Law as Communication

Mark Van Hoecke
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Contemporary analytical and continental philosophy is linguistic philosophy. Both traditions took the 'linguistic turn' at the end of the 19th century, a turn that transfigured the bulk of philosophical issues into questions about how we 'talk' about these issues, or how these issues have been 'constituted' by human talk, speech and communication. Language became both the topic and topos of philosophical discourse as well as those subject areas that feed both off it and into it. One such area is the philosophy of law, also known as legal theory.

However, as compared to other philosophically oriented disciplines such as anthropology and sociology, legal theory has been much slower off the mark in taking the linguistic turn. True, legal theory has throughout the last century been affected by developments in language philosophy. The influences of conceptual analysis and hermeneutics can be seen in much post-1950s Anglo-American and continental philosophy respectively. Yet these influences were, for the most part, rather piecemeal, and there has been in legal theory nothing equivalent to the works such as those by the earlier and later Wittgenstein, which spelled out, in various and often contradictory ways, the implications of the paradigm shift to language. That is, not until Jürgen Habermas's *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, published in 1992 in German and translated into English four years later.[1] This book, in conjunction with Habermas's seminal work on communicative action published a decade earlier,[2] finally dragged legal theory and socio-legal theory into line with many of the latest developments in both analytical and continental philosophy and social theory.

From the title and tenor of *Law as Communication,* it would seem that Mark Van Hoecke would like to adopt and develop upon what he calls Habermas's 'alternative philosophical framework'(8).[3] In particular, it

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1 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans, 1996).

2 Jürgen Habermas, *The Theory of Communicative Action Vol I: Reason and the Rationalization of Society*, (Thomas McCarthy trans, 1981); *The Theory of Communication Vol 2: Lifeworld and System: A Critique of Functionalist Reason* (Thomas McCarthy trans, 1987).

3 It is important to note that though Habermas looms largest of the communications-theoretical philosophers and social theorists upon whom Van Hoecke relies, he is not the only one. The author also discusses, and is clearly influenced by, the work on meaning and communication by the sociologist Niklas Luhmann and his disciple Gunther Teubner.

would seem that he would like to concretise and empirically build upon Habermas's work, which is so dauntingly general and abstract for those lawyers interested professionally or otherwise in theory. If I have characterised Van Hoecke's aims correctly, then I must say that he has been only partially successful in carrying them out. The book, despite being replete with interesting, important and original insights into all manner of issues in general jurisprudence, does not live up to its title. Though it is certainly a superior work in legal theory by a superior legal theorist, it is not a treatise that gives a sustained and unified communications-theoretical account of contemporary law.

Since I believe persons who would read a book entitled *Law as Communication* would be primarily interested in those aspects of the work that elaborate, analyse and develop a communications-theoretical account of law, this review will confine itself to commenting upon those aspects of Van Hoecke's book that do this. Those large sections of the book that deal with a wide range of not all that systematically connected issues in general jurisprudence will be, by and large, skipped over. Many of these discussions on matters such as: the definition of law (Chapter 2); the characteristics of law (Chapter 3); the functions of law (Chapter 4); the concept of a legal system (Chapter 6) and the methodology of law (much of Chapter 7) involve interesting and often original treatments of both enduring and contemporary problematics in legal theory. They build on the author's own previous contributions to these topics and offer sophisticated and critical interpretations of the leading writers in the field, especially Kelsen, Hart and Raz. These sections are definitely worth reading in their own right, but not in order to gain an insight into the stated theme of the book. For though they often elaborate the connection of legislative, administrative and adjudicative procedures to processes of communication, the author here never explains the properties of these communicative processes that make law explicable in some deep or primary sense in terms of communication. Thus we end up with a book that charts some of the connections of law to communication without comprehensively explaining law *as* communication.

Yet given Van Hoecke's minimal definition of law as being 'a framework for human interaction' (7) he presents the appropriate *point d'appui* for explaining the deep structure of legal processes in terms of the fundamental properties of communicative processes. For human interaction is, for most intents and purposes, an intersubjective phenomenon whose fundamental basis and medium is linguistic communication.[4] In so far as law's purpose is to provide a framework for human interaction,[5] then it will

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4 At least, this is what I take Van Hoecke to mean at page 19.

5 To be precise, Van Hoecke is talking about 'law' in the narrow sense of modern positive law.

necessarily be governed in some sense by the structural properties of language. Once we have shown the sense in which these structural properties are embedded in and affect the law, we have gone some way to explaining law *as* communication.

And as those readers familiar with Habermas will be aware, this is where his discourse theory of society and law gains its purchase. For this theory attempts to demonstrate at some length what I take to be the following five theses that are directly germane to Van Hoecke's topic.

(i) Linguistic communication — to be precise, a particular form of oral or written speech termed 'communicative action' — is the primary medium of social interaction.

(ii) Communicative action has certain formal-structural properties and rests on certain strong and unavoidable normative presuppositions and assumptions made by all language users regardless of whether they are acting communicatively or strategically.

(iii) These structural properties and normative suppositions find their way into all aspects of life that are mediated by linguistic communication.

(iv) One such aspect is modern positive law. This mediation occurs at innumerable points throughout the legal system, but most importantly in the processes of legislation, adjudication and administration.

(v) As such, the logic of communicative action which is manifested in the normative presuppositions and assumptions underlying linguistic communication becomes embedded in the fabric of modern law and, via this route, finds its way into those immense areas of modern life that are constituted or affected by law.[6]

In this model, law *is* communication because processes of communicative action play a constitutive role in the creation, application and administration of law. As such, forms of communication, together with their underlying normative presuppositions, *are* law and affect in various ways those domains of life, both normative and systemic, touched by law. In some sections of the book, Van Hoecke clearly understands and develops upon this insight. He does so most directly in his discussion of the connection between law and democracy, and most originally in his analysis of constitutional review.

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6 I have derived these five 'theses' from a reading of Habermas's *Theory of Communication*, vols 1 and 2, above n 2 and *Between Facts and Norms*, above n 1. In a review of this kind I cannot demonstrate how I derived these theses nor show that it involves a correct reading of Habermas's work.

As one would expect, in virtue of the fact that he sees law as both created by, and a transmission belt for, discursive communication, Van Hoecke strongly endorses Habermas's theory of deliberative democracy (122-24). This theory is *democratic* because it conceives the people as being the authors of the laws to which they are also subject. It is *deliberative,* in that it presupposes that people can only be authors of the laws that bind them if they can all freely determine among themselves those restrictions and reinforcing sanctions they would like to impose on each other. This theory is then actualised in the shape of a communicative arrangement, which ensures that the forms of communication, which enable the plethora of issues underlying discursive lawmaking, can be freely and equally deployed by all citizens. And the latter is only possible if the forms of communication are themselves legally institutionalised; that is to say, enshrined in, and backed up by, law.[7] As Van Hoecke points out, the discourse theory of law and democracy entails a transition from the practice of 'vertical linear legitimation' to that of 'circular mutual legitimation' (208), in which citizens' private and public rights are institutionalised in a comprehensive and balanced manner. What makes this model communicative at its core, is that the public and private freedoms that underlie deliberative democracy are themselves articulated in on-going legally structured democratic processes, at the level of state and civil society. In this way, one can appreciate how a communicatively embodied rule of law, on the one hand, and democracy, on the other, are, as Habermas puts it, 'internally related'.[8]

This internal relation is most originally and interestingly spelled out by Van Hoecke in his discussion of judicial review. Such review is depicted as a 'circular relationship' (174) — a communicative circuit — between judges and legislators in which the legitimacy of judicial findings is vindicated 'through deliberative democracy' (176). What makes Van Hoecke's account more nuanced than those of, say, John Hart Ely,[9] Frank Michelman[10] and even Habermas himself,[11] is his analysis of the discursive processes into five 'communicative spheres'. These spheres are, in order; trials, appeals, law reports, discussions of cases in the mass media, and finally, discussions of cases in 'society at large' (177), which I take to mean conversations over breakfast, lunch and dinner and the like. Each successive sphere extends the circle of participants from those within the elitist

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7 For more detail on these points see Robert Shelly, 'Institutionalising Deliberative Democracy' (2001) 26 *Alternative Law Journal* 36.

8 Jürgen Habermas, 'On the Internal Relation between the Rule of Law and Democracy' (1995) 3 *European Journal of Philosophy* 12.

9 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

10 Frank Michelman, *Brennan and Democracy* (1999).

11 Habermas, *Between Facts and Norms*, above n 1, ch 5 and 6.

confines of the court system into wider participational frameworks of civil society. Especially in spheres four and five, judicial review achieves a 'public forum function, through which public control, criticism and debate become possible' (177). The strength of seeing judicial review as taking place in successively open and permeable spheres is twofold. Firstly, it brings further extension and refinement to the idea of the internal connection between the rule of law and democracy. And secondly, it more satisfactorily explains the legitimacy of such review in deliberative democracies. Judicial decisions acquire their democratic imprimatur not via problematic devices such as the direct election of professional judges or appointment of lay judges, but via their potential for critical analysis by the people.

It is in expositions and analyses like these that Van Hoecke moves from merely cataloguing the connections between processes of communication *and* law, to articulating law *as* communication. I have already said that it's a pity that so much of the book is devoted to the former. But even if it cannot be said that the author has completed the task he has set himself, there is no denying that he has provided a number of significant leads for those who might wish to explore further down that path.

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