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OTHER PARTICIPANTS' COOPERATIVE ATTITUDE IN LEGAL CONTEXT¹

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abstract

According to Searle, for there to be collective intentionality two elements must be present: an intention-in-action to collectively do something and a belief in the cooperative attitude of other participants. The author argues that this second element poses the requirement of giving an account of the epistemological basis for holding the belief. The author claims that we cannot extend the way in which, according to Searle, the epistemological basis exists in game-like activities to legal institutional facts, in these last cases, due to the fact that legal norms are discussed in midgame and the fact that legal interpretation is highly indeterminate, it is dubious that such a basis exists.

keywords

Epistemological basis, game-like activities, legal facts

1. Introduction

Searle's theory of social action seems to face a certain challenge. The challenge is a consequence of the fact that the conditions Searle deems necessary for there to be collective intentionality, have reduced the capacity of the theory to account for some institutional facts of our everyday life, or so I will argue. As we know, Searle does not only tell us what must be the case for there to be collective intentionality, he also claims that it is the case that the institutional facts of our everyday life involve collective intentionality¹.

It seems to me that this two-front enterprise introduces a tension in Searle's theory. Collective intentionality requires, as Searle himself seems to admit, the existence of an epistemological basis for its formation (call this "the epistemological basis requirement" or EBR). Searle does not offer a general explanation of how this basis is present and, to my mind, on the basis of the claims that he makes on this regard, there are some central cases of our everyday institutional reality, i.e. legal facts, where there is no such a basis. In the first section I will characterize more precisely EBR. In the second one a brief reference to how EBR can be satisfied in cases where coordination is needed will be made. In the third section I will resume Searle's proposal. In the fourth section I will point out some features of legal facts that seem to preclude the verification of EBR in the legal context.

2. The Epistemological Basis Requirement

One of the major difficulties that the explanation of social actions must face is the problem of the knowledge of other participants' mind contents. The question is crucial because without some reliable information about other participants' contribution, individuals will not have sufficient reasons to engage in social activities. It is in virtue of this fact that a theory of social action must offer a story about how that information is to be gathered and about how that information can bring about the individual action, within the social activity.

An essential feature of social actions is that the outcomes individuals want to produce or prevent are determined by the actions of other agents. That is, the individual finds himself in a situation in which the attainment of a result requires not only an action of him, but the contribution of other

1 "I will focus on what I believe is the fundamental building block of all human social ontology and human society in general: humans being, along with a lot of other animals, have the capacity for collective intentionality" (Searle 2010, 43).

individuals as well. The social outcome would not occur if all the parties did not do their part. Even though social actions are a widespread phenomenon, it has not been easy to single out their constitutive elements. In particular, it has been very difficult to elucidate the intentional states that individuals possess or are in when the social action takes place.

The problems arise because it has proved difficult to concomitantly satisfy two singularly correct but jointly incompatible constraints.

On the one side, an account of social action has to supply the set of necessary and sufficient conditions for the action to take place and, in particular, the intentional states that motivate action². Call this the “motivational constraint” or MC. In this regard, it is certainly clear that the set must contain the intention to do the singular part in the social action but, due to the fact that the outcome can be reached only if other individuals contribute, it will not be sufficient to single out the individual intention.

On the other side, it is forbidden for an account of social action to include any reference to other people’s intentions inside the content of an individual intention³. This constraint has been framed in different ways⁴. I will follow here the more general formulation proposed by Bardsley according to which the constraint amounts to the provision that “an individual’s intentions cannot be said to range over others’ actions” (Bardsley 2007, 144)⁵. In Searle’s terminology, the propositional content of individuals’ intentions cannot make reference to the actions of other individuals, because “the propositional content can only represent elements that the agent can (or he thinks he can) causally influence” (Searle 2010, 45). Call this the “forbidden reference constraint” or FRC.

There are two major proposals regarding the explanation of social actions; each of them, while trying to satisfy MC and FRC, dwells differently with EBR. The so-called conventionalist one, based on individual intentions plus mutual beliefs, and the so-called institutionalist one, based on collective

2 “The action does not get performed if my body does not move, and this has to be reflected in the collective intentional content, even though the collective intentional content exists entirely in my brain and your brain and the brains of the other members of the collective” (Searle 2010, 55).

3 It is also important to add that, as Searle himself recognizes, it is possible for an individual intentionality to make reference to the intentionality of other members of the collective. For example, in cases of authority relationships. See (Searle 2010, 56) and (Velleman 1997, 34).

4 Bratman identifies the following three. First, as stating that an intention necessarily includes a reference to the person that has the intention. An agent can intend only to do something herself (Own Action condition). Second, as establishing that the agent cannot intend what is not under her control (Control condition). And third, as claiming that intentions are the attitudes that resolve deliberative questions, thereby settling issues that are up to you (Settle condition). Bratman believes that only 2 and 3 pose a real problem to an account of collective actions. See (Bratman 1999, 148-150).

5 Bardsley considers this an “uncontroversial constraint on the analysis of action” (Bardsley 2007, 144).

intentionality⁶. Whether they are exhaustive or exclusive approaches is a controversial matter. Both of them seem to give, in some cases, a good answer to EBR: the conventionalist one for cases where coordination is needed and the institutional one for cases where game-like activities are carried out. In these two cases the structure of the situation gives a good epistemic basis for the formation of beliefs⁷ regarding other participants' mind contents. Let see how.

3. Coordination Cases

The conventionalist theory tells us that the existence of a conventional fact (or social action) depends on the occurrence of individual intention plus mutual belief. Doubtlessly, this pair of elements respects both MC and FRC. There is an intention that makes reference only to the agent action and a (mutual) belief that supplies the required information. As we know, Searle claims that conventionalism does not offer a set of necessary and sufficient conditions for the existence of collective action⁸. Even if Searle is right about the limited scope of the theory, I think that conventionalism is able to give an account of social actions in certain cases and to tell a story for EBR satisfaction. Clearly, I am not saying that conventionalism is a good comprehensive account of social actions, nor I need to deny that. I am only saying that to the extent that it offers a story regarding the satisfaction of EBR and the two constraints, conventionalism seems to be a good account of a particular type of cases.

The cases to which I'm making reference here are those where coordination is needed. As we know, coordination is needed when the agent finds himself in a situation where his choice of one course of action between several alternatives depends on which course of action will be chosen by other people⁹.

The need for coordination stems from the fact that in this kind of situation the agent has to choose between several alternative actions and the outcome of such actions depends on others' actions and vice versa. It is in virtue of this dependence that to choose one alternative rather than another the agent must consider what she thinks will be the choices of other agents. To put it differently, she must decide what to do on the basis of her expectations regarding what the others will do. And, in virtue of the

6 See (Celano 2010).

7 Searle talks about beliefs, assumptions or presuppositions. I will use beliefs for short.

8 The claim is based on the well-known example of the business school cases. If the example is good, economists that believe in Adam Smith's theory of the invisible hand will act individually according to their egoistic desires, therefore there will be no cooperation (so, there will be no collective intention in Searle's sense). Nevertheless, the economists will have the individual intention and the mutual belief that conventionalism considers sufficient (and necessary) for there to be collective intentionality. See (Searle 2010, 47-48).

9 See (Lewis 1969, 8).

fact that not only her action depends on the action of others, but also their action depends on hers, in replicating their practical reasoning, she needs also to figure out what *they* expect *her* to do¹⁰.

According to the conventionalist theory, the probabilities for the agents to reach a solution are higher if they rely on a system of suitably concordant and mutual expectations about each other's action¹¹.

Therefore, to satisfy EBR, conventionalism must tell us in which circumstances agents become justified in forming those mutual expectations. A first way to get to the solution is by an agreement. But it is not the only way and, moreover, if agreement were always necessary, then the scope of the conventionalist theory would be dramatically reduced. Another, more common, way to solve coordination problems is by taking advantage of some salient event. An alternative of action is salient when it "stands out from the rest by its uniqueness in some conspicuous respect. It does not have to be uniquely *good*; indeed, it could be uniquely *bad*. It merely has to be unique in some way the subjects will notice, expect each other to notice, and so on" (Lewis 1969, 35).

Once salience has been noted by several agents and the problem has been solved one or more times, coordination can be achieved by precedent. In this third way, coordination is achieved "by means of shared acquaintance with a *regularity* governing the achievement of coordination in a class of past cases which bear some conspicuous analogy to one another and to our present coordination problem" (Lewis 1969, 41)¹².

So, when agreement, or salience, or precedent, occur there is a sufficient basis, according to the conventionalist story, for each agent to form a belief about other agents' coordinative actions. In this sense EBR would be satisfied.

4. **Game-Like Activities** In his book Searle claims that explanations of collective actions based on I-intentions plus mutual beliefs fail and he proposes an alternative account of collective intentionality¹³. From Searle's point of view, in order to engage in collective behavior, the individual must hold two different intentional states. First, she must have a collective intention-in-action to achieve the social action by contributing with her singular action. Second, she has to believe that others are going to cooperate with her¹⁴.

10 See (Lewis 1969, 32).

11 See (Lewis 1969, 27).

12 "Indeed, precedent is merely the source of one important kind of salience: conspicuous uniqueness of an equilibrium because we reach it last time" (Lewis 1969, 36).

13 Even if Searle himself admits that the conventionalist proposal is a good account of some institutional reality.

14 See (Searle 2010, 53).

Clearly enough, Searle is aware of EBR and the two constraints, i.e., MC and FRC¹⁵, and his proposal purports to satisfy all of them¹⁶. He claims that “part of what it means to say that the intentionality is collective is that each agent has to assume that the other members of the collective are doing their parts” (Searle 2010, 52). In other terms, for there to be collective intentionality, each agent has to believe that the other members also have an intention-in-action with the same goal¹⁷. The addition of a belief in the existence of others' collective intention-in-action is necessary to satisfy the two constraints I've mentioned¹⁸. The MC is observed thanks to the fact that the intention-in-action plus the belief in others having the relevant intention-in-action can motivate my action. The FRC is respected inasmuch as “there is no reference to your intentionality or your behavior inside the propositional content of my intention-in-action” (Searle 2010, 53).

Now, does Searle offer sufficient elements to consider EBR satisfied? Searle argues that there is an epistemic basis for holding the belief that others will do their part in the cooperative enterprise. In his words: “There is an epistemic basis for this: often one does not know what the individual intentionality in the minds of the other members of the collective is. I might have the collective intentionality to achieve a certain goal, and I have that on the assumption that you are working toward the same goal as I am. But it need not be the case that I actually know the content of your intentionality. In a football game, the offensive lineman blocking on a pass play does not necessarily need to know what routes are being followed by the wide receivers or how many steps

15 “A second difficulty is that my personal individual intentionality can only range over actions that I can personally cause; and typically in cooperative behavior, there is an intentionality that is beyond the range of my causation” (Searle 2010, 44).

16 In doing this he also puts forward an answer to some critics. In particular, Bardsley had claimed that as much as the propositional content of the intention-in-action includes a result that can only be achieved in conjunction with the other agent action, so the intention-in-action ranges over others action. And this violates FRC. See (Bardsley 2007, 144).

17 Searle have always insisted in the difference between “two quite distinct logical categories” of intentions, to wit, “the intentions that one has *prior* to the performance of an action as when, for example, I now intend to raise my arm in thirty seconds, and the intentions that one has *during* the performance of the action itself, as when I rise my arm intentionally and this have an intention which is part of the action itself” (Searle 2010, 33). Searle calls the first category “prior intention” and the second one “intention-in-action”.

18 “So we need at least two elements in our analysis of collective intentionality. We need a representation of the intention itself, where the intention can only refer to things that the agent can achieve (or he thinks he can achieve) and cannot involve references to other agents' actions, and then we need a representation of a belief, and the belief is a belief about what the other agents are doingv” (Searle 2010, 55-56).

backward the quarterback is taking before throwing the pass. All he has to know is what he is supposed to do ('his assignment' in the jargon of football coaches)" (Searle 2010, 54-55).

I think Searle is right in this. As his example shows, in game-like contexts, due to the close structure of the interaction, it does not appear to be problematic for an individual with a collective intention to hold the relevant belief.

In the first place, it does not seem problematic because participants in games are sharply demarcated, "players are typically recognized as such and can be distinguished quite clearly from spectators, fans, and other non-participants" (Marmor 2009, 60).

In the second place, games involve a certain element of detachment from real-life concerns. It is true that the level of detachment varies considerably in different kinds of games, as well as in different contexts and cultures. But this is precisely the reason that explains why the rules that govern game-like activities have certain artificiality. Within game-like activities rules are followed without being put in discussion by the participants. As Marmor notes, a "violation of such norms typically involves a confusion; it often manifests a misunderstanding of what games are or what the situation is" (Marmor 2009, 60).

I think that these three elements can be held to be sufficient to consider EBR satisfied. That is, the clear identification of participants, the detachment from other real life concerns and the stability of rules give a good epistemological basis for the agent to hold the belief.

Clearly enough, the scope of Searle's theory goes beyond game-like activities, but he does not offer an explicit general account of the conditions that must hold in order to satisfy EBR. One possibility could be to try generalizing from game-like activities to other kinds of institutional facts. In the next section, I will put forward some doubts about this possibility regarding legal institutional facts.

5. **The Case of Law** As we have seen, Searle give us good arguments to accept that there are some cases of institutional facts in which EBR is satisfied, i.e., game-like activities. However, as far as I can tell, Searle does not supply an explicit general explanation of how it is possible, for an individual with a collective intention, to have a sufficient epistemic basis for holding the relevant belief about other participants' cooperative attitude. To my mind, without this general explanation, the scope of the theory will thin out if there are some institutional facts that cannot be account for using the same explanation

employed in the case of game-like activities.

It seems to me that the solution given for game-like activities cannot be extended further to cover other institutional facts where, due to the differences with games, it is not justified to form the relevant belief. In some cases, such as legal practice, characterized by conflicts of interests and by an open structure of interaction, it seems more difficult to claim that EBR is satisfied.

There are well-known attempts to use Searle's concepts and theory to account for legal facts¹⁹ and I'm not questioning the whole enterprise here. My point is that some of the social actions or reality that Searle claims to have explained, i.e., legal facts, take place in a context where there is no sufficient epistemological basis for each participant to form the belief necessary for the existence of a collective intention.

The objection that I'm trying to put forward here is an objection not against Searle's account of collective intention, but against Searle's claim that his theory explains all institutional reality.

The first problem for the application of Searle's theory to law is that, in general, there is neither a sharp demarcation between participants and non-participants nor, obviously, a sharp detachment from real-life concerns. Even more, an individual could not rely on the belief that he shares with other people the same belief about which is the function of each legal institution. As it has been pointed out, many legal institutions do not have a clearly shared function. "For example, what is the purpose of our marriage, divorce, property and inheritance laws? Anything that can be said about it is banal or obviously concocted – for example, that the purpose of the rules of divorce is to enable people to have reasonable access to divorce" (Ross 1958, 147). And that's why there might be legal institutional facts "about which there might be disagreement on whether the institution has a function and what that function is" (Fletcher 2003, 93).

It is true, to face this challenge it could be said, in the first place, that the rules that constitutes legal facts have been codified and that this is a sufficient basis to belief in other individuals' cooperative attitude.

In the second place, it could be said, as Searle does, that legal institutional structures require only "*collective recognition* by the participants in the institution in order to function" and that *cooperation* is needed only in particular transactions within the institution²⁰. In this sense, one could add, with Searle, that collective recognition can be explained in terms of the

19 See, as examples, (MacCormick and Weinberger 1986), (Marmor 2009) and (Redondo 2001).

20 Searle also claims that cooperation is needed for the institution to be born (Searle 2010, 57). I am not here interested in the genesis of institutions.

conventionalist theory, i.e., in terms of I-intentionality plus mutual belief²¹. The resulting picture is then that “the existence of an institution does not require cooperation but simply collective acceptance or recognition. Particular acts within the institution such as buying or selling or getting married or participating in an election require cooperation” (Searle 2010, 58). Maybe we could also accept the claim according to which in particular cases there is a clear demarcation of participants, e.g., the parties of a contract, the wedding persons, and so on²². But, is it a sufficient basis for holding the relevant belief in every particular act where, according to Searle, cooperation is needed? I think that there are two circumstances, highlighted by some legal philosophers, that precludes the possibility of a belief in other individuals' cooperative attitude, or at least render it very unreliable.

The first one is the way in which judges and lawyers discuss about the very rules that regulate legal institutions. As Dworkin showed, from a historical perspective it can be seen that often legal practice changed in response to arguments made in the context of adjudication. These arguments were carried out not as part of a special mini-constitutional convention to change the rules of the game, as in game-like activities. Instead, lawyers “often call for changing even settled practice in midgame” (Dworkin 1986, 138). As a dramatic example, relevant changes in the doctrine of precedent were made inside the context of legal adjudication. These changes were changes within judicial practice; they were not the result of special agreements about having a new set of rules.

In the context of games such arguments would have been powerless, even silly, if everyone had thought that rules constitute the game of law in the same way as the rules of football constitute that game²³.

Rules of games can also change, but once people are engaged in playing them, a sharp distinction is made between arguments about and arguments within the rules. This distinction does not take place in legal argumentation.

Moreover, in legal practice rules are questioned not only in the middle of the game, but it is also the case that there is no agreement about their interpretation. And this take us to the second aforementioned circumstance, that is to say, the fact that the content of legal provisions suffers from a high degree of indeterminacy. The main sources of

21 See (Searle 2010, 57-58).

22 With the following caveat: whereas in game-like activities it is clear both which are the properties that define participants and which are the individuals that satisfy those properties, it is not always the case that both questions are settled in legal practice.

23 See (Dworkin 1986: 137).

indeterminacy are, as Guastini remarks:

- (i) the plurality of interpretive methods;*
- (ii) juristic theories (so-called 'legal dogmatics' in continental jurisprudential language), and*
- (iii) the sense of justice of interpreters, i.e., their ethical and political preferences (be they expressly declared by means of value judgments or not)"*
(Guastini 2011, 148).

As a matter of fact, every normative provision can be interpreted as expressing different norms depending on the methods used to interpret it. Besides, in each legal community there is often a large set of accepted interpretive methods that is sufficient to produce a great deal of incompatible and/or competing results.

Take, for example, an Italian constitutional provision referring to "statutes". Arguing a contrariis, one can conclude that such a provision applies to any kind of statute and only to statutes. Arguing by analogy, one can conclude that the provision at stake applies to statutes as well as to executive regulations (since both are "sources of law"). Arguing by the distinguishing technique, one can conclude that, since the class of "statutes" includes different subclasses (constitutional and ordinary, on the one hand; state and regional, on the other), the provision - in the light of its ratio - only applies to one of such subclasses (Guastini 2011, 148-149).

So, even if there are legal facts where participants are more or less demarcated and some legal constitutive norms are codified, it seems to me that the fact that legal norms are discussed in midgame and the fact that the result of legal interpretation is highly indeterminate preclude the possibility of saying rightly that in legal context there is, in every particular act, a sufficient epistemological basis for the belief in other cooperative attitude. For example, even if both parties of a contract know each other and agree on a text, the fact that the meaning of the text or the way in which it will be settled by courts are not completely determined prevent them to form a belief on the other party's cooperative attitude. Or at least, the formation of the relevant belief cannot be based on the same circumstances that allow the formation of the belief in the case of game-like activities. If this is so, then, I would add, the burden of the proof of providing an explanation of how EBR could be satisfied is on Searle.

- 6. Conclusions** As I have said at the beginning, it was not my purpose to question Searle's conceptual claims. My endeavor had a much less ambitious aspiration, to wit, questioning the explicative capacity of Searle's theory regarding some particular legal institutional facts. If I understood Searle's proposal in the right way, for there to be collective intentionality two elements must be present: an intention-in-action to collectively do something and a belief in the cooperative attitude of other participants. I have argued that this second element poses a requirement to the theory, namely, the requirement of giving an account of the epistemological basis for holding the belief. It seems to me that Searle has not offered in his book a general explanation of this last requirement. Furthermore, I have claimed that we cannot extend the way in which, according to Searle, the epistemological basis exists in game-like activities to legal institutional facts, in these last cases it is dubious that such a basis exists.

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