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## THE WOR(L)D OF THE LAW: LEGAL TEXTS AND WORLD CREATION

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Given that they are fundamentally linguistic phenomena, legal texts allow for hermeneutical and ontological uncertainty in their interpretation. Utilising the framework of speech act theory, Derrida’s “Declarations of Independence” provides a good example of how linguistic performativity works on the legal-political level. A set of legal texts create a legal discourse which we deem binding, but which can equally be regarded as an “autonomous” or “possible world.” In possible worlds theory, the discourse and worldview created by legal texts is only one of the many ways to interpret and make sense of reality.

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This essay ventures to examine how the performative power of language is used to create and maintain the seamless functioning of our social reality. These language uses might be termed “concord-fictions” or “discourses of illusion,” that is, socially-verbally constructed worldviews that do not reflect reality as such, yet are indispensable for providing meaning to everyday life. For my analysis, I will rely on speech act theory and possible worlds theory, both of which showcase the world-creating and world-shaping potential of language.

My particular example will be the law and the declaration of a nation’s independence, which will be studied in more detail with a view to understanding how such a deep change in our social-collective reality can be created only with the help of language. Jacques Derrida’s “Declarations of Independence” provides a good example of how linguistic performativity and constructivity, these two pillars of speech act theory, work on the legal-political level. The crux of Derrida’s presentation is that political legitimisation (in this case, the establishment of the United States of America) can be traced back to uneasy linguistic grounds or, more radically, fictions. A set of legal texts thus create a legal discourse which we deem binding, but which can equally be regarded as a kind of world view, an “autonomous world.”

This is where possible worlds theory, which advocates the plurality of worlds or even realities, enters the picture. In this theory, the discourse and worldview created by legal texts (among others) is only one of the many ways to interpret and make

sense of reality, following its own rules on how to differentiate between certain values. Thus, although an integral part of our experiences, legal discourse alone is not sufficient to comprehend and regulate reality. In short, speech act theory and possible worlds theory can be helpful in calling into question the undisputed objectivity and legitimacy of not only legal texts but any discourse.

Although human and social sciences in the 20<sup>th</sup> century were largely concerned with linguistics, language is still often regarded as carrying merely instrumental value instead of the agency it actually represents. Language, in its guise as performative, plays an active role in shaping, maintaining and creating our social-collective reality: as one example, Sandy Petrey notes that “ideology’s capacity to constitute its own validation is among the most striking examples of how a collectivity does things with words” (1990, 35). Most institutions owe their existence to performative acts, and these institutions in turn influence the community’s everyday experiences; in short, “performative language not only derives from but also establishes communal reality and institutional solidity” (Petrey 1990, 21).

Several taxonomies of performatives have been compiled over the decades, the most often quoted being John Searle’s. One category in his system comprises so-called “institutional facts,” i.e. those instances of performative speech acts that initiate some kind of change in the world, such as a marriage certificate, a death sentence or the election of a new president. A group of related performatives—like those pertaining to chemistry, to business or to literary studies—establishes a discourse which promotes a specific way of perceiving, categorising, prioritising and ultimately shaping and creating reality. These discourses, in turn, evolve into institutions: “a discipline delimits a field of objects, defines legitimate perspectives, and fixes norms for the production of conceptual elements [...eventually progressing] from dawning individualization and autonomy to mature institutionalization” (Leitch 1982, 146).

All of the changes resulting from performative language use derive their binding force from prevalent legal institutions and customs. But there is a contradiction: on the one hand, for institutional performatives to function as intended, there has to be a specialised community that authorises and confirms the validity of the performatives used (Petrey 1990, 7). On the other hand, it should also be noted that all these discursive communities have essentially created themselves and retrospectively sanctioned their own existence in order that all the subsequent performatives they use would be perceived by the general public as legitimate (Miller 2002, 127). Hillis Miller plainly calls the foundation of such autonomous communities “illusion,” “fable” and “fiction,” echoing Derrida’s juxtaposition of man-made rules with fictional works: Derrida claims to “consider laws, constitutions, the declaration of the rights of man, grammar, or the penal code the same as novels. I only want to recall that they are not ‘natural realities’ and that they depend upon

the same structural power that allows novelistic fictions or mendacious inventions and the like to take place” (1988, 134).

Performatives, discourses and institutions create what might be termed *possible worlds*. Possible worlds theory is a relatively new, transdisciplinary field of study: originally developed for logical semantics as “interpretive models providing the domain of reference necessary for the semantic interpretation of counterfactual statements, modal formulas, intensional contexts, and so on,” possible worlds theory has been adopted and adapted by countless other disciplines, such as philosophy (“coherent cosmologies derived from some axioms or presuppositions”), natural sciences (“alternative designs of the universe constructed by varying the basic physical constants”) and fiction studies (“artifacts produced by aesthetic activities”), among others (Doležel 2000, 14–15). Possible worlds posit worldviews or coherent explanatory systems of given aspects of reality; whatever their field of application, the general role of possible worlds is to find suitable representative models for the workings of reality. ‘Models’ is a key word, as it should not be forgotten that possible worlds do not equal empirical reality: regardless of how satisfactory their explanatory powers may be, they remain imaginary constructions of the human mind, based on a certain perception of reality.

Each institution represents and promotes a specific worldview, providing an explanatory system of a specific slice of empirical reality. But participants or stakeholders later strive to deny the “fictionality” of their discourse, and the nonspecialised public eventually takes the existence of the discourse of history or law for granted, believing them to be something natural and commonsensical, a legitimate and objective way of describing the workings of reality. In this sense, institutions and the specialised professionals affiliated with them may be regarded as advocates for a given possible world: they are “instances of the way in which humankind organizes and institutionalizes the world; they constitute pre-defined patterns of conduct which are perceived as possessing a reality of their own; a reality that confronts the individual as an external and intrinsically coercive fact” (Ángeles Orts and Breeze 2017, 9–10). Through language as performative, these institutions also constantly shape and create the discourses responsible for the maintenance of these worldviews. Language turns out to be a double-edged sword: it both creates institutions and is used by these institutions (Ángeles Orts and Breeze 2017, 10–11). Language is also the means by which institutions lend their discourses the illusion of factuality and objectivity:

the acquisition or exhibition of supremacy by specialized communities is achieved through the technicality, precision and complexity of its written texts. [...] Such relationship is wielded ideologically by the expert community as a dominant bloc which treats social hierarchies as natural and reifies human phenomena – professional discourses, professional

genres and their constructs – as non-human, non-humanizable inert facticities, an extreme step in the process of objectivation, whereby the constructs deployed by the issuers of the specialized discourse become incomprehensible and detached from laypeople. (Ángeles Orts and Breeze 2017, 12–13)

This process of self-legitimation is what my particular focus, the discourse of law, has undergone as well. Only members of the legal community can successfully use legal performatives, whose authority and legitimacy the affected multitudes tend not to question. Borrowing from Lubomír Doležel's work *Heterocosmica*, we might say that one of the reasons why the public regards the discourse of law as reality and not just a point of view on reality is that legal texts disguise themselves as “world-imaging” texts instead of the “world-constructing” texts they actually are. World-imaging texts are “representations of the actual world,” i.e. they make statements of a reality that “exists prior to, and independently of, textual activity.” World-constructing texts, on the other hand, create their respective worlds: “it is textual activity that calls worlds into existence and determines their structures” (Doležel 2000, 24). More often than not, legal texts belong to the world-constructing category, since their subjects are not natural entities *per se* that can be discovered and described, yet the institution of law has established its legitimacy and overriding authority so successfully that legal texts are automatically assumed to merely record what there is. However, the entire legal discourse, its originary creation included, depends on performatives: speech act theory is the prerequisite and foundation without which law could not operate as intended.

A major instrument in persuading the public of the legitimacy of legal discourse thus lies in the texts it produces. They almost invariably employ highly specialised language, interspersed with terminology that a layman can find rather difficult to comprehend without special training—and, indeed, the point is that they are not expected to understand it. The convoluted language of legal texts, furthermore, is often complemented by linguistic choices that aim at subliminally influencing the audience. Regarding criminal trials, Robin Conley notes that “individuals are made into certain kinds of persons through legal language”: defendants often “undergo a form of linguistic violence as a result of their movement through the criminal justice system,” and the practice of habitually referring to criminals as monsters, for instance, “excludes them from categories of normal social beings” (2016, 6–7). This act of linguistic dehumanisation, by lessening the psychological burden of robbing a human being of their freedom or life, may subconsciously influence the jury's verdict and entice them into giving out a harsher sentence.

Apart from the world-shaping powers of performatives, this example also highlights that they are, at times, applied in violent situations. Derrida examined extensively the relationship between language and force, most notably in his article “Force of

Law” and his speech “Declarations of Independence.” The title of the former already implies the violence inherent in law, and this is where Derrida actually pinpoints the origins of law: since law is not a natural phenomenon, it needed to be forcefully implemented. He highlights the “internal” and “complex” relationship between law and force by calling attention to the paradox of the birth of law:

The very emergence of justice and law, the founding and justifying moment that institutes law, implies a performative force, which is always an interpretative force [...] Its very moment of foundation or institution [...] would consist of a coup de force, of a performative and therefore interpretative violence that in itself is neither just nor unjust and that no justice and no previous law with its founding anterior moment could guarantee or contradict or invalidate. (1992, 13)

Although the concepts of violence and power are used in the analysis of the “very emergence of justice and law,” Derrida does not necessarily mean actual physical force, but rather a kind of verbal-linguistic force, a set of overpowering performatives which legitimised the very existence of law itself, dispersed all doubts as to its authority and paved the way for its eventual institutionalisation. But Derrida is quick to formulate the unsettling question governing the entire existence of law: “How are we to distinguish between the force of law of a legitimate power and the supposedly originary violence that must have established this authority and that could not itself have been authorised by any anterior legitimacy, so that, in this initial moment, it is neither legal nor illegal...?” (1992, 6).

The answer to this question might be revolution. It may be said that the establishment of the legal discourse was a revolutionary act; a “genuine revolution,” after all,

one that makes a decisive break in history, cannot depend on pre-existing conventions, laws, rights, justifications and formulations, however much it characteristically attempts to claim that it does. A revolution is a performative act of a particular ‘nonstandard’ kind, namely the anomalous kind that creates the circumstances or conventions that validate it, while masking as a constative statement. A revolution is groundless, or rather, by a metaleptic future anterior, it creates the grounds that justify it. (Miller 2002, 27)

Although without using the word “revolution,” Derrida comes to similar conclusions:

Since the origin of authority, the foundation or ground, the position of the law can't by definition rest on anything but themselves, they are themselves a violence without ground. Which is not to say that they are in themselves unjust, in the sense of “illegal.” They are neither legal nor illegal in their founding moment. They exceed the opposition between founded and unfounded, or between any foundationalism or anti-foundationalism. Even if the success of performatives that found law or right (for example, and this is more than an

example, of a state as guarantor of a right) presupposes earlier conditional conventions (for example in the national or international arena), the same “mystical” limit will reappear at the supposed origin of said conditions, rules or conventions, and at the origin of their dominant interpretation. (1992, 14)

A revolution, thus, is an event which is, strictly speaking, illegal at its eruption, but upon successful completion, the revolutionary act retrospectively makes itself legal by issuing proclamations, statements, documents, explanations—in short, verbal authorisations. Every revolution needs legal documents to ensure the recognition of its achievements, and these texts invariably function as performatives because they are responsible for transforming the volatile revolution into a cemented fact.

One of the more extreme revolutionary legal performatives is the declaration of a new nation’s independence. My chosen example is the Declaration of Independence of the United States, which is not a legal text in the strictest sense of the word insofar as it is not a binding document, yet the Declaration can still be argued to belong to the discourse of and around law. In an extensive essay on the origins of the Declaration, John Phillip Reid notes that the language and terminology used in the Declaration was heavily influenced by *The Law of Nations* (1758), an influential treatise on international law, written by Swissman Emer de Vattel. Reid argues that the Declaration adopted several key ideas from de Vattel’s work, such as national freedom and independence as well as the natural right for happiness and peace—such basic human rights were already successfully evoked in legal settings by French and Spanish colonists (1981, 87). The Declaration explicitly lists these natural human laws and rights, which later evolved into the Bill of Rights of the Constitution (Armitage 2007, 38–41). In a powerful linguistic gesture, the text of the Declaration habitually uses the present tense to indicate that the American independence is as good as done: the colonies *are* already free, they “*are* absolved from all allegiance to the British Crown” and they “*have* full power [...] to do all other acts and things which independent states may of right do” (Jefferson 1776). Another, equally relevant part of the Declaration is dedicated to enumerating the reasons why the colonists were dissatisfied with King George III’s governance. This list of “grievances” was meant to explain why the subsequent revolution for independence was both inevitable and entirely lawful as regards the natural human laws and rights: in other words, the Declaration legitimised the revolution (which in itself is a political event with profound and widespread legal repercussions). The Declaration expressed the intention of the newly-called Americans to remove King George III as the law-enforcing sovereign over the colonies. Since legal systems function under the surveillance and governance of a lawful sovereign, the removal of King George III as sovereign meant a break from the prevalent legal system, allowing for the colonists to leave the jurisdiction of Great Britain and to legitimise the foundation



of a new legal-political entity, the United States of America, as the Declaration already refers to it. For this reason, John Phillip Reid even argues for considering the Declaration a legal document *per se*, more precisely an indictment against King George III, similar in both style and content to the Bill of Rights of 1689 against James II (1981, 84), which *is* an Act of Parliament. David Armitage claims as well that the “primary purpose of the American Declaration, like that of most declarations of independence that have been issued since 1776, was to express the international legal sovereignty of the United States” (2007, 21), which it purportedly did by overtly enumerating the powers and activities (such as declaring war and establishing commerce) they would independently engage in henceforward. Even if its legal status is contested, the Declaration of Independence was instrumental in the formation of an independent legal system and originated a new legal discourse, that of the United States. As such, the Declaration should be allowed a prime spot in all discussions of and around legal texts.

Nowadays, the existence of a founding legal document is “fairly self-evident,” forming the basis of “legal certainty” in the sense that what is written in the document is “traditionally viewed as an instrument that is used consciously, intentionally or purposively to express certain natural or self-evident ideas, such as the sovereignty of a people or a nation [or] the existence of a state [...] These ideas or principles are regarded as existing beforehand and must simply be expressed or communicated in the most appropriate way” (de Ville 2008, 89–90). In this interpretation, language is just an instrument for recording the natural state of affairs, but, as we have discussed above, language is rarely used constatively in legal contexts. Derrida explicitly draws a parallel between a “successful revolution,” a “successful foundation of a state” and a “felicitous performative speech act,” which create “proper interpretative models [...] to give sense, necessity and above all legitimacy to the violence that has produced, among others, the interpretative model in question, that is, the discourse of its self-legitimation” (1992, 36). However, this situation gives rise to a paradox: although a nation cannot exist without a written legal document stating its independence, this document can only be written when the given community is still not a nation. Derrida called attention to this issue in a presentation analysing the Declaration of Independence of the United States, and since then it has been extensively researched. The crux of the problem is that when the founding fathers declared that “[w]e, therefore, the representatives of the United States of America in General Congress assembled, do in the name and by the authority of the good people of these [...] free and independent States,” actually “there was no United States of America, no General Congress assembled, no free and independent states, no good people in whose name and by whose authority the General Congress could act. It was through speaking in the name of the American people that the delegates

produced a people to name; it was by invoking an authority that they established an authority to invoke” (Petrey 1990, 159). In other words, the delegates writing the declaration were supposedly chosen as representatives by the American people who only came into existence after writing the declaration; at the moment of writing, the text of the declaration does not match the actual truth of external reality. Perhaps this situation of retrospective creation and justification inspired Hillis Miller to state that the Declaration is “fabulous both in the sense that it is fictive or invented and in the sense that it is like those fables of origin that often are projected back to some mythical preoriginary time.” But he crucially continues with the assertion that “[s]uch fables are invented as necessary fictions in order to account for the founding moment of a new nation” (2002, 124).

What is interesting is that according to Austin’s original theory of speech acts, which placed a great emphasis on following laws and conventions, the Declaration of Independence—or any other similar document, for that matter—should not have been successful because, breaking with conventions, it was an infelicitous speech act. Possible worlds theory, on the contrary, tells us that the construction of worlds is “language-dependent and unimpeded by the absence of a corresponding state of affairs ‘out there’” (Ronen 1994, 34). Philosophy and history characterise possible worlds as contingent states of affairs, i.e. they recognise the possibility of counterfactual states of affairs. According to this theory, other possible worlds, including some in which the American revolution was unsuccessful, could just as easily have obtained as our actual world, in which the US is a sovereign nation. Inexistent as such beforehand, the actual possible world that we know as the American nation “becomes an enormous complexity created and continually recreated by the law” (Fitzpatrick 2001, 82), the authority and legitimacy of which law was (and still is) guaranteed by the originary performative speech act, the Declaration.

It would be far-fetched to claim that the Declaration and, by extension, the US are based on merely fictional grounds. But it would be equally naïve to believe that fiction and reality are neatly separated domains bearing no influence upon one another. The theory of possible worlds can be instrumental in interpreting and comprehending empirical reality; as Eco puts it, “[w]e explore the plurality of possibilities to find out a suitable model for realia” (Eco 1989, 57). Possible worlds theory calls attention to the fact that the borderline between fiction and reality is a dynamic concept that is permeable from both sides. It embraces the new possibilities that the weakening of the boundary between actual and fictional spheres would bring. These new areas of interest include “relaxing philosophical notions of truth, existence and world-language relations” (Ronen 1994, 6), and shed a new light on long-standing epistemological and ontological questions such as “whether



possible worlds say something about the features of our language in its relation to the world” and “whether possible worlds say something about the structure of reality itself” (Ronen 1994, 73).

Wolfgang Iser built his theory of concord-fiction on these principles. In his view, fiction “constitutes discourse to such a degree that the only reality one can talk about is that of discourse-related real entities”, and this idea might be stretched to the extent that “the assumed presence of physical objects is on the way to becoming a type of discourse itself, which comes close to liquidating its factual independence” (1993, 119–20). The concepts of nationhood and democracy are examples of what Iser termed “concord-fictions” (1993, 88–89), i.e. widespread social-collective interpretations of reality that disguise themselves as reality *per se*, instead of the collective fabrications that they actually are. Concord-fictions are not faithful descriptions of the workings of reality, yet they are not hollow lies either: they “spring into being because of the inaccessibilities of life” (1993, 88), meaning that a community creates these concord-fictions to fulfil their compulsion of comprehending and explaining the world, and of providing meaning and purpose to their lives. One concord-fiction, however, is neither enough nor can it provide adequate explanations forever. Flexibility instead of permanence is a defining feature of concord-fictions, which need to be able to meet the explanatory needs of a given period. If “they prove to be inadequate, the substitution of others for them testifies to their indispensability. What counts is success, and not truth, and the former will always be endowed with the latter when it has been telling” (1993, 89). The content of concord-fictions may be changing and reflecting prevalent issues, but the need for them remains permanent, since whenever one such fiction is “discredited,” its place will not remain empty but will be “filled by another fiction that seems more trustworthy” at present (1993, 88).

Although a concord-fiction might be revealed as such retrospectively, in their originating and sustaining circumstances concord-fictions are heralded as *truth*: “we simply do not realize that they may be fictions, because they provide the conditions under which we establish meaning and orient actions” (Iser 1993, 89). In spite of the name, since concord-fictions “embodied collective certainties, they could hardly be viewed as fictions” (1993, 88). Iser explains that “concord-fictions turn into forms of make-believe only when our attitudes toward them change [... and t]he discrediting of such a fiction indicates that an erstwhile collective experience is no longer shared” (1993, 89). Religion is one of Iser’s examples: a thousand years ago, people were satisfied with the answers provided by the discourse of and around religion, but as time went on, religion lost its supreme explanatory status and was revealed as a concord-fiction. But the questions, old and new alike, that thus opened up, could not be left unanswered, so new concord-fictions evolved

(alongside religion), like that of nationhood, which serves our purposes in the present day, but by the end of the century it may perhaps have become obsolete and supplanted by a new concord-fiction.

A more recent iteration of Iser's concord-fictions is what Aditi Bhatia calls "discourses of illusion." Without disregarding Iser's pragmatic considerations, Bhatia's methodology relies instead on discourse analysis and sociolinguistics. Discourses of illusion are very similar to concord-fictions but with an added layer of agency: they constitute "various forms of public discourses, in particular those associated with politics and religion, [which] can be viewed as an attempt by writers or speakers to convince their audiences that the representation of reality that they are putting forward is the correct and objective one. [...] Examples may include the constructs of globalisation, diversity, democracy, freedom, change, climate change, and catastrophe" (Bhatia 2015, 17). Bhatia's concept supposes the existence of several competing (potentially mutually exclusive) worldviews or perspectives on reality, each of which are advocated for by dedicated discursive communities. These communities wish to hide the contingent nature of their discourses and elevate them to the level of objectivity and factuality, maintaining an illusion of the natural order of reality (Bhatia 2015, 7). A primary means of achieving the naturalisation of illusions is textual-linguistic persuasion. Bhatia notes that "the creators of such illusions have at their disposal access to a relevant communicative medium (e.g. mass media) in order to convey their subjective representations," and their enterprise may be deemed successful when "the proliferated representations of reality go on to be recognised as the dominant framework within which understanding of that reality operates" (2015, 13).

When it comes to convincing the public to believe in the objectivity of a given worldview, linguistic subtlety is more efficient than forceful propaganda. By projecting the image of a homogeneous discursive community but (apparently) allowing dissenting opinions, the propagators of illusions seem a trustworthy source of knowledge (Ángeles Orts and Breeze 2017, 14), and the public is always "more likely to accept truths they feel are not being forced upon them and, more importantly, truths they feel they have chosen to accept on their own, thereby subscribing to dominant ideology, or in this case the dominant representation of reality, without realising it" (Bhatia 2015, 13). It certainly helps the building of both trust and dependence that the general public is excluded from participating in these specialised discursive communities; only qualified authority figures are allowed to shape discourses, whose contributions, in turn, are usually concealed to promote the idea of factuality and naturality. It is important to emphasise that these discourses and the persuasion of the general public to believe in an illusion is not inherently good or bad, similarly to Derrida's legal-linguistic violence which is not negative *per se*. The concept of democracy is a discourse of illusion (or a concord-fiction), but this fact should not imply that democracy should be discarded

simply because it is not a natural state of affairs. What the discussion on law and concord-fictions shows is, rather, the true power of language: how a simple verbal act has the potential to solidify into an unquestionable axiom of how reality works. Possible worlds theory highlights the very existence of a multitude of worldviews that shape our conception of “reality” even without us being aware of it, whereas speech act theory uncovers how these worldviews and new states of affairs are created through language. The Declaration of Independence of the United States is a prime example of such a world-creating performative text, and an especially powerful one at that. It managed to successfully perform a set of speech acts on a perhaps unprecedented scale, and this change in the world both brought forth a change in the *perception* of the world (that the political *status quo* could be challenged and overturned, paving the way for the nationalist revolutions of the following century) and exchanged the political concord-fiction of the period—monarchy—for that of democracy.

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