

# Order of Norms and Deontic Modality

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## Abstract

In *Norm and Action* (1963) von Wright differentiates first and higher-order norms: norms whose contents are normative acts are higher-order; all others are first-order. The Hungarian Criminal Code imposes a prohibition on homicide. This seems to be a first-order norm: clearly, killing someone is not a normative act. The actual wording of the law, however, reveals only one kind of norm: a requirement for the judge to punish homicide; there is nothing explicit in the wording about a prohibition on homicide. But we understand—and with a plausible semantic theory couched within a general theory of communication, Relevance Theory, we can explain—that it is a prohibition. An outwardly second-order norm is used to create a first-order one—i.e. to assign deontic status to the act it is about, its content—in the natural language of legislation. But this calls von Wright’s division between norms of first and higher order into question.

**Keywords:** first and higher-order norms; interpretation of law; deontic modality; norm semantics

## Introduction

In this paper I investigate a phenomenon I faced in the Hungarian Criminal Code. This phenomenon is not unprecedented, moreover, it has been mentioned in classics of legal theory. What I would like to do in this paper is to show how we can provide a semantic explanation for it within a contemporary theory of communication and what consequences accepting this explanation has regarding a classical distinction made by the founder of deontic logic, Georg von Wright.

## 1 Norms of First and Higher Order

Von Wright regards *Norm and Action* (1963) as his masterwork. Here he considerably reworks his earlier theory about deontic systems spelled out in “Deontic Logic” (1951):

he creates a new logic of change and a logic of actions based on the former; he revises his view on operators and whether they are interdefinable. In this paper, I am not discussing the connections and differences between the two writings, but am focusing on a distinction that von Wright draws at the end of his masterpiece.

Von Wright devotes the last chapter of *Norm and Action* to norms of higher order. He stresses that he does not incorporate these into his formal theory, his aim is to discuss them informally. It seems that his motivation is to draw a picture of how norms come into being: obviously by human acts. And since acts can serve as contents of norms, we can consider norms which impose obligation (or permission, or possibly prohibition) on a norm-creating<sup>1</sup> act (a legislative process). This way von Wright differentiates first and higher-order norms: by norms of higher order he exclusively understands norms whose contents are normative acts, while norms whose contents are acts other than normative acts, he calls norms of the first order. This distinction appears to be well-founded: it is always clearly decidable whether an act is normative or not.

Within the category of normative acts we may draw a further distinction based on the type of the arising norm: general norm (like a law) or specific norm (like a judgment). It is rather common to authorize, e.g., the competent minister for enactment of a regulation at the end of a law that means authorization to create a general norm. The situation is similar when exclusive legislative domains are assigned in the constitution. Where can we find authorization for creating specific norms? It is present e.g. in the code of civil procedure or among the rules of administrative proceeding and services. It is typically rules about procedures that determine who, under what conditions can or should adopt decisions (sentences, decrees, etc.) on a specific case. (As we will see, not solely.)

With this further subdivision, the distinction between first and higher-order norms still remains quite plausible: after all it is quite obvious how we might distinguish normative acts (like those above) from non-normative ones, so it is clear how we might separate norms about creating other general or specific ones from norms that impose prohibition, obligation or permission on sale, smoking, advertising, rendering aid, disposing of one's property by will, walking the dog, tax payment or appealing. It doesn't seem impetuous to claim that first and higher-order norms are disjoint sets. Let us consider a specific rule.

## 2 A Single Paragraph

The Criminal Code of Hungary imposes a prohibition on homicide (as probably most countries' criminal codes do); one cannot find any person who would deny this. This prohibition must be a first-order norm: clearly, killing someone is not a normative act.

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<sup>1</sup>Issuing or canceling norms

Let's take a closer look at this very section, Section 160 of the Hungarian Criminal Code: *Any person who kills another human is punishable for five to fifteen years of imprisonment due to having committed a felony.*<sup>2</sup>

What kind of norm is this? What kind of obligation do we find here? The only linguistic sign of a deontic status is the -able derivational affix in 'punishable'. Regarding this, we cannot say anything else that this section is an obligation on punishing. In order to tell who the agent of it is, we have to find who the one is who has this duty. Who punishes according to this duty formed in the section above?

Since the punishment in question is imprisonment, the jailer seems to be an obvious answer: he's the one who restrains the inmate in the prison. But this action is only the execution of the punishment, the agent who delivers and pronounces the punishment is the judge. My claim is that to *legally* punish someone is carried out as a criminal sentence. Therefore it is the judge's duty<sup>3</sup> to impose a sentence of punishment of ten to fifteen years if she finds that someone killed another human. Imposing a sentence happens with the act of creating an individual norm (in which the defendant—who becomes convicted with this action—is ycleped), that is, performing a normative act. This means the section above which contains the duty of the punishing is a higher-order norm since its content is a normative act.

One could raise here that a judge who knows of an act of killing is not under the duty to do anything. It seems indeed that the section in question is simply about the *fact* of killing. But this is a *legal* norm. A norm which can be unfolded as a conditional as the following: whenever it has been established (at the court) as a fact that someone killed another human, the offender has to be punished. Who has the authority to decide whether the killing itself—in the legal sense of it—happened?<sup>4</sup> In some legal systems the jury, in others the judge. And who has the authority to impose the sentence of punishment? The judge. And she does it due to the section in question applying modus ponens, acts due to the conclusion: the conditional's antecedent is the case (since it has been established by herself/by the jury), therefore the consequent "is the case" (actually, we are talking about deontic detachment).<sup>5</sup>

One can still say that imposing the sentence of punishment is still not the same as the punishment itself, which is actually done by the jailer. The jailer obviously does not have the authority, though, to decide who to restrain in the prison: he obviously

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<sup>2</sup>Act C of 2012 on the Criminal Code (of Hungary)

<sup>3</sup>The person under obligation is not a specific judge but a judge who will represent the court having authority and jurisdiction in the specific case.

<sup>4</sup>There are two concerns here we need to have regard to when we consider "simple" facts vs. established facts in the court: the meaning of the words used in a legal norm can differ from the everyday usage, and at the end of the day what matters is what the judge/jury found to be proven and consider that as what happened.

<sup>5</sup>The fact that the "inference action" performed by the judges practically happens as applying modus ponens is exploited in Jdžrgensen's dilemma.

cannot do so considering the section above, he does so because of the sentence imposed by the judge.<sup>6</sup> Therefore he cannot be the addressee of the duty of punishing. Insisting on the idea that the execution of the punishment is what matters, we can regard the judge's sentence as an individual norm for the jailer to restrain the convicted criminal in the prison—and not an individual norm for the convicted criminal to go and stay in the prison. This change of regard does not change the fact that the judge creates an individual norm, that is, performs a normative act due to the section in question: the distinction only influences who is the addressee of the individual norm. The point remains: the section above is a second-order norm since its content is a normative act. (Actually, we can be more detailed in considering the process: it is not the jailer who receives the sentence and acts upon to it. The one who receives the sentence is the director of the prison. It's him who, due to the sentence, performs a normative act by ordering the prisoner's transport and commanding the jailer to restrain the prisoner once he is already in the jail. Going into the details makes the individual norm contained by the judge's sentence second-order, since its content will be a normative act of the prison director, that is, makes the general norm not a second, but a third-order one. It does not change the fact, though, that the general norm is higher-order.)

There is one more argument for considering the judge the one who punishes: imprisonment is not the only type of punishment. In the case of less serious crimes, a fine is a usual type of punishment in the Criminal Code. In the case of a fine, there is no separate act of execution: punishing by fine is itself imposing the sentence, there is no other act to possibly choose when one wants to identify the act of punishing. Of course one can refer to cases when the penalized person does not pay in compliance with prescribed deadline, and the office of the court collects the fine, and one can say this is the punishment. But then what about the cases when the penalized person pays due to his duty imposed by the judge till the deadline? He punished himself? Or just paid and we cannot talk about any punishment? It would be absurd to consider these cases as voluntary or spontaneous contribution to public finances. And since there was no other agent involved in this event but the judge who imposed the fine, we can assign the act of punishing only to her. The imposition of the duty to punish by imprisonment and by fine is formulated in the very same way in the Criminal Code: with the word 'punishable'. I see no reason to differentiate between these cases of punishments; therefore, I maintain that fulfilling the obligation ordered by the word 'punishable' happens by delivering (and pronouncing) a sentence—which itself is a normative act. And this means that this section of Criminal Code formulates a second-order norm since its

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<sup>6</sup>For those who insist that the sentence itself cannot be the punishment, since, for instance, criminals wouldn't mind to hear sentences in a court room all day: what they don't like is sitting in the prison, therefore, the punishment can be performed only by the jailer, I would say that the jailer is only the tool of performing the punishment. As the flog is the tool of flogging: criminals wouldn't mind to watch as the flogger flails all day, what they don't like is being hit by the flog in the hand of the flogger while flailing. But just because of this we would not say that the flog is what punishes.

content is a normative act.

The deontic status for the judge's act is all we can find in this norm: there is no explicit textual obligation, prohibition or permission for any other agent. What about murder though? Being punished is not an act, the murderer's only named act is the murder itself, but we cannot find any deontic status attached to it, so we have no linguistic reason to label this paragraph as formulating a first-order norm. Nonetheless every single citizen would say: obviously, homicide is—in light of this passage—forbidden. Yet, there is no verbatim prohibition of homicide in the Hungarian Criminal Code. Is it not forbidden to kill someone in Hungary? Of course it is. But how do we know that deontic status if the relevant article says only that the person who kills another commits a felony: there is no explicit prohibition on committing a felony. And the same goes for all felonies as well, since there is a long list of them in the Code: there is no explicit prohibition at least the deontic words 'prohibited' or 'forbidden' are completely missing from the Criminal Code. In the Canadian Criminal Code, for example, there is a list of felonies presented in a very similar way as in the Hungarian Criminal Code, but there is a title above the list: Prohibited Acts.<sup>7</sup> Is Hungary unlike Canada in that committing a felony is permitted? This conclusion would be rather bizarre, but what indicator of deontic status makes us infer the opposite (which we clearly discern)? What should prompt us to draw the inference? What could express deontic status? After all, a modality is usually defined through the way in which it can be expressed. There is a variety of such ways: auxiliary verbs, adverbs, grammatical mood. There are some typical means that are used in sentences that express deontic force in English—we call these words modal auxiliary verbs that have a deontic reading: these are 'ought to', 'must', 'have to' (which express obligation) 'forbidden', 'must not' (which express prohibition), 'may', 'can' (which in these kinds of sentences express permission).<sup>8</sup> Well, none of these can be found in the section above in relation to homicide. Then what else is doing the job?

My claim is that what secures (what is more, what conveys) the weight of deontic modality, the specific deontic status in the section on homicide as a first-order norm is the second-order norm itself. In order to see clearly how this works from the viewpoint of semantics, we will explore Relevance Theory (developed by Sperber and Wilson, first in 1986), which provides an adequate theoretical framework. Since the phenomenon (prohibitions in the law are obligations to punish wrongdoers) is not new, Relevance Theory is not the only theory in which an explanation can be developed, and although my aim is not to investigate this issue from all viewpoints, I would like to show how

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<sup>7</sup>Consolidation Criminal Code Chapter C-46 Current to October 6, 2010 Published by the Minister of Justice at the following URL: <http://laws-lois.justice.gc.ca>

<sup>8</sup>I deliberately do not go into detail about the connection between reading and context, or whether it is enough to find a modal auxiliary to get a deontic reading, since in our case the very point is that we do not find any of these linguistic tools.

this theory can provide a plausible communication-theoretic and linguistic analysis to support my claim concerning von Wright's norm-order division.

Before introducing the Relevance Theory though, it is crucial to consider remarks on the phenomena just described—remarks due to the greatest legal theorist of the 20th century.

### 3 Kelsen's primary and secondary norms

Hans Kelsen devoted the Chapter 35 of the *General Theory of Norms* to the description of the legistic solution explained above. He defined primary norm as those that command a certain behavior, and secondary norms as those that decree a sanction for the violation of the given first norm. Kelsen says that it often happens that the primary norm is not expressly formulated in norms of statutes. He characterizes such a case as one in which the primary norm is implicit in the secondary norm. Stressing the essentiality of sanction in law, Kelsen maintains that the law often commands a certain behavior simply by attaching a sanction to the opposite behavior, that is, we can *consider* a behavior commanded only if there is a sanction attached to its opposite.

At this point, I would like to show how Relevance Theory and its semantic analysis on imperative mood can help in revealing why and how this consideration actually happens.

### 4 A Relevance Theoretic Take on Interpretation

Relevance Theory can help us answer the questions above in two different ways. In the first way with Relevance Theory as a general framework of describing communication and cognition, we can understand how the labeling of committing a felony as a forbidden act can be so obvious in human interpretation: what the process of interpretation is that allows us to extract deontic statements (statements that express obligation, permission or prohibition, that is, statements from which we can consider these as readouts) from legal texts.

Relevance Theory is a theory of communication that aims to explain every process of communication by appeal to considerations about relevance. This theory fits the Gricean tradition but supercedes and criticizes it also, by giving the notion of relevance a far more extensive and overarching role than Grice had allowed. According to Grice, the Cooperative Principle tacitly governing conversations subsumes four maxims one of which is: "be relevant".<sup>9</sup> According to Deirdre Wilson and Dan Sperber's relevance

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<sup>9</sup>The theory of Grice is about conversational implicatures that according to Grice are partly derivable from the principle and the maxims, that is, conversational implicatures are not part of the lexical meaning. I do not discuss it in detail, since here I consider the Gricean theory to be more or less

theoretic approach, comprehension of linguistic utterances proceeds via inferences: not only do we code and decode messages in language use, we also make inferences in order to discern what the speaker's meaning is beyond the lexical meaning of the sentences she utters. Interpreting the speaker in such a way that her meaning is relevant in the given context is our beacon: every utterance conveys a presumption of its own optimal relevance (this is the communicative principle of relevance); and relevance is featured in a more general aspect of cognition: human cognition tends to be geared to the maximization of relevance (this is the cognitive principle of relevance) (Sperber and Wilson (2012) p.65). That is, we hear an utterance, we understand what is encoded by the words in it, but in order to grasp the speaker's full meaning, we draw inferences based on, among others, background information of the given context. And we have quite a lot of background information which helps us infer what the intended meaning of the Criminal Code's paragraphs is, especially due to one of Relevance Theory's principles above: every utterance carries a promise of its own relevance, accordingly, and the hearer forms an expectation about this. This expectation, assumption and promise, and the background information enable us to infer what the speaker means by her utterance. What kind of background information do we have in the case of a criminal code? First, everyone has some knowledge about the system of rules, the role of legislation: everyone knows that a legal norm is supposed to rule the behavior—of course this is not enough for us, since we already found a behavior or act ruled by the section above: the act of punishment. In order to understand that there is something more in this section, we need more background information and some inferences. Second, we know a lot about the tasks of the State maintaining public order, protecting citizens' safety. All of us have a (pre)conception of the values of society including the protection of life. We know that the right to life is a basic moral and legal principle: it is a crucial element of our culture.<sup>10</sup> Third, and most importantly, we have background information about the institution of penalty. Whatever is penalized is not desirable. And if the State pronounces something undesirable (by the implementation of law in a legal norm) and incurs a (bad) consequence, a sanction to doing it, this disposition has to be understood as a prohibition. As a matter of fact, this is what we call a prohibition: when an authorized individual (in our case the State) pronounces an action undesirable and threatens actors with a bad consequence if the action is taken. And with this act the State actually says: do not do that. This is not a new thought of course. To convince the reader that Relevance Theory in itself serves enough theoretical support

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known. For details, see *Logic and Conversation in Studies in the Way of Words* (1989). (Here we only need it to outline the antecedent of Relevance Theory.)

<sup>10</sup>There is a general agreement that refraining from homicide is desirable, after all, the inherent right to life is one of the most important universal human rights (pronounced to be protected by the constitutions of modern States). This background knowledge though is absolutely not independent: it is part of the background knowledge because of the way (exploited in the next points) we understand rules and penalties.

for this latter point (pronouncing something undesirable amounts to a prohibition, a kind of an imperative act), I will consider another, specifically linguistic point in its support in the context of Relevance Theory.

## 5 A Relevance Theoretic Take on Imperative Mood

Relevance Theory provides an analysis of imperative mood<sup>11</sup> that can help us in mapping what kind of linguistic considerations (or at least linguistic intuitions behind considerations) we might use in interpreting utterances like the section of law above. These considerations are probably based on knowledge about how deontic statements are expressed by means of natural language without using overt deontic words.<sup>12</sup>

In the Chapter 10 of *Meaning and Relevance* (2012) Sperber and Wilson examine mood to analyze non-declarative sentences. They dissect interrogative and imperative mood; of these, the latter will be of interest to us. Sperber and Wilson present some interpretations of the imperative mood, notably Searle's interpretation which seems to be the most common: we use the imperative mood to make someone do something. But Sperber and Wilson highlight examples for which the definition does not work: in some cases we use the imperative mood on the surface, at the syntactic level, but our utterances don't have imperative force. For example, when someone asks for directions, we usually say things like "Go straight", "Turn right", "Take bus 12", etc., but we do not really care if the hearer follows our instructions, surely: we do not *want to make the hearer* carry out our instructions. Also, if someone asks permission to go away and in our answer to give the permission we say "Go, then", we would not describe our utterance as a command making him do something.

Sperber and Wilson give a new account of the imperative mood which can explain, among other things, the above cases. In this account, the imperative mood concerns two crucial notions: desirability and achievability. The action in question has to be desirable for someone and that someone doesn't have to be the speaker, it can be the hearer or someone else. And the action in question has to be achievable, potential and performable. For example, if a tourist wants to go to Trafalgar Square, for him to go

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<sup>11</sup>The reason it is interesting to us is imperative mood is a manifest way of expressing prescriptions: this is the syntactic state from which descriptions can be produced by applying deontic words. (Of course the issue of change between prescription and description is far from being so simple, but here I only wanted to briefly indicate why it is crucial to examine the imperative mood.)

<sup>12</sup>This explanation can give us insights we can use in programming: what kind of literal linguistic signs can be given as ones to be sought by our software to choose the right deontic operator in formalizing. Automated formalizing, of course, needs a certain amount of other conditions and problems to be solved. Not just the proper norm semantics are required; in most languages it is absolutely not plausible how a parser could be created which is able to manage tasks like the ones that will be sketched in this chapter. But in this article I do not want to go into detail regarding NLP, I only want to indicate that the considerations described above are also relevant for programming.



(arrive) there is a desirable action or state of affairs. When I say to him while standing on The Mall Walk “go straight ahead”, it doesn’t matter whether the result (that he arrives at Trafalgar) is desirable for me, it’s enough that it is desirable for him. But it does matter whether the action proposed by me is achievable: I do not say “Fly there” or “Tap your heels three times” because in the real world, due to the present state of science, these methods do not really work, so arriving at Trafalgar Square would not be achievable via these actions. But walking straight ahead is achievable, so according to Sperber and Wilson’s *semantic* analysis of the imperative mood what I used, actually was the imperative mood.

How does this help us in interpreting the Criminal Code and in seeking the deontic modality in it?<sup>13</sup> Section 160 does not use a syntactic imperative mood, but it uses semantic tools to bring it into effect: the section pronounces an act (the murder) undesirable and with that it pronounces an achievable action (refraining from homicide) desirable. To see who is the one for whom the act of refraining is desirable, we need to make some considerations. As Anderson points out, attaching a bad but avoidable (not necessary) consequence (penalty) to an act (or state of affairs) is designed to motivate the behavior of avoiding the penalty. This claim presupposes that the penalty is not desirable for the potential perpetrator. But is it only him for whom his refrain of committing a felony is desirable? My claim is that creating a legal rule which is designed to refrain people from performing an act means itself that the act in question is not desirable for the society, that is, it is desirable that they do not perform that specific act. To accept this, of course we have to accept the presupposition that the State acts in favor of the society (and not just in favor of potential perpetrators, making them refrain from the act which involves penalty for them)—and this is where the background knowledge (like this presupposition) mentioned above comes into the picture again: we use them for our inferences in order to comprehend the utterances we face. We make an assumption and expectation about the utterance’s relevance (by which I mean the Code’s relevance) and we have some background information: we know that one of the State’s tasks is to regulate human actions and we know that the State does this by legal norms. A legal text as such always bears the prescriptive feature due to its regulative role in our society. So if we find an action pronounced desirable or undesirable in a legal norm, it has to be understood as a regulation of our action due to the norm in question. We understand this much by virtue of the norm’s content—the qualification of the action—when a textual command or prohibition is missing. We know that if the State did not want to make us refrain from performing an action, it would not pronounce that action undesirable by punishing its performance. Given all of this, from the judge’s obligation to punish the murderer we infer and understand the aim and the meaning

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<sup>13</sup>By mapping the process of interpretation we can point out one’s considerations, but since we regard these considerations well-founded and functioning, at the same time we actually describe the considerations behind processes of legislation and legistics.

of the legal passage: as a prohibition of homicide.<sup>14</sup> And being prohibited is clearly a deontic status.

## 6 Conclusion

What have we found? We have shown that a second-order norm is used to express an obligation imposed by a first-order norm. This means, on the one hand, that the sets of first and higher-order norms are not disjoint, and, on the other hand, that a second-order norm is directly used in legislation to create a first-order one by assigning deontic status to the act in its content (that is, the first-order norm's content). This does not mean that its second-order feature is illusory: if a judge does not fulfill her obligation, i.e., she does not punish the murderer in spite of the fact that the act of killing has been established, it provides a good reason for the public prosecutor to appeal and, as a result of this, the appellate court will (has to) oblige her to initiate a new proceeding for the case. This means the norm in question is actually first and second-order at the same time, i.e., the division von Wright made cannot be upheld in such a way that the set of first-order norms and the set of higher-order norms are disjoint. Relevance Theory gave the theoretical framework for an explanation. Of course, this theory is not the only one according to which we can connect punishment with the notion of prohibition, but within this theory, we get a complex structure for the interpretation of utterances, along with a communicative-cognitive framework and a special analysis with the semantic approach of the imperative mood which is crucial given that we are seeking to understand a linguistic phenomenon: deontic modality as featured in natural language and in legislation.<sup>15</sup>

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<sup>14</sup>Maybe it is important to indicate that in spite of the fact that Grice's theory on conversational implicatures can be considered as the antecedent of Relevance Theory, the notion of conversational implicature is not involved here. As Sperber and Wilson stress: they provide a semantic analysis on the imperative mood. And this is the point in my approach as well: prescribing an act to be punished is a semantic way to describe the prohibition whose syntactical or literal way would be the wording 'is forbidden'.

<sup>15</sup>I would like to thank Zsófia Zvolenszky and the anonymous reviewers of this paper for their thoughtful and useful comments.

## References

- [1] Anderson, A. R.: A Reduction of Deontic Logic to Alethic Modal Logic. *Mind*, 67:100–103. (1958)
- [2] Grice, H. P.: *Studies in the Way of Words*. Harvard University Press, Cambridge. (1989)
- [3] Kelsen, H.: *General Theory of Norms*. Oxford University Press Inc., New York. (1991)
- [4] Sperber, D., Wilson, D.: *Meaning and Relevance*. Cambridge University Press, Cambridge. (2012)
- [5] Sperber, D., Wilson, D.: *Relevance: Communication and Cognition*. Harvard University Press, Cambridge. (1986)
- [6] Von Wright, G. H.: Deontic Logic. *Mind*, 60:1–15. (1951)
- [7] Von Wright, G. H.: *Norm and Action*. The Humanities Press, New York. (1963)

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