

«DOING THINGS WITH WORDS» AND THE LAW

1. In considerations on the functions of law sociological, psychological, and social-philosophical problems prevail. Attention should be paid, however, also to peculiarities of the normative discourse legal in particular, composed of linguistic expressions functioning as acts of influencing behaviour, and belonging to a larger group of verbal acts of «doing things». The most important contribution to the theory of such acts seems to be that of J. L. Austin. In this paper we shall examine the possibilities offered by Austin's work to the study of functions of legal discourse, while attempting at making the said theory more precise and at supplementing it by the findings of the theory of law (and of the theory of norms in general). This seems worth trying the more so as so far the subject of pragmatic functions of legal expressions has remained almost untouched upon.

2. Our task is restricted in comparison with problems usually considered by the critics (and defenders) of the Austinian theory of «speech acts» (philosophical connections with phenomenology, or even existentialism (1); difficulties in interpretation, superfluous terminological invention, sometimes leading up to «philosophical inflation» (2); redundancy of classifications of this «Linnaeus of speech acts» (3); dubious distinctions: apparent «phonetic, phatic and rhetic acts» are in fact not kinds, but some aspects —or parts— of «locutionary acts» (4), the latter being also «at best a dubious abstraction» of the «illocutionary acts» (5); objections against the distinction of «performative»-«constative» (6), etc.).

(1) W. CERF, «Critical review of How to do things with words», in «Symposium on J. L. Austin», ed. K. T. Fann. London, 1969, pág. 370. f., 379. Comp. Austin's qualification of his own work as «linguistic phenomenology», «Plea of excuses» in *Philosophical papers*. Oxford, 1961, pág. 130.

(2) L. J. COHEN, «Do illocutionary forces exist?», *Symposium...*, pág. 439.

(3) W. CERF, ob. cit., pág. 366, f.

(4) L. J. COHEN, ob. cit., pág. 420; M. BLACK, «Austin on performatives», *Symposium...*, pág. 409, f.

(5) M. BLACK, ob. cit., pág. 410.

(6) L. W. FERGUSON, «In pursuit of performatives», *Symposium...*, pág. 419.

The main issue discussion, however, are two stages of Austin's theory: that of the doctrine of performatives, and that of the general theory of speech acts (locutionary, illocutionary, and perlocutionary acts). This issue is of vital interest also for the present considerations.

The doctrine of performatives was elaborated in the late thirties and expounded in 1946, in the paper «Other Minds» (7), exerting considerable influence, in the study of law among others (8). Austin, however, formulated some objections against his doctrine in 1955 (9), and in 1956 declared himself against the distinction: performative-constative (10).

In the work of 1955, which seems justly to have been later called, «In pursuit of a vanishing distinction» (11), Austin states as follows:

«When we originally contrasted the performative with the constative utterance we said that

(1) the performative should be doing something as opposed to just saying something; and

(2) the performative is happy or unhappy as opposed to true or false.

Were these distinctions really sound? Our subsequent discussion of doing and saying certainly seems to point to the conclusion that whenever I «say» anything (except perhaps a mere exclamation like «damn» or «ouch») I shall be performing both locutionary and illocutionary acts, and these two kinds of acts seem to be the very thing which we tried to use as a means of distinguishing, under the names of «doing» and «saying», performatives from constatives. If we are in general always doing both things, how can our distinction survive?» (12).

Nevertheless, Austin thought still that the doctrine can be maintained within the framework of his new, wider theory:

«The doctrine of the performative/constative distinction stands to the doctrine of locutionary acts in the total speech as the *special* theory to the *general* theory» (13).

In 1956 his opinion sounded more pessimistic:

«We see (...) that stating something is performing an act just as

(7) Published in *Proceedings of the Aristotelian Society*, Supl. Vol. XX, páginas 148-187.

(8) Comp., e.g., K. OLIVECRONA, «Legal language and reality», *Essays in jurisprudence in honor of Roscoe Pound*. Cambridge Mass, 1962, esp. pág. 174, ff.

(9) In his Harvard lectures (posthumous ed. by J. O. Urmson, *How to do things with words*. Oxford, 1962).

(10) «Performative utterances», in *Philosophical papers*, cit., above.

(11) M. BLACK, ob. cit., pág. 401.

(12) *How to do things with words*, pág. 132.

(13) *Ibid.*, pág. 147.

much as is giving an order or giving a warning; and we see, on the other hand, that, when we give an order, a warning or a piece of advice, there is a question about how this is related to fact which is not perhaps so very different from the kind of question that arises when we discuss how a statement is related to fact. Well, this seems to mean that in its original form our distinction between the performative and the statement is considerably weakened, and indeed breaks down» (14).

This evolution of Austin's views sometimes is leading up to their total negation, sometimes to accepting either their former or their latter version, and to recurrent attempts at developing and making precise the sound and relevant elements of Austin's work (15), this being also —on a restricted are— of our concern.

3. In Austin's views the strong, but also the weak aspects of descriptionism, as opposed to reconstructionism in philosophy of language, are visible. Descriptionism has stressed «the multiplicity of the tools in language», paying attention to «countless» kinds of sentences and of their use (16). At the same time descriptionism is erring in its exploration of delusive suggestions of the intuitions of the ordinary language. One must agree with the remark made by M. Black, «(...) that the outcome of Austin's patient work illustrates the limitations of trying to 'screw out of ordinary language' (...) all that one can without trying to elaborate a plausible theoretical framework» (17).

Austin's initial point of departure consisted in some striking instances of utterances, constituting acts of doing something, and differing from instances of «just saying something», either true or false (the quality of «acts» being not ascribed to them at this stage of considerations). Afterwards, however, it became evident that beside «classical» instances of «doing by saying something» one comes across, in the ordinary language, many dubious cases (e. g., there are many ways of betting without using a set formula, there are mixed cases of making a truth-claim, and «doing something more», as in giving a warning); and finally that all kinds of utterances are «acts».

In order to overcome the first difficulty Austin has introduced the

(14) *Performative utterances*, pág. 238.

(15) Comp. papers by W. CERF, L. J. COHEN, M. BLACK, and L. W. FERGUSON, cit. above, and —in the same volumen— those by M. FURBERG, *Meaning and illocutionary force*, págs. 445-468; P. F. STRAWSON, *Intention and convention in speech acts*, págs. 380-400, and K. M. CHISHOLM, *Austin's philosophical papers*, páginas 101-126.

(16) L. WITTGENSTEIN, *Philosophical investigations*. Oxford, 1953, Section 23.

(17) M. BLACK, ob. cit., pág. 411.

criterion of «conventionality» of utterances-acts called «performatives». However, defining «conventionality» in a way which would permit to discern «performatives proper» is not an easy matter. Firstly, any correct use of words is in some sense «conventional», but this sense of the term does not serve the given purpose. Secondly, by «conventionality» it can be understood that in order to perform a given act one has to use fixed formula. This was also not satisfactory because quite a number of «unquestionable» performatives (e. g., promise) can be accomplished by using various alternative linguistic forms; Austin himself even remarked that: «In very many cases it is possible to perform an act of exactly the same kind *not* by uttering words, whether written or spoken, but in some other way» (18). That is why Austin has introduced still another concept of conventionality: a speech act (...) may be said to be conventional in the sense that at least it *could* be made explicit by the performative formula (19). As it was observed, the concept of conventionality as «being *capable* of being conventional» is hard to accept (20) but there is a sound element in this idea, as it will be shown below.

As to the second problem, Austin, when taking into account his initial purpose, possibly *contre coeur* was confronted with the necessity of dealing with the total area of speech acts. Utterances of all kinds ought to have the dimension of «doing by saying something», when treated as illocutionary acts, containing formes performatives along with many other categories. The criterion of divisions in this vast field are «illocutionary forces», enabling to discern among illocutionary acts (1) *Verdictives*, «(...) giving a finding as to something —fact, or value— which is for different reasons hard to be certain about»; (2) *Exercitives*, consisting in «(...) exercising of powers, rights, or influence»; (3) *Commissives*, which «(...) commit you to doing something, but include also declarations or announcements of intention»; (4) *Behabitives*, which «(...) have to do with attitudes and social behaviour»; (5) *Expositives*, which «(...) make plain how our utterances fit into the course of an argument or conversation, how we are using words, or, in general, are expository» (21). In accordance with his concept of conventionality Austin presents, under these five headings, a comprehensive list of verbs, apt to express explicitly what now is called the «illocutionary force» of the utterance.

(18) *How to do things with words*, pág. 8.

(19) *Ibidem*, pág. 103.

(20) P. F. STRAWSON, *ob. cit.*, pág. 386.

(21) *How to do things with words*, págs. 150-162.

This part of Austin's work seems to be somewhat not definite, just a first outline which had to remain undeveloped. Not clear seems to be the concept of «illocutionary forces» when related to that of meaning, or pragmatic functions of utterances. L. J. Cohen, while stressing Austin's merits in detecting the wealth and variety of performative meaning, observes that «his introduction of the concept of illocutionary force achieves nothing but to obscure the nature of this insight» (22). On the other hand, A. Ross claims that verbal expressions examined by Austin are simply «function-indicating verbs and phrases», normally unnecessary for the purposes of communications as far as the informative use of language is concerned, but playing an important role in other uses. Hence Austin was initially under a mistaken suggestion of a peculiar character of the so-called performatives, but later on he realized that they were by no means an exception, since the verbal expressions in question can be «added» to any speech act. In A. Ross's opinion, the idea that these expressions point to the «illocutionary force» of the utterances-acts, obscures the problem of the pragmatic functions of utterances (23).

The groups of illocutionary acts, distinguished by Austin, are marked —apart from their unusual terminology— by unclear lines of division, this being additionally testified to by examining the «illocutionary» verbs, ascribed to these groups. And so, to *verdictives* are said to belong, e. g., *describe, analyse, and understand*; in *exercitives* and *commissives* we deal with verbs which could be very well classed in an opposite way. Austin himself writes about the fourth (*behabitives*) and fifth (*expositives*) groups that they are perplexing, unclear, and not definite, and adds question-marks to some verbs of the fifth group (*conjecture, doubt, know, mention, neglect*) (24). Here the weak sides —pointed out above— of descriptionism become evident.

4. In our opinion, the theory of performatives and the general theory of speech-acts should be treated separately, and there are grounds to account for both. The former ought to be made more precise, while the latter is in need of developing —with some corrections.

In case of the theory of performatives it is advisable to return to

(22) L. J. COHEN, *ob. cit.*, pág. 441.

(23) A. ROSS, «The rise and fall of the doctrine of performatives», *Contemporary philosophy in Scandinavia*, ed. by K. E. Olson and A. M. Paul, Baltimore and London, 1972, pág. 205 f., 208 f.

(24) *How to do things with words*, pág. 151. 161 f., and on this subject D. HOLCROFT, *Meaning and illocutionary acts, The theory of meaning*, ed. by G. H. K. Parkinson. Oxford, 1970, pág. 178 f.

Austin's initial suggestions, and to restrict its range accordingly. Speaking about performatives, Austin had in mind the formulas of ritual, or «ceremonial» acts (legal among others). Such acts have, as a rule, not only verbal, but also non-verbal components (as the frequently repeated example of the «christening» of a ship —uttering proper words when smashing the bottle against the stern). All actions which are components of the act are «conventional» in the sense that (i) the way of performing them is prescribed by certain rules (as regards the form, circumstances, agents etc.), (ii) the performing of these actions in the prescribed way is decisive for the «validity» of the act, (iii) a «non-natural» (conventional) sense is ascribed to the act, this being connected with some determined social consequences of the act (25). This «conventionality» is not linguistic, but one governed by other, extralinguistic rules which only in an auxiliary and subordinate way can make use of linguistic rules. The extra-linguistic conventions in question can be in extreme cases rigid, making it impossible to adopt any alternative ways of performing actions which form part of the act «with equal validity». In quite a number of instances, however, the rules determining conventions can make some allowance as to the way of performing (and even as to the necessity of performing) determined components of the act, verbal one among other. There is an analogy with the linguistic conventionality which treats some alternative formulations as equally admissible from the point of view of the linguistic correctness («linguistic validity»).

Performative acts, as defined above, are essentially non-linguistic (governed by non-linguistic conventions), and so differ from Austinian «illocutionary acts» which are governed by linguistic conventions (as speech-acts) (26).

With respect to performatives so narrowly conceived Austin's doctrine of *infelicities* can be maintained, but cannot serve the purpose of a general division of utterances into happy/unhappy and true/false ones. Performatives can be (a) happy, and so either in the case of fulfilling the strictly fixed requirements (one way of performing), or that of fulfilling one of the alternative ways of performing. In the first instance the performative is happy as being in accordance with a strict prescrip-

(25) Similarly M. BLACK, *ob. cit.*, pág. 407, but it is hard to accept, as a property of conventional acts in the sense discussed here that «The mere doing of the act in accordance with the standard conditions makes the actor liable to certain social consequences» (this would typically pertain only to the so-called *commisives*). This property has been called further by M. BLACK «claim-generating» (who, however, adds the remark, «an inadequate label»).

(26) *Comp. M. FURBERG, ob. cit.*, pág. 454.

tion, while in the second the performative is happy as not transcending «the limits of tolerance» provided for by some given rules. Performatives can be (b) defective (Austin speaks here about *abuses*), or (c) void (Austin speaks here about *misfires*). Austin's definitions of defectiveness and voidness of performatives are by no means clear and complete. As to (b) Austin states that in such cases the act «is achieved», not explaining, however, if there are possibilities of its «sanation», of making it happy. The term «abuses» already makes it evident that Austin's conception of defectiveness is too narrow, this being corroborated by the fact that the only filled rubric of *abuses* is that of *insincerities* (in other rubrics are but questionmarks). As to (c) —the «classical» unhappiness— it remains undecided, if in such instances we deal with a performative, or not. Austin's words, «the act is not achieved» would suggest the latter being the case, but, when we have in mind Austin's views in this stage of his investigations that unhappy is a strict counterpart of false, we should adopt the opinion that also in such instances the performative exists (just as a false statement is nonetheless a statement) (27).

5. The theory of performatives, so restricted, is relevant for the theory of normative, esp. legal discourse, in its functional aspect. Performatives are conventional acts determined by various normative orders, such as system of law (but also norms of different social organizations, rules of customs, games, etc.) (28).

The question of the bearing of Austin's views on the problem of pragmatic functions of the legal discourse was examined lastly by A. Ross, who has elaborated a general concept of the «normative act» on the basis of an analysis of the legal act (he made there recourse to some of his earlier works) (29). In A. Ross's opinion, however, the normative acts are to be classed among the illocutionary acts. He claims that the normative acts cover (in some approximation) the first three categories of these acts (*verdictives*, *exercitives*, and *commissives*) On the other hand, the normative acts are described by this author as «conventional» in the sense of their agents, procedures, and «creative» consequences being determined by certain sets of rules (norms). This corresponds to our concept of the «strict» performative as a conventional act determined by some (no-linguistic) rules, but does not correspond to the

(27) Comp. *How to do things with words*, pág. 14 ff.

(28) Comp. L. NOWAK, S. WRONKOWSKA, M. ZIELINSKI, Z. ZIEMBINSKI, «Czynności konwencjonalne w prawie» («Conventional acts in law»), *Studia prawnicze*, 33, 1972, págs. 73-99.

(29) A. Ross, ob. cit., pág. 209 ff. Comp. his *On law and justice*. London, 1958. Ch. IX.

concept of illocutionary act. The latter is not submitted to such rigorous requirements, being only linguistically conventional and apt to be expressed in quite a number of «loose» linguistic forms (with the possibility of making explicit their «kinds of illocutionality» by introducing suitable illocutionary verbs). In our opinion, performatives are in fact «normative acts», being always determined by non-linguistic rules (norms), while illocutionary acts, and even the first three groups of them, constitute a larger category: the normative acts constitute but some part of them, the part which additionally fulfills the requirements of performatives as determined above.

Norms prescribing conditions under which the normative act comes into existence are, in A. Ross's opinion, «the norms of competence» (of creating other norms). One can hardly agree, however, with the view that any normative act is a norm-creating one. This is dubitable already within the range of legal acts to which, e. g., beside statutes —judicial decisions, administrative resolutions, wills, and contracts are said to belong. It seems more plausible to discern, among legal acts, those of norm-creation, and those of norm-application (30). But the doubts are still greater when one considers other kinds of normative acts, which the author has called «conventional acts» (based, e. g., on customary rules, or rules of games) (3). Making a move in a game of chess is certainly a normative (conventional) act, but can the quality of norm-creating act be ascribed to it?

Nevertheless, Austin's doctrine can be essentially improved by following the suggestions of A. Ross. The narrower theory of performatives is evidently in need of introducing the concept of «normative conventionality», and that of normative act. In particular, this theory can profit from the findings of the study of law as to the characteristics of legal act. The wider theory of illocutionary acts, on the other hand, did not take into due consideration the important place of «normatives» among these acts (32). One has to admit that Austin partly realized the possibilities offered by the study of law when he said that «(...) writers on jurisprudence have constantly shown themselves aware of the varieties of infelicity and even at times of the peculiarities of the performative

(30) Comp. A. Ross, *The rise and fall...*, pág. 210; Z. ZIEMBINSKI, «Kompetencja i norma kompetencyjna» («Competence and norm of competence»), *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 4, 1969, esp., pág. 29 f.; K. OPALEK-J. WRÓBLEWSKI, *Zagadnienia teorii prawa* («Problems of legal theory»). Warszawa, 1969. Ch. VI & VII.

(31) Comp. A. Ross, *The rise and fall...*, pág. 212.

(32) *Ibidem*, pág. 212.

utterance» (33), but his doctrine does not show any marks of the influence of the study of law, and of the legal theory in particular. Nor are there any traces of attention being paid to findings of a more general nature, —those of the theory (or philosophy) of norms. One has to stress that the outcome of considerations of «writers on jurisprudence» on problems of infelicity is surely of greater importance than Austin's results. The study of law dealt successfully with various kinds of invalidity and defectiveness of legal acts, with the sources and consequences of different infelicities, with the ways of «sanating» some of them, etc.

On the other hand, as Austin justly pointed out, «writers on jurisprudence» lacked (and many lack still) proper insight into the nature of the utterances used in «acts in the law» as utterances being something different or something more than «just saying something», utterances being —to put it shortly— «deeds». The general idea was (or still is) that what one deals in legal discourse with are linguistic expressions simply (though not necessarily statements true or false) (34). Austin's doctrine in both its versions demonstrates the peculiarities of the utterances in question —their «performative» character, or their «force» This doctrine gives valuable insights into the pragmatic functions of legal discourse— this differing only in terminology from Austin's ways of expressing it.

6. Now we have to reconsider Austin's general theory of speech-acts its main points being the notions of the illocutionary act and force. This theory is concluded by the thesis that in uttering words we always do something, perform an act. This thesis is fundamental for a general theory of speech-acts, but at the same time despressing in our search for utterances-acts in a qualified sense of doing with words something «specific», different from stating something.

In the restricted theory of performatives we have already isolated a narrow group of such utterances-acts (or parts of acts), governed by some extra-linguistic rules (norms). The question arises if it can be possible to discern among the illocutionary acts a larger group of utterances which do not fulfill strict conditions of performatives, but nevertheless constitute instances of some specific «doing things with words».

This question will be answered in the affirmative by resorting to our views concerning directive (normative) meaning, and in comparison with

(33) *How to do things with words*, pág. 19.

(34) The use of the terms «utterance» and «statement» by *Austin* presents some complications but this will not be entered into here.

it —optative and evaluative meaning (35). In our opinion, one has to distinguish, on the one hand, utterances (statements) referring to extralinguistic states of affairs (in a wide sense; reports on actual psychological experience, or about the utterances of the speaker, also belong here). On the other hand one has to distinguish «self-referring» utterances, the meaning of which constitutes (and exhausts) acts created by the very formulations of these utterances. While the utterances of the first group are secondary in relation to states of affairs they refer to, those of the second group are themselves primarily facts —states of affairs— bearing the character of acts performed by the speaker.

We do not attempt at formulating, at this not much advanced stage of investigations, a full theory of utterances-acts in the sense formulated above. An important group of them will certainly constitute volitional acts (*volitives*) by analogy to Austin's terms). One subspecies of volitives are *directives* as acts of influencing behaviour. Directives are addressed to determined persons. Among directives, norms as categoric in character, are acts of decision as to the way of conduct of the addressee (36). Of great interest will be another subspecies of volitives —verbal acts of decision, as to the speaker's own conduct (e. g., promise, resignation, voting). Acts of the latter category, still in need of elaboration, do not have addressees but have as a rule «destinataries» —persons affected by the said decisional acts. Beside *volitives* one must mention *optatives* and *evaluatives*, having neither addressees, nor destinataries, but being only «audience-directed», prevailingly with the intention to influence it some way, this way being not explicitly determined, however.

This certainly does not exhaust all relevant groups of the said acts, and does not amount to a complete characterization of the groups mentioned above. It should be stressed only that this conception is based on some theoretical framework, neglected in the doctrine of illocutionary acts. Anyway, this theory makes it possible to delimit a large field of utterances in which by saying words we do something different (or something more) than stating something. Also performatives belong to this

(35) K. OPALEK, The problem of 'directive meaning', «Festkrift til Professor, Dr. Juris et Phil. Alf Ross», Kobenhavn, 1969; «On the logical semantic structure of directives», *Logique et Analyse*, págs. 49-50, 1970; «Directives, optatives, and value statements», *Etudes de Logique juridique*, v. V, 1973.

(36) «Categoric» in contradistinction to «hypothetical» (= dependent in its fulfillment on the will of the addressee, as directives other than norms are). This division ought to be distinguished from «conditional» - «unconditional». Comp. M. MORITZ, «Uber konditionale Imperative», *Festkrift till Professor, Dr. Juris et Phil. A. Ross*, pág. 352 f.

larger group of utterances-acts—in case when the given utterances fulfill additionally conditions which were made precise above. In this sense one can treat, in accordance with Austin's words, the (reformulated) theory of performatives as a «special theory» in relation to the «general» one, here outlined. And so Austin's doctrine makes it in fact possible to develop two theories on «doing things with words»: a narrower one, the subject of which are performatives, and a wider one, on utterances «self-referring» to acts created by their formulation. The latter utterances can be provisionally called «performatives *sensu largo*», and the former «performatives *sensu stricto*».

The links between the theory of directives and norms, and that of performatives *sensu largo* are indubitable, and so are mutual profits to be drawn out from their achievements. The theory of performatives *sensu largo* includes the theory of directives and norms into a wider framework, shedding light on properties common to directives and norms on the one hand, and to other types of utterances belonging here, on the other, as well as on peculiarities of directives and norms within the range of performatives *sensu largo*. Studies on directives and norms—legal ones in particular—are more advanced, and so they can effectively serve the investigations on other kinds, special attention has to be paid—as Austin himself has pointed out—to value-statements (38).

Finally it should be stressed that norms, and so also decision as acts as to one's own conduct, are utterances-acts of doing things with words in a pragmatically particularly relevant sense, as volitive acts in which the intended effect is made explicit (by naming the agent and his deed). From this point of view optatives and evaluatives are of lesser importance, as the intended effect of these utterances-acts is much more vague. Law is surely doing things not with words only, but it is very important to pay proper attention also to the functions performed by its language as that of norms, addressee-directed acts of influencing conduct.

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(37) Comp. on this point P. F. STRAWSON, ob. cit., pág. 398 ff.

(38) While paying no attention to norms, Austin (*How to do things with words*, página 162) stressed the importance of his theory for the analyses of the basic evaluative term «good», comp. D. HOLDCROFT, ob. cit., pág. 166 f.

