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THE EPISTEMIC NOVELTY OF NORMS

abstract

The idea of the paper is to look at the way we learn about norms, as a contribution to an understanding of their nature. It is the idea of an a posteriori ontology of norms. For it is pointless to argue about the nature of norms without paying any attention to what we do when we learn something about them or when we act with them. In its turn, the epistemic account presented here is discussed in inferential terms: different cognitive sources and inferences determine different degrees of epistemic novelty that help distinguish kinds of norms and normative systems.

keywords

epistemic novelty, inference, Jørgensen's dilemma, normative systems

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Transformer tout en problème ou en loi, c'est vouloir *s'opposer à certains effets qui* nécessitent *surprise, capture, apparition, spontanéité* (Valéry, 1974, p. 337).

1. Norms and Knowledge

The idea of this paper is to look at the way we learn about norms, as a contribution to an understanding of their nature. It is the idea of an a posteriori ontology of norms. For it is rather pointless to argue about the nature of norms without paying any attention to what we do or experience when we learn something about them or when we act with them.

No doubt, we need a preliminary understanding of what we mean by *norm*. Otherwise it would be impossible to reflect on normative knowledge. So we might start from a definition of *norm* as the content of a prescriptive sentence.[1] This definition accounts for the symmetry between propositions and norms in the respect of sentences having content. Propositions are the content of descriptive sentences. Norms are the content of prescriptive sentences. But this is just a starting point and I hope that an analysis of the epistemic novelty of norms will throw some light on their ontological status.

So, what kind of knowledge is the knowledge that a norm is the case? What kind of knowledge obtains when a norm is known? What kind of epistemic novelty is involved in it?

I am using of course the notion of knowledge in a dynamic sense: I am not interested in epistemic states as such (S knows that *p*), but in epistemic acquisition (S comes to know, learns, is informed, that *p*). So, I'm wondering about the kind of epistemic acquisition we experience when we come to know that a norm is the case. I will focus mainly on legal norms, but some of the thoughts expressed here concern other norms too.

A relevant question is this: if norms *are not inferable*, every norm being known is novel and is known by a cognitive source other than inference (in many cases, by testimony). But no general agreement is reached in the literature on that point, namely that norms are not inferable. Now, what is the case if norms *are inferable*? If they are, does their novelty depend on the kind of inference they constitute the conclusion of?

1 Cf. the *hyletic* conception of norms (contrasted with their *expressive* conception) in Alchourrón & Bulygin (1981). See also, among others, Guastini (2011, pp. 63-65). Cf. Tuzet (2002; 2003, now Ch. 6 of Tuzet, 2010). I believe, but cannot show here, that both semantic and pragmatic dimensions of normative discourse must be taken into account. I must also say that here I won't treat the issue of the interpretation of sentences expressing norms.

2. Norms and Inference

The question is whether there are inferential relations between norms. If there aren't, every norm being know is novel, since it is not inferable from other norms. If there are, one can think that an inferable norm being known is not novel in the same sense as above, since it is inferable from other norms. However, can't we say that at least in a weak sense even an inferable norm being inferred is novel? Can't we say that a norm being inferred constitutes an epistemic novelty, an epistemic acquisition?

If the individual norm expressed by "Theodore must do *A*" is inferred from the general norm expressed by "Everyone living in Byzantium must do *A*" and from the fact that Theodore is living in Byzantium, isn't such an individual norm a form of novelty? In a sense it is a form of epistemic novelty, different from the novelty of a non-inferable norm coming to knowledge. The knowledge of an inferable norm being inferred and the knowledge of a non-inferable norm constitute two different forms of novelty.

Obviously, the whole question depends on whether there are inferential relations between norms. Jørgen Jørgensen (1938) faced the dilemma consisting, on the one hand, in our conception of inference as a relation between indicative sentences (either true or false) and, on the other, in our disposition to formulate inferences with imperative sentences (neither true nor false); he concluded that imperative sentences cannot be part of inferences, but indicative sentences describing their content can (Ross, 1941). Many logicians, after him, denied that norms can be part of inferences (Conte, 2001, pp. 641-644, 832-833; Lorini, 2003; Di Lucia, 2003).

Before going into a brief discussion of Jørgensen's dilemma, let me add that a norm, if inferable, is inferable from at least another norm, or from a norm and a fact. No norm is inferable from a sole fact. Then a logical problem arises. The problem of the heterogeneity of the logical values involved in the inference of a norm from another norm and a fact: if norms do not have truth-values, one of the premises (the factual sentence) has a truth-value but the other and the conclusion (normative sentences) have a different logical value. Anyway, this is a problem I won't deal with here.

3. Jørgensen's Dilemma as an Explanatory Problem

I consider Jørgensen's dilemma as solvable without distinguishing between norms and propositions on norms (von Wright, 1963), namely without the idea that the former cannot be directly inferred but the latter can. In fact, norms can be directly inferred both in case one claims that norms have truth-values (in substantive terms as Kalinowski, 1967, or in minimalist terms as Volpe, 1999) and in case one argues for a syntactic conception of logic making room for the inference between sentences that do not have truth-values (according to some *logic without truth* as the one in Alchourrón & Martino, 1990).

So, I do not address the question of the best solution to Jørgensen's dilemma. I take it as granted that it has a solution indeed: the solution of permitting the inference of norms. And why? Because, as I take it, the dilemma comes from an explanatory problem: how are we to explain the fact that we ordinarily make normative inferences? The answer denying the possibility of normative inferences is no answer at all to that problem. The more plausible solutions are two, as I said: (*a*) norms do have truth-values; (*b*) logical and inferential relations hold for normative sentences as well, since logic is not restricted to truth-values and normative sentences have other logical values. Which is the best solution I do not discuss here. But I claim that it is either the first or the second. Otherwise, the problem is removed rather than solved.[2]

2 Obviously those solutions do not rule out the possibility of additional inferences between propositions on norms.

4. Epistemic Novelty

Novelty has different connotations. There are *kinds* of novelty – such as ontological novelty, epistemic novelty, etc. Here I shall confine myself with the *epistemic* connotation of novelty. Furthermore, there are different *degrees* of novelty applying to each kind of novelty. In this sense, I shall distinguish *absolute* from *relative* novelty.
So, the relevant notions I will use are absolute epistemic novelty and relative epistemic novelty.
Now, what about *epistemic novelty* as such? In a very broad sense, it is the novelty of what comes to knowledge. In this sense, it is epistemically novel anything which comes to knowledge (in the different senses of knowing-of, knowing-how, knowing-that: a new perceptual cognition, a new ability, a new justified true belief). More strictly, if we consider epistemic novelty as novelty of justified true beliefs (knowing-that), we shall say that it has to do with belief acquisition.[3] A belief is acquired in the belief set of subject S, if S comes to believe it and in his belief set there is no belief having the same content.
So, the belief that *p* constitutes an epistemic novelty for subject S when: (i) S acquires in his belief set the belief that *p*; (ii) it is true that *p*; (iii) the belief of S that *p* is justified.[4]
What about epistemic novelty *of norms* now? As to norms, a norm *N* constitutes an epistemic novelty for S when: (i) S acquires in his belief set the belief that *N* is the case; (ii) it is true that *N* is the case; (iii) the belief of S that *N* is the case is justified.
If that is correct, knowledge of norms comes in propositional terms (it is a form of knowing-that) and in some cases it can be developed and modeled in inferential terms: as I will argue in the following, different inferences determine different degrees of epistemic novelty that help distinguish kinds of norms and normative systems.[5]

5. Degrees of Epistemic Novelty

As I remarked in the beginning, the novelty of a non-inferable norm being known and the novelty of an inferable norm being inferred seem to be different. The first is a stronger form of novelty. My intuition is that we must distinguish different degrees of novelty.
According to the *degrees of novelty*, we can make a distinction between *absolute* and *relative* novelty. Such a distinction was already (and critically) stated in a paper of Walter Stace (1939), in the field of philosophy of science.

> If what is red turns green, then the green is something new. It is a novelty. But this kind of novelty is merely relative. The new elements of such a situation are new in that situation and relatively to that situation. [...] I would only call anything an absolute novelty if it were a phenomenon the like of which had never appeared before in the whole history of the universe (Stace, 1939, p. 300).[6]

So, in this sense, relative novelty is novelty relative to specific situations; absolute novelty is novelty independent of specific situations. Now, if a Stace-style distinction applies to degrees of epistemic novelty we get the following: the content which had never appeared before in the whole history of a knowing subject is absolutely novel, and the content whose novelty is just relative to situations is relatively novel.

3 Cf. Gärdenfors (1988) about belief acceptance. Notice that acceptance is stronger than acquisition, and can hardly be applied to novelties inferred by abduction, i.e. by hypothesis.
4 To avoid complications I do not discuss Gettier-style objections. I just claim that the conditions I sketch are necessary.
5 See Ch. 10 of Tuzet (2010) for more detailed arguments about the propositional nature of normative knowledge.
6 Stace confines his distinction to ontological novelty, but his critique (notably of the confusion between *new* and *unexpected*) loses its ground if the distinction is made between epistemic and ontological novelty.

I think that such a distinction is basically correct but too loose to account for more complex phenomena like the novelty of inferable norms. Is an inferable norm being inferred something which had never appeared before in the whole history of a knowing subject? In a sense it is, but in the respect of its being inferable it is a weaker form of novelty than a non-inferable norm, which, being known, really appears for the first time in the history of a knowing subject and had no other means to appear in it.

So, can we provide a more precise criterion to discriminate degrees of novelty? Let me try with a token/type criterion. I refer to the well-known distinction made by Charles S. Peirce.[7] It could be applied to epistemic novelty in the following way:[8] the unknown token of an unknown type constitutes an *absolute epistemic novelty*; the unknown token of a known type constitutes a *relative epistemic novelty*.

Consider some examples. Imagine the first European man in Australia seeing some animals. When he saw a kangaroo, he saw an unknown token of an unknown type, an *absolute* epistemic novelty. When he saw a bird, he saw an unknown token of a known type, a *relative* epistemic novelty.

Consider some normative examples now. Imagine a subject, a young boy for instance, who does not know what norms are the case in a library. When he comes to know that in library L_1 using the mobile phone is not allowed, such knowledge constitutes for him an *absolute* epistemic novelty. It is the knowledge of an unknown token of an unknown type. Then suppose he comes to know that also in library L_2 using the mobile is not allowed: that knowledge constitutes a *relative* epistemic novelty. It is the knowledge of an unknown token of an already known type.

But norms, if inferable, have more complex relations than token/type relations. Our problem is whether norms are inferable and what degree of novelty has a norm being inferred.

Could we simply say that non-inferable novelties are absolute and inferable novelties are relative? Do we really need a more determined connotation? Let me try with an inferable/non-inferable criterion. Suppose that Emperor Leo enacts a general norm saying that "Everyone living in Byzantium must do *A*". Suppose also that the norm is not inferable from other norms. When subject S comes to know that general norm, such knowledge constitutes an absolute epistemic novelty. Subject S *did not have any other means* to know it apart from knowing (by hearing or reading) what Emperor Leo enacted.[9]

Now take the individual norm "Theodore must do *A*". Subject S, provided he has the relevant inferential capacities, can infer that norm from the knowledge of the general norm enacted by Emperor Leo and the knowledge of the fact that Theodore lives in Byzantium. When subject S so infers, such an inferential knowledge constitutes a relative epistemic novelty. Subject S *did have other means* to know it in addition to hearing or reading some statement of the individual norm: namely, his inferential capacities allowed him to infer that norm from the general one.

To take a real example, did you know that according to the 1381 statutes of the butchers of Paris the apprentices of the guild were forbidden to marry a woman who had been, or still was, public?[10] I guess you didn't know. But now if I tell you that François was an apprentice of that

7 Note that Peirce makes a further distinction, between *token* and *replica*: the first has a singularity that the second has not; so, two individual norms inferred by deduction from the same general norm are two tokens of the general norm but are not two replicas, while two instances of the letter "A" are two replicas. Cf. e.g. CP 2.246, 2.253, 4.537, 8.334.

8 On cognitive and normative types cf. Passerini Glazel (2003).

9 Note I use *enactment* (instead of *statement* and similar words) to mark the performative and authoritative dimension of law-making (Amselek, 1990). And of course knowing the law is different from making it.

10 It is reported in Dufour (1870, p. 214). Similarly for barbers and drapers.

guild you can easily infer that he was not permitted to marry a public woman.
So, the criterion – let's call it *C* – could be the following: given that a non-inferable norm can be known only by hearing or reading its enactment or about it, and that an inferable norm can be known by other means (notably by performing the relevant inference), the knowledge of a non-inferable norm constitutes an *absolute epistemic novelty*, while the knowledge of an inferable norm constitutes a *relative epistemic novelty*. Thus, an individual norm deduced from a general one is novel only in the relative sense.
However, shouldn't further distinctions be made according to the kind of inference? Is it not the case that norms being known are absolutely novel in case of ampliative inferences and relatively novel in case of non-ampliative inferences?
The problem is that criterion *C* rules out the difference between ampliative and non-ampliative inferences. If any inferred norm is a relative novelty, both ampliative and non-ampliative inferences draw relative novelties. And this is a serious drawback of criterion *C*.
Taking deductions as non-ampliative inferences (something which is not beyond dispute), we should consider non-deductive inferences as ampliative.
Abduction and induction are both ampliative inferences. They differ in their inferential function: the first can be conceived of as hypothesis generation; the second as generalization.[11]
Take the *abduction* of norms. Since abduction is an ampliative inference, it is the inference of an absolute novelty: from an individual, derived norm, the general norm from which it is supposed to derive is inferred by abduction. Take our subject S. Suppose he comes to know that "Theodore must do *A*" and notices that such a commitment arose when Theodore came in Byzantium for living there. Subject S can infer by abduction (i.e. by hypothesis) that a general norm is the case: the one expressed by "Everyone living in Byzantium must do *A*".[12]
Similarly for *induction*. The induction of norms can provide absolute novelties: generalizing from individual or particular norms, a general norm or normative principle can be inferred. Take again subject S. Suppose he comes to know that "Theodore must do *A*", "Anastasia must do *A*", "The son of Theodore must do *A*" etc., and observes that all such people live in Byzantium: he can infer by induction the general norm "Everyone living in Byzantium must do *A*".[13]
So, while the epistemic novelty of *non-inferable* norms is always *absolute*, the epistemic novelty of *inferable* norms is *absolute* in case of abduction and induction and *relative* in case of deduction.

6. Epistemic Novelty and Normative Systems

The distinction I have been drawing can be seen as a distinction between different normative systems.[14] Everyone knows about Hans Kelsen distinguishing between *static* and *dynamic* normative systems (and for space reasons I shall be brief about it). The distinction is explicitly stated in his work of 1945, *General Theory of Law and State*, and in the second edition of his *Pure Theory of Law* (*Reine Rechtslehre*), published in 1960. But it is already present in the first edition of the *Pure Theory of Law*, published in 1934. Systems of norms, Kelsen claims, can be distinguished into two different types according to their basic norm, that is, according to

11 On the ampliative character of abduction and induction cf. Flach & Kakas (2000a). Their distinction is an open issue. Flach & Kakas (2000b) conceive of abduction as hypothesis generation, and of induction as hypothesis evaluation (rather than generalization). For a functional characterization of inference see Levi (1997).
12 There can be another abduction: the abduction of the fact that Theodore lives in Byzantium, from the knowledge of the individual norm "Theodore must do *A*" and the knowledge of the general norm "Everyone living in Byzantium must do *A*". But of course it is not the abduction of a norm: it is the abduction of a fact.
13 In order to articulate abduction and induction, we could say that induction is not blind generalization but *hypothesis generalization*: before generalizing from cases, subject S must form the hypothesis that everyone living in Byzantium must do *A*.
14 Cf. Kelsen (1934), Alchourrón & Bulygin (1971), Gianformaggio (1991), Navarro & Rodríguez (2014).

the nature of their highest principle of validity. To the different types of normative systems, different types of norms correspond. The norms of the first type – of a *static* system – depend on the basic norm of the system by virtue of their content.

> Norms of the first type are *valid* by virtue of their substance; that is, the human behaviour specified be these norms is to be regarded as obligatory because the content of the norms has a directly evident quality that confers validity on it. And the content of these norms is qualified in this way because the norms can be traced back to a basic norm under whose content the content of the norms forming the system is subsumed, as the particular under the general. Norms of this type are the norms of morality (Kelsen, 1934, p. 55).

The norms of the second type – of a *dynamic* system – do not depend on the basic norm of the system by virtue of their content.

> Norms of the second type of system, norms of the law, are not valid by virtue of their content. Any content whatever can be law; there is no human behaviour that would be excluded simply by virtue of its substance from becoming the content of a legal norm. [...] A norm is valid *qua* legal norm only because it was arrived at in a certain way – created according to a certain rule, issued or set according to a specific method (Kelsen, 1934, pp. 55-56).

Kelsen adds that the norms of natural law and of morality are of the first type, since they can be *deduced* from the basic norm of their system:

> the norms of natural law, like those of morality, are deduced from a basic norm that by virtue of his content – as emanation of divine will, of nature, or of pure reason – is held to be directly evident. The basic norm of a positive legal system, however, is simply the basic rule according to which the norms of the legal system are created [...]. Particular norms of the legal system cannot be logically deduced from this basic norm (Kelsen, 1934, p. 56).

In our terms (making abstraction from more complex accounts of normative systems), the norms of a static normative system are inferable; the norms of a dynamic one are not inferable. What about the epistemic novelty of the norms so determined?
In a dynamic normative system, every norm is (not only from an ontological, but also from an epistemic point of view) absolutely novel. That is, the epistemic novelty of every norm is an absolute epistemic novelty.
In a static normative system, norms are inferable, that is, being inferred they are relatively novel, or, if we admit the relevance of the difference between ampliative and non-ampliative inferences, relatively novel when the inference is deductive and absolutely novel when it is abductive or inductive.

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