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THOMAS HOBBS AS A PRECURSOR OF J. L. AUSTIN'S THEORY OF PERFORMATIVES

John Langshaw Austin remains one of the most influential philosophers of the philosophy of colloquial language of the second half of XX Century and the author of the famous work *How To Do Things With Words* (Oxford, 1962). The aim of his study was the search for the real construction and function of the colloquial language which was to be arrived at by a close observation of different manners in which it was used. A natural language, having been shaped by many generations and revealing their experiences, was seen by Austin as a totally independent, complete and governing by the rights of economy. The principles of the language's completeness and economy constitute a starting point for his studies of the linguistic phenomena. The critique of the sense-datum, the theory of performatives and the theory of illocution are the most significant results of his studies. Austin made the critique of the commonly accepted statement regarding the truthfulness or falseness of all meaningful sentences a starting point of the new philosophy of language and the concept of linguistics.

In case of the majority of statements serving a descriptive function (also known as communicative or informative-reporting function) the existence of objects they inform about does not depend directly on the very statements, or their formulation (articulations). These statements do not make the reality. They only report about it accurately or not accurately describing it. As Austin proves, there are statements, only apparently descriptive, which are connected with the very creation of a given fact, a direct creation of the new reality. A distinctive feature of such statements, which Austin called performative, is that their articulation constitutes the basis for performing a certain act, here "speech" becomes "act".¹ The very articulation of certain

¹ Having arrived at the consideration that basically every utterance may reveal a per-

words in strictly defined circumstances by certain people causes a certain act to take place, a certain event to happen.² An example of such a statement is the following statement: *I name this ship "Boleslaw Chrobry"*, which is a part of the christening procedure or *I promise to be punctually at 12.00* as well as *I apologize*.³

Although Austin was the first to observe and describe the theory of the performative function of certain statements, it had always been present in speech. It was also distinguished by many religions in a special way where gods had a mighty power to change the reality with the help of words. The extract describing the beginnings of the world taken from the Bible reveals a classic example: *Let there be light: and there was light*. A human longing for God's omnipotence and the ability to change the reality with a mere help of word are revealed by many legends, myths and tales.⁴ The statement under consideration is also revealed in taking actions of a magic character whose element was the articulation of a verbal spell – a strictly defined formula where no changes were allowed.

A typical performative statement usually contains the first person singular verb in the Present Tense in the active indicative mood, the so-called performative verbs (eg. I give, I promise, I command, I accuse).⁵ It has an open form. Nevertheless, performatives appear in very different forms. They may contain the third or the first person performative verbs plural in the Present Simple passive voice or an impersonal form. Performative statements often have no performative verb at all but they may be expressed in one of the above mentioned forms. For instance, a statement *Open the door* may mean *I am giving you a command to open the door*. What it really means in this statement is to be deduced from the context, intonation of the voice or a gesture accompanied. (Zygmunt Ziemiński, having considered the above mentioned points, has proposed to call performative

formative element, in his later works Austin incorporated the previously independent theory of performatives into the new theory of locutionary and illocutionary acts. Locutionary acts are connected with the articulation of certain sounds or making certain inscriptions which, being meaningful, are the expression of a certain language. Illocutionary acts are connected with the function of the utterance articulated in a certain situation. A perlocutionary act, in turn, is connected with the effect the utterance has on its receiver. This division was further established by the continuators of Austin's thought – J. R. Searle and L. W. Forgas. Austin's theory of speech acts, which replaced his theory of performatives, found many enthusiasts among philosophers and theorists of law just as it was in case of his earlier theory.

² J. L. Austin, *How to do things with words*, Harvard 1975, p. 5.

³ M. Hempoliński, *Brytyjska filozofia analityczna*, Warszawa 1974, p. 116.

⁴ E. Grodziński, *Wypowiedzi performatywne*, Wrocław 1979, pp. 12–13.

⁵ J. L. Austin, *How to do things with words*, op. cit., pp. 5–6.

statements “statements which fulfill a performative function in a given context”⁶). When one doubts whether a given statement is performative, he should check whether the statement can be preceded by the word *hereby* (as in the formulation “I hereby name you”) since it is articulated an applied till the moment of its utterance.

Among performative statements Austin often mentions the statements of legal significance. Some of them may be called legal acts of general significance (eg. *announce, interpret, declare*), others constitute legal acts of individual significance⁷ (eg. *promise, sentence*). When a Sovereign (eg. Parliament) accepts new regulations, in accordance with the presented concept, a law, which has a common power, is established. In a similar manner, when one utters the words “I bet”, he enters into a contract.

It was lawyers who noticed the existence and significance of the performative utterances long before they were discovered and given a theoretical description. The sphere of legal relations reveals a great majority of them. Certainly, the language of legal norms reveals a creative character for it generates new social phenomena which were absent before. The creative character is also revealed by legal “declaration of will”, which in its historical origins contained the elements of magic acts.⁸ Therefore, in accordance with Austin, in the theory of law among the performative utterances of legal significance there may be distinguished two groups: the first one being of general significance and the second one individual significance. The first group creates a new legal reality for all citizens (examples of these types of speech acts are to be revealed by constitutions or codes or laws) or for some citizens, for example, occupying a certain post (the advocacy act may serve as a good example here). Every new act or, in other words, speech act, takes its part in creating a new reality. It also repeals the already existing legal relations by replacing them with the new ones. It also creates a new collection of rights and duties for a certain group of legal subjects. A specific group of performative utterances of general significance (having a great influence on the mankind in the process of history) is represented by the formula used when declaring peace or war.⁹

The second group of performatives distinguished in the contemporary theory of law are legal acts (legal activities), speech acts of individual significance, which create a new reality for a certain individual or, groups of

⁶ Z. Ziemiński, *Logiczne podstawy prawoznawstwa*, Warszawa 1966, pp. 26–27.

⁷ E. Grodziński, *Wypowiedzi performatywne*, op. cit., pp. 15–19.

⁸ Z. Ziemiński, *Logiczne podstawy prawoznawstwa*, op. cit., p. 27.

⁹ E. Grodziński, *Wypowiedzi performatywne*, op. cit., pp. 15–16.

people connected in some way, usually financially). These acts are based on the performatives of general character which give them a legal power. A declaration made in agreement by the man and woman in presence of the appropriate state official who declares them to be a married couple is the example of a performative utterance of individual character which is based on a certain legal regulation or, in other words, performative of general significance. Entering into a contract is another example of performative of individual significance since every party gets new rights and duties. A single person can also create new social facts by the power of words: making testaments, gifts or soldier's oath.¹⁰

The acts of speech of performative character presented here may appear to be unsuccessful. A substantial discrepancy with performatives of higher order or lack of the forms foreseen by those superior acts are among the reasons why they may appear unsuccessful.

Performative utterances are a kind of conventional acts (distinguished along with natural acts) which are taken in accordance with certain norms which are described or not and obligatory in a given society. The author of the first theoretical study of performatives often highlights that the articulation of the performative utterance is already "making". J. L. Austin notices that such making has a conventional character. Therefore, they are to follow a strictly defined procedure. In the study mentioned above Austin gives a detailed account of the conditions which decide whether performatives are efficient or faulty. He also divides them into successful or unsuccessful and efficient or non-efficient. They are "unhappy" when the fact which was to be realized at the moment of a given utterance does not take place.

A specific character of the performative utterances does not allow to attach a category of being true or false for they do not describe the reality, they only shape it¹¹ (this is one of the reasons why performatives in the form of descriptive sentences are different from those expressing ascertainment – sentences which state something). Austin argues that utterances of this type do not reveal an informative-reporting function at all, a performative function being their basic and the only function. Z. Ziemiński agrees with this view highlighting the significance of the performatives in law. He also claims that the only criterion of the evaluation of the utterance is to be judged by its significance. Insignificant, non-efficient performatives give only the appearance of some conventional act being done; they are over-

¹⁰ Ibid.

¹¹ See J. L. Austin, *How to do things with words*, op. cit., p. 5.

burdened by the “insignificance sanction”.¹² According to Ziemiński, two types of utterances have a performative character: those by means of which a given act is established (eg. Sejm resolution) as well as those which are the means to inform about the establishment of the norms of a given content (eg. a collection of statements in the publication which is to acknowledge the texts of the resolution). Ziemiński rejects the thought that the utterances of the second type which are the means to declare norms should be treated as utterances formulated in the metalanguage, “normal” utterances of the legal language or, in other words, they are true sentences (when revealing the content of the resolution in accordance with its formulation accepted by Sejm) or false when containing an error. A necessary condition for a legal act to be accepted is the fulfillment of the “act of publication” which has to be fulfilled “properly”. The legislation process is therefore characterized by the mutual existence of at least two performatives, neither of which can be recognized as true or false. The author evaluates another performative of legal significance – the act of giving a sentence and the act of its publication¹³ in an analogical way.

On the other hand, Austin's way of thinking is being criticized at this point by one of the Polish researchers of philosophical literature devoted to the study of performative utterances. In E. Grodziński's opinion, performatives of legal significance or, as he calls them, “*quazi-legal*” (he means utterances such as *I make a bet* or *I accept the bet*) apart from their performative function have a descriptive, informative-reporting function, or in other words, they are true or false. When a performative utterance is efficient or, in other words, it creates a new reality in a social sphere, it is therefore true. When it is non-efficient, a new social fact does not take place for some reasons, it is false. Grodziński argues that if one assumes that such performatives have only a creative function and no descriptive function, one would also have to accept that his every single creation of any fact would have to be additionally reported in a different utterance.

The theory of performatives, articulated by John Langshaw Austin, was accepted and developed by the 20th-century lawyers. Now incorporated into the modern theory of law, it appeared for the first time in the works of Thomas Hobbes, a seventeenth-century political writer. Hobbes, who highly valued the issue of language, was perfectly aware of the immanent relationships between law and language. When this English thinker

¹² Z. Ziemiński, *Logiczne podstawy prawoznawstwa*, op. cit., pp. 30–31.

¹³ *Ibid.*, pp. 31–32.

describes the way in which in a newly organized state legislation appears or when he analyzes the concept of agreement, he anticipates later solutions as proposed by Hobbes and his commentators.

In his famous *Leviathan* Hobbes proves that the aim of the social agreement is the constitutionalisation of the state. The state's aim, on the other hand, is to ensure safety for its citizens. The essential guarantee of safety is the establishment of equal moral rules obliging every individual. Only the Sovereign chosen by the power of social agreement introduces a binding differentiation between moral and immoral acts, he is also the one to distinguish between good and evil. In the preceding state of Nature there was no objective criterion of good and evil, what was good for somebody could be bad for another person. Everybody wanted to be the "source" of moral judgment and everybody wanted to prescribe a different meaning to the words "good" and "evil". *For these words of Good, Evill, (...) are ever used with relation to the person that useth them: There being nothing simply and absolutely so; nor any common Rule of Good and Evill, to be taken from the nature of the objects themselves (...)*.¹⁴ In the state of Nature there were a great number of private laws, each of them was deprived of even a relative attribute of permanence.

According to Hobbes, the sovereign selected in accordance with the will of citizens and acting on their behalf executes something which is more than giving a mere opinion in moral issues. The sovereign's decisions, known as orders, become a common law. At the moment of their formulation, the sovereign shapes, not describes, the legal reality. The moment the sovereign's orders are proclaimed, the law becomes. Therefore, they constitute classic, Austinian performatives. When by the power of social agreement a state appears and the person of the sovereign is appointed, by the power of the sovereign's word the legal order appears from non-existence.

It seems that Hobbes would be likely to recognize the fact that sovereign orders do not take a logical value (sovereign orders cannot be false – he declares exclusively the "truth", he has its monopoly), they have only a creative function. (A descriptive function is revealed by the sentences included in the special affair registers – they describe facts which started existing due to the will of the sovereign¹⁵).

Calling some acts moral by the sovereign constitutes a legislative and creative act, the point of reference to be applied to evaluate future behavior

¹⁴ T. Hobbes, *Leviathan*, Oxford 1909, s. 41.

¹⁵ *Ibid.*, p. 211.

of the citizens. This operation is amazingly similar to the process of defining. Hobbes claims that this process is characterized by arbitrariness which also characterizes legislative acts of the sovereign. As long as a properly, although arbitrarily, formulated definition should not cause controversy or discussions, similarly the sovereign's legislative acts should not become the subject of a public dispute.¹⁶ According to Hobbes, similarly to the way in which proper definitions give the beginning to understanding and building of the system of scientific knowledge, legislative acts (laws in which the sovereign proclaims what is good and legal and what is evil and illegal) constitute the foundation of the state and create a new social reality.

Just as Austin, Hobbes describes the conditions of the efficiency of the performative utterances noticing that, for instance, to be obligatory, the state legislation has to be proclaimed. *From this, that the law is a Command, and a Command consisteth in declaration, or manifestation of the will of him that commandeth, by voyce, writing, or some other sufficient argument of the same, we may understand, that the Command of the Common-wealth, is Law onely to those, that have means to take notice of it.*¹⁷ In this manner, an individual who has been deprived of the ability to become acquainted with a given order of the sovereign for some reasons beyond his control is justified; what is more, this law is not the law for him. An order-performative which is to create a new reality is inefficient and unsuccessful as related to him.

Hobbes also analyzes the utterances which are legislative acts of individual significance. For example, he highlights that in some circumstances a legal act is performed by the mere power of word *I give*.¹⁸ The philosopher observes the difference between the usage of this verb in the Future Tense *I will give* and its usage in the Past or Present Tenses: *I gave* or *I give*: *Words alone, if they be of the time to come, and contain a bare promise, are an insufficient sign of a Free-gift and therefore not obligatory (...)* *But if the words be of the time Present or Past, then is my to morrows Right given away to day; and that by the virtue of the words, though there were no other argument of my will.*¹⁹

In XX Century the theorists of law became aware of the fact that the utterances of the language constitute the essence of the phenomena analyzed and described by them. Legal norms are expressed by the language.

¹⁶ Ibid., p. 136.

¹⁷ Ibid., p. 208.

¹⁸ Ibid., p. 103.

¹⁹ Ibid.

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Therefore, the research of any essential problems of the theory of law has to be preceded by the analysis of the phenomena of the language of law. Anticipation of J. L. Austin's concept in the works of T. Hobbes shows that immanent relations between law and language were perceived a long time ago, in the seventeenth century, the epoch when relationships between certain scientific disciplines were constantly searched for.