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∀*r,rule(Dr(*r, *exception(rule)) ≡
∃*c(Applies(*c ⇒ *exception(rule))))
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it is safeguarded that there are no free floating exceptions. If the counterparts of this sentence and the axioms of RBL are added to the constraints on possible worlds according to Rule Logic, the occurrence of free floating exceptions in these worlds is prevented.

Chapter 6

WHAT IS A NORM?

1. INTRODUCTION

One of the central notions in legal theory and in legal logic is that of a *norm*. There are several kinds of entities that might be called norms. The following list contains some examples:

- *General norms*, such as 'Everybody with an income ought to submit a tax declaration', or 'It is forbidden to kill human beings'.
- *Specific norms* such as 'Margaret must pay Jane €100,-'.
- *Permissive norms* such as 'It is permitted to smoke in the canteen'.
- *Assignments of rights*, such as 'Everybody has the right to petition the government'.
- *Procedural rules*, such as 'A contract is made through offer and acceptance'.
- *Commands* such as 'Shut the door'.
- *Technical directives*, e.g. in recipe's such as 'Take three spoons of sugar'.
- *Power conferring norms*, such as 'The mayor has the power to make emergency regulations'.
- *Descriptions of normative situations* such as 'In Belgium one ought to drive on the right hand side of the road'.

Because of its central role, it would be desirable if the notion of a norm were clear. Regrettably, however, it is not. There circulate several theories about, and conceptions of norms.

According to Kelsen, a norm is *the meaning of an act of will* (Sinn eines Willensaktes), that is expressed in language by means of an 'imperative' (Imperativ), or an ought sentence (Soll-Satz).[1]

Von Wright distinguishes three main types of norms. First there are norms in the sense of *rules*. These include the rules of games, which determine which moves are correct, permitted, prohibited, or obligatory. The rules of languages also belong to this main type. The second main type distinguished by Von Wright consists of *prescriptions*, or regulations. The laws of the state provide an example of this main norm type, just as military commands and orders and permissions given by parents to children. In general, prescriptions are commands or permissions, given by someone in a position of authority to someone in a position of subject. The third main type consists of norms in the sense of *directives* or technical norms. They specify the means to be used for the sake of attaining a certain end.[2]

Alchourrón and Bulygin distinguish two conceptions of norms, the *hyletic* conception and the *expressive* conception.[3] They write that according to the hyletic conception, norms are proposition-like entities, the meanings of normative sentences. In contrast to descriptive sentences, which have descriptive meaning, normative sentences have prescriptive meaning. For instance, where the sentence *John walks* describes that John walks, the sentence *John ought to walk* prescribes John to walk. *Expressive norms* are the result of prescriptive use of language. They are expressions in a certain pragmatic mood (commands), and should not be identified with what is commanded. The expression cannot be identified with its content. Expressive norms are not meanings, while hyletic norms are.

There are not only different theories about the nature of norms, there are also entities that are related to, but allegedly not identical to norms. For instance, in *Norm and Action*, Von Wright distinguished between norm-formulations (linguistic entities), norms, normative statements (e.g. In Belgium it is forbidden to steal), and norm-propositions (e.g. In Belgium a norm exists to the effect that it is forbidden to steal).[4] Bulygin has contested the view that there is a difference between normative statements and normative propositions, because the former are merely shorthand for the latter.[5] Mazzarese, then, has argued that the notion of norm(ative) propositions does not make sense.[6]

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[1] Kelsen 1979, 2.
[2] Von Wright 1963, 6f.
[3] Alchourrón and Bulygin 1981.
[4] Von Wright 1963, 93f and 105f.
[5] Bulygin 1999.
[6] Mazzarese 1991 and 1999.

Apparently our conceptual machinery around the notion of a norm can benefit from some cleaning up. In this chapter I will attempt to make a beginning with this cleaning operation. The result will be some conceptual distinctions and the suggestion that next to these distinguished concepts, the notion of a norm is superfluous.

2. THE COMMAND THEORY OF NORMS

The first part of my argument concerns the so-called expressive conception of norms. According to Alchourrón and Bulygin, *expressive norms* are the result of prescriptive use of language.[7] This characterization of norms is ambiguous. On the one hand it may mean that (at least some cases of) prescriptive uses of language *are* norms, and that the single prescriptive use of language therefore constitutes a norm, just as saying 'I agree' under suitable circumstances constitutes the acceptance of an offer. On the other hand it may mean that using language in a prescriptive way has as its consequence that a norm comes about, just as acceptance of an offer to sell leads to the obligation to do what was agreed. In this latter case, the norm is not identical with the prescriptive language use, but is an immediate consequence.

Alchourrón and Bulygin continue their description of expressive norms by pointing out that sentences expressing the same proposition can be used on different occasions to do different things. For instance, the proposition expressed by 'Peter puts the book on the table' can be used to make an assertion (Peter puts the book on the table), a question (Does Peter put the book on the table?), or a command[8] (Peter, put the book on the table!). Next they introduce the symbol ├ to indicate that a proposition is asserted, and the symbol ! to indicate that a proposition is commanded. So ├p indicates that p is asserted, and !p indicates that p is commanded. The combinations ├p and !p do not express propositions, although they make use of propositions, but they express what a speaker *does* on a certain occasion. In other words, these combinations stand for speech acts. As if to tell us that they intend the expressive conception of norms to be the speech act theory, Alchourrón and Bulygin write that !p symbolizes a norm in the expressive conception and that norms in the expressive conception are essentially commands. Let us

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[7] Alchourrón and Bulygin 1981, 96. A similar view was exposed in Wolenski 1982 (DS).

[8] Later in this chapter I will use the expression 'order' for this type of situation, and reserve the expression 'command' for a somewhat different situation.

therefore call the expressive conception of norms in its first interpretation the *command theory of norms*.[9]

The command theory of norms has much in common with the theory about moral ought judgments as exposed by Hare in *The Language of Morals*.[10] According to Hare, the word 'ought' is used for prescribing and this means in turn that an ought judgment (in the proper context) implies an imperative. This so-called 'prescriptive meaning' would be characteristic of the word 'ought'. So, where Alchourrón and Bulygin use speech acts to analyze the nature of norms, Hare uses speech acts to analyze the meaning of the word 'ought'.

Hare's theory of prescriptive meaning has been criticized by Searle for committing the *speech act fallacy*.[11] Because I think that this criticism also applies to the command theory of norms, I will go into some detail in describing it.

The general form of the speech act fallacy is that from 'Word W is used to perform speech act A' it is inferred that 'It is (part of) the meaning of W that it is used to perform speech act A'. Applied to ought judgments, the fallacy would be that from the fact that 'ought' is used to prescribe, it is inferred that (part of) the meaning of 'ought' is that it is used to prescribe, or its prescriptive meaning. To rebut the speech act fallacy, Searle points out that words like 'ought' are often used in other speech acts than prescribing and that in those cases 'ought' has the same meaning as in prescriptive speech acts. For instance, the word 'ought' means the same in 'Ought he to repay his debts?' as in 'He ought to repay his debts.' The more general point behind the speech act fallacy is that speech acts that can be performed by means of a particular word and that maybe even are typically performed by the use of this word, do not determine the meaning of the word.

Let me elaborate this point by delving a little deeper into speech act theory. According to Austin, the act of saying something, e.g. 'The cat is on the mat' is the performance of an *illocutionary act*.[12] Austin expresses this by saying that *in* saying something, one performs an illocutionary act. Examples of such illocutionary acts, speech acts to use the terminology made popular by Searle, are asking or answering a question, giving

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[9] This 'strong' version of the command theory should be distinguished from the weak variant, according to which norms do not merely describe, but have behavior guiding force. This weak version is implicitly discussed and rejected as based on a wrong opposition in section 7.

[10] Hare 1952, 155f.

[11] Searle 1969, 136f. See also the discussion of the related 'Frege-Geach problem' in Miller 2003, 40f.

[12] Austin 1975, 94f.

information, pronouncing a sentence, making an appointment, and – not mentioned by Austin, but certainly an example – prescribing behavior.

Following Searle we can distinguish two elements within an illocutionary act.[13] Speech acts have an illocutionary force, which determines what kind of speech act it is. They also have a propositional content, which indicates what the speech act is about. Different speech acts can have the same propositional content. For instance, the sentence 'My daughter puts her coat on' expresses an assertion with the propositional content that my daughter puts her coat on. The sentence 'Please, put your coat on', directed to my daughter, is a request with the same propositional content. And 'Put your coat on!', directed to my daughter, is an order, again with the same propositional content. Speech acts with the same illocutionary force can have different propositional contents. E.g. the orders 'Put your coat on!' and 'Give me the money!' are different speech acts because of their different propositional content. The propositional content exists of references to one or more entities, normally extra-linguistic, and predication applied to the referents of the referring expressions. Because illocutionary acts have a propositional content, the performance of an illocutionary act includes the performance of a propositional act, namely expressing the propositional content of the illocutionary act. Searle's point about the speech act fallacy can now be rephrased by stating that the contents of a propositional act are not determined by the illocutionary acts in which these propositional acts tend to occur. In the sentence 'You ought to repay her the money you borrowed from her' all the words contribute to the propositional content. These words include the word 'ought'.[14] Since the meaning of the propositional content is independent of the kind of speech act performed by uttering the sentence, the meaning of the word 'ought' in it should also be independent of the kind of speech act. Therefore this meaning cannot be 'prescriptive' merely for the reason that such sentences can well be used for prescribing.

What does this mean for the command theory of norms? If the command theory is taken literally, norms would be a kind of illocutionary acts. Since

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[13] Searle 1969, 22f.

[14] It might be objected that the word 'ought' typically does not belong to the propositional content, because it indicates that the propositional content, formed by the rest, is prescribed rather than described. This objection would rest on a mistake. A similar argument would be that the word 'is' in 'The cat is on the mat' does not belong to the propositional content, because it indicates that the position of the cat relative to the mat is described, rather than prescribed. But that is hard to reconcile with the meaning of 'is' in the question 'Is the cat on the mat?'. The word 'is' belongs to the propositional content, and so does the word 'ought'.

acts are events that have a particular location in space and time, norms would also have such a particular location. This space-time location would not be that the norm is valid during a certain period in a particular territory, but rather that the norm (being an act) occurred at a certain time in a certain place. This is plain nonsense. Therefore, the command theory, interpreted as the theory that norms are a kind of speech acts, is obviously incorrect, if it is meant to be a theory about norms in the (or some) ordinary sense of the word.

If the command theory is given a different interpretation, namely that the illocutionary force of prescriptions somehow is part of the nature of norms, the command theory would involve a variant on the speech act fallacy. If norms such as 'It is forbidden to steal' are often used to command ('Refrain from stealing'), this does not imply that it is the nature of the norm 'It is forbidden to steal' that it is *used for* commanding. The use made of norms in performing speech acts does not determine the nature of norms, just like the use of words in performing speech acts does not determine the meanings of these words.

An entirely different issue is whether it is part of the nature of a norm *that it prescribes*. When prescribing is seen as a speech act, it seems obvious that norms do not prescribe, because norms do not perform speech acts. However, norms might have something like 'prescriptive force', and maybe this is meant by the expressive notion of norms. Having prescriptive force, or – presumably more accurately – behavior guiding force, is quite different from performing, or being instances of, the speech act of prescribing however. Acceptance of the view that norms have prescriptive force in this sense is therefore not adoption of the strong version of the command theory of norms.

3.   NORMS AS EFFECTS OF COMMANDS

The second interpretation of the expressive conception of norms is that norms are not commands themselves, but that they are brought about by commands. On this interpretation, the distinction between the expressive and the hyletic conception of norms becomes less than clear. Hyletic norms are defined as the meanings of normative sentences, and it seems very well possible that the validity of norms in this sense is brought about by commands. For instance, if an army officer commands a soldier to present his arm, this has the consequence that the soldier ought to present his arm. This ought may very well be interpreted as the meaning of the sentence 'the soldier ought to present his arm'. To assess this theory that norms are the effects of commands, we must delve even deeper into speech act theory.

3.1 Searle's distinctions

Searle uses a distinction between directions of fit to analyze different kinds of speech acts.[15] I borrow an example of Searle (which Searle in turn borrowed from Anscombe[16]) to clarify this distinction. Suppose I make a shopping list, which I use in the supermarket to put items in my trolley. A detective follows me and makes a list of everything that I put in my trolley. After I am finished, the list of the detective will be identical to my shopping list. However, the lists had different functions. If I use the list correctly, I place exactly those items in my trolley that are indicated on the list. My behavior is to be adapted to what is on my list. In the case of the detective it is just the other way round; the list should reflect my shopping behavior.

If we consider my behavior as (part of) the world, we can say that my shopping list has the world-to-word direction of fit, because my behavior must fit the words on the list. The detective's list, on the contrary, has the word-to-world direction of fit, because his list must fit the world (my behavior).

The fit holds between the propositional content of a speech act and the world. The illocutionary force of a speech act determines which direction of fit is involved. Searle distinguishes five main kinds of speech acts[17]:

- *Assertives* commit the speaker to something's being the case. They have the word-to-world direction of fit. For instance, the sentence 'It's raining' can be used for an assertive speech act.
- *Directives* are attempts of the speaker to get the hearer to do something. They have the world-to-word direction of fit. For instance, the sentence 'Give me your money' can be used for a directive speech act.
- *Commissives* commit the speaker to some future course of action. They have, according to Searle, also the world-to-word direction of fit. For instance, the sentence 'I promise to lend you my car' can be used for a commissive speech act. The difference between commissives and directives is, according to Searle, that directives direct the *hearer*, while commissives commit the *speaker*.
- *Declarations* bring about a correspondence between the speech act's propositional content and the world. They have, what Searle calls, a double direction of fit, because the world is made to fit the propositional content of the speech act, while that content comes to fit

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[15] Searle 1979, 3/4.
[16] Anscombe 1957.
[17] Searle 1979, 12f.

the world. For instance, the sentence 'I hereby give you my car' can be used for a declaration.
-   *Expressives*, finally, express the speaker's psychological state. For instance, the sentence 'I thank you for lending me your car' expresses the speaker's gratitude. Expressives have no direction of fit at all, because they express, rather than describe the speaker's psychological state.

3.2   Constitutives, commissives, orders and obligations

Searle's analysis of different kinds of speech acts by means of the difference in directions of fit provides a suitable starting point for the analysis of a number of legal phenomena, including the nature of norms. However, it is no more than a starting point. In particular Searle's theory about declarations seems to be not fully satisfactory. Therefore I will propose a number of amendments.

My first amendment is merely terminological. Declarations in Searle's sense are speech acts by means of which facts are created. Searle's own examples include that somebody gets appointed as chairman and that somebody's position is terminated. Since these acts are constitutive (in the case of the termination in a negative sense), I propose to call these speech acts by means of which the world is changed *constitutive acts*, or *constitutives*.

The second amendment concerns the direction of fit of constitutives. According to Searle they have a double direction of fit, because the world is altered to fit the propositional content of the speech act by representing the world as being so altered.[18] This expression 'double direction of fit' is somewhat misleading, because it suggests that both directions are equally important. If somebody copies my computer program, his program comes to be identical to mine and mine comes to be identical to his. However, his copy of the program comes to be identical to my copy in a more basic sense than the other way round, because his copy of the program is adapted to my copy and not the other way round. Approximately the same holds for the double direction of fit: the words come to fit the world only because the world has been adapted to the words. Therefore I propose to speak, in the case of constitutives, of a world-to-word direction of fit.

However, the world-to-word fit of constitutives is not the same as the world-to-word fit of directives. An order is a typical example of a directive in Searle's sense. In the present context I use the notion of an order in a

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[18]   Searle and Vanderveken 1985, 53.

technical sense that makes an order different from a command. Where a command requires a setting in which the commanding person has some authority over the person that is commanded, such a setting is lacking (or irrelevant) in the case of orders. Everybody can order anybody. The issuing of an order will normally exercise some psychological pressure on the hearer to do what (s)he is being directed to do. However, there is no guarantee that the order will be obeyed and that the world will actually come to correspond to the directive's propositional content. That is why Searle writes about the fit of *successful* directives, and 'successful' means in this context *effective*.

Constitutives also need to be successful to create the world-to-word fit, but their success is not the effectiveness but rather the *validity* of the speech act. Searle correctly remarks that declarations (my constitutives) normally require an extra-linguistic institution, a system of constitutive rules, in order that the declaration may successfully be performed.[19] To take a legal example, the law contains constitutive rules that determine how a juridical act is to be performed. If these rules are followed in a concrete case, the act in question is valid. The institution not only defines when constitutive acts are valid, but also connects consequences to valid constitutives, for instance that a contract comes into being. These consequences are *changes* in the world (of law), that account for the world-to-word fit of constitutives.[20]

To distinguish between the world-to-word fit of constitutives and of directives, I call the world-to-word fit of constitutives *direct*, because these effects are the immediate consequence of the performance of the speech act. I call the world-to-word fit of directives *indirect*, because this fit only obtains if the speech act is followed by the behavior that it directs the hearer to perform.

The third amendment concerns the analysis of commissives. According to Searle, commissives have the world-to-word direction of fit, which would - in my terminology - be the indirect world-to-word fit. This means that a commissive would only be successful if the behavior to which the speaker committed himself was actually performed. However, if I make a promise, and nothing extraordinary is the case, I immediately come under the obligation to do what I promised to do. In other words, making a promise has a direct world-to-word fit. Therefore I prefer to treat promises as a species of constitutives, rather than as a separate category of commissives. In general it seems to me that commissives are a kind of constitutives and therefore need not be a special category.[21]

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[19] Searle 1979, 18.
[20] More about this kind of analysis of juridical acts in chapter 7, section 10.
[21] Essentially the same point was made by Ruiter 1993, 67f.

Commissives have a counterpart in constitutives that impose obligations on others than the speaker. For instance, an officer in the army gives a command to a subordinate soldier. In that way he imposes on the soldier the obligation to do what was commanded. Let us call these constitutives, which require a setting of rules, *commands*. Commands can then be opposed to orders that do not require such a setting. Everybody can order anybody and the success of the order only depends on whether it is obeyed. Orders have an indirect world-to-word direction of fit. In opposition to orders, valid commands have the direct world-to-word fit. Their success lies in bringing about an obligation and only in a derived sense in bringing about behavior.[22] Where orders are directives, commands are constitutives.
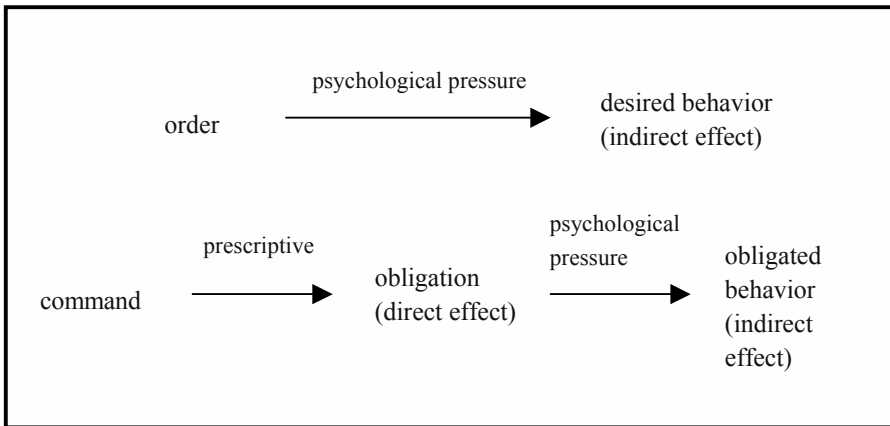
3.3   Conventional acts

According to Searle, a successful declaration makes the world fit the declaration's propositional content. This may be correct, but the correctness depends more on a particular definition of declarations than on insight in the way in which successful declarations bring about changes in the world.[23] Let me explain this by means of an example. Suppose that an officer in the army commands a soldier to present his arm. The officer has the power to give this command and there are no invalidating circumstances. Therefore the

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[22] Ruiter 1993, 70f. makes the same distinction.
[23] This criticism of Searle depends on treating commands as constitutives, that is as declarations in the terminology of Searle. However, Searle himself proposes to treat commands as directives and thus avoids this criticism, only to be liable to the criticism of overlooking that commands and orders are different and that commands have much in common with speech acts which Searle does call declarations.