drawn from this phenomenon. First, even if a written legal rule does not exist, as in the Mouth swab test case, in which the right of bodily integrity had not yet been codified, the conditioning/institutive facts and the consequential facts served to create and express an imaginary picture as if the rule already existed, based on arguments from the existence of unwritten rules and principles. Secondly, reciprocity can be observed between rule and conduct and, in reverse, between conduct and rule in its ultimate form. In this case, it was social practice that generated a rule, not only in a court decision, but also stemming from the evolution of society: for instance, the technical developments within medical and pharmacological science, neurosurgery and scientific research on the effect of chemicals on the human body.

With respect to the period after the codification of the right of bodily integrity (1983), the tripartite model of analysis can also be used. After 1983, the analysis of Article 11 followed a course similar to that of Article 12.

9.7.2 War and peace: Article 96 of the Netherlands Constitution

The case study on the issue of war and peace (Chapter Six) focused on the declaration of war and its procedure, as laid down in Article 96 of the Netherlands Constitution. A governmental decision to declare war on another state is based on a democratic procedure: the prior approval of Parliament is required. The state of war and the state of peace have their own legal régimes. In a state of war, the laws of war come into operation. Belligerents are under an obligation to wage war according to the rules of the Geneva Conventions. Since the 1945 UN Charter prohibited the use of force between states, in order to ban war, shifts in the concept of war have been observed, resulting in an unclear situation about the status of war.

Applying our framework to this case study, the following conclusions may be drawn. By avoiding the term ‘war’ with respect to the existence of actual warfare (conditioning/institutive facts), Article 96 of the Constitution remains inoperative, and with it any democratic influence on decisions to start a war. Article 96, the clear demarcation line between war and peace, has fallen into disuse. Thus, de jure war no longer arises. This raises the question of what exactly is the status of a situation that is not a war in the legal sense, but where nevertheless war actions can be observed. Confusion about the status of such a situation becomes evident in
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case law. Under the pressure of this confusing and undesirable situation – since the ‘state of war’ leads to the obligation to apply the humanitarian laws of war and ‘no war’ means ‘no humanitarian laws’ – a third category, in addition to peace and war, has come into being: the armed conflict that cannot be regarded as a war, but nevertheless counts as a state in which the laws of war are applicable.

In addition, the absence of the rule that determines the state of peace or war (a rule that, in the framework, is positioned between the conditioning/institutive facts and the consequential facts) has resulted in the creation of another new rule, in which the word ‘war’ was renamed ‘armed conflict’.

Another category, whose status is even more unclear, is the so-called ‘peacekeeping mission’, initiated under the rules of the 1945 UN Charter and the decisions of the Security Council in order to monitor states or regions in which international peace and security are threatened. Military units, weapons and aircraft are part of such an operation to restore peace. Thus, peacekeeping missions involve actual warfare – military fighting, the use of weapons, aircraft (F-16), frigates and loss of life. Nevertheless, a peacekeeping mission is not a state of a war, but neither is it a state of peace. Several cases have shown the difficulty of this issue. As a result, the Dutch Penal Code has been amended. The Military Penal Code, however, is still under revision.

Applying our framework, in which the meaning of a rule becomes manifest as a result of institutional/conditioning facts on the one hand and consequential facts on the other, Article 96 of the Constitution acquired a new, indeed opposite meaning, and has fallen into disuse. It is no longer applicable in practice since ‘war’ and the ‘declaration of war’ is regarded as an act of aggression under the UN Charter. In this case study, our analytical framework was found to fit only partly. The two types of facts in the framework are restricted to institutional/conditioning facts (the existence of actual warfare) and consequential facts (the acts of the judiciary). However, the consequential facts in this case study consist, among other things, not only of the observable facts of judicial decisions, but also of activities of international institutions (the United Nations, the Security Council), decisions of the national government, political statements made in parliamentary debates, and the behaviour of committees, citizens, the media, and Ministers. A whole set of legal and non-legal actors participated and dominated in a broad spectrum of observable facts that resulted in the reconstruction and shifts in the meaning of Article 96 of the Constitution and the concept of war. This phenomenon shows that reality is far more complex that the framework suggests.

9.7.3 New war terminology

The case study in Chapter Seven focused on the construction of the new war terminology that came into being in the light of the 1945 UN Charter’s prohibition
of interstate force. Terms like ‘armed conflict’, ‘peacekeeping missions’, ‘peace building missions’, or ‘peace enforcement missions’, etc., then replaced the traditional ‘war’ terminology.

Applying our framework, interstate hostilities functioned as conditioning/institutive facts that provided meaning to the rules of the UN Charter. In order to ban warfare, the terms ‘war’, ‘declaration of war’, and subsequently the ‘state of war’ are prohibited by the Charter. This means that de facto interstate hostilities can no longer be called ‘war’ in the legal sense of the Charter.

Taking the fact-rule-fact structure of the tripartite model as an instrument of analysis, the rule obtains its meaning from, on the one hand, the conditioning/institutive facts, i.e., the interstate hostilities as observable facts, and on the other the perceptible consequential facts of the observable decisions to change the Geneva Conventions. Simultaneously, the consequential facts of observable actions in peacekeeping missions, as well as the consequential facts of interpretations and acts of the Security Council to decide on the conditions for peacekeeping missions and to authorize the start of these missions, construct the legal meaning of the rules of the UN Charter and the Geneva Conventions. Between the observable facts of interstate hostilities and the decisional facts of the Security Council, the imaginary legal rules on the concept of war, laid down in the Geneva Conventions and the UN Charter, have obtained their meaning. Their meaning continues to be adapted in an ongoing process of sense construction in this tripartite structure. Here, we encounter not the classical concept of law, in which the rule determines patterns of conduct, but rather its reverse: it is the factual conduct of warfare and the factual decisions on the basis of that conduct which create the meaning of the indiscernible rule. However, it created not only the meaning of the relevant rule, but also a new concept of war with completely new terms that replace the old ones.

By legitimizing the start of a peacekeeping mission on the basis of the actual existence of a threat to the peace, to be decided on by the Security Council, the rules of the Charter are given a meaning in accordance with the ultimate purpose of the Charter: to ban war. However, a peacekeeping mission is de facto indistinguishable from a war situation. The construction of new war terminology often leads to confusion: the meaning of the terms and categories used is unclear, the legal consequences uncertain. The absence of the old clear-cut terms and categories, such as war and peace without any status mixtus in between, has an adverse effect on citizens and military personnel who are involved in a form of warfare that goes under the name of a peacekeeping mission.

9.7.4 New war terminology: Confusion of the courts

The last case study was the Eric O. case (Chapter Eight), which illustrates the
confusion of the courts about the legal status of a ‘peacekeeping mission’ in Iraq. Eric O. took part in the Dutch military mission in Iraq, which was named a ‘peacekeeping operation’. As the commander of the ORF Battalion (Quick Reaction Force), Eric O. was ordered to recover a container stranded on Main Supply Route (MSR) Jackson, on 27 December 2003. The goods in the stranded container had to be protected against plundering Iraqi civilians. Several incidents had occurred on MSR Jackson. The QRF Battalion was busy blocking the road, recovering the container, and communicating by radio. Only three men were left to perform the protection tasks. Several groups of Iraqi civilians continued to approach the trailer, creating the dangerous situation of isolating the men near the trailer. Eric O. fired two warning shots. The second warning shot was aimed at the mud several meters in front of the group. One Iraqi man (A.) stumbled, fell on the ground and was severely wounded. He was taken to the hospital, where death was pronounced. From the description of the post-mortem report, it was not completely certain that the bullet had ricocheted. Eric O. was arrested on 31 December 2003. He was immediately flown to the Netherlands, where he was imprisoned and prosecuted for manslaughter on the basis of Article 307 of the Dutch Penal Code, the applicable law in times of peace.

Applying our tripartite framework to the Eric O. case prompts the following observations. The message of the legal rule projects an imaginary reality which can be distinguished in its perceptible application and in factual behaviour, in this case, the behaviour of Eric O (conditioning/institutive facts). The meaning of a rule becomes manifest in factual application (consequential facts). However, in this case study, it is not so much the fact of applying one specific rule and the construction of its meaning, but rather the uncertainty about the question of what rules apply and, as a result, about the conflicting opinions of the Public Prosecution Service and the Courts on the application of two rules which have entirely opposite meanings, viz. Article 307 of the Dutch Penal Code and Article 151 of the Rules of Engagement. In the view of the Public Prosecution Service, the specific situation, the international mission in Iraq, is a normal situation, to which the Dutch Penal Code validly applies, since the mission is neither a ‘state of war’ nor an ‘armed conflict’. The situation is qualified as a peacekeeping mission, in which Dutch military personnel have to be seen as ‘experts on mission’, eventually to be compared with police officers during their daily work. The judges, however, stuck to their standpoint that Eric O.’s act was not carried out under normal circumstances. The military forces operating in the situation in Iraq were not even similar to police officers. Even if the mission could have been qualified as ‘peacekeeping’, military actions during an international mission are of a totally different order, the judges insisted. In this situation, Article 307 of the Dutch Penal

\[17\] See p.99, n.5, above.
Code was not applicable. On the contrary, under these ‘war’ circumstances, the Rules of Engagement, rules concerning the use of force, were applicable law.

Through this conflict about which of the two opposite rules applied, we see that, in the very process of applying one specific rule, the rule itself is extended: The general rule ‘Thou shalt not kill’ (Article 307 Penal Code) has been turned into a rule with a complete different perspective: ‘Killing in ‘war’ situations is not necessarily murder’ (Article 151 ROE). This meaning became manifest, we have argued, in the factual application of the rule – not just by testing the rules against the act of killing, but by evaluating the specific situation in which the act took place, here the behaviour of people engaged in ‘war’ practices. The observable and factual (war) practices gave rise to the choice between the two rules. This means that, in the actual testing of facts against the mental picture of a rule, in this case by the Public Prosecution and the Courts, the meaning of the legal rule became manifest, with the circumstances of war practices exerting a strong influence as a factor in the decision.

This case study of Eric O. also provides an illustration of the theoretical notion of semiotic groups: particular groups (professional, national, etc.) that are dominated by internal distinctions and codes, generating a legal meaning distinct from other groups. Semiotic groups play a key role in sense construction. The legal images projected by rules differ in distinct groups. In this case, the Public Prosecution Service can be recognized as one semiotic group, the judiciary as another. The conflicting opinions of the Public Prosecution Service and the Courts on the applicability of two rules which have an entirely opposite meaning express the analytical importance of distinguishing the existence of semiotic groups. As a result of this phenomenon, different social subsystems make sense of legal information in a way that differs from other social subsystems. The degree of autonomy of interpreting groups correlates with the ‘resistance’ they offer against different (dissenting) interpretations of other groups and their power to impose their own interpretation on other groups. In this case, the Courts imposed their dissenting opinion on what rule was applicable on that of the Public Prosecution Service.

9.8 Final conclusions

Conditioning/institutional facts and consequential facts are the focus of our tripartite framework of analysis. Between these types of facts, the legal rule is regarded as ‘a mental phenomenon that has to be thought of as real’,\(^\text{18}\) that can be

\(^{18}\) Ross (1968), p.12.
considered as an ‘ideal entity, available not to direct observation’. In the relationship between language and action, the former is generally regarded as a later and more abstract form, developed from the latter as an observable and concrete form, in evolutionary terms. Here we are confronted with the origin of language: interaction and behaviour. Language as a form of representation is acquired through interaction; by being practiced and shaped by use. It finds its basis in the action itself. This viewpoint is shared by various authors in academic literature. It is generally recognized that meaning is a cultural mediated phenomenon that depends on the prior existence of a shared symbolic system. This notion is expressed by the existence of particular groups, semiotic groups, that are dominated by internal distinctions and codes, generating a meaning distinct from other groups. The basic function of legal language, however, is to produce an effect in the extra-linguistic world. This model of legal communication has to be relativised, since each semiotic group has the capacity to generate meanings (including legal meanings) of its own. Indeed, particular semiotic groups have the ability to undermine the transmission of legal information to a considerable extent, even to turn the meaning content of legal rules into its opposite, or to create entirely new rules. This phenomenon is intensified by the notion that legal effects, such as rights, duties and legal qualities, lack semantic reference. They are powers incorporeal in nature, claiming to exercise a kind of inner, invisible dominion over the normative object. They can only be known by observable facts and unveiled through interaction. They are shaped by use and practices.

A whole set of legal and non-legal actors can generate, reconstruct and transform meaning. In this study, we have identified the semiotic groups that subvert the traditional understanding of warfare: not only the (conflicting opinions of) the Public Prosecution Service and the Courts, but also committees and groups of citizens, politicians and the media.

This study has focused on the claim that we have to adapt the classical concept of law and legal communication, in which the relationship between norm and fact is dominated by a one-sided flow of information. It has argued that we have to reformulate the conventional view of a top-down linear causality between norm and fact by introducing reciprocally operating ‘bottom-up’ elements and

22 Bruner (1990), p.72.
24 Bruner (1990), p.69.
interaction, including the internalised models and codes of particular semiotic groups.

The application of our framework leads to the following observations. Analyzing the case studies, processes of sense construction can be observed in acts. This is shown in the case study on Article 12 of the Netherlands Constitution, concerning the sanctity of the home. Our analysis shows that the meaning of the article has been transformed dramatically through time under the influence of a dynamic society, in which patterns of behaviour with respect to new technology, ICT, etc. (conditioning/institutional facts) determine the meaning of the article established by the courts (consequential facts), while the article itself remained completely unchanged. Here, in interaction and use, we can identify reciprocally operating elements, such as the development and use of advanced technology and ICT practises, the pressure of existing social conditions under which groups generate and change customs, and the acts of officials and court decisions. This is quite different from the classical approach of a unilateral flow of legal information.

The analysis of Article 11 of the Netherlands Constitution concerning bodily integrity differs from the analysis of Article 12, since article 11 was only codified as a constitutional rule in 1983. Nevertheless, both types of facts (conditioning/institutional facts and consequential facts) served to create and express an imaginary picture, that of the right of citizens to inviolability, as if the rule already existed, based on the unwritten rules and legal principles. Here, acts not only express the meaning of a rule, as in the case of Article 12, but constituted a new rule. With respect to bodily integrity, an even more strongly bottom-up effect can be observed, since acts anticipated an uncodified rule, without any intervention of the democratic legislature.

In the case studies on the shifts in the concept of war and the creation of new war terminology, Article 96 of the Netherlands Constitution was analyzed. We noted that the force and meaning of the article changed after 1945, from being constitutive in character to that of a mere declaratory statement. The article must now be understood in a strongly restricted sense: it no longer covers actual warfare, since the term ‘war’ was abolished by the 1945 UN Charter. Nevertheless, the regulation of actual warfare can be observed under different names. Under the influence of the Charter, the existence of observable de facto warfare (conditioning/institutional facts) caused fundamental changes, not only in Article 96 of the Netherlands Constitution, but also in the 1949 Geneva Conventions, in the Dutch Penal Code and in the Military Penal Code. The consequential facts included, remarkably enough, not only legal institutions like officials and courts, as the framework indicates, but the participation of a whole set of legal and non-legal actors in a broad spectrum of observable facts, resulting in the reconstruction and shifts in the meaning of the articles and conventions mentioned. This phenomenon shows that reality is far more complex than the framework suggests. Institutional
and consequential facts go beyond the limitations set by the framework. In a robust bottom-up transmission, meaning is constructed in a far more drastic way than the framework suggests.

Finally, the analysis of the Eric O. case not only shows that the meaning a legal rule becomes manifest in factual behavior and its perceptible application, but also unveils conflicting opinions of two legal institutions that had to decide what rules apply. Remarkably, the Public Prosecution Service and the Courts applied two rules with totally different meanings. The conditioning/institutional facts of Eric O., who performed the act of killing in the context of a peacekeeping mission, gave rise to the phenomenon of a rule turning into its very opposite, by way of the consequential facts. Moreover, this case shows the analytical importance of distinguishing the existence of semiotic groups. The significant symbols of acts and (legal) language are determined by the codes internalized by different groups, creating a distinct meaning. Here, too, we recognize action as the source of sense construction.

In short, we have to replace the unilateral model of law and legal communication with one which recognizes elements of reciprocity. From our analysis we may conclude that the picture of a legal rule not only becomes manifest in practices; the practices themselves also have the capacity to generate legal meaning, even to the point that of turning a legal rule into its opposite, or creating new legal rules. Our case studies showed the several aspects of this mechanism.

Within relatively closed and autonomous groups, dominated by internal distinctions and codes, meaning is generated distinct from that of other groups. It may be stated that the degree of autonomy is connected with the group’s capacity for organizing its own structures and frameworks, determining legal meaning and generating new legal rules, and so mediating the rule’s function to reshape social structures. The notion of semiotic groups clarifies the existence of different meaning constructions with respect to the same rule. This phenomenon is in academic literature perceived in terms of the inadequacy of goal-oriented legislation to convey legal information, resulting in a communication deficit.

It follows that amendments and modifications in legal rules are not initiated or made solely by the democratically legitimized legislature. This is particularly remarkable with respect to the Netherlands Constitution, which is a relatively rigid document and, given the lengthy procedures it requires, very difficult to change.

We must never lose sight of the fact that sense has two dimensions: the semantic dimension (relating to the content of the legal rules) and the pragmatic dimension
The pragmatic dimension involves the images of professional behaviour. A conflict between two distinct groups that professionally construct sense differently was shown in the case study on Sergeant-Major Eric O., who took part in the Dutch military action (officially a peacekeeping mission) in Iraq. The semantic dimension involves the images of non-professional behaviour which inform the professional construction of sense. This ‘narrative typification of behaviour’ is for this reason prior to the pragmatic dimension. In the context of this study, the construction of actual images of what war is has been described in the case study on the shifts in the concept of war and its legal consequences. Scrutinizing this sense differentiation into two dimensions may result in a more sophisticated framework. Further research is needed on this issue. Moreover, the present framework claims not to be a completed and fixed model, but is rather the starting point for further elaboration, offering insights into the concepts of law and legal communication. Here, an agenda for new research is offered.
