

LAW AS LINGUISTIC PHENOMENON: PERFORMATIVE FUNCTION OF LANGUAGE

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Abstract. The paper discusses law as a linguistic phenomenon by focusing on the performative function of legal language. In the introduction the notion of language, as well as the variety of its possible functions are explained by referring to the theories of such scholars as Roman Jakobson and John Langshaw Austin. The introduction is concluded with a very brief presentation of legal language characteristics and the way it can be perceived as a performative speech act. Subsequently, materials and methods used in the course of this analysis are listed. The study focuses mainly on real life examples of utterances expressed during chosen adoption hearings in American courts. The specific communicative situations have been chosen due to their complex emotional and legal character as an example to illustrate how certain seemingly identical statements may be of completely different functions. After the examples are compared and discussed, authors' conclusions are presented and the initially posed question of whether or not legal utterances can be deemed as performatives is answered and justified.

Keywords: performatives, legal language, language functions

INTRODUCTION

The law can be seen as a social phenomenon that constitutes a conceptual system based on customs, traditions, and rules concerted between members of a given community.

Furthermore, it has an organizing and binding nature as well. What allows people to materialize abstract notions and to accord and consolidate legal principles, is a tool accessible to most humans, namely language. What can be retrieved from sociolinguistic studies is the fact that any particular purpose for which language is used, influences its development and form. It means that a language adapts itself to the particular needs of its users. The language of law efficiently exemplifies this premise, as the structural and lexical features of legal language reflect the complex and multilayer quality of the legal system. It must be emphasized that any legal system is a product regulated by the society and hence, based on a convention established and agreed on by its members. Accordingly, the performative and causative character of the language develops as a result of a given social convention respected among all the parties involved. The semantic value of a message may therefore be considered of a lesser significance than the context and other factors of a particular communicative situation. In this paper, the authors aim to analyse instances of such situations and identify the factors which ultimately determine binding consequences of an utterance.

For the purpose of this paper, law is considered to be a special manifestation of language in one of its particular varieties (Durant & Leung, 2017, p. 4). Questions regarding the reason why people react so strongly to the utterances displaying legal language's characteristics are herein going to be posed. Simultaneously, the authors of the present work will consider the impact of context and circumstances in which such utterances must occur to have an effective impact on the recipients of the message.

MATERIALS AND METHODS

In the first part of this paper, the functions of language defined by Roman Jakobson as well as Austin's theory of speech acts, together with performative function of language is presented and discussed. The second part focuses on legal language, and more specifically on its definition and particular characteristics. Subsequently, the authors analyse certain practical aspects of the usage of law by examining their linguistic layer closely. Special attention is paid to the differences in the impact that the standard and legal varieties of language are characterized with in the specific communicative situation.

In order to illustrate the performative nature of the legal language, examples of utterances expressed in a courtroom are provided. The examples constitute utterances collected from an adoption of finalization hearings held by the Oakland County Circuit Court (Michigan, USA) and Cuyahoga County (Ohio, USA). The legal system in the United States of America is a common law system that, due to the federal character of the country, operates simultaneously on two different levels: state legal systems coexist with the federal ones. Due to the pluralism of law, provisions, which are not governed by the federal law, may vary depending on the particular state's law. Such is the case of videotaping the final adoption of the hearings – in some states it is allowed only exceptionally (for example, on some days of October, which is a National Adoption Awareness Month in the United States), in others, such as Indiana, the Supreme Court allows the hearings to be videotaped anytime, leaving the final decision at the sole discretion of the judge (Indiana Supreme Court Order from September 23rd, 2020). The videos used for the analysis have been videotaped and published online either officially by the court itself on the occasion of the National Adoption Day or by the families who were

the parties to the videotaped hearings.

This specific group of communicative situations has been selected basing on its highly emotional character and potential richness of utterances which represent the context and emotions of the addresser, hence, may function as the referential or emotive function. The scope of the analysis is to determine similarities and differences between the utterances in the two groups in terms of semantics and pragmatics.

RESULTS AND DISCUSSION

Functions of language

In debates on the mechanisms and means in which language impacts reality, it is fundamental to consider the essential works on theory of language and its *functions*. Some of the earliest formal reflections regarding the purpose of language are attributed to Karl Ludwig Bühler and his theory of the linguistic sign represented with The Organon Model. Bühler distinguishes three functions of the language: conative, emotive and referential (Jakobson, 1960, p. 5; Grzegorzczkova, 1991, p. 12).

The theory of Bühler was further developed by Roman Jakobson. In his work *Linguistics and Poetics*, Jakobson presents a scheme of a communicative situation and illustrates all the components of an act in which verbal communication occurs. In his model of a communication act the following components are identified: Context, Message, Contact, Code, Addresser and Addressee. Furthermore, Jakobson introduces the distribution of six functions of language based on each element of the communicative act. Depending on the component that prevails in a given communicative act, it may perform one of the following functions: referential, poetic, phatic, metalingual, emotive and conative. Nonetheless, Jakobson emphasizes that in many communicative situations multiple factors may influence the function of a given utterance and such utterances may fulfil several functions.

The relations between the elements of a communicative act and the respective functions can be presented as follows: the referential function of the language is implemented when the main focus is given to the context of a communicative situation, hence, when the reality is being described. In cases, in which the message itself is considered to be the dominant factor, the poetic function of language can be observed. The phatic function of the language serves to ensure that the contact between the parties of a communicative situation is sustained. The utterances that demonstrate this function (such as *Hello!* or *Goodbye!*) may also initiate, establish or terminate the said contact. When it is the code that determines the function of an utterance, we can talk about the metalingual function: such situation may occur when parties of the situation speak about the language, for example, when they discuss the vocabularies they used.

The last two functions regard two remaining components of the communicative situation, namely, the addresser and the addressee. Whenever the addresser is the main focus of the analysed utterance, we can observe the emotive function of language. It is also labelled as the expressive function since it occurs when the addresser aims to express their feelings or inner state of mind. Lastly, the conative function of language is underlined in situations in which the addressee becomes their focal point. Jakobson observes that they can be illustrated with utterances in some particular grammatical forms, such as imperatives or

vocatives, thus when the addresser intends to directly influence the addressee.

An intriguing addition to the above scheme is mentioned by Jakobson in the further parts of his work, namely, the magic or incantatory function of language (Jakobson, 1960, p. 5). This function is exercised when the addressee is represented by a so-called third person, the reality, which is also a part of Bühler's model. Such interpretation is especially worth considering if one takes into consideration language of law and its power and agency: it cannot be ignored that texts or utterances as, for instance, judgements and sentences, constitute examples of situations in which language implements actual alteration of reality.

Speech acts: the performative function of language

While considering law in the context of language and its power, it is necessary to mention speech acts theory created by J.L. Austin. In his work *How to do things with words?* the British philosopher emphasized that the study of language has to be based on the analysis of its use (Cfr. Osika, 2001, p. 2). On the basis of such a premise he made an assertion about two types of sentences: constatives and performatives. Constative sentences are subject to true/false category and serve to describe the world and supply information about it. Performatives, on the other hand, are considered to be action in itself, actual deeds. They have the causal power and cannot be assessed as true or false. As an example of such a statement Austin mentions the following utterance which could be found in a will: *"I give and bequeath this watch to my brother"* (Austin, 1962, p. 5). Those words are 'performing' an action which consists in transferring ownership from one person to another, they are a visible sign of a performance.

A further aspect considered by Austin, and crucial in respect to law, is the fact that Performatives have to meet certain rules to be regarded as valid, otherwise, the so-called infelicities are encountered (Cfr. Austin, 1962, p. 14), by which the author understands an event of incorrect performance of an act or even its non-execution. Firstly, the circumstance in which a given speech act is uttered must be governed by *"an accepted conventional procedure"* that has *"a certain conventional effect"* (Berdini & Bianchi, n.d.). In other words, the given procedure implies that in certain situations particular words are to be pronounced by a certain person. Secondly, a specific procedure must be invoked by appropriate persons and circumstances. Moreover, all parties involved have to execute the given procedure in a correct and complete manner; they are to have thoughts, feelings or intentions adequate to the procedure. Finally, the participants must behave in conformity with the procedure.

As Austin proceeds in his ponderings regarding utterances, the typology that creates a distinction between doing (performatives) and saying (constatives) presented above is revisited by him. He establishes that all sentences are acts; therefore, saying is intrinsically doing. As a result, the prior theory is considered to be a general one, and a new, more specific doctrine of illocutionary forces is introduced and within three different types of acts are distinguished: locutionary act, illocutionary act and perlocutionary act. By locutionary act Austin means the actual uttering of a meaningful sentence which has its reference. Illocutionary acts are those that have a conventional power/force, namely they can inform, warn, request, order etc. The last type of acts differentiated by the author of the discussed text are the perlocutionary ones – they are the intentional or unintentional consequences of

an utterance produced by a speaker (Cfr. Austin, 1962, pp. 98-102; Berdini & Bianchi, n.d.).

The illocutionary acts are further on divided into five more specified classes: Verdictives, Exercitives, Commissives, Behabitives, Expositives. The first class of acts, Verdictives, expresses giving a verdict, estimation, appraisal, reckoning etc. Exercitives indicate the act of exercising certain power, influence or rights by a speaker holding authority. In this class the acts of appointing, voting, ordering, warning could be included. The next in the typology are Commissives, which presuppose that the speaker commits or promises to do something, therefore, the action of promising, undertaking, consenting, but also opposing or siding with, all fall under this category. The fourth class, represented by the name Behabitives, concerns the acts of apologizing, congratulating, commending, thanking, in short, it has to do with attitudes and social behavior. The last category are the Expositives, among which affirming, denying, stating, describing, asking, answering could be enlisted; therefore, they describe the way the speaker uses words and how certain statements, arguments etc. are conveyed (Cfr. Austin, 1962, pp. 150-151; Berdini & Bianchi, n.d.).

To sum up, the theory of speech acts accentuates the significance of language's performative function. It regards language not only as an instrument employed to describe the state of the world but also as a means of action.

Legal language and its characteristics

As it has already been mentioned, language is a way of using certain signs and symbols to represent reality and its aspects. It is also a powerful tool that people use to communicate and to express their thoughts and ideas in a way that would be understandable to others. Given this definition it might seem that language is connected to law in a simple way and serves mostly as a medium for law. However, laws are not only expressed in a language, they are also governed by its logic. Therefore, essentially, law cannot exist and function properly without language and language cannot be reduced to a mere auxiliary role for law. Since law is present in nearly every area of human life, as well as governs the society as whole, by extension, language performs the exact same functions and as such is inseparable from law. It might even be concurred that, in some aspects, law is a linguistic phenomenon (Hargitt, 2013, p. 426).

This specialized and technical law discourse may be called legal language and defined "*as a variably classifiable set of utterances with enough regularities to contrast fairly consistently with other kinds (...). At the same time, legal language is evidently not a single, unified variety. Rather, it is a cluster of uses, distributed on dimensions that need to be disentangled*" (Durand and Leung, 2016, p. 2). Given such a broad definition of the term, legal language might manifest itself in different ways and under a number of circumstances. It might describe the language in which legal documents are written, but can as well refer to the language of legal practice, legal science or even courtroom or police language.

As for its features, they depend to a certain extent on the specific case and the purpose for its use, nonetheless within the legal discourse some general characteristics can be identified. The style adopted by legal language is usually archaic, formal, impersonal and often extensive (Fiorito, 2006, p. 104). Its archaic character manifests itself in the use of words that are in many cases unknown and difficult to understand by a modern language

user. In case of English, a good example of this characteristic are words such as *herein*, *hereof*, *hereto*, *hereunder* etc. The formality and impersonality of legal language include a complex sentence structure, scarce use of personal pronouns and lack of colloquial terms (Hadush, 2009, p. 10).

Extensive language denotes a frequent use of circumlocution and legal doublets or triplets. Circumlocution (lat. to speak around) is a way of constructing the discourse with more words than it is necessary, for example by using expressions such as *at that particular time* or *at a later date* instead of commonly used words *then* and *later*. Doublets date back to medieval times when, due to a complex political situation, lawyers would use a mixture of different languages, for example English and French. The legacy of this practice, is for instance, phrases like *fit and proper* or *give, devise and bequest* (Hargitt, 2013, p. 427).

Another aspect that distinguishes legal language from standard language is its very different approach to punctuation. In legal writing, it is often omitted or used significantly less often. The length of sentences is also visibly different and happens to be much longer in legal contexts. Numerous legal documents include long sentences that contain a large amount of information, as well as multiple coordinate and subordinate clauses. Due to those very specific characteristics, legal language is often deemed obscure and incomprehensible to an average recipient. The issue is widely discussed nowadays with some scholars saying that legal language should be more precise and constructed in a way that would allow everyone to understand what rights and duties they are vested with (Fiorito, 2006, p. 104).

It can be argued that a large part of legal communication is a written extension of speech acts identified by Austin (Fiorito, 2006, p. 106). While legal documents, especially authoritative legal texts may seem to be just an example of ordinary writing, they are in fact, the opposite of that. Legal utterances resort to “*rules and conventions*” (Fiorito, 2006, p. 103) established by law and they put them into effect; what is more, they have “*certain legal force*” (Fiorito, 2006, p. 103) which is inherent to them, they possess a binding faculty. In other words, legal speech acts can be referred to in this manner on the basis of their capacity to enact, to execute an action, such as prohibition, permission, obligations and so forth. They not only describe the state of affairs but also have the ability to change the mentioned state.

The peculiarity of legal written sources is dictated by their power to create, modify or terminate the rights and obligations of individuals and institutions. Therefore, their performative function is of primary significance. As Lorenzo Fiorito, the author of “*On Performatives in Legal Discourse*” (2006), indicates the state constituted by a legal utterance is, in reality, a socially agreed construct, which implicates “*a certain set of obligations*” (Fiorito, 2006, p. 105). What has to be added to those considerations is that to take effect, a certain legal action has to comply with the legal conventionalized procedures. Hence, legal acts are bound, in a restrictive manner, to certain rules and conditions that attest their lawfulness.

Analysis

The collected examples will be divided into two groups: instances of legal discourse (**L**) and those of plain English with no legal power (**P**). Subsequently, a brief comparative analysis will be conducted with the focus on both their lexical and syntactic layer and on the context, namely extralinguistic elements of the communicative situation such as addressers’ legal

competences and reactions of addressees. Names appearing in utterances were substituted with letters X, Y or Z. The addressers of the selected utterances are witnesses (social workers or future parents) and court representatives (judges).

In three analysed cases, it was found that in the same communicative situation, semantically similar utterances may provoke distinct reactions of the addressees. In the first instance of such a situation it might be observed that the statements of two individuals reflect different sets of their legal competences and that their power to influence the surrounding reality differs:

(1)

(1P): *I am recommending to finalize the adoption today*

(1L): *The Court will therefore enter the order of adoption and hereinafter X and Y are the parents of Z.*

The example **1P** is an example of an utterance expressed in plain English and lacks specialized terminology. It is a first-person statement and expresses an opinion whereas the example **1L** illustrates an utterance expressed in legal English. It is characterized by the usage of adverbs such as *therefore* or *hereinafter* and by its impersonal form. It could also be observed that only the second utterance provoked a strong emotional reaction amongst all those who attended the hearing which confirms that they perceived this statement as legally binding and altering their lives.

In the second example analysed, it can be noticed that even the same lexeme used in the same situation but by different addressers may cause distinctive legal consequences. The first example constitutes an utterance of an assessor who worked with the family during the adoption process, whereas the second one is said by the judge:

(2)

(2P) *That is what X needed (...), a great mother*

(2L) *It is an honor to grant the petition filed by Y for the adoption of X. Congratulations, you are mother and son.*

The lexeme *mother* may describe the same person; however, that person will be legally perceived as a mother of a child only after expressed so by the court. In the first utterance, the lexeme might have been used metaphorically, to describe qualities that render the person suitable to be a mother in the eyes of the assessor. The utterance **2L** is again an example of utterance that is compliant with features of legal English, it contains specialized terminology, such as *petition*. Despite the emotive character of the second phrase of this example (congratulatory clause), it illustrates the consequences of certain utterances.

An analogous situation is illustrated by the third example which linguistically demonstrates the addressers' consciousness of the lack or presence of legally binding power in certain utterances. The utterance **3P** is expressed by a future parent as a reply to the request to identify themselves and the utterance **3L** constitutes a part of the judgment:

(3)

(3P) *X, the mom*

(3L) *I do find that from and after today's date X and Y are the parents of Z*

It can be noticed that the utterance **3P** is highly informal and personal as it is a diminutive form of the lexeme *mother*. Moreover, it provoked such reactions as laughter from other parts of the communicative situation. It implies the awareness that such words can be expressed solely in a humorous manner until the judge confirms it themselves. The utterance **3L** is an example of formal language, it is impersonal and contains explicit description of conditions in which it is applicable. It was expressed by a person with legal power recognized by the addressees and thus, the addressees reacted emotionally, aware that they now are parents of their child.

CONCLUSIONS

The analysis of the three utterances produced in the context of the final adoption hearing shows clearly how differently standard language and its legal variety influence the reaction of the addressees. By altering the legal relationship between the parties, the usage of legal language produces strong emotional reactions in message's recipients. Due to its specific structure, the language of law indicates the special status of the communication. Furthermore, the response of addressees displays how a language can change the reality. For this reason, only after hearing the uttered words, legally instituting the familial bond between the parties they show exaltation. This juxtaposition of utterances demonstrates the conventional character of law and the perception of it assumed by the society. Language represents legal systems and constitutes a tool that actively influences the way people comprehend reality and relationships between them. It can also be concluded that the utterances which announce an actual alteration of circumstances should be analysed assuming a holistic approach, i.e., should be treated as communicative situations. Along with the message itself, other factors identified by Jakobson should be taken into account, considering that the context (notably location, occasion), addresser (their competences, function) and code (proper register) all influence the reception of a given utterance. Addressees of utterances treat judges' words as binding even if they are aware that the decision had already been made earlier. Only after *hearing* the judgment do they manifest emotional reaction and acknowledge the change.

In such peculiar communicative situations as court hearings it is visible that extralinguistic aspects influence purely linguistic elements of communication and vice versa. Language and law coexist and strongly impact the reality. Therefore, such a great effect may suggest that language represents an instance of social convention, the conditions of which people accept and learn to respect while developing social maturity.

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