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CONTINUITY AND CHANGE IN LEGAL POSITIVISM

ABSTRACT. Institutional theory of law (ITL) reflects both continuity and change of Kelsen's legal positivism. The main alteration results from the way ITL extends Hart's linguistic turn towards ordinary language philosophy (OLP). Hart holds – like Kelsen – that law cannot be reduced to brute fact nor morality, but because of its attempt to reconstruct social practices his theory is more inclusive. By introducing the notion of law as an extra-linguistic institution ITL takes a next step in legal positivism and accounts for the relationship between action and validity within the legal system. There are, however, some problems yet unresolved by ITL. One of them is its theory of meaning. An other is the way it accounts for change and development. Answers may be based on the pragmatic philosophy of Charles Sanders Peirce, who emphasises the intrinsic relation between the meaning of speech acts and the process of habit formation.

KEY WORDS: pragmaticism, institutional theory, ordinary language philosophy, action, validity, meaning

1. INTRODUCTION

The aim of this article is critically to examine the theory of speech acts underlying the institutional theory of law (ITL) and to suggest an alternative approach towards the phenomenon of language based on the pragmaticism of C. S. Peirce. The outlines of ITL were first developed by D.N. MacCormick and O. Weinberger in their collection of essays *Grundlagen des Institutionalistischen Rechtspositivismus* (1985).[1] The insights of MacCormick and Weinberger were subsequently taken up by others, and particularly worked out and refined in Ruiter's *Institutional Legal Facts* (1993). In this article, we shall ignore the differences between the three writers and

[1] D.N. MacCormick und O. Weinberger, *Grundlagen des institutionalistischen Rechtspositivismus* (Berlin: Duncker & Hublot, 1985). Quotations are from the English translation: N. MacCormick & O. Weinberger, *An institutional theory of law* (Dordrecht: D. Reidel Publishing Company, 1986).

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use the term 'institutional theory of law'(ITL) indiscriminately to denote the approaches of MacCormick, Weinberger and Ruiter.

In the first section, we argue that ITL is to be considered as a form of legal positivism which carries further the 'linguisic turn' in legal positivism. This linguistic turn was brought about by Herbert Hart's application of the insights of ordinary language philosophy to jurisprudence.

In the second section, we discuss the basic tenets of ITL. We hold that, although ITL takes legal positivism many a step forward, it still leaves some important problems unresolved. Partly, this is due to the incompatibility of the theory of speech acts underlying ITL (which takes the perspective of the speaker as its starting point) and the theory of action developed by ITL (which takes the perspective of the hearer as its starting point). As a consequence, ITL has difficulties in accounting for the change in meaning of legal rules and institutions.

In the third section, we introduce the pragmaticism of C. S. Peirce as a possible alternative underpinning of ITL. We argue that the pragmaticist approach towards the phenomenon of speech acts fits the theory of action of ITL better, because it assumes an intrinsic relation between the meaning of speech acts and the process of habit formation of human individuals.

2. THE 'LINGUISTIC TURN' IN LEGAL POSITIVISM

Legal positivism is based on a set of assumptions that make up its 'hard core'. According to Lakatos's methodology of scientific research programmes this hard core of a theoretical paradigm is not questioned by those who accept the programme as a whole.[2] On the contrary, as far as reasonably possible the nucleus will be upheld. In this sense, a research programme implies both a positive and a negative heuristic. Upholding the nucleus of a research program always comes with a rejection of assumptions that repudiate the hard core. Anyone who tries to come to terms with the hard core of legal positivism has to take into account Hans Kelsen's pure theory of law. In his pure theory, Kelsen translates the criteria for scientific

[2] I. Lakatos, *The Methodology of Scientific Research Programmes* (Cambridge: Cambridge University Press, 1978), p. 48.

research developed in previous eras into *methodological* rules for jurisprudence and attempts to determine the a-priori conditions that make pure knowledge of law possible. According to Kelsen, legal theory should thereby take into account the special nature of its object: legal norms are 'objective meanings of acts of will' which cannot be reduced to either facts or fact-descriptions. The specific legal meaning of an act of will can only be described by the statement that someone *ought* to behave in a certain way. By contrast to norms of positive morality – which also express an *ought* – legal norms provide for definitive sanctions. Positive law is essentially a coercive order, made up of mandatory norms of conduct, prescribing who, in certain circumstances, *ought* to apply sanctions.[3]

Although ITL is a theory of legal positivism too, it is highly critical of some of the above mentioned assumptions underlying the pure theory of law. It rejects the idea that the aim of legal theory is the determination of necessary conditions making possible pure knowledge of law and holds that the elements of the legal system cannot be reduced to a single format (the mandatory norm of conduct). In this respect, ITL follows H.L.A. Hart's criticism of Kelsen's program of purity and the linguistic turn in legal positivism advocated by Hart.

As has also been set out by others, Hart's legal theory can be considered as an attempt to apply the insights of the ordinary language philosophy (OLP) to jurisprudence.[4] The outlines of OLP were developed by G.E. Moore at the beginning of this century. The core mission of his philosophy is the description of the use of ordinary language and a coherent reconstruction of the 'common sense' of a particular group or society.[5] After Moore two different approaches in OLP develop: on the one hand the work of *Ludwig Wittgenstein* emphasising the relation between meaning and use in *more or less unique circumstances* and on the other hand the work of Gilbert Ryle and John Langshaw Austin, attempting to recon-

[3] Note that the category of ought comprises also permission ('may') and empowerment ('can').

[4] See also MacCormick, *H.L.A. Hart* (London: Arnold, 1981), pp. 14–17.

[5] G.E. Moore, *Principia Ethica* (Cambridge: Cambridge University Press, 1993 [1903]). See also G.H. von Wright, "Analytische Philosophie", *Rechtstheorie* 23 (1993), pp. 6–7. The 'definition' of his mission is given by Moore (ibid.) on p. 58.

struct *general* structures in language and similarities in meaning in different circumstances.[6] Ryle takes the conventional character of meaning in a community as a starting point. He promotes a moderate kind of 'logical behaviourism', as he looks for *the possibility of understanding* what somebody else is saying. Understanding implies, according to Ryle, to some degree 'competence in performance' on the basis of knowledge.[7] Austin's perspective differs from the focus of Ryle: whereas Ryle takes as his starting point the *understanding* of an utterance, Austin takes up the question what social conditions determine the success or failure of an utterance in general. According to Austin, it is necessary to take into account the 'whole of the situation', which amounts to 'something which is at the moment of uttering being done by the person uttering'.[8]

Hart takes a position close to J. L. Austin's. His focal point of attention is the utterances of authorities which can obtain legal validity within a formalised system of social rules. Hart conceives of law as a union of primary rules of obligation and secondary rules of recognition, change and adjudication. The borderline between the pre-legal and the legal world is determined by rules of recognition: rules 'for conclusive identification of the primary rules of obligation'.[9] Rules like this are mostly 'shown in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers'.[10] Participants in the legal system use them and observers record them (internal point of view), on account of their shared acceptance (external point of view) as facts.[11]

Hart's linguistic turn reflects both the continuity and the development (change) of legal positivism. Although his 'ordinary language

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[6] G. Nuchelmans, *Overzicht van de analytische wijsbegeerte* (Utrecht/Antwerpen: Het Spectrum, 1978 [1969]), p. 190.

[7] Gilbert Ryle, *The Concept of Mind* (Harmondsworth: Penguin Books, 1976 [1949]), pp. 17–18.

[8] John Langshaw Austin, *How to Do Things with Words* (Cambridge, Mass.: Harvard University Press, 1962), p. 60.

[9] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1979 [1961]), p. 92.

[10] Ibid., p. 98.

[11] Ibid., p. 99. See also John Langshaw Austin (ibid.), Lecture 3.

theory of law' is more inclusive than Kelsen's pure theory of law,[12] Hart still holds that law cannot be reduced to either brute fact or morality. This hard core of legal positivism is also accepted by ITL: ITL shares with traditional legal positivism the idea that the existence (validity) of legal norms cannot be derived from morality, while the normativity of law is not necessarily rooted in objective values or immanent principles of right. Moreover, ITL rejects any reductionism which accounts for the existence of law in terms of brute fact alone. However, both Hart's ordinary language approach and the institutional approach of ITL fundamentally differ from the method and assumptions of the pure theory of law. Neither Hart nor ITL aims at the determination of necessary conditions which are rooted in the determinations of the human mind (*Denkbestimmungen*). Rather, they attempt to reconstruct *social practices* and reject the *a priori* reduction of the elements of law to a single format (the *ought*). In order to account for the nature and function of law, both apply insights of the philosophy of language to jurisprudence. The borderline between legal positivism and the philosophy of language becomes increasingly blurred.

3. THE INSTITUTIONAL THEORY OF LAW

3.1. *Speech Act Theory*

Accepting the philosophical and methodological roots of Hart's legal theory as a starting point, institutional theory of law (ITL) takes legal positivism a step further. ITL examines the elements of the legal system on the basis of insights borrowed from the speech act theory of John R. Searle.[13] One of the aims of Searle's theory

[12] Hart describes *The Concept of Law* as an essay in descriptive sociology and allows for a miminum content of natural law. See also W.J. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994).

[13] It should be noticed that the works of Searle which are actually taken into account by MacCormick, Weinberger and Ruiter are his *Speech Acts* (Cambridge: Cambridge University Press, 1990 [1969]) and the taxonomy of speech acts as set out in *Expression and Meaning* (Cambridge: Cambridge University Press, 1979) and – with Daniel Vanderveken – in *Foundations of Illocutionary Logic* (Cambridge: Cambridge University Press, 1989 [1985]). We shall therefore examine these works only and leave out of consideration other books (and

is to examine the relationship between 'word' and 'world'.[14] In order to answer the question as to the relation between 'word' and 'world', Searle takes up the distinction between two types of rule: regulative rules – e.g. mandatory norms of conduct – and constitutive rules. Constitutive rules, Searle states, 'constitute an activity the existence of which is logically dependent on the rule', and take the form '*x* counts as *y* in context *c*'.[15] The characteristic example of constitutive rules is the scoring rules in a game.

The importance of constitutive rules for Searle's analysis of the relation between 'word' and 'world' becomes particularly clear in his examination of the *meaning* of utterances of a speaker. Searle follows Austin, but distinguishes not three but four kinds of acts performed by a speaker in the utterance of a sentence: utterance acts (the *utterance* of words or sentences), propositional acts (*referring* and *predicating*), illocutionary acts (giving the a word or sentence a certain *force* or *point*, i.e. stating, questioning, commanding, promising, etc.) and perlocutionary acts (the production of a certain *effect* on the thoughts and beliefs of the hearer).

According to Searle, the utterance act and the perlocutionary act are *factual* in character and have no bearing whatsoever on the meaning of a sentence. Propositional acts and illocutionary acts, on the other hand, regard the meaning of the utterance act involved while being regulated by the constitutive rules of language. Words are related to the world in virtue of the constitutive rules determining their meaning and in virtue of speakers who intentionally use these rules to perform illocutionary acts.[16] The possible relations between 'word' and 'world' are determined by the constitutive rules underlying language.

3.2. *Institutions and Instances*

Referring to Searle's theory of speech acts, MacCormick distinguishes between legal institutions (the legal concept such as 'con-

articles). See i.e. *Intentionality* (Cambridge: Cambridge University press, 1990 [1983]) and *The Construction of Social Reality* (New York: The Free Press, 1995).

[14] See the opening of Searle's *Speech Acts* (ibid. p. 3): How do words relate to the world?

[15] Ibid., pp. 34–35.

[16] Ibid., p. 47.

tract') and *instances* of an institution (legal facts such as the contract between Clarke and Brown).[17] The (legal) institution itself consists of three types of rule: (1) institutive rules, laying down under what circumstances an instance of an institution comes into existence; (2) consequential rules, stating the rights, duties, legal powers or further institutive rules following from the existence of an institution; (3) terminative rules, providing for the termination of an instance of an institution.

Ruiter refines the way ITL explains the relationship between legal institutions and instances in the context of the notion of the 'extra-linguistic institution'.[18] He illustrates the importance of extra-linguistic institutions (such as the legal system) by analysing the most elusive kind of speech act distinguished by Searle: the *declarative* speech act. Declarative speech acts, if successfully performed, automatically bring about certain states of affairs. At first sight, therefore, it seems impossible that the results of a successfully performed speech act would ever fail to come about. Although this may be true for speech acts performed by divine creators, it is not in conformity with our every-day experience. We all know of officially appointed heads of state lacking any real power, of areas officially declared 'safe havens' lacking real protection or of officially proclaimed wars that are not fought out.

This apparent tension between a happy performative utterance and every day experience Ruiter explains by pointing out that the results of declarative speech acts cannot be accounted for in terms of brute facts. A successful performance of a declarative speech act yields a *presentation* of a state of affairs, *valid within a certain extra-linguistic institution*. Within the institutional framework, the declaration brings about a valid presentation of a state of affairs. This presentation can be either accepted or rejected by the community surrounding the institution. Ruiter continues by asking whether the other four speech acts identified by Searle (commissive speech acts, imperative speech acts, assertive speech acts and expressive

[17] Although critical of Searle's definition of constitutive rules, MacCormick clarifies and improves Hart's notion of law as the union of primary and secondary rules in a manner that is clearly inspired by the work of Searle. See also Ruiter's contribution to this volume.

[18] This concept is used by Searle to distinguish two types of speech acts. See *Expression and Meaning* (Cambridge: Cambridge University Press, 1979), p. 7.

speech acts) can also yield valid presentations within extra-linguistic institutions. His answer to this question is in the affirmative. Within an institutional framework, a commissive speech act yields a valid presentation of an order to the speaker, an imperative speech act brings about a valid presentation of an order to the hearer, an assertive speech act brings about a valid *re*presentation of a state of affairs and an expressive speech act yields a valid presentation of an attitude towards a state of affairs.

In addition to the kinds of speech acts Searle distinguishes, Ruiter identifies two *new types of speech act*: hortatory speech acts and purposive speech acts. Hortatory speech acts can be characterised as uncoercive attempts to get the hearer to carry out some future course of action. Within a social or moral order, hortatory speech acts often take the form of official recommendations and advisory opinions. Purposive speech acts can be considered as noncommittal statements concerning a future course of action the speaker purports to carry out.

The introduction of the notion of law as an *extra-linguistic institution*, determining which kinds of results from human activity can obtain validity within the legal system has taken legal positivism a step forward. However, there is a risk that the emphasises on rules, institutions and institutional facts may involve a 'belief in a formalistic heaven of institutions',[19] separated from social reality. It goes without saying that – standing in the tradition of OLP – neither MacCormick nor Ruiter advocates such an extreme formalistic 'purity'. On the contrary, both hold that legal institutions should be regarded as systems of rules *and* as systems of conduct. This, however, raises a question similar to the question initially raised by Searle in his *Speech Acts*: How do (legal) words relate to the (social) world?

3.3. *Norms, Institutions and Actions*

ITL emphasises that norms and institutions are intrinsically bound up with human action: they become meaningful only for individuals who strive to reduce the complexity of their environment.[20]

[19] N. MacCormick and O. Weinberger, *An Institutional Theory of Law* (Dordrecht: D. Reidel Publishing Company, 1986), p. 67.

[20] Ibid., p. 103.

Norms as well as facts have the pragmatic function of providing information to the acting individual.

The ontology of ITL, therefore, is an ontology of *'handlungsfähiger Gemeinschaftswesen'*. The nature and existence of legal norms can only be accounted for if socially acting subjects are taken as a starting point. Action, in the definition of Weinberger, is goal-oriented, teleological behaviour by any subject (including collectivities) that is part of a society, which is determined by a processing of information. This information can be of two kinds: theoretical and practical. The first type of information consists of sentences describing facts and causal relationships, technical know-how etc. Theoretical information is conveyed by theoretical sentences, requiring that we adjust them to the world.[21] The second type of information is of a different kind. Practical information has the function of enabling an actor to choose between possible courses of action. It consists of (institutional) preferences, goals, values, norms, principles etc. Practical information is conveyed in practical sentences which 'have the pragmatic function of determining directly or indirectly the kind of world we want and the way it is to be changed and shaped through action'.[22]

On the basis of his theory of action, Weinberger seeks to define the concept of a (legal) institution. Traditionally, Weinberger holds, the concept of a legal or social institution is used in two important ways:

1. As an interrelated complex of norms;[23]
2. As a social structure or establishment.

Weinberger points out that both interpretations of a (legal) institution should not be regarded as mutually exclusive categories, indicating a different foundation of respectively legal dogmatics and the sociology of law. Both concepts of an institution are functionally interwoven: the formal rules are used as reasons for action, whereas

[21] O. Weinberger, Law, *Institution and Legal Politics: Fundamental Problems of Legal Theory and Social Philosophy* (Dordrecht, Boston and London: Kluwer Academic Publishers, 1991), p. 6. Weinberger here refers to Searle's notion of the *word to world direction of fit* of assertive speech acts.

[22] O. Weinberger (ibid.), pp. 6–7. Weinberger here refers to the *world to word direction of fit*.

[23] See – amongst others – MacCormick and Ruiter.

the factual social structures can only be identified and described if the rules underlying the social structure are taken into account. There are, therefore, compelling reasons to bring the normative and factual aspects of an institution under a single concept: the institution as an effective system of practical information: *'Institutions are framework systems of human action. They have a core of practical information. In the sense that they consist of an ordered system of practical information which is effective in conjunction with psychological and social facts and events they are always complex objects.'*[24]

3.4. *Provisional Conclusion*

By widening Hart's concept of the legal system (law as an institution) and by formulating a common foundation for legal dogmatics and the sociology of law, ITL has contributed considerably to the further development of legal positivism. There are, however, some problems yet unresolved by the institutional theory. In the first place, the action theory developed by ITL does not correspond with assumptions underlying Searle's theory of speech acts. Like Austin, Searle explains the meaning of speech acts and their relation to the world from the perspective of the speaker: words are related to the world in virtue of their being used by speakers who intend to perform an illocutionary act. ITL, on the other hand, relates legal words to the social world from the perspective of the 'hearer': the subject using theoretical and practical information provided by existing institutions. This raises the question whether the theory of meaning developed by Searle fits within the general framework of the institutional theory. Secondly, the action theory developed by ITL raises the question how we can account for the change and development of the meaning of the information provided by legal institutions. Although ITL recognises the importance of this question, it has not yet dealt with it extensively. In the next section, we shall develop some outlines for a possible answer (if an answer to this question is possible at all) based on the philosophy of Charles Sanders Peirce.

[24] O. Weinberger (ibid.), p. 21.

4. CHARLES SANDERS PEIRCE

4.1. *Pragmaticism*

In order to attempt to find a solution for the problems mentioned in this section, we shall set out a speech act theory and a theory of action which largely correspond to the insights set out by MacCormick and Weinberger, but which also differs from the assumptions underlying legal positivism in the tradition of John Langshaw Austin, in some important respects. The theories under discussion are developed by Charles Sanders Peirce (1839–1914), the founding father of the pragmatic movement in the United States.[25]

In order to understand Peirce's theory of action and his speech act theory, it is first of all necessary to explain the basic outlines of his pragmaticism.[26] In brief, Peirce's philosophy can be described as the attempt to make 'such conjectures as to the constitution of the universe as the methods of science permit'.[27] Instead of following the Cartesian method of universal doubt in order to arrive at indubitable first propositions, Peirce argues that we should begin with all the prejudices we have when entering the study of philosophy. When

[25] Unfortunately, this movement is still often associated with individualistic hedonism and – in legal theory – often regarded as a generalisation of the prediction theory of law, claiming that the existence of a legal norm is nothing but the chance that a particular judge will apply a certain sanction upon a subject. Both interpretations of Peirce's philosophy fail to appreciate the essentially anti-individualistic, anti-nominalistic and anti-behaviouristic character of his work and underestimate the value of his philosophy for a theory of law 'aiming at the explanation of the existence of norms and legal institutions avoiding the traps of idealism and the pitfalls of reductionism'. See N. MacCormick and O. Weinberger, *An Institutional theory of Law* (Dordrecht: D. Reidel Publishing Company, 1986), p. 6.

[26] In this section, we shall use the term 'pragmaticism' to characterise Peirce's philosophy. Peirce first introduced his doctrine under the name 'pragmatism'. As he saw how this name was misused by other philosophers – for example his friend William James, who called his nominalistic, subjectivistic philosophy *pragmatism* too – Peirce renamed his doctrine 'pragmaticism', a name, according to Peirce 'ugly enough to be safe from kidnappers'. See Charles Hartshorne and Paul Weiss (ed.), *Collected Papers of Charles Sanders Peirce* (Cambridge, Mass.: Harvard University Press, 1934), Vol. V: Pragmatism and pragmaticism, 5.414.

[27] Ibid., Vol. I: Principles of philosophy, 1.3 and 1.4.

interaction with (social) reality casts doubts upon the validity of our beliefs, the best we can do is to 'supply a hypothesis, not devoid of all likelihood, capable of being verified or refuted by future observers'.[28] Peirce's pragmaticism is a thorough *fallibilism*, not aiming at absolute certainty within individual self-consciousness, but rather seeking to eliminate unfounded assumptions step by step in a community of investigators.[29] Peirce emphasises that his fallibilism and his pragmaticism can only be understood if they are related to a third aspect of his philosophy: his (scholastic) realism.[30] For pragmaticism could hardly have entered a head that was not already convinced that there are real generals.[31] Nominalists – like Wittgenstein (see section 2) – hold that, strictly spoken, reality consists of particulars only: general classes and qualities as well as the laws of nature are merely figments of the mind, invented to reduce the complexity of reality. Realists like e.g. Ryle and Austin (see section 2), on the other hand, argue that general classes have real existence and that generals are really operative in nature. Peirce holds the nominalistic position to be fundamentally wrong. Acceptance of the nominalistic view of reality would result in the impossibility (or rather: the superfluity) of making predictions: since no real generals exist, we have no reason whatsoever to expect our predictions to be either fulfilled or refuted by experience. Consequently, acceptance of the nominalistic position would render it impossible to learn from experience or argument, thereby blocking the road of inquiry. It is only realism that can account for the fact that – in science and in everyday life – predictions are fulfilled and a rational dealing with future events is possible to an important degree.[32]

On the basis of this bed-rock of realism, Peirce develops his pragmaticism. This pragmaticism can be considered as a methodological device (again: in science, philosophy and daily life) to distinguish real generals from generals which are only figments of the mind. Peirce argues that there are two fundamental psychological modes: doubt and belief. Following the definition of the

[28] Ibid., Vol. I: Principles of philosophy, 1.3 and 1.4.

[29] See also Jürgen Habermas, *Faktizität und Geltung* (Frankfurt am Main: Suhrkamp Verlag, 1992), p. 30.

[30] Ibid., Vol. I: Principles of philosophy, 1.20.

[31] Ibid., Vol. V: Pragmatism and pragmaticism, 5.503.

[32] Ibid., Vol. I: Principles of philosophy, 1.26.

psychologist Alexander Bain, belief is defined as 'that upon which a man is prepared to act'. The essence of a belief is the establishment of a habit (a general), while different beliefs are characterised by the different general modes of action they give rise to. Doubt, on the other hand, is related to action in quite a different way: doubt is an 'uneasy and dissatisfied state from which we struggle to free ourselves'. The irritation of doubt activates a process of inquiry aimed at the establishment of a belief and a habit: *'Belief does not makes us act at once, but puts us into such a condition that we shall behave in some certain way, when the occasion arises. Doubt has not the least such active effect, but stimulates us to inquiry until it is destroyed'*.[33]

The sole object of inquiry and reasoning is the settlement of an opinion upon which we are prepared to act. It is, therefore, of crucial importance to examine what method of inquiry serves this purpose best. In a semi-historical reconstruction, Peirce identifies four methods for the establishment and fixation of a belief. The first method is the method of tenacity, claiming that one should cling to one's beliefs, ignoring or turning with contempt to anything which disturbs them. The second method distinguished by Peirce can be regarded as the method of tenacity writ large. It is the method of authority, aiming at the preservation of some political or theological doctrine whose infallibility is presupposed. The third method examined by Peirce is the a-priori method, arguing that we should adopt some fundamental propositions 'agreeable to reason' and build an infallible and certain philosophy upon these first propositions. At the most fundamental level, Peirce criticises the methods mentioned above because they do not acknowledge the fallibility of all our beliefs. Consequently, they lack a procedure for dealing with mistakes and for establishing a habit of continuous self-correction. Only the final method distinguished by Peirce, the *method of science*, is fallibilistic through and through in its recognition that 'the first step towards finding out is to acknowledge that you don't know satisfactorily already' and that by means of observation and argument we can find better habits for coping with reality. The method of science consists of three types of reasoning: abduction, deduction and induction. The first step, abduction, is a creative act,

[33] Charles Sanders Peirce, The fixation of belief, in: Justus Buchler (ed.), *Philosophical Writings of Peirce* (New York: Dover Publications), p. 10.

consisting in the formulation of a hypothesis or possible explanation for a surprising event. Peirce described the form of abduction as follows:

- *A surprising fact C is observed*
- *But if A were true, C would be a matter of course*
- *Hence, there is reason to believe that A is true*.

Obviously, the result of abduction is not infallible and certain knowledge. On the contrary, the hypothesis gained from abductive reasoning is only the first, fallible step in the settlement of an opinion. The second step, deduction, consists in determining the conceivable consequences that would result from acceptance of a hypothesis as something to act upon. The third step of reasoning, induction, comes into play after the prediction contained in the hypothesis is fulfilled in the event. Induction is the inference of the major premise of a syllogism from its minor premise and its conclusion, and is described by Peirce as a species of 'reduction of the manifold to unity'. By means of induction, the initial hypothesis becomes part of the belief of an actor, until a new surprising event occurs.

As has been set out before, the method of science should not be interpreted as a strategy for successful individual action. It is intrinsically bound up with the notion of a community, governed by moral and social rules of investigation. It starts, in the words of Karl Popper, with the acknowledgement that 'I may be wrong and you may be right and together we might come nearer to the truth' and is therefore also intrinsically bound up with the principles of liberal democracy. The pragmaticist conception of reality is realistic *and* idealistic: *'The real, then, is that which, sooner or later, information and reasoning would finally result in, and which is therefore independent of the vagaries of me and you. Thus the very origin of the conception of reality shows that this conception essentially involves the notion of a COMMUNITY, without definite limits, and capable of a definite increase of knowledge.'*[34]

[34] Ibid., Vol. V: Pragmatism and pragmaticism, 5.311. For a post-modern discussion of Peirce's notion of the Community see Richard Rorty, *Objectivity, Relativism, and Truth* (Cambridge: Cambridge University Press, 1991).

4.2. *Pragmaticism and ITL*

From the foregoing part of this section, it can be inferred that there are striking similarities and dissimilarities between pragmaticism and the institutional theory of law. The most important point shared by pragmaticism and legal positivism since Hart is the 'epistemological primacy of practice', the notion that the function of knowledge, information and reasoning is the fixation of a belief (defined as 'that upon which a man is prepared to act'). Related to this notion is the recognition of the importance of normative rules in the fixation of a belief. Cognition of the outside (social) world is not only a matter of sense experience, but also a matter of normative rules, determining what counts as evidence and what counts as a fact in the context of scientific research and everyday social interaction. Social and legal institutions – containing practical information – are essential for the proper functioning of the 'method of science'.

A third element pragmaticism and ITL have in common is the interest both take in the phenomenon of language and – specifically – in the notion of speech acts. Earlier we set out that one of the foundations of modern legal positivism is the theory of speech acts as developed by Austin and Searle. In his speech act theory, Searle distinguishes between four types of act performed by a speaker when uttering a sentence: utterance acts, propositional acts, illocutionary acts and perlocutionary acts (see section 3.1).

It is interesting to see that Peirce as early as 1902 recognised that speaking a language is a form of rule-governed behaviour and distinguished between three elements involved in the utterance of a sentence: [1] a proposition (compare the propositional act); [2] the use made of a proposition in the performance of a speech act (compare the illocutionary act) and [3] the relation of the performed speech act to the settlement of an opinion and a habit (compare the perlocutionary act).[35]

[35] Peirce expressed the difference between the proposition and the use made of that proposition in performing a speech act as follows: 'one and the same proposition may be affirmed, denied, judged, doubted, inwardly inquired into, put as a question [þ] or merely expressed and does not thereby become a different proposition'. See also the analysis of Peirce's theory of speech acts by J.E. Brock (Peirce and Searle on assertion) and by E. Martens (C.S. Peirce on speech acts), in: Kenneth L. Ketner et al. (ed.), *Proceedings of the C. S. Peirce Bicentennial*

Notwithstanding the similarities between the analysis of speech acts by Searle and Peirce, there are some important *differences* between the two approaches too. First, it should be noticed that Searle's analysis of speech acts comprises considerably more types of speech act than Peirce's approach: whereas Searle distinguished five types of speech act (assertive, commissive, directive, declarative, and expressive), Peirce analysed the assertive speech act only. Second – and for the purposes of this article more important – the theory of meaning underlying the two approaches differs considerably. According to Searle, the meaning of a speech act can be adequately captured only in terms of intention and illocution (which necessarily also comprises the propositional content). Searle explicitly rejects any attempt to derive the meaning of a speech act from its perlocutionary effects on the hearer (in terms of his belief or response). The meaning of speech acts, Searle holds, is a matter of the speaker's reflexive intention to produce an illocutionary effect on the hearer.[36]

In contrast to Searle, Peirce holds that there is an intrinsic relation between the meaning of a speech act and the conceivable consequences (perlocution) resulting from it in terms of general habits. Ultimately, the meaning of an assertive speech act consists in the conceivable consequences that would follow from accepting the assertion as true and in the general modes of conduct that can be based upon this acceptance. Considering the important function of speech acts in the settlement of an opinion (especially in Peirce's notion of dialogue in the Community of investigators), it is understandable that there are social institutions establishing the responsibility of the speaker for the truth (legitimacy, sincerity) of his speech act.[37]

Without denying the importance of Searle's theory of speech acts for legal theory, we are of the opinion that the Peircian theory of the meaning of speech acts *fits better* within the framework and objectives of the institutional theory of law. After all, one of the postulates of ITL was the primacy of praxis, demanding a structure

International Congress (Lubbock: Texas Tech Press, 1981), pp. 281–287 and 289–301.

[36] *Speech Acts* (Cambridge: Cambridge University Press, 1990 [1969]), p. 47.

[37] Ibid., Vol. II: Elements of logic, 2.315.

of information and cognition rendering possible the application in action. The relation between normative and real institutions does not consist in the rule-maker's ('speaker's') intention to produce illocutionary effects on the subjects of the legal system. Rather, normative, legal institutions have real existence in virtue of their function of providing practical and theoretical information for acting subjects. The latter is in conformity with the pragmaticistic theory of meaning, where the function of speech acts for the establishment of an opinion and the fixation of belief is crucial. Moreover, since there is an intrinsic relation between the meaning of a speech act and its function in the formation of a habit, the importance of the context in which a speech act is performed becomes a matter of course. Different contexts give rise to different interpretations, expectations and conceivable consequences. In our view, this dynamic approach to the meaning of speech acts is essential for the socially realistic theory ITL claims to be.

5. CONCLUSION

In this article, we have examined the theory of speech acts underlying the institutional theory of law (ITL). ITL shares with traditional legal positivism the assumption that the nature and existence of legal norms cannot be accounted for in terms of morality or brute fact. Moreover, ITL shares with Hart's ordinary language philosophy an interest in the phenomenon of language and its relation to human action. ITL aims at solving some long-standing problems of jurisprudence by adopting insights from J.R. Searle's theory of speech act and by incorporating a theory of human action into legal positivism.

By incorporating Searle's theory of speech acts and a theory of human action into legal theory, ITL has contributed considerably to the further development of legal positivism. There are some important problems, however, which remain unresolved by ITL. In the first place, the action theory of ITL does not correspond with the assumptions of Searle's theory of speech acts. The latter takes as its starting point the perspective of the speaker, whereas the action theory of ITL starts from the perspective of the hearer. Consequently, ITL has some difficulties in accounting for the changes of

meaning of legal institutions and legal rules. In the final section, we therefore introduced an alternative approach towards the phenomenon of speech acts, based on the pragmaticistic philosophy of C. S. Peirce. Peirce emphasises the intrinsic relation between the meaning of speech act (and therefore acts-in-the-law) and the process of habit formation. Peirce's approach towards the phenomenon of speech acts has striking similarities with the action theory of ITL: it accepts the 'epistomological primacy of practice' (Weinberger) and emphasises the importance of normative rules in the processing of information and the determination of what counts as a fact.