On Performatives in Legal Discourse

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Abstract

Speech Act Theory has proved useful for classifying utterances, because of its seemingly universal application; on the other hand, legal theorists are interested in speech acts for several reasons, the most important being the fact that the theory helps to explain how the law uses language. In legal language there is a large number of speech acts, and most of them fall under the category of performatives: these do not report about doing something, their utterance actually constitutes performing an action. Because performatives are actions, they cannot be considered to be either true or false but only “felicitous” or “infelicitous”. Laws could be considered as types of speech acts, as well as contracts and wills. We can say that in, a very general way, speech act theory is helpful because it permits us to understand legal events from a new perspective: in this paper my attempt is to show that a difference exists between "doing something with words" and "doing something legal with words", and that doing something in speaking in the common language is different from doing it in speaking the legal discourse, since in the legal domain we do not speak to do speech acts, but to carry out legal acts.

1. Doing lawful things with words

Language can be used to perform different categories of speech acts. Two important types of such speech acts are making a statement and performing a legal act. Statements are made by way of descriptive sentences, such as ‘The sun is hot” or ‘Defendant stole the bag from the car’. If the sentence is true, the state of affairs expressed by it obtains and is then called a fact. If the sentence is false, it expresses a non-fact, which is a state of affairs that does not obtain. However, when analysing speech act theory from the point of view of legal theorists, we can start by noting the important role that speech acts play in the law. In a sense laws themselves may be seen as speech acts, i.e. as types of commands or authorizations. In contract law, for example, problems related to contract formation frequently give rise to questions whether particular utterances are speech acts of particular types; whether a certain statement is an offer, or that
utterance is an acceptance.

Another example can be found in courtroom proceedings: the hearsay rule is extremely difficult to conceptualize in a precise way, because the canonical formulation, that hearsay is "an out-of-court declaration introduced for the truth of the matter asserted," is ambiguous. Speech act theory may perform a clarifying function. The phrase "out of court declaration" may be made clear by referring to the types of speech acts: thus, out-of-court declarations can be defined as constantive speech acts.

In Austin’s view it is not useful to ask whether performative utterances are true or not, rather one should ask whether they work or not, that is, the act is accomplished when the state of the world changes following the utterance. A performative that works is called felicitous and one that does not is infelicitous. In order for them to work, such performatives must satisfy the social conventions governing the giving of orders, the naming of a ship etc. Austin calls these enabling conditions for a performative felicity conditions. These social conventions supporting performatives, show that there is a difference between performatives that are highly institutionalized, or even ritual, requiring a complicated and very explicit support, as is the case of a judge pronouncing sentence, and less formal acts like notifying, thanking, warning etc. The use of performatives in legal discourse is motivated by an institutional context which requires a clear indication of the force of the utterance. According to Austin (1962) and Searle (1989), explicit performatives are direct speech acts which state unambiguously the force of the utterance by means of a performative speech act verb.

Thus, one can easily see that the theory of speech acts offers a great wealth of indications for a characterization of legal acts. For example, the promise expresses the will to obtain performances from others, the command expresses the will to obtain a new state of things, a question expresses a state of uncertainty, an assertive act can express a conviction. However, the basic concepts of law are not isolated from other, non-legal basic concepts: when people use language, they use it as a tool that has many purposes, or to say it differently, language can be
used to perform different kinds of speech acts.

Starting from the central idea in Speech Acts, that is the distinction in Locutionary, Illocutionary and Perlocutionary Acts, if we adapt it to the domain of legal discourse, we can find out interesting aspects in view of further researches on this correlation, which can schematically be presented as follows:

<table>
<thead>
<tr>
<th>Utterance act</th>
<th>Meaning</th>
<th>Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Locutionary Act</td>
<td>the act of 'saying' a sentence with determinate sense and reference</td>
<td>issuing a document, declaring one’s name in a courtroom</td>
</tr>
<tr>
<td>The Illocutionary Act</td>
<td>making a statement, offer, promise, etc</td>
<td>all the language functions associated in job related activities</td>
</tr>
<tr>
<td>The Perlocutionary Act</td>
<td>what a speaker intends an utterance to achieve in an addressee.</td>
<td>all the language functions related to social/professional functions</td>
</tr>
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</table>

Table 1. Correlation between Speech acts and legal language.

A legal speech act is different from an everyday speech act in that it “invokes the rules and conventions of the law and carries with it a certain legal force”. That is, legal speech acts create obligations, permissions, and prohibitions. in a word, deontic states that are made obligatory by law. Thus, the feature that mostly differentiate performative speech acts from informative speech acts is the capacity of performative speech acts to change the state of the world; e.g., legal speech acts in commercial sales contracts obligate the contractual parties to perform the acts specified in their agreement.

2. Features of legal discourse

A legal text is something very different from ordinary speech. This is especially true of authoritative legal texts: those that create, modify, or terminate the rights and obligations of individuals or institutions. According to Peter M. Tiersma legal discourse diverges from ordinary English in "far more" ways
“than the technical languages of most other professions.”

V.K. Bhatia shows that legislative statements have “conventionalized communicative purpose mutually shared by the practicing members of the specialist community.” Also, it has been pointed out that the use of atypical sentence structure, conjoined phrases, impersonal constructions, redundant phraseology makes lexical and syntactic discontinuity unavoidable to some extent in the legislative statements, and also gives reason for the discourse patterning that is typically presented in such provisions. A great number of other studies and reports have also discussed the problematic nature of legislative discourse in general. However, a major feature of legal discourse is that statements have to be expressed in such a way that people can be certain about the intent of the law with regard to their rights and duties. Yet in order to truly understand these rights and obligations, legal language must not confuse and confound its readers, as is so often the case. Given the nature of much legislation, a change in words can result in a change of meaning and consequent uncertainty.

3. Performatives in legal discourse

In the process of actually doing legal acts, legal texts do not merely pass information, but reflect, and in fact enact, the adoption and discharge of obligations and commitments. Such texts are called performative in that the utterance itself is a social action that modifies the relationship among the parties.

The linguistic notion of a performative was first introduced by J. L. Austin and later on developed by Searle and others. Austin distinguishes two types of speech act: constative and performative. While constative speech acts describe a situation and can therefore be evaluated for how well they describe the world, i.e. they can be true or false, performative acts produce an action (e.g. "I sentence you to 20 year prison"). Later on, Austin outlines two types of performative speech: illocutionary and perlocutionary: in an illocutionary speech act, the utterance itself constitutes the action (like in "I pronounce you man and wife").
while in perlocutionary speech, the utterance is not the action, but generates the action as an effect (e.g. "Stand up!"). In later research, constative and performative speech acts appear to be not so divergent, but nonetheless Austin's definitions are still evocative of the purpose which lies behind some speech acts as well, therefore, of how certain speech acts are performed.

Although speech act theory has undergone severe criticism for not considering the actual realization of the acts, the virtually multiple functions of an utterance, the interaction of different acts, and the fact that their functions depend on the specific activity in which they are performed and interpreted, this theory can still give a theoretical basis for semantic and pragmatic analysis of utterances and for the formulation of hypotheses and expectations.

A performative is an utterance that not only passes on information but, only by being spoken, brings about a socially significant act. The classic example is the sentence "I now pronounce you husband and wife" that, when uttered by a priest during a wedding ceremony does not describe a relationship between the couple, but actually creates it. The state created by such an utterance is some type of social construction, i.e. the mere act of speaking places people in different socially perceived states. Moreover, this is likely to involve a certain set of obligations, e.g., of commitment, fidelity, financial responsibility etc.

It is also necessary to point out that the socially binding contract resulting from a performative is not always institutional, as in the case of a marriage. Other utterances as for example "I promise to wash the car tomorrow", are also performatives. In this paper, however, only performatives in institutional settings are considered. In these cases both the speaker and addressee must have definite socially recognized and/or legally appointed roles in order for the performatives to have force. For example, marriages can only be pronounced by some specially appointed social characters, like priests, ministers, ship captains, justices of the peace, etc., and on the other hand only unmarried couples of a certain age can become married (at least in most western countries). Because of the commitment effects of performatives, controls are to be careful so that performative acts are not made
fallaciously or unintentionally and when completed, are recognized as such. Thus, a variety of conditions must to hold for performatives to succeed or have effect.

Although legal documents and discourse may have create legal rights and obligations, or affect the ownership of property, nonetheless legal speech acts do not necessarily correspond to the standard form of performatives as observed by Austin J.L. So, we can say that many of the words in legal procedures perform legal acts, such as offering to sell goods, accepting an offer, filing a complaint: we call these legal speech acts.

4. Written legal performatives

Speech acts are usually considered as instances of face-to-face, spoken communication. But a great deal of legal communication is, in effect, a written extension of speech acts. In spite of the fact that speech acts are usually regarded to as single utterances that are part of a limited discourse exchange, documents commonly considered as legal texts (e.g., complaint letters, apologies, refusals, etc.) can easily be categorized as speech acts of a larger size, i.e., as elaborate examples of individual speech acts. In their essence, for example, letters of offer are commissives; certificates and diplomas are declarations; informational brochures are representatives; order forms are directives; and so forth; in general they create, modify, or terminate the rights and obligations of individuals or institutions. Austin might have called such texts “written performatives”.

A legal document is something very different from ordinary speech: this is especially true of authoritative legal texts, i.e. those that create, modify, or terminate the rights and obligations of individuals or institutions: such texts may appear in a variety of genres such as: constitutions, statutes, contracts, wills, deeds, orders, decrees, pleadings.

Obviously, in legal acts of both writing and reading there is often no immediate response from the reader or from the author. Authors draw their document as if they are speaking to their future readers; in so doing, they presuppose that the readers would react
as if in the case of an “oral” speech act, so they create implicit hypotheses about these reactions and write on the basis of the hypotheses. On the other hand, readers also, while reading, build their knowledge as if they were addressed by the author in an oral communication; the act of reading can be interpreted as succession of orders or instructions from the reader to the author. In this way, written acts, just like oral ones, cause intended effects in the world. In the case of orders or rulings, for example, hearers/readers carry out procedures as an intended effect of the acts brought about by the author.

But while in oral performatives the person making the performative is the speaker, and the hearer is addressed with the performative at the very moment in which it is spoken, in written communications the addressee is likely to receive the communication at a later time than it was made; the issues concerning the authorship of the document and the time when the performative comes into force are generally solved by the author's signature and the date on which the act was signed. The signature is the author's declaration of personal responsibility for the associated statements, and in signing the document the person becomes well aware of its contents.

Most documents used in legal procedures are typically of a performative type: it is the document itself that modifies commitments (rights and obligations) between two or more parties.

5. Law abiding performatives

As said above, the utterance of sentences that perform legal acts do not simply express a state of affairs, but are acts themselves, aiming at creating or changing a legal state of affairs. Some speech acts such as promising to buy a piece of property a loan or accepting an offer for something you own, may take legal effect only under special conditions, or conventions, as said above. Conventions can be institutionalized or non-institutionalized. If they are institutionalized, they are often codified in written form or explicitly agreed on.
Within the legal texts, the distribution of the various acts for every utterance could be schematically represented as follows:

<table>
<thead>
<tr>
<th>Types of Speech Acts</th>
<th>Core Functions of Legal Speech Acts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Declarations</td>
<td>attempt to change the world</td>
</tr>
<tr>
<td>Assertives</td>
<td>statements that may be judged true or false because they aim to describe a state of affairs in the world.</td>
</tr>
<tr>
<td>Performatives</td>
<td>attempts by the speaker to get the addressee to do something.</td>
</tr>
<tr>
<td>Commisives</td>
<td>commit the speaker to some future course of action.</td>
</tr>
<tr>
<td>Expressives</td>
<td>express a psychological state</td>
</tr>
</tbody>
</table>

Declarative LSA change the world: *I declare you married*

Assertive LSA inform and certify the existence and the truth of certain world states: *I certify you are Greek*

Performative LSA direct society to certain states

Assertive LSA inform and certify the existence and the truth of certain world states: *I certify you are Greek*

Performative LSA direct society to certain states

Imperative: *Smoking is prohibited*

Optative: *Grant for a third child*

Table 2. Determining classes of legal acts
As we can see, the communication patterns differ in the actions that they refer to and the arguments that these actions take. It must be clearly noted that the illocutionary logic of such patterns provides as well an explanation for the lexical choices; for example, the ability to use correct verbs/verbal phrases to introduce business conditions is of crucial importance for drafters of legal correspondence written in English.

Performatives in institutional settings only achieve the actions they are intended for if there are specific conventions linking the words to institutional procedures. Unlike constatives, performatives are not true or false but rather felicitous or infelicitous, this being determined by conventional institutionalized rules.

For example, commercial contracts compel the contractual parties to perform the acts specified in their agreement. Thus, if a salesman offers to sell goods at a certain price, the buyer's acceptance of this offer obligates the merchant to perform a sales transaction.

In contract law, different terms share a common meaning: *convey*, *transfer*, *negotiate*, *assign*, and *delegate* are legal speech acts that bring about a change in ownership. The feature that distinguishes a legal speech acts from another is the object of the ownership change, in essence, the context of the use of the word. Thus, one *conveys* real estate, *transfers* tangible personal property, *negotiates* commercial paper, *assigns* contractual rights, and *delegates* contractual duties.

The aim of legal performatives is to create facts, not only intersubjective acts which may have a value the parties in an informal context; the *state of the world* generated by a legal performative has a full binding force even for those who haven't any awareness of the relation that obliges them: The effect of the legal performatives are said to be "erga omnes". One simple but effective way to decide whether a speech act is a performatives is to insert the word “hereby” (a typical legalese word) between subject and verb. If the resulting utterance makes sense, then the speech act can be categorised as a performatives. For example:
We order the defendant to pay damages - We hereby order the defendant to pay damages Hereby does not sound strange in this sentence, thus we are fairly sure that this is a performative. On the contrary, we cannot transform the sentence I run every day in I hereby run every day, without feeling it odd. Performatives are given the power to transform reality through the insertion of the word hereby, which refers to the act of producing the speech act. the act of declaring hereby consents the performative to be effective.

Conclusion

In this paper I have attempted to show that a fundamental difference exists between "doing something with words" and "doing something legal with words". Even if legal speech acts are very close to the speech acts of common language called "performatives" they are not identical. Neither is it sufficient to say that the difference consists in the pragmatic context. In fact, since the context is law in all its instances, for example civil or criminal code, with well known difficulties of interpretation and application, it is law itself to represent the criterion for deciding what is legal and what is not, and thus we are caught in a vicious circle. As a matter of fact, performativity of a speech act cannot be automatically regarded as a synonym of its juridicity. Were it be so, legal discourse would only be a sub-sector of the common language, the latter being the only one where we do things with words. Moreover, doing something in speaking in the common language is totally different from doing it in speaking the legal language, In other words, in the legal domain we do not speak to do speech acts, but to carry out, by means of them, legal acts.

Selected Bibliography

McCarty, L.T. “A language for legal discourse. I. Basic features”. In