



## Some remarks on performatives in the law

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**Abstract.** This paper contains an analysis of performatives with special attention to performatives in the law. It deals with the possibility to recognise performativity by means of a grammatical-syntactic criterion, the self-verifying and norm-promulgating character of legal performatives, an analysis of the effects of performatives by means of causal logic, the different forms of performativity and a theory of promise-performatives.

### 1. Introduction: An interesting list of examples

Over the years Fred Stoutland<sup>1</sup> has made quite a few valuable contributions to our understanding of such philosophically crucial notions as those of *action* and *truth*. For this reason I do hope that my present little study on what is known as *performatives* will be of interest to Fred on this jubilee occasion.

In his significant dissertation for the Degree of *juris doctor*, Frändberg (1973), my friend and colleague Åke Frändberg pointed out that a characteristic feature of legal rules (or legal norms) is that they often contain a so-called performative component: *by means of speech acts* (judgments, decisions) the legal official (“functionary”) – enjoined by the legislator – issues *norms* addressed to citizens or to other officials. Frändberg explains the difficult concept/phenomenon of performativity in a very lucid and straightforward way. To start with, he asks us to consider the following sentences (Frändberg 1973, p. 56):

- (1) I promise to visit you tomorrow.
- (2) He promises to visit you tomorrow.
- (3) I promised to visit you tomorrow.
- (4) I play the harp.

Frändberg now points out (still on p. 56):

Among these four sentences (1) differs in an interesting way from the remaining ones. For the one who pronounces this sentence performs the

very act about which the sentence says something – to promise to visit “you” tomorrow – precisely by his pronouncing the sentence. The promise comes into being through his words. (An altogether different matter is that maybe he does not at all intend to keep it.) The same thing holds for sentences like

- (5) We bid you welcome.
- (6) I baptize you *Sofia Albertina*.
- (7) I invite you to dinner.

He then makes the following observation (p. 57):

The sentences (1) and (5)–(7) instantiate a kind of sentences known as *performatives*. A distinctive feature of theirs is that they give the impression of describing an act of which, as a matter of fact, they are a part. By saying “I invite you to dinner” I invite you to dinner (provided that my pronouncement is made under certain adequate circumstances). On the other hand, I do not play the harp by pronouncing the sentence (4).

Typical performatives appear in the first person present indicative (singular or plural) or are equivalent to sentences in that form. Sentence (1) is a performative, but not (2), nor (3).

Frändberg further notes that many jural sentences are performative in character and exemplifies (still on p. 57):

- (8) You are hereby offered a batch of excellent pears.
- (9) I now declare you man and wife.
- (10) Judgment for plaintiff entered: A is obligated to pay damages to B amounting to SEK 1000 plus interest.
- (11) The claim for payment for the freezer dismissed on the merits.
- (12) Pursuant to the Road Traffic Offences Act, art. 1, par. 1, the Court of Appeals imposes a fine on E for careless driving amounting to a total of SEK 400.

With respect to the sentences (10)–(12), Frändberg observes the following:

Precisely *by pronouncing* these sentences (in adequate circumstances) *the judge obligates* A to pay damages to B, *dismisses* the claim for payment for the freezer, and *imposes* a fine on E for careless driving etc. – as the case may be. Herein lies their performative character. (Frändberg 1973, p. 57; my italics)

The plan of the present paper is then as follows.

In Sections 2 and 3 *infra* we are going to discuss some interesting aspects of performatives, which form a sort of background to Frändberg's above presentation of them and which are actualized by that presentation. In Sections 4–7, then, we deal with his positive contribution to the doctrine of performatives, especially as they are used in the law. Finally, in a concluding Appendix, we try to illustrate the role and function of the fascinating little word “hereby”, which word serves as an almost decisive criterion of the performativity of verbs and sentences. We do so by quoting three illuminating passages from the rich literature on the subject.

## **2. Performativity as a property of sentences in the sense of sentence-*gestalts***

A preliminary observation concerning the examples just given of performatives is this: Frändberg takes performativity, i.e., the property of being (a) performative, to be a property of a sentence in the sense of a sentence-*gestalt* or a sentence-*type* – as opposed to such related entities as sentence-*tokens* and *utterances* (pronouncements) of sentence-types; these are rather a kind of ‘acts’ or ‘actions’. Here we just emphasize the importance of the distinction:

sentence-type[-*gestalt*] – sentence-token – utterance of a sentence-type

This distinction is obviously crucial in linguistic theory and must be clearly borne in mind throughout our present discussion, since it affects the analysis of the concept of performativity as such.

## **3. A purely grammatical-syntactic criterion of the performativity of sentences in Swedish?**

We recall that Frändberg takes the sentences (1) and (5)–(12) to be performatives, whereas he takes (2), (3) and notably (4) to be non-performative(s). This is a highly plausible standpoint; however, it has proved quite difficult to find a uniform grammatico-syntactic criterion of performativity, applicable to natural languages like English or Swedish, which yields precisely the results desired by Frändberg. Many of the difficulties involved are, of course, well known from J.L. Austin's celebrated *How to Do Things with Words* (1962) and are nicely illustrated by our raising the following nasty questions:

- I. Is the *first-person*-form necessary for performativity in the sense that a sentence, in order to be a performative, has to contain explicitly some

- of the pronouns “I” or “we” (which is true of the sentences (1), (5)–(7) and (9))?
- II. Is the *present tense* a necessary condition for performativity?
- III. Is the Austinian requirement of the *active* – as opposed to the *passive-voice* necessary for performativity?
- IV. Is the presence of “*hereby*” necessary for performativity? (See here Åqvist: *Performatives and Verifiability by the Use of Language* (1972), notably Sections 1 and 9.)

Here are some *quick comments* on questions I–IV against the background of Frändberg’s list of example sentences. We distinguish reasons *for* and *against* an affirmative answer to the question at issue.

*Ad question I. For:* An affirmative answer here explains why the third-person sentence (2) is not a performative. *Against:* But the sentences (8) and (10)–(12) are not formulated in the first person either. Nonetheless they could reasonably be classified as performatives (as done by Frändberg) by virtue of the fact that they appear to be *equivalent to* (in some appropriate sense) sentences in the first person.<sup>2</sup>

*Ad question II. For:* An affirmative answer here explains why the sentence (3), formulated in the simple past [*praeteritum*], fails to be a performative. *Against:* No sentence on the Frändberg list.

*Ad question III. Against* (most interesting here): The sentences (8), (10) and (11) are all in the passive voice and thus afford clear counterexamples to an affirmative answer here. Nor does Frändberg adopt the present Austinian requirement of active voice in his characterization of the so-called ‘typical’ performatives. Instead, I presume, he would somehow explain the performativity of (8), (10) and (11) by reference to the disjunctive clause “...or are equivalent to...” in that characterization.

*Ad question IV. Against:* The only sentence on the Frändberg list which happens explicitly to contain the word “*hereby*” is the sentence (8). So the “*hereby*” criterion is no good, if interpreted too strictly. If interpreted less strictly, e.g., appealing à la Frändberg to a disjunctive clause “... or are equivalent to...”, we might obtain the following reason for an affirmative answer here, viz. *For:* Such an answer explains why the sentence

(4) I play the harp

is *not* a performative, whereas all the sentences (1) and (5)–(12) appear to be performatives. The explanation involves a substitution or insertion operation and runs as follows:

We insert the word “*hereby*” in all the sentences (1), (5)–(12), and find that we can do this naturally while preserving their performativity – *salva performativitate* as it were. On the other hand, the analogous insertion in the sentence (4) yields an “unnatural” and bewildering result in most cases where the sentence is pronounced. Frändberg’s diagnosis of the situation is

to be found in the following important passage, which is worth re-quoting here:

A distinctive feature of theirs (*sc.* the performatives) is that they give the impression of describing an act of which, as a matter of fact, they are a part. *By saying* “I invite you to dinner” I invite you to dinner (provided that my pronouncement is made under certain adequate circumstances). On the other hand, I *do not* play the harp *by pronouncing* the sentence (4). (Frändberg 1973, p. 57; my italics)

On my view, the function of the word “hereby” is precisely to point out explicitly and to emphasize the interesting causal or quasi-causal relation of ‘doing-by-saying [*pronouncing*]’, about which Frändberg speaks in the quoted passage. We should observe as well that the results of inserting “hereby” in the non-performative sentences (2) and (3) are strained and difficult to interpret – we cannot combine (2) and (3) with “hereby” in the same natural way as we can do in the cases of (1) and the other performatives on Frändberg’s list of examples. So there is a resemblance here between the sentence (4) on the one hand and the sentences (2), (3) on the other.

Let us now go back to the problem formulated in the title of this section, viz. to find, in the spirit of J.L.Austin, a purely grammatical-syntactic criterion of performativity that works for a natural language like English or Swedish. In short, my attitude to this problem can be summarized in the following three points:

- (i) The ‘normal form’ discussed and criticized by Austin – *the first person singular present indicative active (grammatical)* (see Austin 1962, Lecture V) – captures something really important and essential, but is difficult to develop into a criterion of performativity that is immune against objections.
- (ii) My own “hereby”-criterion<sup>3</sup> looks quite promising indeed, but is likely to be open to similar criticism.
- (iii) The attempt to find a purely *syntactic* criterion of the performativity of sentences in English or Swedish seems to be based on expectations that are basically unsound or even absurd – being to the effect that we are entitled to disregard *semantic* and *pragmatic* [“language-user”] aspects, when dealing with the problem of characterizing performativity. In natural languages like English or Swedish, however, syntactic, semantic and pragmatic aspects are intertwined in a way that threatens to make the attempt impossible.<sup>4</sup> Frändberg’s comments on the sentences on the list (1)–(12) provide good evidence for this diagnosis; for instance, he is

well aware of the need for a semantic-pragmatic relation “is equivalent to” when dealing with the problem of adequately characterizing the ‘typical’ performatives.<sup>5</sup>

Let us now pass to consideration of Frändberg’s positive contribution to the doctrine of performatives as they appear in the law.

#### 4. The self-verifying and norm-promulgating character of performatives in the law

Let us again consider the sentences (10)–(12), viz.

- (10) Judgment for plaintiff entered: A is obligated to pay damages to B amounting to SEK 1000 plus interest.
- (11) The claim for payment for the freezer dismissed on the merits.
- (12) Pursuant to the Road Traffic Offences Act, art. 1, par. 1, the Court of Appeals imposes a fine on E for careless driving amounting to a total of SEK 400.

Again, we recall Frändberg’s comment on the sentences (10)–(12):

Precisely *by pronouncing*<sup>6</sup> these sentences (in adequate circumstances) *the judge obligates A to pay damages to B, dismisses the claim for payment for the freezer, and imposes a fine on E for careless driving etc.* – as the case may be. Herein lies their performative character. (Frändberg 1973, p. 57; my italics)

The property of performatives illustrated in this passage is called their *self-verifying* character by Frändberg (p. 58). By this one means the capacity of performatives of making themselves true by being pronounced in adequate circumstances. For the time being we leave this remarkable property<sup>7</sup> of performatives aside, but we shall return to it in Section 6 *infra*. Here we just observe that it is a major theme in the theory of Hedenius (1963).

A major theme in Frändberg is now his doctrine of the so called *norm-promulgating effect* of (at least some) performatives in the law. With respect to the characteristic verb-phrases in the sentences (10)–(12), viz. “is obligated to”, “is dismissed (on the merits)”, “imposes a fine on”, he proposes the interesting idea that they can all be analyzed in terms of the verb “(to) decide”. For he takes the following sentences (10′)–(12′) to be equivalent to (10)–(12), respectively:

- (10') Judgment for plaintiff entered: *The Court decides that A shall pay damages to B amounting to SEK 1000 plus interest.*
- (11') *The Court decides that C may refrain from paying D for the freezer (sc. where C and D are the parties to the case).*
- (12') *The Court of Appeals decides that E shall pay SEK 400 as a fine for careless driving, pursuant to the Road Traffic Offences Act, art. 1, par. 1. (Frändberg 1973, p. 59; his own italics)*

Frändberg then characterizes the norm-promulgating effect of (10)–(12) as follows:

By pronouncing these sentences the judge promulgates the following norms (or, differently expressed, gives binding force to the following norms):

- (10\*) *A shall pay damages to B amounting to SEK 1000 plus interest.*
- (11\*) *C may refrain from paying D for the freezer (C, D being the parties to the case).*
- (12\*) *E shall pay SEK 400 as a fine for careless driving. (Frändberg 1973, p. 58; my italics)*

As for the relation of (10)–(12) to (10\*)–(12\*), respectively, Frändberg then tells us the following:

The relation obtaining, e.g. between (10) and (10\*), (11) and (11\*), as well as between (12) and (12\*), is of great philosophical interest. (A theory on the matter is to the effect that pronouncing, e.g. (10) *causes that* (10\*) gets binding force.) (Frändberg 1973, p. 58; his own italics)

In my opinion, we can obtain a more precise formulation of this theory [which is quite interesting as such], if we appeal explicitly to the three sentences (10')–(12') and utilize their role as *intermediaries* in the context. How? Well, according to Frändberg,

(10)–(12) are equivalent to (10')–(12'), respectively;

*if* in turn we have that

(10')–(12') logically imply the norms (10\*)–(12\*), respectively,

*then* we may conclude that

(10)–(12) *logically imply* the norms (10\*)–(12\*), respectively.

Such a result would then amplify, and supplement, Frändberg's account of the norm-promulgating effect of the sentences (10)–(12). Can we argue in a convincing way for the hypothesis that, in turn, (10')–(12') logically imply the norms (10\*)–(12\*)?

On my view such is indeed the case. In order to establish this result we have to do three things:

- (i) give a reasonable interpretation of the important verb “(to) decide”;
- (ii) pave the way for a formalization of the relevant sentences; and
- (iii) prove a little “**Theorem**”.

*Ad (i):* A preliminary analysis or explicative definition of “*decide*” is this: The Court *decides that* p, if and only if, The Court *causes [makes it true, sees to it] that it shall* be the case that p.

Here the variable ‘p’ ranges over suitable states-of-affairs of a normative and future-oriented character – e.g., those indicated by the sentences (10\*)–(12\*).

*Ad (ii):* This preliminary definition can be stated more formally as follows:

**DefDec.** DecideCt p = df CauseCt Shall p

In this formal definition we think of the relevant verbs, or verb-phrases, as one-place logical operators, to be read in accordance with the following “key”:

DecideCt is read as “The Court decides that”  
 CauseCt is read as “The Court causes that”  
 Shall is read as “it shall be the case that”

In the sequel we will also consider another two logical operators May and Not, for which our “reading-key” stipulates that

May is read as “it may (deontically) be the case that”  
 Not is read as “it is not the case that”.

We can now render the logical form of the sentences (10')–(12') as follows [with some simplifications, viz. omitting the information that the decision means that plaintiff’s claim is sustained in the case of (10'), that it is turned down in the case of (11'), and that it is made in accordance with a certain statute in the case of (12')]:

LgFm(10'): DecideCt Shall (A pays damages to B amounting to SEK 1000 plus interest).

LgFm(11'): DecideCt May Not (C pays D for the freezer).

LgFm(12'): DecideCt Shall (E pays SEK 400 as a fine for careless driving).



Furthermore, we can render the logical form of the norms (10\*)–(12\*) thus:

LgFm(10\*): Shall (A pays damages to B amounting to SEK 1000 plus interest).

LgFm(11\*): May Not (C pays D for the freezer).

LgFm(12\*): Shall (E pays SEK 400 as a fine for careless driving).

*Ad (iii)*: See section 5!

### 5. An application of the causal logic of *causing* [making it true, seeing to it] that and of the deontic logic [norm-logic] for *shall* and *may*

We now easily establish the following result:

THEOREM 5.1. Assume **DefDec**. Then it holds that

- (10') logically implies (10\*),
- (11') logically implies (11\*), and that
- (12') logically implies (12\*).

*Proof.* Let us first transform the sentences (10')–(12') by means of our preliminary definition of the verb-phrase “The Court decides that”. We then obtain [still simplifying]:

- (10'') *The Court causes that* it shall be that A shall pay damages to B amounting to SEK 1000 plus interest.
- (11'') *The Court causes that* it shall be that C may refrain from paying D for the freezer.
- (12'') *The Court of Appeals causes that* it shall be that E shall pay SEK 400 as a fine for careless driving.

Applying our “reading-key” to the sentences (10'')–(12'') we then render their logical form as follows:

LgFm(10''): CauseCt Shall Shall(A pays damages to B amounting to SEK 1000 plus interest).

LgFm(11''): CauseCt Shall May Not (C pays D for the freezer).

LgFm(12'') CauseCt Shall Shall (E pays SEK 400 as a fine for careless driving).

Please observe here that the initial prefix CauseCt Shall captures the meaning of DecideCt in all these cases – by virtue of our formal definition **DefDec**. The next thing to do will be to remind the reader of certain elementary principles that are valid in causal and deontic logic, viz.:

CCt      If CauseCt p, then p  
 SS      Shall Shall p, iff, Shall p  
 SM      Shall May p, iff, May p  
 Mn-nS   May Not p,    iff, Not Shall p

where this time the variable ‘p’ ranges over arbitrary sentences – thus, not necessarily normative ones.

Armed with these logical principles, we finish the proof as follows:

- Step 1. We consider the sentences (10'')–(12'') in their formalized LgFm-versions given above. By CCt we have that (10'')–(12'') logically imply the results of deleting the initial CauseCt operator. So we delete it and obtain in the cases of (10'') and (12'') expressions of the form Shall Shall p, and in the case of (11'') an expression of the form Shall May p.
- Step 2. In the first two cases we reduce the compound ShallShall to Shall (by virtue of the principle SS), and in the third case we reduce the compound ShallMay to May (by virtue of principle SM).
- Step 3. The operations performed in Steps 1 and 2 have thus given us the following expressions as logical consequences of (10'')–(12''):

In the case of (10''):    Shall(A pays damages to B amounting to SEK 1000 plus interest).  
 In the case of (11''):    May Not(C pays D for the freezer).  
 In the case of (12''):    Shall(E pays SEK 400 as a fine for careless driving).

We note that those expressions are identical to the desired results, i.e., the sentences (10\*)–(12\*), in their respective formalized LgFm-versions. And by our definition **DefDec** we know that the sentences (10')–(12') are equivalent, respectively, to the sentences (10'')–(12''), which in turn we have proved logically to imply the norms (10\*)–(12\*), respectively. Hence our desired little theorem.

*Remark.* Note that our result just establishes a *consequence* of **DefDec**, whereas the adequacy, or soundness, of this definition itself is never questioned, but is taken for granted throughout our proof. An altogether different matter is the question to what extent **DefDec** is valid and tenable as such, how it can be defended against objections, and so on.<sup>8</sup> This question must be left aside for the time being.

## 6. Construction of various concepts of performativity

In the literature on performatives there occur a large number of attempts to make precise, to explicate, and to define more exactly the import of the concept of performativity. In my opinion many of these attempts suffer from three main faults, viz.:

- (i) There is insufficient emphasis on the *ambiguity* of the concept, i.e. on the existence of several possible explications of it, which may all be reasonable in their ‘right’ contexts.
- (ii) In the definitional attempts there is insufficient emphasis on the fact that the concept of performativity is highly *relational* and *context-dependent* [“Situationsabhängig”]. This appears very clearly from the fact that
- (iii) the *indexical*, or *demonstrative*, aspects of performatives as well as their involving the complex notions of *conditionality* and *agent-causation* (“agency”) are mostly unsatisfactorily handled from the standpoint of logical semantics, if not missing altogether.

This criticism does not, however, apply to the account given in Frändberg (1973), for he cautiously refrains from trying to contribute to the theory of performatives – at least that is what he explicitly pretends [p. 57]. Nonetheless, his presentation indicates that he is well aware of the pitfalls (i) – (iii) *supra*. Furthermore, Frändberg highlights the important aspects mentioned in point (iii) in such a pertinent and clarifying way that one feels that he fails when pretending to refrain from contributing to the theory of performatives. If so, quite a laudable failure!

In order to motivate this claim somewhat more in detail, let us introduce two definitions of performativity, both of which are clearly suggested by Frändberg’s account of the norm-promulgating and the self-verifying senses of the “judicial” performatives (10)–(12).

**DefPerf.** Sentence *S* is *performative relative to sentence T in the context k* = df  
By addressing *S* to suitable receivers in *k*, the sender of *S* causes that *T* becomes *true* in *k*.

First of all, we note that performativity according to **DefPerf** is a *ternary*, i.e. three-place, *relation*, which has two places for *sentences* (S,T) and a third one for “communicative” *contexts* (k). Now, this semantical definition can be used to capture Frändberg’s *norm-promulgating* sense as follows. Apply **DefPerf** to his pair of sentences (10)–(10\*), and we obtain:

By addressing (10) [= sentence S] to the parties to the case [= A,B as suitable receivers] in the “judicial situation” k, the judge [= the sender of (10)] causes that the norm (10\*) [= sentence T] becomes true (valid, binding) in k – i.e., that in k it shall be that A pays damages to B amounting to SEK 1000 plus interest.

Note here that we appeal to the following semantical principle:

Norm (10\*) is true (valid, binding) in k, iff (= if and only if), in k it shall be that A pays damages to B amounting to SEK 1000 plus interest

So we may use **DefPerf** in order to argue for (10) being performative relative to the norm (10\*) in suitable judicial situations k – as suggested by Frändberg [see Section 4 *supra*]. Similar results are easily obtained for the pairs of sentences (10')–(10\*), (11)–(11\*), (11')–(11\*), (12)–(12\*) and (12')–(12\*), all of which illustrate the interesting norm-promulgating sense under consideration. Moreover, we take **DefPerf** to capture our *basic* notion of performativity as applied to sentences used in legal contexts, e.g. judicial ones.

Consider next a definition of performativity that is intended to capture the cherished *self-verifying* sense of the notion:

**DefPerf<sub>selfverf</sub>**. Sentence S is performative *simpliciter* in the context k = df  
S is performative relative to S, i.e. itself, in k [in the basic sense of **DefPerf**].

We observe here that performativity in the sense of **DefPerf<sub>selfverf</sub>** is a merely binary, i.e. two-place, relation, having just one place for sentences (S) and one for contexts (k). This definition can then be used to explain the sense in which such sentences as (10)–(12), (10')–(12') and related ones can be said to be self-verifying.

*Further Remarks.* (I) We see that the self-verifying notion of performativity is *definable* in terms of the basic one used to explain the norm-promulgating sense, whereas we do *not* have definability in the other direction; e.g., how are we to explain the performativity of (10) relative to the norm (10\*), using the self-verifying notion? (10) and (10\*) are obviously distinct, i.e. non-identical, sentences. Hence, unlike e.g. Hedenius (1963), we

take the self-verifying variant to be merely a special case [with  $S = T$ ] of our basic relation of performativity. This variant, defined by **DefPerf<sub>selfverf</sub>**, turns out to be merely secondary by being definable in terms of the primary concept, defined by **DefPerf**, which figures in Frändberg's norm-promulgating contexts.

(II) Let me add that our two notions of performativity, designed respectively to capture Frändberg's norm-promulgating and self-verifying aspects of performatives in the law, correspond to two concepts of *contextual performativeness* defined in my Åqvist (1972) Section 5. In that work they played a central role due to their capacity of doing justice to the *context-dependence* of notions of performativity, which is in turn important for understanding such features of theirs as *indexicality*, *conditionality*, *agent-causation* etc. – with a view to avoiding and handling the three pitfalls spoken of at the beginning of this section. However, I am not entirely happy with the formal apparatus used in Åqvist (1972) as it stands, in spite of its being quite advanced in a number of respects. For one thing, it lacks a requisite logical machinery for dealing with temporal relations and connexions; this shortcoming is remedied in the later studies Åqvist (1973), Åqvist (1974), Åqvist and Mullock (1989) [on Causation in Tort and Criminal Law] and Åqvist (2002).

## 7. A theory of promise-performatives inspired by Frändberg

Consider the sentences:

- (1) I promise to visit [that I visit] you tomorrow.
- (1\*) I am obliged [committed] to visit you tomorrow.

Frändberg (1973, p. 57) observes that the one who pronounces the sentence (1) in adequate circumstances issues a norm – addressed to himself – viz. the norm (1\*). Recalling his analysis of the judicial sentences (10)–(12) in terms of the verb *decide*, one may suggest a similar analysis of the promise-performative (1) [which is not done by Frändberg, but seems to be worth our while]. To work out this idea, we quickly observe the following. The logical form of the norm (1\*) is unproblematic – it is

LgFm(1\*): Shall(I visit you tomorrow)

How are we then to handle (1)? Pursuing a certain analogy with sentence (10), we suggest that (1) at least implies, and is possibly even synonymous with

I hereby commit myself to visit you tomorrow

(See the quotation from von Wright (1962), discussed in the Appendix *infra*.)  
And in turn – certain analogy with (10') – this phrase could be interpreted as implying, if not as equivalent to

(1') I [*qua* committing] decide that I [*qua* committed] shall cause that  
I visit you tomorrow

Slightly extending our formalism – admitting the pronoun “I” as an argument or index on the operators Decide and Cause, we render the logical form of (1') as follows:

LgFm(1'): DecideI Shall CauseI p

where ‘p’ stands for “I visit you tomorrow”.

Similarly, slightly extending our definition **DefDec**:

DecideI p = df CauseI Shall p [where ‘p’ now stands for arbitrary sentences]

we obtain the result that (1') is equivalent to

(1'') I cause that it shall be that I shall cause that I visit you tomorrow  
the logical form of which then becomes:

LgFm(1''): CauseI Shall Shall CauseI p

Finally we interpret sentence (1) by means of an operator PromI which obeys the formal definition:

**DefProm.** PromI p = df DecideI Shall CauseI p

We now easily prove a little “**Theorem**” to the effect that (1') [equivalent to (1'') by our extended **DefDec**] logically implies the norm (1\*). The strategy of proof is essentially the same as the one used in Section 5 *supra*, with this little deviation: First, we prove that (1') logically implies

(1\*\*) Shall CauseI p [p = “I visit you tomorrow”]

and obtain, via an I-variant of the principle **CCt**, viz.

**CI** If CauseI p, then p

together with standard deontic logic, the desired result

(1\*) Shall p [p = “I visit you tomorrow”]

Finally, we can use **DefPerf** in order to argue for the view that the sentence (1) [with logical form = PromI p] is performative relative to the norm (1\*) in suitable contexts k.

Assertions of the form ‘S is performative relative to T in k’, e.g. that (1) [(1'), (1'')] is performative relative to (1\*) in such and such appropriate contexts, are highly interesting inasmuch as they give an indication about how to interpret the word “hereby”, which can naturally be inserted in such sentences as (1), (1') and (1''). Briefly, one can say that the function of “hereby” is to express and to make explicit the alleged relations of performativity already in the *object-language* to which the matching “hereby”-sentences belong. For, note that the above assertions are formulated in a *meta-language* and thus do not themselves belong to the object-language in question. The matter will be illuminated somewhat further in the Appendix below.

#### **Appendix: On the meaning of the word “hereby” in certain contexts**

We close this paper by quoting some relevant passages from the vast literature on performatives, all of which appear to be along the lines favored by Frändberg and myself. The quoted passages also seem to lend some support to the idea (just proposed) of making relations of performativity explicit in the object-language to which the “hereby”-variants of e.g. the sentences (1), (1') and (1'') belong.

First of all, a quotation from Georg Henrik von Wright’s paper “On Promises” in *Theoria* 28 [= von Wright (1962)]:

This would be a possible analysis of the above third person sentence [*sc.* “x has promised y to do p”]: “By addressing y with a certain form of words (such as ‘I promise you to do p’), x has put himself under an obligation to y to do p.” This would be an “analysis” also in the sense that it mentions two main “components” or “parts” of a promise, viz. the use of a certain *form of words* and the *obligation* which the user of the words henceforth (and on account of having used them) has to another person to do a certain thing.

“With these words I put myself under an obligation to you to do p” is another *form of words*, which could be used for giving a promise. (It probably sometimes *is* used for this purpose.) This form of words is *equivalent* to the form of words “I promise you to do p” in the sense that the two forms may be used for doing exactly the same thing, viz. giving a certain promise. And one could call the longer form of words an *analyzed* version of the shorter form of words, on the ground that the first sentence contains explicit mention of things which, though essential

to promising, are not overtly mentioned in the second. (von Wright 1962, Section 6, p. 288; his own italics)

Two quick observations. The phrase “With these words...”, which introduces the second paragraph in this quotation, could reasonably, and in the context, be replaced by or taken to be synonymous with “hereby”. Moreover, the idea of making relations of performativity explicit *via* two main components of a promise – is at least suggested by von Wright in this interesting and perceptive passage. Anyway, it may conveniently be compared to the following passage from the Introduction to Åqvist (1972), where a basic formal language L is taken as a starting point for the construction of a whole family of *formal languages with performatives*:

The most salient features of L itself [*sc.* the basic formal language at issue] are undoubtedly (i) the availability in it of formal counterparts to *indexicals* like “I”, “you”, “*this situation*”, and “*this sentence*”, and (ii) its machinery for handling *subjunctive conditionals* as well as the well-known Goodman problem of *relevant circumstances* ... .The reason why we equip L with those fairly unorthodox resources is this: consider the following sentence whose status as a performative is, if anything, beyond reasonable doubt and which ought consequently to be amenable to formalization in L:

(1) I *hereby* promise you to pay you 5 dollars

What does (1) mean? and, in particular, what is meant by the mysterious little word “hereby” so characteristic of phrases like (1)? It seems to me that this simple-looking analytic question has not only been seriously neglected by most workers in the field (Hedenius 1963 is again an exception, the only one known to me, in fact<sup>9</sup>) but is indeed as crucial as it is difficult to answer: for it turns out to provide the chief clue to the solution of our key problems. We suggest then that (1) is roughly synonymous with

(2) I communicate this sentence to you in this situation and, *by* doing so (i.e., *by* communicating this sentence to you in this situation) I make a promise to pay you 5 dollars.

You see that, if my suggestion is an acceptable one, all four funny indexicals mentioned above are activated in the analysis of (1) as (2); again the force of “by” in (2) is clearly to convey some relationship between the speaker’s acts of communicating and of promising that appears somehow to be of a *causal* or “productive” nature. In order



for L to be able to represent this causal relationship, then, L must of course be equipped with resources necessary to that purpose;...  
 . (Åqvist 1972, pp. 3–4; my italics)

As far as the closer analysis of the meaning of promise-performatives is concerned – see the quotation above from von Wright (1962) – I still entirely agree with him.<sup>10</sup> This means, however, that we are both exposed to the following objection raised by Hedenius (1963) [= “Performatives”, *Theoria* 29 (1963)], Section 4, p.129, n. 2:

But so far as I can see, such doctrines of promises as von Wright’s have been definitely refuted in A.N. Prior, *Logic and the Basis of Ethics* (1949).

In order to assess the reliability of this statement by Hedenius, we would then have to consult Prior (1949) Chapter V [“Promising as Special Creation”, pp. 46 – 53] and to check whether, and to what extent, Prior has ‘definitely refuted’ the doctrine of promises embraced by von Wright and myself. However, this task is too tedious to be undertaken here. Let me just observe that Prior’s presumptive refutation of the view according to which e.g. the phrase ‘I promise’ *means* ‘I hereby place myself under an obligation’ [p.48] is based on an interpretation of that view according to which it leads to an infinite regress, presumably because it somehow involves a circular definition.<sup>11</sup> Unfortunately, it remains unclear in Prior exactly how the “vicious circle” arises; to me it is anyway clear that vicious circles and infinite regresses are elegantly avoided on the logico-semantic treatment of *indexicals* and *demonstratives* given in Åqvist (1972).

However, I think Hedenius (1963) is much more successful when trying to explain the import of the word “hereby” against the background of his doctrine of the so-called “reflexivity” of performatives:

...there are performatives that do contain linguistic signs of their reflexivity. An example of such a sign is the word “hereby” in such sentences as “Be it hereby enacted ...”, “We hereby have the honour to inform...”, “I hereby promise...”. The word “hereby” points to the words which surround it and indicates the function these words have to enact, to inform, to promise etc. A performative indicates that *by itself* it *establishes* a certain fact and thus it *mentions itself* – either openly through the use of a word such as “hereby”, or else only implicitly. (Hedenius 1963, Section 5, p.136, n. 5 *in fine*; my italics)

In my opinion, the characterization of the function of the word “hereby” given by Hedenius in this passage is on the whole defensible and convincing. I conjecture that both von Wright and Frändberg would agree with me on this point, although, perhaps, our reasons for doing so may diverge concerning certain details.

## Notes

<sup>1</sup> An earlier version of the present paper appeared in 2003 in a *Festschrift* to my friend and colleague Frederick Stoutland at the Uppsala University Department of Philosophy. In turn, it was essentially a translation into English of my contribution (written in Swedish) to another *Festschrift*, also appearing in 2003 and dedicated to my friend and colleague Åke Frändberg at the Uppsala University Law Department.

<sup>2</sup> In Hedenius (1963, p. 117), there is quite a clever defence of the necessity of the first person form:

All these sentences (*sc.* performatives) seem to be expressed in the first person, if not formally, at least in effect. Often the pronouns “I” or “we” are omitted and we find instead the name of, or a definite description of, the person who is speaking. Performatives which contain no such pronouns, names or definite descriptions would seem to be elliptic, requiring in order that their meaning be explicit a clause containing information about the person who utters the performative.

Note the importance for Hedenius of the concept of *ellipticity* – an interesting concept applicable to natural languages which has, for all I know, successfully resisted logical and semantical explication so far.

<sup>3</sup> cf. Austin (1962, Lecture V, p. 57f.), where he observes *inter alia*:

‘Hereby’ is a useful criterion that the utterance is performative.’

<sup>4</sup> For this very reason I then asked the following question in the introduction to my study Åqvist (1972): For what kind of language can we reasonably hope to be able to solve the problem of adequately defining a notion like that of *performativity*? And my answer was very much in the spirit of Tarski, Kanger and Montague: only for such languages as have a sufficiently well specified syntactic structure and a matching well defined notion of *truth in a model* to go along with them. [However, this does not preclude appropriate *fragments* of natural languages like English or Swedish from fulfilling those conditions.] This answer was based on the idea that the predicate “is a performative” is like the predicate “is true” in respect of (i) being essentially *meta-linguistic* in character, and (ii) having to be *relativized* to a suitable notion of a *model* in order to be capable of being adequately characterized. See further Section 6 *infra*.

<sup>5</sup> cf. also Austin (1962, p. 61f).

<sup>6</sup> In a footnote (p. 57, n. 1) Frändberg points out that in the context he uses the locution “to pronounce a sentence” in a wide sense that covers oral utterances, written utterances, Morse-signalling, gesture-speech, and suchlike.

<sup>7</sup> Already Hägerström (1935) was apparently aware that what is known to us nowadays as ‘performatives’ – and to him as ‘declarations of will’ – play an important, indeed a central role in the law. On the other hand he was totally unable to accept the view that they – declarations of will, performatives – could have such a remarkable property as being *self-verifying* (p. 34; I won’t spoil Hägerström’s language in this highly dramatic passage by trying to translate it into English):

Att en upplysning angående en verklighet skulle kunna ha någon som helst betydelse för tillkomsten av samma verklighet, är absurt. En astronom, som lämnade upplysning om planeternas ställning vid en viss tidpunkt och därefter förklarade, att de komma att intaga denna ställning på grund av upplysningen, skulle omedelbart framträda som sinnesrubbad.

For a trenchant criticism of Hägerström's negative attitude to the possibility of self-verifying sentences, see Hedenius (1963, Section 4, pp. 124–126).

<sup>8</sup> A slightly curious question arising from our definition **DefDec** is this: we have an index Ct (= "The Court") on the operators Decide and Cause, while there is no such index at all on the deontic operators Shall and May. Shouldn't we put an index on these operators as well, say Ct, whereby we are to read the verbal phrases ShallCt and MayCt as "*according to the court* it shall be that" and "*according to the court* it may (deontically) be that"? An advantage of such an indexing would seem to be that the matching *according-to-the-court*-qualified normative states-of-affairs could well be brought about by the judge [Frändberg's "legal official" or "functionary"] by his/her pronouncing appropriate performatives, whereas it is doubtful if the corresponding 'unqualified' normative states-of-affairs [indicated by Shall and May *simpliciter*] could be caused or brought about at all, whether by means of pronouncements by functionaries or otherwise. I feel that this proposal – to index even the deontic operators Shall and May in some suitable manner – is an interesting one that ought to be more seriously considered by legal theorists.

<sup>9</sup> I must apologize here (much too late) for this rather exaggerated assertion. As a matter of fact, "hereby" is explicitly discussed by Prior (1949, Chapter V), by Austin (1962, Lecture V), as well as by von Wright (1962) in the passage quoted. And perhaps already by Hume (1739, Bk.III, Pt.ii, Section 5).

<sup>10</sup> See Åqvist (1972, Section 8, pp. 29–30).

<sup>11</sup> In Danielsson (1973, Section 7, p. 34), there is a discussion of a proposed definition of the locution 'at *t* a promises *b* that *S*', which is plainly circular in the familiar sense that the *definiendum* re-appears in the *definiens*.

## References

As the literature on performatives is very large and difficult to survey, I have tried to cut down the present List of References to a minimum, being guided by the purpose and contents of this paper as stated in the Introduction *supra*. This means two things: first, that most items in the following list are explicitly mentioned and referred to somewhere in the current text, and secondly, that there is a strong emphasis on that part of the literature on performatives which was available to Scandinavian legal theorists and philosophers in the early 'seventies (when, e.g. Frändberg and I myself began to write on the topic). Nevertheless, there are nowadays reasons for deviating from these principles of selection, especially the second one: thus, for instance, as far as the contributions *infra* by Jones & Sergot, Santos & Carmo, Searle, Searle & Vanderveken and Spaak are concerned, I include them in the present bibliography on account both of (i) their intrinsic importance and of (ii) their importance for the closer study of performatives in the law from various points of view that have been neglected in this paper.

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