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ASCRIPTIVE LEGAL LANGUAGE AND ITS ORIGINS IN THE SPEECH ACT THEORY[2]

This article presents H.L.A. Hart's theory of an ascriptive legal language as it has been developed in his influential paper "The Ascription of Responsibility and Rights" through the application of a methodology of the speech act theory proposed especially by J.L. Austin and partly by J. Searle. I propose to retrieve Hart's theory of ascriptive statements in the face of critics by carefully analyzing the ascriptions in the context of the speech act theory and capturing their linguistic applications in the legal language, at least for some of them. The result is not the refutation of ascriptivism but rather an opportunity for a constructive modification of Hart's position.
Keywords: *ascriptive, descriptive, performative, speech acts, legal language.*

The close connection between philosophy of language and jurisprudence was emphasized by H.L.A. Hart, and has been recognized for decades. Hart argued that many central issues in jurisprudence depend on an adequate conception of language: "I do not think the general character of acts in the law <...> can be understood without this idea of the performative use of language" [1. P. 276]. In spite of Hart's characterization of his methodology, questions about the relationship between language and law did not become central of some decades after publication of *The Concept of Law* [2]. Only during the past forty years or so, many linguists and social scientists (linguistic anthropologists, psychologists, and sociologists) have turned their attention to legal language. For such researchers, the complex language of lawyers becomes a fascinating topic to study. The results of their work have led to a better understanding of how legal language operates, and that linguistic knowledge can facilitate our understanding of the substance of law (see [3–6]).

However, Hart's first attempts to develop a conception and account of legal language that would be based on the idea of the performative use of language can

[1] (рус.) В.В. Оглезнев. Аскриптивный юридический язык и его истоки в теории речевых актов.

Аннотация. В статье рассматривается теория аскриптивного юридического языка Герберта Харта в том виде, в котором она представлена в его известном эссе «Приписывание ответственности и прав». Основные положения подхода Харта анализируются посредством применения методологии теории речевых актов, разработанной прежде всего Джоном Л. Остином и Джоном Сёрлом. Как известно, Харт не завершил свой проект аскриптивного юридического языка, остановившись на анализе приписывания ответственности и действий. В статье же предлагается в некотором смысле реабилитировать его проект за счет дальнейшего развития предлагаемых им аргументов. Внимательный анализ аскрипций как особых речевых актов в контексте теории речевых актов и фиксации их лингвистических характеристик (семантических и прагматических свойств) позволяет справиться с поставленной задачей. В результате мы получаем модифицированную и усовершенствованную теорию аскриптивного юридического языка, пусть даже и отстоящую от оригинального источника.

Ключевые слова: аскриптивные высказывания, дескриптивные высказывания, речевые акты, юридический язык.

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be found in his earlier article "The Ascription of Responsibility and Rights" [7]. For the purposes of my research, this article is of particular interest. In it, Hart proposed a new approach to statements that refer to action and to the philosophy of legal language as well. Thus, understanding Hart's views through the analysis of the speech act theory will allow reconstructing his theory of legal language and developing an original theory of ascriptive legal language. Thus, I want to prove the thesis that Hart's approach to the legal language is rooted in the speech act theory proposed especially by J.L. Austin and partly by J. Searle. Before proceeding to the study of the theory of ascriptive legal language, one should consider the nature and meaning the speech act in the way that it is presented in philosophy of ordinary language.

In his *How to Do Things with Words* [8], J.L. Austin argued against a positivist philosophical claim that the utterances always "describe" or "constate" something and are thus always true or false. After mentioning several examples of sentences that are not so used in this context, and are not truth-evaluable, he introducintroduces "performative" sentences as another instance. According to Austin, a performative utterance is a sentence that neither describes nor affirms a fact, but contains a felicity condition that must be fulfilled when the performance takes place. Thus, Austin distinguishes between statements that say and statements that do. Unlike the constative statements, the performative statements are neither true nor false. A performative is both an action and an utterance. The fundamental distinction between performative statements and constative statements is grounded in their different verification conditions. The performatives can only be verified in terms of correct or incorrect. Constative sentence, instead, is a sentence that affirms facts, reports events, and describes situations and conditions. It must contain truth-values. Let us consider, for example, the statement "It is raining". It is true if the fact in the actual world that it is raining right now. If in fact it is not raining now, it is simply possible to say that the statement is false. However, when we take a deeper look at the constative, we will find it also fulfills the criteria for a performative sentence, since the above-mentioned sentence is a constative only in terms of its surface structure. In a deep structure, it will become "I tell you that it is raining". In this form, the constative sentence also satisfies all the criteria to be a performative. Therefore, in short, we can say, somewhat roughly but accurately, that the set of constative sentences is also included in the set of performative ones. The principle of maximum ease of articulation is reflected in this pattern. The metrical sentence "I tell you…" is unnecessary and therefore is omitted. A sentence "I tell you that it is raining right now", modified and disposed of the phrase "I tell you…", appears only in the surface structure of "it is raining".

The most important Austin's contribution to the speech act theory is his analysis of the speech act structure. He distinguished among *locutionary* acts, in which a speaker uses a meaningful sentence to express a proposition; *illocutionary* acts, which are identical to our speech acts defined above, and *perlocutionary* acts, which are characteristic effects of illocutionary acts. Austin also provides an account of *infelicities*, which divide into *misfires* and *abuses*. In the former, a speaker attempts to perform an illocution but a flaw prevents it from being more than a locutionary act. In the latter, the putative speech act is performed, but the speaker has abused the practice that makes it possible by for instance a failure of sincerity (see [9]). But Austin does not provide a complex definition of an illocutionary act, and

just claims that to perform a locutionary act is to perform an illocutionary act, that is, performing an act of speaking in opposition to the actions of speaking. Therefore, to determine whether a locution performs an illocutionary act, one must ascertain whether the locution asks answers, warns, informs, etc. Using the simple test of the first person singular, present indicative active form, Austin gets a list of verbs. He distinguishes five more general classes and calls them classes of utterance, according to their illocutionary force, by the following names: *verdictives*, *exercitives*, *commissives*, *behabitives*, and *expositives* [8. P. 150]. But Austin finds that even then some fresh classification altogether is needed, and he is not putting any of this forward as minimally definitive.

Searle's differentiation of the illocutionary force of a statement and the propositional content used by him as the basis for classification of speech acts allows him to reveal the weaknesses of Austin's taxonomy and to offer an alternative taxonomy [10. P. 7–16]. What are the criteria by which we can tell, of three actual utterances, that first is a report, the second–a prediction and the third–a promise? Searle answers that in order to develop higher-order genera, we must first know how the species of promising, predicting, reporting, etc. differ one from another. He attempts to answer that question by discovering that there are several quite different principles of distinction, that is, there are different kinds of differences that enable us to say that the force of this utterance is different from the force of that utterance. Searle notices that "the most important weakness of the taxonomy is simply this: there is no clear or consistent principle or set of principles on the basis of which the taxonomy is constructed" [Ibid. P. 8]. Another source of confusion relates to the tendency to mix illocutionary verbs with the types of illocutionary acts[1]. Searle points out that two nonsynonymous verbs, there is no need to describe them as two different illocutionary acts. His diagnosis is that:

[T]here are (at least) six related difficulties with Austin's taxonomy; in ascending order of importance: there is a persistent confusion between verbs and acts, not all the verbs are illocutionary verbs, there is too much overlap of the categories, too much heterogeneity within the categories, many of the verbs listed in the categories do not satisfy the definition given for the category and, most important, there is no consistent principle of classification [Ibid. P. 9].

Searle wants to maintain a clear distinction between illocutionary verbs and illocutionary acts, because illocutions are a part of language as opposed to particular languages. But illocutionary verbs are always a part of a particular language: French, German, English, etc. The differentiation of illocutionary verbs and illocutionary acts serves as the basis of Searle's research strategy. I do not think that Searle's taxonomy is better than Austin's is. Perhaps, Searle thinks at Austin's classification as a rigid instrument of analysis. But he is wrong. If we interpret Austin's "classes" not as rigid sets, but as more flexible types, which overlap, have no clear boundaries, and can be mixed in order to generate hybrids, we get to think that Searle's objections misses the point (see [11]). Austin clearly knows that is impossible to create sharp distinctions on illocutionary profiles without "oversim-

[1] Searle notes: "[S]ome verbs, for example, mark the manner in which an illocutionary act is performed, for example 'announce'. One may announce orders, promises and reports, but announcing is not on all fours with ordering, promising and reporting. Announcing, to anticipate a bit, is not the name of a type of illocutionary act, but of the way in which some illocutionary act is performed. An announcement is never just an announcement. It must also be a statement, order, etc." [10. P. 8].

plifications". However, Searle offers three "significant" dimensions as the basis for his classification of speech acts: the illocutionary purpose, the direction of fit, and the condition of sincerity. This provides, as he claims, the opportunity to prove the existence of the following "basic" illocutionary acts instead of illocutionary verbs: *representatives*, *directives*, *commissives*, *expressives*, and *declarations* [10. P. 10–14].

The application of analysis of the speech act theory to the utterance of some legal sentences shows that the uniqueness of legal discourse cannot be studied without exploiting certain analytical tools, and without the need to assume a special meaning of the legal concepts and their ontological and epistemological characteristics [12. P. 4]. The most successful strategy for explaining these characteristics about the legal concepts is Hart's ascriptive approach, presented in the article "The Ascription of Responsibility and Rights" [7]. The speech act analysis was Hart's starting point for the elaboration of his legal antireductionism (he consistently held that legal language cannot be reduced to non-legal language and that legal terms are not descriptive), and it is commonly noted that since this early approach his jurisprudence "moves gradually away from its emphasis on speech acts" [13. P. 171]. Indeed, as T. Cole correctly claims "reading Hart in the context of Austin provides genuine insight into the true nature of Hart's own work" [12. P. 16].

Hart noted that in legal language, there is a contradiction between the epistemology of descriptive utterances, which describe facts about an act that can be confirmed by observations, and the epistemology of ascriptive utterances, which cannot be confirmed because it is impossible to state the epistemic question of truth/falsity. In his own words:

My main purpose <...> is to suggest that the philosophical analysis of the concept of a human action has been inadequate and confusing, at least in part because sentences of the form "He did it" have been traditionally regarded as primarily descriptive whereas their principal function is what many venture to call ascriptive, being quite literally to ascribe responsibility for actions much as the principal function of sentences of the form "This is his" is to ascribe rights in property <...>. the logical peculiarities which distinguish these kinds of sentences from descriptive sentences, or rather from the theoretical model of descriptive sentences with which philosophers often work, can best be grasped by considering certain characteristics of legal concepts, as these appear in the practice and procedure of the law rather than in the theoretical discussions of legal concepts by jurists who are apt to be influenced by philosophical theories" [7. P. 145].

For Hart, statements ascribing actions are characterized by being "defeasible"; he thereby extends to the sphere of action features that, in his view, belong to legal concepts. He thinks that legal concepts cannot be given precision by specifying a number of conditions that are necessary and jointly sufficient for the validity of the concept. In his opinion, for the definition of a legal concept, one needs a (necessarily open) list of exceptions, or negative circumstances, that exclude the application of the concept or stipulate that it be applied in a more moderate or partial form. Like Austin, Hart tries to find out significant (generally grammatical) characteristics of the ascriptive utterances and points out that:

[B]y the utterance of such sentences, especially in the present tense, often do not describe but actually perform or effect a transaction; with them an individual can claim proprietary rights, confer or transfer such rights when they are claimed, recognize such rights or ascribe such rights whether claimed or not, and when these

words are so used they are related to the facts that support them much in the same way as the judge's decision. These sentences, especially in past and future tenses, have a variety of other uses not altogether easy to disentangle from <...> their primary use [7. P. 160].

From Hart's view, two important methodological conclusions can be supported. First, the ascription of responsibility or rights is performed by saying something; action verbs are important especially in the descriptive use of present and future tenses. Second, the ascriptive use occurs mainly in the past tense, where the verb is often both timeless and genuinely referring to the past as something distinguished from the present.

Hart's ascriptivist theory has been the subject of numerous criticisms (especially by Peter Geach and George Pitcher). It should be noted that Hart took the criticism very seriously, saying later: "There were some things which were quite useful and true in it, but I think there was a central mistake. I claimed that the statement that a person has done an action is not a description but an ascription – let's say, a way of saying it's your responsibility. And I think that's wrong" [14. P. 276]. Moreover, in the introduction to his *Punishment and Responsibility: Essays in Philosophy of Law,* Hart claims: "I have not reprinted here, in spite of some requests, my earliest venture into this field: 'The Ascription of Responsibility and Rights' <...> My reason for excluding it is simply that its main contentions no longer seem to me defensible, and that the main criticism of it made in recent years are justified" [15. P. 6]. Nevertheless, because of these brief comments, it is difficult to conclude exactly what points of ascriptivism Hart rejected, and whether he rejected them at all. But his suggestion of the ascriptive nature of statements of action can perhaps be rescued and redeveloped in a different way. The same point can be found in Duarte d'Almeida, who correctly notes that Hart's approach to the analysis of the legal language looks a little superficial because it is limited only to distinction of descriptions and ascriptions on some examples and postulation the performative character of legal utterances, disregarding research of ontological characteristics of legal terms and the speech acts connected with their use. Although Hart's terminology is occasionally imprecise, this does not preclude the substance of Hart's thesis being salvaged, independently of any confusion between "meaning" (or semantic "content") and illocutionary "force". Hart was expressly concerned with the explanation of the "functions" or "uses" of legal concepts, and his discussion is open to reconstruction in terms of not so much the semantics of legal concepts as the pragmatics of their use [13. P. 172–173].

As we have seen, according to Hart, statements of the kind "Smith did *x*" are not descriptive, but ascriptive statements, their primary function being the ascription of responsibility to an agent. In order to understand the implications of these assertions, we need some conceptual precision of the meaning of "ascription" and of "responsibility" (see [16]). Let us consider for a better understanding of Hart's ascriptivist theory an argument proposed by D.G. Lagier that the term "ascription" can be understood in a weak or in a strong sense [17. P. 34]. In the weak sense, "ascribing" is equivalent to answering the question "Who did *x*?", the difference between ascriptions and descriptions in this weak sense is the same as that between answering the question "Who did *x*?" and the question "What did Smith do?". In the strong sense, the ascriptive function of language is different from the descriptive function in that it implies an irreducible degree of discretion (ascription in the

strong sense is a matter of decision rather than a matter of discovery), is relative to the respective context (that is, our interest in ascribing an action to one agent or other, or to ascribe one action or other to some agent, depends on the context) and is "defeasible" (that is, ascriptions are *prima facie).*

The approach proposed by J. Feinberg can help clarify the distinction between weak and strong senses of the term "ascription". He examines a variety of notions of ascription and responsibility and distinguishes: l) ascription of a causal relationship, 2) ascription of causal agency, 3) ascriptions of simple agency, 4) imputations of fault, and 5) ascription of strict liability [18. P. 144–147]. Once these five cases have been distinguished, we recognize that there is always some sense of "responsibility" and some sense of "ascription" for which it is true that statements of action ascribe responsibility, and there are four cases in which ascriptions in the strong sense are made. There is no doubt about those cases where a blameworthy action, or responsibility in the strict sense, is ascribed to someone (in these cases, there is an evaluation of the action and a decision about whether or not a sanction should be imposed). But all the other cases may raise doubts. Feinberg holds that there is also an ascription in the strong sense when we ascribe only causal responsibility or causal agency to an agent, because to determine the cause of some outcome is not merely a descriptive question: from a number of different events, all of which are necessary or contributing conditions of the effect, one must be chosen as the cause [19. P. 39]. This choice is a matter of decision (that is, it has an irreducible degree of discretion), it is contextual, and it is revocable. The only case where there is no ascription in the strong sense is that of the ascription of simple agency. The standard example is bodily movement: we just move our fingers [18. P. 147]; we do not have to do anything to cause our fingers to move. When we ascribe simple acts to people, we are making ascriptions of simple agency.

Searle offers three significant dimensions as the basis of the classification of speech acts: illocutionary purpose, direction of fit between words and the world, and sincerity condition. These dimensions according to an ascriptive justify introducing of the illocutionary act, a new speech act – namely, the ascriptive speech act – to the taxonomy (see [20]). For instance, a such *prima facie* descriptive sentence "I declare the war" uttered by the President is the good example of an ascriptive, because there are speaker with the official position, particular group of listeners (i.e. population of the country), ascriptive illocutionary purpose as well as the propositional content of the illocution indicates the obligation to do or to follow a certain line of conduct, the direction of fit is a world-to-words (something is changing), and listeners have to do some actions or to follow a certain line of conduct. Thus, it is possible to demand that *an ascriptive* is a distinct illocutionary act with special characteristics and to claim the introduction of the new unit in the current taxonomy of speech acts.

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