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Promising, Owning, Enacting

Adolf Reinach's Phenomenology of Legal Speech Acts

*Marietta Auer**

1.1 INTRODUCTION

If the reader of this chapter were asked to single out the most-disputed or least-understood features of contemporary private law, two good responses – for common and civil law backgrounds alike – come to mind. First, how does the binding power of contract arise out of a promise? In the common law of contracts, the promise classically needs to be backed by consideration in order to become binding for the promisor, even if the consideration is only nominal, for example, a dollar or a cent. But what is the deeper meaning of the consideration requirement beyond this proverbial 'peppercorn theory'?[1] If the binding power of the contract is not derived from the promise, where does it come from? The 'will theory'? Reliance? Equity? Morality?[2] Or, to argue from the other side, as law and economics scholars have proposed under the provocative heading of 'efficient breach', why shouldn't the parties to a contract simply break free of its bonds if a better, more efficient opportunity for contracting arises?[3] These questions are indicative of the ongoing debates in contract theory in the common law world. But the civil law of contracts

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[1] See, e.g., Arthur L Corbin, 'The Effect of Options on Consideration' (1925) 34 Yale LJ 571; Lon L Fuller, 'Consideration and Form' (1941) 41 Colum L Rev 799, 820. For the substantive bases of contract liability, see ibid 806–813.

[2] See, e.g., Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (2nd edn, Oxford University Press 2015); Anthony T Kronman, 'A New Champion for the Will Theory' (1981) 91 Yale LJ 404.

[3] The wide range of views on the topic of 'efficient breach' cannot be exhausted here. See initially Robert L Birmingham, 'Breach of Contract, Damage Measures, and Economic Efficiency' (1970) 24 Rutgers L Rev 273. A recent variant is the 'dual performance hypothesis' proposed by Daniel Markovits and Alan Schwartz; see Daniel Markovits and Alan Schwartz, 'The Myth of Efficient Breach: New Defenses of the Expectation Interest' (2011) 97 Va L Rev 1939.

doesn't fare much better. While it avoids the quandaries of the consideration doctrine by founding the binding power of the contract on mutual declarations of will, it is nevertheless faced with the same problem: Why are contractual parties bound to what they consented to do?[4]

Second, as if the intricacies of contract law weren't enough, there is property law and the century-old debate whether property should be conceived as an absolute right to a thing or as a mere 'bundle of sticks' of relative rights against other persons.[5] As simple as this restatement of the notorious 'bundle theory' of property may sound, it is still one of the focal points of common law debates on property. The antipodes of 'thing' versus 'bundle' recur across the theoretical spectrum from legal doctrine through law and economics to political theory and legal philosophy.[6] Here again, the civil law seems to offer an easy way out, since its codified structure still reflects the ancient Roman dualism between *rights in rem* and *rights in personam*, thus preserving the structural divide between rights to things and rights against persons within present-day doctrine.[7] Yet, the preservation of an ancient systematic ideal can hardly count as a sufficient reason to insulate civil law property against the structural challenge posed by the bundle theory. But what follows from this? Is the German Civil Code simply wrong in conceptually separating rights to things from obligations? Or might there be some deeper reason for this distinction that could, in turn, help common law property theorists deal with the 'bundle challenge'?

This chapter aims to answer these questions by reconstructing Adolf Reinach's phenomenological theory of private law as developed in *The Apriori Foundations of the Civil Law*[8] against the dual background of the German civil law tradition, wherein Reinach

[4] On the formation of contracts through mutual declarations of will, see §§ 145ff BGB [Bürgerliches Gesetzbuch] (German Civil Code, 1900). For theories of the binding power of contracts, see, e.g., Franz Bydlinski, *Privatautonomie und objektive Grundlagen des verpflichtenden Rechtsgeschäftes* (Springer 1967); Claus-Wilhelm Canaris, *Die Vertrauenshaftung im deutschen Privatrecht* (CH Beck 1971); Reinhard Singer, *Selbstbestimmung und Verkehrsschutz im Recht der Willenserklärungen* (CH Beck 1995); Claus-Wilhelm Canaris, 'Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Materialisierung"' (2000) 200 Archiv für die civilistische Praxis 273, 279–280.

[5] See, e.g., James E Penner, 'The Bundle of Rights Picture of Property' (1996) 43 UCLA L Rev 711.

[6] See, e.g., Thomas W Merrill and Henry E Smith, 'What Happened to Property in Law and Economics?' (2001) 111 Yale LJ 357; Henry E Smith, 'Property as the Law of Things' (2012) 125 Harvard L Rev 1691; Joseph W Singer, 'Property as the Law of Democracy' (2014) 63 Duke LJ 1287.

[7] The German Civil Code preserves this dualism, inter alia, in the conceptual distinction between the law of obligations (*Schuldrecht*) and property law (*Sachenrecht*). For the common law discussion, see Wesley N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale LJ 710; Albert Kocourek, 'Rights in Rem' (1920) 68 U Penn L Rev 322; Arthur L Corbin, 'Jural Relations and Their Classification' (1921) 30 Yale LJ 226; Albert Kocourek, 'Polarized and Unpolarized Legal Relations' (1921) 9 Kentucky LJ 131.

[8] Adolf Reinach, 'The Apriori Foundations of the Civil Law' (John F Crosby tr, 1983) 3 Aletheia 1, reprinted in Adolf Reinach, *The Apriori Foundations of the Civil Law Along with the Lecture 'Concerning Phenomenology'* (John F Crosby ed, Ontos Verlag 2012), originally published as Adolf Reinach, 'Die apriorischen Grundlagen des bürgerlichen Rechtes', in 1(2) *Jahrbuch für*

received his legal training, and modern language philosophy. Both viewpoints complement each other and will prove equally indispensable to reading Reinach. It is impossible to overlook the deep influence of German private law doctrine on Reinach's theory. Thus, to gain access to Reinach's thought, a promising path is to assess his theoretical claims against the backdrop of the civil law tradition. On this basis, the cultural as well as linguistic situatedness of some of Reinach's claims of apriority will become apparent, thus making his theory a valuable resource for cross-system theory comparisons. Yet, such a doctrinal reading of Reinach alone obviously cannot do justice to his original philosophical endeavour. Building on existing work, this chapter thus brings Reinach's phenomenology into further dialogue with modern language philosophy.[9] The following sections will take up these issues in greater depth. Section 1.2 will explore Reinach's concept of a priori foundations of private law and will use John L Austin's concept of 'performative verbs'[10] to understand it as a phenomenology of the performative foundations of legal language. Sections 1.3, 1.4 and 1.5 will, in turn, explore the three most important performative verbs in Reinach's theory against the background of their original etymologies and legal connotations in German private law: 'promising', 'owning' and 'enacting'. I conclude by arguing that what Reinach has to offer today's private law theorists is a slim and remarkably timeless theory of linguistically defined social acts as the basis of legal meaning. This theory merits further consideration, even if the question of its potentially stronger ontological or epistemological readings is left open.

1.2 REINACH'S A PRIORI AS A PHENOMENOLOGY OF PERFORMATIVE LEGAL LANGUAGE

The story of Reinach's brief career and untimely death is largely a story of what could have been the path of German legal philosophy had it not been for the

Philosophie und phänomenologische Forschung (Max Niemeyer 1913), 685–847 [hereinafter Reinach, 'Foundations']. References to the German original are made to Adolf Reinach, 'Die apriorischen Grundlagen des bürgerlichen Rechtes', in Karl Schuhmann and Barry Smith (eds), *Adolf Reinach. Sämtliche Werke. Textkritische Ausgabe in 2 Bänden* vol 1 (Philosophia 1989) [hereinafter Reinach, 'Grundlagen'].

[9] John L Austin, *How to Do Things with Words* (James O Urmson and Marina Sbisà eds, 2nd edn, Harvard University Press 1975); John R Searle, *Speech Acts. An Essay in the Philosophy of Language* (Cambridge University Press 1969). For interpretations of Reinach in the context of speech act theory, see, e.g., John F Crosby, 'Adolf Reinach's Discovery of the Social Acts' (1983) Aletheia III 143; Kevin Mulligan, 'Promisings and other Social Acts: Their Constituents and Structure', in Kevin Mulligan (ed), *Speech Act and Sachverhalt. Reinach and the Foundations of Realist Phenomenology* (Kluwer 1987); Klaus Hoffmann, 'Reinach and Searle on Promising: A Comparison', in ibid; Jean-Louis Gardies, 'Adolf Reinach and the Analytic Foundations of Social Acts', in ibid; James M Brown, 'Reinach on Representative Acts', in ibid; Barry Smith, 'On the Cognition of States of Affairs', in ibid; Armin Burkhard, *Soziale Akte, Sprechakte und Textillokutionen. A. Reinachs Rechtsphilosophie und die moderne Linguistik* (Max Niemeyer 1986); John F Crosby, 'Speech Act Theory and Phenomenology', in Reinach, 'Foundations' (n 8) 167.

[10] See Austin (n 9) 151–164.

atrocities of the twentieth century.[11] Reinach, born into an affluent Jewish family in Mainz on 23 December 1883, enrolled at the law faculty of the University of Munich in 1901, but ended up spending most of his time studying philosophy with Theodor Lipps. At that time one of the leading German philosophers, Lipps was committed to employing the newly developed methods of psychology to the philosophy of mind. Reinach, however, did not stay long within this intellectual circle. After the completion of his dissertation in 1904, and as part of a migration of students later known as the 'Munich invasion of Göttingen',[12] he moved to Göttingen and in 1909 obtained his *habilitation* with Edmund Husserl, Lipps' anti-psychological opponent. In 1913, Reinach was among the founders of Husserl's *Yearbook for Philosophy and Phenomenological Research*, in which *The Apriori Foundations of the Civil Law* appeared in the same year,[13] four years prior to the author's untimely death on the battlefields of World War I outside Diksmuide in Flanders on 16 November 1917.

Though a constant temptation, it is nevertheless pointless to speculate about what Reinach might have achieved had he lived to develop a mature scholarly body of work out of his youthful first attempt at legal philosophy. The theoretical path Reinach explores is remarkably different from virtually all other paths of legal philosophy or jurisprudence that came to fruition in the twentieth century and eventually went on to form the core of the discourse. At the historical point in time when Reinach was writing, there were three main epistemic paradigms within jurisprudence to choose from.[14] First, legal positivism, analyticism and a non-philosophical 'general theory of law' flourished both in England and on the continent. A second, opposing tendency was the simultaneous movement towards free law, jurisprudence of interests, legal realism and sociological jurisprudence. Third and finally, there was the idealist counter-position to the latter expressed in value philosophies, renewed natural law theories and an idealistically turned Neo-Kantianism or Neo-Hegelianism. Reinach's legal phenomenology, however, did not fit into any of these camps.[15] He posited the extra-legal existence of legal

[11] On Reinach's biography, see his self-testimonies and the editor's report in Schuhmann and Smith (eds), *Adolf Reinach. Sämtliche Werke* (n 8) vol 1, 636; vol 2, 665–672, 713; Karl Schuhmann and Barry Smith, 'Adolf Reinach: An Intellectual Biography', in Kevin Mulligan (ed), *Speech Act and Sachverhalt. Reinach and the Foundations of Realist Phenomenology* (Kluwer 1987).

[12] Schuhmann and Smith, 'Adolf Reinach: An Intellectual Biography' (n 11) 8.

[13] For the editions used here, see n 8. For the publication history and original sources, see the editor's report in Schuhmann and Smith (eds), *Adolf Reinach. Sämtliche Werke* (n 8) vol 2, 676–679.

[14] On the twentieth-century history of legal epistemologies, see Marietta Auer, 'A Genealogy of Private Law Epistemologies', in Thilo Kuntz and Paul B Miller (eds), *Methodology in Private Law Theory: Between New Private Law and Rechtsdogmatik* (Oxford University Press 2024).

[15] On Reinach's legal theory, see Stanley L Paulson, 'Demystifying Reinach's Legal Theory', in Kevin Mulligan (ed), *Speech Act and Sachverhalt. Reinach and the Foundations of Realist Phenomenology* (Kluwer 1987); Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn,

concepts without committing to positivism, realism or idealism. His ontology of legal objects was neither merely nominalist, as legal realism would have it, nor idealist in the sense that it implied a transcendental a priori of legal morality. Yet, Reinach's rejection of a moral a priori of the law did not commit him to legal positivism as a theory of jurisprudence either. On the contrary, he emphatically defended the independence between what he perceived as the a priori foundations of private law and the positive law:[16]

> We shall show that the structures (*Gebilde*) which one has generally called specifically legal (*spezifisch rechtlich*) have a being on their own just as much as numbers, trees, or houses, that this being is independent of its being grasped by men, that it is in particular independent of all positive law. It is not only false but ultimately meaningless to call legal entities and structures creations of the positive law, just as meaningless as it would be to call the founding of the German empire or some other historical event a creation of the historical science. We really do find what one has so emphatically denied: the positive law *finds* the legal concepts which enter into it; *in absolutely no way does it produce them*.[17]

What is, then, the essence of Reinach's legal a priori? The phenomenological shibboleth 'back to the things themselves'[18] demands going back to the things *as* they are given to us in experience. According to the phenomenological view, the object *itself* – and not just its representation – becomes accessible to the perceiving consciousness. Consciousness is not *in* the mind; it performs itself through being conscious of something *other* than itself.[19] In Reinach's phenomenology of law, apriority thus serves to describe the irreducible structures of human consciousness as the basis of cognitive acts, to the extent they are foundational for legal meaning. By building his concept of apriority on the perception of legally foundational cognitive acts, Reinach arrives at the contention that a priori foundations of the law in fact *exist* and can be grasped as an immediate object of phenomenological perception. But what are legally foundational cognitive acts? This point represents a

Springer 1991) 111–113; Neil Duxbury, 'The Legal Philosophy of Adolf Reinach' (1991) 77 ARSP 314 (part 1), 466 (part 2); Andreas Funke, *Allgemeine Rechtslehre als juristische Strukturtheorie* (Mohr Siebeck 2004) 37–38.

[16] For further discussion, see infra Section 1.5 at n 100 and accompanying text.

[17] Reinach, 'Foundations' (n 8) 4.

[18] Adolf Reinach, 'Über Phänomenologie' (1914), in Schuhmann and Smith (eds), *Adolf Reinach. Sämtliche Werke* (n 8) vol 1, 538; see also Anthony J Steinbock, 'Back to the Things Themselves' (1997) 20 Human Studies 127. On Reinach's phenomenology, see John F Crosby, 'Adolf Reinach's Discovery of the Social Acts' (1983) Aletheia III 143; Kimberly Baltzer-Jaray, 'Phenomenological Jurisprudence: A Reinterpretation of Reinach's Jahrbuch Essay', in J Edward Hackett and J Aaron Simmons (eds), *Phenomenology for the Twenty-First Century* (Palgrave Macmillan 2016); Kimberly Baltzer-Jaray, 'Bogged Down in Ontologism and Realism: The Phenomenology of Adolf Reinach' in Rodney K B Parker (ed), *The Idealism-Realism Debate among Edmund Husserl's Early Followers and Critics* (Springer 2021).

[19] Edmund Husserl, *Formal and Transcendental Logic* § 94 (D Cairns trans, Springer 1969).

theoretical crossroads from which several possible interpretations of Reinach's phenomenology emanate.

A thick metaphysical reading of Reinach implies a commitment to the epistemological and ontological premises of phenomenology. At the very least, the phenomenological unity of transcendence and experience demands a theory of consciousness that reflects an objective reality beyond individual perception – a reality governed by structural laws independent of the psychic constitution of the human mind. Such structural laws exist; the laws of logic provide an example. With Edmund Husserl, the problem of phenomenology can thus be reformulated as follows: Are the laws of logic a function of human psychology, or is human psychology, on the contrary, a function of the laws of logic? Reinach, siding with Husserl against his early academic mentor Theodor Lipps in this core question of the *fin-de-siècle Psychologismusstreit*, clearly insisted on the latter, emphasising the logical as well as ontological priority of the elementary structures of consciousness.[20] Yet, this reading will hardly convince an anti-metaphysical audience versed in the legal theories of the late twentieth and early twenty-first centuries. But Reinach does not actually need a final answer to the psychologism challenge in order to make a philosophically meaningful statement about the foundations of the law. Another plausible reading of his theory avoids the baggage of philosophical phenomenology by restricting Reinach's claim to a proto-language philosophy of the law. On this – much slimmer – reading, the core of Reinach's theory lies in the simple claim that cognitive acts are, at least in many cases if not *pro tanto*, social acts performed through language. Reinach's a priori thus translates into a phenomenology of the performative foundations of legal language. That the law is, generally speaking, a linguistic social praxis is all one needs to know in order to grasp the essence of its foundations.

This is where Reinach's phenomenology lends itself to an interpretation along the lines of modern speech act theory.[21] Half a century prior to J L Austin's *How to Do Things with Words*, Reinach had already conceptualised his core concept of the 'social act', defined as a 'spontaneous act in need of being heard',[22] in terms of a proto-Austinian performative utterance. Indeed, some parallels between the speech act theory developed by mid twentieth-century philosophers of language, on the one hand, and Reinach's theory of linguistically defined social acts as the legal a priori, on the other, are so striking that they raise the question of a direct influence of Reinach on Austin.[23] Where Reinach conceptualises legal acts as essentially social acts and other-directed utterances 'in need of being heard', Austin distinguishes

[20] See Edmund Husserl, *Logische Untersuchungen* vol 1, §§ 17–20 (Elmar Holenstein ed, Springer 1975) 63–71. On this debate, see James Toomey, 'Darwin's Reinach', Chapter 2 in this volume.

[21] See n 9 for references.

[22] Reinach, 'Foundations' (n 8) 19–20: 'We designate the spontaneous acts which are in need of being heard, social acts. [...] The turning to another subject and the need of being heard is absolutely essential for every social act.'

[23] On Reinach's potential influence on speech act theory, see Mulligan (n 9) 33–34 at n 5.

between declarative and performative utterances and points to the fundamental irreducibility of the performative character of the latter.[24] This is not to argue that all social acts constitute speech acts, that all speech acts qualify as social acts, or that all legal acts necessarily presuppose either speech acts or Reinachian social acts. If we put aside the considerable theoretical differences,[25] there is nonetheless a significant overlap between the three groups of acts, which makes it a fruitful enterprise to use Austin's speech act theory as an interpretive aide when coming to terms with Reinach's phenomenology.

Two features of Austin's theory appear particularly well suited to illuminate Reinach's legal theory. First, Austin's distinction between the truth conditions for declarative and performative utterances has direct implications for assessing the binding power of legal acts independently of their truth value. While declarative utterances can be true or false, performative utterances, according to Austin, may only 'succeed' or 'fail', that is, be 'happy' or 'unhappy'.[26] For Austin, happiness or unhappiness thus replaces truth or falsehood in the realm of performative (or illocutionary) speech acts. One way to read this insight is as a restatement of the non-naturalist metaethical position that the truth criteria applicable to statements of natural facts do not apply to moral statements, or, for that matter, to the assessment of legal acts. But Austin's insight goes even further than this by pointing to the pervasive power of the social performance of normativity, which supplants and supervenes natural laws even where they seem to govern. Reinach formulates a remarkably similar intuition in rejecting the classical project of natural law while, at the same time, rescuing it in the form of a phenomenology of social performativity. Thus, for Reinach, it is not the eternal truth of contractualism but the performative happiness of the very act of contracting that constitutes its normative power:

> When Hobbes and other natural law philosophers posit contracts and derive from them claims, obligations, and other legal consequences, they are altogether in the right. For these consequences are grounded, as we have shown, *in the essence of the performed acts*.[27]

Second, it is no accident that Reinach uses the example of contracting to illustrate his more general point. As we will see shortly, the binding contract, a result of the

[24] See Austin (n 9) 12: 'to *say* something is to *do* something; or [...] *by* saying or *in* saying something we are doing something'. Later in his work, Austin replaces the concept of performative utterances by the three-pronged distinction between locutionary, illocutionary and perlocutionary acts. Within this triad, the performative utterance is represented in the illocutionary act, defined as 'performance of an act *in* saying something as opposed to performance of an act *of* saying something'; see ibid 99–100.

[25] On the fundamentally different theoretical points of departure, see Mulligan (n 9) 31: Whereas Reinach's concept of language aims at a representation of the mind, Austin's ordinary language philosophy opposes logical conceptions of language.

[26] Austin (n 9) 133: '(1) the performative should be doing something as opposed to just saying something; and (2) the performative is happy or unhappy as opposed to true or false.'

[27] Reinach, 'Foundations' (n 8) 137; emphasis added.

performative power of mutual promises, comprises one of the centrepieces of Reinach's private law theory and opens up another avenue of productive dialogue with Austin's theory of performative verbs.[28] Reinach, too, relies on performative verbs such as 'commanding [...], requesting, warning, questioning, informing, answering and [...] still many other acts'[29] to describe the innumerable multitude of legally relevant performative social acts. The similarities to Austin, who distinguishes five classes of performative verbs constituting a plethora of social interactions, are striking. According to Austin's classification, 'verdictives' comprise all verbs that mean 'giving a verdict', such as convicting, acquitting, grading or assessing.[30] 'Exercitives' describe the exercise of powers or rights through appointing, voting, ordering, advising or warning, to which Reinach's case of 'enacting' also belongs.[31] Another important class for the matter at hand is 'commissives', which commit the speaker to doing something and, in particular, contain Reinach's central case of 'promising'.[32]

With this analytical background mastered, the stage is now set for a reconstruction of Reinach's private law theory along the lines of Austin's theory of performative verbs. In the following part, I will explore the performative phenomenology of the arguably most important concept in Reinach's theory – namely, 'promising' (*versprechen*). This concept is fundamental to Reinach's understanding of the performativity of contracts and the entire law of obligations.

1.3 PROMISING AND SPEAKING (*VER-SPRECHEN*)

The promise, or, more precisely, the social act of promising lies at the core of Reinach's theory of obligations. Reinach offers a comprehensive theory of the law of obligations centred on the act of promising. He identifies the promise as the exclusive origin of claims and obligations as relative rights within the bipolar legal relation between promisor and promisee. On this basis, Reinach draws several a priori conclusions for the structure of the law of obligations. He departs from the question whether the promise needs to be accepted in order to be binding, then offers an exposition of possible modes of termination for promises and obligations and concludes by addressing the fundamental problem of why promises are binding at all.

[28] Austin (n 9) 151–164.
[29] Reinach, 'Foundations' (n 8) 19–20.
[30] Austin (n 9) 153–155.
[31] ibid 155–157. For 'enacting', see infra Section 1.5 at n 95 and accompanying text.
[32] ibid 157–160. For the sake of completeness, Austin's 'behabitives' indicate social behaviour and comprise verbs like apologising, congratulating or condoling, while 'expositives' refer to utterances in the course of a conversation: replying, arguing, assuming or postulating. See ibid 160–164.

Let us first examine Reinach's theory of promising as the source of obligation. For Reinach, 'it lies in the essence of this act [sc. promising] to bring forth claims and obligations.'[33] But why is this the case? And how can Reinach claim the apriority of the effect of promising – assuming it exists at all? The answer directly follows from Reinach's definition of the social act. As discussed above, the social act is performative precisely in its 'need of being heard', that is, in its linguistic other-directedness as such. This means that the question of how the obligation arises from the promise cannot be further reduced or permits any further analysis; indeed, it would be a mistake to search for further grounds of the obligation *beyond* the social performativity of the promise. Under the premise that the socially irreducible is identical with the a priori, it follows that the promise *as such* – as opposed to its content, the promisor's intention, or the 'informative expression of a resolution of will'[34] – is the decisive reason for the emergence of the obligation arising from the promise. Reinach particularly stresses the difference between a mere 'expression of intending', on the one hand, and the promise as 'an independent spontaneous act which in turning without, expresses itself',[35] on the other. He thus establishes a sharp distinction between 'intending' and 'promising' as the a priori basis of the legal distinction between a declaration of will as opposed to a promise by pointing to the incommensurable performativity of both acts. The upshot of this argument is a critique of the construction of the formation of contracts through matching declarations of will under the German Civil Code:[36]

> We now see clearly how thoroughly mistaken und untenable is the usual conception of promising as an expressing of intention or of will. An expression of will runs like this: I intend. If it is directed to someone, then it is an informing, which is indeed a social act but no act of promising. And of course it does not become a promise by being directed to the one who will profit from the intended action. Promising is neither intending nor the expression of intending; it is rather an independent spontaneous act which in turning without, expresses itself. [...] It is not – as one had thought – through impotent declarations of intention that relations of right are constituted but rather through the strictly apriori efficacy of the social acts.[37]

But is this argument, as Reinach contends, sufficient to establish the very act of promising as the a priori foundation of the law of obligations? The answer is that Reinach's argument is surprisingly efficient because it provides the best possible *irreducible* interpretation of the emanation of the obligation from the promise under

[33] Reinach, 'Foundations' (n 8) 26.
[34] ibid.
[35] ibid.
[36] §§ 145ff BGB; see also supra Section 1.1 at n 4. On Reinach's critique of the declaration of will as the basis of contract in the German Civil Code, see also infra Section 1.4 at n 90 and accompanying text.
[37] Reinach, 'Foundations' (n 8) 26.

the condition that promising exists as a practice in private law. But how do we know that this explanation of the obligatory power of the obligation is indeed irreducible? Here, no further argument can be given. But this is precisely the point where Reinach's philosophy reveals its striking modernity and ability to work on several levels apart from the thicker metaphysical assumptions of both phenomenology and language philosophy. In the reading proposed here, Reinach's a priori of promising essentially amounts to an application of Ockham's razor to contract theory, a discursive reduction that releases the latter from the search for further explanations for the binding power of contracts where none can be given.[38] Read this way, Reinach's argument closely resembles Wittgenstein's picture in the *Philosophical Investigations* of the spade turning upon reaching hard bedrock: 'Once I have exhausted the justifications, I have reached bedrock, and my spade is turned. Then I am inclined to say: "This is simply what I do."'[39] Reinach is also looking for the irreducible forms of law which neither require nor even allow for further definition or analysis. Apriority, for Reinach, neither requires transcendental conditions of knowledge or truth, nor priority of cognition over experience. It simply requires grasping the constituent, irreducible elements of human consciousness in the limited realm of legal acts – understanding the elements that, within the law, permit no further questioning. Having hit bedrock, the spade is turned and every further philosophical effort is rendered futile.

The next question Reinach raises is whether the promise needs to be accepted in order to be binding. His argument sets out from the observation that the concept of acceptance – another performative act – is ambiguous, if not polysemous. Reinach distinguishes no less than five meanings on what 'acceptance of an offer' could mean: (1) the outward expression of a positive response to the promise, irrespective of how it is performed; (2) the substantive content of the positive response; (3) the promisee's inner experience of 'saying yes'; (4) the outward expression of this inner acceptance; and finally, (5) the acceptance as 'a social act in its own right which is not reducible to an informing.'[40] These distinctions might at first glance seem captious. Yet, by introducing them, Reinach again highlights the crucial difference between the performative power of the promise as a speech act and the diverging

[38] Indeed, it is Reinach's conviction that weak philosophical thought exposes itself through the search for definitions where none can be given. See ibid 65: 'It is a sign of a philosophically misshapen mind to demand definitions where none are possible or have any value. We have characterized promising as a social act and have unfolded its distinctive presuppositions and effects. But what distinguishes promising as such from other social acts such as commanding or requesting, can indeed be seen (*erschauen*) and made evident to others, but it can no more be defined than one can define that which distinguishes red from other colors.' The quote continues by citing Descartes: 'perhaps one of the main errors which one can commit in the sciences [is] to try to define what can only be seen through itself.'

[39] Ludwig Wittgenstein, *Philosophical Investigations* § 217 (GEM Anscombe, PMS Hacker and J Schulte trans, PMS Hacker and J Schulte eds, 4th edn, Wiley-Blackwell 2009) 91. Interestingly, the argument is part of Wittgenstein's treatment of rule following.

[40] Reinach, 'Foundations' (n 8) 29.

construction of the binding contract in the positive law. A common fallacy among jurists familiar with the positive law of contracts, he argues, is to jump from the a priori performativity of the binding promise to the instrumental, a posteriori conclusion that there can be no binding contract without offer and acceptance:

> It is now clear how ambiguous is the question whether a promise needs to be accepted in order to be efficacious. In raising this question one is mainly thinking about the principle of the positive law that onesided acts of intention usually do not produce claim and obligation, and that some 'meeting of the minds' (*Willenseinigung*) is usually required, that is, to put it in our language, an agreement which is constituted by mutual social acts.[41]

Yet, such an identification between the binding power of promising and the rules for binding contracts would be rash, Reinach argues. The a priori performativity of the promise has nothing to do with the acceptance required for a binding contract under positive law. The promise should no more be confused with the contractual offer required by law than the acceptance can be reduced to the first, formal, contractual meaning stated above. Instead, Reinach is only interested in the question whether the speech act of promising needs to be accepted in the second, substantive sense in order to become efficacious, and he clearly answers this question in the negative: 'We are only asking whether *promising* needs a (material) acceptance in order to be efficacious.'[42] Since the acceptance of a promise cannot amount to another promise – due to the resulting infinite regress of mutual promising – the promise must carry its binding power in itself, that is, in the very performativity of promising:

> The accepting of a promise, however, cannot itself be a vowing or a promising. For then we would fall into a fallacious *regressus in infinitum*, inasmuch as this new promise would also need acceptance, etc. This also shows clearly how thoroughly different [*from promising*] the supposed analogates [*requesting and commanding*] are. With them it is a question of imposing an obligation on the addressee of the social act, and this of course really does need some acceptance. But in the case of promising the performer of the act assumes the obligation himself; on the side of the addressee there arise only claims, and we do not see why any social act on his part should be necessary. And so we are entitled to say: claim and obligation are grounded in promising as such.[43]

It goes without saying that this analytical conclusion – which excludes the possibility of a priori binding promises vis-à-vis third persons[44] – is incongruous with

[41] ibid 30.
[42] ibid.
[43] ibid 31.
[44] ibid: 'We put forward the apriori law that the claim can only arise in the person of the addressee. It is apriori impossible that a person to whom the promise is not directed should acquire a claim from it. Of course the positive law deals with contracts with third-party

both the civil law of obligations, which construes the binding power of contract through offer and acceptance, thus bypassing the concept of promise altogether, and with the common law and the doctrine of consideration. While Reinach does not deal with the doctrine of consideration, it follows from his treatment of the a priori binding power of the promise that the consideration doctrine can only be regarded a positive, a posteriori contingency of contract law and not as a part of its a priori essence.

From this understanding of the promise as binding per se and the one-sided emergence of obligation and claim right, Reinach deduces further consequences for the fulfilment, violation and termination of both promise and obligation. He distinguishes two ways of dissolving an obligation: realisation (i.e., fulfilment) and waiver. The natural – 'destined' – way of dissolving an obligation is 'the realization of its content by the promisor.'[45] If the realisation does not occur at the time and in the way it should, the claim is 'violated'. For Reinach, the violation – even in cases of impossibility – does not terminate the obligation; again, a consequence at odds with the doctrine of impossibility under the German Civil Code.[46] Other than realisation, the only other way to dissolve an obligation is through waiver by the promisee. Reinach takes pains to distinguish the waiver of the claim by the addressee from the revocation of the promise itself through the promisor. Whereas the waiver 'is grounded immutably in the essence of the claim',[47] the revocation requires 'a legal capacity or power (*rechtliches Können*)'[48] that can only be conferred on the promisor by the promisee. Reinach describes this granting of the legal power to revoke as a separate social act that necessarily cannot be a promise. A promise would only create another obligation for the promisee to waive the claim but does not confer any immediate power on the promisor to revoke the promise. The latter distinction relies heavily on the structure of German private law, wherein the difference between obligation (*Verpflichtung*) and disposition over a right based on an underlying legal power to dispose (*Verfügung, Verfügungsmacht*) is so fundamental as to amount to apriority.[49]

Finally, Reinach returns to the core question of why promises – or, for that matter, contracts – are binding at all. His ultimate answer to this question consists in refuting three alternative approaches to his own theory by showing that none of them can provide further reasons for the binding power of promises, hence delivering indirect proof of his own assumption that no such reasons can be given. The first approach, exemplified by David Hume's nominalist and conventionalist theory of

beneficiaries. [...] For now let us just remark that it is surely no accident that contracts with third-party beneficiaries were in some legal codes established so late, if at all.'

[45] ibid 32.

[46] See § 275 BGB.

[47] Reinach, 'Foundations' (n 8) 33.

[48] ibid 34.

[49] See in more detail infra Section 1.4 at nn 85 ff and accompanying text.

moral obligation, holds that the binding power of the promise does not stem from the promise itself but from 'the *willing* of the *obligation*, which arises from the promise'.[50] According to Hume, restated by Reinach, this internal motivation on the part of the promisor to be bound is, in turn, experienced as binding by the promisor because a social convention that promises should be binding exists. Thus, the binding power of the promise can be construed in two ways. Either the social convention that promises should be binding directly implants an 'ought' into the perceived intention of the promisor, because promises cannot be thought of other than as conventionally binding, or the conventional explanation of the binding power of promising refers to an external category of social utility, which demands that promises be binding because it is useful that they should be so. In both cases, the reasoning is circular or begging the question. If the promisor regards his promise as binding because convention says so, no advancement is made beyond the starting point why promises should be binding at all. If conventional reasoning regards promises as binding because it is socially useful that they are, the same question arises on a higher level: Why should the 'ought' of the binding power of promises follow from a conventional experience of social utility – which may or may not apply to a particular promise without presupposing that, as a *promise*, it has a good reason to be binding in its own right?

The second theory Reinach opposes is the psychologistic explanation of moral obligation proposed by his early teacher Theodor Lipps.[51] In Reinach's reading, Lipps' theory appears as the paradigmatic case of an extreme internalist theory which directly traces the binding power of the promise back to the promisor's intention to be bound. This reading thus even goes beyond the internalist reading of Hume stated above in that it does not even purport to rely on a social convention to explain the binding power of contract. Instead, it directly places the burden of explanation on the inner psychic state arising out of promising that the promisor experiences as an 'ought' to hold himself bound by the promise. This path of argumentation, however, actually exacerbates the difficulties of providing independent reasons for the binding power of promise experienced above. To argue that the will to be bound creates a psychic state from which emerges the imperative that the promisor 'ought' to be bound by a promise does not at all imply that such an 'ought' in fact exists, unless – again – the binding power of the promise is already presupposed.

Finally, Reinach discusses the same problem from the standpoint of consequentialism, exemplified by the 'uitilitarian theory' (*Erfolgstheorie*) of the now mostly

[50] Reinach, 'Foundations' (n 8) 35–38, with reference to David Hume, *A Treatise of Human Nature: Being an Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects* (John Noon 1739/40) [reference to the German translation in Reinach's original: Hume, *Traktat über die menschliche Natur*; see Reinach, 'Grundlagen' (n 8) 175].

[51] Reinach, 'Foundations' (n 8) 38–42, with references to Theodor Lipps, *Leitfaden der Psychologie* (2nd edn, Wilhelm Engelmann 1906) and Theodor Lipps, *Die ethischen Grundfragen. Zehn Vorträge* (2nd edn, Leopold Voß 1905).

forgotten nineteenth-century moral philosopher Wilhelm Schuppe.[52] In Reinach's reading, Schuppe shifts the emphasis from the inner psychic state of the promisor to the social utility of binding contracts as the basis of legally secured property rights. Thus, for Schuppe, it is neither the mere will nor the intention to be bound which makes the contractual promise binding, but rather the expediency of a legal regime which regards contracts and declarations of will as binding: 'The so-called binding force of a contract consists in nothing other than the importance of the legal order which insists on irrevocability.'[53] Yet again, this begs the question as to how the promisee's reliance on the promise can justify its binding power without already presupposing the binding power of promise itself. Reinach's critique of Schuppe's argument rightly points to this lacuna at the heart of Schuppe's position, which circles around will, declaration of will and the supposed binding power of contract founded on social utility without addressing the very core of the performative promise itself. How can Schuppe, Reinach asks, avoid the difficulties of justifying the unconditional and exclusive bond of contract where there is, in the concrete case, no reliance on its binding power and thus no damage, or, conversely, where there is reliance and damage done, but to third parties alien to the contract? 'In taking his stand on the fact that precisely the promisee relies on the promise, Schuppe presupposes what he wants to explain: the obligation of the promise.'[54]

It is easy to see that all these theories have survived under different guises up to the present day. 'Promise as reliance' is as much a staple of today's debate on the binding power of the promise as is its moral or conventional justification.[55] In these debates, Reinach's argument that all these approaches face comparable difficulties when asked to provide further reasons for the binding power of the promise beyond the nature of promising itself would still be valid and merits a rediscovery. The upshot of Reinach's argument is that *none* of the additional criteria proposed by any of the three theories or their present-day equivalents carries enough weight to prove their point. Rather, all of them end up begging the question or make use of circular reasoning.[56] It is exactly here where Wittgenstein's spade hits bedrock and is turned back. The promise is binding *because* it is a promise, or more precisely, because the performative social act of promising can only be thought of as binding. If it were otherwise, talk of promising would be meaningless. Thus, Reinach's phenomenology of promising as a performative social act provides the best possible *irreducible* interpretation of the emergence of the obligation from the promise under the condition that promising exists as a performative social practice at all. In fact,

[52] Reinach, 'Foundations' (n 8) 42–46, with reference to Wilhelm Schuppe, *Grundzüge der Ethik und Rechtsphilosophie* (Wilhelm Koebner 1881).
[53] Reinach, 'Foundations' (n 8) 42.
[54] ibid 44.
[55] For references, see supra nn 2 and 4.
[56] This argument has much in common with Moore's 'open question argument'. See GE Moore, *Principia Ethica* (Cambridge University Press 1903) 17.

understanding promising is all about *reduction* of unnecessary theoretical effort – even to the extent that Reinach disclaims proposing a theory at all:

> Strictly speaking we are not proposing any theory of promising. For we are only putting forth the simple thesis that promising as such produces claim and obligation. One can try, and we have in fact tried, to bring out the intelligibility of this thesis by analysis and clarification. To try to explain it would be just like trying to explain the proposition, 1 x 1 = 1. It is a fear of what is directly given (*Angst vor der Gegebenheit*), a strange reluctance or incapacity to look the ultimate data in the face and to recognize them as such which has driven unphenomenological philosophies, in this as in so many more fundamental problems, to untenable and ultimately to extravagant constructions.[57]

One final point remains to be made. As already discussed, 'promising' is a performative verb. Etymologically, 'promising' is derived from the old French '*promesse*' and ultimately from the Latin '*promittere*', meaning to send or to put forth, to let go forward or to say beforehand, which is related, inter alia, to mission, admit, commit or permit.[58] The Latin root of the English verb 'promise' already conveys some of the meaning of actively putting forth or sending out something from the promisor in the direction of the promisee. What is not captured in the English etymology, however, is the specific performativity encapsulated in the original German verb: '*Versprechen*' is derived from '*sprechen*', that is, to speak, which literally states that the promise is something that the speaker does to the addressee with words.[59] A direct translation of '*versprechen*' into English is not possible; a close approximation would be something like 'forspeak' or 'forespeak'.[60] Much like the prefix '*ver-*' itself, the verb '*versprechen*' is ambivalent and can mean either 'to promise' or, in its reflexive form, 'to misspeak'. Used as a prefix before a verb root, '*ver-*' dialectically emphasises both its binding, communicating and, at the same time, misleading or confusing aspects. As to the further etymology, '*sprechen*' is not only directly related to the English 'to speak' but also to many ancient Indo-European verbs indicating or imitating sound.[61] This etymology characterises '*versprechen*' as the prototype of a performative verb referring to the activity of speaking to another person with the consequence of bringing future consequences into being by the mere utterance of words.

[57] Reinach, 'Foundations' (n 8) 46.

[58] See headword 'promise', in *Wiktionary: The Free Dictionary* (April 2024); URL: https://en.wiktionary.org/wiki/promise.

[59] Reinach, 'Grundlagen' (n 8) 147–189 and passim.

[60] See headword 'forspeak' (Scottish archaic for 'bewitch'), in *Collins Dictionary* (April 2024); URL: www.collinsdictionary.com/de/worterbuch/englisch/forspeak; headword 'forspeak', in *Wiktionary: The Free Dictionary* (April 2024); URL: https://en.wiktionary.org/wiki/forspeak.

[61] See headword 'Versprechung', in *Digitales Wörterbuch der deutschen Sprache* (April 2024); URL: www.dwds.de/wb/etymwb/Versprechung.

Indeed, more insight might be gleaned from the study of etymology here, even if one does not believe in linguistic universals.[62] In what follows, I argue that the original German etymology of 'promising' (*versprechen*) as opposed to 'owning' (*gehören*) may teach today's readers of Reinach – regardless of their language – something important about the roots of the doctrinal divides between promising and owning, obligation and property, as well as relative and absolute rights. As I argue in the subsequent part, '*versprechen*' and '*gehören*' have correlative performative functions in Reinach's private law theory that are expressed in their etymologies. While '*versprechen*' is the basis of promise, obligation and relative right, '*gehören*' is the source of owning, property and absolute rights. Moreover, both '*versprechen*' and '*gehören*' refer to the spoken language as the core of their respective performative functions in strikingly complementary ways. Whereas '*versprechen*' is a derivative of the German equivalent of 'speaking', '*gehören*' expresses a similar relation to the equivalent of 'hearing' (*hören*).[63] Just like 'speaking' and 'hearing', the conceptual pairs promise and ownership, obligation and property, and relative and absolute right all share the same performative oppositional structure and act as social correlatives in Reinach's theory: hearing means not speaking; however, there is no hearing without speaking and no speaking without hearing. Reinach must have been aware of this striking etymological correlation. Indeed, no strong reading of Reinach's phenomenology of performative legal language will be able to avoid noticing its significance as a phenomenologically meaningful a priori of the German legal language – thus leading the comparative theorist to search for homologous or, perhaps even more interestingly, for characteristically different linguistic and etymological relations in other languages which might reveal deeper insights about the basic structures of legal relations.

1.4 OWNING AND HEARING (*GE-HÖREN*)

As just argued, the second performative verb that defines the foundations of private law for Reinach is '*gehören*', a derivative of the German '*hören*', which literally means 'to hear'. Translated as 'owning' or 'belonging', this verb provides the performative basis of Reinach's theory of property. Much like '*ver-sprechen*', '*ge-hören*' is constructed through an extension of the root verb '*hören*' with the prefix '*ge*', indicating direction or consequence. Moreover, and even more importantly, the root '*hören*' also appears in German words explicitly linked to performative social acts involving subordination, such as '*hörig*' (subordinate, subservient), '*Hörigkeit*'

[62] This horizon of inquiry cannot be pursued further here. See generally Cliff Goddard, 'The Search for the Shared Semantic Core of All Languages', in Cliff Goddard and Anna Wierzbicka (eds), *Meaning and Universal Grammar. Theory and Empirical Findings* vol 1 (John Benjamins 2002).

[63] Reinach, 'Grundlagen' (n 8) 193–204 and passim.

(subordination, subservience) or '*Höriger*' (serf).[64] Again, these phenomenologically significant semantic relations have no equivalent in the English translations of '*gehören*' as 'owning', 'ownership' or 'property'. The closest approximation of what Reinach does with these performative verbs – picturing the subordinate object of property as 'hearing' and 'obeying' the command of the owner – is probably 'to belong'.[65] Yet, 'belonging' also misses the specific semantic juxtaposition of 'speaking' in '*versprechen*' and 'hearing' in '*gehören*' as referring to two opposite, yet mutually correlative performance functions of spoken language. It should be added that there is a specific socially performative side not only to speaking but also to hearing. Not unlike speaking, hearing necessarily expresses itself through an other-directed social act of attentiveness in the direction of the speaker. There is, thus, good reason to look for a specific linguistic performativity not only in the law of obligations but also in property law, and to imagine it as a narrative of submission to the owner's power – submission of both the object owned and other persons bound to respect the owner's rights.[66]

Read along those lines, what Reinach has to say about the fundamentals of absolute rights, rights over things, the indivisibility of property, as well as the distinction between legal right and legal power is on par with his theory of promising. First of all, Reinach establishes a sharp distinction between absolute rights and rights over things. Though this distinction may come as somewhat of a surprise to modern property theorists, it not only mirrors classical Roman law but also highlights a fundamental semantic distinction when thinking about the structure of rights. A right over a thing (*dingliches Recht*) is a right that establishes an immediate legal relationship between a person and a thing. By contrast, in the usual definition, the absoluteness of a right expresses neither its direct reference to an object nor the scope of its protection, but rather the universality of the claim rights attached to it.[67] In contrast to relative rights, absolute rights are usually described as giving rise to rights of action vis-à-vis *any* third party.[68] In modern property thinking, the absoluteness and the *in rem* character of a right are often confused because both categories coincide – property rights are, incidentally, both the most important category of

[64] See headword 'hörig', in *Digitales Wörterbuch der deutschen Sprache* (April 2024); URL: www.dwds.de/wb/etymwb/hörig.

[65] See headword 'belonging', in *Wiktionary: The Free Dictionary* (April 2024); URL: https://en.wiktionary.org/wiki/belonging.

[66] This argument has much in common with Carol Rose's reading of property as a narrative of persuasion; see Carol M Rose, *Property and Persuasion. Essays on the History, Theory, and Rhetoric of Ownership* (Routledge 1995). See also Bart J Wilson, 'The Primacy of Property: Or, the Subordination of Property Rights' (2023) 19 J Inst Econ 251, 252: 'Property – like grooming, tool-making, and story-telling – is a custom socially taught and learned each generation anew.'

[67] See, e.g., §§ 823, 985, 1004 BGB.

[68] See, e.g., Jürgen F Baur and Rolf Stürner, *Sachenrecht* § 2 n 2 (18th edn, CH Beck 2009) 618. On the distinction between absolute rights and rights over things, see Marietta Auer, *Der privatrechtliche Diskurs der Moderne* (Mohr Siebeck 2014) 94–100.

rights over things as well as universally protected absolute rights.[69] Reinach, however, not only teaches us to keep both categories strictly separate even where they coincide but also rejects outright the usual definition of absolute rights and offers a much more radical view of absoluteness:

> The absoluteness of rights and obligations means the *absence* of every relation to a partner (*jeglicher Gegnerschaft*), and not its *universality*, that is, not the fact that the so-called absolute rights and obligations exist over against *all* persons in contrast to the obligatory rights and obligations, which are tied to a *single* person. [. . .] Even if this were so, it would not mean that absolute rights *are* nothing but universal rights against all persons, but only that they have such rights *as a consequence*. The very relationship which is here in question presupposes that there are absolute rights, that is, rights without any partner at all.[70]

This is a masterful piece of conceptual clarification by way of an almost Kantian transcendental proof of necessary conditions of the existence of absolute rights. If one assumes that there are absolute rights, they cannot exhaust themselves in mere relative rights. Thus, they cannot be identical with the sum of their own protection through relative rights, nor is there any other way of reducing them to a relationship between persons. Since all relative rights are, by definition, relationships between persons, it follows that absolute rights are only possible if they are conceptualised as the *absence* of any relationship with another person. Reinach thus has to transcend the conventional understanding of 'right' in order to salvage the social apriority of absolute rights. Put differently, he rejects any deduction of subcategories of rights from the mere conceptual umbrella of 'right' and thereby avoids a common formalist fallacy.[71] For Reinach, absolute rights have nothing in common with relative rights; their corona of claim rights directed against any potential violator is just a secondary layer of technical relativity detached from the essential anti-relativity of the absolute right:

> [T]he claim is by its nature something preliminary, something aiming at fulfillment, whereas the absolute right is something definitive, something resting in itself. The claim is in need of fulfillment; the absolute right over one's own action is not

[69] The background against which this coincidence takes place is the demise of the Roman system of actions, where the distinction between *actio in rem* and *actio in personam* was procedurally meaningful: While the former allowed the plaintiff immediate access to the disputed object, the latter referred the plaintiff to personal action against the defendant without being able to access the object itself. Hence the modern debate on the meaning of the dualism between *rights in rem* and *rights in personam*. See supra n 7 for further references.

[70] Reinach, 'Foundations' (n 8) 52.

[71] It is striking that Hohfeld, in his famous analysis of 'jural relations', follows a similar aim, but often comes to a conclusion opposite to that of Reinach, for example, on the 'bundle theory' and the status of *rights in rem*. See Wesley N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16; Hohfeld (n 7). On Reinach and Hohfeld, see Olivier Massin, 'The Ontology of Rights: Reconciling Reinach and Hohfeld', in this volume, Chapter 8.

> even capable of fulfillment at all. It can indeed be *exercised* by the holder of the right himself, but it does not call for such exercise in the sense in which a claim calls for fulfillment.[72]

Let us take this one step further. If a right is relative as opposed to absolute, someone has to *speak*, namely, by making a promise. But absolute rights are not about *speaking*; they are about *hearing*. Under the reading proposed here, the question why an absolute right cannot denote a relation to a person has a phenomenologically valid answer. Such a person would have to *hear absolutely* and *not speak*. But persons are not in the world only to hear. Only things, the mute servants of civilisation, allow for a phenomenology of social acts wherein they figure as mere passive objects. In the same vein, Reinach conceptualises rights over things (*Sachenrechte*) as '[e]verything one can "deal" with, everything "usable" in the broadest sense of the word [. . .]: apples, houses, oxygen, but also a unit of electricity or warmth'.[73] According to Reinach, they *immediately* relate to things in that they 'present themselves as a *dealing* (*Verfahren*) with things'.[74] The *immediate* relation to the object embodied in the right equals the social practice of absolute domination. Seen this way, rights over things also qualify as 'rights that refer to one's own action'[75] – namely, to the absolute power the owner wields over the object, which, in turn, is literally bound to 'hear' and obey his commands and dealings. In fact, Reinach explicitly says so with respect to property as the most important and most powerful subclass of rights over things: 'It lies in the essence of the owning that the owner has the right to deal in any way he likes with the thing which belongs to him.'[76]

Note that this does not imply that the positive law cannot regulate the property relationship in manifold ways which indeed curtail the freedom of the owner to deal with his property at will. Again, it would be a mistake to confuse absoluteness with limitlessness. What Reinach is proposing is only that an a priori – that is, argumentatively irreducible, basal – understanding of property requires reading it as the *social act* of *owning*, understood as the *immediate absolute relation of power between the owner and the object owned*. Specifically, this means that property is (1) not a right, but a *relation* between the owner and the object; (2) an *act*, which consists in the perpetual realisation of absolute domination of the owner over the object; (3) a *social act*, defined by its other-directness toward other persons beside the owner; (4) a *performative act* in the specific linguistic sense that the owner's absolute domination requires the object's absolute submission and thus implies an etymological performativity associated with 'hearing' or a similar performative verb. It should be

[72] Reinach, 'Foundations' (n 8) 58.
[73] ibid 53.
[74] ibid.
[75] ibid 66.
[76] ibid 55.

noted that because of (4), the other-directedness of the property relation (3) does *not* require the *actual* presence of other persons beside the owner as long as property exists as a *social* relation at all, that is, as a relation inseparable from the apriority of human society and its performative practices. Thus, even Robinson Crusoe, alone on his island, can be an owner as long as his being on the island alone is conceptualised against the background of the civilisation he has left behind. In other words, property is a basal legal relationship as soon as there is a civilisation able to express an intersubjective mine and thine, even where there is no law to govern it:

> The relation between person and thing which is called owning or property is an ultimate, irreducible relation which cannot be further resolved into elements. It can come to being even where there is no positive law. When Robinson Crusoe produces for himself all kinds of things on his island, these things belong to him.[77]

From all of this, it follows that the 'bundle theory' cannot provide a basal explanation of property because it mistakes the auxiliary claim rights stemming from the basal social relation between the owner and the object – that is, the absolute right – for this basal relation itself.[78] In Reinach's reading, understanding the social function of property means looking beyond the legal construction of the owner's protection to the performative phenomenology embodied in the property relation as such.[79] As a corollary, this property relation is indivisible – a point which Reinach argues at great length using the example of restricted rights to things.[80] Under the German Civil Code, restricted rights to things such as liens can arguably be construed as partitions of the comprehensive property right with the consequence that the lienholder acquires a limited absolute right, while the diminished remainder of the property right stays with the owner.[81] Reinach makes it clear that this reading is fallacious and that such partitions have no effect on the integrity of the residual property relation:

> We of course reject the usual formulation that property is the *sum* or the *unity* of all rights over the thing. [. . .] If property were a sum or unity of rights, it would be

[77] ibid 56.

[78] On the 'bundle theory', see supra nn 5–6 and accompanying text.

[79] This insight might be of particular interest to property theorists whose focus is shifting away from the protection of the individual owner in the direction of the social function of property regimes. For a recent statement of this position, see Anna di Robilant, *The Making of Modern Property. Reinventing Roman Law in Europe and Its Peripheries, 1789–1950* (Cambridge University Press 2023) 322–326.

[80] Reinach, 'Foundations' (n 8) 58–66. He formulates two further a priori laws for liens that are only partially consistent with the German Civil Code; ibid 62–63: (1) the lien is an auxiliary right, that is, if the claim is extinguished, it is not possible for the lien to stay in existence, (2) a lien on one's own property is impossible.

[81] On this debate ('*Eigentumssplittertheorie*' versus '*Vervielfältigungstheorie*'), see Volker Jänich, *Geistiges Eigentum – Eine Komplementärerscheinung zum Sacheigentum?* (Mohr Siebeck 2002) 241; Auer (n 68) 97.

> reduced by the alienation of one of those rights, and it would be eliminated by the alienation of the totality of all rights, for a sum necessarily disappears with the disappearance of all of its parts. [. . .] We have definitely to hold fast to the thesis that property is itself no right over a thing but rather a *relation* (*Verhältnis*) to the thing, a relation in which all rights over it are grounded. This relation *remains completely intact even if all those rights have been granted to other persons*. [. . .] One sometimes speaks of divided property. Now nothing is clearer than that *property* itself, the relation of belonging, cannot be divided, just as little as the relation of identity or of similarity. Only if one lets property *consist in* the rights over the thing – in reality these rights are *grounded in* property – can one want to divide it up by dividing up the rights. The rights grounded in owning can of course be divided among ever so many persons; it is also possible to resolve them into ever so many rights by breaking up their content. But it is evident that a division of the *owning itself* is impossible.[82]

One further step remains to be taken. If, as Reinach suggests, it is more apt to describe property and other absolute rights not as rights but as performative social powers of the rightsholder over himself and the objects within his dominion, what is the relationship between rights, powers and possible further subclasses of jural relations?[83] Besides relative rights and absolute powers, Reinach describes yet another class of legal powers denoting the potential of the power holder to effect immediate consequences in the legal sphere. Such legal powers or *abilities* – the terminology is not entirely unequivocal – are distinct from both classes of rights in that their holder can bring about immediate legal effects by transferring, eliminating or modifying both absolute and relative rights:

> As we know, rights can refer to one's own action (these are absolute rights) as well as to the action of another (these are relative rights, or claims). We distinguish as sharply as possible from both of them a legal power or capacity (*Können*), which only refers to one's own action. A power reveals itself in the fact that the action to which it refers, produces an immediate effect in the world of right (*rechtliche Wirkung*), for example, produces, modifies, or eliminates claims and obligations. By contrast, it is *not* intrinsic to a right, not even to an absolute one referring to one's own action, to have immediate effects in the world of rights; one has only to consider all the absolute rights over things. It is only through the concept of a legal ability that we are able to understand the origin of absolute rights and obligations, and their passing from one person to another.[84]

In other words, Reinach seems to ascribe a priori power to the German model of transferring rights through the construction of a separate, abstract act of disposition detached from the underlying relation of obligation (non-causa principle;

[82] Reinach, 'Foundations' (n 8) 56.
[83] On the relationship between Reinach and Hohfeld, see supra n 71.
[84] Reinach, 'Foundations' (n 8) 66.

Trennungsprinzip; *Abstraktionsprinzip*).[85] Under German law, a property transaction demands not one but two legal relationships. The obligatory contract – say, a sales contract – does not in itself transfer the property right in the object sold. For the transfer of property, the owner has to convey the property right to the buyer in a separate, abstract transaction detached from the sales contract.[86] This is usually done implicitly by handing over the object sold while concluding the obligatory contract. Yet, although both agreements often coincide in practice, they are legally independent from one another. The only content of the property transaction is the abstract transferal of the property right, which is made explicit through the transfer of possession of the object sold. But why is it useful to distinguish between the obligatory contract, from which the claim to the object arises, and the property transaction itself? Reinach's response states that this separation emphasises the necessary logical step between the promise to transfer property and its actual effectuation. The in-between step is the *ability* of the owner to transfer the right he has promised: 'The presence of a specific power (*Können*) to transfer, or a *right* to transfer which implies this ability, is required.'[87] Conversely (and leaving aside the positive rules of good faith purchase[88]), the transferor can only transfer a right he actually has. Thus, it should come as no surprise that the brocard '*nemo dat*' constitutes yet another facet of Reinach's a priori: 'The principle, *nemo plus iuris transferre potest quam ipse habet*, expresses of course an apriori truth.'[89]

Again, note that this a priori recognition of the abstraction principle of German property law does not commit Reinach to the uniform construction of both obligatory contracts and abstract transactions under the German Civil Code via matching declarations of intention. On the contrary, as already discussed above, Reinach argues that this constructive principle is conceptually mistaken because it obscures the performativity of the incompatible social acts of promising and owning, including the independent performative forms of transferring, granting, revoking and waiving:

> We have already objected to the dogma of 'declarations of intention' through which relations of right are supposed to come about. Its untenability in every respect has become clear. It may be that promising, aiming as it does at a later action of the

[85] On the significance of these principles, see Yun-chien Chang, *Property Law. Comparative, Empirical, and Economic Analyses* (Cambridge University Press 2023) 104–105; Jürgen F Baur and Rolf Stürner § 5 n 42 (n 68) 56.

[86] §§ 873, 929 BGB; see also Chang (n 85) 104. This construction is also discussed by Reinach as an example of the constructive freedom of the positive law; see Reinach, 'Foundations' (n 8) 119.

[87] Reinach, 'Foundations' (n 8) 67.

[88] §§ 892 ff, 932 ff BGB; see Chang (n 85) 259–288.

[89] ibid 68. On the English equivalent *nemo dat* (*nemo dat quod non habet*), see, e.g., Skelwith (Leisure) Ltd v Armstrong [2015] EWHC 2830 (Ch); [2016] Ch 345 per Newey J, at 54; see also Chang (n 85) 262–263; Andrew S Gold and Henry E Smith, 'Legal Concepts as a Deep Structure of the Law: Reinach's A Priori in Action', in this volume, Chapter 5.

> promisor and presupposing the intention to perform this action, could be confused with the expression of this intention. But there is no intention to perform a later action in the case of transferring and granting, of revoking and waiving. How should it be possible to speak here of a declaration of intention in the strict sense?[90]

Finally, there is yet another consequence that follows from Reinach's embrace of the abstraction principle between promise and power. Reinach insists that the same analytical divide involving the obligatory contract and the abstract disposition over a right also applies with regard to the construction of agency. Again, the German Civil Code provides the blueprint for this two-layered construction by distinguishing between the 'internal' and 'external' relationships created by agency: the mandate contract between the principal and the agent, on the one hand, and the actual exercise of the agent's power, on the other.[91] In line with this differentiation, Reinach argues that the distinction between mandate and representative power must be yet another element belonging to the a priori of private law. Again, while both relations may coincide, they are nevertheless independent from one another, resulting in, for example, the possibility of an *ultra vires* use of the agent's power. The resulting parallel between property and agency is yet another highlight in the garland of Reinach's structural 'must-haves' of private law:

> [T]he obligation to perform a social act with immediate effects in the world of right does not necessarily include any legal power directed to the same content. And: the obligation not to perform a social act with immediate effects in the world of right does not eliminate or restrict a legal power directed to the same content.[92]

1.5 ENACTING AND GIVING VOICE (*BE-STIMMEN*)

In all this, one question has yet to be answered. If Reinach is right about the apriority of principles like the irrelevance of the acceptance for the binding power of a promise, the categorical difference between absolute and relative rights, the indivisibility of property or the precedence of *nemo dat* over the rules of bona fide acquisition, how does he address the challenge of the existing positive law? In Reinach's own words, 'how can one put forward apriori laws which claim absolute validity, when any positive law can stand in the most flagrant contradiction to them?'[93] And, to push this even further, how can Reinach's legal a priori become

[90] Reinach, 'Foundations' (n 8) 69; see also supra Section 1.3 at n 37 and accompanying text.
[91] §§ 164 ff BGB. On the separation between the internal and external agency relation, see, e.g., Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts* vol 2, § 501 (4th edn, Springer 1992) 839–845.
[92] Reinach, 'Foundations' (n 8) 88–89; emphasis omitted. Reinach treats agency in § 7 of his treatise, directly following his treatment of property.
[93] ibid 103.

relevant at all in a world of widely dominant positive law which, for apparently good reasons, has long ago accepted legal positivism as the leading legal theory?

In answering his own question, Reinach is in no way reluctant to sacrifice his edifice of a priori building blocks of private law to the supervening normative power of the legislator. He emphasises that the legislator may not only be free but indeed often obliged to depart from the a priori foundations of law if social expediency demands their reversal. In such cases, it is not only moral value but virtually 'everything that can take on the character of value' that provides a good reason to overrule the legal a priori through legislative *enactment*:

> It is the function of the enactment either to destroy the relations of right which arise according to apriori laws, or to generate out of its own power relations of right which are apriori excluded. The enacting person will very often have reason to exercise this fullness of legal power. [...] Not only moral value in the strict sense, but also the useful, the pleasant, the practical and the like, that is, everything which can take on the character of value, can also take on, in virtue of its value, the character of being such that it ought to be. This objective ought-to-be which lacks existence acquires it here through its enactment.'[94]

The question of how Reinach can accommodate both the idea of a legal a priori and the facility of the deviating fiat of the positive law in his theory thus has a clear answer. It points once more to Reinach's phenomenology of performative legal language. If the legislator is free to reverse at will the performative acts that constitute the a priori of legal meaning, this can only be accomplished through yet another performative social act, namely, through an enactment, which is derived from Reinach's third basic performative verb 'enacting'. And again, the original German etymology of Reinach's term '*bestimmen*'[95] adds even more phenomenological persuasion to the idea that Reinach is building his entire edifice of the legal a priori on performative verbs that explicitly refer to the human voice, speaking and hearing as basic features of social communication and thus the basis of sound (!) legal acts. For '*bestimmen*' is etymologically related not only to '*Stimme*' (voice) but also to a host of normative concepts indicating consistency, harmony or justification, such as '*stimmen*' (to tune, to be correct), '*Stimmung*' (mood, tune) or '*Stimmigkeit*' (consistency).[96] Moreover, '*be-stimmen*' offers yet another example of a performative verb composed of affixing a prefix to a root verb – a combination resulting in a striking ambivalence between designating or calling out the voiced object, on the one hand, and lending or giving voice to the named object, on the other. This amounts to a theory of positive law in which the legislator both designates the

[94] ibid 111–112.

[95] '*Bestimmungen*'; '*Bestimmungssätze*'; see Reinach, 'Grundlagen' (n 8) 238–251.

[96] See headwords 'bestimmen' and 'Stimme', in *Digitales Wörterbuch der deutschen Sprache* (April 2024); URL: www.dwds.de/wb/etymwb/bestimmen; www.dwds.de/wb/etymwb/Stimme.

desired legislative goal in the positive enactment and gives voice to it as a binding legal commandment.

Yet, despite the seemingly perfect tripartite correlation between 'promising', 'owning' and 'enacting', Reinach's treatment of 'enacting' also shows the limits of the explanatory power of his phenomenology of legal language. Reinach does not simply identify 'enacting' with 'commanding', nor does he perceive both concepts as on a par with each other regarding their performative power. While Reinach is quick to categorise 'enacting' as a social act, he takes pains to distinguish 'enacting' from 'commanding' by emphasising the de-personalised character of 'enacting', which, in his view, rather surprisingly does not qualify as an *other-directed* social act in the strict sense:

> There are neither commands nor enactments which unfold purely within the person; they always address themselves to others, and the need of being heard is intrinsic to them. But whereas commanding is at the same time necessarily an other-directed social act, the act of enacting is not. By its very nature every command presupposes a person or group of persons who are commanded, just as with the act of promising or of granting. But enacting does not have this necessary relation to another person, just as little as do acts like waiving or revoking. Although these acts are addressed to other persons in being performed, their substance (*Gehalt*) lacks any personal moment (*personales Moment*). Whereas I *always* promise to or command *a person*, I simply waive a claim or simply enact that something should be in a certain way.[97]

In other words, we are faced with a dilemma within Reinach's theory. If all legal meaning is based on performative social acts, then the fabric of positive law cannot be an exception. Its substance must also be based on performative legal language, namely, on an enactment. And yet, this precisely means giving up on Reinach's claim that there is a legal a priori *beyond* the positive law. If the phenomenology of positive law shows the *same* performative substance as the legal a priori, then there is, ultimately, no way to distinguish the legal a priori from the positive law designed to replace it. Yet, Reinach shies away from this consequence by introducing even more complexity on the level of the positive law. One enactment, he argues, is not enough to constitute legal meaning. Indeed, thinking 'in terms of an arbitrator'[98] will lead the legal theorist to the result that no enactment can become the basis of normative commands without further normative conditions, which – while Reinach does not elaborate them in any detail – amount to a theory of the social foundation of the state as built on an edifice of performative acts *beyond* promising:

> The enactment has to be preceded by another social act, in particular an act which is addressed to the enacting person by those for whom the enactment is supposed to

[97] Reinach, 'Foundations' (n 8) 105.
[98] ibid 110.

> be efficacious. The power of producing through enactments legal effects has first to be conferred by these persons. Here too the act of promising proves to be insufficient.[99]

But doesn't this prove that legal positivism, which puts all the theoretical emphasis on the state and state-enacted positive law, was on the right track all along? Put differently, what remains of Reinach's a priori in a world wherein, even according to his own theory, the a priori laws of promising and owning are widely overruled by an edifice of legislative enactments? Doesn't this imply the superior explanatory power of, for instance, Hans Kelsen's *Pure Theory of Law*, which holds that only positive law is law and defines the legitimate scope of legal scholarship?[100] Yet, reading Reinach shows why this is not a sound conclusion. The primary merit of his theory is, again, not to add but to *take away* additional metaphysical effort from legal theory where none is needed, even if it comes at the cost of renouncing the possibility of a general theory of law. Reinach *relieves* contract theory from the interminable search for further justifications for the binding nature of contract. Likewise, he *relieves* property theory from the riddle of the dissolution of modern property into a mere bundle of relative rights. And, finally, he offers a theory of positive law that allows *combining* legal positivism with the fruitfulness of phenomenological inquiries into the performative nature of different legal languages and legal cultures.

1.6 CONCLUSION: AGAINST ONTOLOGISM

This chapter aimed to reconstruct Reinach's theory of performative legal language against the dual background of modern language philosophy and German private law. I argued that Reinach uses a triad of performative verbs – 'promising', 'owning' and 'enacting' – to explain the core institutions of private law, that is, contract and property, including the doctrinalisation of these institutions through positive law. I conclude that what Reinach has to offer today's legal theorists shows all the hallmarks of good philosophy. He poses questions until no further justification can be given, and he refrains from metaphysical speculation beyond that point. The strength of Reinach's theory results from its non-commitment to any of the following three systems of tenets (which does not exclude that it is theoretically compatible with all of them): (1) legal positivist claims about what the law *is*, (2) moral and natural law claims as to what the law *ought to be*, as well as (3) legal realist claims as to what the social reality of the law is or ought to be. In other words, Reinach avoids the Ought without essentialising the Is. This is what makes his theory modern, or, indeed, timeless.

[99] ibid.

[100] Hans Kelsen, *Pure Theory of Law* (M Knight trans, University of California Press 1967).

Is such a slim theoretical setup persuasive as a legal epistemology? Reinach's answer would be to refuse, once again, offering philosophical answers where none can be given. Perhaps the most important lesson to be gleaned from Reinach is that a theorist's metaphysics, even where it cannot be avoided, should not play an *indispensable* role in his theoretical framework when it cannot be questioned further. In other words, even if a metaphysical grounding of ontology and epistemology is ultimately unavoidable – which Reinach would probably concede – one should be ready to bracket it whenever necessary, lest one commit the fallacy of *ontologism*:

> Though we cannot doubt the freedom which an enactment has with respect to the laws of being, and though a *right* enactment often has to deviate from that which is, for the sake of that which ought to be, we nevertheless often find a certain *lack of freedom* on the part of enacting persons, a tendency to cling to that which is, even when it ought rather not to be, an inability or unwillingness to give being, in virtue of one's own efficacious enactment, to that what ought to be, and to replace with this that which prima facie exists. This phenomenon belongs to the sphere of what one is used to calling 'formalism' in the positive law. In order to distinguish it from various other phenomena which better deserve this name, we propose to speak of 'ontologism'.[101]

Reinach's phenomenology of performative legal language not only highlights the manifold ontological, linguistic and social facets of the foundations of private law, but it also provides, on many levels, a powerful antidote to all kinds of legal formalism and doctrinalism. Reinach's ontology is an ontology to end all ontologisms.

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[101] Reinach, 'Foundations' (n 8) 124.

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