# *A Speech Act Analysis of Judicial Decisions*

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## I. Introduction

According to the theory of speech acts, speech is a kind of action. He, who says something, does something. Certainly, when a judge or a court makes a decision, he or it says something.[1] He performs some (locutionary) acts like uttering or writing some sentences.[2] However, there is something further he does, namely, by uttering or writing some sentences in the appropriate context, he makes a judicial decision. By a judicial decision I mean an act by a judge adjudicating a case according to the law, with the authority that the state and the legal system confer on him. In a judicial decision the judge says something about the law, the facts of the case, and the consequences that the legal system imputes to the parties, in the most cases, the plaintiff or the prosecutor and the defendant. How does the judge saying the things he does bring it about that he has adjudicated a case? More specifically, what kind of speech acts, or more precisely, illocutionary acts,[3] does he perform, and what is their relation to the adjudication?

As these questions indicate, the aim of this paper is to give an account of judicial decisions from the point of view of the theory of speech acts. This account can contribute to

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[1] At the beginning of this paper I will talk about judges performing speech acts. However, this account of the logical and speech act structure of judicial decisions can also explain a judicial decision made by a Court, with some modifications concerning the collective intentionality of an act performed by various judges.

[2] Following J.L. Austin, I will use the concept of locutionary act as the act of "saying something". See **J.L. AUSTIN**, *How to do Things with Words*, Oxford, Oxford University Press, 1976, p. 34. John Searle speaks about "utterance acts". He says that "utterance acts" consist "simply in uttering string of words". See **J. SEARLE**, *Speech Acts*, Cambridge, Cambridge University Press, 1969, p. 24. For the purpose of this paper it is necessary to take into account that writing a sentence is also a "locutionary act" or an "utterance act".

[3] Following Austin, I will use the concept of illocutionary act as an act performed "in saying something". See **J.L. AUSTIN**, *How to do Things with Words*, *supra* note 2, p. 98. A more complete definition of an illocutionary act is the following: "An illocutionary act is a complete speech act, made in a typical utterance that consists of the delivery of the propositional content of the utterance and a particular illocutionary force, whereby the speaker asserts, suggests, demands, promises or vows"; Summer Institute of Linguistics, 10 Apr., 2007, http://www.sil.org/linguistics/GlossaryOfLinguisticTerms/WhatIsAnIllocutionaryAct.htm

two different projects at the same time. On the one hand, it can help to explain the nature and the structure of judicial decisions, as a set of sentences uttered by the judge which constitute a set of speech acts. The ontology involved in a judicial decision looks quite simple at the first glance. It seems to be the same ontology implicit in every instance of a human act of speaking: a set of sounds or strings, articulated as sentences, pronounced or written respectively by a person or group of persons. However, this ontology is in fact very complex. In a judicial decision the speaker, that is to say, the judge, has a special status and performs a special function. We, the group of citizens of the state, have conferred on the judge this special status: we have given him the power to solve legal disputes according to the law of the state. In John Searle's term, being a judge is having a certain status function, whose reality consists in a broad agreement that a person so designated, by certain performances in an appropriate context and in accordance with appropriate rules, makes certain changes to social, and, in this case, specifically legal, reality.[4] Consequently, the sentences pronounced or written by the judge also have special status functions in the institutional framework of the law. One relevant question for this paper is what these status functions are. The answer to the question about what the judge does in a judicial decision or what kind of illocutionary acts the judge performs in a judicial decision, can provide an answer to this question about the status functions of the sentences involved in a judicial decision. This promises to be a fruitful way to determine what a judicial decision is and what kind of structure it has.[5] In addition to this, as we will see, a speech act analysis can explain the criteria used to evaluate judicial decisions. This analysis will make clear that a judicial decision is a highly complex logical sequence of illocutionary acts, or to put it in a more precise way, of speech acts with several illocutionary forces.[6]

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[4] According to John Searle, "social reality" is constructed out of status functions. See, on the concept of status function, **J. SEARLE**, *The Construction of Social Reality*, London, Free Press, 1995, pp. 40-ff.

[5] The theory of speech acts has been fruitfully used in the analysis of legal concepts in the past. See, e.g. the analysis of rules conferring powers by **D.W.P. RUITER**, *Legal Institutions*, Dordrecht, Kluwer, 1993; *id.*, "Legal Powers", in **S. PAULSON and B.L. PAULSON**, *Normativity and Norms*, Oxford, Oxford University Press, 1998, pp. 471-492; *id.*, "Institutional Legal Facts: Legal Powers and Their Effects", *Artificial Intelligence and Law*, 1997, pp. 377-385. See also the analysis of contracts by **J. CONISON**, "The Pragmatics of Promise", *Canadian Journal of Law and Jurisprudence*, 1997, pp. 273-ff; **J. YOVEL**, "What Is Contract Law 'About'? Speech Act Theory and a Critique of 'Skeletal Promises'", *Northwestern University Law Review*, 2000, pp. 937-ff. See also the analysis of a verdict by **H.L. HO**, "What Does a Verdict Do? A Speech Act Analysis of Giving a Verdict", *International Commentary on Evidence*, 2006, pp. 1-ff.; and the analysis of the judicial overruling by **P.H. DUNN**, "How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis", *Yale Law Journal*, 2003, p. 493.

[6] The illocutionary force is a property of speech acts, which results of the "combination of the illocutionary point of an utterance, and particular presuppositions and attitudes that must accompany that point, including the strength of the illocutionary point, preparatory conditions, propositional content conditions, mode of achievement, sincerity conditions, and strength of sincerity conditions", Summer Institute of Linguistics, 10 Apr. 2007, http://www.sil.org/linguistics/GlossaryOfLinguisticterms/WhatIsIllocutionaryForce.htm. Now, depending on their illocutionary force, it is possible to distinguish among the following types of acts: asserting, promising,

Consequently, it is possible to evaluate these speech acts, from a variety of points of view: truth or falsity, correctness or incorrectness, and validity or invalidity.

On the other hand, this account can also contribute to the theory of the speech acts by providing an analysis of speech acts which occur in the highly institutionalized context of judicial decisions. Such an account can contribute to how the theory of speech acts explains the relationship between language and reality, and in particular how by having certain status functions certain speech acts can not just reflect but change reality.[7]

To achieve this aim, I will explain what kind of illocutionary acts are involved in a judicial decision and what are the necessary and sufficient conditions required for a non-defective performance of a judicial decision. To facilitate my exposition, I will use a particular judicial decision as an example. In my analysis I will use the well known judgment by the New York Court of Appeals in the case *Riggs v. Palmer*. It will be possible to generalise only some considerations drawn from the analysis of this case. For this reason, I will try to clarify how various considerations will change in other typical cases.

The plan of this paper is the following. In section (I), I will summarise the facts, the justification for, and the decision of the New York Court in the case *Riggs v. Palmer*. In section (II), I will explain the logical structure of a judicial decision. I will show that two premises and the decision are the structural elements of a judicial decision. In section (III), I will explain the difference between the propositional contents and the illocutionary forces that the utterances of these three structural elements of a judicial decision involve. In section (IV), I will briefly summarise the concepts of the theory of the speech acts that I will use in the final analysis. In section (V), I will use these concepts drawn from the theory of the speech acts to analyse the three basic elements of a judicial decision.

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excommunicating, exclaiming in pain, inquiring and ordering. See also **J. SEARLE and D. VANDERVEKEN**, *Foundations of Illocutionary Logic*, Cambridge, Cambridge University Press, 1985, pp. 1, 7-9 and 20-21.

[7] Thinking about the law has contributed for developing the theory of speech acts. See, e.g. the explicit references to the law in the works by **J. SEARLE**, *The Construction of Social Reality*, *supra* note 4, pp. 82-ff.; and **J.L. AUSTIN**, *How to do Things with Words*, *supra* note 2, pp. 7-ff. In this book Austin also recognised the influence of H.L.A. Hart's ideas about the law in the development of his theory.

## II. The judicial decision in the case *Riggs v. Palmer*[8]

### A. The facts

On the 13th of August 1880, Francis B. Palmer made his last will and testament, in which he gave small legacies to his two daughters and the remainder of the estate to his grandson, Elmer E. Palmer. Elmer Palmer knew of the provisions made in his favour in the will. He also knew that his grandfather wanted to revoke such provisions. Elmer Palmer wilfully murdered him in order to obtain the immediate possession and enjoyment of his property. For this crime he was tried, and was convicted of murder in the second degree. At the time of the commencement of the action leading to the New York Court's decision, he was serving out his sentence in the state reformatory. In spite of these facts, he claimed the property, that is to say, the legal recognition of his right to the inheritance.

### B. The justification of the decision

The question for the Court in this case was whether Palmer had the right to this property. To answer this question, in its reasoning, the Court developed an argument in three steps. First, it determined what legal rule provided the solution for the case. The answer was not obvious. The Court recognised that, according to a literal interpretation of the statutes regulating the making, proof and effect of wills, and the devolution of property, due to the fact that the will had been in force and had not been modified, the law ordered that the property be given to the murderer. The statutes did not prescribe an exception, according to which, if the inheritor murdered the testator, he lost the title to receive the property. Nevertheless, the Court said that this solution was not correct. The Court gave an alternative interpretation of the legal system. It said that the purpose of the statutes,[9] the intention of the law-makers,[10] the application of a rational interpretation,[11] and the principle[12] or general maxim of the common

[8] **Court of Appeals of New York**, *Riggs v. Palmer*, 8 Oct. 1889, http://www.courts.state.ny.us/reporter/archives/riggs_palmer.htm

[9] According to the Court, this purpose was to "enable testator to dispose of their estates to the objects of their bounty at death and to carry into effect their final wishes legally expressed".

[10] According to the Court, this intention was that: "the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it".

[11] The rational interpretation or equitable construction tries to correct the impossibility of the law makers ruling on every particular case in which a rule applies, and allows the Court to restrain or to extend the meaning of the word

law, according to which: "No one shall be permitted to profit by his own fraud, or to take advantage of this own wrong, or to acquire property by his own crime", which was applied in the precedent case *New York Mutual Life Insurance Company v. Armstrong*, allowed the conclusion that: if the inheritor had murdered the testator, he would have no title to the property.

Now in a second step, the Court verified that Palmer had murdered the testator, that is to say, his grandfather.

According to the Court, these reasons led to the following decision (the third step of the reasoning): the defendant Palmer could not possess any of the property as heir.

## III. The logical structure of a judicial decision

Any judicial decision has two parts: the justification and the decision. Now, the justification has two dimensions: one internal, the other external. The internal justification consists of the reasoning whereby a conclusion leading to the decision is inferred from the supporting premises, whereas the external justification is the reasoning which supports the premises that make up the internal justification, and from which the conclusion follows.[13]

In this paper I will focus in the internal justification. In a simple case, the internal justification has the following structure:[14]

(1) $(x)(Cx \rightarrow LCx)$

(2) $Ca$

(3) $LCa$ MP (1, 2)

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of a statute to avoid irrational outcomes. In this case, the Court enhanced the exceptions to the inheritance of the property by including among the exceptions the case in which the inheritor murdered the testator.

[12] This case is well known because **R. DWORKIN** used it to show (against Hart's concept of law) that the legal system is not only made of rules but also of principles; *Taking Rights Seriously*, London, Duckworth, 1977, pp. 23-45.

[13] On the concepts of internal and external justification, see **R. ALEXY**, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, transl. [by **N. MACCORMICK and R. ADLER**, Oxford, Clarendon Press, 1989]; **J. WRÓBLEWSKI**, "Legal Decision and its Justification", in **J. WRÓBLEWSKI**, *Le raisonnement juridique*, Brussels, Hubien, 1971, p. 412; **N. MACCORMICK**, *Legal Reasoning and Legal Theory*, Oxford, Oxford University Press, 1978, p. 100.

[14] On this kind of logical reconstruction of judicial decisions, see **R. ALEXY**, "Die Logische Analyse Juristischer Entscheidungen", in **R. ALEXY**, *Recht, Vernunft, Diskurs. Studien zur Rechtsphilosophie*, Frankfurt, Suhrkamp, 1995, p. 20.

This corresponds to the structure of a syllogism, namely, it involves the movement from a major premise and a minor premise to a conclusion. The major premise (1) is a general rule. According to this rule, the judge has the power and ought to impute[15] the legal consequence (*LC*) to every agent (*x*), whose actions fulfil the conditions (*C*). Correlatively, this rule also establishes that if an agent (*x*) performs the action described in (*C*), the legal consequence (*LC*) is to be imputed to him. The judge asserts this general rule as a legal interpretation of a statement or a set of statements belonging to the sources of the law (the constitution, the statutes, a contract or a precedent). The minor premise (2), meanwhile, consists of an assertion about a particular. By means of this assertion the judge affirms that, according to the evidences, an action or a set of actions of the agent (*a*) took place and fulfilled the conditions mentioned in the antecedent of the general rule (1). Finally, the decision (3) is a particular rule, which follows by modus ponens from the major and the minor premises. According to this rule, the judge has the power and ought to impute to the agent, who performed the action (*a*), the legal consequence (*LC*) established by the general rule (1). Correlatively, this rule also establishes that the agent (*x*), who performed the action (*a*), prescribed by the general rule (1), is subject to the imputation of the legal consequence (*LC*).

However, the decision (3) goes further. In the decision (3) the judge also orders other officials to impute or imputes himself the legal consequence (*LC*) to the agent (*a*). In criminal law, for instance, a typical decision entails also an order of imprisonment. In torts law, the decision involves also the declaration of liability of the agent and the order to pay for the damages he caused. In other cases, like contract law cases or divorce cases, the decision entails a declaration about the legal status and the legal relationship of the parties. Finally, in some constitutional cases (especially in the continental European system of constitutional review) the decision involves the declaration about the legal status of a legal rule, that is to say, the constitutionality or unconstitutionality of a legal rule.

This schema can explain the logical structure of the judgment by the Court of Appeals of New York in the case *Riggs v. Palmer*. In this case, premise (1) is the general rule according to which the judge has the power and ought to impute the legal consequence: not to give the property (¬*G*) to any inheritor (*x*) having murdered the testator (*M*). This rule follows from

[15] On the concept of imputation, see **S. L. PAULSON**, "Hans Kelsen's Doctrine of Imputation", *Ratio Juris*, 2001, pp. 47-ff.

what the Court says in the judgment by means of a chain of restatements of its original sentence:

(i) The Court states the major premise of its reasoning by means of the following sentence: "one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered".

(ii) It is possible to restate this sentence in the following way without introducing changes in its content: if an inheritor has murdered the testator (an ancestor or benefactor), then the property conferred to him by inheritance or will is not to be given to him.

(iii) However, it is necessary to understand this last sentence in the context of the institutional framework of the law and the state. The law of the state confers on the judge (in this case the Court of Appeals) the institutional authority to give or not to give the property conferred by inheritance or will. Taking this into account, then a further statement runs as follows: if an inheritor has murdered the testator (an ancestor or benefactor), then the judge is empowered by the law and ought not to give to him the property conferred to him by inheritance or will.

(iv) The last step arrives to the sentence: the judge has the power and ought to impute the legal consequence: not to give the property ($\neg G$) to any inheritor ($x$) having murdered the testator ($M$).

The logical form of this last sentence is the major premise: $(x)(Cx \rightarrow LCx)$

Premise (2) is the assertion that, according to the evidence, Palmer ($p$) murdered the testator ($Mp$). The Court states this premise when it says: "He [Elmer Palmer] knew of the provisions made in his favour in the will, and, that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment and immediate possession of his property, *he wilfully murdered him by poisoning him*" [Emphasis added].

From these premises the conclusion follows by modus ponens, namely, the judge ought not to give the property to Palmer ($\neg Gp$). This conclusion is not explicit in the judgment of the Court, but could be inferred from its decision. The decision ($D$) of the Court is the following:

($D$) "that the devise and bequest in the will to Elmer be declared ineffective to pass the title to him; that by reason of the crime of murder committed upon the grandfather he is deprived of any interest in the estate left by him".

Let us express the logical form of this decision by means of the sentence ($IWp$). From this decision, and with the understanding of some additional elements of the legal institutional framework, it is possible to infer the conclusion of the internal justification, according to which the Court ought not to give the property to Palmer ($\neg Gp$). The declaration of the ineffectiveness of the devise and bequest in the will to pass the title to Elmer Palmer is the way in which the Court fulfils the obligation to not give the property to him. In order to fulfil this obligation the Court has to declare that the devise and bequest in the will to Elmer is ineffective to pass the title to him. Then, it looks like in this case the Court not only achieves the conclusion that it ought not to give the property to Elmer Palmer ($\neg Gp$), but also does not give him the property in the same judgment, by means of the declaration of the ineffectiveness of the devise and bequest in the will to pass the title to him. If we denote this last move with ($Ix$) (Ineffectiveness of the will), then we have the following structure:

| | | |
|---|---|---|
| (1) | $(x)(Mx \rightarrow \neg Gx)$ | |
| (2) | $Mp$ | |
| (3) | $\neg Gp$ | MP (1, 2) |
| (4) | $(x)(\neg Gx \rightarrow IWx)$ | |
| (5) | $IWp$ | MP (4,3) |

This argument includes premise (4) to support the conclusion (5). Premise (4) makes explicit the legal rule according to which, if any judge wants not to give the property to an inheritor, it ought to declare the ineffectiveness of the devise and bequest in the will to pass the title to him. The conclusion (5) follows from (4) and (3) by modus ponens and makes it explicit that the Court has to declare the ineffectiveness of the will in the case of Elmer Palmer. This conclusion is the support for the decision ($D$) of the New York Court of Appeals that in deed declares the ineffectiveness of the will to pass the title to Elmer Palmer. The sentences (3), (4)

and (5) are implicit in the reasoning of the Court. They do not appear in the text of the judgment but could be inferred from (1), (2) and the decision (*D*).

## IV. The propositional content and illocutionary force of the premises and the decision

This reconstruction of the logical structure of judicial decisions makes clear that a judicial decision implies at least three locutionary acts: the utterance or writing of the premises (1) and (2), and the decision (3). It also clarifies what the propositional content of these acts is.[16] In the case *Riggs v. Palmer*, the structure of the judicial decision is more complex. It is made at least of the following (explicit and implicit) premises, where now I indicate, at least in part, the force with which they are put forward, using the turnstile to indicate assertion, ' ⊨':

⊨ (1) $(x)(Mx \rightarrow \neg Gx)$

⊨ (2) $Mp$

⊨ (3) $\neg Gp$ MP (1, 2)

⊨ (4) $(x)(\neg Gx \rightarrow IWx)$

⊨ (5) $IWp$ MP (4,3)

It is necessary to add also the decision, where I use 'd!' to indicate, in Searle's terms, a declarative speech act, which we will discuss further below (what we might express in ordinary English with a kind of third person imperative, "let it be that this very act makes it the case that," though the effect can be achieved in context without the explicit statement of the intent and will require in addition that the institutional setting be appropriate):

d! (6) $IWp$

The speech act indicated in (6) is different from that in (5). The assertion of ($IWp$) states an obligation: the obligation of the Court to declare the ineffectiveness of the will to

[16] For the concept of propositional content, see **J. SEARLE**, *Speech Acts*, *supra* note 2, pp. 29-30. Searle says: "A proposition is what is asserted in the act of asserting, what is stated in the act of stating". The propositional content remains constant, despite changes in the illocutionary force of the speech act.

transfer the property to Palmer. Meanwhile, the speech act indicated in (6) which is performed using the very same sentence as in (5) makes a declaration: the declaration that in deed the will made by his grandfather is ineffective to pass the property to Palmer.

This shows that a judicial decision involves a logical sequence of speech acts. The final speech act is the decision (*D*). This decision is justified by means of an argument leading from premise (1) to a conclusion (5), through a finite number of premises (2), (3) and (4). Nevertheless, this structure does not make it explicit what kinds of illocutionary act the judge performs by uttering the premises (1) and (2), and the decision (*D*) (Let us remember that (3) (4) and (5) are implicit). It is not obvious that these three acts are *just* assertions. Indeed, it is clear that, in uttering the decision (*D*) the judge is not merely reporting that the legal consequence of the rule (1) *is or will be* imputed to the agent. He is actually imputing the legal consequence by a declaration of the ineffectiveness of the will to pass the title to Elmer Palmer. This declaration has a consequence for the legal status of the agent. It not only settles something epistemically, it brings something about, it changes the world by determining the heretofore undetermined legal status of the property in question. In the case of Palmer, the consequence is that he does not have a legal right to the property, or, put in another way, that the legal system does not recognize his right to this property and, correlatively, it recognizes the plaintiffs to have a right to it. In other kinds of cases, the judge performs in its decision analogous sorts of declarations. In criminal law cases, ***e.g.***, the judge may convict the defendant of a crime and order his imprisonment. In contract law or torts law cases, the judge may declare there to be a state of legal relations between the parties and give, for instance, compensation for damages.

In uttering premise (1) the judge is not merely reporting that the rule, $(x)(Mx \rightarrow \neg Gx)$, is a legal rule. He is also stating that this rule is a correct legal interpretation of a sentence or a set of sentences belonging to the sources of law. The judge usually builds the major premise after performing a (literal, teleological, historical or systematic) interpretation of a provision or a set of provisions from the constitution or the statutes, or a sentence or set of sentences from other kinds of sources of law. For instance, in the case ***Riggs v. Palmer***, the New York Court of Appeals gives arguments for and against two different interpretations of the law that could be applied as premise (1). The first interpretation is the rule $(x)(Mx \rightarrow Gx)$, according to which, in cases of murder of the testator by the inheritor, the judge ought to assign him the property. The Court speaks about the hypothesis when it says: "It is quite true that statutes regulating the

making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer". The second interpretation is the rule $(x)(Mx \rightarrow \neg Gx)$ that the Court applied as major premise to the case. According to the Court, on the basis of the arguments from the purpose of the statutes, the intention of the law-makers, the application of a rational interpretation, and the principle or general maxim of the common law, according to which: "No one shall be permitted to profit by his own fraud, or to take advantage of this own wrong, or to acquire property by his own crime", it is the second and not the first one of these which is the correct interpretation of the law. For this reason, the Court applies as major premise of the case the rule according to which: "one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered".

There are cases, like *Riggs v. Palmer*, in which it is clear that this rule did not even exist before in the legal system. Thus, the judge, in exercising his authority, is creating a new legal rule. This new rule is also a precedent for future cases. In addition to this, the judge is also applying this rule to the case. In this sense, he is taking it as the legal basis for resolving the case.

In uttering premise (2) the Court is of course asserting something about the occurrence of the action ($a$), that is to say, the state of affairs described in the rule (1). There are cases in which the judge is the fact finder and cases in which the jury is the fact finder. Whoever plays this role is doing something further in uttering premise (2). The judge or the jury is creating an institutional fact that entitles the judge to impute the legal consequence to the agent and that is a precedence for future decisions. The occurrence of the action ($a$) in the world is a natural fact. However, when the fact finder asserts in a trial that the action ($a$) occurred in world and that it is proved, it creates an institutional fact that has various effects in the law. For instance, in the decision in *Riggs v. Palmer* the Court takes the fact that Palmer murdered the testator as a fact that has been proved in the criminal procedure in which Palmer has been found guilty.

There are further complexities. In the cases of premises (1) and (2), the judge assigns a function to the utterance of these statements,[17] leading to specific consequences. Both premises

[17] On the assignment of a function, see **J. SEARLE**, *The Construction of Social Reality*, *supra* note 4, pp. 14-ff and 23.

accomplish the function of creating institutional facts,[18] which the judge uses as a basis for the justification of the judicial decision and which modifies the legal system. In this sense, the creation of these institutional facts and the role they play presuppose a particular kind of collective intentionality[19] and certain constitutive rules. There is a qualitative difference between the fact that a professor utters the rule $(x)(Mx \rightarrow \neg Gx)$ as an interpretation of the sources of the law in the classroom and the fact that the Court of Appeals of New York utters it as main premise for the justification of the decision in the case *Riggs v. Palmer*. The second case makes a legal difference, the first does not. It is like the difference between a commentator at a football game judging there has been a foul and the umpire so judging. The second case presupposes a whole institutional network of rules and authorities correlated by means of collective intentionality. There is a Court of Appeals of New York because there is a set of statutes creating it, establishing the procedures for the trials and the substantive rules to resolve cases. Now there are such kinds of statutes because the Constitution created a Congress and empowered it to create them. Naturally, the Constitution also sets conditions for the procedures for the creation of the statutes and establishes some restrictions on the exercise of powers by the Congress, for instance, by establishing certain basic rights. Finally, the Constitution presupposes also the existence of a rule of recognition[20] or a basic norm[21] or a certain kind of appropriate we-intention[22] about having a state and a legal system among the sovereign people of the country. A rule, a norm or the appropriate set of we-intentions of this kind can justify the rule according to which we ought to obey what the Constitution commands or forbids. This institutional network is behind a constitutive rule[23] according to which, for instance, the interpretation of the statutes performed by the Court of Appeals of New York in the context of the trial leading to the resolution of a particular case like *Riggs v. Palmer counts as* main premise for the justification of the decision and as precedence for future cases.[24]

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[18] On the concept of institutional fact: *Ibid.*, pp. 17-ff.
[19] On the concept of collective intentionality: *Ibid.*, pp. 23-ff.
[20] On the concept of rule of recognition, see **H.L.A. HART**, *The Concept of Law*, Oxford, Clarendon, 1997, mainly Chapter V.
[21] On the concept of basic norm, see **H. KELSEN**, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*, transl. [by **B. LITSCHEWSKI PAULSON** and **S.L. PAULSON**, Oxford, Clarendon, 1997], pp. 58-ff.
[22] On the concept of we-intention and its role in collective intentionality, see **K. LUDWIG**, "Foundations of Social Reality in Collective Intentional Behaviour", in **S.L. TSOHATZIDIS**, *Intentional Acts and Institutional Facts: Essays on John Searle's Social Ontology,* Dordrecht, Springer, 2007.
[23] On the concept of constitutive rule, see **J. SEARLE**, *The Construction of Social Reality*, *supra* note 4, pp. 27-ff. According to Searle, a canonical formulation of this kind of rules is: "*X* counts as *Y* in context *C*".
[24] In this sentence, the interpretation of the canonical formulation of the constitutive rule "*X* counts as *Y* in context *C*" is:
Domain: The set of all the human actions
*X*: The interpretation of the statutes

This institutional network can also explain why, concerning the premise (2), there is a difference between the fact that somebody says that Palmer poisoned his grandfather and the fact the Court of Appeals of New York declares that this fact was proved and counts as murder. Uttering premise (2) there is more than a mere assertion.

Now, this first approach shows that the reconstruction of the logical structure is not enough to achieve a complete analysis of a judicial decision. This analysis should entail also an explanation of what kind of illocutionary acts the judge performs by uttering premises (1) and (2) and the decision (*D*). I will develop this explanation in section V. However, before I turn to that I would like to summarise some concepts of the theory of speech acts that I will apply in the following section.

## V. Some elements of Speech Act Theory

An analysis of the illocutionary acts that are the elements of a judicial decision presupposes to state a taxonomy of illocutionary acts. Any taxonomy must acknowledge, first, that there are at least five types of illocutionary acts and, second, that they may differ in along at least seven dimensions of illocutionary force, and in direction of fit and perlocutionary effect. On the one hand, the types of illocutionary acts are: assertives (*e.g.*, a statement), directives (*e.g.*, an order), expressives (*e.g.*, thanks), commissives (*e.g.*, a promise) and declaratives (*e.g.*, a firing).[25] On the other hand, according to Searle and Vanderveken, the seven dimensions of illocutionary force are: the illocutionary point, the degree of strength of the illocutionary point, the mode of achievement, the propositional content conditions, the preparatory conditions, the sincerity conditions and the degree of strength of the sincerity conditions.[26] It is necessary to add the satisfaction conditions and the intended and actual perlocutionary effects to these components.

The illocutionary point is the basic component of the illocutionary force. It is the point or purpose which is internal to every illocutionary act, that is to say, "a successful

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*Y*: Major premise for the justification of the decision and precedence for future cases
*C*: *X* is performed by the Court of Appeals of New York in the context of the trial leading to the solution of a particular case

[25] See **J. SEARLE**, *Speech Acts*, *supra* note 2, pp. 31-ff and 64-ff. See also **D. GONZÁLEZ LAGIER**, *The Paradoxes of Action: Human Action, Law and Philosophy*, Dordrecht, Kluwer, 2003, pp. 73-ff.

[26] See **J. SEARLE and D. VANDERVEKEN**, *Foundations of Illocutionary Logic, supra* note 6, pp. 12-ff.

performance" of a certain type of illocutionary acts necessarily achieves that purpose. To put it differently, it could not be a successful act of that type if it did not achieve that purpose.[27] The point of an assertive is "to describe the world", the point of a directive is "to direct one's hearer to perform a certain king of act", the point of expressives is "to express the speaker's emotion or attitude", the point of commissives is "to commit the speaker to doing something" and the point of declaratives (for instance, of the declaration that *p*) is "to make it the case that p".[28]

Different illocutionary acts may achieve "the same illocutionary point with different degrees of strength",[29] because of several causes. Searle and Vanderveken give good examples of this property: "if I *request* someone to do something my attempt to get him to do it is less strong than if I *insist* that he do it", or: "both pleading and ordering are stronger than requesting, but the greater strength of pleading derives from the intensity of the desire expressed, while the greater strength of ordering derives from the fact that the speaker uses a position of power or authority that he has over the hearer".[30]

The mode of achievement is the way in which an illocutionary act achieves its purpose. For instance, an order achieves its purpose "by way of invoking the position of authority of the speaker" in issuing the order. Another example is the following: "a person who makes a statement in his capacity as a witness in a court trial does not merely make a statement, but he *testifies*, and his status as a witness is what makes his utterance count as testimony".[31]

The propositional content conditions are the conditions that the content of a speech act has to fulfil because of its illocutionary force. For instance, in commissives, the speaker commits himself to doing something. This kind of speech act sets a condition on its content: that the speaker does something in the future. For example, anyone who makes a promise commits himself to doing something in the future.

The preparatory conditions are conditions that it is necessary to fulfil for a successful and non-defective performance of an illocutionary act. For instance, "all acts whose point is to get the hearer to do something -orders, requests, commands, *etc*.- have as a preparatory

[27] *Ibid.*, p. 13.
[28] See **K. LUDWIG and D. BOISVERT**, "Semantic for Nondeclaratives", in **E. LEPORE and B. SMITH**, *Oxford Handbook of the Philosophy of Language*, Oxford, Oxford University Press, 2006, Chapter 34.
[29] See **J. SEARLE and D. VANDERVEKEN**, *Foundations of Illocutionary Logic*, *supra* note 6, p. 15.
[30] *Ibid.*, p. 15.
[31] *Ibid.*, p. 16.

condition that the hearer is able to do the act directed".[32] For example, unless we have a time machine, a judicial decision would be defective, if the judge gives the defendant the order to travel to the past and to stop the performance of some prior action of his.

The sincerity conditions are the conditions that the psychological states of the speaker have to fulfil for the illocutionary act to be non-defective. The utterance of an illocutionary act implies certain psychological states related to the content of the act. Thus, "an insincere speech act is one in which the speaker performs a speech act and thereby expresses a psychological state even though he does not have that state".[33] For instance, "an insincere promise is one where the speaker does not in fact intend to do the things he promises to do".[34]

The last of the seven dimensions of illocutionary force is the degree of strength of the sincerity conditions. As Searle and Vanderveken make explicit, "just as the same illocutionary point can be achieved with different degrees of strength, so the same psychological state can be expressed with different degrees of strength".[35] For instance, "the speaker who makes a request expresses the desire that the hearer do the act requested; but if he begs, beseeches, or implores, he expresses a stronger desire than if he merely requests."

Now, as Ludwig and Boisvert explain: "assertives, directives, commissives and declaratives have satisfaction conditions, which come in two varieties: those with word-to-world direction of fit, and those with world-to-word direction of fit".[36] They also explain the difference between the illocutionary acts from this point of view: "Assertives have word-to-world direction of fit, since their point is to make the words match the world; directives and commissives have world-to-word direction of fit, since their point is to make the world match the words. Declaratives have at least world-to-word direction of fit since their point is to bring the world to match their contents […], and arguably, in some case, word-to-world direction of fit as well".[37]

Finally, when an illocutionary act is successfully and non-defectively performed, it produces an effect in its addressee. This effect is the perlocutionary effect of the speech act and

[32] *Ibid.*, pp. 17-18.
[33] *Ibid.*, p. 18.
[34] *Ibid.*, p. 18.
[35] *Ibid.*, p. 19.
[36] See **K. LUDWIG and D. BOISVERT**, "Semantic for Nondeclaratives", *supra* note 28, p. 3.
[37] See **J. SEARLE and D. VANDERVEKEN**, *Foundations of Illocutionary Logic*, *supra* note 6, p. 3.

refers to the impact it aims to have (intended perlocutionary effect) or really has (actual perlocutionary effect) on the "feelings, attitudes, and subsequent behaviour of the person or persons to whom it is addressed".[38]

## VI. Illocutionary acts in the justification and decision

Taking into account these concepts of the theory of speech acts, it is possible to analyse the three elements of a basic judicial decision: major and minor premise and decision. However, before looking at this, it is necessary to explain two general preparatory conditions that the judicial decision has to fulfil.

### A. General preparatory conditions

The judicial decision as a sequence of speech acts has to fulfil at least two general conditions to be successful and non-defective. The first concerns the authority of the judge. It is necessary for the judge to have the legal power or competence to make the decision. Concretely, a rule of the legal system must confer this competence on the judge. This rule must be valid. As we say, it is necessary to understand the validity of this rule in the institutional framework of the legal system as a hierarchical structure of valid norms (rules and principles). Only in this framework it is possible to understand the rule conferring power to the judge as a constitutive rule according to which the decision (that is to say a certain chain of speech acts) of the judge (a certain speaker) counts as a judicial decision.[39] If the speaker does not have the power to make a judicial decision at all or the judge does not have the specific power to resolve the case at issue, then the chain of speech acts he performs would not count as a judicial decision and would be void.

Now the second general condition relates to the form and the environment of judicial decisions. The judge has to make the decision in a trial. The trial has to fulfil the forms that the law establishes and the judicial decision as such has to fulfil certain formalities as well. A serious procedural irregularity or a serious irregularity in the form of the decision can make the judicial decision void. For instance, in the case *Riggs v. Palmer*, the validity of the decision

[38] See **K. LUDWIG and D. BOISVERT**, "Semantic for Nondeclaratives", *supra* note 28, p. 11.
[39] On the analysis of the rules conferring powers as constitutive rules, see **D.W.P. RUITER**, "Legal Powers", *supra* note 5, pp. 471-ff.

presupposed that the New York Court of Appeals had competence to provide a decision for the case and that its judgment took place at the end of a procedure with all the legal formalities of an appeal. The decision by the Court fulfilled all these conditions.

Having stated these conditions it is now possible to analyse the structure of the main elements of a judicial decision from the point of view of the theory of speech acts.

### B. Premise (1): The general rule

By uttering premise (1), that is to say, the general rule *"R"*, the Court is doing at least the following things. First, he asserts that *"R"* is the correct interpretation of the law to apply in the actual case. Second, since this rule did not exist before, at least as a rule in the legal system, the Court creates it as a rule of law. Third, the Court set this precedent for analogous future cases. Fourth, the Court uses the rule as a major premise in resolving the case.

These four things clearly appear in the case of *Riggs v. Palmer*. The New York Court of Appeals asserted that the rule $(x)(Mx \rightarrow \neg Gx)$ is the correct interpretation of the law for cases like this. Second, since this rule did not exist before, the Court creates the rule. Third, the Court set this precedent for analogous future cases. Fourth, the Court uses the rule as a major premise in resolving the case.

These four things correspond to three different illocutionary forces of the judicial speech act of uttering premise (1). The first one corresponds to a special kind of assertive. Let me call this special kind: *declarative judgement*. On the one hand, the declarative judgement is an assertive, because by saying that *"R"* is the correct interpretation of the law to rule the actual case, the judge is describing the world. This is its illocutionary point. However, he is not describing something in the physical realm but in the normative (more precisely: legal) realm of the world.[40] The judge is saying that *"R"* is valid under description of the legal system.[41] Let us remember that in the decision *Riggs v. Palmer* the New York Court of Appeals gives some arguments about the purpose of the statutes, the intention of the law-makers, the application of a rational interpretation, and the principle or general maxim of the common law,

[40] This corresponds to the third realm of Frege. See **G. FREGE**, "The Thought: A Logical Inquiry", transl. [by **A. M. QUINTON and M. QUINTON**, in **P. F. STRAWSON**, *Philosophical Logic*, Oxford, Oxford University Press, 1967], p. 29.
[41] The legal system is part of the normative realm.

according to which: “No one shall be permitted to profit by his own fraud, or to take advantage of this own wrong, or to acquire property by his own crime”, in order to ground the claim that the rule “one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered” is the right interpretation of the law for cases like that of Elmer Palmer. This argumentation entails a description of the legal realm, or put in another way, of the legal practice. The statutes, the intention of the law-makers, the methods of interpretation and the general maxims of the common law are elements of this legal practice.

In addition to this, this description of the normative realm has an evaluative component. The judge utters premise (1) as the correct interpretation of what the statutes and the other sources of the law establish for the actual case. This interpretation depends on objective and subjective factors. The words of the statements are an objective factor and the attitudes of the judge about the moral values grounding the statutes are subjective factors. Consequently, the utterance of premise (1) is not merely an assertion, but an assertion that presupposes an evaluation. Since the assertion has a normative propositional content, the following name is appropriate: judgement. Thus, in the case ***Riggs v. Palmer***, the New York Court of Appeals performs a normative assertion that the rule, $(x)(Mx \rightarrow \neg Gx)$, belongs to the legal system.

Now a special preparatory condition of this illocutionary act is that the judge has reasons for *“R”*. A propositional content condition is that *“R”* is a possible interpretation of what the legal system establishes for the actual case.

A sincerity condition is that the judge believes that *“R”* is correct. A further question is about the standard of correctness. The question is whether it is enough that *“R”* be correct under the legal system or whether *“R”* has to be correct also in general, that is to say, according to justice. Certainly, the sincerity condition refers to correctness under the legal system. However, it is possible to ask whether, in order to be non-defective it is also necessary that the judge believe that “*R*” is correct from the point of view of justice. Let us image a case in which a statute establishes an evil rule “*ER*” and the judge has simultaneously two different psychological states related to the content of the act: on the one hand, he believes that “*ER*” is a correct interpretation of the law; on the other hand, he believes that “*ER*” is unjust. If we use the strategy of stating *“R”* and simultaneously denying the psychological state related to

correctness from the point of view of justice,[42] then we get the following result: *"ER"* is the correct interpretation of the law, but "*ER*" is unjust. At this point, the answer to the question whether the utterance of "*ER*" by a judge is non-defective depends on the answer to the question whether there is a conceptually necessary connection between law and justice, or law and morality. A legal positivistic theorist would deny this connection and say that the utterance of "*ER*" is non-defective.[43] A non-legal positivistic theorist would endorse this connection and say that the utterance of "*ER*" is defective.[44] The reason for the defectiveness would be the paradox between, on the one hand, the sentence that we get when we contrast the content of the speech act with the psychological state of the judge, that is to say: *"ER"* is the correct interpretation of the law, but "*ER*" is unjust, and, on the other hand, the sentence stating that there is a conceptually necessary connection between law and justice. If, due to this connection, genuine law can never be unjust, "*ER*" cannot be at the same time "the correct interpretation of the law" and "unjust".

In any case, it is necessary to say that the direction of fit of the illocutionary act of uttering premise (1) is word-to-world, since its point is to make the justification of the judicial decision match the correct interpretation of the normative (legal) realm. Its intended perlocutionary effect is to persuade the parties in the process, the legal community and the community in general, that *"R"* is the correct interpretation of the law in the actual case.

The second illocutionary force of the utterance of premise (1) is declarative. For this reason, the speech act involved in uttering premise (1) has been called declarative judgement. By the utterance of this premise, the Court creates the rule *"R"*. The illocutionary point of uttering this declaration is to bring about the state of affairs that it represents. The Court is actually introducing a modification in the legal system. He is adding a new rule. By uttering the premise (1) he is bringing about this state of affairs. From this moment, the new rule appears in the legal system. This is the creation of a new institutional fact. It also explains why this rule is valid as a precedent for future cases and why the judge can apply it as major premise to resolve the actual case. This is the way in which the New York Court of Appeals

[42] See **J. SEARLE and D. VANDERVEKEN**, *Foundations of Illocutionary Logic*, *supra* note 6, p. 19.
[43] See **E. BULYGIN**, "Alexy's Thesis of the Necessary Connection between Law and Morality", *Ratio Juris*, 2000, pp. 133-ff.
[44] See **R. ALEXY**, *The Argument form Injustice: A Reply to Legal Positivism*, transl. [by **B. LITSCHEWSKI PAULSON and S. L. PAULSON**, Oxford, Clarendon Press, 2002], pp. 40-ff.

creates the rule $(x)(Mx \rightarrow \neg Gx)$. The Court set this rule as precedent for future cases and applies it as major premise for the case *Riggs v. Palmer*.

Nevertheless, this application of the rule *"R"* as major premise implies another different illocutionary force. This is again a declarative, but it is different from the creation of the rule *"R"*. In the application of the rule *"R"* the judge is bringing about the state of affairs that the actual case, for instance, *Riggs v. Palmer* is going to be adjudicated under the rule *"R"*. This is also the creation of a new institutional fact.

Now the direction of fit of these declarations is world-to-word, precisely: normative realm-to-word, since the point of the first is to introduce a new rule in the legal system and the point of the second to introduce the major premise in the justification of the case. They aim to bring about those new legal facts.

### C. Premise (2): The subsuntive statement

Premise (2), that is to say: $(Ca)$, is a subsuntive statement. By uttering it, the judge is doing at least the following things. First, he is asserting that the facts described as conditions of the rule "R" took place, according to the evidence. In the case *Riggs v. Palmer* the subsuntive statement is $(Mp)$. According to this statement, Palmer $(P)$ murdered his testator and, in this way, this event is an instantiation of the conditions described in the antecedent of the rule: $(x)(Mx \rightarrow \neg Gx)$. Of course, since it is a judgment by the New York Court of Appeals, this Court does not evaluate directly the evidence in order to assert that $(Mp)$. The Court takes this assertion for granted, that is to say, its point of depart is the assertion by the criminal jury, according to which Palmer murdered his grandfather. It is well known that in the American System of Justice, in certain cases the judge is the fact finder and the other cases the fact finder is the jury. In the first kind of cases is the judge who asserts that the conditions described in the antecedent of the rule took place. In the second sort of cases, the jury asserts it and the judge departs from the assertion made by the jury. In what follows I will speak about the cases in which the judge is the fact finder.

Second, by uttering premise (2) the judge is also creating this institutional fact, and setting it as precedence. Third, he is also including this sentence $(Mp)$ as minor premise in the justification of the decision.

These three things correspond to three different illocutionary forces of the judicial speech act of uttering premise (2). The first one corresponds to a special kind of assertive. Let me call this special kind: empirical declarative judgement. The empirical declarative judgement is an assertive, because by saying, for instance, that *(Ca)* (in the case *Riggs v. Palmer*: "*Mp*"), that is to say, that the action (*a*) (What Palmer "*p*" did) fulfilled the conditions *(C)* (to murder the testator: "*Mx*") of the rule *"R"*, (*x*)(*Mx* → ¬*Gx*), the judge is describing the world. This is its illocutionary point. However, he is not describing directly something in the empirical world, because the judge actually does not have any direct contact with the performance of the action *(a)*.[45] Therefore, the judge is just able to assert indirectly that *(a)*, at least probably, took place and fulfilled the conditions *(C)*. The judge is directly describing something about the proofs taken into account in the process. He is asserting that the proofs show that *(a)*. Nevertheless, the judge adds an evaluative component to this assertion. The judge does not merely describe what the proofs show, but evaluates it according to normative criteria related to their relevance and reliability. For this reason, *(Ca)* is not a mere empirical assertion but an empirical ascription.[46]

A special preparatory condition of this illocutionary act is that the judge has reasons for the truth of *(Ca)*. These reasons derive from the evaluation of the proofs. Now there are at least two kinds of sincerity conditions for this illocutionary act. According to Austin,[47] in criminal law cases it is arguable whether the judge has to believe ("really feel") "that the defendant is guilty" or to believe "that one is justified ('feel justified'), on the evidence adduced at the trial, in *accepting* that he is guilty". At the first glance it looks like the second hypothesis of Austin is true, that is to say, that the sincerity conditions of asserting premise (2) presupposes that the judge believes that he is justified on the evidence in accepting that (*Ca)*. Nevertheless, this does not seem to be enough. Premise (2) also presupposes that the judge believes that the defendant is indeed guilty, that is to say, that an action performed by the defendant indeed took place and is an instantiation of the conditions described in the antecedent of the rule "R". If we use again the strategy of stating *(Ca)* and simultaneously denying the belief of the judge that the defendant performed *(a)* and that this action is an instantiation of the conditions described

[45] However, this could be the case in exceptional circumstances, when the judge makes a direct inspection of certain things.
[46] On the concept of ascription in this context, see **H.L. HO**, "What Does a Verdict Do? A Speech Act Analysis of Giving a Verdict", *supra* note 5, p. 19.
[47] See **J.L. AUSTIN**, *How to Do Things with Words*, *supra* note 2, p. 41.

in the rule,[48] then the result is the following paradox: *(Ca)* is proved, but this statement is false, because *(a)* did not actually take place or did not actually fulfilled the conditions *(C)*. Now the direction of fit of this illocutionary act is word-to-world, since its point is to make the minor premise of the justification of the judicial decision match the evidence and the empirical world. Its intended perlocutionary effect is to persuade the parties in the process, the legal community and the community in general, that, according to the evidence, *(a)* indeed took place and fulfilled the conditions *(C)* of the rule *"R"*.

As in premise (1), the second illocutionary force of the utterance of premise (2) is declarative. For this reason, it has been called: empiric declarative judgement. By the utterance of this premise, the fact finder (the judge or the jury) creates a new institutional fact. It declares that *"Ca"*. The illocutionary point of uttering this declaration (*"a"* officially took place and fulfilled the conditions *"C"* of the rule *"R"*) is to bring about the state of affairs that it represents. The fact finder is actually introducing a modification in the legal system. He is officially adding a new fact to the set of facts officially recognised by the legal system and he is changing the status of the agent of the action *(a)*. From this moment, this action (*a*) is officially imputed by the legal system to the agent and it is officially declared that this action (*a*) fulfilled the conditions (*C*) of the rule *"R"*. The judge declares with his authority that the agent's behaviour took place and fulfilled the conditions described in the general rule. By doing this, the accusations of the plaintiff became official fact. There is a difference between this institutional fact and the brute facts. This institutional fact is a "legal certification"[49] that the brute fact took place. Only the fact finder (judge or jury), with his competence, after a judicial procedure and with the right legal forms can give this legal certification. The legal certification makes the brute fact relevant to the legal system. All this also explains why this declaration has precedential force for future cases and why the judge has to (or can) apply it as minor premise to solve the actual case.

Nevertheless, this application of the statement *"Ca"* as minor premise implies another different illocutionary force. This is again a declaration, but it is different from the creation of the official declaration that *"Ca"*. In the application of *"Ca"* to the case, the judge is bringing about a state of affairs, namely, that the actual case, for instance, ***Riggs v. Palmer*** is going to be adjudicated under the premise *"Mp"*. This is also the creation of a new institutional fact.

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[48] See **J. SEARLE and D. VANDERVEKEN**, *Foundations of Illocutionary Logic*, *supra* note 6, p. 19.
[49] **H.L. HO**, "What Does a Verdict Do? A Speech Act Analysis of Giving a Verdict", *supra* note 5, p. 13.

Now the direction of fit of these declarations is world-to-word, more precisely, normative realm-to-word, since the point of the first is to introduce a new official fact into the legal system and the point of the second to introduce the minor premise in the justification of the decision in the case.

**D. The decision (*D*)**

Finally, by uttering the decision (*D*), that is to say, the imposition of the legal consequence (*LCa*) to the agent, the judge is doing one of two things or both. First, he is changing or settling the legal positions, that is to say the legal status or relationships of the parties. Second, he is giving an order addressed to other competent authorities or to the parties.

The first thing clearly appears in the case *Riggs v. Palmer*. The New York Court of Appeals imputes directly the sanction (¬*Gp*), that is to say, does not give the property to Palmer and, correlatively, gives this property to the plaintiffs. Nevertheless, in other cases the judge can also give an order to other competent authorities. In criminal judgments, for instance, the judge can give an order of imprisonment of the defendant, and in tort law cases the judge can order the payment of damages to a party. In these last cases, the decision has also a declarative component. If a judge convicts an agent of a crime and orders his imprisonment, he is also changing the legal status of this agent.

These two things correspond to two different illocutionary forces of the judicial speech act of uttering the decision (*D*). The first one is declarative. By uttering the decision (*D*) the judge is creating a new institutional fact. He is changing the legal positions of a party or of the parties. The illocutionary point of uttering this declaration (the actual imputation of the sanction *"S"* to the agent "*a*") is to bring about the state of affairs that it represents. The judge is actually introducing a modification in the legal status of the agent. He is officially adding a new institutional fact to the set of institutional facts that the legal system associates with the agent (*a*). It is possible to see very clearly this point in cases like divorce decisions. With the decision, the judge actually changes the legal status of the agent and this change has certain consequences (for example, the agent can get married again).

Now the second illocutionary force of the decision corresponds to a directive. Its point is to direct the addressees of the order to perform the imputation of the sanction (*S*) to the agent of the action (*a*). The judge has to use directive speech acts when he does not have the competence to impute the sanction by himself. For instance, in the criminal cases, when a sanction of imprisonment is a stake, the judge clearly does not have the power himself to bring the defendant to prison. Consequently, he gives the order to impute this sanction to the competent authority. A special propositional condition of this speech act is that the sanction has not yet been imputed to the agent. The imputation of the sanction must be a future act. A special preparatory condition is that the addressee of the order is empirically and legally able to impute the sanction (*S*) to the agent of the action (*a*) and that the judge believes it. A special sincerity condition is that the judge actually intends to impute the sanction (*S*) to the agent of the action (*a*). Finally, an essential condition is that the order counts as an attempt of the judge to make the competent authority impute the sanction (*S*) to the agent of the action (*a*). The direction of fit of this speech act is world-to-word, since its point is to make the world (the act of imputing the sanction) match to the decision.

Finally, in some cases (*e.g.*, in certain criminal and tort law cases) the decision has also an expressive force. It expresses (in the speech act sense) a negative attitude towards the agent. According to Ho,[50] in criminal law cases the decision entails a condemnation or censure that aims "to bring about a sense of shame in the defendant as a first step towards repentance and reform." Some decisions in tort law have a similar expressive force. However, this is not always the case. In many cases a judicial decision solves a social problem without any formal expression of any negative attitude toward the parties.

[50] See **H.L. HO**, "What Does a Verdict Do? A Speech Act Analysis of Giving a Verdict", *supra* note 5, p. 25.