THE SPEAKER PARADOX IN STATUTORY IMPLICATURES

Samuele Chilovi

abstract

Law-making in modern societies is typically thought to be the product of collective activities undertaken by law-making actors. Legislators vote on statutes, thereby bringing about, modifying or preventing a change in the law as originally envisioned by the legal texts' framers. Though a number of sceptical challenges to the notion of collective intentionality has been advanced,¹ it remains uncontroversial, for legal positivists² and (some) antipositivists³ alike, that some kind of collective social practice be a necessary element within the metaphysical determination of legal content – in to making propositions of law true.

The subject matter I shall be dealing with is a narrow fragment of the general question: how does the enactment of a statute contribute to the content of the law? Do the legal norms which result from a text's approval correspond to its sentences' literal meaning? Are they shaped by the utterance's pragmatic determinants? And, if so, how?

Speakers engaged in daily conversation ordinarily manage to convey parts of the total communicative content of their utterances by producing what Paul Grice named *conversational implicatures*.⁴ Insofar as multi-membered bodies such as legislatures can act intentionally, the very existence of legislative intentions implies the possibility that, in enacting a legal text, part of its content be similarly conveyed. Let us call the relevant phenomenon *statutory implicatures*.

The present paper's aim is to show that, once a majoritarian model of legislative intentions is assumed, it, together with the rule of majority vote, make room for there possibly being a case where the generation of a statutory implicature would be controversial even if we knew the intention each legislator had. I call *speaker paradox* the phenomenon this sort of cases gives birth to.

The conclusion my analysis will seek to establish is that anyone presupposing a speech act theory of law-making should abandon the majoritarian model of legislative intentions or otherwise explain how that model can be preserved in the face of the challenge posed by the speaker paradox. (Alternatively, one may wish to drop the majority rule assumption, since the speaker paradox threatens the joint holding of majority rule and majoritarian model, but none of them individually.

¹ For a critical treatment of the majoritarian model see Moore (1985).

² Hart (1994), Raz (1979).

³ Dworkin (1986), Greenberg (2004).

⁴ Grice (1989).

However, in many legal systems, where the majority rule is positively enshrined, that wouldn't be an option).

In a nutshell, the argument runs as follows. Imagine a legislature composed by three legislators, A, B, and C, all involved in the enactment of statute φ , which comprises provisions *s* and *p*. A votes for φ intending the utterance of *p* to implicate *q*; B votes for φ intending the utterance of *p* to implicate *not-q*; C votes against φ since, while he wants *p* to explicitly state *q* (and, *a fortiori*, he intends to implicate *q*), she opposes the enactment of *s*. Does the legislature implicate *q*?

The case just sketched seems to give rise to a paradox of sorts; for it appears that if by uttering (voting for) φ , *q* was implicated, then it would not be correct to say that the statute *supporters* ' intentions alone determine statutory meaning; but if by uttering φ , *q* was not implicated, then it would turn out to be incorrect to say that the *majority* members' intentions determine statutory meaning. No doubt, one may be tempted to reply that A, the party who wants to enact both *s* and *q*, could split the statute into two bills, φ and ψ , and thereby seek the majority which is needed to enact each, by involving B and C respectively. However, it doesn't take much effort to imagine a political scenario where A's primary concerns lie in the enactment of *s* and B threatens A not to vote for φ if A were to separately pass *q* with the support of C. So the balance reached by the parties in the relevant situation seems to gives rise to a conflict between the majority rule and the majoritarian model for aggregating the legislators' intentions – which, therefore, cannot be jointly maintained, on pain of contradiction. Apparently, it makes room for the possibility that a conversational implicature generated in the course of a legislative speech be backed by the intentions of those who voted for the provision whose very utterance would seem to generate the implicature.

Legislators	Statutory vote	Legislative intentions	Majority implicature	Supporters implicature
Α	ф	q		
В	ф	Not-q	q	indeterminate
С	Not-ф	q		