

WHY NORMS ARE NOT IMPERATIVES¹

Jaap Hage

University of Maastricht

e-mail: jaap.hage@metajur.unimaas.nl

ABSTRACT

This paper deals with the so-called 'imperative theory of norms'. I argue briefly that norms are not speech acts and therefore not imperatives. I discuss more extensively the view that norms are the results of 'imperatives'. In this connection I delve into speech act theory and treat the effects of speech acts upon the world in which they are performed. In particular I discuss orders, commands and legislative acts by means of which deontic rules are created. The conclusion is that norms might be deontic facts (the result of commands) or deontic rules (the result of legislation), but that the notion of a norm is so unclear that it is better abandoned, for instance in favour of the conceptual framework developed in this paper.

1. Introduction

With some regularity the thesis is defended in the literature on legal (or ethical) theory that norms are, or imply, (a kind of) imperatives.² This thesis can be interpreted in a weak sense, namely as the thesis that norms guide behaviour. I have no problems with this weak variant of the thesis, as long as it is confined to prescriptive (as opposed to permissive or power conferring) norms. In this paper I will briefly argue against the stronger version of the thesis which holds that norms are or imply imperatives (section 2). I discuss more extensively the view that norms are the result of 'imperatives' in the sense of orders, commands or legislative acts (sections 3 and 4).

2. The speech act fallacy

Let me call the strong thesis that norms are or imply (a kind of) imperatives 'the imperative theory of norms'. The imperative theory of norms has much in common with the theory about moral ought judgements as exposed by Hare in *The Language of Morals*.³ According to Hare, the word 'ought' is used for prescribing and this means that an ought judgment (in the proper context) implies an imperative. This so-called 'prescriptive meaning' would be characteristic of the word 'ought'.

¹ This paper is based on chapter 6 of Hage 2005.

² Cf. Kelsen 1979, p. 2, Woléński 1977, Alchourrón and Bulygin 1981, p. 96.

³ Hare 1952, p. 155f.

Hare's theory of prescriptive meaning has been criticised by Searle for committing the *speech act fallacy*.⁴ Because I think that this criticism also applies to the imperative 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 that word, do not determine the meaning of that word.

This point can be generalized. Issuing an imperative is a speech *act*. Speech acts are acts which take place at a specific location in space and time. They are *performed* by one or more specific persons. I know of no common use of the word 'norm' according to which norms take place at a specific location in space and time, or are *performed* by one or more specific persons. Norms are not acts, and a fortiori no speech acts. If the imperative theory of norms is interpreted that norms are imperative speech acts, it is obviously false.

3. Norms as effects of commands

A second interpretation of the imperative theory of norms is that norms are not imperative speech acts, but that they are brought about by such speech acts. For instance, if an army officer commands a soldier to present arm, this has the consequence that 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 analyse different kinds of speech acts.⁵ I borrow an example of Searle (which Searle in turn borrowed from Anscombe⁶) to clarify this distinction. Suppose I make a shopping list that 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

⁴ Searle 1969, p. 136f.

⁵ Searle 1979, p. 3/4.

⁶ Anscombe 1957.

trolley that are indicated on the list. My behaviour 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 behaviour.

If we consider my behaviour as (part of) the world, we can say that my shopping list has the world-to-word direction of fit, because my behaviour 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 behaviour).

The direction of 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 acts⁷:

- *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 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

⁷ Searle 1979, p. 12f.

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.⁸ 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 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 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.⁹ 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.¹⁰

⁸ Searle and Vanderveken 1985, p. 53.

⁹ Searle 1979, p. 18.

¹⁰ More about this kind of analysis of juridical acts in chapter 7, section 10.

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 behaviour 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 behaviour 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.¹¹

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. Anyone 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 behaviour.¹² 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.¹³ Let me explain this by means of an example. Suppose that the officer in the army commands the soldier to present his arm. The officer has the power to give this command and there are no invalidating circumstances. Therefore the command

¹¹ Essentially the same point was made by Ruiter 1993, p. 67f.

¹² Ruiter 1993, p. 70f. makes the same distinction.

¹³ 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.

has the direct effect that the soldier ought to present his arm. According to Searle's analysis, the world should fit the propositional content of the command. This content is that the soldier presents his arm. However, the *direct* result of the command is not that the soldier presents his arm, but that the soldier *ought* to present his arm. Although the command's effect in the world is related to the command's propositional content, it is not identical. How can this be explained?

The answer can be found in the setting of rules that defines when a command is validly given and what are the consequences of a validly given command. In the present case, these rules state that the addressee of the command *ought* to perform the action that he is commanded to perform. The ought, which belongs to the consequences of the command, derives from the rule that attaches consequences to commands, rather than from the command itself. It is the ought of owing to do what is commanded, and not the ought contained in the command. In fact, there is in general not even an ought contained in a command.¹⁴

Schematised, the issue can be stated as follows:

rule: If an officer commands to do X, then soldiers **ought to** do X.

fact: An officer commands: *Present arm!*

result: A soldier **ought to** *present arm*.

In this schema, the obligation is in boldface, while the content of the obligation is italicised. In this way it becomes clear that the *obligation* derives from the rule, while the *content* of the obligation is provided by the command.

The world does not automatically come to fit the propositional content of a successful constitutive. The effects of successful constitutives depend on the rules that attach consequences to the constitutives. A rule about the appointment of chairpersons may make the world precisely fit the propositional content of the appointment. Such a rule might be that if X appoints Y as chairperson by saying that Y is chairperson, Y *is* chairperson. However, as the example above illustrated, a rule about army commands may make that a deontic version of the propositional content comes to hold: the command does not bring about that the soldier presents his arm, but that he ought to present his arm.

This observation can be generalised from speech acts to acts in general. Many acts derive their meaning from a setting of rules that define who is competent to perform acts of a particular type, what count as valid acts of this type, and what are the consequences of this type of act. Examples are raising one's hand at an auction, baptising ships, officially raising a flag, and laying down one's king in chess. These acts may be called *conventional* acts. Conventional acts that are not speech acts have no propositional content, and their effects can therefore not be that the world comes to fit their propositional content. Their effects are completely determined by the rules that define them. In the examples mentioned

¹⁴ MacCormick 1972.

above, these effects are respectively that one makes a bid, that a ship receives a name, that honour is paid to the country of the flag, and that one gives in.

Constitutive speech acts are in my opinion best considered as a subcategory of this general category of conventional acts. Their effects are also completely determined by their defining rules. However, in the case of speech acts it will normally be fruitful to have rules that make their effects somehow dependent on their propositional contents. Precisely in which way their effects depend on their content is determined by the kind of constitutive speech act. This is demonstrated by the examples about the appointment to chairperson and the command in the army. In the appointment example, the effect of the speech act corresponds precisely to the propositional content of the speech act. In the example of the army command, the effect is a deontic version of the propositional content.

It seems therefore that the world-to-word direction of fit of constitutive speech acts is not something that is special for these speech acts. It is not even the case that all constitutive speech acts have this direction of fit exactly. Whether, and to which extent, the world fits the content of successful constitutive speech acts depends fully on the conventions that govern these acts. The theory of constitutive speech acts is not something independent, but rather part of a general theory of conventional action.

If the above analysis of commands is approximately correct, the relation between commands and the obligations that arise from them is weaker than might seem at first sight. Commands are no more than conventional acts to which the conventions assign the quality that they lead to obligations. The obligation to do what was commanded stems primarily from the conventions; the commands gives the content to this obligation. It seems therefore somewhat misleading to state that norms are the effects of commands. Maybe some norms are brought about by commands, but there is no inherent connection between commands and norms.

4. Norms and legislation

If norms are not essentially the result of commands, they might still be the result of rule creation, for instance by means of legislation. Since not all legislation deals with rules that prescribe behaviour, we must limit the focus of our attention to legislation by means of which prescriptive or deontic rules are created. Are these deontic rules perhaps the norms that we are looking for?

Maybe the first thing to notice is that not all rules have as their primary aim to guide action. Obviously many rules such as traffic rules, or rules of a game aim to guide human behaviour. But just as obviously, rules defining when a chess player is check mated, rules stating the number of members of Parliament, and rules spelling out the organs of the United Nations do not have as their primary aim to guide behaviour. They may be seen as supporting other rules that do guide behaviour, but even from this perspective they do not guide behaviour

themselves. The same counts for power conferring rules, which give persons the power to perform some kinds of actions. Knowing that rules do not necessarily guide behaviour is the first step on the road to a better insight in what rules are.

One type of rules are rules of meaning. We have rules for the use of the words 'square' and 'rectangle' that make that everything that falls under the concept of a square also falls under the concept of a rectangle. These meaning rules not only govern the use of these words, but by means of them, the users of these rules also impose structure on the world: Given these rules, all squares must be rectangles. Similarly, given the conventions governing the use of the word 'bachelor', all bachelors must be unmarried. There is nothing spectacular about these structures we impose on the world by meaning conventions. All we do is use words in a particular way and, given this use, some relations between types of states of affairs come to hold, as by definition. The rules that govern our linguistic behaviour indirectly have also effects upon the world. We may call this phenomenon the *ontological effect* of rules.

The relation between one fact that is a reason for the presence of some other fact, and the reason-based fact supervening upon the reason, is often brought about by a rule. For instance, the rule that thieves ought to be punished makes that the fact that X ought to be punished supervenes on the fact that X is a thief.

If a rule exists, not all combinations of facts are equally possible anymore. For instance, without the meaning rule that squares are a kind of rectangles, there might have been squares that are not rectangles. Without the rule that if the ball passes the goal line, a goal is scored, it would be possible that the ball passes the goal line without a goal being scored. However, if this last rule exists, a special explanation is needed if the ball passes the goal line without a goal being scored. The two types of facts, the ball passing the goal line and a goal being scored, normally go together.

By having rules, humans make that facts supervene upon each other. By using the rule of soccer, they make that scoring a goal supervenes on the ball's passing the goal line. By using the rule that thieves ought to be punished they make that the fact that X ought to be punished supervenes on X's being a thief. There is a structural connection between facts that are based upon each other. By using rules, humans create that structure. Supervenience based on rules is an example of the ontological effect of rules.

Legal rules also have ontological effects. To make the transition to legal rules as small as possible, we can start with legal meaning conventions. The Dutch Penal Code defines a number of crimes, and thereby gives meaning conventions for, e.g., the notion of 'thief'. Given the convention for 'thief', somebody who takes away somebody else's good with the intention to appropriate this good illegally, is necessarily a thief.¹⁵ This meaning convention structures the legal world by creating a connection between (compound) states of affairs of the types

¹⁵ Cf. art. 310 of the Dutch Penal Code.

'being a thief' and 'taking away somebody else's good with the intention to appropriate this good illegally'.

It is not only meaning conventions that have ontological effects in the law. There is also a legal rule that creates a connection between being a thief and being punishable. This rule *imposes* punishability. Another rule creates a connection between being the municipality council and being empowered to make by-laws. This is a *competence conferring* rule. Yet another rule creates a connection between having a driver's licence, and the state of affairs of being permitted to drive a car. Finally, there is also a rule that connects the facts of having enjoyed an income and being obliged to make a statement to the tax officials. The last two rules, that have deontic states of affairs in their conclusion parts (being *permitted* to drive, and *being obliged* to make a statement), are deontic rules.

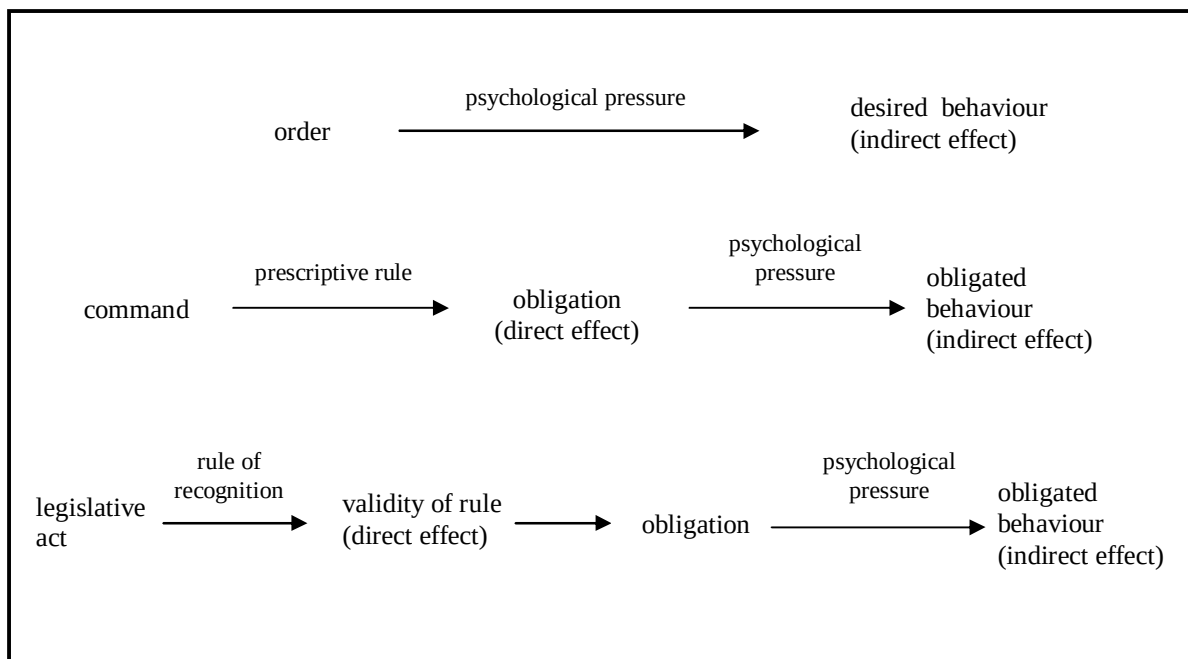
Deontic rules have ontological effects by attaching deontic facts¹⁶ to the facts that satisfy their conditions. Enjoying an income and being obliged to make a statement to the tax officials go together in a way that is not identical, but nevertheless quite similar, to the way in which being a square and being a rectangle go together.

If a rule exists, the world is adapted to the contents of the rule. Rules can therefore be said to have the direct world-to-word direction of fit. Nevertheless the way in which this fit comes about is different for rules than it is for constitutive acts. Constitutives cause *changes* in the world; rules do influence the world, but not by causing changes. Their effects are more like constraints on the possible content of the world.

This contrast between the way in which constitutive acts and rules have the world-to-word direction of fit can be sharpened by paying attention to the phenomenon of legislation. Legislation is a constitutive act by means of which (amongst others) deontic rules are created. A legislative act brings about a change in the world, because a deontic rule that did not exist before has come into existence. Moreover, if a deontic rule comes to exist, the structure that the deontic rule imposes upon the world also comes to hold. So if the legislator makes the deontic rule that thieves ought to be punished, the direct effect of this constitutive is that the deontic rule that thieves ought to be punished comes into existence. The indirect effect is that the state of affairs that thieves ought to be punished comes into existence too. (Assuming that before the deontic rule was created it was not yet the case that thieves ought to be punished.) An even more indirect effect obtains if the deontic rule is acted upon, and thieves are actually punished.

The differences between orders, commands and legislation are depicted in the following schema:

¹⁶ Some readers may object against the notion of a deontic *fact*, because it seems to blur the distinction between is and ought. In chapter 6 of Hage 2005, on which this paper is based, I argue extensively why there can be deontic facts and what their nature would be.



5. Conclusions concerning the imperative theory

I started this paper with the argument that norms are not acts and therefore not speech acts, let alone imperatives. To investigate the thesis that norms might be the result of ‘imperatives’, I discussed speech act theory and in particular what it had to say about orders, commands and legislative acts. The result of an order is psychological pressure, not a norm. The result of a successful command is a deontic fact (an obligation). Such a deontic fact might be called a norm. The result of successful legislation (of the appropriate kind) is the existence of a deontic rule. Such a deontic rule might also be called a norm. It should, however, be distinguished sharply from a deontic fact, because rules are not facts, not even states of affairs (possible facts). Because deontic facts and deontic rules may both be called ‘norms’, it may be argued that norms are the result of commands or legislation, but personally I find this hardly illuminating for the nature of norms. Moreover, the phenomenon that both deontic facts and deontic rules, although they are very different from each other, both can claim to be ‘norms’ leads me to the judgement that the notion of a norm is better abandoned and that we continue living with the notions ‘order’, ‘command’, ‘legislative act’, ‘deontic fact’ and ‘deontic rule’. These notions are much more precise and allow as a consequence the creation of better theories about the (nature of) law.

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