

# Insult in Context: Incorporating Speech Act Theory in Doctrinal Legal Analysis of Interpretative Discussions

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## Abstract

In this article, I want to show that some doctrinal problems of legal interpretation and argumentation can be analysed in a more precise way than a standard doctrinal analysis, when we use insights from speech act theory and argumentation theory. Taking a discussion about the accusation of the criminal act insulting as a starting point, I will try to show that the doctrinal perspective on meaning of statutory norms and of the qualification of utterances as legal acts lacks the instruments to explain why discussions about these meanings and utterances are so complicated. In short, a doctrinal analysis focuses on word or sentence meaning, distinguishing between the literal or semantic meaning on the one hand and the meaning in context on the other. However, the analysis of this 'meaning in context' is often rather vague, especially in cases of indirect and strategic communication. It is the analysis of this meaning in context that can profit from insights from speech act theory. I do not want to 'solve' the problems of the interpretation of the norms concerning insulting. I only use this case in point as an exemplary example to discuss important (often implicit doctrinal) starting points about the related concepts meaning and intention (or commitment) in interpretative discussions.

**Keywords:** interdisciplinary doctrinal research, interpretation, argumentation, speech act theory

## 1 Introduction

This special issue of *Erasmus Law Review* seeks to address the question as to how we can translate and incorporate various non-legal disciplines and their findings into the language of legal doctrine. It is apparently assumed that other disciplines may provide useful insights to legal doctrinal research. In this contribution, I want to help validate this assumption by showing that some problems of legal interpretation and interpretative discussions can be analysed in a more precise way than in a standard doctrinal analysis when we draw on insights from *speech act theory*. Taking a discussion about the accusation of the criminal act insulting as a starting point, I will try to show that the doctrinal per-

spective on *meaning* of statutory norms and of the qualification of utterances as legal acts lacks the instruments to explain why discussions about these meanings and utterances are so complicated. In short, a doctrinal analysis focuses on word or sentence meaning, distinguishing between the literal or semantic meaning on the one hand and the *meaning in context* on the other. However, the analysis of this 'meaning in context' is often rather vague, especially in cases of *indirect* and *strategic communication*. It is the analysis of this meaning in context that can profit from insights from speech act theory. I do not want to 'solve' the problems of the interpretation of the norms concerning insulting. I only use this case in point as an exemplary example to discuss important (often implicit doctrinal) starting points about the related concepts *meaning* and *intention* (or commitment) in interpretative discussions.<sup>1</sup>

Before I will give an overview of the different parts of this article, I want to say something about the theoretical background of this case study and about the close bond between legal theory and speech act theory. This relationship goes back to the first publications of H.L.A. Hart. Already in his inaugural lecture *Definition and Theory in Jurisprudence* (1953), Hart defends a contextual analysis of the meaning of legal concepts: 'We must take not the *word* "right" but the sentence "You have a right" not the *word* "State" but the sentence "He is a member or an official of the State."<sup>2</sup> In the footsteps of Hart's analysis, Neil MacCormick and Dick Ruiters used insights from speech act theory to build a theory of institutional legal positivism.<sup>3</sup> This theory is not only

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1. This analysis is an elaboration of my argument defended in H.T.M. Kloosterhuis, 'The Logic of Indirect Insulting in Legal Discussions. A Speech Act Perspective', in *Explorations in Language and Law. An International, Peer-Reviewed Publication Series* (2012) 69, at 82 (Aprilia: NOVALOGOS/Ortica editrice soc. coop); and H.T.M. Kloosterhuis, 'Institutional Constraints of Topical Strategic Maneuvering in Legal Argumentation. The Case of "Insulting"', in T. Bustamante and C. Dahlman (eds.), *Argument Types and Fallacies in Legal Argumentation* (2015) 67, at 75 (New York, NY: Springer).
2. H.L.A. Hart, *Definition and Theory in Jurisprudence* (1953) 4, at 5, 16-7 (Oxford: Oxford University Press).
3. D.N. MacCormick and O. Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism* (1986) (Dordrecht: Reidel); D.N. MacCormick, *Institutions of Law. An Essay in Legal Theory* (2007) (Oxford: Oxford University Press); D.W.P. Ruiters, *Institutional Legal Facts. Legal Powers and Their Effects* (1993) (Dordrecht: Kluwer Academic Publishers); and D.W.P. Ruiters, *Legal Institutions* (2001) (Dordrecht: Kluwer Academic Publishers).

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relevant for the ‘big’ questions of legal philosophy. It can also be seen as a contribution to the answer of John Searle’s basic question concerning the construction of social reality and of institutional facts.<sup>4</sup> More recently Andrei Marmor uses speech act theory to explain problems of legal interpretation, focusing on the pragmatic aspects of indirectness in legal language. In several publications, Marmor shows the fruitfulness of this approach when analysing implicatures, presuppositions, and commitments in legal language and strategic language use.<sup>5</sup> Marmor not only analyses problems of legal interpretation by using speech act theory, he also uses this analysis to test and adapt the standard model of this theory. Marmor rightly states that one of the crucial starting points of this model is the *presumption of cooperation* in communication, and he shows that the legal context offers important examples of *strategic* communication.<sup>6</sup>

My analysis of interpretative discussions about insulting is also both an application and a test of speech act theory. The reasoning in this contribution proceeds as follows. In the first section I will describe the doctrinal analysis of the interpretative discussions about the accusation of insulting, I will show its problems and I will sketch the necessary conditions to solve these problems. As a first step in solving the problems, I will redefine ‘insulting’ in terms of a speech act and I will argue that there is no *direct* relation between one of the standard speech acts and the effect of being insulted. As a second step, I will show that this relation is an indirect one and that there is an apparent difference between sentence or word meaning on the one hand and speaker or utterance meaning on the other hand. Then – as a final step – I will demonstrate how this indirect relation creates the possibility of strategic communication where someone brings about the effect of an insult and denies the commitment to this effect. With these three steps I want to show how the doctrinal concept *meaning in context* can be clarified and specified with the help of insights of speech act theory. In the concluding remarks I will reflect on the results of this analysis in light of the aim of this issue: incorporating non-legal disciplines in the doctrinal legal research.

4. ‘How can there be an objective world of money, property, marriage, governments, elections, football games, cocktail parties, and law courts in a world that consists entirely of physical particles in fields of force, and in which some of these particles are organised into systems that are conscious biological beasts, such as ourselves?’ J.R. Searle and D. Vanderveken, *Foundations of Illocutionary Logic* (1985), xi (Cambridge: Cambridge University Press).
5. A. Marmor, *The Language of Law* (2014) (Oxford: Oxford University Press); A. Marmor, ‘Can the Law Imply More Than It Says? – On Some Pragmatic Aspects of Strategic Speech’, *USC Legal Studies Research Paper No. 09-43* (2009), available at: <<http://ssrn.com/abstract=1517883>>.
6. See also J.J. Lee and S. Pinker, ‘Rationales for Indirect Speech: The Theory of the Strategic Speaker’, 117 *Psychological Review* (2010) 785, at 807; S. Pinker, M.A. Nowak & J.J. Lee, ‘The Logic of Indirect Speech’, 10(3) *Proceedings of the National Academy of Sciences USA* 833, at 838 (2008); and S. Pinker, ‘The Evolutionary Social Psychology of Off-Record Indirect Speech Acts’, 4(4) *Intercultural Pragmatics* 437, at 4614 (2007).

## 2 The Problem: The Doctrinal Analysis of Discussions about the Accusation of Insulting

In 10 March 2009, the Supreme Court of the Netherlands ruled in an important case about the relation between freedom of speech and the prohibition of insulting. The case was about Article 137c of the Criminal Code, which makes insulting statements about a group of people a crime. The Supreme Court acquitted a man who stuck a poster in his window with the text ‘Stop the cancer called Islam’ of insulting Muslims. According to the district court and the court of appeal, this statement was insulting for a group of people due to their religion, considering the strong connection between Islam and its believers. But the Supreme Court argued that criticising a religion is not automatically also insulting its followers. According to the Supreme Court the appeal court gave too wide an interpretation of the expression ‘a group of people according to their religion’ in Article 137c. People expressing themselves offensively about a religion are not automatically guilty of insulting its followers, even if the followers feel insulted. The Supreme Court ruled that ‘the statement must unmistakably refer to a certain group of people who differentiate themselves from others by their religion’. While people may not insult believers, they can insult their religion. The sole circumstance of offensive statements about a religion also insulting its followers is not sufficient to speak of insulting a group of people due to their religion.

This decision of the Supreme Court incited reactions of criticism and confusion. In critical reactions, people wondered why for instance denying the Holocaust is insulting for Jews and comparing the Islam with cancer is not insulting for Muslims. And there was confusion about the distinction made by the Supreme Court: how is it possible to make a distinction between insulting a religion (allowed) and insulting members of a religious community (forbidden)? In his legal comment on the decision, commentator P.A.M. Mevis criticised this aspect of the ruling. He argued that the legal qualification ‘insulting a group of people because of their religion’ now depends on the wording chosen. One and the same insulting effect can be reached with criminal and non-criminal formulations. Mevis concludes with the critical question whether this is a desirable result. This decision of the Supreme Court is only one example showing the difficulties of interpreting the relevant Dutch legal norm about insulting. Case law about insults shows that clear rules about this interpretation are lacking and that the argumentation is often backed with rather vague references to ‘the meaning in context’ and ‘the specific circumstances of the case’. This vagueness results in uncertainty and – sometimes – in absurd consequences in case law on this topic. Let me give one

more example. In 2012, the Supreme Court ruled that calling a police officer an ‘ants fucker’ is not an insult.<sup>7</sup> But in 2013, the Court of Appeal distinguished from this decision by ruling that calling a police officer ‘an ants fucker and an acorn’ – probably because of the specific circumstances of the case – must be qualified as an insult.

Now, what could be the explanation for these problems regarding the interpretation of statutory norms about insulting? Let us first look at the relevant statutory rule in the example ‘Stop the cancer called Islam’ in Article 137c of the Dutch Penal Code:

#### Article 137c

He who publicly, verbally or in writing or image, deliberately expresses himself in a way insulting of a group of people because of their race, their religion or belief, or their hetero- or homosexual nature or their physical, mental, or intellectual disabilities, will be punished with a prison sentence of at the most one year or a fine of third category.

This rule contains the following conditions for the application: (i) there is an act of insulting of (ii) a group of people, (iii) there is an intention to insult, (iv) the insult is in public, (v) verbally or in writing or image, and (vi) because of race, religion or belief, or hetero- or homosexual nature or physical, mental, or intellectual disabilities. These six conditions are developed in case law. These case law-rules refine and specify the six necessary conditions, but the case law about 137c also resulted in a new condition for the application. According to the rules from case law about the application of Article 137c, three questions should be answered. The first question is whether or not an utterance is an insult and whether or not the other conditions of 137c are fulfilled. If the utterance is an insult and the other conditions are fulfilled, the next question is whether or not the utterance is part of a public debate. And if the insult is an utterance in a public debate the third question is whether or not the utterance is unnecessary offensive.

Let us now focus on the first question: is the utterance insulting? The doctrinal answer to this question proceeds as follows. In order to qualify an utterance as an insult the words themselves and semantic rules may often suffice, but often one may require the *context* to understand the actual meaning of the words.<sup>8</sup> In the case about the Dutch politician Geert Wilders, the Public Prosecution explained how these contextual criteria work in practice:

The words ‘in itself’ mean ‘according to his phraseology and in conjunction’. In order to know what words mean, words themselves may often suffice, but

one may require the rest of the text to understand the actual meaning of the words. It could be clear, for instance, that the tone of the entire text is ironic. Those few words which in isolation may be construed as insulting, would then in their totality, in conjunction, be ironic and hence have an entirely different meaning. ‘Assessment in conjunction’ must be understood as the interpretation of words *within* the bigger picture of the statement; the text, the film or anything else it may be part of.

What one can expect with these *contextual criteria* is that there is room for reasonable disagreement about the question whether a certain utterance counts as an insult. In short, the contextual criteria – often in combination with the ‘criterion’ the ‘specific facts of the case’ – provide little clarity about the correct application of Article 137c. In my opinion the explanation for this problem is the doctrinal concept of *meaning*. The problem with the doctrinal approach is that questions about meaning are formulated as problems of *sentence* or *word meaning* (semantics) and that the contextual criteria to provide little insight in the *speaker meaning* or *utterance meaning* (pragmatics). An adequate explanation for the problems regarding the analysis of interpretative discussions about insulting should specify this speaker or utterance meaning. In the next section I will do that by analysing the meaning of ‘insulting’ as a speech act. This analysis results in a theoretical description of insulting incorporation not only sentence meaning but also *intention* (or commitment) a part of the speaker meaning.

### 3 The Analysis of Insulting as a Speech Act

The distinction between *sentence meaning* or *word meaning* on the one hand and *speaker meaning* or *utterance meaning* on the other is one of the central starting points of speech act theory.<sup>9</sup> Sentence or word meaning is determined by semantics, syntaxis, and conventions of language, but speaker or utterance meaning is also related to the context and the intentions of the speaker. Central in the analysis of speaker meaning is the concept *speech act*: a form of acting where four acts coincide:<sup>10</sup>

1. an *utterance act*: the bringing forth certain speech sounds, words and sentences,
2. a *propositional act*: referring to something or someone and predicating some properties of that thing or person,
3. an *illocutionary act*: investing the utterance with a communicative force of promise, statement of fact and so on,

7. HR 8 mei 2012, LJN BV9188.

8. Of course there are more precise legal definitions for these components but these often result in new interpretation problems. ‘Insulting’, for instance, is described as ‘to defile one’s honour’ and ‘honour’ as ‘recognition of moral dignity that every citizen has a right to expect’. These definitions are also vague and are, therefore, new sources for differences of opinion about the applicability of Art. 137c.

9. J.R. Searle, ‘What Is a Speech Act?’, in J.R. Searle (ed.), *The Philosophy of Language* (1971) (London: Oxford); and H.P. Grice, ‘Logic and Conversation’, in P. Cole and J.L. Morgan (eds.), *Syntax and Semantics 3: Speech Acts* (1975) 43, at 58 (New York, NY: Academic Press).

10. Searle, above at n. 9.

4. a *perlocutionary act*: bringing about certain interactional effects, such as shock or boredom.

Let us now illustrate these distinctions with the example of calling a police-officer a homo. The sentence meaning is related to the propositional act: saying that a person is a homo, which could be a neutral statement. The speaker meaning is related to the illocutionary and the perlocutionary act: the communicative force of the utterance results in the interactional effect of being insulted.

The next step in the analysis of the speaker meaning of insulting is answering the question which illocutionary acts could be connected to the effect of being insulted. Searle claims that there are five and only five types of *illocutionary acts*.

- *Assertive* illocutionary acts that commit a speaker to the truth or acceptability of the expressed proposition, for example making a statement.
- *Directive* illocutionary acts that are to cause the hearer to take a particular action, for example requests, commands and advice.
- *Commissive* illocutionary acts that commit a speaker to some future action, for example promises and oaths.
- *Expressive* illocutionary acts that express the speaker's attitudes and emotions towards the proposition, for example congratulations, excuses, and thanks.
- *Declarative* illocutionary acts that change the reality in accord with the proposition of the declaration, for example baptisms, pronouncing someone guilty or pronouncing someone husband and wife.

The successful performance of an illocutionary act will always result in the effect that the hearer understands of the utterance produced by the speaker. But in addition to the illocutionary effect of understanding, utterances normally produce and are often intend to produce, further perlocutionary effects on the feelings, attitudes, and subsequent behaviour of the hearers. An assertive speech act as asserting or argumentation may result in the perlocutionary effect of convincing or persuasion and a commissive speech act as a promise may create expectations. Perlocutionary effects are defined as intended by the speaker or writer and based on rational

ground by the addressee.<sup>11</sup> Within the framework of speech act theory we are now able to give a more precise definition of the effect 'being insulted':

*being insulted is a perlocutionary effect that is intended by the speaker or writer and that is based on rational considerations on the part of the addressee.*

The next question now is how the perlocutionary effect of being insulted is related to the five types of illocutionary acts. I will argue that there is no direct associated perlocutionary effect with one of the five illocutionary acts. (i) The assertive point is to say how things are. (ii) The directive point is to try to get other people to do things. (iii) The commissive point is to commit the speaker to doing something. (iv) The declarative point is to change the world by saying so. (v) The expressive point is to express feelings and attitudes. None of these points is directly connected to the effect of being insulted. How then, in other words, is a language user capable of inferring an 'insult' from an assertion, a promise, a question, a compliment, or a declaration? In the following I will argue that this connection is indirect.

Let us now, in trying to connect the effect of being insulted to one or more illocutionary acts, look at some examples from Dutch case law. According to Dutch case law the following utterances count as insult:

1. Calling a police-officer a 'homo'.
2. Greeting a police-officer with 'Heil Hitler'.
3. Saying 'I am gonna fuck you' to a police-officer.
4. Having a tattoo or a bomber jack with the text '1312' or 'ACAB' (All Cops Are Bastards).
5. Referring to a passage in the bible where Pilatus washes his hands.
6. Saying or implicating that the Holocaust did not happen.

These examples illustrate that the direct perlocutionary effects of these acts are not 'being insulted' Calling a police officer a homo or comparing an employer with Pontius Pilatus are assertive illocutionary acts, in which a proposition is presented as representing a state of

11. In other to make clear what this perlocutionary effect involves the following distinctions can be made (F.H. Van Eemeren, *Strategic Maneuvering in Argumentative Discourse. Extending the Pragma-Dialectical Theory of Argumentation* (2010), at 37 (Amsterdam/Philadelphia, PA: John Benjamins Publishing Company)). Van Eemeren distinguishes between effects of the speech act that are intended by the speaker or writer and consequences that are brought about accidentally. Van Eemeren reserves the term act, in contradistinction with 'mere behaviour', for conscious, purposive activities based on rational considerations for which the actor can be held accountable. As a result, bringing about completely unintended consequences cannot be regarded as acting, so in such cases there can be no question of the performance of perlocutionary acts. According to Van Eemeren a rough and ready criterion for distinguishing between the performance of perlocutionary acts and the bringing about of unintended consequences is whether the speaker can reasonably be asked to provide his/her reasons for causing the consequences in question. Second, Van Eemeren distinguishes between consequences of speech acts whose occurrence may be regarded to be based on rational considerations on the part of the addressee and consequences that are divorced from reasonable decision-making, like being startled when someone shouts 'boo!'.

affairs, with an associated perlocution as accepting a description or being convinced, but not being insulted. Saying ‘I am gonna fuck you’ to a police-officer is a commissive illocutionary act – a promise or a threat – in which the speaker commits himself to carrying out an action. The associated perlocutionary effects of commissives are accepting the promise or being intimidated, but not being insulted. Greeting a police-officer with ‘Heil Hitler’ is an expressive illocutionary act with an associated perlocution as accepting the greeting but again – not being insulted. So there is no direct connection between the act and the effect of being insulted. In the next section I will show that this connection is indirect.

## 4 Insulting as Conversational Implicatures and the Possibilities for Strategic Communication

So, the question now is: how is it possible to derive the *indirect* perlocutionary effect ‘being insulted’ from illocutionary acts whose associated perlocutionary effects is primarily a different one. The key to an answer to this question is analysing these examples as forms *conversational implicatures* as baptised by Grice. In order to analyse the difference between sentence meaning and speaker meaning, Grice postulated a general Cooperative Principle and four maxims specifying how to be cooperative:

- *Cooperative Principle*. Contribute what is required by the accepted purpose of the conversation.
- *Maxim of Quality*. Make your contribution true; so do not convey what you believe false or unjustified.
- *Maxim of Quantity*. Make your contribution as informative as is required for the current purposes of the exchange. Do not make your contribution more informative than is required.
- *Maxim of Relation*. Be relevant.
- *Maxim of Manner*. Be perspicuous; so avoid obscurity and ambiguity, and strive for brevity and order.<sup>12</sup>

According to Grice it is common knowledge that people generally follow these rules for efficient communication and, so long as there are no indications to the contrary, assume that others also adhere to the maxims. Cases in which the speaker leaves certain elements implicit, yet the listener still understands what he means over and above what he ‘literally’ says, can then be explained by assuming that, in combination with the cooperative principle, these maxims enable the language users to convey conversational implicatures. So, if a speaker is able to adhere to the maxims, yet deliberately and open-

ly violates one of the maxims, even though there is no reason to suppose that he has completely abandoned the cooperative principle, then it is possible to derive a conversational implicature. A general pattern for the working-out of a conversational implicature might be given as follows:

1. he has said that q;
2. there is no reason to suppose that he is not observing the maxims, or at least the Cooperative Principle;
3. he could not be doing this unless he thought that p;
4. he knows (and knows that I know that he knows) that I can see that the supposition that he thinks that p is required;
5. he has done nothing to stop me thinking that p;
6. he intends me to think, or is at least willing to allow me to think, that p;
7. so he has implicated that p (Grice 1975, p. 31).<sup>13</sup>

In order to give a more precise description of inferring conversational implicatures, it is insightful to combine the maxims of Grice with Searle’s conditions for the performance of illocutionary acts. For the performance of an assertive the preparatory conditions are that the speaker has reasons for acceptance of the truth of the propositional content and the sincerity condition is belief. For the performance of a commissive the propositional content condition is that the propositional content represents a future course of action of the speaker, the preparatory condition is that the speaker is able to perform this course of action and the sincerity condition is intention. For the performance of a directive the propositional content condition is that the propositional content represents a future course of action of the hearer, the preparatory condition is that the hearer is able to perform this course of action and the sincerity condition is desire. For the performance of a declarative, there are no special propositional content conditions, the preparatory condition is that the speaker is capable of bringing about the state of affairs represented in the propositional content solely in virtue of the performance of the speech act and the sincerity conditions are belief and desire. For the performance of an expressive, there are no general propositional content, preparatory and sincerity conditions. But most expressives have propositional content conditions (you cannot apologise for the law of *modus ponens*), the preparatory condition that the propositional content is true and the sincerity condition about a state of affairs that the speaker presupposes to obtain. Let us now try to reconstruct the possible argumentation about the accusation of insulting in our examples. The line of reasoning of the public prosecution defending the standpoint that an utterance counts as an insult would be as follows.

Someone who calls a police-officer a homo implicates an insult by openly violating one of the maxims. When the assertive is not true, the speaker violates the maxim of quality, or in terms of the conditions for performing an

12. Grice, above n. 9, at 26-30.

13. Grice, above n. 9, at 31.

assertive, the speaker infringes one of the conditions for performing the assertive. When the assertive is true the speaker violates the maxime of relevance, or in terms of the conditions for performing an assertive, the speaker violates the essential rule, because there is no sense or point.

The fired employee who compares his employer with Pontius Pilatus does not say that his dismissal is like the condemnation of Jesus, but he is implicating it by openly violating the maxime of quality and the conditions for an assertive illocutionary act.

Someone who greets a police-officer with 'Heil Hitler' implicates an insult by openly violating the maxime of relation, or more precise the sincerity conditions for performing an expressive illocutionary act. Someone who promises or threatens a police-officer to fuck him implicates an insult by openly violating the maxime of quality of relation, or more precise the preparatory and sincerity conditions for performing a commissive illocutionary act.

Saying or implicating that the Holocaust did not happen counts as an insult because it is (or counts as) a violation of the maxime of quality. In terms of the conditions for performing the assertive illocutionary act, this utterance can be analysed as a violation of the preparatory and maybe also the sincerity conditions for performing an assertive illocutionary act.

The examples of indirect insulting illustrate two important characteristics of conversational implicatures. The first is that the presence of the implicature must be capable of being worked out for even if it can in fact be intuitively grasped, unless the intuition is replaceable by an argument, the implicature (if present at all) will not count as a conversational implicature. The second characteristic is that a conversational implicature is always *contextually cancellable* if one can find situations in which the utterance would simply not carry the implicature.<sup>14</sup> In other words, in using an 'indirect insult' there is *plausible deniability*. These two characteristics are the explanation for the room for disagreement in discussions about the accusation of an indirect insult. The party who claims that a certain illocutionary act carries the implicature 'insulting' and the perlocutionary effect 'being insulted' claims that there are good arguments for this standpoint, given the conventional meaning of the utterance and the conventional rules for conversations. Because of the plausible deniability the accused can argue that there was no insult at all. In the examples mentioned this was precise one of the types of argumentation to defend the standpoint that there was no insult. Of course this *plausible deniability* also 'facilitates' forms of strategic communication (or the accusation of strategic communication), because the effect of being insulted is reached without commitment to this indirect or implied content.

Let us to illustrate this point take a closer look to the argumentation in the case 'Stop the Cancer called

Islam'. Is it possible to analyse this utterance as implicating an insult because the writer openly violates one of the maxims or conditions for performing a directive illocutionary act? The analysis of the utterance as an open violation of the maxime of quality and the sincerity conditions for the performance of an assertive – Islam is not a cancer – can easily be countered with the argument that it was meant metaphorically. The analysis of the utterance as a violation of the maxime of relation and the essential condition for an assertive, can be countered by arguing that this utterance was part of a public debate. This was in fact the point the defence made in this case.

It is good to summarise the analysis so far. In light of the foregoing we can redefine the definition of insulting as follows. Being insulted is an *indirect* perlocutionary effect that is intended by the speaker or writer and that is based on rational considerations on the part of the addressee. Because of this indirectness there is always room for disagreement in actual cases about the accusation of insulting. This room for disagreement also involves the possibilities of strategic communication where someone is achieving an effect like insulting and can deny the intention to insult or the commitment for having insulted. In my opinion, this explains the problems of interpretative discussions about insulting in a better way than the doctrinal analysis based on the imprecise concept 'meaning in context'.

## 5 Concluding Remarks: The Relevance for Doctrinal Legal Research

The central question in this special issue is: how can we translate and incorporate the various non-legal disciplines and their findings into doctrinal legal research? In this article I tried to contribute to an answer to this central question by showing that some doctrinal problems of legal interpretation and argumentation can be analysed in a more precise way than a standard doctrinal analysis, when we use insights from *speech act theory*. In these concluding remarks I want to relate my findings to the aims, the problems, and the methods of doctrinal legal research.

What are the aims of doctrinal legal research, which central problems are analysed, and what are the methods used to solve these problems? According to Taekema, there are three central characteristics of doctrinal legal scholarship: the orientation towards legal practice, the internal perspective taken by legal scholars and the hermeneutical method used.<sup>15</sup> According to Taekema the close relationship between scholarship and practice and

14. H.P. Grice, *Studies in the Way of Words* (1989), at 44 (Cambridge: Harvard University Press).

15. H.S. Taekema, 'Relative Autonomy: A Characterisation of the Discipline of Law', in B. van Klink and S. Taekema (eds.), *Law and Method. On Interdisciplinary Research into Law* (2011) 33, at 52 (Tübingen: Mohr Siebeck).

its combined descriptive and normative orientation has two methodological consequences. The first is the *internal perspective to the practice of law*. This means that scholars regard the subject matter of their research from the same point of view as the people who engage in the subject. The second consequence is the *hermeneutical method used* in doctrinal legal research. In short, this method is used for interpreting legal texts. It presupposes that the meaning of a text is not immediately clear because of a potential problematic interaction between author, text, reader, and broader context. Taekema concludes that the method of hermeneutics does provide a solution for solving the interpretation problems, but it shows us that the discourse of interpretation is one of plausibility rather than one of truth and deduction. Therefore legal scholarship is necessarily *argumentative*. The incorporation of speech act theory in the doctrinal analysis and the specification of the doctrinal concept of ‘meaning in context’ in terms of speech acts and perlocutionary effects is – as I have tried to show – also characterised by the orientations identified by Taekema. First I tried to solve practical problems about the interpretation of an article of the Dutch criminal code. I tried to demonstrate that these problems are the result of the doctrinal approach to the meaning of words in legal norms. Although the perspective of ‘meaning in context’ is a good starting point, the doctrinal perspective fails to give an adequate analysis of speaker meaning and of indirect communication. As an alternative I proposed to use the instruments of speech act theory to solve these problems. Second, this analysis based on speech act theory takes an (epistemological) internal perspective as a starting point, because the analysis of speaker meaning is connected with intentions and commitments and shared normative expectations in communication. Third, the analysis shows that there are no easy cases concerning indirect insulting (and, I think this conclusion can be generalised to other forms of interpretation and indirect communication in law). Therefore, this analysis also illustrates the argumentative character of legal scholarship.