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Law, Language and Science

Work in Progress

Abstract: This paper is aimed to re-elaborate questions and discuss them rather than presenting answers. It starts with the dialog concerning specific contributions of philosophy of language to Law, followed by the re-elaboration of some yet unanswered problems, as well as the discussion of possible paths for this issue.
Keywords: Jurisprudence, philosophy of Law, speech acts, democracy

I. Introduction – About science and language

The main purpose of this paper is to introduce problems, or to better elaborate relevant issues for discussion, rather than to propose answers. It is to put the importance of the intersubjective validation into practice aiming not only the results of one study, but the entire research's process of development. In order to do so, the paper starts with the most visible philosophy of language's contributions to Law, followed by the re-elaboration of some yet unanswered problems as well as the discussion of possible paths for this issue.

The relation that exists between words and the knowledge of reality has always been discussed in philosophy. If, on one hand, the naturalistic thesis[1] could not sustain itself, the arbitrariness of the linguistic sign originated in conventionalism leaded to the belief that language could not bring any contribution to knowledge, for being merely the way to express an autonomous and previously acquired knowledge (Plato, Cratylus: 438a-b). Socrates' speech in the above mentioned dialogue clarifies it:

> [438d-e]: Socrates: in this struggle between names, in which some of them are presented as similar to the truth, while others state the same thing of themselves, which criteria will we adopt and to whom should we call upon? Evidently, not to other names rather than those, because there are no others. It is obvious that we will have to *look outside the names for something that allows us to see, without the names, which one of the classes is the real one*, what will be demonstrated by its indication of the truth to us. (highlighted by the author)

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[1] According to naturalism there is a *natural relation* between the sign and the object the language addresses. (MARCONDES, 2010: 14). This idea is put into question by the diversity of natural languages (different languages spoken by different peoples].

The idea of the language being only a means of expression of thoughts and of "mental entities" (Aristotle) or concepts (Descartes) – both essential to the development of knowledge – as well as an instrument for description of the reality, predominated during centuries. Descartes made this relation in terms similar to those proposed by Plato, Aristotle, St. Augustine and other antecessors: language would be a source of mistake, a barrier to the true knowledge of things, an imperfect means of expression of thought (MARCONDES, 2010: 43).

At most, language has been seen as a carrier of an instrumental value for making feasible the exchange of ideas between the scientific community and, thenceforward, the development of science. Locke's observations evolved according to this view, and he has seen in language – even though it could undergo abuses, because of the frequently bad word use by men – "[…] the vehicle par excellence through which men transmit their findings, reasonings and knowledge to one another […]" (*Essay*, III, xi, 15). As a rule, however, it was seen as something negative, which was confusing and precluded human beings from achieving the truth.

It would not fit this paper to precisely define the moment in which a change in these conceptions happened. Indeed – which frequently happens in sciences – the origins of what would become the philosophy of language of the 20th century were already there, incipiently, in some of these authors' ideas. One example is the before mentioned importance given by Locke to the function of communication, which would make the scientific progress caused by the discussion of these theories possible (MARCONDES, 2010: 55-59).

The notion that *to state* always means *to describe* a given reality, be it inner (the thought) or outer (the world) was, as seen before, accepted among philosophers and scholars of language for a long time. Nonetheless, it was noticed that describing the states of things would be solely one of the possible functions of what, in most of the times, constitutes authentic form of action.

A number of examples could be presented to highlight these uses of language, hitherto seen as secondary. One who, in certain circumstances, asserts "I promise A", is not exteriorizing his intent to make a promise, but rather is performing the action of promising, through which one assumes the ethical obligation to do A.

The same applies to the "I do" said by bride and groom at the altar in a marriage ceremony. No one would refer to this situation as a simple description, by each one of the involved, of their intents to become married with each other, in any situation but a wedding.

By saying "I do" in appropriate circumstances, they do not *declare* or *describe*, they do *get married*[2].

Through these considerations, philosophers such as John Langshaw Austin have put into question "[…] the assumption that to say something, at least in all cases worth considering, i.e. all cases considered, is always and simply to state something. This assumption is no doubt unconscious, no doubt is precipitate, but it is wholly natural in philosophy apparently." (AUSTIN 1990: 29; 1976: 12).

Reflections such as those fall within a movement known as philosophy of language. It is based on the idea that only through the consideration of the role and of the objectives of language it is possible to have a better understanding of the object the language addresses (BLACKBURN, 2007: 154). Ordinary language philosophy or Oxford School, one of the lines of this method of analysis that had J. L. Austin as one of its exponents, highlights the context of linguistic expressions' use as well as the constitutive elements of such context: one must not consider the language in abstract, but always integrated in its situation of use, since this situation will also contribute to the determination of its sense.

II. Brief excursus about Law

The evolution of Law and of one of its – still discussed – scientific comprehension could not be unlinked of the dominant modes of thinking throughout history in other sciences. Also, the strict vision of language as a description of a (inner or outer) reality previously given has prevailed in the juridical realm for a long time. Paradoxically, in the field in which language most widely presents itself as a form of action, there are no references to speech acts, at least not in Brazilian legal literature geared to students[3].

A clear example is the theory of contracts. The fact that Brazilian manuals of Civil Law still face contracts as the exchange of "declarations of intent", or as an externalization of an intent that already existed in the intellect of the one who declares it, has already been highlighted in previous studies (PEREIRA: 2009). However, to express the intent to do B is quite different of doing B. One who, in a specific context, says "I am selling the book X for a hundred dollars", is not externalizing only his intent to sell the book – that is, one is not giving only a declaration of intent. One is, in fact, making an offer. If there is acceptance by

[2] All mentioned examples highlight what Austin calls illocutionary acts, or acts endowed with a certain illocutionary force, notion that will be once again mentioned below.

[3] An exception was found in Luiz Alberto Warat's writings, who in his book *O direito e sua linguagem* (among others) aims to systematically present the central thesis of philosophy of language, of ordinary language philosophy, its contributions to Law, besides the suggestions to problems that still need to be studied by the programmatic analysis of law point of view, as it will be mentioned hereafter.

someone else who, in the same context, says "I will buy the book X for a hundred dollars", then both will be actually celebrating a contract of purchase and sale, rather than describing their interior states of intent.

In this same sense the Speech Act Theory by J. L. Austin was elaborated. Among other topics, it aims to highlight the illocutionary force of speech acts (AUSTIN, 1976). In other words, how one can *act* through *language*.

Although in Brazilian law this characteristic of language has been being widely treated with negligence, it was already known in the writings of Adolf Reinach, author of the first systematic theory of the promise, request and accusation phenomena, among others (SMITH, 1990: 2). Reinach classifies a series of speech acts' variation, including the *social acts*, characterized by the fact that theirs expression through language is inseparable of the complex whole in which the intent to compromise would also be present.

> What is important about an action of this kind, now, is that it is not divided into the self-sufficient execution of an act and an accidental statement [Konstatierung]; rather it constitutes an inner unity of deliberate execution and deliberate utterance. The experience is here impossible in the absence of the utterance. And the utterance for its part is not something that is added thereto as an incidental extra; rather it stands in the service of the social act and is necessary in order that this should fulfill its announcing function [kundgebende Funktion]. Certainly there exist also incidental statements relating to social acts: "I have just issued the command." But such statements then relate to the whole social act, with its external aspect (REINACH, *op. cit.*, p. 708, Eng. p. 20) (*apud* SMITH, 1990: 13).

Hence, one should cogitate about the necessity of thinking over some basic concepts from the investigations of philosophy of language's point of view also in the case of Law, field in which language, written or spoken, is essentially dealt with, and in most cases has some illocutionary force.

III. Addressing the definition of problems – proposing some questions

Once surpassed the vision of language as characterized only of a descriptive function – which is quite clear in Law, as previously seen – some questions must be specified. In the first period of analytic philosophy, attention should be drawn to the necessity of a precise use of words and concepts. One would actually come to think about the elaboration of a formal

language that did not present the "deficiencies" of natural languages: vagueness, ambiguity, etc.

According to Warat this would be the stance taken by logical positivism. It reduces philosophy to epistemology, epistemology to semiotics and, highlighting strictly linguistic questionings, it asserts the idea that "[…] to make science is to translate data about the world in a rigorous language […]" (WARAT, 1995: 37). Broadly, science, language and the criteria of recognition of a sentence as scientific would be intermingled with linguistic precision, correction and verifiability themselves. In Law, this model would have reflected in the logical-formal structure of Kelsen's Legal Order, as well as in the reduction of the norm to its validity[4]. (WARAT, 1995, chapter II).

In the pretension to build an ideal and absolutely precise language with a realistic appearance, the strengthening of a vision of the world which aims to maintain the *status quo* would be present, having in mind the lack of consideration to the historical and social facts that influences the law-making and the application of juridical norms (WARAT, 1995: 42). The reality, once identified to its theoretical-linguistic reconstruction, would not explicit the ideology of who transmits such reconstruction, which would hence be intermingled with reality itself.

> Reality acquires a value that does not admit any suspicion and, therefore, *rejects, from the theoretical point of view, the necessity to perform changes.* Thus, scientific speech of social and juridical sciences loses all possibilities of being converted into a speech of denunciation, of diagnosis of both inequality and domination mechanisms. This kind of scientific speech is, obviously, a soporific language. (WARAT, 1995: 38, highlighted by the author).

Soporific, for it ignores the historic signification of norms, as if they were neutral entities. By moving away scientific speeches from their creation and communication process, an univocal illusion would be given, which could be demystified by the pragmatic analysis of law[5]. (WARAT, 1995: 46-47). "Pragmatics, if extended to Law, allows one to comprehend that ideology is a fact inseparable of the conceptual structure explained in general legal norms." (WARAT, 1995: 47).

[4] However, it is important to notice that Kelsen's model leaves some gaps when it puts social efficacy as a condition for validity, which can be observed in the first chapter of the Pure Theory of Law.
[5] Pragmatics such as in Warat's proposal, rather than the original proposal made by the ordinary language philosophy, which, according to him, would not include power relationships.

If one admits the impossibility of a formal language to include the complexity of the lifeworld phenomena, the pursuit of precision and accuracy, necessary to a scientific language, undergoes the attempt to comprehend the way natural languages work (COSTA, 2008: 126-133). It is the aforementioned ordinary language philosophy, in which a pragmatic emphasis in the analysis of problems prevails.

Philosophy of language is characterized by the attention given to the context of the performance of a speech act, considering its influence in the definition of the sense of speech acts and of each term used on them. Here, context is understood in a broader sense, in such a way that the subjects involved in the communication process are taken into account, as well as their positions (their authority, the specialized knowledge they have – or do not have – about Law, their juridical status) and the action intended to be performed through language.

In fact, one must go beyond the pragmatic approach of philosophy of language to also consider, in the communicational situation, the historical and political factors of a bigger social context, which increases the problem's complexity (WARAT, 1995, *passim*).

In short, if a Law's thinking intends to be held as scientific, it should recognize the importance of philosophy of language's contributions (and of Oxford School), and should incorporate them into their practices. However, one must not forget that the attention to linguistic aspects involved in Law is a necessary but not sufficient condition to the scientific reflection of Law.

It is fundamental to raise law professionals' awareness about the responsible maneuvering of juridical language. That is, one cannot ignore the necessity to pay attention to the precise use of technical juridical terms, as well as to the fact that technical language is not the use of complex words, neither the use of forms of expression that hamper the comprehension of a message or make it become ambiguous.

It is pretty common among those who work with Law, for example, to use synonyms in order to avoid word repetition – which, at a first sight, does not seem to perform any problem. Notwithstanding, when it comes to the juridical science's technical terms, one should prefer repetition to a stylistic preoccupation that might hamper or confuse the comprehension of the communicated message.

Another frequent situation is the appropriation of common language terms that acquire a new conceptual content in technical-juridical language. The notion of kinship, for instance, is not the same when common sense's concept is compared to the juridical concept. This redefinition of day-to-day terms in juridical language, when inevitable, must be at least clarified to the norm addressees.

1. The comprehension by the addressees

In the juridical realm there is sort of a linguistic habit in which it is not so easy to distinguish (in a substantial number of cases) between what is technical and what is similar to stylistic complications or to unnecessary embellishments. Therefore, the challenge proposed by philosophy of language remains current, which is to think of a language use in science of Law concerned with the precision of technical terms, and, once that is taken care of, with simplicity and the possibility of having the biggest number of addressees' understanding.

Comprehension of juridical language is difficult for "not initiated" people, even if they have had good education or if they are graduated in another area. This fact should not be surprising. The same difficulty in comprehension of the scientific speech happens to those who were "not initiated" in Medicine, Engineering or Economics.

However, one should think about the necessity for technical language in Law to be accessible to the common citizen. Having the assumptions of a democratic rule-of-law state in mind, should the participation of citizens in the construction of the public sphere be taken into account as a formal requirement? Although the ignorance of a norm does not excuse anyone from complying with it, can Law consider itself satisfied with a fiction[6] or should it first contribute to guarantee juridical knowledge to the population? With no ambition to exhibit definite answers to these questions, but rather in order to clarify their relevance, some ideas concerning subjects of a right's participation in the construction and implementation of an allegedly democratic society will hereafter be exposed.

According to Habermas, private and public autonomies are co-originated and reciprocally presuppose one another (HABERMAS, 1997). The former relates to subjective rights and can only exist in a community in which citizens see themselves as equals and as carriers of the same rights, which happens in a dialogical process – thus, through language. However, the fact that this communicative action implies the use of public autonomy should be stressed. When citizens prescribe and recognize duties and rights, they contribute to the construction of the public sphere, and such contribution is a requirement for current democracies' legitimacy. This requirement would be the idea of subjects of a right taking part at the construction of the legal order that will govern them.

Nevertheless, one could question whether an effective democratic rule-of-law state can or cannot satisfy itself with a requisite that is mostly only formally accomplished, since juridical language (among other factors) hampers comprehension of law by common citizens and, thus, influences their effective action in the construction of the public sphere.

[6] In Brazilian legal theory, this is technically understood as a "legal assumption", rather than as a fiction. Anyhow, ordinary citizens do not know most of the norms.

This factor would reflect on a limitation to private autonomy itself, since the ignorance about rights (be it subjective or fundamental) would affect the way the person conducts her own juridical sphere: life projects that one plans and the means one uses to achieve them - which could also include the pursuit of the accomplishment of fundamental rights in the public sphere.

Hence, there is a series of restrictions to the citizen's public and private autonomies in the lifeworld, what is reflected on the biggest difficulties in the achievement of fundamental rights and may become a threat to the effectiveness of a rule-of-law state – an even more considerable threat in an allegedly democratic state. Public and private autonomy, as well as public and private spheres, presuppose one another.

2. Brief considerations about historical and political factors

As previously mentioned, the pragmatic approach of law should go beyond the ordinary language philosophy's proposal, so as to also take into consideration historical and political factors that manifest in language and in the application of law. By acting like this, the pragmatic analysis would be:

> […] a good instrument to the formation of critical jurists, who would not perform naïve and superficial readings of norms, but who would rather try to discover connections between words in the law as well as political and ideological facts that produce and determine their functions in society. (WARAT, 1995: 47).

Hence, aspects such as persuasion, achievement of legitimacy and even domination (in a lot of cases obtained through the word of an authority invested in a powerful position, what cannot be intermingled with the rational conviction of the ones who are involved) should be noticed. As some social-linguistic authors remind, "it would not be appropriate to neglect factors such as power and domination relationships, which govern the restrict or generalized use of a [language] code." (BAGNO, 2009: 160). Then, it is important to make deeper studies of such questions.

When it comes to political factors in law, a possible path might be the analysis of Bordieu's concept of symbolic power, which institutes juridical authority (and thus Law) as the "form par excellence of legitimate symbolic violence whose monopoly belongs to the state, and that can be combined with the use of physical force". (BORDIEU, 2007: 211).

Bordieu asserts the existence of a social space (field) and of a mode of action internalized by subjects, which would be originated in the assumption that law constitutes an autonomous

social universe (with respect to external influences), which is based on itself and has a logic of its own[7]. Juridical authority would be produced and performed in this autonomous social universe. It is important to notice that the beliefs shared by subjects concerning this autonomy (as well as concerning rationality and universality of Law and its conflict solving method) would be a condition for the possibility of the symbolic power exercised by Law.

> The juridical realm is the place to compete for the monopoly of the right to speak of rights, that is, the good distribution (*nomos*) or the good order, in which agents invested of competence, at the same time social and technical, face each other, which consists essentially in the acknowledged capacity to *interpret* (in a way more or less free and authorized) a body of texts that establish the legitimate and fair vision of the social world. And with this condition one can give reasons for the relative autonomy of Law, or for the properly symbolic effect of ignorance, which is a result of the illusion of its absolute autonomy from external forces. (BORDIEU, 2007: 212).

Also in the context of explaining the effectiveness of such *symbolic power*, the author expresses that the law realm is characterized, among other aspects, by the appeal to "modes of arguing" accepted as juridical by the specialized literature and by jurisprudence (which constitute the symbolic order of juridical norms and of doctrines). These modes of acting and arguing, acknowledged as juridical, would be based on law practice (necessarily including its language) and would be defined throughout the symbolic dispute between agents endowed with juridical competence over the establishment of knowledge concerning law and the right interpretation of the norm (the monopoly of the right to state the law).

The symbolic order of juridical norms and of doctrines, defined by the symbolic dispute between law professionals, would determine the "space of possibles", that is, the possible forms of interpretation and of arguing, as well as the conflicts that can be taken to juridical appreciation and *the language through which they could be expressed when transposed to the juridical realm*. (BORDIEU, 2007: 211-212). This "translation" would draw a boundary between

> […] those who are prepared to join the game and those that, when finding themselves hurled in the game, will be held excluded in there, for they are not able to operate the

[7] As it will be hereafter explained, this field would also have a language of its own, which would combine with elements taken from common language as well as elements that did not belong to it – elements typically from the juridical world. (BORDIEU, 2007: 215).

> conversion of all the mental space – and, in particular, of all the linguist posture – which supposes the entry into this social space. (BORDIEU, 2007: 225).

The interested part would hold, hence, oblivious to what is happening in the process destined to "solve" his problem. And this consequence would not happen by chance, but would rather be constitutive of a power relationship (BORDIEU, 2007: 226) in which the person is dispossessed of his vision and reconstruction of the case, and all is delivered to specialists capable of dealing with this linguistic code. The inaccessibility of juridical language can be seen as an instrument of a purposeful restriction of juridical knowledge, aiming to contribute to the maintenance of a structure of power relationships. From this possible background, which has to be better studied and problematized, the possibility of intervening in such system and of altering such reality could be investigated.

IV. Final considerations

The possibility of comprehension of law by the citizen is connected with at least two factors related to language. The first concerns the juridical language itself, which – as previously said and as it is planned to study deeper later – should be presented in a simpler way and should be more precisely structured. This aspect would be a condition for law's scientific status, being both aspects relevant factors to aim the legitimacy of a rule-of-law state. This is an important contribution from philosophy of language and, in this sense, studies concerning speech acts can be a fruitful path to follow.

The second aspect concerns the necessity to make qualified education available to citizens, especially when considering the bigger development of their linguistic abilities, that is, their capacities to comprehend texts (oral or written), to interpret them from their world views, and to position and justify themselves (linguistically). The formation of citizens capable of abilities such as well developed reading, writing and speaking – also to justify themselves as well as the choices they make before the world – would be, after all, a condition for the possibility of a more complete democratic experience.

Furthermore, one should deepen studies in the analysis of juridical language, taking also historic and political facts into consideration. Therefore, the use of research methodologies that allow the apprehension of such dimensions is essential. The critical discourse analysis and the ethnography are here presented as proposals for discussion.

The former, precisely because of its vision of language as a social practice. The critical analysis of discourse sustains that in interpretative processes one should consider, besides the

spoken or written text, the inequality in accessing linguistic resources by the involved subjects, as well as political and economical factors that originate such inequality and permeate speech and all social context. It is thus a methodology that aims beyond the strictly linguistic elements, as previously proposed in this article.

When it comes to the latter, ethnography, it consists in a method of collecting, describing and analyzing data used in social sciences, and, broadly, in anthropology. It is characterized by the use of techniques such as partaking observation, interviews and questionnaires, among others, which can be used in field researches.

Law, as an applied social science, should have, in all its analysis, the bigger context of the lifeworld, with all its historical, political and ideological constraints. Accordingly, the critical discourse analysis as well as field researches that utilize the ethnographic method can represent paths so as to apprehend, to comprehend and to reflect about the complexity of the object of study.

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