



Procedural Acts as Double-Conventionalized Acts: Considerations on Conventional Acts Performed in a Courtroom Discourse

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Abstract

The subject of interest of this article is procedural acts considered as double-conventionalized acts. It is assumed in this article that in the case of procedural acts, one can distinguish two levels of conventionalization: (1) the level of a speech act and (2) the level of a procedural act. Both above-mentioned levels affect each other in various ways, what is discussed in the article. As assumed in the article, the analysis of acts characterized by this particular trait (double conventionalization) and with due account of this trait allows one to observe phenomena that can be hard or even impossible to notice in the process of analyzing acts that are deprived of this trait. Furthermore, it seems that the description of this type of acts may particularly enrich the current discussion on some properties of speech acts held on the grounds of philosophy of language or pragmalinguistics. The research material used in this article as an illustration consists of actual utterances of participants of Polish court proceedings used by them at a hearing.

Keywords Procedural act · Conventional act · Speech act · Identification process · Intentional · Explanation · Court proceedings

1 Introduction

One of the methods of scientific analysis of acts such as: (1) statements; (2) claims; (3) requests; (4) court decisions; (5) declarations of marriage or (6) taking public oaths is putting them into a single category—speech, communication or conventional acts—in line with the terminological and conceptual tradition characteristic of a given field. This way of analyzing is focused on the identity of specific traits manifested by these acts. However, taking the acts indicated in the first sentence as

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an example, one can easily notice that the first three acts are somehow different from the subsequent three.¹ The meaning of the acts in points 4 to 6 is determined not only on the grounds of rules of linguistic communication. To assign the right meaning to such acts, one has to refer to rules related to the legal system. The actions analyzed in this article are also actions of this type.

The subject of interest in this paper is the conventional acts performed in (Polish) court proceedings, i.e. conventional acts whose constitutive rules are specified in legal texts (especially in the Polish Code of Civil Procedure and the Polish Code of Penal Procedure). These acts are called “procedural acts” in this article. However, the analysis is limited to the procedural acts performed at a court hearing in a face to face communication. Procedural acts, as understood in the article (and other types of legal acts), are characterized in the literature as performative or even magic: “The sense of all truly performative statements is, indeed, magical. They purport to create something. That which is held to be performed is the creation of a non-physical relationship or property through the pronouncing of some words. Such doings fall under the category of magic” [quotation 25: 75, in 38: 394]. At the same time, attention is drawn to the fact that people implement the way of communication that is characteristic for everyday communication (e.g. indirectness) also into the sphere of communication that could be called “institutionalized” [35: 229 sqq.]. This suggests that the nature of the procedural acts performed in a courtroom discourse might be particularly complex. In this context, it is justified to ask which rules are adequate to the identification process of procedural acts performed in a courtroom discourse—those that regulate everyday communication, some specific rules connected with the procedural acts, or perhaps both of them.

The performed analysis aims neither to formulate a certain holistic descriptive conception of the identification process of the analyzed acts nor to create a normative conception in this regard. Instead, it aims to draw attention to some issues that are connected with the above-mentioned complexity of procedural acts, it especially discusses the relations between conventionalization levels of procedural acts. Furthermore, the analysis tries to answer some particular questions, e.g. how an illocutionary force of the procedural acts is determined, what mechanisms are used in the identification process of procedural acts performed without “magic formulas”, i.e. implicitly, or what are the consequences of an unsuccessful attempt to perform the procedural act for the communication process at the court hearing.

¹ See about the distinction proposed by Strawson [34], adopted as one of the theoretical bases by Bach and Harnish [5], see also [41].

The analysis of actual utterances of participants of the court proceedings² performed for this article was undertaken not as a part of and by participants of the communication process during which specific procedural acts were identified, but by an external researcher (a post-communication analysis), who, however, was a member of the audience observing the court hearing. Hence, this analytical perspective can hardly be considered fully “external” with regard to the analyzed object. This research perspective is considered in this article to be methodologically correct or even desired. On the one hand, it allows the researcher to formulate conclusions in the language of the proper theory (the theoretical background is presented in point (2), while on the other, it provides the possibility to refer to the observer’s own experience.³

2 Conventional Acts and Their Identification

The acts analyzed in this paper are procedural acts—from the point of view of the court proceedings, and at the same time, they are communication acts—from the point of view of the communication process in these proceedings. This assumption has an impact on the choice of the theoretical background of the analysis and justifies the use of the theoretical concepts developed in the following fields of science: (Polish) theory of law, philosophy of language, and pragmalinguistics. The main theoretical assumption is that the procedural acts are conventional acts,⁴ i.e. acts that

² Research material was collected by the author of this article for the purpose of analyzing courtroom discourse. The empirical data includes the record of 250 hearings. After permission, the hearings were voice-recorded what resulted in about 160 h of data. In case permission was denied, the hearings were recorded in writing in accordance with a prepared formula. The observed and recorded hearings were held in three common courts of first instance. The research focused on the following types of court cases: (1) civil cases (in contentious and non-contentious proceedings); (2) cases proceeded by family courts; (3) commercial cases; (4) labor law and social security cases; (5) criminal cases and penal fiscal cases; (6) misdemeanor cases. The percentage distribution of the observed court cases of certain types (e.g. civil, criminal or commercial) is the same as those disclosed in court reports from the year preceding the beginning of observation. The observation was being conducted from June 2014 to 2015.

³ “You have to be able to think yourself into the institution to understand it” [31: 22].

⁴ Conventional acts are discussed in this article in a processual approach. However, in the case of utterances formulated in direct contact (such as those analyzed in this article), the product of this act (an utterance as a product of the act of speaking) takes as long as the act itself. The concept of conventional acts as understood in this article was developed in the Polish theory of law [24: 115–136, 11: 85–102]; it is still further developed in particular with due regard to certain elements of Searle’s conception of constitutive rules [10]. Nonetheless, Searle’s conception of constitutive rules was not simply transferred onto the grounds of the concept of conventional acts, but together with other theoretical assumptions allowed Czepita to formulate an original connotative conception of constitutive act rules. To describe the sense of this conception as briefly as possible, one could say that the constitutive rules that refer to a given conventional act are rules infringement of which makes a given act no longer identifiable as a conventional act of a given type, which is due to its meaning described in a pragmatic approach as a way of using this name [10: 151 and 155]. There is a strong connection between the meaning of a certain conventional act and the rules that are constitutive for that act; constitutive rules are determined by the linguistic content of the name of that act. Furthermore, the subject of interest in the concept of conventional acts is a conventional act, not a convention as such. The main goal of the concept is to develop a regulatory definition of the term “conventional act” not to ask a question about the nature of convention. Among other things, thanks to this approach, the concept of conventional acts is quite easy to operationalize and

meaning is created by the particular socio-cultural rules. In other words, the relation between the meaning of such an act and the act itself is a matter of the socio-cultural reality, not the physical one. Furthermore, it is assumed in the concept of conventional acts that: (1) for every conventional act, one can indicate a name that differs from the name of a material substrate of this act, (2) the material substrate is an act of human being, and (3) for every conventional act one can indicate its normative consequences [10: 145–147]. In this approach, a request as a speech act, greeting someone with a handshake, saluting or delivering judgment are all conventional acts.

Regarding conventional acts in the above understanding, one can indicate each time the so-called material substrate that the human's act relies on, e.g. formulating an oral utterance or performing a movement. When referring the above to Searle's formula describing the essence of institutional facts—"X counts as Y in context C" [28: 52]—it can be said that variable Y represents a conventional act, whereas X represents its material substrate. Conventional acts can be simple or complex (which is not explored in this article) and conventionalized on various levels. Regarding to the identification of a certain conventional act as a double (triple etc.)-conventionalized act, it should be possible to indicate at least one constitutive rule for every level of conventionalization (e.g. among rules of communication or among legal norms), and to indicate different names of acts on every level of conventionalization.

It is assumed in this article that in the case of procedural acts, one can distinguish two levels of conventionalization: (1) the level of a speech act and (2) the level of a procedural act.⁵ To recognize the meaning on the procedural act level,⁶ one has to refer to legal norms regulating court proceedings. This meaning is also a superimposed meaning determined by the binding force of what Searle called an "extra-linguistic institution" [29: 18].⁷ Both above-mentioned levels affect each other in various ways, what is discussed in more detail further in the article.

The concept of conventional acts (in its original shape) pertained to the meaning of a conventional act understood in two ways: (1) as identifying an act as a conventional act of a given type and (2) as the answer to the question why? (what for?) an act was performed. One can easily notice that the mental acts indicated in points 1 and 2 are distinguished from a methodological perspective, particularly that the

Footnote 4 (continued)

allows relatively precise indication of the class of conventional acts. The conventional acts remain in various relations to the convention, and these relations depend especially on what we mean by "convention". As it is commonly known, the nature of the convention is the subject of a long scientific debate, whose re-continuation in the second half of the 20th century is combined with the classic work of Lewis [19, see on convention in a legal context, e.g. 20]. Due to the framework of this article, this issue will not be further analyzed.

⁵ One could also distinguish subsequent levels of conventionalization (e.g. types of procedural acts). Due to the objectives of this article, only two levels of conventionalization are distinguished, each related to a different social institution.

⁶ The term "procedural meaning" has a specific meaning in the philosophy of language [6: 101 sqq.]. For this reason, in this article, the term "meaning on the level of procedural act" is used instead.

⁷ In Searle's approach, language is the fundamental social institution in the sense that "(...) that all others [institutions] presuppose language, but language does not presuppose the others (...)", [30: 60].

latter corresponds to the act of explaining. However, the relation between these processes is ambiguous and depends on whether the explained subject is considered to be a conventional act or its material substrate. This is because providing the answer to the question *why X greeted Y?* is a different thing—because one acted according to the norms of linguistic politeness, etc. The answer to the question *why did X wave at Y?* is yet another thing—because X wanted to greet Y. When answering the first question, one explains the performance of a conventional act; this process hence follows up the conventional act identification. Whereas by answering the second question, one explains the formation of the material substrate of the conventional act; this process is part of the conventional act identification process.

When speaking in this article of recognizing the meaning of conventional acts, it refers to the process of identifying a certain act as a conventional act of a given type whose element is the intentional explanation of the material substrate (see point 4.2).⁸

When adopted, the above-indicated terminological and conceptual convention allows increasing the consistency of the analysis conducted for this article, classifying various kinds of acts into one category of conventional acts, while on the other hand, it allows using names specific for a certain level of conventionalization of a given act. This does not mean that this article denies the validity of the analysis of procedural acts or other legal acts in terms of speech act theory.⁹ The primary aim of this article is, however, to draw attention to conventionalization levels of procedural acts and characteristic traits of these acts determined by this fact.

The concept of conventional acts (developed in Polish theory of law) was chosen as a theoretical and methodological background for the analysis conducted in this article, because of its universal dimension—it disputes different types of acts (speech acts, communication acts, legal acts, etc.) and it systematizes basic issues such as constitutive elements of all conventional acts. Moreover, the concept of conventional acts was developed in the theory of law, and because of that, it considers some problems characteristic for legal acts (including procedural acts) such as levels of conventionalization. Nevertheless, the concept of conventional acts is used in this article especially as a theoretical and methodological frame. That concept is unable to name, describe or explain some aspects of procedural acts that resulting from their communicative nature. Therefore, an attempt is made to select theoretical assumptions and the language of the analysis in a way that would allow primarily to identify and describe specific traits of the procedural acts as communication acts. The analysis refers to the theoretical tradition of Austin and Searle,¹⁰ and also

⁸ In the identification process of conventional acts on at least two levels, the function of the explained subject can be also fulfilled by an act characterized on a lower level if the said level has been already identified.

⁹ At present, it is one of the leading ways for analyzing legal acts, including proceedings, particularly beyond the scope of jurisprudence [for more information on this subject see 17: 3 sqq., cf. e.g. 16, 37, 8, 39, 23, in historical approach, e.g. 9, 12].

¹⁰ This coherence is especially evident in the fact that all mentioned theoretical approaches assume that performing conventional act (including speech act) creates a sphere of obligations between entities somehow involved in this activity.

to the conception of interaction grammar developed by Awdiejew¹¹ pertaining to the fields of linguistics and philosophy of language (specific assumptions are formulated in proper parts of this article). There is a consistency between the mentioned theoretical approaches and the assumptions of the concept of conventional acts. Furthermore, the detailed considerations in the philosophy of language and pragmatics are referred to in this article when the examined procedural acts revealed particular properties that are also discussed in the mentioned scientific fields.

3 Identification of the Speech Act Level and Its Impact on the Procedural Act Identification Process

First of all, let us analyze fictional utterances (Table 1):

- (1) “*I am asking you to take photos of this house*”;
- (2) “*Is it possible to read documents included in the files?*”;
- (3) “*I will not answer these questions*”.

Unaware of the context in which they were used, one can identify speech acts based solely on the applied linguistic measures using the so-called standard interpretation. The mechanism of standard interpretation applied for speech acts consists in combining the applied standard form of a speech act with a standard situation in which it is used [3: 44–45].

Taking into consideration the context of use of these utterances may not change the result of standard interpretation or on the contrary, particularly show a higher conventionalization level. The first utterance may be a request made by a wife to her husband, but it can also be an order issued by a prosecutor when surveying a crime scene. The second utterance may be a question made by a client to a lawyer; however, it can also be an application for presenting documents from case files submitted at the hearing. Whereas the third utterance may be both a refusal as part of an argument and a witness’s statement made during court proceedings.

Standard interpretation has two substantial traits. First of all, it takes place based on a form of a verbal utterance. In this sense, standard interpretation is primary, since it is the linguistic form that is encountered as the first one by an individual tasked with identifying the conventional act performed using language. Second of all, the result of standard interpretation limits possible further interpretation with due account of a given context (let us call it a “nonstandard”). For instance, standard interpretation of utterance “*I am asking you to take photos of this house*” makes it unrecognizable with due account of the context as a prohibition against behaving in a manner specified in the propositional content of this act.

¹¹ Speech acts are the basic units of the so-called interactive level of communication in the Awdiejew’s conception of interaction grammar. The conception especially adopts certain assumptions of Austin’s and Searle’s theories of speech acts.

Considering the above-described mechanism, let us analyze utterances of participants of court proceedings (Table 2):

- (4) the insured¹²: “*I propose* that the court includes this sentence and this record”;
 (5) the defendant: “Your Honor, as a suggestion, *I would like to* give my own testimony today (...);”
 (6) the plaintiff: “Your Honor, *I would like to ask* for evidence from the document to be added to the case files (...)”

Having the above utterances in verbal form at disposal and knowing that these acts were identified during the hearing as motions to permit evidence, it is not difficult to indicate two conventionalization levels—the speech act level and the procedural act level, particularly that on each of these levels, an act can be defined with a different name.

Examples from 4 to 6 not only allow both conventionalization levels to be easily distinguished but also reveal that the act of submitting a motion to permit evidence may be performed by using various speech acts. This is because using a specific speech act is not a constitutive rule for performing this type of procedural act specified by the legislator. However, this choice is not unlimited, and the possibilities of nonstandard interpretation are limited by the result of the standard interpretation. Let us analyze example no. 6:

the plaintiff: “Your Honor, *I would like to ask* for evidence from the document to be added to the case files (...)”

standard interpretation:

standard form of use of the speech act: “(...) *I would like to ask* (...)”

standard situation where this form is used: request

nonstandard interpretation: motion to permit evidence.

In this case, the result of standard interpretation may lead to this act being identified as a motion to permit evidence. However, if the plaintiff’s utterance in reply to the court’s question regarding further motions were as follows: “Your Honor, *I do not* submit any further motions,” standard interpretation would deem it unable to be identified as a motion to permit evidence:

the plaintiff: “Your Honor, *I do not* submit any further motions”

standard interpretation:

standard form of use of the speech act: “(...) *I do not* submit any further motions”

standard situation where this form is used: denying the assumption included in the question

¹² A participant of court proceedings concerning social security matters.

Table 1 Standard interpretation—examples

Standard interpretation of a speech act	
Standard form of use	Standard situation of use
(1) “ <i>I am asking (...)</i> ”	request
(2) “ <i>Is it possible (...)</i> ”	question
(3) “ <i>I will not answer (...)</i> ”	refusal

Table 2 Motion to permit evidence—levels of conventionalization

Speech act level	Procedural act level
(4) “ <i>I propose (...)</i> ”—proposal	motion to permit evidence
(5) “ <i>(...) I would like to (...)</i> ”—request (wish for)	
(6) “ <i>(...) I would like to ask for (...)</i> ”—request (ask for)	

nonstandard interpretation: procedural statement on a lack of motions.

Identification of a speech act level by means of standard interpretation is one of the mechanisms used for identifying procedural acts. It may be of particular importance in the process of identifying procedural acts of motion-like nature, in the case of which, the catalog of speech acts that can be used is particularly broad.¹³ Nonetheless, this does not mean that every procedural act identification process takes place as described above (see point 4.1). However, given the fact that the result of the standard interpretation in the form of identification of a specific speech act may either constitute a stimulus for identifying a specific procedural act or hinder such identification, distinguishing conventionalization levels of procedural acts is reasonable for at least two reasons. Firstly, it might play a significant role in the procedural act identification processes and, secondly, it might be a useful tool for a researcher.

4 The Determining Nature of the Identification on the Procedural Act Level

4.1 Identification of the Speech Act Level Based on the Meaning of a Procedural Act

Let us begin with elaborating on the remark formulated in point 3. It was stated there that not every procedural act identification process is conducted using the

¹³ The key speech acts involved here are proposal, request, request made in an indirect manner, and demand.

mechanism of standard interpretation with a clear distinction between both conventionalization levels. Let us analyze the following utterances of the court:

(7) the court: “At a hearing held on (...), the Court (...) *decided*, as follows. Point one: to discontinue proceedings in case (...)”;

(8) the court: “The Court *decides* to fine witness XY for failure to appear (...)”.

Both court’s utterances formulated during a hearing were identified as issued decisions¹⁴—in the first case, a decision to discontinue proceedings and in the other, a decision to fine the witness for failure to appear at the hearing. The fundamental problem we encounter in the case of the aforementioned utterances concerns distinguishing the levels of conventionalization. Both these utterances were formulated using the verb “to decide” (used in past or present tense). In this case, the linguistic form immediately indicates that this act should be identified on the procedural act level, since the court uses a description characteristic of this level of conventionalization.¹⁵ Hence, in this case, the procedural act identification process is not made indirectly through the identification of the speech act based on standard interpretation.

However, the key matter concerns the answer to the question, is it possible to identify a conventionalization level lower than the procedural act level in reference to the act of issuing a decision by the court? This question can be answered in the affirmative,¹⁶ while identification of the speech act level will not be based on the mechanism of standard interpretation but determined by the meaning of this act on the procedural act level. To identify the speech act level in reference to the above-indicated examples of court’s decisions, one should take into account both the content of these decisions and their normative consequences. In the case where court proceedings are discontinued (example 7), the court has no competence to continue it. Considering the court may conduct proceedings only within the scope of competence, this decision on the speech act level may be identified as a norm¹⁷ that prohibits the court from conducting the proceeding any further. On the other hand, the decision on fining the witness (example 8) determines normative consequences in the form of an obligation to pay the fine; hence, this act can be identified on the speech act level as a norm that orders the witness to pay the fine at the specified amount.

In the case of the procedural act identification process with due account of the standard interpretation on the speech act level, the identification of the speech act was of original nature and served as an element of this process. In the

¹⁴ In this case, the court’s utterance is both a procedural act of issuing and delivering the decision.

¹⁵ So is the case with other utterances formulated using verbs referring to names of legal proceedings, e.g. “Your Honor, *I withdraw the claim*” (a procedural act of withdrawal of the claim).

¹⁶ This manner of settling the discussed matter refers to the position that each speech acts conventionalized on a higher level can be typologically characterized without the need for creating a different category for an act identified on a higher conventionalization level.

¹⁷ The norm of conduct discussed in this article prohibits/orders a given addressee to behave in a certain way in specific circumstances.

above-presented situation, previous identification of the speech act level is not necessary for identifying the procedural act, since the verbal form of the utterance immediately indicates a higher conventionalization level. In this case, identification of the speech act level is successive to identification of the procedural act, hence, it bears no interpretative significance. However, it does have an analytic value (particularly from the point of view of the approach described in footnote 16), whereas the determining character of the procedural act level in the process of identifying a speech act as a lower level of its conventionalization is manifested in the fact that the illocutionary force of thus identified speech act is adequate to the illocutionary force of this procedural act.¹⁸ This is because it is identified by means of the procedural act characteristics. In the case of identification of a speech act based on standard interpretation, a thesis about such a correlation cannot be formulated, as proven by the examples analyzed below in Sect. 4.2.

4.2 The Essence of the Determining Character of Identification on the Procedural Act Level

The issue described in Sect. 4.1 has a primarily analytical value, whereas the essence of the determining character of the procedural act level in the context of identification process consists only in the meaning of the act on the procedural act level being taken into consideration if a specific type of procedural act was identified, particularly based on standard interpretation and the context in which it was performed. What this “taking into account” boils down to is explained below in the context of phenomena related to the performance of conventional acts such as (1) intentionality; (2) normative context; (3) structure of dominance, and (4) normative consequences.

Before specific examples of utterances will be subjected to an analysis, the complex problematics of intention and intentional explanation of conventional acts are introduced. Due to the fact that the reflection on intentions in philosophy alone proposes various ways for perceiving this phenomenon, this article uses a synthesizing approach to this matter proposed by Bogucki. He indicated that modern philosophy¹⁹ discusses intention in three commonly adopted contexts (aspects). In the first context, it is said that one performed act A intentionally when one performed A with the intent I to perform A [7: 52–53]. In the second context, it is said that one performed act A with the intent I to thus perform a subsequent act or to trigger result B [7: 53], whereas according to the third context, one has the intent I to perform act A in the future [7: 53].

¹⁸ The illocutionary force is discussed in this article with regard to both conventionalization levels.

¹⁹ Philosophy of language and pragmalinguistics also propose different approaches to intention—informative intention [32: 58], communication intention [32: 61], complex communication intention (“complex intention”—Grice, Strawson, 34: 445 sqq.), etc. See also about locutionary, illocutionary and perlocutionary intention in the legal context [21]. This issue has been broadly discussed in the literature. Due to the aim of the consideration made in this article is not presented to a broader extent.

In this article, primary importance is put on the manner in which intent is approached specifically for the first context. However, due to the scope of this article, that is conventional acts and not psychophysical ones, it has to be noted that in this case variable A should be referred not to the conventional act but its material substrate S(A), possibly to the conventional act on a lower level on conventionalization A_{-1} , if this act (e.g. speech act) has already been identified.

Hence, in this context, the intentional explanation²⁰ of a conventional act performance, in its basic form, consists in providing an answer to the question, why (for what reason, with what intent) would one undertake an act that is a material substrate of a conventional act. As marked in this article (see point 2), the explanation process in the above understanding is an element of a given conventional act identification process. Adoption of such a relation between both thinking processes suggests that intent is an element that takes part in forming conventional acts. Here, the matter regarding the level of precision with which an intentional explanation should be made so that a specific procedural act can be identified²¹ remains open, along with the question on the nature of relation between intentional explanation and recognizing other rules for performing a given procedural act (felicity conditions). Some light is shed on these unobvious matters by an analysis of utterances of participants of the court proceedings identified as procedural acts.

Let us recall various utterances of participants of the proceedings in an orderly manner and begin with the following examples (Table 3):

- (9) the court: “*Would you like to tell the Court for how long you have known (...)?*”;
- (10) the interested entity²²: “*Your Honor, can we also apply for reimbursement as well?*”;
- (11) the defendant: “*Your Honor, I would suggest that this motion be dismissed (...)*”.

Utterances 9–11 were identified during the hearing as procedural acts. Using the mechanism of standard interpretation, one can recreate the following conventionalization levels of these acts:

²⁰ This name is used after Bogucki [7].

²¹ This issue has two aspects, namely, the ontological (or constitutive) one and the epistemic one (of course in a specific sense; in relation to the socio-cultural reality). In the first case, this pertains to the intent (e.g. the level of precision regarding the illocutionary force) that the subject must have in order to perform a specific conventional act. In the other one, this pertains to what allows the subject who identifies the conventional act to determine that the one who performed this act had an intent necessary/sufficient to identify this act as a conventional act of a given type. Both these aspects are naturally dependent on each other, primarily, the declared settlements of epistemic nature are dependent on the adopted ontological assumptions.

²² The interested entity is a participant in proceedings regarding social security matters.

In the case of utterances 9 and 10, standard interpretation allows identifying a request expressed in the indirect form of a question,²³ in the case of utterance 11—a proposal, whereas in all cases (9–11), the illocutionary force on the speech act level is inadequate to the illocutionary force at the procedural act level. Let us think about what the cause is.

The illocutionary force of an act is determined primarily by rules that specify its normative consequences.²⁴ Taking the request as an example, the sender takes on a position subordinate to the receiver because the sender allows him or her the freedom to implement the request with normative consequences being determined in this case by rules of linguistic communication,²⁵ generally speaking. In turn, the illocutionary force of procedural acts is shaped by legal norms based on which normative consequences of the performed procedural acts are determined. The normative consequences of conventional acts (including speech acts) determine the specific structure of dominance. As stressed by Awdziejew [3: 65], the structure of dominance within a given communication process is at the same time affected by social roles of participants of this process and interactive roles, i.e. roles played in a given communication process. In the case of procedural acts, the structure of dominance is prejudged by neither social position (e.g. higher position of the court that acts on behalf of the State compared to other participants of the proceeding) nor the position determined by the interactive role (e.g. demand—higher position of the demanding party, request—lower position of the requesting party or proposal—equal positions of interaction participants). The factor that ultimately determines the structure of dominance in a communication process, an element of which is the performance of a procedural act, are legal norms that specify normative consequences of performing this act.²⁶

In the case of the court questioning the witness (example 9), the witness according to the binding legal norms has the obligation to answer.²⁷ In this case, the court has unquestionably a higher (dominant) position. It can be said that the force of this procedural act is similar to the force of a demand, bearing in mind that this force is determined not by rules of linguistic communication but by legal norms. In turn, in the case of the motion for reimbursement of legal representation costs (example 10), the situation is reversed in this regard, as it is the entity that formulates the motion who takes the dominant position compared to the position taken by the court. This

²³ A request expressed in the form of a question is considered in the literature the classic example of indirect speech act [29: 30]. In more recent works, attention is drawn to the fact that the way in which a request is expressed in the form of a question is so common (both in English and in other Indo-European languages) that this form can be also regarded as the standard form for the request [3: 58 and 158, cf. 1: 28 and 93].

²⁴ This is particularly visible in Searle's conception of pragmatic conditions which, when listed, form a specific obligation between participants in communication [28: 60–62], but also in Austin's conception, that is noted by Witek, who writes, "(...) the central function of illocutionary acts is to bring about their normative effects" [42: 14].

²⁵ Some of these rules can also be classified as e.g. rules of good manners [cf. 26: 79].

²⁶ See about these issues in the context of interactions between citizens and police officers [35: 229 sqq.].

²⁷ Except for some circumstances clearly foreseen by legal norms.

Table 3 Levels of conventionalization for the exemplary utterances

(9) the court: “ <i>Would you like to tell the Court for how long you have known (...)?</i> ”	
speech act: request expressed in an indirect manner (in the form of a question)	procedural act: a question to the witness (a simpler procedural act that serves as an element of a witness examination)
(10) the interested entity: “ <i>You Honor, can we also apply for reimbursement as well?</i> ”	
speech act: request expressed in an indirect manner (in the form of a question)	procedural act: motion for reimbursement of legal representation costs
(11) the defendant: “ <i>Your Honor, I would suggest that this motion be dismissed (...)</i> ”	
speech act: proposal	procedural act: procedural statement

is because the illocutionary force of this act is determined by the legal norm that in general orders the court to award reimbursement of legal representation costs to the interested entity (i.e. issue a positive opinion on this motion) in a situation where the party with whom the interested entity is related to wins the lawsuit. Again, it can be said that the force of this act is similar to the force of a demand with a somewhat conditional nature, as it is determined by the result of the conducted proceedings. In turn, the procedural statement (example 11), cannot have the illocutionary force of a proposal that implies equal positions of participants in communication. This is because the court is free to assess evidence and settles motions to permit evidence on its own, while the scope of this freedom is determined by procedural norms and not rules of linguistic communication. In this case, the illocutionary force of the procedural statement is similar to a statement, alternatively to an assessment act whose propositional content is constituted by the content of the motion filed by the plaintiff.

Therefore, it can be said that in all the above-described cases, the speech act identified based on standard interpretation is unsuccessful. Is it that in order to perform a binding act on the procedural act level, the sender must act with the intent to perform an act of a specific illocutionary force that is adequate to the force of the procedural act being performed? The analysis of utterances of the participants of court proceedings suggests that this is not the case.

Considering the last of the analyzed utterances, it can be assumed that these utterances were formulated with the intent to perform an act of the illocutionary force of a request or a proposal, as speech acts or with the intent (awareness) to perform an act of the illocutionary force adequate to the procedural act being performed.

And although in the case of the court’s utterance, one can be sure that the illocutionary force of the performed procedural act is known to the court and the use of the form of a request is only a politeness, there is no such certainty when it comes to the interested entity and the defendant (as well as other nonprofessional participants of the proceedings).

Let us return for a moment to the issue of intent. It is assumed on the grounds of this article that the intent of the entity who undertakes an act, as a mental phenomenon, is directly unrecognizable for the receiver. The existence of an intent to perform any act, an act of a specific type, an act of a specific force or content can be concluded in particular based on a noticeable behavior of a given entity. Above all,

having a specific intent is affirmed by the very fact of a given act being undertaken, pursuant to rules of performing this act [7: 57]. Therefore, it seems that in the case of such acts where illocutionary force is identified based on standard interpretation is inadequate to the illocutionary force of a procedural act and, at the same time, the result of the standard interpretation does not hinder further identification, the decisive issue (obviously apart from other elements of the context that correspond to the constitutive rules of a given act²⁸) is the intentional explanation that takes into account the propositional content of the act,²⁹ which pertains to the future act of taking the evidence, reimbursement of costs, providing information by the witness, etc.³⁰

In the case of acts of a suggestive nature, it comes down to the person identifying the procedural act being able to recognize, with due account of the propositional content, that the participant of the proceedings intentionally seeks to make a certain state of affairs reality regardless of whether the participant asks for it or demands it. However, this state of affairs may come down only to communicating certain content (as in a statement or a testimony).³¹ In this case, the explained subject may take the form of both the material substrate of a given procedural act, i.e. an utterance of a given verbal form, and an act identified on the speech act level if already identified based on standard interpretation.

The above considerations constitute an argument for adopting the position called by Witek [42] the “illocutionary agency externalism”, as they evidence the possibility to form unintentional yet binding illocutions.³²

The matter of internal and external felicity conditions is analyzed in the literature in the context of various conceptions of speech acts. As Harnish writes:

“Speech act theory has its own version of the internalism–externalism debate, but it is, at least until recently, implicit rather than explicit. It has to do with the nature of the conditions set down on the analysis of the force of success-

²⁸ In jurisprudence, particular constitutive elements are indicated and discussed, e.g. the entity performing the procedural act of a certain type and the authorization to perform the act, relations between acts (e.g. in criminal proceedings the hearing of a witness may not take place before the indictment has been read), or a special form of the procedural act.

²⁹ It is obvious that the level of illocution of the speech act cannot exist without the level of locution (propositional content) in the sense that what is the meaning of a request if we do not know what we are asking for, or a promise, if we do not know what we are promising. In the literature, attention is drawn to the fact that even in the case of emotive speech acts such as “Ouch!”, the function of propositional content is fulfilled by the situation that evoked the emotive reaction [4: 48]. The classic illocution formula $F(p)$ can be thus reasonably transformed into p , i.e. distinguish an objectified propositional content instead of transforming it into the formula $F(?)$ has no sense regardless of whether on how many levels this act is conventionalized – $F'(F?)$.

³⁰ The issue of ways to determine the propositional content is also complex. Due to the framework of this article, this matter is not discussed here in more depth.

³¹ Intentional explanation as presented here does not require previous identification of the procedural act, even though the state of affair that is indicated in the propositional content of the utterance could be perceived as a perlocutionary effect of the performed procedural act. A broader justification for this conclusion needs to be presented in a separate paper.

³² The examples discussed by Witek also convince him that “(...) it is to accept the externalist that at least in some cases the force of an act» is not in the speaker’s head«” [42: 21].

ful speech acts. If a condition restricts the way the »external« world must be, it is an externalist condition. If a condition restricts the mental state(s) of a speaker/hearer, it is an internalist condition. Some theorists seem to side with the internalist end of the spectrum, some with the externalist end, and others offered mixed analyses” [14: 28].³³

The significance of external rules for performing procedural acts is manifested in the context of intentional explanation in a quite subtle way. Nonetheless, the role of external rules in the identification process of procedural acts is also more obvious at times. Let us take the following utterance as an example:

(12) the witness: “I would like to file a proposal to summon another witness (...)”
and analyze it using the standard interpretation mechanism:
standard interpretation:

standard form of use of the speech act: “*I would like to file a proposal (...)*”
standard situation where the form is used: proposal

intentional explanation with due account of the propositional content: will
(intent) to implement a state of affairs in the form of witness examination
other elements of the context of the utterance: not compliant with rules for performing the procedural act of submission of a motion to permit evidence
nonstandard interpretation: a failed attempt to submit a motion to permit evidence

The result of the standard interpretation (a proposal) does not hinder possible further nonstandard interpretation. The intentional explanation, which takes due account of the propositional content of the speech act regarding future act of witness examination is also sufficient for continuing identification of the procedural act. However, regardless of the above-described results, the witness’s utterance cannot be identified as a motion to permit evidence. This is because, in accordance with legal norms, the witness is not authorized to file a motion to permit evidence. Hence, one of the external constitutive conditions for performing this procedural act is not met.

In the context of the above example, it is worth to note a certain characteristic of failed procedural acts. If a given utterance is not identified as a procedural act (for any reason whatsoever), it is not binding either as a procedural act or as a speech act as well. In other words, just as the unsuccessful nature of an act as a speech act does not imply failure on the level of a procedural act, failure on the procedural act level covers both levels of conventionalization. Additionally, it might be the case that such an act that was a failed attempt to perform a procedural act becomes an impulse to take a specific action by some entity; however, this act may not be qualified as a consequence of a binding speech act. Let us illustrate this by the following example:

³³ This border is determined in a different manner by Navarro-Reyes, since “Such a demarcation would leave no room for mixed positions, since it is not a matter of relative weight, but of presence or absence of such kind of internal or cognitive requirements” [22: 147].

(13) the witness: “If I could add something, *I would like to ask*, if possible, that supervision for X be waived (...)”
 the court: “It has already been waived”

The above utterance of the witness cannot be identified as a motion to waive the decision issued by the court that the defendant be supervised by the police, since the witness is not authorized to file such a motion. This utterance cannot be considered successful, including the binding request, since the area of competence and duties of the court regarding issuance and annulment of decisions is shaped by legal norms and not the fact that a witness left the court free to fulfill it by formulating an utterance of a standard form of a request. The court’s reaction in the form of information about the supervision (“It has already been waived”) is not a consequence of a successful act performed on any conventionalization level. It is simply a communicative reaction of courtesy to the unsuccessful conventional act.

To conclude this point, let us once again return to the matter of normative consequences of performed procedural acts. These consequences are determined by the binding legal norms, particularly impose the duty to react to the performed procedural act on specific entities, e.g. the duty to consider a filed motion.³⁴ They also determine the illocutionary force of procedural acts and constitute the strongest determinant of the structure of dominance in a communication process between participants of the proceedings.

To illustrate the particularly complex structure of normative consequences of a performed procedural act and to summarize previously addressed matters, let us analyze one more utterance:

(14) the applicant³⁵: “*I think that we have reached an agreement and there is no point to examine witnesses*”
 standard interpretation:

standard form of use of the speech act: “*I think that we have reached an agreement and there is no point (...)*”

standard situation where the form is used: opinion (an act of a subjective assessing nature)

intentional explanation with due account of the propositional content: will (intent) to implement a state of affairs in the form of omission of evidence from witness examination

other elements of the context of the utterance: compliant to the rules of performing the procedural act of dismissing a motion to permit evidence

nonstandard interpretation: withdrawal of a motion to permit evidence

³⁴ Hence, it is not a consequence in the form of creating a possibility for a proper reaction discussed by Austin when characterizing types of effects of successful and binding illocutions [2: 116], but a normative consequence in the form of a legal obligation, which determines somewhat “by the way” the course of a communication process after the act is done.

³⁵ The applicant initiates civil non-contentious proceedings.

The above-mentioned utterance, with due account of the results of standard interpretation, intentional explanation, and other elements of the context of the utterance could have been (and was) identified as a specified procedural act. Here, the binding performance of this procedural act triggers various normative consequences determined by the binding legal norms. Annulment of a motion to permit evidence is the so-called dispositive procedural act. In a situation where an authorized entity decides to use the competence in this regard, this act is binding for the court. This means that the court loses the competence (in this case, it is equal to a prohibition) to take evidence, e.g. the competence to call witnesses to the stand,³⁶ while at the same time being obligated to e.g. release witnesses if they appeared at the examination. The structure of dominance determined by the normative consequences of this act, thus, correspond to the structure of dominance characteristic of the act of demanding. The dominant position is taken by the entity that performs the act, while it is determined by the binding legal norms.

All properties of procedural acts discussed in this point as acts conventionalized on a level higher than the speech act level prove the determining nature of the higher conventionalization level of these acts.

5 Some Other Specific Traits of Procedural Acts and the Process of Their Identification

First, let us take note of a certain property of conventional acts in general, which arises from the assumption that intent is an element that co-constitutes conventional acts. As Bogucki [7: 59] remarks, as a result of adopting such an assumption (along with the belief that intent is not directly identifiable for the receiver), the individual who performs the conventional act gains the potential possibility to “dismiss” it by claiming that one did not intend to perform it. However, the fact to what extent and in which situations one can rely on the lack of intention is determined by rules adopted in a given culture referred to by Bogucki [7: 60] as “rules of falsification”. And thus, as in the case of daily communication, its participants happen to repeatedly rely on the lack of specific intent³⁷ and such a “dismissal” is fully successful, it is difficult to imagine this in the legal reality. Rules of falsification also refer to procedural acts and can be set by the legislator or shaped by means of practice. Placing rules of falsification outside the constitutive rules of conventional acts, which is how these rules are regarded in this article, allows a situation where a given act is a function in the socio-cultural reality (including the legal reality) as a specific conventional act, while in fact, it is not this act (due to the lack of proper intention).

In the case of procedural acts (and some other legal acts), we also deal with other specific rules that allow for certain legal fiction. For instance, in some situations,

³⁶ In the event of exceptional situations, the court may decide to take such evidence ex officio and hence regain competence to examine witnesses, however these are consequences of a different performed procedural act.

³⁷ For instance, by means of stating, “But I am not *ordering* you to do it, I only *ask* if that is possible”.

procedural acts (successful and binding at the time when they are performed) may be deemed not to have taken place.³⁸

A claim that a given act was identified as a conventional act of a specific type is not logically equivalent to a claim that a given act is a conventional act of a specific type. This is because the process of identifying conventional acts as presented in this article is not an algorithmic process, as it requires the person who performs the identification to make decisions prone to cognitive or inferential errors [in relation to the inference in communication process, 32: 65 sqq.]. Suffice to say that interpretation of the act may require that it is complemented by deriving implicature,³⁹ thus, conducting a pragmatic inference that is fallible by nature.

In this context, let us note some communication phenomena that may complicate the course of the procedural act identification process using the following dialogues:

- (15) the plaintiff: “Your Honor, I sustain [the motions submitted] and would like to further complement my testimony due to the fact that (...)”
 the court: “Do you want to submit a paper or to be heard?”
 the plaintiff: “No, I did not submit any paper”
 the court: “So you would like the court to hear you again?”
 (16) the defendant: “Is there a photograph of the damage?”
 the court: “The court will present it to you in a moment”
 the defendant: “Good. Thank you”

The first dialogue illustrates a situation where the court decides on the procedural act the participant of the hearing wants to perform, at the same time, proposing alternative ways to identify the meaning of the participant’s utterance. In the second dialogue, the defendant’s utterance was identified by the court as a motion to permit a document included in the case files, namely, a photograph of a damaged car.⁴⁰ Considering the context in which this utterance was formulated,⁴¹ questions identified therein as the verbal form suggests were also justified (e.g. the defendant only wanted to make sure that the photograph is included in the case file). By the reaction to the participant’s utterance, the court somewhat proposed a way in which this utterance could be understood, to which the defendant agreed. In this situation, it is difficult to determine whether the defendant in fact intended to file the said motion or only agreed to the court’s understanding. This is because this dialogue could have been equally well concluded with the defendant’s statement in which he or she

³⁸ For instance, when the court deems proceedings not to have been taken due to an unauthorized legal representative participating in the proceedings.

³⁹ This pertains to conversational implicatures as understood by Grice [13: 26] or scalar implicatures as proposed by Gazdar, i.e. unconventional implicatures [18: 97 sqq.]. However, the border between conversational and conventional implicatures is not always evident [27: 28]. Due to the framework of this article, this matter is not discussed here in more depth.

⁴⁰ Interpretation of the propositional content of this act requires taking into consideration the fragment of the context that covers common knowledge of participants of the interaction about the subject of the trial.

⁴¹ The author of this article directly observed this context due to personal participation in the hearing.

would dismiss the way of understanding the act “proposed” by the court, e.g. “No, that is not necessary, I only wanted to make sure that the photograph is in the files”.

For it might be the case that the meaning of an act proposed by the entity who identifies the act is dismissed. In the process of acts identification, the acts particularly prone to errors are the implicit ones, i.e. indirect speech acts,⁴² and what is easy to notice, most utterances recalled in this article are of this specific nature. This is because in general, in the case of indirect speech acts, there is the possibility to “waive” an implicit meaning [1: 183 sqq.]. Let us illustrate this issue with the following hypothetical⁴³ dialogue:

- (17) the defendant: “Your Honor, *could you call XY to the stand?*”
 the court: “As to what circumstances are you applying for this witness be called?”
 the defendant: “I do not apply, I only ask if that would be possible, because XY was my attorney, after all”

In this dialogue, a classical indirect speech act was used, i.e. a question about a “possibility”, which is as a rule identified as a request. Therefore, it can be said that this “indirectness” appeared here on two levels (at least considering the original result of identification made by the court). The second utterance of the defendant “waived” both the request and the motion to permit evidence. Ultimately, the defendant’s act should be identified as a question.⁴⁴

In the above-mentioned dialogues, we are dealing with a particularly imprecise utterances of unprofessional participants of proceedings. This is largely due to the lack of communicative competence in the field of legal language, as the legal practice has developed forms of performing procedural acts whose nature is far more explicit than those recalled in this article to illustrate the issue, e.g.:

- (18) “Your Honor, *I withdraw the suit in the part concerning the claim (...)*”;
 (19) “Your Honor, *I apply for the witness examination be postponed due to (...)*”;
 (20) “Your Honor, *I file a reservation regarding the minutes pursuant to Article (...)*”.

⁴² Procedural acts can be successfully analyzed as indirect speech acts, e.g. using methods proposed by Stadler [33]. This analysis should provide due account to specific traits of procedural acts as double-conventionalized acts disclosed in this article, particularly when it comes to the analysis from the viewpoint of the mechanism of mitigation as a method of modifying the illocutionary force [36]. Due to the framework of this article, this matter is not discussed here in more depth.

⁴³ In the research material used for this article, there was no instance of a dialogue that would reflect the essence of the matter in question.

⁴⁴ The consequences provoked by this speech act (a question) are also determined by legal norms, since the court is not authorized to provide information on all matters that a question put forward by a participant of proceedings could pertain to.

In the case law, various levels of acceptance are adopted for the court's active attitude regarding the identification of procedural acts. In particular, it is required that professional participants of proceedings express their intent in a precise manner.⁴⁵

The course of the procedural act identification process depends thus also on participants' communicative competence⁴⁶ and the scope of their joint knowledge, including knowledge of the interlocutor's communicative competence, particularly knowledge that the participant uses courtesies characteristic of daily communication. This area of context of the utterance does not act as a normative context as understood in Austin tradition, as it does not pertain to felicity conditions of procedural acts. However, it does pertain to traits and mental states of participants of a communication process that may affect the actual course of identification of a given procedural act. However, these do not determine whether a given act is or is not a procedural act of a given type; therefore, they do not serve as evaluation in this regard. Nonetheless, in some situations, taking due account of elements of common knowledge of participants in communication may be essential for determining that a given condition for performing a procedural act was met (see footnote 40).⁴⁷

6 Conclusions

Let us indicate the key conclusions that can be drawn based on the considerations included in this article.

1. The acts discussed in this article are procedural acts—from the point of view of the court proceedings, and at the same time, they are communication (speech) acts—from the point of view of the communication process in these proceedings. It is strictly connected with the assumption that the procedural acts are double-conventionalized acts and there are specific relations between certain levels of conventionalization. The essence of the determining nature of the procedural act level consists in the fact that if an act was identified as a procedural act of a given type, only the meaning on the procedural act level is significant. Especially the illocutionary force of the procedural act is the strongest determinant of the structure of dominance in a communication process which includes a certain procedural act.
2. The assumption of double conventionalization of procedural acts has a specific and important role in the identification process of procedural acts that are performed implicitly, i.e. by using standard forms of speech acts. The standard interpretation that starts the identification process leads an interpreter to the speech act

⁴⁵ This can lead to a phenomenon known as “selective literalism” when sometimes the same utterances are interpreted as if they were explicit, and sometimes as if they were implicit [see examples from American case law, 35: 229 sqq.].

⁴⁶ Communicative competences as proposed by Hymes [15].

⁴⁷ For more information on normative and cognitive context, see “Austinian presupposition” and “Stalnakerian presupposition” [42: 15 and 21, in more depth 40: 145 sqq.].

- level. The recognition of the speech act level is a part of the identification process. When the procedural act is performed explicitly the standard interpretation leads the interpreter at once to the procedural act level.
3. It is required to use two universal mechanisms in the identification process of procedural acts: the standard interpretation (which is used after the recognition of the verbal form of an utterance) and the intentional explanation (which is connected with the assumption that the intention co-constitute conventional acts), which especially takes into account the propositional content of the utterance. It is also required to recognize other elements of the situational context, e.g. the authorization of the entity to perform the procedural act of a certain type, or relations between acts (the identified one and others). On the other hand, identifying a procedural act does not require the intent to perform the act to be recognized as bearing illocutionary force equal to the illocutionary force characteristic of the identified procedural act. This does not mean, obviously, that each result of intentional explanation can lead to the identification of a specific procedural act. Nonetheless, the results of the analysis of the utterances of participants of court proceedings should be considered an argument supporting the stance that assumes the existence of unintended illocutions (illocutionary agency externalism).
 4. The essence of performing procedural acts (in Polish courtroom discourse at least) does not come down to expressing specific (“magic”) formulas by specific entities in specific circumstances. Therefore, that model of interpretation that does not take into consideration the internalist conditions (especially the intention) is not adequate to describe the identification process of procedural acts. However, the interpretation model that reduces the interpretation process to recognize the speaker’s intention is also inadequate. When one performs a given procedural act, he or she has to conduct according to both internalist and externalist conditions. It is why the interpreter has to consider both internalist and externalist elements of the performed procedural act in the process of its identification.
 5. There is a specific relation between the unsuccessful procedural act and the speech act identified on a lower level of conventionalization. Especially when one unsuccessfully tries to perform a procedural act at the trial and the used verbal form is characteristic for a speech act (e.g. request, or question), that act cannot be found a fully successful speech act. That act is not able to determine normative consequences characteristic of a certain type of speech act. It is because the normative relations between participants of court proceedings involved in performing procedural acts are determined by legal norms.
 6. The analysis of actual utterances formulated by the participants of court proceedings justifies the conclusion that the identification process of procedural acts performed in courtroom discourse considers both universal rules that regulate a speech acts interpretation (e.g. standard interpretation) and the rules characteristic for legal context (e.g. relating to the recognition of the authorization to perform procedural acts). It is connected with the complex nature of procedural acts performed in a courtroom discourse.

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