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Why legal rules are not speech acts and what follows from that

ABSTRACT

The speech-act approach to rules is commonplace in both Anglo-American and continental traditions of legal philosophy. Despite its pervasiveness, I argue in this paper that the approach is misguided and therefore intrinsically flawed.

My critique identifies how speech-act theory provides an inadequate theoretical framework for the analysis of written discourse, a case in point being legal text. Two main misconceptions resulting from this misguided approach are the fallacy of synchronicity and the fallacy of a-discursivity. The former consists of treating legal rules as if they were uttered and received in the same context, the latter consists of treating legal rules as relatively short, isolated sentences. Among the consequences of these fallacies are an excessive focus on the lawmakers' semantic intentions and the neglect of the semantic and pragmatic complexity of rules as sets of utterances (discourses).

To redress these flaws, I propose analysing legal rules through the prism of complex text-acts. My paper presents the consequences of this revised approach for legal interpretation, supporting Joseph Raz's idea of minimal legislative intent.

KEY WORDS: lawmaker's intention, legal interpretation, rules, speech acts, writtenness in law;

1. Aim and structure of the paper

The aim of this paper is to show that using speech-act theory to analyse legal rules is based on an incorrect assumption. According to this assumption, legal rules can be analysed in the same way as

(i) single oral utterances,

(ii) utterances addressed by a speaker to a hearer where both are in the same place at the same time.

I will call assumption (i) the fallacy of a-discursivity and assumption (ii) the fallacy of synchronicity. I show below that both these fallacies arise from the nature of speech-act theory, which traditionally focuses on analysing simple oral utterances made in a *face-to-face* speech situation[1]. Speech-act theory has never been fully elaborated to analyse complex written discourses, which are used for diachronic communication - communication involving different moments in time and different locations. Nonetheless, a version of speech-act theory which is not adjusted to written communications has gained popularity in legal philosophy. My argument is that, in order to avoid the fallacies of a-discursivity and of synchronicity, speech-act theory has to be revised and legal rules have to be treated not as simple, single speech acts, but as more akin to complex text acts. This approach acknowledges the pragmatic complexity (in linguistic terms) of the lawmaker's intention and thereby prevents excessive focus on its semantic aspect.

In the first part of this paper I briefly discuss the role that speech-act theory plays in the analysis of legal rules. In the second part I demonstrate that speech-act theory is ill-equipped to analyse written communication and I identify areas in which its shortcomings are most apparent. The third section of the paper is dedicated to showing that legal rules can be analysed through the prism of complex text acts[2] (rather than be treated as speech acts) and to identifying the main consequences that this approach has on legal text interpretation, in particular on the understanding of the lawmaker's intention.

2. The significance of speech-act theory for legal philosophy

Legal philosophy's interest in speech-act theory began with the co-operation between H.L.A. Hart and J. L. Austin. The most widely-known legal rule in jurisprudence, i.e. *No vehicles in the park* (Hart, 1958), is analysed in a manner characteristic of this theory. Although Hart treats this rule as a written – not spoken – one, he treats it as a single statement

[1] This applies to both J.L. Austin and J. Searle, and their commentators: K. Bach, R. Harnish and P. Grice, though the latter touches upon communications directed in writing to an unspecified group (cf. e.g. P. Grice's solution in *Studies in the Way of Words* devoted to signs such as '*Keep off the grass')*. This analysis is of an auxiliary nature and does not affect the nature of their conclusions. Another exception is the work of Hancher (1979) and Edmonson (1981) on co-operative speech acts, and the work of _____ on complex speech acts. None of these, however, take into account the specifics of writing.

[2] It is not the purpose of this paper to determine whether the rules are text acts (or acts in any sense) or if they are the outcomes of such acts.

made by a single author. As I will show in part 3, in reality legal rules are not single statements but are more the effect of several – sometimes many – statements[3].

Concurrently with the development of linguistic analyses in legal philosophy, the application of speech-act theory to analyse legal rules has become increasingly popular. This especially concerns the concept of an illocutionary act (e.g. Visconti, 2009), and the concept of illocutionary uptake (e.g. Solum 2010). The role played in legal philosophy by speech-act theory has been neatly stated by P. Amselek:

> *"The theory of speech acts is, in my opinion, a general foundation which provides legal philosophy with an adequate method of approaching the legal utterances with which it is confronted. It also provides a general orientation and framework for analysis and research.*" (Amselek, 1988)

Besides such explicitly expressed belief in its value, most analyses of legal rules in accordance with speech-act theory are carried out using the following implicit assumptions:

(i) Legal rules are uttered or treated as utterances (e.g. Cyrul, 2007). Even if we agree that the term *"utterance"* may also refer to written communications, calling a rule an *"utterance"* indicates that it is a statement made at a single point in time, being one indivisible whole (as distinct from a collection of utterances (discourse)).

(ii) Legal rules are addressed by a speaker to a hearer. (e.g. Cao, 2007).

(iii) The primary context in which legal rules are subject to linguistic analysis is the mental context of the utterer, the key element of which is his semantic (locutionary) intent (e.g. Solum 2008, Marmor, 2013).

(iv) Taking the recipient's context into account when analysing rules is not deemed a linguistic analysis but an attempt to depart from one and to promote values other than fidelity to the legal text, e.g. the flexibility of law or the freedom of the interpreter (e.g. Eskridge, Frickey, 1990).

[3] The criticism presented here refers to so called expressive theories of legal norm, i.e. the theories which equate legal norms with linguistic expressions. The critique does not apply to those theories defined as hyletic i.e. those which distinguish between the normative act and the norm as the outcome of this act (and not necessarily a linguistic one). The work of K. Opałek (---) and J. Woleński (----), can be taken as an example of the latter. I am grateful to the reviewers of this paper for indicating the need to clarify this matter.

The foregoing assumptions constitute the underlying structure of thinking about legal rules among legal philosophers. Uncritical acceptance of these assumptions leads to a kind of theory-induced blindness, i.e. failure to observe the differences between simple face-to-face communication and communication in which legal rules are used. The vast majority of legal rules are written rules directed at an unspecified group of addressees commonly external to the immediate context in which the legal rules are created. Among them are the legal rules that are most important for legal philosophers, i.e. those set out in statutes, constitutions and contracts.

3. Lacunae in speech-act theory

Some authors dealing with speech-act theory show that it is not fully suitable to analyses of written communications, the communicative aim of which falls outside the face-to-face speech situation. W. Ong states that:

> *"Speech-act theory could be developed not only to attend more to oral communication, but also to attend more reflectively to textual communication precisely as textual".* (Ong 2000, p. 166)

Ong's critique is supported by M. Stubbs:

> *"Much of speech act theory has difficulty in freeing itself from two assumptions (…) One is the assumption that speech act theory should take, as its paradigm cases, the conveying of messages in face-to-face two-party interaction. The other is the assumption that speech act theory can be based on invented, isolated sentences* (…) *invented sentences are isolated and not connected discourse*." (M. Stubbs 1983, p. 485)

The primary factor in the inadequacy of speech-act theory is the diachronic nature of written communication. This communication is employed to go beyond the face-to-face speech situation in order to communicate with persons who are beyond the reach of the human voice, in a different place and particularly at a different time. This communication covers not one but two contexts – the context of the utterer and that of the recipient.

The second feature of written communication not acknowledged by speech-act theory is its discursiveness, understood as involving a number and/or variety of utterers and a

complexity of communications between and among them. This discursiveness allows written communications to be built with simpler elements, each uttered by a different person, while still remaining a single text. It also allows for elements to be added to or removed from the original text; in this sense, discursiveness is not possible in oral communication, as in speech, words cannot be re-analysed at a later date and nothing can be added to or removed from an oral communication that has already been made (if it was not recorded).

Lacunae in speech-act theory are visible if we take a closer look at the structure of the locutionary act performed within the framework of a written communication. A locutionary act covers utterances of certain words with sense and reference and is composed of three sub-acts: a phonetic act, which is the act of uttering certain noises, a phatic act, which is the uttering of words, and a rhetic act, which is the uttering of words with a definite sense and reference (Austin, 1971).

In speech these three aspects of a speech act arise at the same time and are therefore synchronous. The case is different with written text. The equivalent of a phonetic act in written communication is the physical creation of a sign, e.g. leaving traces of ink on a page. The equivalent of a phatic act in writing would be leaving a sign that has meaning. At this point doubt arises as to the perspective from which the meaning of the signs should be assessed – from the utterer's perspective or from that of the recipient? Is a phatic act performed effectively if the signs are written, but never reach the recipient? The latter does not seem a reasonable assumption.

The key differences between speech and writing can be seen in the case of a rhetic act. In certain situations, the speaker is clearly referring to his own context, e.g. by using indexicals ("here", "now", "I"). In many other cases, however, doubt could arise as to the context – that of the utterer or that of the recipient – to which a text refers. This is the case with texts that constitute instructions on how to proceed in a situation that may arise, e.g. instructions on how to proceed in the event of fire. The phrases and the words contained therein definitely do not refer to the context of the author - we do not expect fire-fighting instructions to be written during a fire. Like fire-fighting instructions, legal texts apply to future situations. Hence, a doubt arises as to choice of relevant context which constitutes the framework of reference for the language of such texts.

This doubt may give rise to the theory that a text recipient is necessary for a rhetic act, and therefore a locutionary act, to occur. This theory seems to go too far, particularly in the case of legal texts that have binding effect without having to be received by the addressees, in

accordance with the adage *ignorantia iuris non excusat*. This notwithstanding, the reference of a locutionary act in written communication has to be considered in the context of the recipient to a much greater extent than it does in the case of an oral rhetic act.

The specifics of a locutionary act performed in writing raises the question of whether a written illocutionary act is performed at the moment that the writing of the text is finished or at that when the text is read. The uncertainty increases when consideration is given to a third, frequently omitted possibility, i.e. that an illocutionary act is performed when a text written earlier is used. This option is considered by Bianchi (2013), who analyses illocutionary acts in recorded speech, which she calls "delayed speech". Bianchi notes that in the case of recorded speech doubts arise as to whose intention determines the nature of the act - the intention existing at the time the communiqué is produced (i.e. when the text is written) or the intention at the time the text is used. Bianchi uses the example of the cartoon character Homer Simpson, who in his office writes a note saying "Don't leave" and then goes on to use it several times, putting it in his wife Margie's handbag, leaving it on his butler's desk, and finally giving it to his son Bart. Bianchi separates Homer's intention at the time the note was composed from the intentions each time the note was used. According to Bianchi, the intention that defines the nature of the illocutionary act is not the intention from the moment of writing, but the intention with which the text was subsequently used.

It can be argued that separating the moment a text is written and the moment it is used in order to perform an illocutionary act is in reality separating a locutionary act from an illocutionary act. This separation in turn enables the locutionary intention to be separated from the illocutionary intention (Skinner 1972). The former is the intention of giving words a specific meaning (sense and reference) and the latter – the intention to perform a specific illocutionary act (e.g. giving an order or making a promise). This proves that a written illocutionary act is much more complex than a similar speech act, not least in terms of intentions.

4. The fallacy of synchronicity and the fallacy of a-discursivity; their impact on identifying the lawmaker's intention

The difference between speech and writing requires a new approach to the analysis of legal rules. A useful theoretical framework has been provided by Horner (1979) and his concept of text-acts, which share the characteristics of complexity, diachronicity and

discursivity. I argue specify below what the fallacies committed by legal philosophers involve and what consequences they have for any deliberation on the interpretation of legal rules.

4.1 The fallacy of synchronicity

The fallacy of synchronicity involves a failure to take into account the diachronicity of legal language. This means that a legal rule is treated as if it were a statement uttered by the utterer and received by the recipient at the same moment in time.

Additionally:

a) an illocutionary act – which is what a legal rule is – involves the use of a text written by someone else, usually at a time other than that at which is it used; the person using such text plays the role of reader, not author;

b) to perform an illocutionary act, a locutionary act is required and this in turn requires a rhetic act, which – as I have already shown – requires the participation of the recipient.

Consequently, this gives rise to doubt as to whether it is possible to analyse legal rules without taking into account contexts other than that of the utterer. The text of an act in law, once written and adopted, may subsequently be amended or derogated. This means that despite the process of writing the text having ended, a rhetic act and therefore a locutionary act and an illocutionary act – do not bring about effects for the persons to which the amended or derogated text is to apply. Treating a legal rule in a synchronous manner is therefore mistaken.

4.2 The fallacy of a-discursivity

The fallacy of a-discursivity involves treating a legal rule as if it were a relatively short, single statement, similar to an oral order and able to be interpreted in isolation from other statements. Treating a legal rule in this way is derived from unquestioning acceptance of the assumptions of speech-act theory, of which the model example of an utterance is an isolated and self-sufficient statement: "No vehicles in the park". However, a legal rule is the outcome of the linkage of several lawmaker statements and therefore the outcome of a discourse.

Legal philosophy generally overlooks the discursiveness of rules, thus there is no broadly recognised theoretical standpoint that would enable the complexity of the matter to be observed. An exception here is the work of M. Zieliński (Zieliński, 1972), who states that legal rules are recorded in legal text by using the "breakdown" technique in individual provisions. This means that several provisions may comprise one rule, which Zieliński calls a "legal norm". The reconstruction of a legal rule starts with selecting a so-called ‘base clause’. Then "modifying clauses" and "supplementing clauses" are selected from the legal text. An example of the difference between a base clause and supplementing or modifying clauses is the use of legal definitions and clauses containing the defined terms. In this case, the reconstruction of a rule requires the use of both these clauses at the same time. The same applies to clauses on crime (e.g. murder) and clauses providing for lawful excuses (e.g. self defence), and also clauses providing for specified general decisions and clauses providing for exceptions to such decisions. All these examples require a legal rule to be treated as the outcome of several statements being linked and therefore treated as the outcome of a mini-discourse, not as a single stand-alone statement[4].

4.3 Impact of the two fallacies on identifying the lawmaker's intention

Both fallacies bring about an incorrect understanding of the lawmaker's intention, which consists in the latter being equated with the locutionary intention of the person uttering the rule. This is an oversimplification. As already shown in the Homer Simpson example, using a text in order to perform an illocutionary act requires the separation of at least two intentions: that of the text author and that of the person who is using the text. In the Homer Simpson case, the same person is both the author of the text and the one who is then to use it. In the case of the law, the actual author of a legal text (e.g. a ministry official) is not usually a person who may then use the act to perform a valid illocutionary act, as he is not recognised through the appropriate procedure (in the Austinian sense) as the person appropriate to perform the act. Thus in the case of the law, the person or group of persons having the appropriate authorisation to perform an illocutionary act (e.g. issue an order) use a text written by someone else.

[4] Distinguishing the fallacy of a-discursivity leads to a question as to the ontological status of a legal rule. This is a version of the question about the individuation of laws (Raz, 1982, p. 77).

The necessity of differentiating pragmatic linguistic roles within the framework of the concept of lawmaker is also emphasised by Maley, who on the production side calls for a distinction between ‘draftsman’ and ‘source’ (Maley 1987p. 31-32). Goffman, with regard to the entity performing an illocutionary act, distinguishes between the author, who selects and encodes the message, and the principal, who is committed to the propositions and acts expressed. He states that the author and the principal typically coincide in face-to-face conversation, but not in written communication (Goffman 1981). This distinction can also be applied to the lawmaker.

Treating a rule as discursive in nature makes it more difficult to identify the legislative intention. Although it is possible in the case of a typical independent oral statement to analyse the specific semantic intention of the statement utterer, it is not possible where a rule is treated as the outcome of a discourse, as a discourse does not have only one author.

Given that there are at least two types of entity engaged in performing a legal text act, a distinction between the locutionary and the illocutionary intention of the utterer (Skinner, (1972a) can be applied to the lawmaker. The locutionary intention may be understood to mean the intention given to words of a specified sense and reference. This intention guides the text author who, when writing it, builds up a meaningful discourse. The illocutionary intention is the intention to perform an illocutionary act of a specified force, e.g. an order. This intention is key to giving an act adopting a law the appropriate normative meaning, which cannot be achieved merely by writing the text. The illocutionary intention is manifest only in people who are appropriately authorised in the procedure to perform a given illocutionary act.

The distinction between locutionary and illocutionary intentions is not acknowledged in the contemporary analyses of legislative intention (Ekins, 2012). The closest to it is Raz’s idea of the "intention to make law" (Raz, 2009a, p. 329) or the minimum intention (Raz, 2009b, p. 284), which seems to be illocutionary in its nature. Thus, this paper provides additional support for the Razian concept – support that stems from linguistic analysis of intentions in written communication.

5. Conclusions

There are three main conclusions of this paper. Firstly, revision of the speech-act theory as applied to legal rules makes it possible to distinguish between locutionary and illocutionary intentions of the lawmaker. Secondly, what gives the rule its normativity is the illocutionary intention, because this intention defines the type of illocutionary act performed.

The role of the lawmaker's locutionary (i.e. semantic) intention is then not so crucial for legal rules as may otherwise seem. Thirdly, it is not possible to base the identification of the semantic content of the rule exclusively on the analysis of the lawmaker's context. If the process of identification is to be comprehensive and reliable, there are other contexts to be taken into consideration. Amongst these the recipient's context, on which the completion of the locutionary act that creates the content of the rule partially depends. This last insight may constitute a starting point for a linguistically-based dynamic theory of legal interpretation, the development of which is beyond the scope of the current paper to explore.

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