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NORM: WHAT IS IT? ONTOLOGICAL AND PRAGMATICAL PERSPECTIVES

Edited by Paolo Di Lucia and Lorenzo Passerini Glazel

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Paolo Di Lucia, Lorenzo Passerini Glazel
Two Semiotic Shifts in the Philosophy of Norms: Meaning Shift and Referent Shift

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TWO SEMIOTIC SHIFTS IN THE PHILOSOPHY OF NORMS: MEANING SHIFT AND REFERENT SHIFT*

abstract

In this introductory paper the guest editors (Paolo Di Lucia and Lorenzo Passerini Glazel) of the special issue "Norm: What Is It? Ontological and Pragmatical Perspectives" maintain that the word norm *is subject to two kinds of semiotic shifts: shifts in the meaning and shifts in the referents. Philosophical research on norms and on the normative has, indeed, broadened its dominion of investigation in both directions. The phenomena of norms and normativity, intersecting different orders of phenomena, are investigated by different disciplines from different methodological perspectives.*

keywords

norm, normativity, ontology of norms, pragmatics, phenomenology of normativity

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Ὁ νόμος ἄρα βούλεται τοῦ ὄντος εἶναι ἐξεύρεσις.
So law tends to be discovery of reality.
(Plato, *Minos*, 315a).

1. What is a norm?

1.1. Ontological and pragmatical perspectives

The present special issue (vol. 13) of *Phenomenology and Mind*, "Norm: What Is It? Ontological and Pragmatical Perspectives", originates from the international conference "Qu'est-ce qu'une règle? Perspectives ontologiques et pragmatiques" held in Milan on October 13th and 14th, 2016 with the support of the Dipartimento di Scienze giuridiche "Cesare Beccaria" (Università di Milano), and of the Dipartimento di Giurisprudenza (Università di Milano-Bicocca).
The five speakers invited to the conference were: Amedeo Giovanni Conte (Accademia Nazionale dei Lincei, Università di Pavia), Paul Amselek (Université de Panthéon-Assas – Paris II), Wojciech Żełaniec (Uniwersytet Gdański), Pedro M. S. Alves (Universidade de Lisboa), and Pascal Richard (Université de Toulon).
Beside the five contributions of the speakers invited to the conference, the present special issue collects eleven papers that were selected through a call for papers issued by the Journal on the same subject of the conference.

1.2. Normativity vs. normality

The philosophical inquiries on the concept of norm run often into difficulties connected to the different uses of the word *norm* (or *rule*),[1] both in ordinary and in technical languages. These different uses bring about a difficulty in determining the object of investigation itself.
As Norberto Bobbio recalls (1964/1994, p. 215-232), when we use the expression "It is a norm that..." (for instance, in sentences like: "In the United States, it is a norm that people shake hands when they are formally introduced") we may refer either to the fact that there is a norm (a rule) prescribing a certain behaviour, or to the mere observation of the constant repetition of a certain behaviour. According to Bobbio, in the former case, the *normativity* aspect of the ordinary meaning of the word *norm* is emphasized; in the latter, the *normality* aspect is emphasized.[2]

1 Although in some contexts the terms *rule* and *norm*, as well as their equivalents in many languages (*règle* and *norme*, *Regel* and *Norm*, *regola* and *norma*, *reguła* and *norma*, etc.) are not perfectly interchangeable, when emphasis is laid on normativity they are mainly used as synonyms. For the sake of simplicity, and to stress our focus on normativity, we prefer to use in the following the term *norm*.
2 According to Avrum Stroll, the "normality" meaning of the word *norm* is primary, the "normativity" meaning is secondary (Stroll, 1987, p. 7).

But even when research is expressly focused on the *normativity* aspect connected to the word *norm* (as distinct from the *normality* aspect), the object of investigation is hardly uniquely and univocally determined: despite the fact that we are accustomed to deal with a plurality of norms or rules in almost every aspect of our everyday life, the question "What is a norm?" is far from being futile, and the answer to it is far from being obvious.[3]

2. Semiotics of the word *norm*

Some of the difficulties encountered in answering this question, as well as in determining the very object of research on norms and on "the normative", may be explained in terms of the semiotic distinction between *meaning* (or *intension*) and *referent*: both ordinary and technical uses of the word *norm* are subject to two different kinds of semiotic shifts: shifts in the *meaning* (in the intension), and shifts in the *referents* of the word.

2.1. Meaning and referents

On the one hand, indeed, many inquiries on norms and on the normative have progressively laid aside the narrow (prototypical) *meaning* (or intension) of *norm* (and of *normative*) as the "prescription of an obligation" by investigating a wider range of different forms of normativity, both at the level of normative *content* (e.g. permissive norms, derogatory norms, constitutive rules, technical rules) and at the level of normative *force* (e.g. advices, recommendations, pleas).[4]
On the other hand, other inquiries on norms and on the normative have progressively laid aside the narrow identification of the *referents* of the word *norm* with normative *sentences* or normative *propositions* by considering a broader range of possible referents, such as normative utterances, normative acts, deontic states-of-affairs, mental objects or deontic noemata, normative facts, normative events, exemplary behaviours and concrete normative objects.

2.2. What is a norm? Splitting the question

As a consequence of the heterogeneity of these two kinds of semiotic shifts occurring in the use of the word *norm*, the question: "What is a norm?" can be split into two different questions:

(i) the question concerning the possible *meanings* (the intension) of the word *norm*, and particularly: "What *forms of normativity* exist, and what *kinds of norms* are consequently to be distinguished?"

(ii) the question concerning the possible *referents* of the word *norm*: "What *kinds of entities* can be norms?"

It is worth recalling (*a fortiori* on a journal devoted to phenomenology) that a precursor of these kinds of enlargements in the field of philosophical research on norms and on the normative was the German phenomenologist Herbert Spiegelberg in his work *Gesetz und Sittengesetz* (1935).
On the one hand, Spiegelberg anticipated the theories of constitutive normativity (and in particular that of *thetic* normativity) in his analysis of the *Gestaltungsnormen*, which he contrasts with the *Verhaltensnormen*.

3 Even the Finnish philosopher Georg Henrik von Wright, in his pioneering book on *Norm and Action* (1963) underlines the intrinsic difficulties implied in the philosophical challenge of constructing a general theory of norms and of the normative. (It is worth to recall that *General Theory of Norms* – in German *Allgemeine Theorie der Normen* – is the title of a famous posthumous book by Hans Kelsen).

4 In 1963 von Wright laid the basis of an enlargement of the research on norms and on the normative by soliciting to investigate such phenomena as *technical* rules and *constitutive* rules, which transcend the category of prescription (von Wright 1963, first chapter); nonetheless, in his book he confined his investigation to *prescriptive* norms. An analogous enlargement of the research concerning different forms of normative *content* and of normative *force*, was solicited by Norberto Bobbio (1964). In the second section of this special issue, Pedro M.S. Alves (2017) specifically distinguishes, in a phenomenological perspective, the *matter* and the *quality* of nomothetic acts.

On the other hand, he anticipated the investigation of the possible referents of the word *norm* through the determination of sixteen different *Bedeutungsmöglichkeiten* of *norm* (*Norm*), which he sorted into six categories.[5]

3. A plurality of perspectives in the investigation of norms and normative phenomena

Along with the semiotic shifts connected to the *meaning* and *referents* of the word *norm*, there is another fact that contributes to making the philosophy of norms and of the normative even more challenging.

Normative phenomena intersect different orders of phenomena, such as psychological and mental phenomena, linguistic phenomena, logical phenomena, biological phenomena, behavioral phenomena, social phenomena, ethical, legal and political phenomena, etc.

As a consequence, norms and normative phenomena are made objects of investigation (or at least their existence is presupposed) in a plurality of different sciences and disciplines.

Since every science and every discipline is based on its own constitutive theoretical and methodological assumptions, which make it possible for each of them to investigate a specific order of phenomena to the consequent detriment of others, the results achieved by different disciplines only partially overlap, and often tend to refract into a plurality of heterogeneous perspectives.

However, just as the analysis of the different sections of the visible spectrum contributes to our understanding of what light is, the different perspectives adopted in the investigation of norms and normative phenomena can contribute to our comprehensive understanding of what a norm is.

The papers collected in this special issue of *Phenomenology and Mind* reflect this plurality of perspectives.[6]

The issue is divided into five sections: the *first* section is devoted to the concepts of norm and to the referents of the word *norm*; the *second* section, to the phenomenology of the normative; the *third* section, to the existence of norms and to normative events; the *fourth* section, to the logical and epistemological dimensions of norms; the *fifth* and last section, to the relationships between norms, language and social practices.

3.1. Concepts of Norm, Referents of *Norm*

The semiotic shifts concerning the meaning and the referents of the word *norm* are well documented in the four papers collected in the first section ("Concepts of Norm, Referents of *Norm*") of the present special issue. In these four papers, the *ontological* and *pragmatical* perspectives intertwine, and the question "What is a norm?" is confronted by proposing both an analysis of the *concepts* of norm and an analysis of the *entities* which the word *norm* can refer to.

In *Norme: cinq référents*, Amedeo Giovanni Conte challenges the very question: "What is a norm?" by making explicit, and criticizing, one of its presuppositions: the presupposition that

5 The six categories in which Spiegelberg (1935) sorted the sixteen *Bedeutungsmöglichkeiten* of the word *norm* (*Norm*) are:
(i) *konkret-gegenständliche Normbedeutungen* (concrete-objectual meanings of norm);
(ii) *sachverhaltige Normbedeutungen* (factual meanings of norm);
(iii) *logische Normbedeutungen* (logical meanings of norm);
(iv) *sprachliche Normbedeutungen* (linguistic meanings of norm);
(v) erkenntnismässige Normbedeutungen (epistemic meanings of norm);
(vi) *produktive Normbedeutungen* (productive meanings of norm).
On Spiegelberg's philosophy of norms see Cacopardi (2013-2014) and Di Lucia (2003, pp. 43-68).

6 A recent collection of works also documenting this plurality of perspectives can be found in Lorini & Passerini Glazel (2012).

the word *norm* denotes *at least* one, and *only* one kind of entity. He shows, on the contrary, that there are (at least) five possible referents of the word *norm*: a deontic *sentence*, a deontic *proposition*, a deontic *utterance*, a deontic *state-of-affairs*, and a deontic *noema*. The existence of deontic *state-of-affairs* and deontic *noemata* as possible referents of the word *norm* contradicts the claim that *all* norms are *linguistic* entities (a thesis that Conte also challenges through the claim that it is impossible – it would be a sortal incorrectness – to predicate the violation, infringement, or transgression of a deontic sentence, of a deontic proposition, or of a deontic utterance).[7]

In *Comment je vois le monde du droit*, Paul Amselek adopts the methods of Husserl's phenomenology to construct a theory of rules and norms as mental tools. In the first part of the paper, Amselek, going beyond the limits which legal philosophy is often restricted to, moves from an analysis of the ontology of rules and of norms in general, and rejects the "logicism" of many conceptions of norms as linguistic or propositional entities: norms are mental tools (which cannot be reduced to propositions), and more precisely they are immaterial samples "giving the measure of what is possible". In his original analysis, he also reinterprets from a new perspective the distinction between *normative norms* (*practical* rules), seen as tools for acting, and *scientific laws* (*theoretical* rules), seen as tools for thinking. In the second part of the paper, Amselek investigates, in the light of J.L. Austin's theory of speech acts, the pragmatics of normative acts, making direct reference to the world of law: normative acts are thus analysed as *authoritative* acts on the one hand, and on the other hand as *mental* acts, which need be communicated through linguistic signs.

In *Les critères et l'ordinaire de la norme*, Pascal Richard moves from the circular definition: "law is what the law considers as law" (a definition useful for the practice of law, but useless for philosophical inquiry) to investigate, in a pragmatical perspective, how the criteria shared in the background of a form of life are the unavoidable place of an unfounded certainty. The norm as a "mental tool" transmitted by (but not reducible to) a speech act has "no foundation but its acceptance in a form of life". The practice of litigation shows that background shared criteria (and, only as a consequence, legal concepts) are always open to scepticism; at the same time, it is impossible to go beyond them. Drawing inspiration from Stanley Cavell and Hilary Putnam, Richard directly examines the paradoxes of scepticism, and criticizes the perspectives both of "regulism" and "regularism", while adopting an "embodied" pragmatical perspective that puts shared criteria, rather than concepts, at the very basis of normativity.

In *Constitutive and Regulative Rules: A Dispute and a Resolution*, Adriana Placani gives a contribution to the analysis of the concept of norm by investigating the phenomenon of *constitutive* rules, as opposed to *regulative* rules. Placani examines, in particular, Joseph Raz's challenge of the distinction between regulative and constitutive rules as formulated by John R. Searle, taking Raz's critique concerning the inadequate clarification of the criteria by which the differentiation can be made very seriously. According to Placani, a clearer criterion for this differentiation can be found in the pragmatical analysis of how agents make use of rules, and specifically how rules are capable of guiding practical reasoning.

7 A similar remark has been made by Jovan Brkić, who neatly distinguishes "linguistic expressions of normative discourse on the one hand from ontological entities called norms, imperatives, and judgments of value, on the other hand" (1970, p. 9).

3.2. Phenomenology of the Normative

The second section ("Phenomenology of the Normative") of the present special issue collects three papers investigating normative phenomena and norm-creating legal acts in a phenomenological perspective.

In *Vers une phénoménologie de la normativité. Une circonscription préliminaire du domaine*, Pedro M.S. Alves outlines a phenomenological theory of "normative consciousness", understood as the intentionality that originally creates norms through "nomothetic acts". He criticizes Husserl's distinction between *norms* and *judgments*, which he considers inapt to rightly account for the sense and content of "normative intentionality"; Alves specifically rejects, in the light of Hans Kelsen's theory of norms, the thesis according to which normative intentionality is founded upon objectifying acts. However, on the basis of the phenomenological distinction between *matter* and *quality* of intentional acts, Alves argues, in contrast with Kelsen, Felix Kaufmann and Carlos Cossio, that an ought-proposition (*Sollsatz*) cannot be a good rendering of the sense-content of norms. Alves thus proposes an original account of normative intentionality based on the novel concept of "ductive force". The ductive force of norms cannot be identified with simple coercion: a variety of ductive forces can be found even within the legal sphere, ranging from sheer coercion to advice and recommendation.

In *Eidetics of Law-Making Acts: Parts, Wholes and Degrees of Existence*, Francesca De Vecchi, drawing inspiration from the works of Adolf Reinach and Edith Stein, applies the phenomenological method of eidetics to the analysis of law-making acts *as wholes*. De Vecchi argues that the parts of law-making acts can be subject to varying degrees of constraint (necessary, possible or contingent parts), and investigates the hypothesis that the difference between *existence* and *validity* of law-making acts is to be found in the possible parts of law-making acts. She also argues, through the concept of "essential relationship of tendency", that these parts of law-making acts, in spite of being *possible*, are nonetheless constitutive of the essence of law-making acts.

In *Normative Experience: Deontic Noema and Deontic Noesis*, Lorenzo Passerini Glazel examines Conte's distinction of the five referents of the word *norm*, and focuses on the concept of deontic *noema*. Assuming a perspective complementary to the one assumed by Alves, Passerini Glazel investigates normative experience not as the intentionality that *creates* norms, but as the intentionality that *makes experience of* norms, and raises the question concerning how a deontic *noesis* of a deontic noema can be understood. Through the analysis, in terms of deontic noema, of some specific normative phenomena investigated by Hans Kelsen, Ota Weinberger, and Leon Petrażycki, Passerini Glazel examines different possible noeseis of a deontic noema: he makes a distinction between *theoretical* noeseis (either cognitive or hypothetical) on the one hand, and, on the other hand, genuine *deontic* noeseis, which are at the basis of specifically *normative Erlebnisse*; he then stresses the relevance of the concept of deontic noema on the hypothesis that no normative phenomenon would be possible without a consciousness capable of *normative Erlebnisse*.

3.3. Norms, Existence, and Normative Events

The third section ("Norms, Existence, and Normative Events") of the present special issue collects three papers investigating the problem of existence and validity of norms, and the concept of normative event.

In *On the Question of How Social Rules and Social Norms Exist*, Christian Bispinck-Funke investigates the mode of existence of norms. Arguing for a characterization of a norm as "a multi-dimensional phenomenon that encompasses mental and linguistic realizations as well as

socially organized bindingness", he develops an answer to the question of how social rules and norms exist by analysing different pragmatic roles played by mental representations of norms in social life (in deliberating, in expecting, in demanding, in requesting, in rewarding, in punishing, and in evaluating). Special attention is also given to the crucial question of the bindingness of norms, which Bispinck-Funke examines in the light of the works of the two philosophers and deontic logicians Georg Henrik von Wright and Ota Weinberger.

In *Norms, Norms, and Norms: Validity, Existence and Referents of the Term* Norm *in Alexy, Conte, and Guastini*, Alice Borghi and Guglielmo Feis challenge the well-known validity-as-existence thesis formulated by Hans Kelsen by putting it into relation with the possible referents of the word *norm* as admitted respectively in Amedeo Giovanni Conte's and Robert Alexy's theories. Borghi and Feis further analyse the philosophical presuppositions of Riccardo Guastini's rejection of the validity-as-existence thesis, and of the contrasting adoption of the existence-as-legal-membership thesis.

In *Normative Events*, Federico Faroldi introduces the novel concept of "normative event" and distinguishes "nomophoric" and "nomogonic" normative events. Although these two kinds of normative events are *normatively* heterogenous, they are *metaphysically* homogeneous, according to Faroldi: making use of the categories of analytical metaphysics, he maintains that both nomophoric and nomogonic events are to be understood as "abstract particulars".

3.4. Logical and Epistemological Dimensions of Norms

The fourth section ("Logical and Epistemological Dimensions of Norms") of the present special issue collects three papers investigating logical and epistemological problems connected to norms.

In *The Challenge of the K-Principle in Deontic Logic* (*and Well Beyond*), Wojciech Żełaniec investigates the meaning and the validity of the K-principle of deontic logic – the principle according to which if it is obligatory that if p, then q, then, if it is obligatory that p, then it is obligatory that q: $O(p \rightarrow q) \rightarrow (Op \rightarrow Oq)$. Żełaniec confronts this seemingly abstract problem with the explicit intent to test whether the principles of deontic logic are able to account for real-life deontic (moral or legal) discourse. The K-principle is, indeed, something of a challenge in this regard. Żełaniec argues that the standard Kripkean semantics in terms of possible worlds is not suitable for deontic logic, if deontic logic is to give an account of real-life deontic discourse.

In *Logical Semantics and Norms: A Kantian Perspective*, Sérgio Mascarenhas confronts the question of the possibility of applying a logic to norms, given that norms, according to a long-held perspective, are not capable of truth values. Moving from Kant's theory of practical judgment, he explicitly argues for the possibility of building a logical pluralistic semantics for norms, originally enriched by the introduction of three sets of bivalent values into the analysis of modalities ("problematic/unproblematic", "assertoric/non-assertoric", "apodictic/non-apodictic"), and by the association of logical form with a matter corresponding either to the domain of nature or to the domain of freedom.

In *The Epistemic Novelty of Norms*, Giovanni Tuzet raises the question: "What kind of knowledge is the knowledge that a norm is the case?". Assuming the definition of *norm* as "the content of a prescriptive sentence", he maintains that knowledge of norms is a propositional knowledge, i.e. a form of "knowing-that". Starting from considerations about the way we learn about norms, Tuzet introduces the notion of the "epistemic novelty of norms", and distinguishes

an *absolute* epistemic novelty (the epistemic novelty of a non-inferable norm) from a *relative* epistemic novelty (the epistemic novelty of an inferable norm). This distinction is then applied to interpret Kelsen's distinction between *static* and *dynamic* normative systems.

3.5. Norms, Language, and Social Practices

The fifth section ("Norms, Language, and Social Practices") of the present special issue collects three papers focusing on the intersubjective and social dimensions of norms, both in relation to language practices and to the possible practical conflicts between social and moral norms. In the perspective according to which linguistic practices as social practices contain implicit norms concerning how it is correct to use certain expressions, the first two papers join the long-lasting debate stemming from Ludwig Wittgenstein's reflections on language games and rule-following, and they both explore the possibility of a naturalistic account of questions about the origins of norms and conceptual normativity.

In *Expressing Rules*, Giacomo Turbanti starts from Wittgenstein's dilemma about rule-following and the metalanguage of rules, and briefly examines the different strategies advanced in literature to confront the dilemma (by Wilfrid Sellars, Richard Rorty, Robert Brandom, Donald Davidson, John McDowell). Regarding the problem of realism and objectivity, Turbanti, following Joseph Rouse, advocates a non-reductionist naturalistic approach, capable of integrating both the social and the biological dimensions of cognition; he draws inspiration from Michael Tomasello's view that human thinking is essentially cooperative. Distinguishing the selective pressure exerted by *natural evolution* and *cultural learning* (which can only be explained in the context of existing discursive practices) respectively, he opts for an expressivist strategy based on a pragmatic, rather than a semantic, metavocabulary for expressing rules.

In *Reconstructing Intersubjective Norms*, James Trafford challenges Richard Brandom's attempt to ground norms in intersubjective practices. In opposition to Brandom, Trafford argues that the forms of interaction implied in dialogue and in the institution of norms are to be investigated primarily as *sub-intentional* processes. In this sense, according to Trafford, norms are just "the regularities produced by adjustment and correcting mechanisms of feedback internal to interactions with each other" leading to the "reinforcing of stabilities in those interactions" and to "their recognition as being appropriate or inappropriate".

In *The Imperative of Reputation Between Social and Moral Norms*, Gian Paolo Terravecchia investigates the phenomenon of reputation and the possible conflict between the imperative to maintain or to improve one's reputation – regarded as a pre-moral social norm "blind to values and to moral good" – and the moral sanctioning of hypocritical efforts to improve one's reputation.

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SECTION

SECTION 1

CONCEPTS OF NORM, REFERENTS OF *NORM*

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NORME: CINQ RÉFÉRENTS*

abstract

La question: "Qu'est-ce qu'une norme?" est une fausse question, parce qu'elle présuppose l'unité, l'unicité, l'unitariété de la désignation du terme norme. *L'auteur montre, au contraire, que le terme norme désigne à la fois un énoncé déontique, une proposition déontique, une énonciation déontique, un état-de-choses déontique, un noème déontique. À travers le concept d'état-de-choses déontique, l'auteur réfute la thèse de l'universelle linguisticité des normes (la thèse selon laquelle les normes sont toutes soit des énoncés déontiques, soit des énonciations déontiques, soit des propositions déontiques).*

keywords

norme, énoncé déontique, proposition déontique, énonciation déontique, état-de-choses déontique, noème déontique

* Traduction par Christiane Golesi, Pascal Richard et Lorenzo Passerini Glazel.

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We are up against one of the great sources of philosophical bewilderment: we try to find a substance *for a* substantive. *A* substantive *makes us look for a* thing *that corresponds to it.*
(Ludwig Wittgenstein, 1958/1964, p. 5)

0. La pentade des référents du terme *norme*: *énoncé* déontique, *proposition* déontique, *énonciation* déontique, *état-de-choses* déontique, *noème* déontique

0.0. Un patient consulte un oculiste, pour des sensations de brûlures au niveau des yeux. L'oculiste l'ausculte et le rassure:

"Ce n'est qu'une manifestation psychosomatique passagère".

L'oculiste lui prescrit un comprimé par jour pendant sept jours et l'invite à revenir au bout d'une semaine.
Une semaine plus tard, le patient revient, mais ses troubles (et son inquiétude) demeurent. L'oculiste prend acte de la gravité du cas et pose un nouveau diagnostic ("Un trouble circulatoire") et prescrit, pour la semaine suivante, une série de sept injections.
Au bout de la deuxième semaine, le patient revient, toujours plus inquiet car ses troubles persistent. L'oculiste pose un troisième diagnostic:

"Phosphènes".

L'oculiste explique au patient – que le mot effraie – ce que sont les phosphènes: une perception anormale de points lumineux, d'étincelles, des apparitions de taches dans le champ visuel non provoquées par un agent extérieur. (*Phosphène*, dit l'oculiste vient du grec φῶς *phôs*, "lumière", et de φαίνομαι *phaínomai*, "apparaître": il s'agit donc d'apparitions lumineuses).[1] Il existe un remède, poursuit l'oculiste, mais il est très coûteux: ce sont des lunettes américaines, qui viennent de sortir; l'oculiste les lui prescrit, lui demande de les tester et de revenir la semaine suivante.
Au terme de la troisième semaine, le patient revient avec ses nouvelles lunettes et (pour la première fois) il est tout sourire.

1 J'ai trouvé les suivantes traductions de *phosphène*: en allemand: *Lichtempfindung*; en italien: *fosfene*; en anglais: *phosphene*. (Je rappelle qu'en italien *fosfene* a un homonyme: *fosfene*, qui est le nom d'un composé chimique. Le mot correspondant en allemand de ce deuxième substantif *fosfene* est *Phosphen*.)

> "Je constate, qu'avec ces lunettes américaines, les phosphènes ont disparu", dit l'oculiste.

Et le patient de répliquer:

> "Non, ils n'ont pas disparu; mais avec ces nouvelles lunettes je les vois mieux".

Le but de cet article est, justement, de faire en sorte que l'on voit mieux des phosphènes philosophiques; de montrer que les phosphènes philosophiques sont de simples phosphènes: des phosphènes illusoires.

0.1. Il existe, en philosophie, des questions auxquelles s'appliquent parfaitement ces mots du physicien allemand Heinrich Rudolf Hertz:
"Mais c'est évidemment la question (*Frage*) qui est erronée par rapport à la réponse (*Antwort*) qu'elle attend" (Hertz, 1894, p. 9).
Parmi ces fausses questions, en voici une:
"Qu'est- ce qu'une norme?"
C'est une *fausse question* car au moins l'une de ses présuppositions (*presuppositions*, *Präsuppositionen*, *presupposizioni*) est *fausse*: la présupposition que le terme *norme* désigne une seule et unique entité.
Cette présupposition *d'unité, d'unicité*, *d'unitariété* de la désignation du terme *norme* est une *fausse présupposition*: car, en réalité, le terme *norme* désigne au moins cinq entités déontiques.

0.2. Il est notamment faux de considérer que le substantif *norme* désigne universellement un *énoncé* déontique (*deontic sentence*, *deontischer Satz*, *enunciato deontico*).[2]

0.2.1. Il est indubitablement vrai que, dans *certains* contextes, le terme *norme* désigne un *énoncé* déontique, comme dans les deux exemples qui suivent:

> [1] La *norme*: "Il est obligatoire de payer ses impôts" contient douze syllabes.

> [2] La *norme*: "Les étudiants en Philosophie *ne doivent pas* s'inscrire en Logique mathématique" est une norme ambiguë.[3]

0.2.2. Mais il n'est pas *vrai* pour autant que *quel que soit* le contexte, le terme *norme* désigne un énoncé déontique.

0.3. L'universalité apparente de la conception des normes comme énoncés est infirmée par un simple *exemplum contrarium*. Lorsqu'on dit que l'énoncé déontique anglais "*One ought to pay one's debts*" et l'énoncé déontique français "Il faut payer ses dettes" expriment la même

2 Un énoncé déontique est un énoncé formé avec l'une des modalités déontiques (obligatoire, interdit, permis, facultatif, indifférent (adiaphore)), c'est-à-dire un énoncé de la forme "*p* est obligatoire", "*p* est interdit", "*p* est permis", "*p* est facultatif", "*p* est indifférent".

3 En fait, l'énoncé déontique "Les étudiants en Philosophie *ne doivent pas* s'inscrire en Logique mathématique" admet au moins deux interprétations: (i) "*Il est interdit* (il est *obligatoire-que-non*) aux étudiants en Philosophie de s'inscrire en Logique mathématique"; (ii) "*Il n'est pas obligatoire* (il est *non-obligatoire*, c'est-à-dire: *facultatif*) pour les étudiants en Philosophie de s'inscrire en Logique mathématique". Il s'agit d'un cas transparent d'ambiguïté *syntactique* d'un énoncé déontique.

norme, ce que le terme *norme* désigne ici est une entité différente (catégoriellement différente) des deux énoncés déontiques ("*One ought to pay one's debts*", "Il faut payer ses dettes") qui l'expriment.[4]
En réalité, le terme *norme* recouvre non pas *une seule*, mais *cinq* espèces d'entités déontiques, que l'on appelle toutes normes (par métonymie ou par métaphore). Ces cinq espèces d'entités sont:

(i) l'*énoncé* déontique;
(ii) la *proposition* déontique;
(iii) l'*énonciation* déontique;
(iv) l'*état-de-choses* déontique;
(v) le *noème* déontique.[5]

À ces cinq référents du terme *norme* sont consacrés respectivement les §§ 1., 2., 3., 4., 5.

1. *Premier* référent du terme *norme*: l'*énoncé* déontique

En premier lieu, il est des contextes dans lesquels le terme *norme* désigne un *énoncé* déontique (*deontic sentence*, *deontischer Satz*, *enunciato deontico*).

1.1. Un *premier* contexte dans lequel le terme *norme* désigne un *énoncé* déontique, c'est le contexte de l'énoncé:

> [2] La *norme*: "Les étudiants en Philosophie *ne doivent pas* s'inscrire en Logique mathématique" est une norme ambiguë.

1.2. Un *deuxième* contexte dans lequel le terme *norme* désigne un *énoncé* déontique, c'est le syntagme: *interprétation littérale d'une norme*.

2. *Deuxième* référent du terme *norme*: la *proposition* déontique

En deuxième lieu (et j'en viens à la *deuxième* des cinq entités déontiques également désignées per le terme *norme*), il est des contextes dans lesquels le terme *norme* désigne (non plus un énoncé déontique, mais) une autre espèce d'entité déontique: une *proposition* déontique (*deontic proposition*, *deontische Proposition*, *proposizione deontica*).[6]
En voici un exemple:

> [3] L'énoncé déontique anglais "*One ought to pay one's debts*" et l'énoncé français "Il faut payer ses dettes" expriment la même *norme*.

3. *Troisième* référent du terme *norme*: *l'énonciation* déontique

En troisième lieu (et j'en viens à la *troisième* des cinq entités déontiques également désignées per le terme *norme*), il est des contextes dans lesquels le terme *norme* désigne (ni un *énoncé* déontique, ni une *proposition* déontique, mais) un *tertium quid*, une troisième espèce d'entité déontique: une *énonciation* déontique (*deontic utterance*, *deontische Äußerung*, *enunciazione deontica*).[7]

4 Évidemment, (i) la *norme exprimée* par les deux énoncés ("*One ought to pay one's debts*", "Il faut payer ses dettes") c'est une chose; (ii) les deux énoncés *exprimants* la norme ce sont autre chose.
5 La *pentachotomie* des entités déontiques désignées par le terme *norme* (thèse de la *pentasémie du terme norme*) est un développement de la *tétracotomie* des entités déontiques désignées par le terme *norme* (thèse de la *tétrasémie du terme norme*) opérée in Conte (1970).
6 Pour la sémantique philosophique, *proposition* (*proposition*, *Proposition*, *proposizione*) n'est pas synonyme d'*énoncé* (*sentence*, *Satz*, *enunciato*). La proposition c'est une entité *sémantique*: c'est le sens d'un énoncé, ce que l'énoncé exprime.
7 Une énonciation déontique c'est l'énonciation d'un énoncé qui produit l'état-de-choses déontique sur lequel porte l'énoncé déontique.

En voici un exemple:

> [4] Interdire sans aucune discrimination à tous les Arabes d'entrer sur le sol américain aussitôt après l'attentat du 11 septembre 2001 aurait été une *norme* intempestive.[8]

4. *Quatrième* référent du terme *norme*: l'*état-de-choses* déontique

4.0. Les trois référents du terme *norme* analysés ci-dessus (*énoncé* déontique, *proposition* déontique, *énonciation* déontique) sont tous des entités linguistiques (énoncés et énonciations) ou des entités corrélées à une entité linguistique (*propositions*).
Cependant, on ne peut pas dire que dans tous les contextes, le terme *norme* désigne une entité linguistique, un *Sprachgebilde*, un *Sprachverhalt* (un énoncé déontique, une énonciation déontique), ou le corrélat d'une entité linguistique (une proposition déontique).[9]
Il est, en effet, des contextes (et j'en viens à la *quatrième* des cinq entités déontiques également désignées per le terme *norme*) dans lesquels le terme *norme* désigne (*ni* un *énoncé* déontique, *ni* une *proposition* déontique, *ni* une *énonciation* déontique, mais) un *quartum quid*, une quatrième espèce d'entité déontique: un *état-de-choses* déontique (*deontic state-of-affairs*, *deontischer Sachverhalt*, *status deontico* ou *stato-di-cose deontico*), ou brièvement dit, un *status* déontique.

4.1. Voici un *premier* contexte dans lequel le terme *norme* désigne un *état-de-choses* déontique. Lorsque l'on dit qu'une norme est *violée* (ou transgressée, ou enfreinte, ou contournée) ce que *norme* désigne, c'est un *quid* qui n'est ni un *énoncé* déontique, ni une *proposition* déontique, ni une *énonciation* déontique, mais c'est un *quartum quid*: un *état-de-choses* déontique.[10]

4.2. Et voici un deuxième contexte dans lequel le terme 'norme' désigne un *état-de-choses* déontique:

> [5] Le *Sachsenspiegel* (*Le miroir des Saxons*) est une codification des *normes* en vigueur dans la société de son auteur Eike von Repgow (1180 environ-1233).

Les normes, objet de cette codification (codification *descriptive*) de Eike von Repgow, ne sont *ni* des *énoncés* déontiques, *ni* des *énonciations* déontiques, *ni* des *propositions* déontiques.
Et pourtant ce sont bien des normes que Eike von Repgow codifie.
L'existence de la codification (codification descriptive) opérée par Eike von Repgow dans le *Sachsenspiegel* est un *exemplum contrarium* qui infirme l'universalité (la validité universelle) de la thèse selon laquelle les normes sont toutes soit des énoncés déontiques, soit des énonciations déontiques, soit des propositions déontiques.[11]
Il est vrai que certains *états-de-choses* déontiques sont produits par une énonciation déontique (par un acte législatif). C'est le cas, par exemple, des *états-de-choses* déontiques codifiés *normativement* (thétiquement) par le Code Civil.

8 Dans cet exemple, la norme qui est qualifiée de intempestive c'est un *acte*: l'acte de parole (*speech act*, *Sprechakt*, *atto linguistico*) d'interdire.
9 Le terme *Sprachverhalt* a été proposé par Giampaolo M. Azzoni sur le modèle du préexistant terme *Sachverhalt*.
10 *Énoncé* déontique, *proposition* déontique, *énonciation* déontique, ce sont toutes des entités desquels on ne peut pas prédiquer la violation (la transgression, l'infraction, le contournement), de la même façon qu'on ne peut pas prediquer la couleur rouge du nombre 7. Prédiquer "violé" ("transgressé", "enfreint", "contourné") soit d'un *énoncé* déontique, soit d'une *proposition* déontique, soit d'une *énonciation* déontique, ce serait un cas évident d'incorrection sortale, de *sortal incorrectness*, ainsi qu'il est un cas d'incorrection sortale prédiquer "rouge" du nombre 7.
11 Deux auteurs prestigieux qui nient la linguisticité de la norme ce sont: (i) parmi le *juristes*, le comparatiste Rodolfo Sacco (2007); (ii) parmi les *sociologues*, le sociologue du droit Theodor Geiger (1947/1964), qui nie explicitement l'équation: *Norm* (norme)=*Normsatz* (énoncé déontique).

Cependant, (comme le montre *l'exemplum contrarium* des normes codifiées de manière descriptive par Eike von Repgow) il est faux que tout *état-de-choses* déontique soit le produit d'une énonciation déontique (d'un acte législatif).

5. *Cinquième* référent du terme *norme*: le *noème* déontique.

5.1. En cinquième lieu (j'en viens à la cinquième des cinq entités déontiques également désignées par le terme *norme*), il est des contextes dans lesquels le terme *norme* désigne (*ni* un *énoncé* déontique, *ni* une *proposition* déontique, *ni* une *énonciation* déontique, *ni* un *état-de-choses* déontique, mais) un *quintum quid*, une cinquième espèce d'entité déontique: un *noème* déontique (*deontic noema*, *deontisches Noema*, *noema deontico*).[12]

5.2. Voici deux exemples de noèmes déontiques.

5.2.1. Le terme *norme* désigne un *noème* déontique à l'intérieur du syntagme:

[6] *proposer une norme à l'assemblée législative*.

Comparons les deux syntagmes *abroger une norme* et *proposer une norme*.

(i) Dans le syntagme *abroger une norme*, le terme *norme* désigne un *état-de-choses* déontique (un noème déontique *in actu*);

(ii) dans le syntagme *proposer une* norme *à l'assemblée législative*, le terme *norme* désigne uniquement la simple *conception* d'un *état-de-choses* déontique (et précisément: la *conception* – la *représentation*, *Vostellung*, de l'*état-de-choses* déontique qui deviendrait réel si la proposition était adoptée par cette même assemblée).

5.2.2. Un synonyme du terme *norme* (le terme *règle*) désigne un *noème* déontique dans le texte (trilingue) de l'art. 1, alinéa 2, du Code civil suisse:

[7] "A défaut d'une disposition légale, le juge prononce selon le droit coutumier et, à défaut d'une coutume, selon les *règles* qu'il établirait s'il avait à faire acte de législateur".

[8] "*Nei casi non previsti dalla legge il giudice decide secondo la consuetudine e, in difetto di questa, secondo la regola che egli adotterebbe come legislatore*".

[9] "*Kann dem Gesetz keine Vorschrift entnommen werden, so soll das Gericht nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die es als Gesetzgeber aufstellen würde.*"[13]

5.3. Le concept de *noème* déontique est à distinguer:

(i) en *premier* lieu, du concept de *proposition* déontique (§ 5.3.1);

(ii) en *second* lieu, du concept de *état-de-choses* déontique (§ 5.3.2).

12 Un *noème* déontique est l'aspect objectif d'une *noesis* déontique. Les deux grécismes allemands *Noema* (du grec νόημα *nóēma*) et *Noesis* (du grec νόησις *nóēsis*) sont deux termes techniques de la phénoménologie de Husserl.
13 Ce deuxième exemple de noème déontique a été découvert par Giuseppe Lorini.

5.3.1. La différence entre *noème* déontique et *proposition* déontique peut se formuler en recourant à la distinction entre *intensionnalité* (avec *s*) et *intentionnalité* (avec *t*):

(i) La *proposition* déontique est une entité *intensionnelle*;

(ii) Le *noème* déontique est une entité *intentionnelle*.[14]

5.3.2. La différence entre *noème* déontique et *état-de-choses* déontique peut se formuler en recourant à la distinction entre *intellectus* et *actus*:

(i) Un *noème* déontique est un *état-de-choses* déontique *in intellectu*;

(ii) Un *état-de-choses* déontique est un *noème* déontique *in actu*.

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14 *Intensionnel*, avec *s* (anglais: *intensional*; allemand: *intensional*; italien: *intensionale*), est un terme de la *sémantique*. *Intentionnel*, avec *t* (anglais: *intentional*; allemand: *intentional*; italien: *intenzionale*), est un terme de l'*ontologie*.

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COMMENT JE VOIS LE MONDE DU DROIT

abstract

L'expérience juridique se développe, non pas simplement et abstraitement autour du droit, des règles juridiques, mais plus exactement autour du droit positif, des règles juridiques posées: ce sont là deux données fondamentales indissociables qui doivent être clairement prises en compte pour une bonne compréhension de la réalité. L'auteur résume ici, d'une part, les approfondissements ontologiques qu'il a consacrés, à la lueur de la méthode phénoménologique husserlienne, aux règles en général et aux règles éthiques et juridique en particulier, et, d'autre part, les approfondissements pragmatiques qu'il a effectués, à partir de la théorie austinienne des actes de langage, à propos des actes sociaux d'autorité que sont les actes de position des règles juridiques.

keywords

ontologie des règles, outils mentaux, étalons du possible, lois scientifiques, actes normatifs

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La plus belle chose que nous puissions éprouver, c'est le mystère des choses
(Albert Einstein, *Comment je vois le monde*, 1934).

Je tiens, tout d'abord, à remercier très chaleureusement mes collègues et amis Paolo Di Lucia et Lorenzo Passerini Glazel de m'avoir invité à ce séminaire. Je les en remercie d'autant plus que le thème général proposé à nos débats m'enchante. Voilà maintenant près de soixante ans, depuis la préparation de ma thèse de doctorat soutenue à Paris en 1962, que mes recherches sont focalisées justement, pour l'essentiel, sur les données ontologiques et pragmatiques des règles en général et des règles éthiques et juridiques en particulier.
Mes approfondissements ontologiques ont été effectués à la lueur de la méthode phénoménologique de Husserl, débarrassée toutefois de ses inutiles oripeaux métaphysiques et envisagée comme une méthode de réexamen – de remise à l'épreuve – de nos concepts, classes ou catégories en tant que constructions de notre esprit au contact des choses, et nullement en tant que mystérieux êtres ou entités catégoriels qui se donneraient d'eux-mêmes, naturellement, à notre observation. Husserl a eu un net penchant à hypostasier les productions de l'esprit, professant aussi un réalisme des valeurs à côté de celui des concepts. Mais cela ne prive pas de leur intérêt les directives méthodologiques qu'il a esquissées dans ce dernier domaine.
Mes approfondissements pragmatiques ont été, quant à eux, réalisés en prenant appui sur la théorie anglo-saxonne des actes de parole (*speech acts theory*) d'Austin et de Searle, une théorie qui m'a paru d'emblée tout spécialement appropriée pour comprendre les pratiques langagières à travers lesquelles s'exprime la vie du droit.
La conjugaison de ces deux approches m'a conduit à considérer comme indissociables dans l'expérience juridique humaine deux données fondamentales: d'une part, des règles spécifiques, spécifiquement affectées à une gouvernance publique, à la gouvernance de peuples; et d'autre part, des actes d'autorité accomplis par des gouvernants publics pour faire entrer en action et rendre applicable cette réglementation, – ce qu'on appelle couramment des actes normatifs. La réalité, ce n'est pas le droit, les règles juridiques, mais le droit *positif*, les règles juridiques *posées* par les pouvoirs publics, c'est-à-dire rendues par leurs actes, leurs décrets, officiellement applicables dans l'espace social placé sous leur autorité. L'élucidation de l'expérience juridique renvoie ainsi à la fois à un point de vue ontologique, concernant l'être ou l'essence même des règles juridiques, et à un point de vue pragmatique, relatif à leur fonctionnement: il faut féliciter les concepteurs de ce séminaire de l'avoir judicieusement

articulé autour de ces deux axes.
Dans son célèbre ouvrage *Alice au Pays des Merveilles*, Lewis Carroll prête à l'un des personnages cette jolie formule: "Tu ne manqueras pas d'arriver quelque part si tu marches assez longtemps". J'ai marché pendant fort longtemps et mon propos ici sera de vous indiquer, à grands traits, où je suis finalement arrivé après mes patientes et persévérantes pérégrinations dans le monde du droit: je vous exposerai successivement mes vues sur les règles ou normes juridiques, puis mes vues sur les actes normatifs juridiques.

1. Mes vues sur les règles juridiques

Il est banal de dire que le droit, c'est de la réglementation, des règles ou normes de conduite. Mais encore, qu'est-ce que ces règles ou normes juridiques? Ou, plus précisément, à quoi correspond le concept – la catégorie – de règle juridique, qu'est-ce qu'il recouvre exactement? Les théoriciens qui ont entrepris de répondre à cette question ont toujours éprouvé des difficultés quasi-insurmontables: "Les juristes cherchent encore une définition à leur concept du droit", constatait ironiquement Kant en 1781 dans sa *Critique de la raison pure*; les choses n'ont pas beaucoup changé depuis, et Kant lui-même d'ailleurs a plutôt contribué à les obscurcir encore davantage! La raison de ces déconvenues me paraît être la suivante: s'atteler dès le départ à rechercher la particularité des règles juridiques, c'est se condamner à une recherche à l'aveuglette, semée d'embûches, dans la mesure où l'on n'a le plus couramment, faute d'approfondissements suffisants, que de faibles lueurs à la conscience sur les catégories plus générales dont à la fois fait partie et se distingue la catégorie des règles de droit. Si l'on veut parvenir à une élucidation correcte de ces dernières, il est indispensable de procéder pas à pas, en commençant par dégager ce que sont les règles en général, ce que recouvre le concept générique de règle, et plus spécifiquement ce que sont les règles de conduite, ce que recouvre le concept de règle éthique.
En explorant ces catégories plus générales en amont du droit, j'ai été amené à faire deux grandes découvertes, qui me sont apparues d'une importance capitale en ce qu'elles commandent toute la suite du processus d'élucidation ontologique des règles juridiques. C'est d'abord cette double découverte que je veux évoquer; je vous montrerai ensuite comment elle permet d'aiguiller, de mettre sur de bons rails la quête de l'être des règles juridiques.

1.1.

Ce que j'ai découvert, ce sont les deux éléments les plus essentiels de l'ontologie des règles, deux éléments restés très largement occultés, non pris en compte et inexplorés, dans la théorie éthique et juridique; ils sont à mes yeux la clef même, en quelque sorte le sésame, ouvrant les portes du monde des règles.

1.1.1.

Le premier élément, c'est ce que j'appellerai la "chosité" des règles. Dans l'expérience que nous en avons, les règles se donnent à nous de prime abord comme des séquences de pensée discursive, des contenus de pensée exprimés en mots, en bref comme du logos, par exemple des maximes morales ou encore des dispositions de lois. Mais les règles ne sont pas pour autant simplement du logos; ce sont des choses, des *res*, – des choses, des *res*, fabriquées avec du logos mais qui ne se réduisent pas à lui, pas plus qu'une maison ne se réduit aux matériaux, aux pierres dont elle est faite. C'est la raison pour laquelle, d'ailleurs, les règles sont insusceptibles d'être dites vraies ou fausses; et c'est aussi la raison pour laquelle elles ne sont pas soumises aux principes de la logique formelle applicables à la pensée comme le principe d'inférence ou le principe de non-contradiction: les règles ne sont pas de la pensée, du flux de pensée, mais de la pensée *réifiée*, de la pensée intégrée – incorporée – à des choses, à des objets, dont elle constitue la substance.
L'un des mérites les plus importants de la théorie des actes de parole d'Austin a été de dénoncer un travers insidieux traditionnellement répandu jusque-là en philosophie et

consistant justement à traiter comme du pur logos des actes humains intersubjectifs accomplis avec des paroles, ce qu'Austin a appelé des "performatifs", des actes tels que des remerciements, des félicitations, des ordres, des prières... Le travers ainsi démasqué voilà plus de cinquante ans a été et est encore à l'œuvre dans la philosophie morale et juridique, j'y reviendrai plus loin; mais on aperçoit en plus, dans ces secteurs, que ce travers ne concerne pas seulement des actes, mais aussi des choses, des objets, en l'occurrence des règles. Il y a, en effet, une tendance bien ancrée à réduire les règles éthiques, et en particulier les règles de droit, aux segments de pensée codés en langage dont elles sont faites: cette vue tronquée qui identifie purement et simplement ces artéfacts humains au matériau intelligible, au logos, qui leur sert de texture, c'est ce que j'ai qualifié de "logicisme". On le voit sévir tout particulièrement dans la logique déontique ou logique des normes, pour laquelle les règles ne sont que des propositions, pleinement éligibles aux exercices de la logique; mais il imprègne plus largement, sous les houlettes emblématiques de Hume, de Kant et de Kelsen, toute la philosophie éthique et juridique, qui considère classiquement les règles comme un certain registre spécifique de pensée discursive, comme de la pensée déontologique en devoir-être ou *Sollen*, par opposition à de la pensée en être ou *Sein*.

1.1.2. Le dévoilement de la chosité des règles m'a conduit à découvrir, dans son prolongement, un second élément essentiel de leur ontologie: leur nature d'outils, d'objets *techniques*. Les règles, la réglementation, c'est de l'outillage fabriqué et utilisé par les hommes, qui s'inscrit dans la vocation générale et caractéristique de l'être humain – celui que Bergson appelait *homo faber* – à créer sans cesse des outils en tous genres pour être en prise et pouvoir agir sur le monde. Cette essence technique des règles est restée, elle aussi, largement occultée dans la théorie de l'éthique et du droit. Elle transparaît pourtant dans la terminologie même couramment employée, en particulier dans l'expérience juridique: on parle de "pratiquer" ou "appliquer" des règles, de "pratique", "usage" ou "mise en œuvre" des règles, ce qui renvoie bien implicitement aux idées d'outils et d'utilisation. De même le droit est vaguement ressenti et catalogué comme une "technique", une "technique de contrainte" selon les courants positivistes, une "technique de contrôle social" ou "d'ingénierie sociale" selon l'école sociologique du droit américaine. Et surtout, l'étymologie elle-même est tout à fait édifiante: les termes latins *regula* et *norma* – issu du grec *gnômon* – désignaient originairement des outils matériels, physiques, donnant la mesure de la droiture des lignes ou des angles et servant à réaliser ou à contrôler des tracés rectilignes ou des angles droits. Le mot français *règle* a, du reste, conservé ce sens concret à côté du sens abstrait qui en est dérivé; il en va de même des termes italiens *regola-regolo*, comme le rappelle fort à propos la règle à calcul imprimée en filigrane sur le programme de ce séminaire. Précisément, si s'est accomplie cette dérivation du concret à l'abstrait, c'est parce que les règles de conduite se sont vues reconnaître intuitivement, par une fulgurance de l'esprit, la même nature fondamentale d'outils que les règles et équerres matérielles.

Il s'agit sans doute d'outils d'un type spécial, d'outils mentaux, constitués avec de la pensée codée en langage et qu'on ne peut donc toucher ou prendre en main. Elles ne sont ni des observables, ni des existants qui se tiendraient en dehors de nous dans le monde extérieur. Elles font partie de l'univers intérieur immanent à notre esprit, ce qu'on appelle le monde intelligible: c'est là qu'elles sont créées, c'est là qu'elles sont utilisées, c'est là qu'elles résident à tout jamais, sans aucune possibilité d'en sortir. Elles circulent seulement en sautillant en quelque sorte, comme à saute-mouton, d'esprit à esprit, catapultées par des signes ou signaux sensibles, perceptibles, oraux ou scripturaux, paroles proférées ou écrites: la personne émettrice, le législateur par exemple, envoie de tels signaux codant la pensée dont est faite la réglementation présente dans son esprit, et le receveur, après avoir capté ces signaux avec

son appareil sensoriel, les décode mentalement pour reconstituer dans son propre esprit la teneur de cette réglementation et pour pouvoir éventuellement l'utiliser. Contrairement à nos façons courantes de parler, les codes juridiques qui peuplent nos bibliothèques ne sont pas des recueils de normes juridiques, mais des recueils de convoyeurs ou transbordeurs de normes. On connaît le célèbre tableau figuratif de Magritte *La Trahison des images* représentant une pipe et sur lequel ce peintre-philosophe averti (qui se définissait "peintre de la pensée") a inscrit cette mise en garde "Ceci n'est pas une pipe": je propose pareillement d'apposer sur chaque disposition normative imprimée la mention "Ceci n'est pas une norme". Les choses, qu'elles soient de texture matérielle ou idéelle, ne doivent pas être confondues avec les représentations que nous en donnons. Les normes ne sont ni les signes scripturaux perceptibles, ni le texte révélé par le premier déchiffrement qu'est la lecture; elles sont le sens du texte, la pensée codée en lui et dégagée par un second déchiffrement, correspondant à la compréhension du texte, à la saisie de ce qu'il veut signifier à notre esprit. Si les normes étaient le texte lui-même, comme le prétendent certains, il n'y aurait pas lieu à interprétation ou exégèse. Ces particularités n'enlèvent, en tous cas, rien à la similitude profonde de ces outils mentaux avec les outils du monde physique, ni à l'importance considérable du rôle qu'ils jouent en tant que tels dans les sociétés humaines à côté de ceux-ci.

1.2.

Je veux maintenant souligner la valeur heuristique qui s'attache à cette double découverte que je viens d'évoquer: la chosité et, plus précisément, l'essence technique des règles permettent de mettre sur les bonnes voies la suite du processus d'élucidation de l'ontologie des règles juridiques. Un outil, en effet, c'est un quelque chose *qui sert à*, auquel une intention humaine sous-jacente inapparente, transcendante à sa substance, a imparti une certaine vocation instrumentale, qu'elle a affecté à rendre certains services particuliers; comme dit Heidegger, tout outil est "outil pour". C'est cet être *pour*, le ce à quoi il est destiné à servir, son utilité, qui constitue l'essence de l'outil; c'est ce qui permet d'identifier une chose comme un outil d'un certain type. Par exemple, un cendrier est un outil pour recueillir les cendres des fumeurs, un parapluie est un outil pour se protéger de la pluie, etc. En conséquence, après avoir aperçu que les règles sont des outils, les bonnes questions à se poser sont celles-ci: "À quoi ça sert? Comment ça fonctionne?". C'est dans cette direction qu'il faut résolument orienter la recherche: se focaliser sur la substance des règles, essayer de découvrir dans la teneur ou contenu des règles leur nature même de règles, revient à se fourvoyer complètement, à s'engager sur des voies de garage qui ne mènent nulle part. La lumière se trouve du côté de l'arrière-plan intentionnel qui sous-tend ces outils.
Je propose ici à nouveau d'aller pas à pas, du général au particulier, de passer progressivement du concept générique de règle au concept particulier de règle juridique.

1.2.1.

À quoi servent, tout d'abord, les règles en général? Quel est le dénominateur commun des services rendus par toutes les règles de toutes sortes? Leur fonction commune est de servir *d'*étalons, de *mesures*: dans l'expérience juridique on dit bien "prendre des mesures" lorsque l'on adopte des règles; *adottare misure*, dit-on pareillement en italien. Les règles entrent ainsi – devraient entrer – dans le champ de la *métrologie* ou théorie de la mesure, bien que celle-ci soit en pratique quasi-exclusivement centrée sur les outils matériels de mesure.
Plus précisément, et c'est là que réside leur trait typique le plus essentiel, il s'agit d'outils de référence donnant la mesure du possible: une règle, c'est très exactement un fixateur de la marge ou degré de possibilité pour certaines choses d'avoir lieu, de survenir. À cet égard, on retrouve à l'œuvre dans toutes les règles, de quelque sorte qu'elles soient, les trois grands degrés que comporte l'échelle bipolaire du possible: le degré maximum de possibilité (100%, qui est en même temps à l'inverse, de l'autre bout de l'échelle, le degré 0 d'impossibilité), c'est

l'obligation ou nécessité absolue d'avoir lieu; le degré minimum (0%, qui est aussi le degré de 100% d'impossibilité), c'est la non-possibilité absolue d'avoir lieu; et le degré intermédiaire (entre 100% et 0% de possibilité, et corrélativement entre 0% et 100% d'impossibilité), c'est à la fois la possibilité d'avoir lieu ou de ne pas avoir lieu. Cette marge intermédiaire est elle-même quantifiée dans le cas des règles dites probabilistes, qui indiquent des sous-degrés de possibilité, et corrélativement de non-possibilité, d'avoir lieu compris entre 0% et 100%. Il y a, on le voit, de la mathématique dans toute règle, pas seulement dans les lois scientifiques mais aussi dans les règles éthiques et juridiques.
Plus précisément encore, les règles appartiennent à la catégorie qualifiée en métrologie "étalons de capacité": à la différence des étalons concrets (tels que, par exemple, les prototypes industriels ou les appartements-témoins) qui doivent être reproduits à l'identique par les choses qu'on y rapporte, les étalons de capacité correspondent à des formes qui doivent être exactement remplies, épousées, par les choses avec lesquelles elles sont corrélées. C'est le cas, dans le monde sensible, des "formes" – comme on les appelle précisément – utilisées par les chapeliers et les bottiers et qui leur donnent la mesure des chapeaux et chaussures à confectionner, ou encore des "patrons" qui indiquent aux tailleurs la mesure des vêtements à couper; c'est aussi le cas des récipients comme les pintes ou les barils qui donnent la mesure de certaines quantités standard de liquides ou de grains commercialisées; mais c'est également le cas des règles-outils matériels qui permettent d'attribuer la valeur de droiture aux lignes qui se tiennent à l'intérieur de leur marge, qui épousent exactement la forme de leur bordure. Justement, si on est passé, par dérivation métaphorique, de ces outils physiques aux règles-outils mentaux, c'est parce que ces dernières sont des étalons fondamentalement du même type, fonctionnant selon le même principe, mais qui opèrent sur le plan de l'intelligible et ont la nature de formes à remplir logiques et non matérielles: elles fixent les marges du possible à l'intérieur desquelles doivent se tenir les survenances des choses concernées, en particulier s'agissant des règles éthiques les conduites humaines qu'elles visent. Comme pour les autres étalons de capacité, le rapport de conformité des survenances ou avoir lieu aux étalons-règles n'est pas un rapport d'identité, mais de correspondance, d'accordance, d'exact remplissement; le terme *conforme* dénote littéralement un accord avec une forme. Une conduite conforme à une règle, ce n'est pas une conduite identique à une règle, ce qui n'a strictement aucun sens: c'est une conduite qui rentre dans la marge de possibilité fixée par la règle, qui ne s'écarte pas de cette marge, ni en deçà par manquement, ni au-delà par excès.

1.2.2. Des règles en général, je descends maintenant à un premier niveau de concrétisation ou particularisation. À l'intérieur du genre "règles", en effet, on doit distinguer deux grandes variétés ou sous-catégories: les règles éthiques ou règles de conduite, que j'appellerai ici "règles pratiques", et les règles théoriques, connues plus couramment sous l'appellation "lois scientifiques". On répugne traditionnellement à parler de "règles" à propos des lois scientifiques et à les faire entrer dans la même famille générale que les règles de conduite; il est d'usage de les assimiler à du simple discours prévisionnel, à de simples assertions conjecturales, hypothétiques. Il s'agit bien pourtant de deux espèces de *règles*, qui se situent sur un même arbre généalogique comme deux rameaux distincts se développant en prolongement d'un tronc commun. Elles fixent bien les unes et les autres, et c'est en ce sens qu'elles sont des règles, la mesure de la possibilité pour certaines choses d'avoir lieu. Mais elles se différencient par la vocation instrumentale plus spécifique, plus pointue, qui leur est respectivement assignée.
Les règles pratiques, ainsi que l'indique ce qualificatif, sont des outils pour l'action des hommes, pour leur action créatrice, "fabricatrice". À l'image des réglettes et équerres matérielles qui ont pour fonction fondamentale de permettre à leurs utilisateurs de tracer

des lignes droites ou des lignes en angle droit, de servir de supports de référence guidant leur main dans la réalisation de ces tracés, les règles de conduite servent à guider ceux à qui elles sont destinées dans la fabrication de leur agir, de leurs faits et gestes: elles leur indiquent ce qu'ils peuvent, ne peuvent pas ou doivent accomplir, faire survenir (permissions, interdictions, obligations). Elles servent à diriger leur conduite d'eux-mêmes, à encadrer les déterminations de leur volonté. Leur caractéristique est d'être des règles "à suivre", "à observer", par leurs destinataires.
Ces règles pratiques, pour l'agir humain, se distinguent des lois scientifiques ou règles théoriques, qui sont aussi des outils et non de la pensée assertée susceptible d'être dite vraie ou fausse, des outils pour l'entendement et non pour l'action. Elles ont pour vocation instrumentale spécifique d'éclairer, de guider notre intelligence, de lui servir à se repérer dans l'écheveau complexe des productions du réel en lui indiquant les marges ou degrés de la possibilité d'avoir lieu des différents types de phénomènes en fonction des données circonstancielles: "dans telles circonstances, tel type de phénomènes doit, ne peut pas ou peut – ou encore, dans le cas des lois probabilistes, a tant de chances de – se produire".
De cette différence de vocation instrumentale spécifique découle la conséquence suivante: lorsqu'il y a discordance entre une règle pratique et la conduite effective de son destinataire, ce dernier apparaît être en faute, il ne s'est pas comporté comme il aurait dû selon la règle qu'il avait à observer; sa conduite se montre entachée d'invalidité au regard de cette règle. Par contre, lorsqu'il y a discordance entre une règle théorique et ce qui se produit réellement, la réalité ne s'affiche pas frappée d'invalidité: la nature n'avait pas à se conformer à la loi scientifique en cause; c'est celle-ci qui se trouve disqualifiée, qui apparaît dépourvue de valeur pragmatique, inapte à rendre les services qu'on en attend, inapte à permettre de se repérer efficacement.

1.2.3.

Si l'on veut descendre à un second niveau de concrétisation et déterminer les traits typiques qui singularisent les règles *juridiques* par rapport aux autres règles éthiques ou pratiques, c'est une erreur de centrer cette recherche, ainsi qu'on le fait couramment, sur la substance ou teneur des règles, sur les dispositions dont elles sont faites. Il est ainsi prétendu que les règles juridiques se distingueraient par le contenu matériel caractéristique de leurs dispositions, un contenu sanctionnateur, assortissant certaines conduites de sanctions, spécialement de sanctions physiques, corporelles ou patrimoniales; ou encore, elles se distingueraient par la structure formelle caractéristique de leurs dispositions, notamment une structure de type hypothétique ou conditionnelle: "si..., alors...". Toutes ces démarches apparaissent par avance parfaitement vaines, pour la bonne raison que je peux moi-même imaginer toutes sortes de dispositions normatives présentant les caractéristiques alléguées, ou n'importe quelles autres d'ailleurs: elles n'apparaîtront pas juridiques pour autant et personne ne me considèrera sérieusement comme un créateur ou découvreur de droit! C'est par sa fonction qu'un outil se définit, et en toute logique c'est aussi par des particularités fonctionnelles qu'un outil se distingue des autres outils rentrant dans une même catégorie générale que lui et qu'il correspond à une catégorie plus spéciale d'outils.
En l'occurrence, les règles juridiques se différencient des autres règles pratiques en ce qu'elles ne servent pas seulement à diriger les conduites humaines, mais à diriger plus particulièrement les *peuples humains*, les conduites d'hommes vivant en population. L'être humain est par nature un être social (*zôon politikon*, comme disait Aristote), un être qui ne vit pas isolé; il fait naturellement partie de peuples, de formations collectives amenées spontanément à se structurer, à se différencier en gouvernants et gouvernés et à constituer ainsi des sociétés politiques. C'est précisément au moyen des règles de droit qu'ils édictent que les dirigeants ou gouvernants publics, placés à la tête des peuples humains, assument leur

fonction de direction ou gouvernance. Dirigeant public, je le rappelle, signifie littéralement "dirigeant de peuple", – *publicus* en latin c'est originairement l'adjectif de *populus*: ce qui est public, c'est ce qui est relatif à un peuple. Les règles juridiques s'inscrivent en ce sens dans l'exercice du pouvoir public et servent à gouverner les peuples humains, en donnant à chacun la mesure de ses possibilités d'agir, en délimitant de manière coordonnée, dans une perspective synchronique ou combinatoire, les espaces respectifs de liberté d'agir de chacun. Voilà très exactement en quoi consiste la singularité des règles juridiques. Tel était bien, du reste, le sens originaire du *jus* et des *jura* dans la langue latine; et c'est également ce qu'exprime la célèbre formule des *Institutes* de Justinien: "*suum cuique tribuere*", attribuer à chacun le sien. Les règles juridiques se distinguent des autres règles éthiques en tant qu'outils de direction publique des conduites. Il s'agit d'un outillage qui a partie liée avec la vie en peuple, ainsi que le souligne un autre éclairant aphorisme romain bien connu: "*ubi societas, ibi jus*".

2. Mes vues sur les actes normatifs juridiques

Le droit, tel qu'il est expérimenté dans les sociétés humaines, n'est pas un droit à l'état pur, éthéré, mais un droit *positif*, "posé" ou "édicté". L'expérience juridique ne se développe pas uniquement au moyen de règles ou normes, mais aussi par le biais *d'actes* accomplis par les dirigeants publics en vue de faire entrer ces normes en action, en application, – ce qu'on appelle couramment des "actes normatifs" ou "normateurs". On a généralement une vue assez brouillée, approximative, insuffisamment approfondie de ces actes. Je voudrais évoquer ici, au moins brièvement, les traits les plus essentiels qui les caractérisent à mes yeux: ce sont, d'une part, des actes d'autorité, qui ont, d'autre part, la nature d'actes mentaux.

2.1. Des actes d'autorité, tout d'abord: c'est un aspect dont la théorie positiviste du droit, Kelsen en tête, a eu beaucoup de mal à rendre compte. Les actes normatifs seraient des actes d'édiction de normes au sens d'actes de *dire* des normes, d'émettre ou communiquer verbalement des normes: c'est à cela que correspondrait l'antique formule romaine "*jus dicere*". Il a fallu attendre la théorie austinienne des actes de langage pour y voir plus clair et prendre pleinement conscience qu'on se trouve en présence, non pas simplement de paroles proférées, mais d'actes sociaux accomplis à l'aide de paroles proférées, et plus précisément d'actes d'autorité, d'actes de commandement manifestés verbalement par des dirigeants à l'adresse de dirigés. C'est le sens authentique qu'avaient, d'ailleurs, dans l'expérience juridique romaine les formules "*jus dicere*" et "*jurisdictio*": édicter du droit, *jus dicere*, ce n'est pas exprimer des dispositions normatives, mais exercer une fonction de commandement, décider impérativement de ce qui revient à chacun, accomplir des actes d'autorité. On comprend mieux par là la différence, qui a causé beaucoup de souci aux positivistes, entre le législateur et ceux qui "disent" les mêmes choses que lui, qui répètent les dispositions qu'il a édictées, mais qui ce faisant ne sont pas du tout assimilables à des législateurs: c'est qu'ils exercent, à travers ce qu'ils disent, des fonctions sociales, non pas de commandement, mais d'information ou d'étude, comme c'est le cas du tambour de ville à l'égard de la population locale ou du conseil juridique à l'égard de ses clients.
Il faut surtout souligner, par ailleurs, qu'en ramenant les actes normatifs à des actes de dire des normes, on les réduit du même coup à un seul et même type d'actes, de structure identique, de constitution uniforme; or les actes d'autorité dont il s'agit sont, au contraire, de nature très variée. Schématiquement, je propose d'introduire parmi eux une double distinction.

2.1. Première distinction: les actes de mise en vigueur et les actes de mise hors vigueur de règles. Sous ce même concept d'actes d'édiction de normes, la théorie du droit range syncrétiquement

deux sortes d'actes tout à fait différents et qu'on ne doit justement pas confondre. Une partie de ces actes consiste bien à établir officiellement dans un certain espace social des normes à respecter, à les mettre autoritairement en vigueur, à les faire entrer d'office en service, en état d'applicabilité, c'est-à-dire en état d'être obligatoirement à appliquer. Ce qui ne veut pas dire, du reste, que ces règles seront immédiatement applicables dès l'accomplissement de l'acte, dès son prononcé ou sa signature: le plus souvent, on le sait, la réglementation juridique prévoit des mesures de publicité et des délais avant que l'acte produise tous ses effets et que son dispositif devienne effectivement applicable; l'acte lui-même peut aussi contenir, le cas échéant, des dispositions spéciales relatives à l'entrée en vigueur effective de tout ou partie de ses autres dispositions.
On range également sous l'étiquette "actes d'édiction ou position de normes", à côté des actes de mise en vigueur de règles, des actes en réalité contraires, des actes de mise hors vigueur, hors service, temporairement ou définitivement: des actes suspendant l'applicabilité de normes antérieurement édictées, ou bien des actes annulant *ab initio* ou abrogeant sans effet rétroactif, en tout ou partie, des édictions antérieures de règles; à quoi il faut ajouter les actes de modification de réglementations antérieurement mises en vigueur, actes réalisant à la fois une mise hors vigueur des dispositions en cause dans leur teneur initiale et une mise en vigueur d'un dispositif nouveau dans la teneur résultant de la modification apportée. En baptisant aussi ces actes d'actes d'édiction de règles, on est amené à des analyses totalement extravagantes, comme on le voit notamment chez Kelsen: les actes d'annulation de normes seraient en réalité, nous dit-il, des actes d'édiction de normes d'un type spécial, des "normes négatives", des "normes d'annulation de normes"; on serait en présence d'un "législateur négatif", accomplissant des "actes de législation négative". Tout cela est pur verbiage et pervertit jusqu'à l'idée même des règles de conduite en impliquant qu'elles pourraient régir, non pas seulement des conduites humaines, mais des règles, qu'elles pourraient être par elles-mêmes directement en prise sur d'autres règles, être des règles de règles! Il convient, en réalité, de bien prendre conscience que la fonction de commandement ne consiste pas uniquement à édicter, à faire entrer en vigueur des règles, mais plutôt à moduler à l'adresse des dirigés le champ ou tissu de règles en vigueur, qu'ils ont à observer; cette modulation ne se réduit pas à un accroissement continu; les actes d'autorité déployés procèdent à des aménagements et ajustements de la réglementation bien plus nuancés.

2.1.2.

Une seconde distinction doit être opérée au sein des actes d'autorité accomplis par les dirigeants publics. À côté des actes de mise en vigueur ou hors vigueur de normes, ces dirigeants exécutent une autre variété d'actes juridiques, qui correspond à ce que les théoriciens des actes de langage qualifient d' "actes déclaratifs", comme par exemple les actes par lesquels le président d'une assemblée déclare la séance "ouverte" ou "levée", ou par lesquels dans une vente aux enchères le commissaire-priseur déclare un objet "adjugé", ou encore par lesquels les dirigeants d'un club déclarent admise ou, au contraire, exclue telle ou telle personne. Des actes déclaratifs du même type sont fort nombreux dans le champ juridique de la part des autorités publiques, même s'ils ont peu retenu l'attention des théoriciens du droit (comme Herbert Hart, par exemple, avec son concept *d'ascription*): actes de déclaration de guerre, ou d'état de siège, d'état d'urgence, d'état de catastrophe nationale; actes de déclaration de conformité ou de non-conformité d'un acte juridique à la Constitution ou à la loi; actes divers portant classement ou déclassement, inscription ou radiation (d'une personne, d'un bien, d'un site, etc.); actes de nomination ou de révocation, de naturalisation ou de retrait de la nationalité; actes portant approbation ou acceptation, actes portant rejet ou refus; etc.
Ces actes déclaratifs ne consistent pas à instituer ou destituer, retirer, des normes; leur dénominateur commun est de mettre en activité ou, au contraire, en sommeil des régimes

ou statuts prédéterminés par la réglementation en vigueur. Il est fréquent, en effet, que la réglementation subordonne le déclenchement, le maintien ou la cessation du jeu des régimes qu'elle fixe à une formalité verbale, à un acte de parole, et notamment – ce qui nous intéresse ici – à une déclaration d'une autorité publique: ainsi, pour que s'applique dans un cas donné le statut de l'état de siège ou celui de la fonction publique, il faut qu'intervienne de la part d'une autorité publique un acte de déclaration de l'état de siège ou un acte de nomination à un emploi public.
Bien que se distinguant des actes de mise en vigueur ou hors vigueur de normes, ces actes déclaratifs sont en pratique très généralement confondus avec eux. On y est incité, il est vrai, par le fait qu'il s'agit d'actes d'autorité par lesquels, en définitive, les pouvoirs publics dirigent pareillement les conduites, sont en prise sur elles: on ne perçoit pas, parce que c'est sans grand intérêt pratique, la différence entre mettre impérativement en service une nouvelle réglementation à respecter et faire entrer en activité et obliger à s'y conformer désormais des régimes ou statuts préfixés par la réglementation en vigueur; c'est toujours une fonction de commandement qui est ainsi exercée et pour les intéressés le résultat est strictement le même. Souvent, en outre, le même acte, la même loi, le même décret contient à la fois des dispositions déclaratives et des dispositions prescriptives de normes.

2.2. Les actes normatifs sont des actes d'autorité, mais ils sont aussi, en second lieu, des actes mentaux. Par les paroles écrites ou orales qu'il émet, le locuteur transmet, à ceux à qui il s'adresse, un acte que son esprit accomplit à leur égard. À côté de nos actions physiques comme marcher, fumer ou couper du bois, nous accomplissons couramment dans nos relations intersubjectives des actes mentaux, des actes qui se déploient dans le monde intelligible, et non dans le monde sensible, par le canal des circuits mentaux du locuteur et des adressataires: des actes tels que des demandes, des exhortations, des avertissements, des défis, des menaces, des promesses, etc. Il s'agit littéralement d'*actes dits*, d'actes de l'esprit *montrés par la parole*.
Bien que mentaux, bien qu'agissements de l'esprit, ces actes n'en sont pas moins dans leur essence des actes authentiques, c'est-à-dire des initiations ou provocations de choses dans le cours du réel, des productions ou engendrements intentionnels d'effets, amenant – poussant – certaines choses à survenir, à avoir lieu, en l'occurrence dans le contexte social environnant: c'est cette idée d'être moteur ou instigateur d'un quelque chose qu'exprime originairement le verbe latin *agere*, "pousser devant soi", "faire sortir", et par suite "être l'auteur de..." (*augere*, *auctor*, *auctoritas*, sont des dérivés de *agere*). Les actes mentaux, à l'instar des actes physiques, sont des agissements sur la réalité qui nous sont imputables, des interventions de notre propre fait sur l'état des choses du monde.
Mais les actes d'autorité présentent, parmi les autres actes mentaux, une particularité remarquable: ils sont, pour ainsi dire, doublement mentaux, mentaux à un double égard. Par ses paroles, en effet, le dirigeant communique aux dirigés – à leur esprit – un acte mental leur enjoignant de respecter des règles, c'est-à-dire aussi des objets mentaux dont il fixe lui-même la teneur ou auxquels il renvoie (dans le cas des actes déclaratifs). L'étymologie est, à nouveau, très édifiante: *commander* dérive de l'ancienne expression latine *manum dare*, "mettre en mains", "donner", d'où sont issus par contraction les verbes *mandare* et *commandare*. Commander, c'est littéralement donner aux adressataires des règles à observer, les leur mettre en mains pour qu'ils y ajustent leur conduite. Tout se passe ainsi d'esprit à esprit: l'esprit du dirigeant agit sur l'esprit du dirigé en vue de l'amener à initier lui-même, de l'intérieur, des comportements conformes aux règles qui lui sont données à observer.

3. Il est plus que temps pour moi de conclure. Transgressant les usages académiques les mieux établis, c'est dans cette partie finale de mon propos, et non dans l'introduction, que j'ai choisi

de m'expliquer sur le titre que j'ai donné à mon rapport: "Comment je vois le monde du droit". Ce clin d'œil au célèbre ouvrage d'Albert Einstein ne procède pas, de ma part, d'un excès d'immodestie, de la prétention dérisoire de me comparer à l'illustre physicien et penseur. C'est un tout autre parallèle que j'ai voulu évoquer. Il y a toujours eu une fascination exercée sur nous par le monde extérieur, l'univers physique, par la déconcertante étrangeté, le mystère et l'infinie poésie qu'il offre à notre regard naïf, débarrassé de nos préoccupations et de nos œillères du quotidien; Einstein s'en fait magistralement l'écho dans son livre, à la fois ébloui par la beauté du "mystère des choses" et profondément étonné, nous dit-il, que "le monde soit compréhensible". Mais c'est une semblable fascination que devrait, je crois, exercer sur nous l'univers intérieur – plus discret il est vrai – des choses de l'esprit, et tout particulièrement, quand on prend la peine de s'y arrêter et d'y poser un regard naïf, le monde de l'expérience juridique des hommes. Il s'agit pareillement, même si l'on n'y prête guère attention, d'un monde étrange, mystérieux et poétique; on y aperçoit toute une ingénierie souterraine, invisible et silencieuse, à l'œuvre pour réguler les sociétés humaines au travers d'outils et d'actes mentaux opérant en nous-mêmes, sans jamais sortir de nous: les signaux verbaux échangés et les comportements extérieurs, les gesticulations en tous genres, induits par cette ingénierie ne sont, si l'on ose dire, que la partie visible, émergée, de l'iceberg enfoui dans les profondeurs de nous-mêmes. Cette manière, qui nous est propre, d'être au monde et de vivre avec nos congénères devrait nous surprendre bien davantage que toutes les fictions les plus inventives, les plus débridées, produites par notre imagination.

Le plus étonnant peut-être, c'est que cette expérience d'ingénierie sociale soit possible et fonctionne tant bien que mal en dépit de la cacophonie, des divergences de décodage que risque d'engendrer cette circulation indirecte des outils juridiques, en dépit aussi du paradoxe sur lequel repose en fin de compte le principe de l'autorité sur des êtres dotés de la faculté particulière et irréductible de s'autodéterminer, de se conduire du dedans d'eux-mêmes: pour que le dirigeant puisse diriger de l'extérieur la conduite du dirigé, encore faut-il que ce dernier consente à se laisser diriger et à prêter l'oreille, à "obéir" (*ob-audire*) aux règles qui lui sont prescrites; l'autorité du dirigeant passe toute entière par le sas de la volonté du dirigé, le recours à la violence n'est lui-même qu'une sollicitation de l'assentiment du dirigé. Tout cela est, à mes yeux, aussi fascinant et énigmatique que le monde quantique ou cosmique.

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LES CRITÈRES ET L'ORDINAIRE DE LA NORME

abstract

"Le droit est ce que le droit considère comme du droit": cette définition circulaire, qui permet bien de structurer un discours de droit et d'engager une axiomatique du droit, ne dit rien pourtant sur le droit et sur ses éléments constitutifs. L'auteur, en partant de l'analyse du contentieux juridique, réfléchi, à partir de Wittgenstein et de Cavell, sur l'arrière-plan des critères qui s'attachent au droit en tant que "forme de vie". Ces critères peuvent toujours être remis en question: il est donc nécessaire de se confronter avec une incontournable perspective sceptique. En critiquant la perspective fondée sur la normativité des concepts, l'auteur propose d'adopter un réalisme pragmatique interne et incarnée, fondé sur l'idée que ce sont plutôt les critères sur lesquels les sujets s'accordent dans la "conversation de la justice" qui nous permettent de comprendre notre engagement dans les normes et dans le langage.

keywords

concept de droit, normativité, forme de vie, critères, pragmatisme incarné, Stanley Cavell

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Il n'y a pas d'images vraies a priori
(Wittgenstein, 1921/1993, 2.225, p. 40).
M'illumino di ciò che mi consuma
(Conte, 2006, p. 38).

0. Introduction

Il me semble qu'existent deux jugements sur lesquels nous pouvons aisément nous accorder. Le premier consiste en ce que, dans nos pays, le droit est globalement respecté ce qui démontre un certain assentiment sur sa légitimité. Le second réside en ce que, dans ces mêmes pays, le droit est appréhendé sous la forme simplifié du "droit positif".[1] Que signifie le fait que nous nous accordions[2] ainsi sur ces points dans nos jugements? La réflexion philosophique nous laisse entendre que lorsque nous nous accordons dans les jugements nous manifestons non seulement que le langage est chose partagée mais également et surtout que lorsque j'énonce ce que nous nous pouvons dire (ou ne pas dire) j'exprime des contraintes que les autres reconnaissent comme des limites propres à la forme de vie que nous partageons. Ce qui nous est ainsi accordé ce n'est donc pas tant le même monde[3] que la même "forme de vie".

1 Ce concept, comme nous le verrons, permet de faire l'économie d'une pensée véritable. Il masque le caractère équivoque de la norme. La définition de cette dernière est délicate et ouvre à l'ambigüité. Elle est régulièrement simplifiée ou plus justement appréhendée à partir d'un glissement de sens: métaphorique ou métonymique. En fait, la définition se présente comme travaillée à partir d'une pluralité de points de vue: existent ainsi s'agissant de la norme une pluralité de thèses, une pluralité de champs disciplinaires qui la concerne et enfin une pluralité de thèmes qui s'accordent à celle-ci (sur cette question: G. Lorini & L. Passerini Glazel, *Filosofie della norma* (2012), en particulier pp. XIV-XVIII). Le professeur A. G. Conte a admirablement synthétisé cette pluralité: "Norma: cinque referenti" (2007; cf. maintenant aussi Conte, 2017). Il se réfère ainsi à la norme comme énoncé déontique; à la norme comme énonciation déontique; à la norme comme statut déontique; à la norme comme proposition déontique; à la norme comme noème déontique.

2 Au sens particulier de ce que Stanley Cavell développe au fil de son œuvre comme étant un "accord". L'accord se fait ainsi dans le monde et non sur le monde. Dans l'accord ordinaire que nous établissons se manifeste la reconnaissance de critères publics qui fondent notre sentiment de certitude. C'est l'accord sur ces critères qui nous offre l'occasion de créer nos concepts. Sur cette question, S. Cavell, *Qu'est-ce que la philosophie américaine? De Wittgenstein à Emerson* (2009c), en particulier: "La conversation de la justice" (2009b).

3 Cf. J. Rabachou, *Qu'est-ce qu'un monde ?* (2016). La réflexion sur ce qui existe au sein du monde est délicate: "nous disposons seulement, pour parler du réel, de nos propres concepts, dont nous ne pouvons évidemment sortir pour en examiner la pertinence; or, comme le soupçonne Quine, non seulement nous déconstruisons opiniâtrement la réalité en une multitude d'objets identifiables et discernables, par exemple en plusieurs mondes, mais encore nous n'avons pas les moyens de déconstruire autrement, parce que nous plaquons sur n'importe quelle information empirique

Celles-ci expriment

> un arrière-plan d'accords exhaustifs et systématiques, sans que nous le réalisions (ou dont nous ignorons avoir conscience). A ces accords Wittgenstein donne tantôt le nom de conventions, tantôt celui de règles [...]. Wittgenstein appelle accord dans les jugements (§ 242) l'accord sur la base duquel nous agissons, et notre capacité à nous servir du langage dépend, selon lui, d'un accord dans des formes de vie (§ 241). Or les formes de vie sont précisément, toujours d'après lui, ce qui doit être accepté; car elles sont données" (Cavell, 1979/1996, p. 66).

Ces formes nous sont donc données en tant qu'immanentes à notre vie elle-même et pas uniquement sur la base d'une convention sociale. L'accord sur cette forme de vie, qui est l'arrière-plan de nos jugements, peut cependant se déliter lorsque nous ne partageons plus les mêmes critères. La nécessité d'en assurer la pérennité ou le renouvellement est ainsi l'enjeu véritable de toutes les démocraties.
Lorsque l'accord est en péril les critères sont là pour en assurer la continuité ou le renégocier. Ils permettent de répondre à la question essentielle: "comment savez-vous que...?". Il faut entendre par là que les critères ne permettent pas tant de déterminer la certitude de certains énoncés que l'adéquation des concepts qui sont eux-mêmes employés dans les énoncés. Le concept donne forme à une pensée mais se pense lui-même à partir de sa pertinence, c'est-à-dire de son adaptation ou de son adéquation à son objet. En agissant à ce niveau, ils nous permettent de nous accorder dans les jugements qui portent sur cette pertinence. Étrangement, les critères ne portent pas sur une chose que l'on connaît déjà mais semblent conçus pour nous offrir d'apprendre ce qu'est cette chose. Le critère est le lieu naturel en quelque sorte de notre apprentissage. Ce n'est que par la suite qu'il se cristallise en certitude. La force heuristique du critère réside, en effet, en ce qu'il peut être refusé.
Dans le cadre de notre réflexion juridique cette piste, largement développée par Cavell, nous paraît riche d'enseignements.
En effet, si nous nous accordons sur la définition tautologique du droit positif c'est parce que cette dernière nous offre la possibilité de disposer de divers critères qui nous renseignent sur ce sur quoi nous nous accordons, en désignant une chose comme étant du droit dans nos jugements sur le droit. Le "droit positif" entendu comme concept serait, dès lors, le lieu d'une certitude infondée (§ 1.). En ce sens, le contentieux qui se développe à partir de ce droit positif est l'illustration d'une certaine crise des critères qui s'attachent à cette "forme de vie". L'ordinaire du contentieux se présente alors comme le lieu d'un scepticisme repensé (§ 2.). Les critères apparaissent, en effet, comme la vérité même du scepticisme qui hante notre forme de vie spécifique inscrite dans le langage ordinaire et juridique. Il s'agira donc à partir de la tautologie que forme la définition "classique" du droit de percevoir conformément à une approche pragmatique ce que peuvent nous offrir à penser les critères au bénéfice de la norme. Cette reconstruction pragmatique semble impliquer l'adoption d'un réalisme interne et l'acceptation d'un certain effet de deuil. Nous devrions accepter sur la base de ce

notre patron objectivant, qui risque bien d'être relatif et provincial [...] dans le cas particulier du concept de monde, la détermination de notre patron objectifiant est d'ailleurs singulièrement brouillé par la question de la pluralité des mondes: le concept de monde signifie-t-il la totalité de ce qui existe, sans possibilité que quoi que ce soit échappe à cette totalité, ou réfère-t-il à des totalités, certes englobantes, mais locales, et donc multiples, qui méritent à plusieurs le nom de mondes?" (Rabachou, 2016, pp. 8-9). Sur une discussion qui porte sur l'existence ou la cohérence même de ce concept: M. Gabriel, *Pourquoi le monde n'existe pas* (2013). Plus largement les travaux de N. Goodman sur le pluralisme relativiste (*Manières de faire des mondes*, 1978/2006).

scepticisme repensé l'abandon définitif de divers dogmes dont le dernier et non le moindre est l'abandon de la dichotomie entre la forme et le contenu. En ce sens, les critères apparaissent comme la chance d'une "parole juridique malheureuse"[4] (§ 3.).

1. Les critères dans le "droit normatif ordinaire" comme lieu d'une certitude infondée

Il est commun devant l'incapacité des juristes à définir convenablement l'objet de leurs recherches[5] de donner la définition suivante du droit positif: "le droit est ce que le droit considère comme du droit".[6] En ce sens, le droit positif tout entier semble devoir être rapporté à une tautologie. Cette approche permet d'offrir un accès au "réel du droit" et ceci lorsqu'on entend par "réel" ce qui est conforme au principe d'identité. On peut lui objecter cependant le fait qu'avec une telle définition on s'interdit de dire véritablement "quelque chose" sinon par le moyen d'une parole ajoutée.[7] Le droit n'est plus le droit mais le "droit positif"; le "droit constitutionnel"; le "droit subjectif"; le "droit naturel"; le "droit civil"... On sait, en outre, suivant les réflexions développées au sein du *Tractatus* qu'une telle tautologie serait non pas une "pensée insensée" mais, plus justement, une "pensée vide" de sens.[8]

Ce qui s'énonce par ce moyen *montre* que celle-ci ne dit rien sur le droit mais qu'elle offre la capacité de structurer un discours de droit. Cette grammaire va ainsi permettre d'engager une sorte d'axiomatique du droit.[9] Elle doit être appréhendée comme une sorte de norme de la langue elle-même, car elle a pour objet de stipuler les conditions qui sont nécessaires afin de permettre la mise en place d'une évaluation de ce qui est énoncé dans cette langue.[10]

Sur la base de cette tautologie seront, de la sorte, développées des propositions analytiques. Le droit positif va donc généralement se développer par inférences logiques,[11] dont pourront être déduites par exemple, des normes techniques.[12] L'ordre du discours juridique se met de cette manière en place.

Il engendre également, dans le même temps, sa part de mystère et de développement apophantique. Muet à énoncer l'objet qui l'impose comme énonciation il est parfaitement

4 Pour copier la jolie et célèbre formule de Bouveresse.

5 En 1989, une expérience a été tentée par la revue *Droits*: il s'agissait de demander à quarante-sept auteurs de donner en quelques pages leur conception du droit. Le doyen Vedel commença sa participation par ces mots: "Voilà des semaines et même des mois que je 'sèche' laborieusement sur la question, pourtant si apparemment innocente [...]: 'Qu'est-ce que le droit?' Cet état déjà peu glorieux, s'aggrave d'un sentiment de honte. J'ai entendu ma première leçon de droit voici plus de soixante ans; j'ai donné mon premier cours en chaire voici plus de cinquante; je n'ai cessé de faire le métier de juriste tour à tour ou simultanément comme avocat, comme professeur, comme auteur, comme conseil et même comme juge. Et me voilà déconcerté tel un étudiant de première année remettant copie blanche, faute d'avoir pu rassembler les bribes de réponse qui font échapper au zéro" (Vedel, 1989, p. 69).

6 Dans une étude maintenant ancienne mais toujours d'une grande actualité Jean-Louis Gardies (*Essai sur les fondements a priori de la rationalité morale et juridique*, 1972) opérait une analyse de la distinction qui se manifeste entre le "droit positif" et un "droit a priori" tel qu'il a été dégagé, par exemple, dans les travaux de Reinach. La schématisation de cette proposition faisant apparaitre la définition du droit positif comme résultant d'une tautologie pourrait prendre la forme suivante: (A) est ce que (A) considère comme (A). Il s'agit, en ce sens, d'une vérité logique.

7 Sur cette question: cf., par exemple, C. Rosset, *Le démon de la tautologie suivi de cinq petites pièces morales* (1997).

8 L. Wittgenstein, *Tractatus logico-philosophicus*, 4.461: "[...] La tautologie et la contradiction sont vides de sens (Comme le point, duquel partent deux flèches en directions opposées.) (Je ne sais rien du temps qu'il fait par exemple lorsque je sais: ou il pleut ou il ne pleut pas.)" (1921/1993, p. 68).

9 Sur cette question de l'axiomatique dans le domaine juridique: cf. les travaux de Luigi Ferrajoli et, en particulier, les 3 volumes des *Principia iuris* (2007). Pour une analyse critique, cf. P. Di Lucia (2014).

10 Sur cette question des relations entre la langue et la logique cf. A. Lecomte (2008, p. 111). D'une certaine manière la grammaire cherche à éviter les non-sens alors que la logique cherche à éviter le contre-sens.

11 C'est la logique inhérente à la mise en œuvre, par exemple, du si célèbre "syllogisme juridique".

12 On parle, également, de règles régulatives, de règles "anankastiques" ou d'impératifs conformément à la terminologie de Kant... Pour tisser la métaphore il apparait, par exemple, que les recettes de cuisine sont l'illustration parfaite de ces règles techniques.

capable de montrer la relation qu'il informe.[13] Selon Gardies (1975) il faudrait, finalement, choisir entre un langage vulgaire qui est inconsistant mais universel et un langage qui achète la garantie de la non contradiction mais au prix de son universalité.
Dans cette perspective, la construction qui donne forme au droit positif est, certes, utile afin de permettre l'application et la mise en œuvre du droit, pour autant, elle serait d'une assez formidable inutilité dès lors que l'on s'attacherait à *penser* le droit ou ses éléments constitutifs. Le caractère positif du droit offre, pourtant, divers critères qui rendent compte de ce qui est entendue dans nos jugements comme étant le droit. Le droit c'est ainsi le droit officiel, le droit en vigueur...[14]
Ce que l'accord sur une définition tautologique du droit implique c'est, finalement, l'adhésion à une présentation simplifiée de la norme. La norme comme outil mental véhiculé par un acte de langage implique qu'elle n'a pas d'autre fondement que son acceptation dans une forme de vie. La question de la norme est ainsi pleinement offerte à la menace de la récursivité dès lors qu'elle se déploie dans une forme de vie mais qu'elle ne se fonde dans rien de plus profond. Il serait, en effet impossible d'adopter le point de vue d'un conventionnalisme. L'accord est trop "intime et exhaustif [...]; aucune conception courante de la 'convention' ne semble pouvoir rendre compte du travail qu'accomplissent les mots – car il faudrait, pour ainsi dire, faire entrer en scène un trop grand nombre de conventions, une pour chaque nuance, de chaque mot et dans chaque contexte" (Cavell, 1996, p. 68). Nous savons que les critères qui fondent nos accords dans les jugements sont, par nature, ouverts au scepticisme: l'accord peut toujours être récusé, c'est sa force et c'est en cela, nous le verrons, qu'il exprime la vérité même du scepticisme et qu'il en manifeste le caractère indépassable. Si imaginer un langage c'est imaginer une forme de vie alors imaginer le langage juridique – comme langue de spécialité – c'est imaginer une forme de vie spécifique inhérente à la pratique ordinaire du droit:

> Nous apprenons et nous enseignons des mots dans certains contextes, et on attend alors de nous (et nous attendons des autres) que nous puissions (qu'ils puissent) les projeter dans d'autres contextes. Rien ne nous assure que cette projection aura lieu (et en particulier ce n'est pas assuré par notre appréhension des universaux, ni par notre appréhension de recueils de règles), tout comme rien ne garantit que nous ferons et comprendrons les mêmes projections. Le fait que dans l'ensemble nous y parvenons est affaire du cheminement partagé de nos intérêts et de nos sentiments, de nos modes de réaction, de notre sens de l'humour, de ce qui est important ou adéquat, de ce qui est scandaleux, de ce qui est pareil à autre chose, de ce qu'est un reproche ou un pardon, de ce qui fait d'une énonciation une assertion, un appel, ou une explication – tout le tourbillon de l'organisme que Wittgenstein appelle "formes de vie". Le langage et l'activité des humains, la santé et la communauté humaine ne sont fondés sur rien de plus, et rien de moins. C'est là une vision aussi simple que difficile, et aussi difficile que terrifiante – difficile parce que terrifiante. Entreprendre la tâche d'en *montrer* la simplicité serait faire un grand pas vers l'accessibilité de la seconde philosophie de Wittgenstein (Cavell, 1969/2009a, pp. 138-139).

13 C'est ainsi que se manifeste pleinement cette dimension apophantique.
14 Le philosophe de Harvard dans son ouvrage *Les voix de la raison* (Cavell, 1979/1996) opère au premier chapitre une classification passionnante de l'usage ordinaire des critères. Il distingue ainsi sept éléments qui entrent en jeu dans l'usage des critères: la source de l'autorité; la modalité d'exercice de l'autorité; la visée épistémique; l'objet ou le phénomène candidat; le concept qui définit le statut; les moyens épistémiques (spécification des critères); le degré de satisfaction.

2. Les critères dans "l'ordinaire du contentieux" comme lieu d'un scepticisme repensé

Dans le cadre du contentieux propre au fonctionnement du droit positif nous n'engageons certes pas notre "forme de vie". En ce sens nous ne manifestons, de fait, que des désaccords, en quelque sorte, périphériques ou marginaux sur les critères de ce droit.[15] Les évolutions conceptuelles et les revirements de jurisprudence expriment cette prééminence du critère sur le concept. Le désaccord sur les critères offre la possibilité de remettre en cause la pertinence du concept.

Il convient de noter que les critères ne permettent pas tant de nous doter d'une certitude sur la réalité d'une chose que d'identifier ce qu'est cette chose afin de mieux "nous repérer".

> En ayant recours aux critères, on ne cherche pas à expliquer, ou à prouver le fait que nous nous sommes accordés entre nous dans les mots (et donc dans des formes de vie). On décrit seulement autrement le même fait; ou plutôt, il y a un recours possible lorsque l'accord est menacé, ou perdu. Nous avons recours aux critères officiels lorsqu'il faut établir des jugements de valeur; mais nous avons recours aux critères de Wittgenstein lorsque "nous ne savons pas où nous en sommes", lorsque nous sommes perdus par rapport à nos mots, et au monde qu'ils anticipent. Nous cherchons alors à nous retrouver nous-mêmes en découvrant et en déclarant les critères sur lesquels nous sommes en accord (Cavell, 1979/1996, p. 71).

Il s'agit ainsi avec le contentieux, essentiellement, de critiquer des conventions, des règles... et finalement, principalement des "concepts" qui permettaient jusqu'à présent de conforter - ou de réassurer - notre accord dans le langage juridique. Parfois celui-ci, du fait du caractère tautologique du droit positif nécessite d'être réinterprété et cette action de renégociation ne pourra intervenir que de l'intérieur du schème conceptuel adopté. Ce qui se présente, dès lors, à l'examen dans le cadre du contentieux, c'est la difficulté inhérente à notre participation véritable à cette "conversation de justice"[16] et cependant essentielle au regard de notre accord social[17] telle qu'elle a été parfaitement analysée par Cavell sur la base des travaux de Rawls (Cavell, 2009b).[18] On comprend que la légitimité et l'effectivité du droit positif résident dans cette dimension pragmatique et dans la possibilité, pour le droit, de pouvoir répéter ainsi inlassablement sa réalité.

Pour percevoir convenablement cette dimension pragmatique il convient, d'une part, de se rappeler que comme l'a définitivement, selon nous, démontré le professeur Amselek les normes sont des outils de direction des conduites véhiculés par des actes de langage. D'autre part, il convient, également, de se libérer du mythe de l'objectivité ou de l'intériorité. Il existe, en effet, une sorte de croyance[19] dans l'idée d'une connaissance immédiate à l'égard du monde.[20] Cette connaissance serait privée et singulière. Dans cette perspective, c'est la

15 Comme l'énonce Wittgenstein, "nous jugeons une action d'après son arrière-plan dans la vie humaine [...]. L'arrière-plan est le train de la vie" (1980/1989-1994, §§ 624-625).

16 Sur cette question: S. Cavell, "La conversation de la justice: Rawls et le théâtre du consentement" (2009b).

17 Sur cette question, cf. les travaux importants de S. Laugier à partir de l'œuvre de S. Cavell sur conversation et démocratie. Nous nous contenterons de citer le chapitre IV de l'ouvrage *Recommencer la philosophie: Stanley Cavell et la philosophie en Amérique* (Laugier, 2014, pp. 147-178). Également D. Lorenzini, Éthique et politique de *soi: Foucault, Hadot, Cavell et les techniques de l'ordinaire* (2015).

18 L'idée qui se dessine est celle qui sera reprise ensuite dans l'étude des comédies de remariage. "Ce qui projette l'idée que ce qui constitue un mariage ne se trouve pas, pour ainsi dire à l'extérieur du mariage (dans l'Église, l'État, la satisfaction sexuelle, ou la promesse d'une progéniture) mais dans la disposition à répéter la reconnaissance de sa réalité, comme si tout mariage authentique était un remariage" (Cavell, 2009b, p. 374).

19 Celle-ci n'est finalement jamais qu'une croyance déplacée.

20 C'est finalement ce dogme que souhaite remettre en cause Davidson lorsqu'il s'attaque à ce qu'il présente comme

présence de "raisons privées" élaborées sur le même modèle que celui du "langage privé" qui prévaudrait. La critique de ce mythe est impérative mais reste déroutante car elle impacte le fondement en apparence le plus assuré de notre rapport au monde.[21]

Pour autant, dès lors que l'on prête véritablement attention à cette mythologie, on distingue nettement le paradoxe qui consiste à reconnaître, simultanément, l'intériorité de la pensée et la rationalité de celle-ci. La réfutation par Wittgenstein de cette approche est suffisamment connue pour qu'il ne soit pas nécessaire d'y revenir:[22] il suffit de noter que cet appel à une raison privée serait au-delà du mythe un non-sens. Nos raisons n'ont, en effet, de sens qu'inscrites dans le langage et celui-ci est irrémédiablement public.

Cette mythologie consiste dans l'idée finalement assez étrange qu'il y aurait une raison avant même que nous l'ayons utilisée: une raison "déjà-là". Cette illusion engendre, cependant, des effets dommageables: cette croyance en une intériorité de la raison implique ainsi la prise en compte de ces raisons comme étant des causes. Cette démarche se retrouve d'abondance dans le fonctionnement ordinaire du droit et dans la présence de justifications *a posteriori* qui sont présentées comme des causes de la décision.

De ce retournement découle une certaine confusion entre nécessité et causalité...[23]

Les principes directeurs du procès expriment très nettement le caractère public de cet échange des raisons[24] permettant la mise en l'état des instances. Ce qui se présente dans la mise en cause de cette illusion d'une raison privée c'est une conception plus réaliste de la subjectivité. Avec cette dernière on s'attache à récuser l'idée selon laquelle, un contentieux, pourrait lors de l'instance, permettre à ses protagonistes de se comprendre et leur faire apparaître la "véritable raison" du contentieux. Or, il n'y a pas de "vraies raisons" cachées qui pourraient être expurgées à l'occasion du contentieux et le procès ne peut pas être une catharsis. Ce qui se présente n'est donc que la mise en œuvre d'un jeu des raisons dans un espace public.

Plus justement encore ce qui se dévoile c'est que l'on ne peut transcender le langage dans ou par le langage.[25]

Devrait ainsi être mis en cause l'idée d'un for intérieur qui reste présent dans une approche mythifiée du procès. Une illustration clinique est susceptible de donner de la force à notre analyse: il a été démontré qu'il est possible de comprendre un autiste et ceci du simple fait que cette compréhension est extérieure, publique (Renaudo, 2016, p. 169 ss.).

Il faut ainsi convenir que l'usage de cette "rhétorique de l'intériorité" ou de "la raison privée" n'est qu'une... rhétorique: un usage langagier qui est orienté vers certains résultats pragmatiques.

Il nous appartient, en ce sens, de résister à un certain appauvrissement du monde – ou de notre relation au monde – que le professeur Amselek a, une nouvelle fois, admirablement analysé sous les traits du "logicisme" (2017, p. 33) et qui se présente comme la capacité à

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le troisième dogme de l'empirisme celui du schème et du contenu.

21 Sur cette question les développements très intéressants de G. Renaudo, *Des sciences pour nous comprendre.* Vérité et réalisme dans les sciences humaines (2016).

22 Le caractère même d'une règle est ainsi d'être public.

23 La nécessité s'invente chez Wittgenstein dans un certain nombre de faits, pour reprendre la jolie formule de J. Bouveresse, *La force de la règle: Wittgenstein et l'invention de la nécessité* (1987).

24 Sur cette question W. Sellars et son "nominalisme psychologique" (1956/1992); R. Brandom et son "réalisme conceptuel". Cf. le chapitre "Le réalisme conceptuel de Robert Brandom" in J.-P. Cometti, *Qu'est-ce que le pragmatisme?* (2010, pp. 218-223). Dans son ouvrage *L'articulation des raisons: introduction à l'inférentialisme*, R. Brandom utilise les termes de "pragmatisme conceptuel" (2000/2009, p. 12).

25 Cette situation est, d'évidence, le cœur même des réflexions développées par Wittgenstein, Quine, Putnam ou Davidson...

réduire les normes juridiques au matériau dont elles sont faites en oubliant leur ustensilité et le fait qu'elles sont véhiculées par des actes de langage.[26]
S'il serait absurde de considérer que nous serions à même de connaître les raisons de nos comportements avant même de nous comporter, et, partant, de couper nos actions et leurs normes de notre forme de vie, la présence d'un lien entre intériorité et extériorité impliquant que les critères de l'intériorité sont... extérieurs c'est-à-dire publics, peut être envisageable. On retrouve ainsi sous une forme différente cette formidable intuition, déjà présente dans la célèbre formule de Deleuze, selon lequel le plus profond chez l'homme c'est sa peau.
Il ne s'agit pas là de faire l'apologie d'une quelconque superficialité des comportements mais de comprendre pleinement que ce qui fait l'homme est aussi cette perméabilité à son environnement. Intériorité et extériorité ne forment pas une opposition "logique" mais figure "le tourbillon" même de la vie et le moteur véritable de notre "forme de vie" selon les formules chères à Cavell. Le public est, en ce sens, l'ordinaire d'une vie: celui que Cavell, à la suite d'Austin, cherche à redécouvrir et à repenser. L'extérieur ordinaire se présente comme la pleine expression des usages du langage et son *contexte* même (ce qui signifie que les critères de notre expression sont externes et publics). C'est la raison pour laquelle, à partir d'une prise en compte de l'ordinaire du contentieux juridique, c'est le scepticisme même inhérent à notre forme de vie qui est en cause. Devant l'impossibilité de nous situer en surplomb de notre forme de vie nous devons en effet concentrer nos efforts sur les effets pragmatiques des mots du contentieux afin de prendre enfin au sérieux son ordinaire.
Dans ses réflexions sur Emerson, le philosophe de Harvard, n'hésite jamais à rappeler la citation présente dans *Self-Reliance*: "chacun des mots qu'ils disent nous chagrine" (Emerson, 1841, p. 45). En effet, les mots, dans cette perception pragmatique, méritent d'être rédimés car ils offrent la possibilité au droit de répéter de manière immanente sa réalité.

3. Les critères comme lieu enchanté d'une "parole juridique malheureuse"

Au total, les critères sont la vérité[27] même du scepticisme[28] tel qu'il est propre à notre forme de vie: ils forment ainsi, à la fois, l'expression de la vérité de la question sceptique et la seule réponse possible à ce défi.
Une vision de notre connaissance du langage telle qu'elle est contrôlée par les critères devrait permettre de nous libérer de notre quête de certitude et de fondement. Il apparaît de la sorte que travailler la vérité du scepticisme offre la possibilité de révéler le *destin* même des critères. Pour justifier cette assertion il convient de rappeler, rapidement, les éléments propres à définir ce scepticisme.
L'inscription de notre pensée dans le langage semble impliquer un certain arbitraire (tenant à

26 Cet impératif impose de comprendre de manière liminaire la structure même de la pensée qui peut être développée au bénéfice de l'examen de l'objet juridique. La pensée est généralement appréhendée à partir de sa portée conceptuelle. Elle apparait, dès lors, dominée par la raison, la logique et le logos... Traditionnellement, on recherche ainsi dans le droit des contenus de pensée qui peuvent être analysés. Néanmoins, on peut considérer que cette approche, relativement traditionnelle, ne cerne pas totalement le droit. Celle-ci est également débordée par l'intuition et l'imagination – ou par le désir – ou enfin encadré et bornée par la mémoire. On sait, depuis Heidegger, qu'au-delà de la raison la pensée semble devoir toujours être restituée dans sa "lumière originelle". Si la pensée s'élabore ainsi sur la base d'un "horizon d'être" – et d'une différence ontologique – les règles, quant à elles, se livrent à nous sur la base d'un nécessaire "horizon pragmatique". La règle est chose publique: elle s'entend comme un acte de langage public.

27 Entendue comme fidélité à un évènement fondateur. Ce qui apparait dans notre hypothèse comme fondateur c'est ainsi que notre relation au monde hantée par le scepticisme n'est jamais une relation de connaissance.
28 Cf. E. Domenach, "'La vérité du scepticisme', le destin d'une expression" (2011, p. 201). Cette expression traverse la totalité de l'œuvre du philosophe de Harvard. Dans *Les voix de la raison*, qui est le texte essentiel sur cette question, il estime dans la première partie de l'ouvrage que les critères sont à la fois l'objet de la critique et les termes de cette même critique (Cavell, 1979/1996).

la présence du monde et donc à une éventuelle dénotation ou à la présence de l'autre comme destinataire de mon discours et de mon message). Cette question se manifeste pleinement dans les débats inhérents à la question du réalisme philosophique. Incapables d'inscrire la vérité dans un rapport de correspondance au monde, on a ainsi cherché à l'appréhender à partir de son inscription dans les usages. Le risque étant, dès lors, de tomber dans un certain relativisme et dans le scepticisme.

Le relativisme se manifeste, par exemple, dans le débat classique entre Rorty et Putnam.[29] Le premier estimant que tout le sens est dans l'usage et que, dès lors, toute modification des usages implique, nécessairement, une mutation dans le sens. Putnam, au contraire, considérant que subsiste un certain réalisme. À ce titre, l'approche de Putnam semble proche de celle développée par W. Quine au moyen de son naturalisme pragmatique.[30] Certes, il n'est pas possible d'établir un réalisme qui serait fondé sur une théorie de la correspondance entre l'esprit et la réalité; pour autant, la biologie, au sens large, aurait quelque chose à énoncer sur la manière dont va s'établir notre capacité à coder la réalité à partir de schémas conceptuels. En ce sens, la connaissance fait toujours partie d'un tel schéma qui ne sera modifié, dès lors, que de l'intérieur à l'image de la célèbre métaphore du "bateau de Neurath". Au total, les arguments de Putnam contre Rorty et le relativisme peuvent être synthétisés de la manière suivante: d'une part le relativisme se présente comme auto-réfutant,[31] d'autre part, il observe que nos conceptions, mêmes indissociables de notre langage et de nos formes de vie, sont objectives, ce même s'il s'agit d'"une objectivité pour nous".[32]

Cette controverse doit être située au regard de l'évolution même de la pensée philosophique de Putnam. On sait que cette pensée a, en effet, été régulièrement renouvelée. Initialement proche d'un réalisme métaphysique, il s'est ensuite orienté vers un réalisme interne, puis vers un réalisme pragmatique à visage humain. Cette évolution l'a porté à se détourner de l'externalisme au bénéfice d'une vision pragmatique. Il adhèrera ainsi à une définition "peircienne" de la vérité selon laquelle cette dernière peut être appréciée en termes de "limite idéale de l'enquête".[33]

La ligne défendue par Putnam, pour se préserver contre les dangers du relativisme et du

29 Sur cette question des relations entre la vérité et la signification et du débat entre Rorty et Putnam cf. l'ouvrage récent de G. Renaudo, *Des sciences pour nous comprendre. Vérité et réalisme dans les sciences humaines* (2016), et en particulier le chapitre III: "Du paradoxe à l'impasse: le vrai dans la question réaliste (Putnam, Rorty, Diamond)" (pp. 85-133). On connait le contexte de cette discussion: Rorty estimait ainsi "Nous devrions redéfinir vrai pour être en accord avec la déclaration de Heidegger selon laquelle les lois de Newton sont devenues vraies grâce aux travaux de Newton, et qu'avant sa découverte elles n'étaient ni vraies ni fausses" (Rorty, 1987; cité par C. Diamond & S. Gerrard, 1999, p. 100). Selon Putnam cette personne était dans le vrai au XVIIe siècle et elle l'est toujours lorsque nous considérons, de nos jours, ses déclarations. Par conséquent, pour lui l'extension d'un terme ne dépend pas uniquement de nos états mentaux mais également de certains aspects externes. La signification serait ainsi dans un lien de dépendance vis-à-vis de l'environnement. Par ce terme d'environnement il ne s'agit pas d'en appeler au contexte d'énonciation mais plus justement de se référer à un certain état du monde physique qui serait alors indépendant de toute théorie. On comprend que dans cette confrontation s'opposent deux conceptions de la signification: l'une qui est interne aux usages et l'autre qui fait dépendre cette même signification d'un certain réalisme (dans cette dernière analyse il existe ainsi une structure de la vérité qui se place dans le monde).

30 Pour celui-ci, on le sait, l'entrelacement de la pensée et du langage est inextricable. Cf. A. Rainone, *Quale realismo, quale verità. Saggio su W. V. Quine* (2012).

31 Dans la position du relativisme selon laquelle tous les points de vue se valent le relativiste s'accorde cependant un privilège qu'il refuse aux autres.

32 On connait la formule de Putnam: si quelqu'un pense que tous les systèmes conceptuels se valent "il n'a qu'à choisir le système conceptuel nous attribuant la capacité de voler, et sauter par la fenêtre; il pourra se convaincre, s'il survit, de la faiblesse de ce point de vue" (Putnam, 1981/1984).

33 Cette adhésion prendra dans la réflexion du philosophe américain la forme de "l'acceptabilité rationnelle idéalisée"... Ou en conditions épistémiques suffisamment bonnes dans la suite de ses réflexions.

scepticisme, est de concilier, d'une part, l'idée selon laquelle la distinction entre fait et valeur est fragile[34] et, d'autre part, l'intuition selon laquelle le monde n'est pas seulement ce que nous en faisons et que tout le sens n'est pas dans l'usage. Dans les trois *Dewey Lectures,* il sera encore conduit à amplifier son ancrage pragmatique. Il estimera, dès lors, qu'il ne faut pas considérer l'esprit comme extérieur au langage, mais comme directement présent en lui. Le langage apparaît, en ce sens, pleinement comme notre forme de vie elle-même. En outre, les vérités conceptuelles dépendront quant à elles de l'interprétation des formes de vie. Enfin, il estimera que nous ne sommes pas causalement mais cognitivement liés aux objets de l'expérience ce qui implique un arrière-plan de "lois".

Le scepticisme se manifeste également au-delà de ce relativisme par l'impossibilité de déterminer préalablement une signification par l'usage d'une règle.

Deux écueils apparaissent ainsi comme susceptibles de rendre impossible la présence d'une règle préalable: le *régulisme* c'est à dire le fait de penser que la formulation explicite d'une règle puisse donner naissance à une norme[35] et le *régularisme*. Dans cette seconde approche la normativité serait simplement reconduite à une régularité des comportements: le danger serait alors de croire que l'étude des régularités des comportements pourrait, à elle seule, permettre de déterminer la présence de normes, sans prendre en compte la question de ce que les agents eux-mêmes avaient en tête dans le cadre de ces mêmes comportements réguliers.[36]

Face à ce défi, les critères ne peuvent être appréhendés comme une simple réfutation du scepticisme. Ils permettent de mettre en évidence le désir de rejeter l'ordinaire de notre connaissance et notre appel ou notre besoin de fondements. Avec l'analyse *critérielle* du scepticisme de Cavell il s'agit dès lors de tenter de comprendre cette tendance à éprouver le monde comme s'il était indépendant de nous. Les critères ne déterminant en rien des certitudes, ils offrent la possibilité de comprendre ce qui est engendré dans le langage.

S. Cavell dans sa relecture de Wittgenstein défend ainsi la thèse selon laquelle "notre relation au monde pris dans son ensemble, ou aux autres pris en général, n'est pas une relation de connaissance, dans la mesure où la connaissance se conçoit elle-même comme certitude" (Cavell, 1979/1996, p. 87). Notre relation au monde n'est pas de l'ordre de la connaissance assurée mais de l'ordre de la construction pragmatique et incarnée.

Dans la construction de sa pensée Cavell a ainsi parfaitement fait son miel des travaux d'Austin et de ses conférences à Harvard. Il estime, en effet, que ce dernier avait une nette conscience de la vulnérabilité de nos actions et qu'il est possible de trouver chez lui une réelle perplexité au regard de la question "qu'est-ce que faire quelque chose?". C'est sur la base de cette réflexion initiale que Cavell publiera son premier ouvrage *Dire et vouloir dire* (1969/2009a).

En ce sens, le célèbre texte de J.L. Austin qui porte sur les excuses (1961/1994) semble

34 Cette mise en cause est essentielle car elle implique qu'existe une différence non de nature mais de degré entre les jugements de fait et les jugements de valeur. En ce sens elle est un fondement de la crise d'un certain empirisme. Le pragmatisme est ainsi davantage une méthode qu'une doctrine. Elle a fait son lit dans notre modernité à partir de la mise en cause des principaux dogmes de l'empirisme. Ce pragmatisme se caractérise par le refus d'un essentialisme, de la prépondérance de la représentation et du fondationnalisme. Sur cette question: H. Putnam, *Fait/valeur: la fin d'un dogme et autres essais* (2002/2004).

35 On connait la critique développée contre ce régulisme par le moyen de l'argument de la régression à l'infinie. Wittgenstein considère ainsi qu'il y a une manière de saisir la règle qui n'est pas seulement de l'interprétation. "Le problème inhérent à ce type de régulisme a été clairement identifié par Kant mais a été formulé de façon plus incisive par Wittgenstein [...] une règle explicite ne peut, par elle-même, déterminer le statut normatif d'autre chose. Elle doit être appliquée. Mais l'application est aussi quelque chose qui peut être fait correctement ou incorrectement. Par conséquent, il doit y avoir une norme de second ordre qui précise la façon dont les normes de premier ordre doivent être appliquées. Mais alors, comment ces normes de second ordre doivent-elles être appliquées" (J. Heath, 2001, p. 29).

36 On comprendra aisément que dans ce cas il y aura simplement trop de règles qui apparaitront comme cohérentes au regard du cas concret qui sera l'objet de l'examen.

démontrer cette tendance à questionner la vulnérabilité de nos pratiques et sa pleine volonté de mettre en lumière l'ordinaire de nos actions et la machinerie propre à ces dernières. Les excuses manifestent, en effet, que l'homme est toujours dans la présence du corps, d'un corps envahissant que j'emmène partout. A ce titre, la loi du corps et de l'incarnation est "la" Loi même.[37] "Je" suis livré au langage, certes, cependant je dois supporter cette voix qui me dépasse. Cette vérité est puissamment affirmée par Cavell lui-même dans *Les voix de la raison:*

> Nous suffoquons étouffés par la pomme à demi avalée de la connaissance. Être humain, serait-ce très exactement être incapable d'avaler la pomme comme de la recracher? Les hoquets de la voix humaine, disons le sanglot et le rire, seraient-ils la meilleure preuve de l'humain? Ou sa meilleure image, et donc son meilleur masque? avaler la pomme une fois pour toutes, ce serait vivre pour toujours à l'intérieur des jeux de langage ordinaires, à l'intérieur du quotidien; la recracher une fois pour toutes, ce serait exister à l'écart de cette vie, vivre sans, en particulier vivre sans la voix humaine (par exemple, sans appel et sans cris)" (Cavell, 1979/1996, p. 682).

Ce qui est insupportable ce n'est donc pas l'inexprimable "c'est la 'terreur d'être expressifs au-delà de nos moyens' [...]. Le scepticisme n'est que le masque de cette crainte. Le drame ce n'est pas l'absence de signification mais la fatalité de cette dernière. Il y a, dès lors, une crainte conjuguée du silence et de l'éclat de voix" (Laugier, 1997, p. 33 s.).
Dès lors, pour avancer nous avons aussi besoin des frictions du langage sans jamais être assuré de sa réussite. Face à cela nous nous accordons dans les jugements et dans les critères qui supportent ces jugements. Les critères vont donc nous permettre de construire nos concepts et de juger de leur pertinence, ils sont alors les conditions mêmes de nos usages.
Le paradoxe présent dans ce mécanisme réside en ce que les critères sont extérieurs mais que pourtant ils sont les nôtres. C'est en cela que se manifeste la conception réaliste de la subjectivité. Les critères ne pouvant être qu'externes ils imposent une inclusion du contexte dans le langage. En ce sens, à l'occasion d'un contentieux "je" manifeste publiquement une raison qui trouve son critère non pas dans une motivation cachée mais qui apparaît comme externe et incluse dans le langage lui-même dont "je" reste un usager.
Deux remarques restent à faire.
D'une part, il convient de distinguer le pragmatisme de Cavell d'avec les réflexions avec lesquelles il pourrait être confondu. En effet, son approche est conceptuellement proche de celle mise en œuvre par Putnam dans son tournant vers un réalisme à visage humain; *a contrario* elle reste profondément distincte de celle partagée par Sellars et Brandom qui se manifeste comme, en quelque sorte, désincarnée. Pour ces derniers, l'échange discursif est certes pragmatique mais il s'agit d'un échange de raisons dans un espace logique inférentiel et argumentatif:
Le propre de Brandom sera d'étendre ce type de conception pragmatique et inférentielle au contenu des propositions. Montrons le par un exemple trivial: supposons que, mollement affalé dans le transat d'un mas en Camargue j'entende soudain mon interlocuteur déclarer: "il y a un taureau dans le salon"; j'en inférerai un certain nombre de propositions (ou de croyances) telles que le taureau n'est pas un animal placide; il y a donc un danger; je dois dès lors prendre garde et par suite agir en appelant les pompiers ou en compulsant fébrilement un manuel de tauromachie mais quoi qu'il en soit en posant un certain nombre d'actes. Ces inférences, je les attribue à mon interlocuteur et si d'aventure il les récusait toutes s'étonnant

37 Certains courants de la pensée actuelle des sciences cognitives redécouvrent ainsi la pensée phénoménologique de Merleau-Ponty et son concept de corporéité (Varela, Thompson & Rosch, 1993).

de mon soudain affolement j'en conclurai que son concept de taureau n'a pas ici de contenu conceptuel (Thomas-Fogiel, 2010, p. 22).[38]

D'autre part, l'approche critérielle de Cavell semble devoir susciter une ultime réflexion s'agissant des normes qui gouvernent notre vie et notre relation au langage. Si la forme de vie est première et si c'est au sein de celle-ci que s'accordent les sujets sur les critères dans les jugements il apparaît alors que ces règles ont nécessairement un certain poids ontologique. Il est fréquent de présenter les règles issues de la pensée de Wittgenstein et de ses continuateurs sur la base de la métaphore du jeu d'échecs. Il semble, cependant, que ces règles qui naissent de la "conversation de justice" sont incarnées et qu'elles doivent à ce titre davantage être entendues comme *régulatives*. Ces règles, en effet, ne fondent pas la situation qu'elles règlent et les effets de ces règles se présentent comme extérieurs à la règle elle-même.[39]

Au total, les critères semblent être le niveau véritable d'analyse de notre engagement dans les normes. Leur fonctionnement est ainsi aussi transparent qu'il est essentiel. Ce n'est pas dans les concepts que se situe la normativité. Le plus profond dans l'examen de celle-ci serait paradoxalement ce qui semble un effet de surface: l'accord dans les jugements par le jeu des critères.

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38 Cette question de l'implicite trouve également des racines dans les approches contextualistes qui distinguent divers niveaux de sens: une signification linguistique (qui est non contextuelle, dans cette signification purement sémantique le contenu potentiel est en quelque sorte encodé par les mots, l'énoncé est réflexif: le contenu littéral est donné par la règle même du langage); existe ensuite un contenu contextuel, le sens est actualisé par le contexte; enfin existerait une signification purement pragmatique selon laquelle le sens est communiqué par l'énonciation. Cette dernière démarche est inférentialiste: il s'agit de percevoir non plus seulement ce que la phrase dit mais ce que le locuteur veut dire en énonçant cette phrase: l'intention exprimée.

39 Pour une très belle analyse de cette question et des relations entre normes constitutives et normes régulatives, cf. W. Żełaniec, "Sull'idea stessa di regola costitutiva" (2003).

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CONSTITUTIVE AND REGULATIVE RULES: A DISPUTE AND A RESOLUTION*

abstract

This paper examines the distinction between constitutive and regulative rules by way of the philosophical dispute between John Searle and Joseph Raz. These theorists disagree inasmuch as Searle claims that constitutive and regulative rules represent distinct types, while Raz argues that such a differentiation is untenable. This work acknowledges the merits of Raz's position, but argues that Searle's distinction between constitutive and regulative rules is sound given certain refinements. The paper argues that the distinction between constitutive and regulative rules should be grounded on the rules' distinct capacity for guidance (i.e., whether or not the rules themselves constitute normative reasons for action for subjects).

keywords

constitutive rules, regulative rules, Searle, Raz, normative reasons, action guidance

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1. Introduction

Constitutive rules constitute and regulative rules regulate. This assertion seems uncontroversial if based solely on the qualifiers *constitutive* and *regulative* that are used to distinguish them. Whether there are other, non-linguistic grounds, for distinguishing between the two kinds of rules has proven more contentious. Perhaps the most pronounced disagreement is embodied by the opposing positions of John Searle and Joseph Raz. Whereas Searle claims that constitutive and regulative rules represent distinct types, Raz contends that no such differentiation can be made.

It seems to make sense to claim that not all rules are of the same sort, but it is not evident how and which divisions can be made. The dispute between Raz and Searle aids in the revelation of one method for distinguishing between rule types, which centers on the analysis of how agents use rules and how rules guide practical reasoning. This method helps to resolve the disagreement between Raz and Searle, which is the aim of this paper.

My position acknowledges the strengths in some of the claims of each camp, not all of which are mutually exclusive. Nevertheless, this paper stresses that Searle's distinction between constitutive and regulative rules is tenable, but only if certain clarifications and refinements are made to it. This, then, does not mean that Raz's position is fully refuted, nor Searle's views fully embraced. My claim is that the criterion by which the differentiation between constitutive and regulative rules should be made is not clearly explicated by Searle. I argue that the distinction is better conceived in terms of these rules' distinct capacity for guidance (i.e. whether or not the rules themselves constitute normative reasons for action for subjects).

2. Constitutive and Regulative Rules: Searle's Distinction and Raz's Challenge

The distinction between constitutive and regulative rules is most famously associated with John Searle.[1] As described by Searle in his book, *Speech Acts: An Essay in the Philosophy of Language*, constitutive rules "create or define new types of behavior" (Searle, 1969, p. 33). They create the very possibility of engaging in certain kinds of conduct (Searle, 1969, p. 33). For Searle the formal way of thinking about constitutive rules is the following: —"X counts as Y in context C" (Searle, 1969, p. 35). On the other hand, regulative rules regulate antecedently or independently existing forms of behavior (Searle, p. 33). They require or permit, certain acts and characteristically take the form of: — "Do X" or — "If C do X" (Searle, 1969, p. 35).

1 Other philosophers have also distinguished between these rules — most prominently H. L. A. Hart (1961), J. Rawls (1955), J. G. Warnock (1971), and M. Black (1962).

Prototypical examples of constitutive rules are rules of games such as: castling in chess, dunking in basketball, performing a corner-kick in soccer, and so on. To use one of these examples in Searle's formula for constitutive rules, we would say that: transferring the king from its original square two squares towards the rook on its original square, then transferring the rook to the square the king has just crossed (X) counts as castling (Y) in a game of chess (C). Notice that while the same conduct may be displayed, for instance someone can move the rook three squares to the left and the king two squares to the right, the conduct will only count as castling in a game of chess. Even from this simple example it is easy to notice that specific constitutive rules may, and often do, depend on other constitutive rules in a system of rules (e.g., the rule that says: the piece that has the shape of a tower with battlements counts as a "rook"). Still, what is important for the present purpose is that the rule of castling in chess defines and constitutes castling. So, absent the rules of chess and the rule of castling itself one could never, ever castle.

Regulative rules regulate antecedently or independently existing forms of behavior—that is, behavior that exists without reference to the rule (Searle, 1969, p. 33; Smith, 2003, p. 9). As a consequence, the behavior is logically prior to the rule that regulates it (Schauer, 1992, p. 6; Rawls, 1955). Eating etiquette is an example of the sort of behavior that is prior to regulating rules. Consider the following example of such etiquette: "When cutting food, hold the knife in the right hand" (Searle, 1969, p. 34). Bear in mind that this is a regulative rule because eating with a knife itself exists independently of the rules of polite table behavior (Smith, 2003, p. 9).

In contrast to Searle, Joseph Raz holds that every constitutive rule also has a regulative side.[2] Further, he claims that what follows logically from Searle's argument is that all rules are both regulative and constitutive (Raz, 1975/1999, p. 109). Raz's argument starts with the following comparison between two pairs of act descriptions:

	A		B
1	'Giving £50 to Mr. Jones'	And	'paying income tax'
2	'Saying: "I promise"'	And	'promising'

In Raz's example, there is a law about paying ones' taxes and a rule about promising. One can pay one's income tax by giving Mr. Jones, who is the HM Inspector of Taxes, £50 (Raz, 1975/1999, p. 109). Also, one can promise (to pay £50 to Mr. Jones) by saying "I promise" (Raz, 1975/1999, p. 109). 1A and 2A provide descriptions of actions that would accord with the rules about paying taxes and promising regardless of whether such rules existed (Raz, 1975/1999, p. 109). In conformity with Searle's account, this makes the rules regulative (Raz, 1975/1999, p. 109). 1B and 2B describe actions in accordance with the rules in a way which could not be given if there were no such rules (Raz, 1975/1999, p. 109). It follows that the rules are constitutive as well. Raz claims that because a similar pair of act descriptions is available for every rule it follows that all rules are both constitutive and regulative (Raz, 1975/1999, p. 109).

Searle, by contrast, argues that regulative rules regulate pre-existing activities whose existence is logically independent of the rules, while constitutive rules constitute activities whose existence is logically dependent on the rules (1969, p. 34). He illustrates this with the help of the following example: It is possible, he says, for twenty-two men to go through all

2 But see Bulygin (1992).

the physical movements as two teams playing football would go through, but if there were no rules of football, then the twenty-two men would not be playing football (Searle, 1969, p. 34). Raz answers to this by making use of the distinction between a normative act description and a natural act description (Raz, 1975/1999, p. 110).

Normative act descriptions are those for which a complete explanation must include reference to a rule (Raz, 1975/1999, p. 110). By contrast, descriptions for natural acts may be given without reference to a rule (Raz, 1975/1999, p. 110). Following the example from the above table, going through the motions of paying income tax (1A) is not paying income tax unless an income tax law exists (Raz, 1975/1999, p. 110). This, then, requires a normative act description. However, that does not mean that the rule itself (the tax law) is constitutive. In Raz's conception, while a difference between acts is possible, it does not need to correspond to a difference between types of rules (Raz, 1975/1999, p. 110). Further, as Raz says, "every rule regulates action which can be described without presupposing the existence of that rule (though sometimes it regulates only actions done with the intention of invoking the rule). Similarly every rule 'creates' actions which can be described only in ways which presuppose its existence" (Raz, 1975/1999, p. 110).

3. The Capacity for Guidance of Rules

Searle's distinction between constitutive and regulative rules has intuitive appeal, even if Raz (rightly) believes it to be misleading. Others have leveled criticisms similar to those of Raz (Warnock, 1971; Giddens, 1984; Ruben, 1997). Nonetheless, distinguishing between different types of rules is important. It may simply be the case, as I suggest, that Searle does not clearly explicate the criteria by which the differentiation between constitutive and regulative rules can be made.

We would do well to return to Searle's original description in order to source the limitation in his distinction:

> Where the rule is purely regulative, behavior which is in accordance with the rule could be given the same description or specification (the same answer to the question "What did he do?") whether or not the rule existed, provided the description or specification makes no explicit reference to the rule. But where the rule (or system of rules) is constitutive, behavior which is in accordance with the rule can receive specifications or descriptions which it could not receive if the rule did not exist (1969, p. 35).

In order to illuminate the distinction, Searle relies, at least in part, on that which follows from having regulative and constitutive rules (i.e., certain otherwise unavailable kinds of act descriptions in the case of constitutive rules). As Raz indicates, the problem with that approach is that both rules can bear descriptions according to which they are at the same time regulative and constitutive. In order to make the distinction acute one would need to rely on something else; my claim is that the fact that constitutive and regulative rules stand in different kinds of relationships relative to their subjects and the actions that they reference can keep this distinction alive while answering and acknowledging some of Raz's criticisms. The crucial distinction between constitutive and regulative rules is, then, the difference between these relationships, which manifests itself in the rules' capacity for guidance.

Before setting off with the analysis, some additional definitions are in order. First, a rule's capacity for guidance depends on whether the existence of the rule is a normative reason for action for subjects of that rule. Second, I take a normative reason for action to be a kind of consideration that counts in favor of or against performing a specific action (Scanlon, 1998). Finally, the fact that an agent has a normative reason to perform a certain action, ϕ, means that there is some normative requirement or obligation that she ϕ, which, in turn, means

that the agent's ϕ-ing must be justified from the perspective of the normative system that generated that requirement (Smith, 1994, p. 95).

The distinction between rule types becomes readily apparent when Searle's formal characterization of constitutive rules — "X counts as Y in C"—is compared with the formal characterization of regulative rules — "If C do X".[3] For both types of rules, the variable X stands for the action to be performed.[4] However, for constitutive rules X describes or specifies an action, while for regulative rules X represents an action that is demanded (e.g., do or don't X). Raz is correct in that there are two distinct types of acts that Searle's rules regard, but the rules themselves stand in different kinds of relationships vis-à-vis those acts, which makes them distinguishable.

First, consider the constitutive rule of chess called castling: "This is a move of the king and either rook of the same color along the player's first rank, counting as a single move of the king and executed as follows: the king is transferred from its original square two squares towards the rook on its original square, then that rook is transferred to the square the king has just crossed." (FIDE Laws of Chess 2008, Article 3.8). Next, consider a regulative rule about speeding that stipulates: "Maximum speed on the highway for all motor vehicles is 90 kilometers per hour". Looking at how these two rules stand in relation to the action that they reference, it becomes apparent that the rule of castling is not prescribing castling, meaning that it is not recommending, commanding, or claiming that one ought to castle in a game of chess. In turn, it is clear that the speeding rule is setting the speed limit for motor vehicles on the highway. The rule, then, states that all drivers ought to stay within this limit. It makes clear that one ought not to drive faster than 90 km/hour.[5]

There are multiple ways in which one can both violate and abide by the above speeding rule. Every speed between 0 and 90 km/hour is in accordance with the rule, while anything greater than 90 km/hour violates it. By contrast, there is only one precise way (or two) in which a player can castle. The rule that specifies what amounts to speeding puts up a barrier, raises an obstacle on the range of available legal options of driving on the highway. But the rule that specifies what amounts to castling in chess does not try to rein in something that people were beforehand free to do. The rule makes castling possible because the possibility of castling (now) exists according to the rule of castling. Further, the rule specifies the exact way in which castling is to be done. However, the rule does not say that a player ought to castle. Note that the rule of castling creates the possibility that players, if they choose to, can castle. Does this mean that the rule is instead permissive (i.e., the rule allows players to castle)? I believe such a description would be inadequate for it would be pointless to permit that somebody "forsmink" when "forsminking" did not exist. So, the rule of castling creates "castling", thus creating the (ontological, not deontic) possibility of castling.

When a subject is faced with a constitutive rule the performance of actions referenced by the rule depends on the subject's prior reasons in the sense that, more often than not, an agent will invoke a constitutive rule only when she has reasons to do so. In this sense, if a subject has prior reasons (e.g., strategy) to move her king two squares in a game of chess then she will invoke the rule of castling and act accordingly. However, the rule *qua* rule does not provide the

3 The paper's treatment of regulative rules includes prohibitions (e.g., don't do X), but avoids the complicated matter of rules that permit action (e.g., an agent may or is allowed to X). It is not clear whether permissions are an independent category from prescriptions and prohibitions because permissions can be defined as the absence of prohibitions. See von Wright (1983).

4 In the case of constitutive rules, 'X' need not be an action like in the rule: "This paper counts as money", but in the case of regulative rules "do X" is, necessarily, an action.

5 The rule, as it is formulated, allows for different interpretations that can give rise to exceptions to the claim.

subject with a normative reason for doing so. On the other hand, after a decision to castle is made it is no longer optional for the subject to choose how she will castle. The rule governing how to castle is antecedently defined. The same reasoning applies to constitutive rules outside the prototypical examples from games. Classic models of constitutive rules from law, such as laws about making contracts or wills, are not normative reasons in favor of making either wills or contracts. These legal rules are similar to their relatives from the game examples because what they do is create the ontological, but not deontic, possibility of making contracts and wills (still less so the obligation).

When a subject is faced with a regulative rule like the speeding law, the performance of actions that are in conformity with the rule is not conditional on the subject's prior reasons to perform the actions, or her evaluation of the content of the rule. Irrespective of the subject's reasons, there is now a normative reason to perform the action(s) that the regulative rule specifies. This reason is the fact of the existence of the rule demanding the action. This does not mean that a subject has a conclusive reason for action as there may be reasons that can defeat the rule. Nevertheless, a subject now has a new normative reason where there previously may not have been one. In the speeding example, there is a spectrum of available options for subjects, but this need not be the case. A regulative rule that says: "All children must wear blue shoes" does not allow for a multitude of available actions that conform to the rule.

Joseph Raz's examples of promising and paying income tax are vulnerable to an objection that follows from the above analysis. A law demanding that subjects pay income taxes is a reason for them to pay income tax. Paying the HM inspector £50 and paying income tax may describe the same action, but the rule about income taxes that stipulates that taxes ought to be paid stands in a peculiar relationship vis-à-vis its subjects. This relationship consists in the fact that the rule itself is a reason for action for subjects, a reason to do as the rule stipulates. On the other hand, the rule about promising is not in itself a reason to start making promises. Raz describes two actions — saying: "I promise" and Promising. Both of these may be accurate descriptions of the same conduct, but there is no relationship between the rule about promises (let's say the rule that says promises are made by saying: "I promise") and its subjects such that the rule is itself a reason for action — a reason why subjects ought to make promises. On the other hand, a rule saying that "promises ought to be kept" constitutes a normative reason for subjects to keep their promises. This is because the latter rule is regulative.

One might be tempted to say that the regulative rule "promises ought to be kept" is in fact constitutive of promising. It seems that without such a rule promising does not mean what it typically does (i.e., declaring to undertake a commitment). I don't think this is accurate. Saying 'I promise' constitutes the formal way in which somebody makes a promise, but the normativity of the promise — captured by the rule "promises ought to be kept" — is subject to further conditions. For instance, promises ought to be kept when one is not coerced into promising, when that which is promised is not impossible, or, most importantly, when a promise has actually been made. This means that the regulative rule can only show its force once a promise has been made, and the promise is not annulled by disqualifying considerations. Under these and further conditions, the rule about keeping promises will be in force and will guide that which happens after or once the act of promising is completed. This shows the rule to be regulative since it regulates a previously existing act.

Moreover, constitutive rules such as the rules of chess cannot be violated in the same way in which one can violate regulative rules like "promises ought to be kept". As Searle writes, "it is not easy to see how one could even violate the rule as to what constitutes check mate in chess, or touchdown in football" (1969, p. 41). If a player were not to perform the correct actions while playing chess (e.g., the player chose to castle with pieces other than the rook and king) it would not be the case that the castling rule was violated or castling was ill-performed. It

would simply be the case that the player, who did not perform the actions in the right way, did not castle. This is because the X in "X counts as Y in C" describes the "how-to" of Y-ing in a basic definitional sense. On the other hand, if somebody made a valid promise that they did not honor, then this would constitute a violation of the rule about keeping promises because a promise had been made.

The above analysis provides reasons why the distinct capacity for guidance of constitutive and regulative rules is an important point of differentiation between the rule types. To summarize, the preceding addressed the rules' capacity for guidance in terms of the existence of the rules providing or not providing normative reasons for action for subjects. It has been shown that both types of rules regard action, but they regard it in different ways. Regulative rules demand that a certain action be performed. As such, they are normative reasons for action that compete with other reasons on the balance of reasons of an agent, which makes them violable. In turn, constitutive rules qua rules do not provide agents with reasons, but merely identify the "how-to" of bringing something into existence. Constitutive rules are, therefore, inviolable as they do not face reasons that might stand against them on the balance of reasons. In these ways, the guiding capacity of constitutive rules is presented as a highly specialized function. Although Joseph Raz offers strong arguments in favor of the indistinguishability of regulative and constitutive rules, his position ultimately misapprehends the narrow scope and particularity of constitutive rules' limited guiding capacities. For now, it might be enough to say that there are clear reasons to take Searle's position as the ruling one.

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SECTION

2

SECTION 2

PHENOMENOLOGY OF THE NORMATIVE

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VERS UNE PHÉNOMÉNOLOGIE DE LA NORMATIVITÉ. UNE CIRCONSCRIPTION PRÉLIMINAIRE DU DOMAINE

abstract

I discuss, from a phenomenological point of view, the distinction between judgments and norms. I stress the limits of the Husserlian canonical analysis in order to rightly account for the sense and content of normative intentionality. Based on some Kelsenian insights, I draw a clear distinction between judgments and norms, criticizing some classical trends coming from Husserl himself that consider norms as a kind of intentionality founded upon objectifying acts. However, taking distance from Kelsen, Kaufmann, and Cossio, I stress that the ought-proposition (Sollsatz) *cannot be a good rendering of the sense-content of norms, based on the phenomenological distinction between the intentional matter and the quality of intentional acts. Finally, I propose my own account based on the concept of "ductive force". I stress that the ductive force of norms cannot be identified with simple coercion. I show that there is, even inside the juridical sphere, a variety of ductive forces, going from sheer coercion to council and recommendation. To end, I stress the centrality of the concept of "ductive force" for a phenomenology of the social world.*

keywords

phenomenology of law, norms, judgments thetic acts, ductive force

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1. Liminaires

Carlos Alchourrón et Eugenio Bulygin ont soutenu qu'il n'avait que deux conceptions de la nature des normes juridiques. Ou bien celle qu'ils appellent "hylétique" ou bien celle qu'ils appellent "expressive" (Alchourrón & Bulygin, 1999, pp. 384-5). Par conception "hylétique" les auteurs entendaient la position selon laquelle les normes sont des entités propositionnelles ou, plus précisément, le *sens* (on ajoutera *idéal*) des expressions qu'on appelle "énoncés normatifs". Les normes auraient donc une teneur de sens que leur serait propre, le "sens prescriptif", lequel on serait à même de trouver dans la morphologie et la syntaxe propres aux énoncés normatifs. Par contre, la conception "expressive" soutient que les normes n'ont pas un contenu propositionnel typique qui les distingue des énoncés descriptifs. Elles seraient, au contraire, le résultat de l'"usage prescriptif" du langage. Ainsi, on pourrait user la même proposition pour faire des choses tout à fait différentes, comme affirmer, poser une question, faire une conjecture ou commander, par exemple. Qu'un certain contenu propositionnel *soit* une norme, cela dépendra non pas de sa teneur de sens propre (le soi-disant "sens prescriptif"), mais de la façon dont il intervient dans un acte de parole (*speech act*) particulier. C'est seulement au niveau pragmatique qu'on pourra cerner la spécificité des énoncés normatifs.

Alchourrón et Bulygin soutiennent que ces deux conceptions sont incompatibles et mutuellement exclusives. Ou bien les normes sont des significations (des unités de sens) indépendantes de la dimension pragmatique du langage et même de la langue (il aura donc toujours des "normes inexprimées", subsistant au plan idéal des significations); ou bien les normes correspondent à un certain acte de parole et il n'y aura pas des «significations normatives» (*normative meanings*) en tant que telles. En étant des actes de parole, les normes juridiques seraient essentiellement des *commandements*[1]: elles correspondraient donc aux actes illocutoires directifs, selon la typification d'Austin.

Après avoir déclaré leur adoption de la conception expressive des normes, les auteurs rangent sous ces deux conceptions les philosophes du droit et les logiciens déontiques les plus connus, en reconnaissant cependant des cas ambigus.[2] Il y a pourtant quelque chose d'artificiel dans

1 "For the expressive conception, norms are essentially *commands* [...]" (Alchourrón & Bulygin, 1999, p. 386).

2 "Most legal and moral philosophers as well as deontic logicians share the expressive conception of norms; the most conspicuous and clear cases are those of Jeremy Bentham, John Austin, Hans Kelsen, Alf Ross, Richard Hare, Jørgen Jørgensen, Manfred Moritz, Bengt Hansson, Lennart Åqvist, Joseph Raz, and Franz von Kutschera. Among the far less numerous representatives of the hyletic conception might be mentioned Georges Kalinowski and Ota Weinberger"

la typification présenté par eux. Ils n'expliquent pas si sa disjonction (ou bien... ou bien...) s'appuie sur des raisons de principe ou si elle est simplement le résultat d'une constatation de fait. La preuve principielle qu'il n'y a que deux conceptions possibles de la nature des normes juridiques n'est pas présentée dans leur article. En son absence, on supposera qu'il s'agit d'une simple typification des chemins parcourus jusqu'à présent par les philosophes du droit et les théoriciens de la logique déontique.[3]

Il y a, quand-même, tout une autre tradition qui n'est pas prise en compte par eux. Je me réfère à la phénoménologie et, spécifiquement, à la phénoménologie directement issue de l'œuvre de son fondateur, Edmund Husserl.[4] En y regardant de plus près, il semblerait que les phénoménologues du droit, tels que Reinach, Kaufmann, Schreier, Cossio, et d'autres, peuvent être classés en fonction de la disjonction d'Alchourrón et Bulygin. Il y aura, quand-même, des cas ambigus. Par exemple, avec sa théorie des "figures juridiques" (*rechtliche Gebilde*), en tant que "lois d'essence" qui conditionnent les déterminations juridiques (*Bestimmungen*) positives, Reinach pourrait être considéré comme un représentant de la conception hylétique. Malgré cela, sa théorie des actes sociaux et l'application qu'il en fait dans le domaine du droit le ramène plutôt du côté de la conception expressive.

Quoi qu'il en soit, je ne veux pas revendiquer ici une spécificité des théories d'inspiration phénoménologique déjà connues. Mais je souhaite, par contre, affirmer une aptitude de la méthode phénoménologique à donner des réponses peut-être plus justes aux grandes questions qui sont à la base de la philosophie du droit, y compris le dilemme d'avoir à choisir entre une conception pragmatique ou une conception sémantique de la nature des normes juridiques. J'essaierais donc de montrer que la phénoménologie est à même de fournir un *tertium quid* à la situation dilemmatique d'Alchourrón et Bulygin, même quand cela implique une *autocritique phénoménologique* des phénoménologies du droit, comme j'essaierais de faire ici. Par questions de fond de la théorie des normes, spécifiquement des normes juridiques, je me réfère à certains enjeux de base de la philosophie du droit tels que:

1) Qu'est-ce qu'une norme? Autrement dit: quelles sont les conditions qui doivent être remplies pour qu'un énoncé *vaille* comme une norme et soit reconnu en tant que tel?
2) Quel est le rapport des normes aux valeurs? Plus précisément: trouve-t-on une relation de correspondance, voire même de dépendance, entre le domaine des énoncés normatifs et le domaine des jugements de valeur?
3) Quel est, somme tout, le rapport des normes à la vérité? Du point de vue phénoménologique, il ne s'agit pas seulement de la question de savoir si on peut attribuer des valeurs de vérité aux normes ou exclusivement aux énoncés qui décrivent les normes. Phénoménologiquement, le vécu de la vérité est l'évidence. L'évidence est la conscience de la concordance entre le visé et le donné (voir Husserl, 1984, p. 562). Ce rapport de remplissement est un rapport cognitif. Il y a toujours là un plan objectual pré-donné vers

(Alchourrón & Bulygin, 1999, pp. 387-8). C. I. Lewis et G. H. von Wright sont, curieusement, les cas ambigus que les auteurs réfèrent (Alchourrón & Bulygin, 1999, pp. 386-7).

3 Pour une critique acerbe de la division de l'ontologie des normes proposé par les auteurs, voir Ota Weinberger (1999, pp. 412-432).

4 Pour la phénoménologique du droit, voire les travaux de Giuliana Stella sur l'école en son ensemble (*I giuristi di Husserl; Origini, assetto, interpretazioni della scuola fenomenologica del diritto*), sur Kaufmann (*Il senso del diritto. Felix Kaufmann a confronto con Kelsen e Husserl*), sur Reinach (*Determinazione giuridica del soggetto attraverso la promessa in Adolf Reinach*), ou encore sur Gerhart Husserl (*L'interpretazione temporale del diritto in Gerhart Husserl*). Une exposition d'ensemble est aussi donné par Sophie Loidolt: *Einführung in die Rechtsphänomenologie. Eine historisch-systematische Darstellung.*

lequel le vécu intentionnel se dirige en constituant un objet ou un état-de-choses objectif. La question est de savoir s'il y a aussi une pré-donation à laquelle les normes se réfèrent intentionnellement, et si l'intentionnalité qui pose la norme enveloppe une relation à quelque chose dont la donation viendrait la remplir à la façon d'une connaissance d'objet. C'est une question complexe et on devra distinguer plusieurs niveaux. Nommément, (i) la position originaire de la norme et son fond de pré-donation; (ii) la visée des comportements par l'entremise des normes; (iii) la représentation d'une norme en tant que règle pour la volonté. Il y aura là peut-être des dimensions cognitives et non-cognitives d'où sortira, par conséquent, une réponse non-uniforme à la question du rapport des normes à la vérité.

Il s'agit donc ici de questions concernant l'ontologie, l'axiologie et la dimension cognitive (ou pas) de l'intentionnalité normative, et, de plus, de la *vexata quæstio* concernant une "logique des norms" par analogie avec la logique aléthique. Quoique rapidement, j'essaierais de les analyser phénoménologiquement, en me concentrant surtout sur la première question. Cela implique:

1) Une explicitation phénoménologique de la teneur de sens de la conscience originaire de la norme;
2) Une régression à l´horizon passivement pré-donné, à l'encontre duquel vient s'exercer l'activité qui pose les normes;
3) L'identification, du point de vue génétique, des institutions de sens qui sont à la base du domaine normatif;
4) Ce en quoi la position de la norme constitue en tant que telle comme objet propre de l'intentionnalité normative.

Quoique tâtonnantes et incomplètes, ces analyses essaieront d'ouvrir une voie moyenne, à même de surmonter le dilemme d'Alchourrón et Bulygin, en montrant les limites, aussi bien que les points forts, des conceptions sémantique et expressive des normes juridiques.

2. Un premier partage des eaux: règles techniques et normes juridiques

À mon avis, on n'a pas encore une claire délimitation, du point de vue phénoménologique, de la sphère de la conscience normative. Par "conscience normative" j'entends l'intentionnalité qui *pose* originairement les normes par des actes ayant une teneur de sens bien spécifique, que j'appelle "actes nomothétiques".

Je trouve deux raisons principales à cette situation de demi-invisibilité de la forme propre de la conscience normative. Dans les analyses phénoménologiques de la normativité, il y une constante immixtion des apports de l'intentionnalité évaluative, qui est une conscience de la valeur, et même de l'intentionnalité théorique, c'est-à-dire, des actes objectivants qui visent un état de choses dans le monde ou une relation idéale entre essences. La conséquence est que la spécificité de l'intentionnalité normative n'est pas clairement cernée. Certainement, on trouvera toujours des éléments évaluatifs et théoriques enchevêtrés dans l'intentionnalité normative. Cependant, il ne faut pas confondre ces éléments adjuvants ou concomitants avec la conscience de norme elle-même. De ce constant mélange découle une seconde raison plus lourde de conséquences: la tendance à faire du mélange même toute une théorie, en réduisant l'intentionnalité normative à l'intentionnalité qui vise la valeur et à l'intentionnalité objectivante; bref, la tendance à réduire le domaine prescriptif à une conjugaison des plans évaluatif et descriptif.

Husserl le premier a donné le ton pour ce type de réductionnisme. Un texte bien connu des *Prolégomènes* (aux paragraphes 14 e 16, Husserl, 1975, pp. 53-62) établi qu'au moins un jugement théorique et au moins un jugement évaluatif sont, de concert, à la base de chaque position normative. Selon ces propres termes, toute discipline normative "doit posséder un contenu théorique séparable de toute idée de normation (*Normierung*), du devoir-être (*des*

Sollens)". Dans l'exemple de Husserl, que je remanie ici, le jugement théorique "un guerrier peut être courageux ou lâche", qui divise l'extension du concept de "guerrier" en ce qui concerne le prédicat (essentiel, dans ce cas) de la bravoure, s'enchevêtre avec le jugement évaluatif "seulement un guerrier courageux est un bon guerrier", et la conjonction de ces deux jugements est équivalente au jugement normatif "un guerrier doit être courageux", exprimant une proposition normative que Husserl appelle la "norme fondamentale" (*Grundnorm*) pour un certain domaine d'objets. C'est ainsi que des propositions normatives comme "un drame ne doit pas être divisé en épisodes" ou "l'homme doit aimer son prochain" sont réductibles à la conjonction de jugements théoriques et évaluatives tels que "l'homme peut haïr ou aimer son prochain" et "seul un homme qui aime son prochain est un homme bon". Le prédicat "bon" sera donc polysémique: il exprimerait, le cas échéant, l'utile, le désirable, le beau, l'éthiquement correct, ou aura encore d'autres sens, en fonction des objets concernés et du point de vue adopté pour les positions normatives. Cette "norme fondamentale", ajoute Husserl, n'est pas, en elle-même, une norme au sens prégnant du mot: "La norme fondamentale est le corrélat de la définition du 'bon' e du 'meilleur' [...] et ne constitue pas une phrase normative au sens propre" (Husserl, 1975, p. 58). Elle est donc simplement une proposition contenant une évaluation dans le domaine des connaissances purement théoriques d'objet. Ce qu'elle exprime n'est pas encore un mobile pour la pratique, une détermination de la volonté, mais seulement la "valorisation fondamentale" d'où peuvent découler ensuite plusieurs propositions normatives qui font système dans l'unité d'une "discipline normative".

Si on pouvait penser les normes à l'instar des préceptes techniques, cette présentation serait tout à fait acceptable. Husserl eut une conscience très nette de cette ressemblance. En effet, il a appelé la discipline normative qu'il était en train de décrire comme une "technique" ou "technologie" (*Technik, Technologie*; Husserl, 1975, p. 59), en ce sens que l'évaluation fondamentale d'une certaine discipline normative "se transforme dans une correspondante position de fin" (Husserl, 1975, p. 59, à la fin du paragraphe 15). En vérité, si on croit à cette présentation, il n'existe aucune différence substantielle entre les préceptes pratiques de l'éthique ou du droit, dans la mesure où ils déterminent effectivement la volonté, et un ensemble d'instructions pour remonter une montre ou résoudre une équation du second degré, par exemple. On aura, ici et partout, quelque chose comme un catalogue d'instructions relatives au savoir-faire, instructions s'exprimant par le verbe "devoir", bien sûr, mais qui parlent de devoir dans un sens tout à fait technique: on doit faire ceci ou cela, si on trouve "bonne" la teneur particulière de certains objets telle qu'elle s'exprime dans la proposition normative fondamentale et si on se décide à sa réalisation concrète. Cependant, ce n'est pas le s'y connaître productif qui est en question dans une théorie des normes, nommément dans le cas de l'éthique ou du droit. C'est plutôt le *nomos* et la *praxis*, et non pas la *techne* et la *poiesis* qu'on doit cerner de plus près.

Pour l'exprimer d'une façon simple, je dirais que les normes ne sont pas réductibles à des jugements théoriques (*Jt*) et à des jugements de valeur (*Jv*), nommément à l'évaluation fondamentale, en fonction de la position préalable d'un but (*Pb*). Je dirais donc que la formule:

I. Pour toute norme *N*, *N* = *Pb* (*Jt* & *Jv*)

sera seulement valide pour les règles instrumentales et pour l'activité productive en général, non pas pour le cas des normes au sens prégnant du droit. En quoi la différence consiste-elle, demandera-t-on? J'ajoute deux différences, qui me semblent importantes.

En premier lieu, une norme technique (une règle) lie les sujets seulement à la condition qu'ils désirent et posent un certain but, pour lequel la règle décrit les procédures qui amènent à sa

réalisation. Si, par exemple, on ne veut pas trouver les solutions d'une équation quadratique, la méthode de résolution, quoique valide (au sens qu'elle est efficace pour la réalisation du but), n'a aucun pouvoir pour déterminer la volonté. De plus, plusieurs règles techniques peuvent conduire à la réalisation de la même fin. Le choix est déterminé par des considérations d'efficacité. On trouve une situation un peu différente dans le cas des règles constitutives non-techniques, comme les règles d'un jeu, soit le football, les échecs, ou autres: les règles sont ici strictement obligeantes et, à la condition qu'on désire effectivement jouer, on n'aura pas de choix. Bien que le but ne soit autre que l'exercice même de l'activité décrite par la norme, ces règles n'ont, cependant, aucun pouvoir de déterminer les sujets et leur comportement en l'absence du désir respectif. Pour celui qui ne s'intéresse pas aux échecs, c'est comme si ses règles n'existaient pas dans le monde. Par contre, les normes du droit lient les sujets dans la mesure où ils se trouvent dans une situation particulière concrète, indépendamment de leurs désirs ou des buts qu'ils ont. Il y a des situations plus ou moins permanentes, comme être un citoyen, avoir l'âge de majorité, être marié ou divorcé. Il y a des situations occasionnelles, comme l'héritage, les procédés de signature d'un contrat, par exemple. De toute façon, une caractéristique des normes juridiques c'est son pouvoir de lier les sujets concernés et de ne pas être, en son actualité, conditionné par un désir particulier et la position d'un but ou par un choix déterminé par des raisons d'efficience. Les normes, au dire de Kelsen, sont *valides,* et la validité est leur mode propre d'existence. Cette validité ne doit être confondue ni avec la validité au sens technique (telle règle est une méthode valide pour...), ni avec la validité au sens de la valeur (le valable n'est pas l'évaluable). Par validité, au sens normatif, il faut entendre cette propriété des normes de *lier* les sujets: une norme est toujours "en acte" (*ens actu*), depuis sa promulgation jusqu'à sa dérogation. Ce pouvoir de lier sans conditions n'est pas, toutefois, toujours une coaction stricte, un pouvoir absolu de soumettre. Contre la vision impérative du droit, il ne faut pas mettre sur un même pied le pouvoir de lier (la validité normative) et la contrainte (le *jus cogens*). La norme juridique lie directement, mais elle ne contraigne pas toujours. En effet, des documents comme des recommandations, des avis, ou la «législation souple» (*soft law,* en opposition au *hard law*) font partie de l'univers juridique, mais n'ont pas une force contraignante (je reviendrais sur ce point).

Deuxièmement, il y a une difficulté à mon avis insurmontable au cœur même de la conception husserlienne: c'est que, au contraire des règles techniques, la *qualité d'acte normative* (au sens précis du concept phénoménologique de "qualité", *Qualität*) n'est pas dérivable, et donc réductible, à une combinaison de jugements théoriques et de valeur dont l'efficacité pratique dépendra de la position préalable d'un but. En effet, pour l'Husserl des *Recherches Logiques,* tout se passerait comme si le domaine normatif était un champ de commandements ou impératifs basés à la fois sur un plan axiologique et un plan théorique plus fondamentaux. Pour obtenir le domaine normatif à partir de ces deux derniers, Husserl fournit la formule de dérivation suivante: du jugement thétique "Seul un A qui est B a la propriété C" s'ensuit le jugement de valeur "Seul un A qui est C est un bon A" et, finalement, l'injonction (la supposé *Grundnorm* qui est à la base des phrases normatives) "A doit être B", laquelle prescrirait à la sphère des faits – ici, celle des agents et des actions – comme une exigence objective à laquelle ils seraient nécessairement soumis.

À y voir de plus près, toutefois, la nécessité qu'Husserl obtient par cette dérivation (liée à la copule "devoir" de la *Grundnorm*) n'est, cependant, qu'une nécessité à mi-chemin entre une nécessité *ontique* (qui exprimerait cette conformité inexorable du fait avec *son* essence dont Husserl parle dans l'introduction de *Idées I* – voir Husserl, 1977, pp. 19-20), et une nécessité simplement *hypothétique* pour la volonté. Il ne s'agit pas ici encore d'une nécessité *déontique,* basée sur une prescription, laquelle lie la volonté indépendamment des désirs qu'on a et des fins qu'on se donne. Il s'agit, en vérité, d'une nécessité qu'on pourrait énoncer de la façon

suivante: “si *x* est un guerrier, et si *x* veut être un bon guerrier, alors *x* doit nécessairement être un guerrier courageux, parce qu’un guerrier non-courageux ne peut pas être un vrai guerrier”. On voit immédiatement que cette exigence objective “si *x* veut être un bon A, alors *x* doit être B” ne formule pas encore une *obligation* pour *x,* c’est-à-dire qu’elle ne contient pas une coaction pour la volonté de *x,* qu’elle ne lui commande pas d’être un bon guerrier. Elle est tout à fait identique à la proposition “Seul l’or 24 carats est un or pur (un or *bon*)”, de laquelle dérive “l’or doit avoir 24 carats”. Ceci, cependant, est l’expression d’un “devoir” ontique et pas déontique, d’où découleront des normes techniques particulières pour la production du “bon” or ou pour l’entrainement d’un “bon” guerrier (telles que des exercices pour cultiver un caractère intrépide, etc.). Ainsi, ne pouvant pas déterminer le type de lien qu’on doit établir entre la norme et la volonté de *x,* la formule husserlienne de la normativité est seulement hypothétique: “si *x* veux être D, alors il doit vouloir F, étant donné que F est un prédicat essentiel ou une condition nécessaire pour être D”. Toutefois, une caractérisation complète de la qualité d’acte normatif doit aller plus loin: elle doit définir la façon dont la volonté de *x* se trouve liée par la norme – comme une obligation, une suggestion, un conseil, ou autre encore. Ce mode de liaison qui fait partie de la teneur de sens de l’acte normatif je le nommerais dorénavant la “force ductive” de la norme (du latin *ductio, ducere*). La formulation husserlienne de la normativité ne la contient pas vraiment. Elle dit qu’un A (“authentique”, “bon”, “pur”) doit être B, c’est-à-dire, elle parle de devoir ontique, en disant ce que c’est un A authentique, mais elle ne dit pas jusqu’à quelle point les sujets sont soumis à la norme et quelle est la teneur de cette soumission (obligation, conseil, etc.).
Bref, la question décisive est la suivante: la forme de la normativité n’est pré-contenue et ne peut pas, en conséquence, être dérivée de jugements thétiques, ou des jugements théoriques, ou des jugements évaluatifs, ou de la combinaison des deux. Pour le voir clairement, on comparera les jugements:

1. Seul un guerrier courageux est un bon guerrier;
2. Le guerrier doit être courageux (pour être pleinement guerrier);

avec la norme:

3. Le guerrier est courageux (et ça c’est une obligation stricte pour tout guerrier).

Dans le cas de 3., le “est” a un sens normatif – il ne décrit pas un fait, disons, que tel ou tel guerrier est courageux, il ne dit pas ce que c’est un guerrier selon son essence; au contraire, il impose un certain comportement au guerrier, mode d’imposition qu’on peut expliciter dans le parenthèse. Or, quand on la compare avec 1. et 2., la formule 3. contient une qualité d’acte (celle de la normativité) qu’on ne saurait dériver de 1., qui exprime une évaluation basée sur une loi d’essence, et de 2., laquelle exprime un devoir-être, bien sûr, mais un devoir-être ontique, statuant ce que c’est qu’un vrai, qu’un authentique guerrier. De cette *Grundnorm* (qui est encore une proposition théorique, comme le souligne Husserl) découlera par après un devoir-être technique ou instrumental, c’est-à-dire un ensemble de normes concernant les règles du savoir-faire, normes dont la validité dépendra toujours des désirs qu’on a et de la position de quelque fin qu’on réalise effectivement (produire de l’or pur, être un vrai guerrier, etc.). Par contre, la validité normative n’est pas dépendante d’une situation de fait quelconque.
On rencontre ici la vétuste irréductibilité des jugements en *ought* aux jugements en *is,* dont Hume a parlé le premier, ou, dans ma formulation, d’un devoir déontique à un devoir ontique et, par extension, des normes au sens prégnant aux normes instrumentales. Theodor Lessing,

qui a été élève de Husserl pendant deux années et a assisté à ses cours sur la *Wertlehre,* a aussi donné expression à cette discontinuité dans son œuvre de 1914 *Studien zur Wertaxiomatik, Untersuchungen über reine Ethik und reines Recht.* En effet, en comparant les domaines d'une théorie (formelle) des valeurs et des principes normatifs pour le vouloir, il refuse de concevoir les derniers comme étant dérivables immédiatement des premiers. Il écrivit:

> Il faut donc que se développe un groupe de propositions de valeur aprioriques entièrement nouveau, en tant que membre intermédiaire entre les propositions théoriques, aprioristiques, absolument objectives de la mathématique des valeurs et les propositions aprioristiques normatives sur le vouloir et la répulsion corrects [...] (Lessing, 1914, p. 36).[5]

Nonobstant, la présupposition commune aux deux autres c'est que la normativité est fondée sur un plan axiologique préalable (au plan matériel, pas seulement formel), comme si toute pratique concrète était la réalisation de valeurs déjà préexistants. Au contraire, sans nier que des jugements évaluatifs (qui sont encore thétiques) interviennent dans l'intentionnalité normative, je soutiens que l'intentionnalité normative constitue originairement des nouveaux objets et situations, et que c'est dans ce nouveau domaine que les jugements de valeur rencontrent ces thèmes propres. Cela revient à concevoir la sphère normative et pratique comme une sphère autonome, qui régit par sa teneur spécifique et sa rationalité propre les emprunts qu'elle demande aux domaines théorique et évaluatif.

3. Qu'est-ce que c'est une norme?

La raison de cette dernière affirmation de l'autonomie du plan normatif relativement aux jugements thétiques, qui peut paraître paradoxale, c'est que les normes au sens prégnant du mot, nommément une grande partie des normes juridiques, ont un pouvoir originairement *constitutif* de tout un nouveau domaine d'objets, objets qui, par conséquent, ne sont pas encore disponibles pour les actes thétiques (soit théoriques, soit évaluatifs) avant que les actes nomothétiques les instituent.

Par exemple, quand la constitution française dit que "Le Président de la République nomme le Premier ministre" (article 8), cela ne se réfère ni à un fait, ni signifie que le Président doit nommer le Premier ministre, ou qu'il soit autorisé à le faire, ou encore qu'il ne soit pas interdit de le faire. Cette norme *précède* le champ des faits (réels ou possibles), ainsi que toutes les normes prescriptives. Elle dit simplement qu'il il y a un "Premier ministre" quand et seulement quand il y a un acte de nomination par le Président, et cette capacité de nommer n'est pas une obligation au sens prescriptif (un commandement), mais plutôt une définition d'un pouvoir constitutif de ce que c'est un Président de la République et du processus par lequel il y a quelque chose comme un Premier ministre. L'acte normatif a certainement une pensée directrice. Dans ce cas, la relation de nomination entre le Président et le Premier ministre. Cependant, cette pensée ne s'articule pas selon une modalité positionnelle quelconque, elle ne vise pas son objet comme un *fait*, possible ou réel. Elle est simplement le *sens de l'acte normatif* et non pas un élément d'un acte thétique, positionnel.[6] La preuve ultime c'est que, si on faisait abstraction de tous les objets qui sont constitués originairement par

5 "Es muß somit eine ganz neue Gruppe apriorischer Wertsätze entstehen; als ein Zwischenglied zwischen den rein theoretischen, apriorischen, absolut objektiven Sätzen der Wertmathematik und den normativen apriorischen Sätzen über richtiges Wollen und Widerwollen [...]".

6 L'intentionnalité normative a donc un contenu de pensée propre, et, pour cerner le contenu de pensée commun aux actes thétiques et nomothétiques, on se souviendra ici du concept kelsenien de "substrat modal indifférent", lequel se réfère au sens qui peut être, *qua* sens, énoncé selon la modalité du *Sein* ou selon celle du *Sollen*.

des actes normatifs, *il ne resterait rien* qui pourrait être l'objet d'un acte thétique, c'est-à-dire, d'un acte visant sont objet sur quelque modalité d'être que ce soit (existant, possible, etc.). Resteraient, surement, les personnes concernées, dans leurs dimensions physiques et morales. Cependant, il n'y aurait plus quelque chose comme un Président, un Premier ministre, et un acte institutionnel dont le sens propre serait la nomination. On ne trouvera donc rien de ce qu'un acte thétique serait à même de viser avant que l'intentionnalité normative constitue ses objets, raison pour laquelle l'acte normatif n'a pas, à l'évidence, un acte objectivante, thétique à sa base; bien au contraire, c'est le pouvoir constituant de l'intentionnalité normative qui ouvre la possibilité des actes thétiques (tant théoriques qu'évaluatifs) visant les objets qu'elle institue.

En effet, les normes qui caractérisent certains objets comme un premier-ministre, un majeur d'âge, un document authentique, un homicide, ou les phases et acteurs de la procédure législative, par exemple, constituent des objets et des états-de-choses nouveaux qui façonnent le domaine où peuvent intervenir, par après, les normes prescriptives, qui obligent, interdisent ou permettent. En utilisant la distinction, développé par Searle, entre règles constitutives et régulatrices, je dirais que la dimension plus profonde de l'intentionnalité normative est celle de constituer originairement des objets, créant par son entremise des rapports, des qualités et des comportements qui *n'auraient pas de sens* (et donc de réalité) en son absence. À vrai dire, cela n'est pas une spécificité de la norme juridique. On trouve un grand nombre d'exemples de normes constitutives hors du champ de la juridicité (le cas qui revient toujours est celui des règles des échecs). Néanmoins, avec ses normes, la sphère juridique ne *propose* pas simplement des comportements et des rapports intersubjectifs qui peuvent être ou ne pas être réalisés par les sujets (comme jouer une partie d'échecs); au contraire, elle *impose* ses nouveaux comportements, qualités et rapports, au sens que les individus concernés ne peuvent pas leur échapper, dans la mesure où, je l'ai souligné, la norme juridique lie les sujets en instituant des qualités et des relations indépendamment de leur volonté et de leurs désirs. Le résultat de cette dimension constitutive de l'acte normatif sera donc celle d'instituer, au-dessus de la sphère pré-donné d'une communauté intersubjective empathique et communicative, les couches supérieures de sens d'un monde social. La fonction constitutive de la norme a donc partie liée avec l'ontologie du monde social.

On voit que la teneur de sens de l'intentionnalité normative est très variée. Elle contient des dimensions constitutives; elle contient aussi des normes au sens de la prescription, comme celles qui obligent ou interdisent, et encore des normes sanctionnatrices (on ne les interprétera pas comme des commandements donnés aux autorités, comme l'a fait Kelsen). De plus, les normes n'expriment pas toujours une contrainte stricte: l'univers normatif va de la coaction, d'un côté, au conseil, à l'avis et à la recommandation, de l'autre (on présente cette division comme la ligne de partage entre le droit et l'éthique, mais je soutiens qu'on peut la trouver aussi à l'intérieur de l'univers juridique). Si on respect cette richesse ou cette souplesse de sens, on rejettera l'approche prescriptiviste – qui est aussi défendu par Alchourrón et Bulygin dans leur théorie "expressive" (pragmatique) des normes –, selon laquelle les normes sont toujours, essentiellement, des commandements, ainsi que l'ancienne tendance, qui a prévalue aussi chez les phénoménologues du droit, à considérer que le syntagme "devoir-être" exprime le sens de l'intentionnalité normative.

Relativement à cette dernière thèse (je discuterais la première dans la prochaine section), on doit reconnaître qu'elle est presque consensuelle chez les phénoménologues du droit. Par-delà Husserl lui-même, qui voit dans le syntagme "devoir-être" l'expression du sens propre de la normativité, je ne citerais que deux cas paradigmatiques. Le premier est celui du phénoménologue Felix Kaufmann qui, en suivant Kelsen, voit l'origine du droit dans un *Soll-Satz,* c'est-à-dire, dans un énoncé de devoir-être, lequel, encore en accord avec Kelsen,

implique un jugement hypothétique qui articule une norme secondaire et une norme primaire:

> Un sujet A doit réaliser un comportement C1 et, s'il ne le fait pas, devra alors avoir lieux, contre lui, un comportement C2 (Kaufmann, 1922, p. 91).[7]

L'autre cas c'est celui du phénoménologue argentin Carlos Cossio, lequel, aussi à l'instar de Kelsen, décrit de la façon suivante la proposition juridique explicitant le contenu de sens de la norme:

> L'analyse phénoménologique du problème normatif que l'égologie a réalisé [...] établit [...] que la norme est un jugement et que, dans ce jugement, la copule est le verbe *devoir-être* et non pas le verbe être. [...] Étant donné A, il doit être B (Cossio, 1964, pp. 332-333; p. 353).[8]

Ceci revient à défendre une théorie "hylétique" de la norme, selon la classification d'Alchourrón et Bulygin. Je ne suis pas d'accord avec cette thèse, bien que mon désaccord ne soit pas dicté par le refus de reconnaître un contenu sémantique (et aussi syntaxique) propre aux normes. Mon argument est plutôt basé sur un des points forts de l'analyse husserlienne de l'intentionnalité. Je me réfère à la séparation stricte entre matière intentionnelle et qualité d'acte, aussi bien qu'à la thèse selon laquelle l'attitude doxique (ici, non pas comme doxique, mais plutôt nomothétique) qui est impliquée dans l'assertion ne se reflète pas dans le contenu propositionnel de l'énoncé, c'est-à-dire, dans sa matière, nommément dans la copule.
Cette thèse a été établie par Husserl au cours d'une discussion serré de la théorie brentanienne du double-jugement. Selon Brentano, le contenu propositionnel d'un jugement "A est B" devrait être entendu comme une assertion double dans laquelle le "est" exprimerait à la fois la croyance que "A existe" ou que "AB existe" (Brentano l'appelle *Anerkennung,* reconnaissance, admission) et la relation prédicative au sens strict. Ainsi, dans sa teneur d'ensemble, le jugement signifierait "le A qui existe est B" ou "Le *A* qui est *B* existe", selon que la représentation de base soit simple (seulement *A*) ou complexe (*AB*). Contre cette doctrine du double jugement, Husserl a montré d'une manière qui me semble tout à fait convaincante que le «est» a, dans la proposition, une fonction simplement copulative, étant donné qu'il n'y a pas aucune différence entre le contenu propositionnel d'une phrase, disons "Marte est trois fois plus grand que la Terre", quand elle est énoncé assertivement comme vrai, ou quand elle est simplement comprise sans qu'on prenne position sur sa vérité, ou quand elle est refusé comme fausse. En effet, si la croyance ou la non croyance, ou encore quelque autre attitude doxique venait se projeter sur le contenu propositionnel, nommément sur le "est", on aurait donc plusieurs propositions et non pas seulement une. Cela revient à dire que le "est" peut avoir seulement une fonction copulative ("logique" et pas "doxique") et que la qualité positionnelle du jugement (croyance, etc.) n'est pas incorporée dans son contenu propositionnel.
Or la thèse selon laquelle la proposition juridique contient le syntagme verbal *devoir-être* a le semblant d'une retombée dans la conception brentanienne, dans la mesure où elle suppose que

7 "Jeder Rechtssatz konstituiert sich als Doppelnorm in der Weise, dass das Soll-Subjekt der primären Norm 'Zielpunkt' des in der sekundären Norm gebotenen Verhalten wird. *Der 'reine einfache' Rechtssatz lautet: Ein Subjekt A soll ein Verhalten V1 an den Tag legen, tut es dies nicht, so soll ihm gegenüber ein Verhalten V2 platzgreifen*" (Kaufmann, 1922, p. 91).

8 "El análisis fenomenológico del problema normativo que ha efectuado la Egología [...] establece [...] que la norma es un juicio y que en ese juicio la cópula proposicional es el verbo *deber ser* y no el verbo *ser*. [...] *Dado A, debe ser B*".

la qualité normative de l'acte doit s'exprimer dans sa matière propositionnelle. Carlos Cossio est un cas frappant de cette tendance. Dans un passage de sa *Teoría Egológica del Derecho,* il écrit:

> On sait déjà que le devoir-être copulatif se réfère à la concordance, établie et énoncée par lui, entre les deux termes de la norme; tandis que le devoir-être de la norme dans son ensemble se réfère à la concordance entre elle, en tant qu'indication de comportement, et la perception du comportement qui est visée par elle (Cossio, 1964, p. 369).[9]

En un mot, le *devoir-être* établit une connexion copulative entre les termes de la proposition et, à la fois, exprime que la proposition, dans son ensemble, a une valeur obligatoire relativement aux comportements de ses destinataires. Cette thèse semble être un bouleversement de la distinction stricte entre matière et qualité, aussi bien que de l'évidence qu'une même matière peut devenir le soubassement d'actes doxiques différents, tels que l'affirmation, la supposition, le doute, etc., en demeurant cependant inchangé en ce qui concerne son contenu propositionnel. Pour revenir à l'exemple précédent, le contenu propositionnel "Le Président nome le Premier ministre" est toujours le même, qu'il soit énoncé dans un acte avec force assertive ou dans un acte avec force normative (je reviendrais sur ce point). Dans le premier cas, il s'agit d'une phrase déclarative qui décrit, d'une façon vrai ou fausse, un article de la constitution française; dans le second, il s'agit de la norme elle-même, laquelle ne décrit pas, mais détermine comment quelqu'un peut être constitué comme Premier ministre. Bien que la force, ou ce que nous appelons la "qualité d'acte", soit totalement différente, le contenu propositionnel demeure invariable. Par contre, selon Cossio, le contenu propositionnel devrait être différent, nommément la copule *est* de la norme devrait pouvoir être substitué par la copule *doit-être* dans la proposition juridique, en exprimant celle-ci, de manière double, la connexion entre les termes de la proposition et la force normative de la proposition dans son ensemble. Cependant, il est évident que la norme "Le Président nome le Premier ministre" n'est pas équivalente, du point de vue sémantique, à la proposition juridique "Le Président doit nommer le Premier ministre". La norme ne dit pas qu'il est préférable que le Président nomme le Premier ministre (si on admet l'interprétation faible de *devoir*), ni que c'est une obligation du Président que de nommer le Premier ministre (en admettant l'interprétation forte); la norme dit simplement qu'il y a un Premier ministre quand il y a un acte de nomination par le Président. Cela ne peut pas s'exprimer en termes de *devoir-être* dans la proposition juridique.

Par ailleurs, le "devoir-être" qui est introduit dans la description de la norme, en plus de changer le sens, est encore bien loin de pouvoir exprimer la force normative. Dans un travail récent, Paolo Di Lucia a fait une analyse de la polysémie du *devoir-être* (Di Lucia, 2003). Il a distingué un sens boulétique, un sens axiotique et un sens eidétique de *devoir*. Le premier a à voir avec désirs et volitions, comme quand on dit "Tu dois rentrer à 12 heures", une forme elliptique de dire "Je veux que..." ou "Je t'ordonne de...". Le deuxième exprime une évaluation en ce qui concerne ce qui est bon à une occasion donnée, ce qui n'a pas besoin d'être nécessairement désiré ou voulu. Par exemple: "Le drame ne doit pas être divisé en épisodes", "Tout homme doit aimer son prochain". Le troisième, le devoir eidétique, exprime une nécessité d'essence, comme dans la phrase "Un triangle équilatéral doit avoir les trois angles égaux", ou encore, dans le mot de Reinach, "De la promesse doit naître une prétention". Les

9 "Ya sabemos que el deber ser copulativo se refiere a la concordancia, por el establecida y enunciada, entre los dos términos de la norma; en tanto que el deber ser de la norma en conjunto se refiere a la concordancia entre ella como mención de la conducta y la percepción de la conducta por ella mentada".

trois sens s'organisent d'après des concepts de *vouloir,* de *valoir* et de *nécessité ontique,* celle-ci entendue d'après le sens que Albert Hofstadter lui a donné:

> Nous avons une *nécessité ontique* quand [...] le fait qu'une chose soit quelque chose *nécessite* qu'elle soit autre chose, ou quand le fait d'être quelque chose l'*empêche* d'être autre chose (Hofstadter, 1957, p. 603).[10]

Pace Reinach et Di Lucia, le *devoir-être* copulatif, dans la proposition juridique (Cossio, toutefois, se réfère plus précisément, avec cette expression, à la relation entre les membres du jugement hypothétique: "si A est, alors il doit être B"), n'exprime pas une nécessité d'essence. Il décrit simplement ce que la norme statue, comme quand on dit, en fonction de la norme "Le fait, pour tout conducteur, de circuler en sens interdit est puni de l'amende..." (Code de la Route, article R412-28), que le conducteur qui circule en sens interdit *doit être* condamné à une amende. Cet usage du syntagme *devoir-être* est simplement une description de la connexion entre l'infraction et la sanction. Cependant, Cossio exige qu'il y ait, dans la proposition juridique, encore une autre fonction et également un autre sens qui exprimerait le caractère obligatoire de la norme dans son ensemble. C'est-à-dire, un sens qui devrait, d'une façon autoréférentielle, signifier: "Si quelqu'un circule en sens..., alors il *doit être* sanctionné d'une amende *et* cela est une obligation (un *devoir-être*) pour les autorités compétentes".
Cossio prend appui sur Husserl lui-même afin de corroborer son analyse de la proposition juridique. L'argument husserlien qu'il reprend consiste à montrer qu'en visant un état-de-choses par une expression significative, on vise à la fois deux choses, à savoir, "que A est B", ce qui est vécu et exprimé, et que "il est vrai que A est B", ce qui est vécu mais non pas exprimé. (Cossio, 1964, p. 355). *Mutatis mutandis,* la proposition juridique affirmerait que "B doit être, si A est" et que "il est obligatoire que B soit, si A est". Elle le ferait, cependant, explicitement, j'ajoute, étant donné que la proposition juridique doit manifester expressément le contenu global de la norme. Or, compte tenu que ce n'est pas le chercheur en droit positif qu'énonce avec force obligatoire (dans le cas de l'énonciation normative, la force obligatoire est vécue, mais non pas exprimé dans le contenu propositionnel de la norme), mais plutôt le législateur, la proposition juridique doit énoncer *descriptivement* le double sens, copulatif et obligeant, du *devoir-être*. Il s'agit d'une conséquence que Cossio ne semble pas avoir tenu en compte.
Or, quand on tient compte de ce corolaire, l'analyse de Cossio ne peut plus se revendiquer de l'autorité d'Husserl au sujet de ce qui est vécu et exprimé ou vécu mais non pas exprimé dans un énoncé. Dans la proposition juridique, les deux doivent être également exprimés. Et, dans ce cas, quand on exprime descriptivement le devoir-être copulatif et le devoir-être relevant de la force obligatoire de la norme dans son ensemble, l'unité sémantique du *devoir-être* se trouve complétement brisé.
En fait, en analysant le sens de propositions comme "A est B" et "il est vrai que A est B", Husserl montre – à juste titre, il me semble – que les objets intentionnels des deux propositions sont tout à fait différents. Dans le premier cas, nous sommes intentionnellement dirigés vers l'état-de-choses objectuel, à savoir, vers le fait que A est B, et nous l'affirmons dans la phrase déclarative (*Aussagesatz*) correspondante. Dans le second cas, par contre, nous sommes dirigés vers la proposition elle-même, vers le "noème propositionnel", et nous affirmons non pas l'état-de-choses, mais plutôt le fait que la proposition, dans ce qu'elle *dit,* est vrai ou fausse. Dans ce second cas il est exigé un acte intentionnel spécifique que Husserl appelle "réflexion

10 "We have *ontic necessity* when, for instance, something's being *necessitates* it to be something else, or when its being something *prevents* it from being something else".

catégorielle". Ainsi, par analogie, dans la proposition juridique qui décrit la norme "A est B", le doublet "A doit être B" et "A est B doit être" utilisent le syntagme en deux sens différents, qui ne peuvent pas être amalgamés, comme le veut Cossio, dans un énoncé unique de la forme "si A, B doit être", dans lequel le *doit être* aurait à la fois le sens copulatif et le sens de la force contraignante relatif à la norme dans son ensemble. A en croire l'analyse de Cossio, on aurait, dans la proposition juridique qui exprime explicitement le contenu de la norme (sa matière et sa qualité), le cas entièrement anomale d'un *devoir-être* autoréférentiel mélangé avec un *devoir-être* copulatif.
Cette analyse est donc invraisemblable. Le *devoir-être* devient équivoque, allant de la qualité de l'acte à la matière intentionnelle. Ces deux niveaux de sens du *devoir-être* peuvent – et doivent – être différenciés dans la proposition juridique, étant donné qu'ils se réfèrent, respectivement, à la matière intentionnelle (le *devoir-être* copulatif) et à la qualité normative de l'acte (le *devoir-être* qui décrit la force contraignante de la norme dans son ensemble).
Cette différentiation ne pourra cependant se faire qu'*en abandonnant* l'idée selon laquelle le syntagme *devoir-être* est la formule correcte pour exprimer le contenu des normes. On doit, ici, se passer des équivoques du *devoir-être* et chercher un métalangage pour exprimer descriptivement le contenu des normes en ce qui concerne leur contenu propositionnel et leur qualité d'acte. Cela, on le fera, par exemple, par la conjonction de plusieurs propositions, à savoir:

II. Si *N* est une norme, alors *N* est décrite par
(i) son contenu propositionnel: *N dit* que "Le fait ... de circuler en sens interdit est sanctionné par une amende...";
(ii) sa validité: *N* est *valide* dans l'ordonnancement juridique tel ou tel;
(iii) sa force ductive (sa qualité d'acte spécifique): *N* a une *force* contraignante.

4. La force ductive

Comme je l'ai dit avant, mon autre point c'est que la qualité d'acte des actes normatifs exhibe une telle variabilité qui n'est pas tout à fait exprimable par le simple *devoir-être*, étant donné que la force ductive contraignante n'est qu'un cas, sans doute important, des modes possibles que la duction, lié à la force normative, peut revêtir. Je refuse donc la conception d'Alchourrón et Bulygin selon laquelle les normes sont toujours des commandements en ce qui concerne leur qualité d'acte.
La question autour de la qualité de l'acte normatif peut être formulée en partant de la distinction de Frege entre "contenu" et "force". D'après Frege, un sens propositionnel, qui exprime une pensée, peut être le contenu d'un acte assertif, mais également, en demeurant le même, peut donner lieux à une question à laquelle on répond par oui ou non, ou être l'antécédent d'un jugement hypothétique. Chaque fois, il y a un élément identique, la pensée elle-même, et une variabilité des modes d'énonciation, lesquels transforment cette pensée en des phrases assertives, interrogatives ou conditionnelles. Comme Frege écrit dans *Der Gedanke,*

> Phrases interrogatives et phrases déclaratives contiennent les mêmes pensées; la phrase déclarative, cependant, contient quelque chose en plus, à savoir, justement l'assertion. Aussi la phrase interrogative contient quelque chose en plus, à savoir, une solicitation (Frege, 2003, pp. 40-41).[11]

11 "Fragesatz und Behauptungsatz enthalten denselben Gedanken; aber der Behauptungssatz enthält noch etwas mehr, nämlich eben die Behauptung. Auch der Fragesatz enthält etwas mehr, nämlich eine Aufforderung".

Par contre, Frege distingue, dans le même passage, d'autres phrases, comme les optatives, les impératives et rogatoires, qui ne peuvent pas être considérées des "pensées", étant donné que leur sens n'était ni vrai ni faux.

La question phénoménologique sur la qualité des actes a une similarité structurelle avec ces distinctions frégéennes. La séparation entre contenu et force corresponde à la distinction entre matière intentionnelle et qualité de l'acte, et la distinction entre phrases qui expriment des pensées susceptibles d'être vraies ou fausses correspond à la distinction phénoménologique entre actes objectivants et actes fondés (tels que désirs, volitions, évaluations). La question est donc celle de savoir où doit-on repérer la qualité nomothétique: dans la classe des actes objectivants, lesquels ont un contenu propositionnel susceptible d'être vrai ou faux, ou dans celle des actes fondés, qui ont bien sûr un acte objectivant pour base, mais qui ne sont pas, en eux-mêmes, des actes de qualité objectivante et ne sont pas non plus ni vrais ni faux.

Les phénoménologues ont refusé toujours la vision, triviale à la fin du XIXème siècle, des normes comme des impératifs ou commandements, accompagnés ou non par des sanctions. La raison profonde pour cela c'est, à mon avis, l'apparente convertibilité entre jugements et normes dont j'ai parlé plus haut, c'est-à-dire, le fait que le contenu propositionnel se maintient inchangé quand on passe d'un jugement, avec force assertive, à une norme. En vérité, le contenu «Le Président nomme le Premier ministre» peut fournir la matière tant pour un acte thétique que pour un acte nomothétique et fonctionner, le cas échéant, comme une phrase déclarative ou une norme. Bien au contraire des actes fondés, dont le contenu propositionnel doit être précédé par des clauses comme "je désire que...", "je t'ordonne que...", la convertibilité des jugements en normes est directe, n'ayant pas nécessité des clauses propres aux actes fondés. Cette similarité flagrante est à la base du refus de Kaufmann, aussi bien que de Reinach ou Spiegelberg, de construire la normativité comme un ensemble de commandements ou ordres, même si ces ordres sont entendus d'une façon impersonnelle. Cela signifie, dans l'idiolecte de la phénoménologie, que l'acte normatif n'est pas un acte fondé. Qu'est-ce que c'est, alors? L'unique voie qui resterait apparemment ouverte est celle qui a été parcouru par Cossio: étant donné que l'acte normatif n'est pas un acte fondé sur un acte objectivant de base, il sera alors un jugement, donc un acte fondant, pas un acte fondé, qui se distinguerait du jugement doxique (thétique) en vertu du fait que dans la copule s'exprime un "devoir-être" et non pas un "être". De là l'insistance de Cossio sur la nécessité d'une logique du devoir-être, en parallèle à la logique modale aléthique et irréductible à celle-ci, d'après quelques intuitions essentielles de la logique déontique de von Wright, lesquelles Cossio discute explicitement (Cossio, 1964, pp. 333 ss.).

Cependant, comme l'a remarqué Paul Amselek, "l'idée confuse du devoir-être n'est qu'une autre façon d'exprimer la structure propre de la norme en tant que modèle, en tant qu'instrument d'évaluation" (Amselek, 1962, p. 81). L'observation de Paul Amselek est importante. On doit distinguer entre le contenu sémantique des normes et la fonction propre de l'acte normatif. Quant à leur contenu, les normes peuvent être des permissions, des obligations ou des prohibitions. Ces foncteurs déontiques se définissent en fonction les uns des autres, comme l'a montré von Wright en partant du foncteur "permission" (von Wright, 1951, p. 4). Toutefois, il reste encore la question de savoir ce qu'on *fait* par l'entremise des normes, ou quelle est la teneur de sens de la qualité d'acte normatif. On doit distinguer les deux plans. D'un côté, ce que la norme *dit*; de l'autre côté, ce que la norme *est.* Ces deux plans ne peuvent pas être mélangés dans un concept de "devoir-être" complètement équivoque. La norme s'adresse intentionnellement aux comportements *possibles,* elle façonne originairement plusieurs espaces de liberté, lesquels vont de la norme en tant que contrainte pure (l'absence de choix) à la norme en tant qu'élément non exclusif de la délibération volontaire (l'avis, le

conseil, etc.). C'est cette visée constitutive des comportements possibles et de leur espace de liberté qui définit la *fonction ductive* de la norme ou, en termes phénoménologiques, la *qualité* de l'acte nomothétique. En plus, la norme dit quelque chose: elle parle d'obligations, de permissions ou de prohibitions. Cela concerne le *contenu sémantique* de la norme ou, en termes phénoménologiques, sa *matière intentionnelle.*

On doit maintenir les deux aspects séparés, à l'encontre des analyses les plus répandues de l'intentionnalité normative. En effet, de la même façon qu'une norme permissive n'est pas, elle-même, permissive, une norme qui prescrit, quant à son contenu, une obligation pourrait être décrite seulement d'une façon incorrecte par une duplication du foncteur "obligation", comme une obligation. On doit distinguer les deux plans. Il y a quelque chose dans la norme qui s'impose comme modèle pour le comportement. Mais on ne saurait pas décrire cette fonction de la norme comme une obligation. Autrement, on devrait, confusément, dire que toutes les normes sont obligatoires et que, quant à leur contenu, elles peuvent exprimer des obligations, des prohibitions ou des permissions. C'est justement cette caractérisation confuse, mélangeant qualité (force ductive) et matière (contenu propositionnel) qui est venu s'exprimer dans la doctrine de Kelsen et de Cossio sur le *devoir-être*. Le fait paradoxal c'est que la norme, étant toujours comprise comme une obligation, peut "obliger" une permission, situation qui n'a pas un sens clair et sans ambigüités.

Si on distingue, par contre, la matière intentionnelle des normes et la qualité de l'acte normatif, on sera à même de clarifier ce point décisif. Quant à leur contenu propositionnel, les normes expriment des obligations ou des permissions ou des prohibitions. La qualité de l'acte normatif, c'est-à-dire, le type d'intentionnalité qui défini la conscience qui pose originairement les normes, est, cependant, unique. La norme ne dit pas ce qui est, comme le jugement; par contre, elle constitue qualités et relations juridiques; l'acte normatif ne prescrit pas ce qui doit être, comme s'il exprimait toujours une obligation stricte. L'acte normatif établi plutôt un étalon de référence pour des comportements possibles, lequel se rapport à l'arbitre des agents avec des niveaux divers de coaction. En effet, ce pouvoir de la norme a des formes variés et souples. Il va de la contrainte au simple conseil. En un mot, la qualité de l'acte nomothétique n'est pas l'obligation (ou le commandement) mais la *duction.* La fonction de la norme est donc de se constituer objectivement comme étalon pour les comportements possibles et de poser cet étalon avec des niveaux différents de coercition. Une norme peut être simplement un conseil ou une recommandation. Toutefois, ce qu'elle recommande ou conseille peut être, *quant à sa matière propositionnelle,* une obligation ou une prohibition. De même, une norme peut exprimer une permission quant à sa matière et, cependant, quant à sa qualité, l'acte peut bien avoir une force ductive contraignante.

En regardant la grande variété des normes, depuis les normes éthiques jusqu'aux juridiques, en passant par les normes instrumentales jusqu'aux règles d'étiquette, etc., il est facile de comprendre que la vie sociale est façonnée par des règles et des codes. Et il est tout aussi facile de comprendre que ces étalons sont bien loin d'avoir tous une force ductive contraignante, et que sa fonction d'étalon admette une palette bien varié de modalités. Il serait une option dramatiquement limitatrice que de considérer que seulement les normes juridiques avec une force contraignante et, parfois, accompagnées de sanction, peuvent être considérées en tant que normes au sens prégnant du mot. Cela reviendrait à rétrécir d'une manière drastique le phénomène social de la normativité.

Il est toutefois une tendance presque inexorable de la pensée juridique que de penser les normes comme ayant toujours une force ductive contraignante (le *jus cogens*). De là provient la tendance à les exprimer comme un *devoir-être*, comme si toute norme avait, par essence, une force obligatoire. En vérité, la différence entre normes contraignantes et non-contraignantes a été entendue, chez les classiques, comme étant la distinction elle-même

entre le Droit et l'Éthique. On peut le voir clairement chez Thomasius: la distinction entre *obligatio interna* et *obligatio externa* séparait les domaines des conseils de la raison, relatifs au *decorum* et à l'*honestum,* d'une part, et le domaine du *iustum,* de l'autre. Ainsi se séparaient les sphères de l'éthique et du droit. Cependant, il y a également des normes juridiques non-contraignantes. Par exemple, les dispositifs de *opt-in* (la norme s'applique à la condition d'être accepté) et de *opt-out* (la norme ne s'applique pas si elle n'est pas acceptée) dans le Droit Européen permettent de parler d'une force ductive *optionnelle* de la norme, dans la mesure où elles convoquent expressément une liberté (elles *constituent* cet espace de liberté) quant à son acceptation ou rejection. Aussi le phénomène désigné par *soft law,* relatif à des recommandations et déclarations des organismes internationaux, est un clair exemple d'une force ductive non-contraignante, mais seulement indicative, qui a, cependant, validité et efficacité. Il serait une vision appauvrissante que de considérer le *soft law* comme une étape dans le chemin qui va vers le *hard law.* Au contraire, le *soft law* rempli une fonction spécifique, nommément en donnant aux états la capacité de remplir d'une façon non-automatique des résolutions ou des accords, libérés des mécanismes *hard* des traités internationaux.[12] Aussi dans le domaine juridique interne, des documents juridiques comme les arrêtes de la Cour de Comptes (je parle du cas portugais), aussi bien que les avis des autorités régulatrices, n'ont pas une force ductive contraignante pour les entités visés, même quand ils s'expriment en termes de *devoirs*. Ayant les normes juridiques, dans la majorité des cas, une force ductive contraignante, il y a cependant des modulations à l'intérieur de la sphère du droit, de telle façon que la force ductive ne signifie *eo ipso* coaction stricte. Tout n'est pas coaction dans l'univers juridique, aussi bien que toutes les normes ne sont pas accompagnés par des sanctions. Cette ductilité de ce que j'appelle la "force ductive" de la norme a été bien exposé par le juriste Cédric Grouiller. Il vaut la peine de citer ses paroles:

> La fonction assignée à la norme juridique [est de] fournir référence pour l'organisation des rapports sociaux. Or, cette fonction est occultée dans l'approche impérativiste, focalisé sur cette spécificité qui aurait le droit à s'imposer unilatéralement et à s'appuyer sur un appareil coercitif lié au pouvoir. ... Non seulement le point de vue impérativiste adopte une posture dogmatique qui oblige à des contorsions théoriques s'agissant des normes permissives, mais il restreint et obscurcit ce qu'il faut entendre par force normative: l'exclusion du *soft law* montre combien la notion de normativité est dénaturée, qu'elle ne renvoie plus, comme l'étymologie du mot *norme* l'enseigne, à cette aptitude à constituer un modèle, une référence, mais est consubstantiellement liée à la contrainte. N'est normatif que ce qui contraint. De même, il semble qui s'est opéré une association abusive de la normativité à la juridicité: prétendument non normatif, le *soft law* est rejeté hors du champ du juridique (Groulier, 2009, p. 201).

12 Cette question, quoique controverse, est en progrès vers la reconnaissance de l'autonomie et de la spécificité du droit souple: "Emerging changes that have occurred in recent years have also influenced the methods and enforcement of international law. The positivist approach to law defined a norm as a law if a sanction or other type of enforcement followed it. In the international system, sovereign states use treaties, general principles of law and customary international law. The International Court of Justice recognizes these methods as a source of law and believes that judicial decisions as well as education will help implement laws. Within the last forty years, soft law, something that is either not year or not only a law, has been a major influence in international law. The United Nations system has used soft law to create and establish declarations, codes of conduct and guidelines. Non-governmental organizations have also used soft law to create resolutions and other statements. Although soft laws lack enforceability, they have normative weight in the international system. International environmental law has appeared to blur the use and difference between soft law and hard law in order to face new trends in the international system" (Buriel *et al.*, 2004).

Somme tout, si ma séparation de la force ductive et de la matière propositionnelle de l'intentionnalité nomothétique a quelque pertinence, on pourrait en tirer, en guise de conclusion, les corollaires suivants:

5. Vision pragmatique et sémantique: le *tertium quid* phénoménologique

5.1. L'approche pragmatique a raison dans la mesure où elle cherche l'essence de la normativité dans le domaine des rapports intersubjectifs. Toutefois, sa vision de la norme comme étant un commandement demeure aveugle à la souplesse de la force ductive. La normativité va bien plus loin que la contrainte, et, par conséquent, on ne saurait trouver une bonne définition de la force ductive en l'assimilant au command et à l'obéissance. En outre, ce n'est pas l'usage du langage qui explique la norme; c'est plutôt la fonction ductive qui explique les actes du langage, parce que c'est l'intentionnalité nomothétique qui ouvre le domaine où ces actes de parole seront désormais possibles. En effet, l'approche pragmatique n'explique pas les conditions qui doivent être réunies pour qu'un énoncé vaille comme une norme et soit reconnu en tant que tel. Il tient la fonction normative simplement pour un fait social: le fait qu'il y a une autorité capable d'établir des normes et de se faire obéir, fait dont l'explication est renvoyée à la sociologie et à la science politique positives. Pourquoi il y a des normes et donc une fonction ductive sous-jacente est une question qui reste donc non résolue et même non-formulé. Toutefois, elle est formulable à l'intérieur de l'approche phénoménologique si on explicite régressivement les horizons de sens de l'intentionnalité normative. On trouvera, en tant que pré-donation, une communauté ou un groupe façonné par des rapports empathiques et communicatifs. On trouvera, en outre, ce qui constitue un groupe en tant que groupe, à savoir, sa capacité d'agir en tant que sujet d'ordre supérieur et de prendre des décisions ayant une validité collective, soient-elles des commandements ou des simples orientations. Cette capacité signifie qu'un groupe se constitue dans la mesure où il n'y a pas simplement une intentionnalité individuelle, articulé sous la forme du "Je", mais une intentionnalité collective s'articulant sous la forme du "Nous". Or – et cela constitue la pré-donation de sens la plus décisive – cette intentionnalité exprime la relation des individus à une instance ductive qui est immanente au groupe parce que c'est elle qui le constitue en tant que tel. L'instance ductive est impersonnelle. C'est la visée d'un être collectif ou du groupe en tant que tel. Elle doit toutefois devenir concrète. Elle se personnifie quand elle est remplie par des individus qui exercent une fonction d'autorité (le chef, le roi, l'empereur). Elle peut aussi être façonné d'une manière abstraite par des institutions, telles que celles qu'on rencontre dans les états modernes. Ici, l'autorité se confond avec les institutions, et les individus la possèdent seulement dans la mesure où ils exercent certaines fonctions institutionnelles. Une analyse phénoménologique de ces pré-donations de sens se constituerait comme une enquête régressive allant de l'intentionnalité nomothétique qui pose la norme jusqu'au Monde Social et au phénomène du Politique, lequel se profile comme horizon ultime. On voit donc que l'approche pragmatique, quoique allant dans la bonne direction, reste à la surface du phénomène global de la normativité.

5.2. De l'autre côté, il est indéniable que la conception sémantique ou "hylétique" a également sa part de raison. Ayant séparé force ductive et contenu propositionnel de la norme, on sera à même de distinguer, d'une part, la façon dont la norme *lie* les individus (contrainte, conseil, avis, etc.), tout en refusant l'idée que toute norme est un commandement (une "obligation"), et de distinguer, d'autre part, ce que la norme *dit.* Or, relativement à ce dernier aspect, il est indéniable que les normes ont une teneur de sens bien particulier. Il y a, en premier lieu, l'usage normatif du verbe "être" ("Le Président de la République *est* le chef des armées", Constitution française, article 15) et d'autres verbes encore ("Le Président de la République *nomme* le Premier ministre", *idem,* article 8), usage qui a partie lié avec la fonction constitutive

des normes. Il y a, de plus, les foncteurs normatifs spécifiques: "être-obligé de...", "être-permis", "être-interdit", etc. Cossio et bien d'autres (comme Kelsen) avaient donc raison en reconnaissant une copule spécifique aux énoncés normatifs. La limitation des leurs analyses était que, en confondant qualité ductive et contenu propositionnel, ils sont tombés dans une théorie équivoque du *devoir-être*.
Par contre, l'intuition qui est à la base de la logique déontique veut libérer un contenu dit invariable des énoncés de toutes les espèces (assertions, questions, ordres, etc.) et traiter les copules normatives comme des éléments modaux. L'analogie entre modalités aléthiques et déontiques remonte à Leibniz.[13] D'après cette analogie, on parlera d'une correspondance entre le nécessaire et l'obligatoire, entre le possible et le permis, le contingent et l'optionnel, et entre l'impossible et l'interdit. Mais on ne voit pas clairement la portée de cette analogie. Signifie-t-elle, en effet, qu'un énoncé déontique est réductible à un énoncé aléthique? Ou signifie-t-elle qu'il y a un comportement structurellement isomorphe, invariant, des modalités aléthiques et des modalités déontiques?
Cependant, à y regarder de plus près, l'analogie s'estompe un peux. Il n'y a pas un comportement isomorphe des modalités aléthiques et des modalités déontiques. En effet, dans les systèmes de logique modale, on trouve deux théorèmes triviaux qui n'ont pas de contrepartie dans la logique déontique: que la nécessité de *p* implique la vérité de *p,* et que, si *p* est vrai, alors *p* est possible. En effet, étant donné

1. $\Box p \rightarrow p$
2. $p \rightarrow \Diamond p$

on ne pourra pas écrire:

1'. $Op \rightarrow p$
2'. $p \rightarrow Pp$

parce que ni le caractère obligatoire de *p* implique que *p* soit le cas (soit vrai), ni du fait que *p* soit le cas il s'ensuit que *p* soit permis. L'échappatoire a été cherché des deux côtés. Du côté de la logique modale, on a essayé de trouver l'isomorphisme dans des systèmes plus généraux où l'opérateur modal "necessaire" n'a pas une implication de vérité. Du côté de la déontique, on a ajouté la présupposition d'une action toujours conforme aux prescriptions déontiques. Cette échappatoire remonte à Leibniz lui-même, lequel a introduit la figure du *vir bonus,* dont les actions respecteraient toujours la loi. Elle est reprise dans les systèmes de Anderson (1967) et Kanger (1971) par l'entremise de l'adjonction d'une constante selon laquelle presque toutes les exigences normatives sont satisfaites. L'isomorphisme se rétabli, certes. Cependant, la déontique parlera désormais d'un sujet purement idéal et d'un monde idéalisé, qui serait le corrélat de ce sujet moral parfait.
Par contre, si on admet que le contenu propositionnel des énoncés normatifs a une teneur propre de sens, on traitera lesdites modalités déontiques en tant que copules et on écrira, par exemple:

1. Les conducteurs de voitures sont obligés de respecter le Code de la Route;
2. Il y a des meurtres.

13 "Uti se habent inter se necessarium, contingens, possibile, impossibile; ita se habent debitum, indebitum, licitum, illicitum" (Leibniz, 1999, p. 2762).

La proposition 1. a un contenu sémantique idéal propre (un "sens prescriptif"), et on ne peut déduire d'elle aucune proposition concernant les faits, nommément que les conducteurs respectent toujours le Code de la Route. La proposition 2. est, de son côté, la simple description d'un fait, d'où ne découlera aucune conséquence pour les copules déontiques: du fait qu'il y a des meurtres il ne s'ensuit, en effet, ni que le meurtre soit permis, ni qu'il soit interdit.
Doit-on donc abandonner le projet d'une réduction de la déontique a la logique modale aléthique? Cela était ma première question. Et je réponds qu'il y a, malgré tout, une forme non paradoxale de réduire un énoncé déontique à un énoncé aléthique. Cette voie a été depuis toujours signalé par Paul Amselek: tous les foncteurs déontiques sont en rapport avec la catégorie modale du *possible.* Ainsi, du fait que *A* soit obligatoire et que *~A* soit interdit, il ne s'ensuivra pas que *A* soit nécessaire et *~A* impossible. Il s'ensuivra, plutôt, que *A* et *~A* sont les deux *possibles,* et que la probabilité de *A* est plus grande que celle de *~A.* Dans ce contexte, la réduction se fera en abandonnant la logique bivalente à l'avantage d'un calcul de probabilités appliqué aux comportements possibles à chaque occasion ou contexte. En ce qui concerne le domaine strict des comportements humains, on devra exclure, bien sûr, ce qui est impossible (donc, impraticable) aussi bien que ce qui est nécessaire (donc, hors de notre capacité de choix).
Pour conclure, je dirais qu'une analyse phénoménologique de l'intentionnalité normative est à même de surmonter le dilemme d'Alchourrón et Bulygin. Les énoncés normatifs ont une teneur propre de sens: cela nous ramène du côté de la conception "hylétique". Mais les énoncés normatifs sont aussi dépendants d'un contexte social et intersubjectif, nommément de l'institution originaire d'une instance de duction. Cela nous ramène du côté de la conception "pragmatique".
Il y a donc une voie moyenne, que l'approche phénoménologique de l'intentionnalité normative sera en mesure d'ouvrir.
C'est ça que j'ai essayé de faire ici, quoique d'une façon encore tâtonnante et imparfaite.

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EIDETICS OF LAW-MAKING ACTS: PARTS, WHOLES AND DEGREES OF EXISTENCE

abstract

In my paper I introduce the phenomenological concept of "eidetics" and its application to law. I show that, according to this approach grounded in the works of Reinach (1913/1989) and Stein (1925), the problem of the existence and validity of the law can be fruitfully analysed in terms of parts-wholes which constitute law-making acts as wholes, both as performed and fulfilled acts. I argue that the parts of law-making acts can be subject to varying degrees of constraint – necessary, possible or contingent parts – and that it is the possible part of law-making acts that makes the difference between the existence of law-making acts and their validity: between their mere existence as performed acts, and their full existence as fulfilled and valid acts. I show this in focusing on Stein's suggestion of filling the inter-personal gap between legislator and citizens in legal provisions by introducing "integrative acts", which facilitate the uptake and, consequently, the enforcement of legal provisions by citizens. I suggest that Stein's work on the integrative acts of legal provisions is grounded in the eidetic claim that essential parts of a whole also include possible – and not only necessary – parts, and that these are essential relations of tendency: legal provisions tend essentially to be fulfilled and their existence acquires a full sense only when they are enforced. Finally, I deal with eidetics and the issue of degrees and quality of existence in social ontology.

keywords

eidetics, law-making acts, parts and wholes, degrees of constraint, quality of existence

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1. Introduction

In this paper I will argue that the problem of the relationship between the *existence* and the *validity* of the *law* is approached by social phenomenology in a very fruitful way that combines pragmatics and ontology and can be embodied in the concept of eidetics [*Eidetik*] of law-making acts [*Recht setzende Akte*].[1]

I will focus on the eidetic approach to law, grounded in Adolf Reinach's *The Apriori Foundations of the Civil Law* [*Die apriorischen Grundlagen des burgerlichen Rechts*] (1913/1989) and Edith Stein's *Investigation Concerning the State* [*Eine Untersuchung* über *den Staat*] (1925/2006). I will show that, according to this approach, the problem of the *existence* and *validity* of the *law* can be fruitfully analysed in terms of the problem of the relation between *performance* [*Vollziehung*] and *enforcement* [*Durchführung*] of *law-making acts*, and that performance and enforcement of law-making acts are distinct but connected moments of law-making acts as *wholes*: in order for law-making acts *to exist*, law-making acts must be performed; in order for law-making acts *to be valid*, law-making acts must be fulfilled; and in order for law-making acts to be fulfilled, law-making acts must have been previously performed.

Basically, this problem involves questions such as: what does the fact that law-making acts are performed really mean and, more precisely, that legal provisions [*Bestimmungen*], which are law-making acts *par excellence*, are performed? What is the role of uptake in the performance of legal provisions? What is the sense of "uptake" here? Are there specific conditions that facilitate the uptake of legal provisions on the part of citizens? Is there an ontological difference between performed and fulfilled law-making acts? I suggest that, in terms of eidetics, this is the problem of the parts, necessary and possible, which constitute law-making acts as wholes, both as performed and fulfilled acts: the *uptake* of law-making acts is a *necessary part* of law-making act as performed acts, and the *performance* of law-making acts is, in its turn, a *necessary part* of law-making acts as fulfilled acts, while the *fulfilment* of law-making acts is just a *possible or probable part* of law-making acts as performed acts. I argue that it is the possible part of law-making acts that makes the difference between the existence of law-making acts, on the one hand, and their validity, on the other hand; between their mere

1 On the concept of "Eidetics" [*Eidetik*], see Husserl (1913/1950), and on the concept of "law-making acts" see Stein (1925) who makes the most of Reinach's account of social acts (1913/1989) in developing an eidetics of the state, the law and social acts. On the concept of "eidetics of law" see De Vecchi (2012; 2015). On Reinach's reception in Stein, see Schuhmann (1993/2005).

existence as performed acts, and their full existence as fulfilled and valid acts.
I will develop my paper in the following way: I will briefly introduce the phenomenological concept of "eidetics" and its application to law: I will claim that even law-making acts – just as any other kind of entity – can be defined in terms of parts and wholes, and their parts can be subject to varying degrees of constraint corresponding to their being necessary, possible or contingent parts (§ 2); I will focus on Stein's account of law-making acts and deal with the problem of the impersonal nature of legal provisions and the inter-personal gap between legislator (as organ of the state) and citizens: the problem concerns especially cases of misfire uptake (§ 3); I will dwell on Stein's suggestion of filling the inter-personal gap in legal provisions by introducing "integrative acts", which facilitate the uptake and, consequently, the enforcement of legal provisions on the part of citizens, and uphold the relation between legislator and citizens: in upholding the relation between the legislator and the citizens, they also uphold the law (§§ 4-5); I will argue that Stein's work on the integrative acts of legal provisions is grounded in the eidetic claim that essential parts of a whole also include possible parts – and not only necessary parts –, and that these possible parts of legal provisions are essential relations of tendency: legal provisions tend essentially to be fulfilled and their existence acquires full sense only when they are enforced; this is a qualitative sense of "existence"; finally I will deal with eidetics (necessary parts, possible parts and essential relations of tendency) and the issues of degrees of existence and qualitative social ontology (§§ 6-8).

2. Eidetics

According to Edmund Husserl eidetics is the "science of essences" [*Wesenswissenschaft*] (Husserl, 1913/1950, Introduction) and essences are the bonds which define the possibility of co-variation of the parts constituting any entity as a whole. The fundamental idea is that such bonds can be more or less binding and that any type of entity is specifically defined by the degrees to which its parts are bound-constrained: some of its parts can be varied to the point of being suppressed, while others of these parts cannot be varied because otherwise the entity would cease to exist. In other words, there are necessary parts, which are characterized by the maximum degree of constraint and which must be necessarily bound together with other parts in order for a certain type of entity to exist, think for instance of the necessary bond between colour and extension, such that colour and extension are mutually-existentially dependent parts and both are necessary parts of any material object as whole. But there are also parts of certain types of entities which are characterized by lower degrees of constraint: they are merely possible or even contingent parts, which can be varied or even suppressed in their occurrence, as for instance in the case of wholes such as a flock of birds or a heap of stones, respectively. In these cases the bonds of possible co-variation of the parts are very loose and are subject to many possibilities of variation: for instance the number of the birds or of the stones can be varied, and the degree of constraint that must be satisfied concern merely certain forms which such wholes must assume, and can assume in several ways: all the possible forms a flock of birds and a heap of stones can assume in order for a flock of birds and a heap of stones to exist – where, of course, the flock of birds must satisfy a higher degree of constraint than the heap of stones.[2]
Now, to return to what I call here the "eidetics of law", my claim is that the law (just like any other kind of entity) can be fruitfully ontologically grasped in terms of the degree of bound-

2 On the idea of bonds and degrees of constraint which bind the parts of a whole together, see Husserl (1901/1984, *Third Logical Investigation*, "*Zur Lehre von den Ganzen und Teilen*" [Towards a theory of Wholes and Parts]). On the essences as bonds see De Monticelli (2013a; 2013b).

constraint that defines the possible co-variation of the parts constituting the law as a whole, i.e. in terms of necessary, possible or even contingent parts of the law. Here, I limit myself to working on some elements of an eidetics of law, and more precisely I focus on some elements of an eidetics of law-making acts. I tackle this issue starting from Reinach's and in particular Stein's account of law-making acts as a specific kind of social act (Reinach, 1913/1989; Stein, 1925/2006). The fundamental and original idea of Stein's approach to law is that in order for positive law to be law in force, law-making acts must be performed by the legislator as organ of the state and must be taken up and enforced by the citizens to whom they are addressed. Translated in terms of eidetics, I argue that: the *uptake* of law-making acts is a *necessary part* of law-making acts as performed acts, and the *performance* of law-making acts is, in its turn, a *necessary part* of law-making acts as fulfilled acts; both these parts are necessarily parts of law-making acts, and cannot be varied or eliminated, otherwise the law-making acts would cease to exist. In contrast, the *fulfilment* of law-making acts is just a *possible part* of law-making acts and the existence of law-making acts as performed acts do not depend on it; but this possible part is not just a possibility among others, a contingent one; rather it is an essential possibility to which law-making acts tend essentially: according to their essence, law-making acts tend to be fulfilled, and the fulfilment of this essential tendency is itself a necessary part of the law as law in force, i.e. of the validity of the law.

I will discuss this relation between necessary and possible essential parts of law-making acts. I will do this by focusing on Stein's account of legal provisions: the impersonal moment of legal provisions and its involving uptake misfires; the introduction of other acts which, according to Stein, should and could integrate legal provisions in order for them to be taken up and enforced by citizens.

3. The interpersonal gap of law-making acts

Stein applies to positive law Reinach's relational schema of social acts, between the agent of the act and the addressee, and goes a step further. In the case of law-making acts, Stein extends the uptake moment of social acts from the mere perception [*Vernehmung*] of the act to the full understanding of the content of the act. The social act of promulgating the law [*bestimmen*] must not just be perceived, but also understood in its content and recognized by its addressee;[3] otherwise the act is not performed: it misfires.[4]

All of Stein's account of the law-making acts aims to show the crucial role that the inter-subjective relation between legislator (who, as organ of the state, is the agent of the law of the state) and citizens (who are the addressees of the law and the counterpart of the legislator as organ of the state) has for the uptake and performance of law-making acts on the one hand, and for their fulfilment on the other hand. There cannot be a positive law as such, i.e. a law in force, if the citizens do not take up the acts of the legislator (see Stein, 1925/2006, I). In eidetic terms: citizens' uptake of legal provisions constitutes a necessary part of the performance of legal provisions, and, indirectly, a necessary part of their enforcement, since the performance of legal provision is a necessary condition for legal provision to be enforced.

This is the reason for which Stein develops a very fine analysis of what the legislator should do in order for citizens to perceive and recognize his laws. In particular, Stein identifies two types of problems that may obstruct the uptake of legal provisions and are grounded in the inter-personal gap that characterizes the legislator-citizen relationship:

3 Reinach uses the verb "*vernehmen*", "perceive", in particular in the sense of "hearing perception" and speaks of "*Vernehmungsbedürftigkeit*", "necessity of being perceived", as a necessary condition of social acts, see Reinach (1913/1989, § 3). On Stein's extension of the moment of the uptake, see Stein (1925, I).

4 See Reinach's example of misfires of social acts: the command that is not perceived [*vernimmt*] by its addressee (Reinach, 1913/1989, § 3).

(i) the impersonal moment of legal provisions;
(ii) three possible cases of infelicity of the performance of legal provisions (see Stein, 1925/2006, I, §2d).

3.1. The impersonal moment of legal provisions

As Reinach had already claimed, legal provisions do not have a *personal moment* in their content: they are generically addressed to citizens, and are not addressed to specific individuals (see Reinach, 1913/1989, § 3; Mulligan, 1987). Stein takes up Reinach's claim and affirms that, because of lack of the personal moment, legal provisions alone are not able to reach the range of persons to whom they are addressed – the citizens or a certain group of them. So, legal provisions risk not being taken up and recognized by their addressees, unless other acts intervene to fill the inter-personal gap between the legislator and the citizens – the agent and the addressees of legal provisions, respectively.

3.2. Three cases of infelicity of legal provisions and three senses of "uptake"

Stein identifies three possible cases of "infelicity" of the performance of the legal provisions, because of uptake misfire by the addressees – the citizens.[5]

[1] A legal provision might not even "reach the ears" of all those to whom it is addressed.
[2] Furthermore, it is possible for the provision to be perceived as to its wording but not understood as to its sense.
[3] Finally, the provision might be understood but without the insight that a particular case is covered by it.

[1] Es kann vorkommen, daß eine gesetzliche Bestimmung zunächst schon gar nicht „zu Ohren kommt", an die sie adressiert ist.
[2] Es ist ferner möglich, daß sie wohl ihren Wortlaut nach vernommen, aber nicht ihrem Sinne nach verstanden wird.
[3] Und schließlich kann die Bestimmung verstanden sein, ohne daß im einzelnen Fall durchschaut ist, daß er unter die Bestimmung fällt (Stein, 1925/2006, I, 2d, p. 42; En. tr.: pp. 54-55, slightly modified by me.).

These are all cases in which the citizens, to whom the legal provision is addressed, do not uptake the legal provision, according to three possible senses of "uptake":

(i) the basic sense in which the citizens do not uptake the legal provision perceptually – the provision do not "reach the ears" of its addressees;
(ii) the semantic sense in which the citizens do not uptake the meaning – but just the wording – of the legal provision, and do not understand the meaning of its content;
(iii) the practical and concrete sense in which the citizens do not realize that the legal provision is actually directed at them: they do not become aware that the case presented in the provision applies specifically to them.

5 The idea of "infelicity" of the provision that I mean here as cases of non-performance of the provision is a variation on the theme of the infelicity of the performatives presented by Austin (1962/1980). However, it is worth noting that Reinach had already identified cases of infelicity of social acts, though he did not refer to them by the term "infelicity", see Reinach (1913/1989, §3).

4. Filling the inter-personal gap and complying with the senses of "uptake"

Stein claims that in order for the inter-personal gap in the law to be filled, the state should undertake three tasks, which should and could help the uptake of legal provisions complying with the three different senses of "uptake", and facilitate the performance and enforcement of legal provisions. According to Stein, these three tasks represent the answer that the state should and could give to the problem of the inter-personal gap in the law of the state, the gap between the legislator (as organ of the state) and his counterpart, the citizens.

> (i) The first task is to be attained through "a certain form of proclamation of the law" [*eine bestimmte Form der Gesetzverkündigung*] that aims, at most, to "reach the ears of the citizens". The state can arrange it through commands and provisions with this aim. This kind of command and provision is not addressed to all citizens, but just to the persons to whom the state entrusts the assignment of proclaiming the law.
> (ii) The second task, to make the content of the provisions understood by the citizens, is to be realized through "continual interpretation" [*fortlaufende Interpretation*]. The state itself must carry out this interpretation. If the state left the interpretation up to private discretion, it "would risk having some other intrude between itself and its citizens". The state can arrange for the activity of interpretation to be realized through the institution of agencies charged with interpretation. This occurs in turn through commands and provisions of the state.
> (iii) The third task the state must undertake for the performance and enforcement of its provisions is "the assessment [*Beurteilung*] of discrete cases where they are to be applied by agencies set up or recognized by the state".

To sum up:

> [...] the state, when issuing provisions and commanding that they be followed, must ensure that the provisions [1] reach the ears of the citizens, [2] are understood by them, and [3] can be applied to cases in practice.
>
> So muß der Staat, wenn er Bestimmungen erlässt und befiehlt, sie zu befolgen, dahin wirken, daß [1] sie den Staatsbürgern zu Ohren kommen, [2] von ihnen verstanden werden und [3] auf die praktische Fälle angewendet werden können (Stein, 1925/2006, I, §2d, p. 43; En. tr. p. 55).

5. Upholding the law [*Rechtspflege*]

Stein points out that the task of proclamation of the law in order to reach the ears of the citizens is a "legislation" [*Rechtsetzung*] act, while the interpretation of provisions and the theoretical decision about particular cases, which fall within the domain of the applicability of the provisions, are "jurisprudence" [*Rechtsprechung*] acts.
According to Stein, both the act pertaining to legislation and the acts pertaining to jurisprudence are acts which serve the uptake, the performance and consequently the enforcement of the provisions and, therefore, all of these acts contribute to fill the interpersonal gap between the legislator (state) and the citizens. In other words, these acts uphold the relation between the legislator and the citizens, and, in doing so, they also *uphold the law* [*Rechtspflege*].
All of these acts are personal acts. They can be either practical or theoretical personal acts. The legal act is a *practical-free act* of the legislator as organ of the state, while, both the jurisprudence acts are "*purely intellectual acts* [*rein intellektuelle Akte*] in which the sense content – according to its provisions – is fulfilled and made explicit" (Stein, 1925/2006, I, §2d, p. 43; En. tr. p. 56). So, the acts pertaining to jurisprudence are theoretical, while the acts pertaining to legislation are practical-free acts.

> The theoretical acts that make up the bulk of adjudication are not spontaneous in the same sense that provisions are. What should be made into law is up to the discretion of the law-making subject; what we come upon as law is independent of our arbitrariness.
>
> Die theoretischen Akte, die den Hauptbestand der Rechtsprechung ausmachen, sind nicht im selben Sinne spontan wie die Bestimmungen. Was al Recht gesetzt werden soll, steht im Belieben des Recht setzendes Subjekts; was wir als Recht vorfinden, ist von unserer Willkür unabhängig (Stein, 1925/2006, I, §2d, p. 44; En. tr. modified, p. 57).

More generally, according to Stein, the validity of the law depends upon the acts and actions performed by *persons*: the legislator and the state as (collective) persons, on the one hand, and the citizens as (collective) persons, on the other hand.[6] Besides these legislative and jurisprudence acts, the validity of the law, of course, depends upon the law-making acts performed by the legislator, the uptake acts performed by the citizens and the actions performed by the citizens in order for law-making acts to be fulfilled.
The problem is understanding the variety of degrees of this existential dependence: the validity of the law depends necessarily upon the performance of law-making acts by the legislator, upon the uptake and enforcement of law-making by the citizens. But the validity of the law depends only as a possibility upon the integrative acts of provisions: they are not necessary acts for the enforcement of the provisions and the validity of the law; they are just a possibility. Let's focus on this crucial point.

6. Possible essential parts of law-making acts

According to Stein, the legal and jurisprudence tasks which the state should undertake, in order for the interpersonal gap in the law to be filled, are possible integrative acts of legal provisions: they are possible – and not necessary – parts of legal provisions.
The point Stein focuses on is the possibility that certain acts play the role of integrating and complementing the provisions in order for provisions to be taken up, recognized and enforced by citizens. In other terms, Stein' suggestion is that, in order for positive law to be law in force, other state acts can contribute to the uptake of legal provisions, and they are possible essential parts of legal provisions.

> There are acts that are not required in every case as an integration of the provision, yet their integrative functioning is designated as possible by the character of provisions.
>
> [Es] sind andere Akte heranzuziehen, die nicht in jedem Falle als Ergänzung der Bestimmung erforderlich sind, deren ergänzende Funktion aber durch den Charakter der Bestimmungen als möglich vorgezeichnet ist (Stein, 1925/2006, § 2d, p. 42; En. tr. p. 54, slightly modified by me).

The essential structure of the provisions implies these other acts as a possibility (and not as a necessity!), i.e. as a possible part of the provisions in order for provisions to be taken up, and consequently fulfilled: acts which are not necessarily and universally (*a priori*) required as integrations of the provisions, but whose integrative functioning is designated as possible by the *eîdos* of provisions. The possibility of such integrative acts is part of the essential structure of provisions, because:

6 I cannot deal here with the issue of the legislator and state as collective persons in Stein (1925), and with contemporary debate on collective subjects as for instance in Gilbert (2013). See De Vecchi (2015).

> Legal provisions are there to be followed. That is how their sense is fulfilled.
>
> Bestimmungen sind dazu da, befolgt zu werden. Darin erfüllt sich ihr Sinn (Stein, 1925/2006, § 2d, p. 42; En. tr. p. 54).

The sense [*Sinn*] of legal provisions is fulfilled [*erfüllt*] in their being followed: if they are followed, i.e. enforced, their sense is fulfilled.[7]
Stein here adopts Husserl's relation between the sense of an expression [*Ausdruck*] and its fulfilment by an act of intuition (the Husserlian pairing of «sense» [*Sinn*] and «fulfilment» [*Erfüllung*], i.e. of «sense-giving acts» or «meaning-conferring acts» [*sinnverleihende Akte*] and «meaning-fulfilling acts» [*erfüllende Akte*], presented and discussed by Husserl in the *Logical Investigations*) as a paradigmatic relation to explain the relation between the sense of the provision (the sense of the provision which is also an expression: a proposition, a sentence) and its fulfilment by the actions which enforce the content of the provision.[8]
I argue that this relation is just a *probable relation*, and never a necessary relation. In other words, in the essential structure of legal provisions there is the expectation, the *tendency*, but not the necessity, to be fulfilled (as, for instance in the sense of the expression "dog", there is an expectation, and not a necessity, of fulfilment through the intuition, for instance the perception of the dog in flesh and blood).
I claim that in saying that the sense of the provisions lies in their being enforced, Stein introduces a qualitative sense of the "existence" of legal provisions: legal provisions exist in a full sense of "existence" if they are enforced. The idea is that legal provisions may exist at a minimal level, when they are simply performed acts, and may also exist in a full and complete way, when they are enforced acts. This is the issue of different degrees of existence and of the quality of existence of legal provisions – and more generally of social entities.

7. Essential relations of tendency

In this ontological framework characterizing the essential structure of the provision, Stein identifies some acts which can contribute to the fulfilment of the legal provision: precisely because the legal provision tends essentially to be fulfilled, there may be some acts that can contribute to the realization of this tendency.
Such acts belong to the essential structure of the legal provision as *possible or probable parts* and not as necessary parts: this is an essential relation of tendency, which concerns the fulfilment of the provision, and not an essential relation of necessity. Nothing is necessary between the legal provision and its fulfilment: the legal provisions do not necessarily have be fulfilled, they just have the essential tendency to be fulfilled. On the contrary, everything is necessary between, for instance, the legal provision and the legislator who is the bearer of the legal provision: without the legislator, there is no legal provision.
Reinach, too, deals with this fine ontological point on the variety of essential relations – necessary, possible and even contingent–, and does it very clearly: on the one hand there is the essential and necessary relation between, for instance, the command and the obligation

7 I do not deal here with the fact that law does not include only regulative norms, which need to be enforced, but also constitutive norms, which do not need any enforcement; Stein neglects this fact and considers the law just as regulative law (Stein, 1925, I). On the distinction between regulative and constitutive norms and on the concept of constitutive rules, see Conte (1988) and Searle (1964).
8 On Husserl's meaning-conferring acts and meaning-fulfilling acts, see Husserl (1901/1984), in particular the "First Logical Investigation". Stein adopts the sense-fulfilling paradigm also in other works of her: see for instance Stein (1941). It is worth noticing that Husserl uses "*Sinn*" and "*Bedeutung*" as synonymous, see Husserl (1901/1984, "First Logical Investigation").

produced by the command, or the promise and the claim and the obligation generated by the promise; on the other hand, there is the essential relation of tendency, for instance, between the promise and the realization of its content, i.e. its fulfilment: "promising tends towards the realization of its content by the promisor" (Reinach, 1913/1989, p. 172-173; En. tr. p. 32).[9] Eidetic analysis of social entities such as law-making acts (or, more generally, social acts, in Reinach's examples) provides us with essential connections, which are neither necessary nor universal: essential connections which correspond to a tendency – and not to a necessity – inscribed in the *eîdos* of an entity. These essential connections are only probable, and are characterized by a degree of constraint midway between the strongest degree of constraint given by the necessity connection and the zero degree of constraint given by the contingent relation. Reinach and Stein seem to me to share the idea that the social ontological region is specifically characterized by essential connections of tendency: unlike natural and ideal entities, social entities are wholes which are in particular constituted by parts which are also possible or probable parts.[10] This specificity of social ontology is grounded in the specific ontological status of social entities: social ontology is indeed an ontological region whose entities are ontologically dependent upon individuals' intentionality, and especially, upon personal acts – as Stein herself claims about the law: its existence, its upholding and validity depend upon acts and actions of persons.

8. The ontological quality issue

I argue that essential connections of tendency, i.e. the essential possible parts of a whole, show that eidetics can provide meaningful insights into the existential quality issue in social ontology – an issue that is often neglected in the contemporary social ontological debate.[11] I suggest that the concept of "existence" itself is here revised: on the one hand, law-making acts exist as such as performed acts, but, on the other hand, they actually and fully exist only when they are enforced, and the law itself exists in a full way, as a valid law – a law in force – only if its legal provisions are not merely performed by the legislator and taken up by the citizens but also enforced by the citizens.
Stein's focus on the integrative acts of social provisions (the acts which should and could fill the inter-personal gap between the legislator, as organ of the state, and the citizens, as his counterpart and addressees of his law-making acts) puts forward very clearly the relation between the essential connection of tendency account and the ontological qualitative issue. All of the integrative acts of legal provisions Stein deals with are «acts belonging to the life of the state» [*zum Leben des Staates gehörigen Akte*] and are acts Stein focuses on in order to identify the parts which are either necessary parts or possible (probable) parts for the good functioning of the relation between the legislator as organ of state and its citizens in regard to the law. This relation, and above all the quality of this relation, is what lies principally at the heart of Stein's idea of the law of the state. If this relation succeeds, then the positive law of the state is a law in force: the legal provisions promulgated by the legislator are recognized by the citizens and, through such recognition, they are performed (they exist) and may also be enforced (they are valid).

9 On the relation of tendency in Reinach, see Di Lucia (2015) and De Vecchi (2016b).
10 On the topic of the essential connection of tendency in social ontology, see: Spiegelberg (1960, p. 205), who speaks of the fact that social entities are in certain cases characterized by "a law of essential tendencies rather than one of essential necessities"; Di Lucia (2015), on "conditioned a priori"; Smith (1990, § 7 "A priori Structures"), who discusses the case of "laws of a priori tendency". I identified another example of relation of tendency as essential relation in the relation between values and law (e.g. the rational contract) in the phenomenology of law of Wilhelm Schapp (Schapp, 1930; De Vecchi, 2016a).
11 I dealt with this issue in De Vecchi (2016b), where I worked on Reinach's qualitative social ontology and mentioned his extremely acute remark on the quality of the existence of claim and obligation, see Reinach (1913/1989, p. 173; En. tr. p. 32).

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NORMATIVE EXPERIENCE: DEONTIC NOEMA AND DEONTIC NOESIS*

abstract

What is a norm? A. G. Conte replies to this question by enumerating five possible referents of the word norm *(§ 1.). Focusing on the fifth referent, the "deontic noema", I raise the question (§ 2.): How is the deontic noesis of a deontic noema to be understood? Through a reconstruction in terms of deontic noema of H. Kelsen's "merely thought norm" (§ 3.), of O. Weinberger's "*Normgedanke*" (§ 4.), and of L. Petrażycki's psychological analysis of normative experience (§ 5.), I propose to distinguish (§ 6.) a genuine deontic noesis from theoretical (cognitive or hypothetical) noeseis of a deontic noema, and I will argue that, in the hypothesis that no normative phenomenon would be possible without a consciousness capable of the deontic noesis of deontic noemata, the concepts of deontic noema and of deontic noesis deserve further investigation.*

keywords

norm, deontic noema, deontic noesis, normative experience/normatives Erlebnis, psychological conception of norms

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Νοεῖν οὐκ ἔστιν ἄνευ φαντάσματος.
There is no thinking without a phantasma.
(Aristotle, *De memoria*, 449b34-450a1).

1. Five referents of the word *norm* in Amedeo Giovanni Conte

According to Amedeo Giovanni Conte, the question "What is a norm?" – the fundamental question of a philosophy of norms – is a "false" question.
It is a false question because it rests on at least one false presupposition: the presupposition that the word *norm* denotes one, and only one kind of entity. This presupposition is false because there are (at least) *five* different kinds of entities which can be (alternately, but not alternatively) referred to by the word "norm" (Conte, 2007, p. 28; 2012, p. 59; 2017, p. 24).[1]
The five entities which the word *norm* can refer to are, according to Conte: (i) a deontic *sentence*; (ii) a deontic *proposition*; (iii) a deontic *utterance*; (iv) a deontic *state-of-affairs*; and (v) a deontic *noema.*[2]
Conte gives at least one example for every possible referent of the word *norm*.

1.1. The word *norm* refers to a deontic *sentence* (*enunciato deontico*, *deontischer Satz*) in the following example:

(1) The *norm*: "One ought to pay one's debts" is composed of six syllables.[3]

1 This pentad of referents is a development of the tetrad of concepts of *norm* delineated in Conte 1970/1989. It is worth recalling that the German phenomenologist Adolf Reinach, with regards to legal enactments (*Bestimmungen*), distinguished five different phenomena: (i) the *experience* of enacting (*Bestimmungserlebnis*), (ii) the *act* of enacting (*Bestimmungsakt*), (iii) the *proposition* expressing the enactment (*Bestimmungssatz*), (iv) the *content* of the enactment (*Bestimmungsinhalt*), and (v) the *effect* of the enactment (*Bestimmungswirkung*) (Reinach, 1913/1953, p. 171; see also Reinach, 2012, p. 106; Loidolt, 2016). A partially similar analysis can be found in Spiegelberg (1935), where the level of the *law-sentence* (*Gesetzessatz*), the level of the *law-thought* (*Gesetzesgedanke*) and the level of the *practical state-of-affairs* (*praktischer Sachverhalt*) are distinguished (see also Cacopardi, 2013-2014). As P. Di Lucia & L. Passerini Glazel (2017) recall, Spiegelberg also singles out sixteen different *Bedeutungsmöglichkeiten* for the word *norm* (*Norm*). Due to space limitations, in the present paper I cannot compare Reinach's and Spiegelberg's analyses with Conte's, Kelsen's, Weinberger's, and Petrażycki's ones.
2 An analysis of Conte's enumeration can be found also in Borghi & Feis (2017). For a general survey on the philosophical investigations on norms and normative phenomena see Lorini & Passerini Glazel (2012).
3 I adapt Conte's example in Italian to English. Conte gives a second example in Italian that cannot be plainly translated into English because of the different behaviour of the Italian modal verb *dovere* and the English verbs *should*,

What is composed of six syllables here is a (deontic) sentence.

1.2. The word *norm* refers to a deontic *proposition* (*proposizione deontica*, *deontische Proposition*) in the following example:

> (2) The English deontic sentence: "One ought to pay one's debts" and the Italian deontic sentence: "*Si devono pagare i propri debiti*" express the same *norm*.

What is expressed here by the two different (synonymous) sentences is a (deontic) proposition.[4]

1.3. The word *norm* refers to a deontic *utterance* (*enunciazione deontica*, *deontische Äusserung*) in the following example:

> (3) To indiscriminately forbid all Arabs to enter the US immediately after 9/11 would have been an ill-timed *norm*.

Forbidding is here a norm-enacting act, consisting in a performative deontic utterance.

1.4. The word *norm* refers to a deontic *state-of-affairs* (*status deontico*, *deontischer Sachverhalt*) in the following example:

> (4) Eike von Repgow's book *Sachsenspiegel* (*Saxon Mirror*) is a codification of *norms* established among the Saxons.[5]

1.5. The fifth, and last, kind of entity which the word *norm* may refer to is a deontic *noema* (*noema deontico*, *deontisches Noema*). The word *norm* (or its synonym *rule*) refers to a deontic *noema* in the following two examples by Conte:

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ought to, etc., as to the scope of negation. The second example given by Conte is: "La norma: 'Gli studenti di Filosofia *non devono* iscriversi a Logica matematica' è una norma ambigua" (Conte 2012, p. 59).

4 Conte's concept of deontic proposition can be compared to Alchourrón and Bulygin's concept of norm-*lektón*. Alchourrón and Bulygin define a norm-*lektón* as the "prescriptive [deontic] counterpart of a [descriptive] proposition", "the content of a merely possible act of prescribing" (Alchourrón & Bulygin, 1973-1989/2015, p. 91; see also Alchourrón & Bulygin, 1993; 1981/2015). Alchourrón and Bulygin do not distinguish, though, (as Conte instead does) the intensional (semiotic) phenomenon of a deontic *proposition* – i.e. a meaning, a propositional content – from the intentional (psychic or noetic) phenomenon of a deontic *noema* – i.e. a mental content (Conte, 2007; 2012; 2017; see also below, § 2., especially note 7).

5 This example is quite important, since it contradicts the claim that *all* norms are *linguistic* entities: the customary norms codified by von Repgow were neither *linguistic* entities nor *language-related* ones: they were neither deontic sentences, nor deontic propositions, nor deontic utterances; they were subsisting extralinguistic deontic states-of-affairs, established by custom. Customary deontic states-of-affairs may, indeed, become established independently of, and prior to, their linguistic formulation, like in the famous example of the old saw "*Drei sind frei* [Three are free]", which eventually gave expression to a long established unspoken customary norm (Th. Geiger, 1947/1964, pp. 57-64). True, *some* deontic states-of-affairs (those created by statutory norms, for instance), unlike customary ones, may be *established by means of* (or *in virtue of*) the *linguistic* performative deontic utterance of a deontic sentence expressing a deontic proposition; nonetheless, deontic *states-of-affairs* themselves, *qua* states-of-affairs, are, according to Conte, *non-linguistic* entities (be they established by means of a linguistic deontic utterance or not). It is also true that the paradigmatic examples of deontic states-of-affairs, at least in modern Western culture, are statutory norms; but it is false that *every* deontic state-of-affairs is a statutory norm.

(5) Proposing a *norm* in a legislative assembly.
(6) In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the *rule* [*Regel*, *règle*, *regola*] that it would make [*aufstellen würde*, *établirait*, *adotterebbe*] as a legislator (art. 1(2) of the Swiss Civil Code).[6]

2. Deontic noema as the correlate of a deontic noesis

2.1. In the present paper I focus on the concept of deontic noema, a concept that can be even more fruitful if connected to an analysis of the correlated deontic *noeseis*.
To better illustrate the concept of deontic *noema*, Conte sets it in contrast (i) with the concept of deontic *proposition*, and (ii) with the concept of deontic *state-of-affairs*.

(i) The concept of deontic *noema* cannot be reduced to the concept of deontic *proposition*, because a deontic *noema* is, according to Conte, an *intentional* – a *noetic* – entity (intentional with 't'), i.e. the correlate of an intentional act; on the contrary, a deontic *proposition* is an *intensional* – a *semiotic* – entity (intensional with 's'), i.e. the meaning of a sentence (Conte, 2006, p. 7947; 2012, p. 65).[7]

(ii) The concept of deontic *noema* cannot be reduced to the concept of deontic *state-of-affairs*. According to Conte a deontic *noema* is merely a deontic state-of-affairs *in intellectu*, in the mind; symmetrically, a deontic *state-of-affairs* is a normative noema *in actu*, an actually existing deontic state-of-affairs – in the specific sense of the existence of a deontic state-of-affairs, whatever it may be.[8]

6 Conte expressly considers here the term *rule* (in Italian: *regola*) as a synonym of *norm* (in Italian: *norma*). The discovery of the example of the Swiss Civil Code is credited by Conte to Giuseppe Lorini.

7 It could be objected that the concept of *proposition* could be understood as nothing but a *noema*, and that consequently the introduction of the concept of a deontic *noema* is a duplication of the concept of a deontic *proposition* – and a violation of Ockham's razor: *Numquam ponenda est pluralitas sine necessitate*. But even if a proposition could be regarded as nothing but a noema, the converse does not hold: not every noema is a proposition – the domain of *noemata* is broader than the domain of *propositions*.
One could still maintain that all *normative* noemata are nothing but *normative* propositions, that is, one could maintain the "non-transcendability of language" with specific regard to normative consciousness. It is my opinion, though, that normative experiences (*normative Erlebnisse*) are possible whose intentional object has not the form of a *propositional* noema. It is beyond the scope of this paper to provide a demonstration for this conviction, but hints in this direction are: Benjamin Lee Whorf's and Rodolfo Sacco's concept of "cryptotype" (Sacco, 1989; 2015); the normative experiences that can be associated to, or acquired through, direct imitation (see, for instance, Mormino 2016); the possible normative experiences of animals; Petrażycki's concept of intuitive normative experiences (the intuitive normative experience driving one to help a drowning child for instance). An explicit refusal of "logicism" with regard to norms is also in P. Amselek (2017, p. 33).

8 In a private communication (July, 2017), Conte has clarified that the existence of a deontic state-of-affairs can be "empirically ascertained" through (i) the empirical investigation of the occurrence of a normative act or fact, and (ii) the correlation of such a normative act or fact with the meta-norms concerning the validity of norms in a specific legal system – and ultimately with the basic norm of that legal system (the *Grundnorm* in Kelsen's sense).
The truth of a statement asserting the existence of a deontic state-of-affairs in a legal system is, thus, both a *contingent*, a *necessary*, and a *hypothetical* truth: it is *contingent*, because the actual occurrence of the normative act or fact is contingent; it is *necessary*, because, once the occurrence of the normative act or fact has been ascertained, in virtue of the meta-norms concerning the validity of norms in that legal system the existence of the deontic state-of-affairs necessarily follows; it is *hypothetical*, because it ultimately depends on the *hypothetical* basic norm assumed by he who makes the assertion. On the verifiability of a statement asserting the existence of a norm cf. also Kelsen (1979/1991, ch. 46). Conte's claim on the empirical ascertainableness of the existence of a deontic state-of-affairs can be compared to Jerzy Lande's conception of the "correctness" (as opposed to truth) of the legal-dogmatic judgments on the positive bindingness of a norm [*obowiązywanie normy*] (Lande, 1948/1959, p. 828 ff., as cited in Fittipaldi, 2016b, p. 520).

2.2. Even if it is true that *omnis determinatio est negatio*, and thus a deontic noema is neither a deontic proposition, nor a deontic state-of-affairs, it is also true that *non omnis negatio est determinatio*: therefore, what is exactly a deontic noema?
Conte's concept of deontic noema, which draws inspiration from Husserl's phenomenological concept of noema, is defined by Conte simply as "the objective aspect of a deontic *noesis*", as the correlate of a deontic noesis (Conte, 2006, p. 79-47).
However, Conte does not clarify how the "deontic noesis" – the *subjective* aspect of a deontic noema – is to be understood.
Is it to be understood as the mere mental representation of a possible, hypothetical, or fictional deontic state-of-affairs? Is it to be understood as an act of cognition? Or is it rather to be understood as a specifically *normative* experience, a genuine *normatives Erlebnis*? Or, again, different kinds of noeseis of a deontic noema are to be distinguished?

2.3. I think that when the question is confronted of how a deontic noesis is to be understood, the concept of deontic noema may prove very fruitful in at least two respects: on the one hand, for the investigation of a wide range of specific normative phenomena, such as the inference of norms by analogy or from past rulings, the inference of general principles from a set of norms, the analysis of the *opinio iuris* in customary law, the establishing of a norm from exemplary behavior, the analysis of normative cryptotypes, the analysis of the convictions as to natural or divine law, etc.; on the other hand, if Max Weber (1907/1976, pp. 22-23) is right in suggesting that "it is [...] not the conventional rule of greeting, which personally bares my head when I meet an acquaintance, but my hand, [which] is prompted to do so [...] through the 'conception of a norm' ['*Normvorstellung*']"[9], and if Weber's *Normvorstellung* can be construed in terms of a deontic noema, then the *deontic noesis* of a *deontic noema* is an unavoidable moment not only of the phantasmic representation of a possible – non-actual – norm, but also of the actual operancy of valid or established norms – in the sense of deontic states-of-affairs – on one's behaviour.

2.4. As an initial contribution to the analysis of the possible deontic noeseis of a deontic noema, I will construe Hans Kelsen's concept of "merely thought norms" (§ 3.), Ota Weinberger's analysis of norm as a thought-object (§ 4.), and Leon Petrażycki's psychological analysis of normative experience (§ 5.) in terms of deontic noemata.[10]

3. Merely thought norms in Hans Kelsen: phantasmic noeseis of a deontic noema

3.1. Many theories of norms focus on norms as the product of a norm-positing act – as the correlate of an act of will, conceived of as the will to issue a norm – more than on norms as the objects of a deontic experience. Hans Kelsen's theory of norms is emblematic in this respect. According to Kelsen, "a norm is the meaning [*Sinn*[11]] of an act of will [*Willensakt*] [...], of an act

9 As Paolo Di Lucia (2003) recalls, an analogous remark has been made by Hans Kelsen: according to Kelsen, what becomes operant (*wirksam*) is not properly "the norm or the legal order in its specific existence as validity [*Geltungsexistenz*], [...] but the fact that men represent to themselves the norm or the legal system, and this representation [*Vorstellung*] becomes operant insofar as it drives men to a conduct corresponding to their representation" (Kelsen, 1926, p. 8, quoted in Di Lucia, 2003, p. 187; my translation).
10 I make use of the term *noesis* in a broad sense, including not only intentional acts of cognition, but more generally all intentional acts of consciousness, whose correlate is a noema.
11 Kelsen's notion of "meaning" is quite an ambiguous one: in some connections of Kelsen's works, it can seemingly be compared to a proposition (i.e. a semantical or logical entity), in others to the pragmatic sense of a normative utterance (a pragmatical entity), in others again to Heinrich Rickert's or Max Weber's notion of *Sinn* (Kelsen, 1985, p. 12; Rickert, 1910). I discuss some of the issues connected to the understanding of Kelsen's notion of norm as a "meaning", a "*Sinn*" in Passerini Glazel, 2017a.

of will directed towards the behaviour of others" (1979, p. 152).[12] Kelsen expressly assumes the principle: "No norm without a norm-positing authority", and establishes an equivalence between the *validity* of a norm and its specific *existence*.
Nonetheless, Kelsen admits that we "can think of a norm which has not actually been posited by any authority, i.e. which is not the meaning of any real act of will occurring in reality" (1979, p. 6).
At the same time, the correlation between the norm and the act of will – a correlation implied in the principle: "No norm without a norm-positing authority" – is, for Kelsen, a necessary one, which holds even when there is no *actual* norm-positing act of will, i.e. when a norm is a "merely thought norm [*ein bloß gedachte Norm*]" – a mere deontic noema, in Conte's terms. A merely thought norm is indeed, for Kelsen, the correlate of a *fictitious* act of will:

> I can think of a norm which has not actually been posited by any authority, i.e. which is not the meaning of any real act of will occurring in reality. But I can think of such a norm only as the meaning of an act of will which I *think of at the same time*. [...] The principle "No norm without a norm-positing authority" remains valid, even if the authority's act of will of which the merely thought norm is the meaning is fictitious [*fingiert ist*]. A merely thought norm is the meaning of a fictitious act of will (Kelsen, 1979, p. 6; 1991, p. 6).

Kelsen, thus, understands the act of will, whose meaning is a norm, expressly as a norm-positing will; and even a mere deontic noema (a merely thought norm) implies a fictitious norm-positing act of will of a fictitious authority.

3.2. However, the noesis of a mere deontic noema is not to be identified with the fictitious act of will implied in the deontic noema (the fictitious act of will is rather a part of the deontic noema). According to Kelsen, a merely thought norm is, instead, the correlate of an "*act of thought*" (*Denkakt*).
At the same time, this act of *thought* is not an act of *knowledge*: in Kelsen's works, it takes the form, respectively, of an *act of imagination*, of a *presupposition*, of a *hypothesis*, or of a *fiction* – in the sense of Vaihinger's philosophy of As-If (Kelsen, 1960/2000, p. 206; 1979/1991, p. 256).
Here, the object of thought – the merely thought norm – is not a pre-existent object given *to* thought: it is rather an object given *by* thought, a noema produced by thought itself.[13]
In Kelsen, thus, a deontic noema can be the correlate of four different kinds of noesis: imagination, presupposition, hypothesis, fiction.

3.3. As is well-known, in Kelsen's pure theory of law the entire hierarchical structure (the *Stufenbau*) of a normative system rests on a basic norm (*Grundnorm*), which is not the product of a positive act of will of a norm-issuing authority; in this sense, the basic norm is, for Kelsen, a merely thought norm – a deontic noema – which he understood at first as the correlate of a *hypothesis* or a *presupposition* (1934; 1960/2000), and lately as the correlate of a *fiction* (1979):

12 Kelsen distinguishes "willing one's own behavior" and "willing that someone else *is to* behave in a certain way": only a willing directed to the behavior of someone else (where "someone else" can also be the *alter ego*) "has the meaning of an Ought (*Sollen*), i.e. of an order, a command, a prescription, a norm" (1979/1991, pp. 31-32).
13 The object of thought is not *presented to*, it is *presentified by* consciousness. For the distinction between *presentation* (*Gegenwärtigung*) and *presentification* (*Vergegenwärtigung*) see Fink (1929-1930/2014).

> The Basic Norm [*Grundnorm*] of a positive moral or legal system is not a positive norm, but a merely thought norm (i.e. a fictitious norm), the meaning of a fictitious, and not a real, act of will (Kelsen, 1979, p. 206; 1991, p. 256).

The whole normative system therefore rests upon a mere fictional deontic noema; but what kind of noesis exactly is the noesis of this noema, of this merely thought basic norm?
Two interpretations are possible.
According to the *first* interpretation, the basic norm is a *noetic* norm: it is conceived of as a transcendental hypothesis of the science of law, and is thus the object of a *theoretical hypothetical* noesis.
On the contrary, according to the *second* interpretation, the basic norm is a *nomic* norm, a fictitious norm experienced as a binding norm by the subjects of the legal system, and is thus the object of a *fictional deontic* noesis.

4. *Normgedanke, Soll-Wissen* and *Soll-Erlebnis* in Ota Weinberger

4.1. A partially different analysis of a "deontic noema" can be found in Ota Weinberger's analysis of "the norm as thought and as reality", where he expressly confronts the question of the ways in which a norm can be a content of consciousness (*Inhalt des Bewußtseins*).[14] According to Weinberger, a norm is not a material entity; it is an ideal entity [*ideelle Entität*]:[15] it is "a thought [*Gedanke*]", "in the same sense as this expression is used in characterising logic as the 'analysis of thought' [*Gedankenanalyse*]": in particular, a norm is a thought "in an objective sense, divorced from the processes of consciousness" (Weinberger, 1970, p. 205; 1986, p. 33).

4.2. Weinberger, nonetheless, remarks that a correct grasp of the ideal nature of norms is connected to the way they actually operate: the ideal nature of norms is elucidated by the role they play in the reality of human life and action (1970, p. 207).
He consequently enquires in what ways a norm can be an *effective* content of consciousness (*Inhalt des Bewußtseins*), in what ways norms "*leben*" or "exist in the realm of human consciousness" (Weinberger, 1970, pp. 210-211; 1986, p. 40). According to Weinberger, a norm, or a *Sollen* (an ought), can be a content of consciousness in two different ways:

> (i) as a "*Soll-Wissen*", or "ought-knowledge", that is, as the mere *knowledge* that a *Sollen* – an ought – "holds good for some human group, in which case it may be that the subject of the 'ought-knowledge' does not 'will' the 'ought' [*das Gesollte*]" (Weinberger, 1986, p. 40; 1970, pp. 210-211);[16]
> (ii) as a "*Soll-Erlebnis*", or "ought-experience", that is, as the *experience* of a *Sollen* – an ought – *qua* "experience of obligatoriness", or "consciousness that something ought to be the case"; this *Soll-Erlebnis* consists in the *will* of the object of the ought [*das Wollen des Gesollten*]; this is the instance of "custom, law, or other normative systems", that are

14 Weinberger, like Conte, draws explicit inspiration from Edmund Husserl's phenomenology (see Weinberger, 1970, p. 205; 1986, p. 33; Conte, 2006, p. 7947; 2012, p. 64n). Paul Amselek, too, drawing inspiration from Husserl's phenomenological method, investigates legal rules as mental entities in Amselek, 1993 and 2017.
15 In the original German text Weinberger switches from "*ideelle Entität*" to "*ideale Entität*" and back again to "*ideelle Entität*" (in one and the same passage: 1970, pp. 208-209). Kelsen, on the contrary, considers the German adjective *ideell*, in its (ontological) meaning of "spiritual, belonging to the realm of ideas and thoughts, non-material", more appropriate to norms than the adjective *ideal*, in its (axiological) meaning of "corresponding to an ideal" (Kelsen, 1979/1985, p. 56).
16 It is unclear, from this definition of a *Soll-Wissen*, whether the knowledge that an ought holds good for some human group has to be understood as an *empirical* knowledge on the human group's normative convictions, or as a *dogmatic* knowledge depending on the axiotic meta-rules of the human group's normative system.

> "experienced as obligatory (as willed so) [*als gesollt erlebt* (*gewollt*)] by the supporters [*Trägern*] of these systems (not only by the norm-issuing organs)" (Weinberger, 1970, pp. 210-211; 1986, p. 40).

4.3. Weinberger, thus, points out that a deontic noema can be the correlate of two different kinds of *noeseis*:

> (i) a *theoretical* (cognitive) noesis: the noesis of a *Soll-Wissen*;[17]
> (ii) a truly *deontic* noesis: the noesis of a *Soll-Erlebnis*.

Weinberger understands the deontic noesis of a *Soll-Erlebnis* in terms of *will* (*das Wollen des Gesollten*), since in a *Soll-Erlebnis* the norms of a normative system are experienced as obligatory, or as willed [*als gesollt erlebt (gewollt)*], even though he does not make perfectly clear what he means by "*das Wollen des Gesollten*"; but it seems that the will of the ought (*das Wollen des Gesollten*) is not to be identified with the will of the norm-positing act, because he writes: "When I speak of the being or real existence of a norm, I am not concerned with the act through which the norm is posited" (1970, p. 210; 1986, p. 39).

5. Leon Petrażycki's conception of norm as an emotional phantasma

5.1. Another author offering an analysis of what I propose to call a truly *deontic* noesis of a deontic noema is the Polish-Russian legal philosopher Leon Petrażycki (1867-1931).
One of the main points in Petrażycki's theory of law is that real legal phenomena are to be found uniquely in the sphere of the "spiritual world", i.e. of psychic phenomena (Petrażycki, 1909-1910/2011, p. 6): according to Petrażycki, real legal phenomena are nothing but psychic processes (1909-1910/2011, p. 6 ff.), and precisely an "immediate combination of emotional and intellectual processes" (1909-1910/2011, p. 43).[18]
When one sees – as often legal scientists do, according to Petrażycki – legal phenomena "in a world external to the subject who is experiencing [them]" – when one sees, for instance, rights and duties as "properties" of the objects or subjects to which they are ascribed – he is subject to "an optical illusion", to a misunderstanding determined by the projection outside of his consciousness of something that exists only within his consciousness (1909-1910/2011, pp. 8, 40-45).
Such a "projective point of view" produces what Petrażycki calls "impulsive phantasmata", i.e. the impression that legal phenomena like rights, duties and *norms*, exist outside of the subject, whereas they are nothing but the correlate of a normative psychic experience taking place within one's own consciousness:

> Moral and legal norms and obligations represent nothing actually and objectively outside the minds of the individuals asserting or denying their existence, and apart from those individuals. They are merely reflections or projections of the psychic states of those individuals (Petrażycki, 1909-1910/2011, p. 112).

The projected "norm" can be construed as a deontic noema that is the correlate of a *phantasmic noesis* and is improperly projected onto reality.

17 A *Soll-Wissen* can be an element of one's unparticipant, *nicht-teilnehmende Erfahrung* without ever being, for him, the object of a participant deontic *Erlebnis*, of a *teilnehmend Soll-Erlebnis*. (The distinction between participant and unparticipant experience can be compared to Bronisław Malinowski's notion of "participant observation").
18 It has to be reminded that, along with the analysis of law and morals in terms of emotional experiences, Petrażycki develops an original and keen theory of legal dogmatics.

5.2. The psychic experience that causes the phantasmic projection of a norm is, in Petrażycki's analysis, an "immediate combination of an action representation and an impulsion rejecting or encouraging corresponding conduct" (1909-1910/2011, p. 30).
A norm (*norm*) in the proper sense is, for Petrażycki, the "content of a normative judgment"; and a normative judgment is the manifestation of "the existence and operation, in our mind, of immediate combinations of action representations and impulsions rejecting or encouraging corresponding conduct (that is repulsive and appulsive emotions)":

> The existence and operation, in our mind, of immediate combinations of action representations and impulsions rejecting or encouraging corresponding conduct (that is repulsive and appulsive emotions) may be manifested in the form of judgments [*suždenija*] rejecting or encouraging a certain conduct *per se* (and not as a means to a certain end), such as for instance: "A lie is shameful", "One should not lie", "One should speak the truth", and so forth. Judgments made up of such combinations of action representations with repulsions or attractions I will term "practical judgments of principle" [*principial'nye praktičeskie suždenija*], or [...] "normative judgments" [*normativnye suždenij*]; the content of such judgments I will term "principled rules of conduct" [*principial'nye pravily povedenija*], "principles of conduct" [*principy povedenija*], or "norms" [*normy*]. The corresponding dispositions [*dispozicii*] I will term "principled practical convictions" or "normative convictions" [*normativnye ubeždenija*] (Petrażycki, 1909-1910/2011, p. 30; Petrażycki, 2012, p. 264, modified and integrated translation).

As Edoardo Fittipaldi points out, for Petrażycki the "core phenomenon" is "the combination of an action representation [the representation of an action in one's mind] and an ethical emotion", consisting in the impulsion rejecting or encouraging corresponding conduct (Fittipaldi, 2016c, p. 454).
The judgment manifesting such a psychic experience is not a *linguistic* phenomenon; it is an *emotional* act. A *positive* judgment is, for Petrażycki, an "*appulsive*-emotional act"; a *negative* judgment is a "*repulsive*-emotional act" (Petrażycki, 1908, p. 248, as quoted in Fittipaldi 2016c, p. 454).
A norm in its proper sense (as opposed to a projected norm) can thus be understood, in Petrażycki, as a *deontic noema* which is the correlate of a *specifically deontic noesis*, where the deontic noesis consists in an appulsive-emotional or repulsive-emotional experience associated to the mental representation of a given conduct.

5.3. If, on the one hand, Petrażycki's analysis of normative experience as a specific deontic noesis, can be compared to Weinberger's *Soll-Erlebnis*, on the other hand, it is important to emphasize that Petrażycki, unlike Weinberger, does not conceive the normative experience in terms of *will*[19].
Petrażycki distinguishes, indeed, four elements of psychical life: (i) *cognitive experiences*, which are *unilateral-passive* experiences; (ii) *feelings*, such as pleasures and sufferings, which are *unilateral-passive* experiences; (iii) *will*, which is a *unilateral-active* experience; (iv) *impulsions*, which are *bilateral passive-active* experiences, such as hunger, thirst or sexual arousal, in which the passive side of a feeling is immediately connected to a (repuslive or appulsive) stimulus or appetence (*ad-petitus*) (1909-1910/2011, pp. 22-23).

19 Petrażycki criticizes the confusion of "will" and "demand" implied in some legal and political theories (1909-1910/2011, p. 39).

Normative experiences, according to Petrażycki, do not involve a (unilateral active) *will*: they involve an *impulsion* (a bilateral active-passive impulsion).
Therefore, in Petrażycki's theory, a deontic noema (a norm in its proper sense) is the correlate of a normative experience, which is the experience of a bilateral passive-active *impulsion* connected to an action representation (and the direct correlate of the emotional act of the normative judgment which is a possible manifestation of the normative experience).

5.4. A question may arise, though: If there is no norm without a normative emotional experience, is it possible to have an unparticipant *Erfahrung* of a norm, a non-deontic noesis of a norm – for instance, the knowledge of a norm existing in someone else's mind – independently of the participant *Erlebnis* of a norm?[20]
According to Petrażycki, one can acquire "information (indirect and more or less hypothetical, however)" about normative phenomena in the minds of others through an "inference by analogy".
But this possibility presupposes that one is acquainted with normative phenomena because of having personally experienced (*erlebt*) them; on the contrary, it is precluded in the case of "absolute legal idiotism", i.e. "the impossibility to have legal experiences": a man suffering from absolute legal idiotism "could not possibly know what law is" (Petrażycki 1909-1910/2011, p. 15).

6. *Theoretical* vs. *deontic* noeseis of a deontic noema

I have documented (in Kelsen, Weinberger, and Petrażycki) a plurality of phenomena that can be investigated through the concept of deontic noema, and that a deontic noema is not always the correlate of a *deontic* noesis: it can as well be the correlate of a *theoretical* (cognitive or hypothetical) noesis.[21]
However, if Petrażycki's claim about absolute legal idiotism is correct, no *theoretical* noesis of a deontic noema would ever be possible for a consciousness incapable of having *normative Erlebnisse* in general, i.e. incapable of *deontic* noeseis of deontic noemata.
The relevance of further investigation on the concept of deontic noema and on the correlate concept of deontic noesis becomes apparent if the hypothesis is advanced that without a human – or non-human – consciousnesses capable of deontic noeseis – *normative Erlebnisse* – of deontic noemata, the "normative landscape", i.e. the landscape of normative phenomena, would be an empty landscape.[22]

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20 More generally: Can a norm be an object of *thought* (of a theoretical noesis) without being the object of a truly deontic noesis, of a normative experience (see also Fittipaldi, 2016a)?
21 For further analysis on this distinction see Passerini Glazel (2017b).
22 *Shaping the Normative Landscape* is the title of a book by David Owens (2012).

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SECTION 3

SECTION 3

NORMS, EXISTENCE, AND NORMATIVE EVENTS

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ON THE QUESTION OF HOW SOCIAL RULES AND SOCIAL NORMS EXIST

abstract

The objective of this paper is to grasp the mode of being of social rules and norms. I begin by analyzing how mental representations of rules and norms structure social interaction. Then I demonstrate that the actual existence of rules and norms is a multi-dimensional phenomenon that encompasses mental and linguistic realization (linguistically expressed or habituated doxastic attitudes) as well as socially organized bindingness. I conclude that social rules and norms can be described merely by refering to dispositions and notions.

keywords

ontology of social rules and norms, cognitive realization of social rules and norms, pragmatic roles of social rules and norms, socially organized pressure, the meaning of ought

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1. The notion of social rules and social norms

What is the mode of being (*modus existendi*, *mode d'être*, *Seinsweise*) of social rules and norms? In order to answer that question, one needs to formulate a valid theoretical concept of the position social rules and norms have in the world. The purpose of this paper is to outline an answer by arguing that the existence of social rules and norms can be reduced to common dispositions and doxastic attitudes. In order to frame the existence of norms I shall elaborate a framework by relying on key lessons of relevant literature on that complex topic (in paragraph 3).[1] In particular, this paper contributes to the debate on the existence of rules and norms due to the concept of pragmatic roles of social rules and norms that is elaborated in paragraph 2. In what follows, I shall begin with a definition of the central concepts.

Social rules and norms are common notions of right and bad conduct in all its varieties. They define what is proper or inappropriate, befitting or indecent, good or wrong, permissible or offensive, decent or obscene, prohibited or allowable, etc. Examples of social rules and norms are "The guests ought to leave if the host wants to go to bed" or "You ought not to interrupt a conversation" or "One ought to keep one's position in the queue". Ordinary language distinguishes between rules as explicit demands for action and norms as implicit, or habituated demands for action. This seems justified. Rules and norms differ in the degree in which they are present to the agent's mind (epistemic presence), and rules typically are linguistically expressed in an explicit fashion whereas norms are typically unspoken and habituated (latent action potential). With the word *epistemic presence*, I describe the object of a doxastic attitude regarding its mental accessibility. The degree of epistemic presence is clear and distinct if I can distinguish it from other objects, and diffuse if I can recognize it. Explicit statements on appropriate conduct, i. e. rules, are transparent or lucid notions, they are clear and distinct. Notions about norms, in contrast, are diffuse or opaque, although they can be transformed into lucid notions. Such transformation takes place when one appeals to a norm in a practical manner, i. e. take it as a reason for justifying a demand. Then the norm, qua linguistic reminding, becomes lucid. However, norm-guided behavior (in the generic sense) refers to habituated action that is accompanied by opaque notions with a small degree of

1 I selected the literature due to my (ontological) focus on mental, linguistic and dispositional realization of rules and norms. Because of this selection, I shall not discuss practical approaches to rules and norms, i. e. approaches that frame rules and norms as solutions for coordination- or cooperation-problems or as solutions for the distributions of goods in society. That is why such contributions as D. Lewis' *Convention* (1969), E. Margalit-Ullmann's *The Emergence of Norms* (1977), C. Bicchieri's *The Grammar of Society* (2006), or G. Brennan *et al. Explaining Norms* (2013), are ignored.

epistemic presence. In contrast, a rule-guided behavior is accompanied by declaratory mental states, i. e. clear and assessable notions of the rule.
Notions of right and bad conduct are common in at least two meanings. First, they are common in the sense that there is a general agreement without explicit consultation or discourse about them, i. e. they are accepted in ways of tacit consensus. And second, they are common in the sense that they are customary, i. e. they are spread massively throughout a community to the extent that any two strangers, for example, can agree in their normative assessment of conduct. Furthermore, it is a general attribute of such mores – for ages understood as *tacitus consensus populi, longa consuetudine inveterans* – that they are accompanied by social pressure. And indeed this, the pressure (the force or bindingness) with which they occur, makes them a social rule or a norm in the real and proper sense.
The logical analysis provided by Siegwart (2010; 2012) shows that a rule in general expresses a conditionalized modalised action: If "Agents of the kind *A* are in a situation *S*", then "*A* has to act in a m-fashioned manner". It says that a particular class of people (the norm-addressees) are expected to execute or to omit a specific action (the focal action, modalized via deontic character) under specific conditions (situations). The same holds for norms, whereas the majority of social norms tells what to omit (and not what to do). Concerning that analysis, we say that social rules and norms are conditionalized practical guidances.

2. Pragmatic roles of social rules and norms

Rule-guidance and norm-guidance are phenomena that are grounded in mental processes which are accompanied by representations. Everyone whose conduct is guided by a rule has a mental representation of that rule, i. e. (s)he is capable to tell which rule (s)he is following. The same is true for norm guided action. In cases of rule-following the epistemic presence of the guiding notion is more transparent than in cases of norm-following. The exception to this is the phenomenon of rule-following with any mental representation. The most obvious example for such blind rule-following is the use of grammatical rules in everyday conversation. However, the phenomenon of blind rule-following is ignored here.
As mental representations, rules and norms have a grip on social interaction in at least five respects, whereby each refers to a pragmatic role. Such pragmatic roles show in which constellations in social life mental representations of rules or norms occur: in deliberation, in expectation, in demanding and in requesting, in rewarding and in punishing, and in evaluating.

1) In a way, every conscious occurrence of a rule or norm is oriented towards future action, no matter whether it was brought to attention linguistically (in speech-based interaction) or whether it was reminded personally (in a situation of interaction without discourse). A rule or norm as a mental representation tells us how the world ought to be. But what ought to be is not yet the case. Indeed, what the rule or norm tells will be the case if the norm-addressee adapts its will, i. e. its goals, accordingly. The diverse sources of motivation to follow a rule or norm (e.g. to avoid sanctions, to increase social esteem, or due to moral reasons) are ignored here. However, in general, a rule (and a norm alike) is called a *reason for action* if the action in question was motivated by that rule. The pragmatic role in question is well known to philosophers of action. Schauer (2002) for example states:

   p is a reason for S to do A if, and only if, p is a fact about A's awareness of which by S, under conditions of rational consideration, would lead S to prefer his doing A to his not doing A, other things being equal (p. 112).

   If you ask a person why (s)he has acted in this particular situation the way (s)he did (and not otherwise), a possible and not uncommon answer is: Because there was this rule. A

rule is motivationally effective if it operates on and manipulates what action-theory calls (the process of) deliberation and thus participated in the resulted action in a significant manner. As Conte/Castelfranchi (1995, p. 86; 2006) analyze: A rule manipulates individual goals. Furthermore, a rule or norm is motivationally effective if it operates on the agent's mind, i. e. it overdrives the personal goals to that extent that the agent's goals and the goals inscribed in the rule become identical, cf. Conte/Castelfranchi (1995, pp. 74-118; 1999; 2006, pp. 504-508). Unfortunately, the name *reason for action* is slightly misleading. Iorio (2011, p. 171) corrects that primary reasons for action result from individual preferential deliberations, as Davidson (1980) shows. But a rule is not a product of individual preferential deliberations. If a rule motivates an action, then it gives a reason for action, but it is not a primary reason. To be precise, we can thus call a rule in this role a *reason for deliberation*.

2) Another pragmatic role is the *reason for expectation*. A rule is a reason for expectation if a person anticipates the future conduct of another person on the cognitive basis of the rule in question. Anticipation here means that the rule in consciousness evokes a notion of future conduct (with or without visual imagination). The mental representation of that rule is the basis for two kinds of expectation: first-order (I expect that (s)he will do X in situation S) and second-order (I expect that they expect that I will do X in situation S). In this pragmatic role rules guide social interaction inasmuch as they give orientation knowledge with which its bearer predicts future behaviors of others (or other's expectations towards him). This allows for communal life in general and individual action plans in particular, since the notion of a rule displays a typical conduct in typical situations and allows to predict how other people behave.
3) In another pragmatic role, a practical hint to a rule justifies normative demands, i. e. requests to follow a rule. If a person A requests another person B that (s)he ought to show a specific conduct and if B asked back why (s)he should do that, then the demanding one can refer to a rule to justify the demand. If a rule was used like this, then we can call it the reason for justification. Take as an example the rule for queues. If this rule justifies a demand ("Join the end of the queue, please!") then it is the *reason for justification*.
4) In a similar way, a rule is used to sanction. In a sequence of actions, a sanction is an ensuing action that is meant to punish an act of deviation. One must distinguish between the emotional states triggered by observed deviance (e. g. confusion, indignation, anger, disgust, etc.) from generally accepted sanctions of those deviations, e. g, roll one's eyes, complaints, angry rebuke, invective, avoidance, etc. If someone sanctions the deviant conduct of another, then the mental representation of that rule is the *reason for sanction*.
5) Again another pragmatic role is if a rule is taken as a measure to evaluate conduct. This results for example in propositions that it was laudable (or awful), praiseworthy (or hateful), correct (or mistaken), etc. A rule which is taken as a measure to discern whether conduct is right or wrong (and the like) is thus *the reason for evaluation*.

I cannot give a principle to show that this list of pragmatic roles is complete. I can only state that it was developed using Charles Sanders Peirce's maxim for definition:

> Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object (CP 5.422).

The conceivable practical bearings of rules and norms on social interaction are the ways in which they are used. Reconsidering their practical bearings on social interaction, rules and norms are indistinguishable. Although it is in need for an explanation how opaque mental

representations of appropriate conduct (norms) can occur in those pragmatic roles, it is undoubtedly the case that they do. I call this the identity of rules and norms in pragmatic respects.

These insights into the pragmatic roles help to comprehend the distinction between *using* a rule and *mentioning* it, and thus allows us an clearer understanding of the pragmatic reality of rules and norms. As Black (1981) shows, one needs to distinguish between the act of denoting a rule (theoretical hint to a rule) from the act of using it (practical hint to a rule); otherwise, description and normativity are mixed up. If we talk about rules with descriptions, such as the rules of chess, the rules for queuing in supermarkets, the rules of conversation, etc., we always already have abstracted from real practical bearings and generalized a common practice thereby. In contrast, if a rule is truly used then the (intended) result is to change, manipulate, or measure conduct. If for example the queue-rule or the conversation-rule appears in a pragmatic role, then this notion is intended to measure a deviance (you acted wrong), to justify a demand (get in line, resp. don't interrupt), or to rebuke.

3. Framing the existence of social rules and norms

In every case of usage (deliberating, expecting, demanding, requesting, rewarding, punishing, evaluating) there is an underlying mental representation of the rule or norm which serves a specific cognitive function.[2] With Conte/Castelfranchi (1995, pp. 95-102), I conceptualize the underlying mental representation as a belief (doxastic attitude) about an action that agents of a specific kind and in a specific situation ought to do (or to omit). The syntax of such beliefs shows an if-then-structure, as the logical analysis of rules by Siegwart (2012) and the analysis by Conte/Castelfranchi (1995) demonstrate. The conceptual content of mentally representated rules and norms appears as a conditionalized action (modalized with a deontic operator). It expresses: If agents of the kind A are in situations of the type S, then they ought to do X.

But this does not mean that rules and norms are mental representations (and nothing else). It signals us only that rule- or norm-guided behavior, as well as the use of rules and norms at large, requires concept possession. Inasfar the cognitive functions of mentally represented rules or norms comes into focus, the mental or cognitive dimension of their existence is discussed. One can call this dimension of the existence the *cognitive (or subjective) realization of rules and norms*. Nevertheless, it would be an insufficient and mistaken approach to declare that the ontological status of a rule or a norm is that it is a mental representation, or that rules and norms can be reduced to mental states. This would be an error because there is actually more to a rule or a norm than its realization in people's heads, as doxastic attitudes. Rules and norms are executed via punishment or reward, and they are maintained via the personal goals and interests of people. In a word: the existence of rules and norms (as the phenomenon of interest) encompasses their bindingness as well as their cognitive realization. A valid theoretical concept of the position that rules and norms have in the world (an account on the ontological status) must include the whole phenomenon.

In order to frame the existence of a rule or norm as a multi-dimensional phenomenon, I rely on central lessons from von Wright (1969; 1971) and Weinberger (1970; 1983; 1985; 2001) who, in their days, considered a theory on the existence of norms a background theory for deontic logic. Von Wright (1969) concludes that the reality of a norm consists in its being in force. In

2 In the case of deliberation the mental representation of the rule or norm *represents an option for action*. In the case of expectation the mental representation serves an *anticipatoric* function. In the case of demanding and requesting the mental representation is the *phrastic meaning* of demands and requests. In the case of sanctioning the mental representation serves as the *concept with which deviations get identified*. In the case of evaluation the mental representation serves as the *measure* with which conduct is measured (as good or bad, befitting or indecent, etc.).

his *Norm and Action* (1971 [1963]) von Wright states that the "ontological problem of norms" concerns the nature of the facts which make normative statements true (p. 106). But according to his proclamation, he felt not at all satisfied with the details of his proposed solution to this "extremely difficult problem" (p. viii). Anyhow, the Czech philosopher of law Ota Weinberger develops this line of thought in a more sophisticated manner based on an understanding of the expression "x exists" as "x has a position in the coming to be and passing away". He notes (1980): "A norm exists in a time interval, i. e. the time interval of its validity" (p. 437).[3] To say "a norm exists" thus means: As soon as and as long as there is socially organized pressure, there is a norm (1988, p. 82). His basic idea precisely is that it – the existence of a norm as a fact (in German: *das Dasein der Norm*) – has two dimensions: the social and the subjective. The social dimension encompass the bindingness with all its modes of appearance, e. g. bindingness as a social fact and social generated force and pressure. The subjective dimension encompass the cognitive realization of norms with all its modes of appearance, e. g. linguistic expressions or cognitive functions of that (mentally represented) norm. This framework challenges any such approaches to the ontological status which seek to grasp the essence of norms or rules in mental states or linguistic expressions. Weinberger (1985) for example disproves such attempts showing that an exclusive focus on explicit norm-sentences ignores the roles norms have in the pragmatic realm of human existence.

Framing the existence of rules and norms

social aspects, e. g.	**pragmatic aspects**	**subjective aspects**, e. g.
Normativity as a social fact, socially generated pressure, indifference of that norm against individual goals and wishes.	Pragmatic roles (see above)	Cognitive realization as doxastic attitudes, propositional attributes of these beliefs, cognitive functions

I take up Weinberger's basic idea as follows. The subjective realization of a rule or norm and its bindingness are dimensions of their existence. They can be distinguished analytically. But actually these dimensions coincide in the pragmatic roles of rules and norms. The use of a rule or norm in a pragmatic role implies its cognitive realization in the format of a doxastic attitude. But furthermore, a necessary condition for a norm or rule to appear in a pragmatic role is its bindingness. The bindingness of a rule or norm is the social dimension of its existence. This framework is depicted in the table above.
In general, the bindingness of rules and norms can be explicated as: In a situation S agents of the kind A ought to do X. The essence of bindingness is grasp if the meaning of *ought* is explained as situated particular pressure which is organized socially. In order to explain bindingness as a socially organized fact, I rely on Savigny's analysis (1983, p. 39). A social rule or norm, resp. its bindingness, exists iff,
1) the conduct in question is customary,
2) deviations are met with criticism,
3) the deviations are accepted as a justification for criticizing deviations.
Take for example "The guests ought to leave, if the host wants to go to bed". We can analyze: The norm in question exists, if (1) it is customary that the guests leave if the host wants to

3 My translation. Note that in German the word *validity* in its practical meaning (*Geltung*) refers pretty much to the meaning of bindingness, and the conceivably practical bearings of the bindingness of a norm is the pressure by which it is accompanied.

go to bed, (2) to stay meets criticism, (3) the fact that you stayed is accepted as a justification for the critique on your behaviour. The conduct for A's in S to do X is customary if there are a habit and tacit consensus about it. Customs such as these are accompanied by (opaque) notions on the future conduct of others. There is a common mutual expectation, i. e. each and everyone expects from the other that A's in S will do X (first-order) and everyone expects that every other expects that (s)he will do X if (s)he is an A in S (second-order). A disappointment of this mutual expectation would cause confusion. Here conditions (2) and (3) apply. For A's to do X in S is binding, if the observed deviant act, i. e. the act which causes confusion, would be faced by negative ensuing actions (sanctions) and if these sanctions are considered right by a large majority. Consider an angry rebuke as an ensuing action following a deviation, e. g. an angry shouting as a reaction to the observation that someone throws garbage onto the street. If there is a general consent regarding this angry shouting a proper ensuing reaction to the deviant behavior, then there is bindingness.

Subjectively, bindingness is perceived as pressure. How this pressure comes into being can be called the ontological problem of normativity, cf. Stemmer (2008). In particular, pressure is a product of the incompatibility of a rule or norm with personal goals. Even in the state of greatest liberty, individual action goals are restricted through the potential reactivity of fellow people.[4] Take again "The guests ought to leave, if the host wants to go to bed". From an individual viewpoint, the norm and the wish to stay although the host wants to go to bed (personal goal) are incompatible. What generate the bindingness of a norm thus is the potentially negative reaction of other people (e. g. the host) who restrict one's personal goals. The problem of normativity of social rules and norms thus can be solved by taking into account the described potential reactivity of the group towards deviations, i. e. the counterfactually preserved common readiness to punish deviances. Or, as Stemmer (2008, p. 163, pp. 172-175) puts it, very much like Weinberger (1988, p. 82): "A binding rule or norm exists as soon as and as long as particular actions (the focal action) are subject to any penalty". Such an enduring and tacitly accepted common reactivity (based on customs) adopts a threatening posture for each and everyone, i. e. the rule in question represents a permanent restriction of individual action goals. The meaning of *ought* in these contexts, such as in "You ought to keep your position in the queue!", merely means that a) there is a fellow person who expects that you keep your position in the queue,[5] and b) there is a objective possibility that your deviance will faced with ensuing negative behavior. Apropos, it deserves a mention that this social-externalistic organization of bindingness, in general, is a unique feature of *social* rules and norms. In contrast, the bindingness of *legal* rules or norms (resp. the pressure that accompanies them) is organized by the governmental deployed organs in a controlled manner. In fact, the constituting factors of rule- or norm-bindingness are dispositional attitudes of ordinary people, i. e. mutual expectation and contrafactually preserved common readiness to punish deviances. Thus, the time interval in which a rule or norm exists (the time interval of its bindingness) correlates with the perdurance of these common dispositional attitudes.

4 In general, social pressure is a product of potential reactivity in group public and individual pursuit of social acceptance. The latter is a meta-goal of each individual action (besides the strive for individual well-being). That is why there is a general pressure to follow social rules, because, in the long run, continual deviations (as a maxim) would slur one's reputation, and such a lifestyle is in danger to result in social isolation.

5 The role of the spectator is crucial for the motivational effectiveness of a norm. In our context, the spectator is present actually since it is the spectating fellow human. But note that the process of goal adaption, i. e. the assimilation of the personal will to the expressed goal in the rule, also applies in cases in which the spectator (who expects and whose pleasure is of personal importance) is present *virtually*, such as in cases of the general will expected behind anonymous norms or as in cases of God's will behind religious norms.

These socially arranged situations, i. e. the connection of certain conduct with sanctions, are genuine subsets of the world. In a word: They are facts.
What is the connection between the social and the subjective dimension of the existence of rules and norms? The factual bindingness of a rule or norm allows us to use it in deliberation, expectation, demanding and requesting, rewarding and punishing, and evaluation. Furthermore, the mental representations of rules and norms, realized subjectively in the format of doxastic attitudes, are conceptual reproductions of such socially arranged situations. What is actually the case – that certain people A in specific situations S ought to do X which means that there is a mutual expectation and a common reactivity potential towards deviances – what is actually the case that is reproduced mentally (and linguistically), represented in the if-clause (agents of the kind A are in a situation S), and in the then-clause (A has to act in a m-fashioned manner).

4. Conclusion

I developed a framework that includes the subjective, the social and the pragmatic dimension of the existence of social rules and norms. The subjective realization of rules and norms was explained as a reproduction of the social fact that the corresponding conduct is acually binding. Mental representations of rules and norms (linguistically explicit or not) serve specific cognitive functions in several constellations of social life: in deliberation, in expectation, in demanding and in requesting, in rewarding and in punishing, and in evaluating. Furthermore, the above analyses show that the bindingness of social rules and norms are constituted by common and mutual expectation and common readiness to punish deviances (contrafactually preserved). These dispositions generate what is called "a socially arranged situation", i. e. a state of affairs in which a particular action (the focal action of the norm) is subject to any penalty if the norm-adressee fails to act in the corresponding manner. The phenomenon of normativity (bindingness) was explained as a social organized restriction of personal goals that is perceived subjectively as pressure.
By this analyses, I demonstrate that all aspects of the existence of social rules and norms can be explained merely by referring to dispositional attitudes and mental representations, more precise: doxastic attitudes, without denying the social-externalistic sources of normativity. To say that a social rule or norm exists thus merely means that there are common dispositional attitudes towards certain people in specific situations and that there are common beliefs about this. That is their ontological status: They are grounded in common dispositions which are mentally realized and epistemically present to the agent's in some degree. How and why those dispositional attitudes are preserved over time, how they can be installed or destroyed, or, in other words, how and why social rules and norms persists, how and why the can be succesfully proclaimed or dissolved, is indeed another, more sociological and less ontological question.

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NORMS, NORMS, AND NORMS: VALIDITY, EXISTENCE AND REFERENTS OF THE TERM *NORM* IN ALEXY, CONTE, AND GUASTINI*

abstract

In this paper we examine the interplay between validity and existence of a norm. We compare Amedeo Giovanni Conte's five-folded conception of norm with the "semantic" conception of Robert Alexy's and Riccardo Guastini's idea of existence-as-legal-membership. We show how Alexy's model encompasses all the referents of Conte.
We investigate the interplay between different theses on the relationships between validity and existence of norms and the referents for norm *that a theory is able to admit. In particular, we show that if we want to encompass all five Contean referents we have to give up the (Kelsenian) validity-as-existence thesis.*

keywords

ontology of norm, Amedeo Giovanni Conte, Robert Alexy, Riccardo Guastini, validity

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Is there an interplay between validity and existence of a norm? It seems so. What is exactly this interplay? This question is way more difficult to tackle.
Our route here will be somehow peculiar. 'Norm' is ambiguous: there are different sorts of entity that can be called 'norm' and different theories (of both validity and existence) rely on different entities.
We start from these different norms to tackle the validity-existence interplay. Given that there are way more things that can be called 'norm' than the standard (Kelsenian) validity-as-existence thesis allows, we are going to drop such a link.
Our aim is to distinguish and clarify the relationship between the (Kelsenian) validity-as-existence thesis, Guastini's existence-as-legal-membership, Alexy's existence-as-possible-expression and Conte's existence-as-having-a-referent.[1]
In section 1 we present the Contean pluralistic account of 'norm' trying to highlight its remarkable features and focus on the fourth and the fifth referents of his list.
In section 2 we deal with Alexy's "semantic"[2] model and we show some quotes that can be interpreted as an agreement with Conte's pluralistic conception. The divorce between validity and existence of norms is the turning point of our analysis and is also the reason why Alexy's conception encompasses all the Contean referents.
In section 3 we compare Conte's and Alexy's account of validity with the positivist position of Riccardo Guastini (2011a, 2013) who sharply distinguishes between validity and existence of norms. From the comparison of these authors different accounts of this issue will emerge: Guastini's account follows Kelsen as a less extremist positivism but precedes Alexy and Conte's conceptions that are more sensitive to non-positivist frameworks.

1 Throughout the paper we follow the Kelsenian characterization of validity as formal enactment but we reject validity-as-existence. Retaining formal enactment without validity-as-existence is something Guastini, Alexy and (to some extent) Conte do as well.

2 We added the scare quotes because, in a Contean setting, a "semantic conception of norm" is intended as a reductionistic or restrictive conception according to which the norm is only a semantic entity. Most often such entity is the written norm of a code (a sentence) or, otherwise, a deontic proposition. Alchourrón & Bulygin (1971: sect. 3.3 and 3.5; 1981)'s conception of a norm may be such an example (both the hyletic *vs*. expressivistic conception of norm and their concept of norms in *Normative Systems*). Further, the distinction between insular and bridge conception of norms applies mainly to this semantic conception. Alexy's "semantic" is different and it encompasses all the Contean references (see sect. 2).

1. Conte's Pluralistic Account of the Term 'Norm'

Conte tries to pinpoint the different referents of the term 'norm'. Properly speaking, he is not committing himself to a specific ontology of norms (say the hyletic or the expressive conception of Alchourrón & Bulygin (1981)), rather he offers us a broader phenomenology of norm.
Norms and 'ought' (*ta deonta*, as Conte would put it) are told in many ways, Conte says. 'Norm' can refer to at least five different things; some are linguistic entities, some are not.

As linguistic entities we have:[3]

(**C1**) Deontic sentences, i.e. written pieces of normative texts.
(**C2**) Deontic propositions, i.e. abstract entities.[4] It is deontic propositions we refer to when we say that two different legal provisions express the same norm.
(**C3**) Deontic utterances, i.e. speech acts such as those made in a Parliament, e.g. when derogating a norm.

Contemporary legal positivists that analyse legal language, such as Guastini (2011a, 2011b, 2013), are well aware of these referents and draw many distinctions about them.
To these three referents we can add two further referents that, though linguistically expressible, are not linguistic entities strictly speaking:

(**C4**) Deontic states-of-affairs. Sometimes a norm "is there" factually, it is - as the name says - a deontic state-of-affairs. Deontic states-of-affairs require us to drop the Is/Ought distinction. Identifying the "Is-element" of this Ought-state is complicated. Sometimes it is its effects or products (think about constitutive rules). Sometimes the Is-element(s) are factual situations and patterns of behaviours that you can grasp because there's a rule.

Conte's example is that of the rules we read in the *Sachsenspiegel*: these rules - if the book says the truth - were actually there in the Holy Roman Empire.
The deontic state-of-affairs is the anti-positivists' and the sociologists' best friend, since it relies on an (anti-Kelsenian) norm's conception which gives up with the distinction between norm, norm's validity and norm's existence[5] (see sect. 3).
We think this referent applies also to written norms (e.g. when constitutive rules produce their effects and deontic) despite Conte's highlighting its impact to unwritten norms such as customs.

(**C5**) Deontic noema. This referent points out the propositional attitudes we have when we are discussing possible norms.[6] Conte's example is that of a law proposal, i.e. before its formal enactment.

3 Throughout the paper we shall refer to Contean referents as (**C1**-**C5**) to make the comparisons with different conceptions easier.
4 'Propositions' in their philosophical meaning, not according to the legal usage for which a proposition is a statement (most often a written text or an article of a code).
5 Much of what Sacco (2015) says about unspoken law (*diritto muto*) can be grasped as deontic state-of-affairs.
6 Guastini (1982) calls them normative-attitudes (*atteggiamenti normativi*), maybe to avoid talking (rectius: talking in disguise) about mental entities which are seen as suspect. In Guastini (2011a: 266) normative acts are defined as "(linguistic) behaviours that create (produce, promulgate) deontic provisions [*disposizioni*]". These linguistic behaviours, if they require some mental act or before actually producing a valid deontic utterance, seem to involve noema. Probably you may argue that all interpretative acts involve deontic noema. Nonetheless this is the topic of another paper.

2. Alexy's Pluralistic "Semantic" Conception of Norm

Alexy (1985/2002) provides a "semantic" theory of norms which we claim is able to encompass all the five Contean referents, through inspired by a different research agenda.[7] Alexy (1985/2002: §1.1) aims to offer a "model" of norms that is both as comprehensive and wide as possible, in order to match with the majority of norms' conceptions, as well as strong enough to serve his theory of fundamental rights. Alexy is not interested in providing a full analysis of the concepts involved in the definition of 'norm'. Nonetheless, going through a few quotes seems enough to find out all the Contean referents.

If we consider the Contean distinction between a deontic sentence and a deontic proposition, we see that Alexy's (§1.2) semantic model (of norms) points up an analogous difference between "normative statement" (*Normsatz* - (**C1**)) and "norm" (*Norm* - (**C2**)). In fact, we have different normative statements (think about a normative disposition and its translation or about two textual evidences from a legal corpus that are said to state the same fundamental right) that express the same norm.

As far as Conte's third referent is concerned, i.e. deontic utterance (**C3**), Alexy is well aware that norms can be uttered and that there are specific speech acts that pertain to the normative sphere.[8]

As we have seen, it is fairly easy for an account of norms to meet these first three referents (**C1**-**C3**). After all, the vast majority of legal theories knows the distinction between how a norm is laid down (be it written or spoken) and its meaning, so it is fairly easy to have the distinction between deontic sentences and deontic propositions (think about the distinction of the Italian jurisprudence between *norma* and *disposizione*). Further, it is not surprising that a legal scholar who cares about practical matters as Alexy is able to focus on the peculiarities of the acts of law-making, hence encompassing also deontic utterances.

Nonetheless, it is surprising to have Alexy encompassing Conte's last two referents. As we shall see in a while (sect. 3), admitting the Contean fourth and fifth reference (deontic state-of-affairs and deontic noema) involves non-standard choices as far as the relationships between norms, existence and validity are concerned. In particular, you need to drop the (Kelsenian) validity-as-existence thesis.

Norms, in fact, according to Alexy (and Conte as well), can be expressed without using deontic sentences (or utterances) and, given that, we can refer to them as deontic states-of-affairs (§1.2). Let's see this passage in full:

> It should also be noted that norms can be expressed without the use of words at all, such as by traffic lights. This makes clear that the concept of a norm is prior to that of a normative statement. It is therefore appropriate to look for criteria for the identification of norms not at level of statements but at level of the norms itself. Such a criterion can be established with the help of deontic modes, and at this point only the basic deontic modes of command, prohibition, and permission need be considered (Alexy 1985/2002: 22).

Here Alexy clearly states that norms and normative sentences can be divorced.[9] He makes

7 Conte develops his research on the referents in Conte (1970) while working on validity. The deontic noema is added in Conte (2007). Alexy's book is from 1985, the English translation from 2002. We refer to it as Alexy (1985/2002).

8 His section 1.5 is entitled *The Assertion and Creation of Norms.* Further, Alexy is well found both with the Searlean-Austinian speech acts theory and with Habermas' universal pragmatic and discourse ethic. On normative acts and deontic utterances see further e.g. Rescigno (1998).

9 Lorini & Moroni (2016) elaborate traffic signs as graphic norms, i.e. *verba* without a proper *dictum*. Please note that Conte's example of (**C4**) has way less written positive law (i.e. deontic sentences) than Alexy and Lorini & Moroni cases that are backup up by a traffic code. Reasons of space prevent us from going deeper on deontic drawings.

the example of a traffic light that is enough to realize a deontic state-of-affairs - one in which you ought to stop when certain conditions occur - without the there being any normative statement. You may object that it is possible to have a traffic light because there is some positive law detailing traffic regulamentation but that is not necessary nor does Alexy establish such a connection. You may say that Alexy focuses more on the positive law side of the deontic state-of-affairs while Conte unleashes its sociological powers, still Alexy has the distinction. As we will see in the next quote, Alexy distinguishes a norm both from its validity and its existence, hence his model can also admit a more sociologically oriented reading. Further he gives priority to the norm (**C2**) rather than to the normative statement(s) (**C1**) that corresponds to it. This suggests that, for Alexy, there is no need to have an article in a code to have a norm.[10]
Last but not least, Alexy also considers something that we can interpret as a Contean deontic noema. Let's see a passage that justifies our statement:

> If there is an interest in speaking of the validity or existence of norms - and there is indeed such an interest - then there is also an interest in speaking of invalid and non-existent norms. But in that case the concept of norm must be defined in such a way as to include its validity or existence. Just as it is possible to 'express' a norm without laying it down as 'true', so also it has to be possible to express a norm without assuming that is valid. *Relieving the concept of a norm from the burden of validity* seems at first glance to have the disadvantage that the universe of norms suddenly becomes overpopulated. Everybody can express as many norms with whatever content they please. But this does not give rise to any serious difficulty (Alexy 1985/2002: 25 emphasis added).

Alexy clearly states that we can express a norm without saying or assuming that it is valid. This fits with the idea and example of a deontic noema. When we are discussing a law in the Parliament or when we are drafting a law or a code the products of our normative enterprises are not (yet) valid.
We can see how Alexy is here divorcing - *contra* Kelsen - the fact that there's a norm from its validity and also from its existence. He is thus able of conceiving law proposals or laws-in-the-making-that-are-not-yet-laws as norms.

3. Guastini's Positivistic Divorce between Norms, Existence and Validity

Alexy manages to identify the five Contean referents because of a central feature of his model, that is the radical distinction between norms, their existence, and their validity. Alexy, therefore, abandons the Kelsenian paradigm of coincidence between norms and their existence and validity (validity-as-existence).[11]
Let's see why to fully appreciate (**C4**-**C5**) you need to drop validity-as-existence.
The deontic state-of-affairs gives its best with non-valid norms. We can grasp what the institutions of Roman law are or what are the laws of different legal orders that are not valid

10 At the end of the last quote Alexy suggests that we better use norms when we look for criteria of identification for the normative rather than normative statements and points out deontic modality as ingredient of this criteria.
11 As we have seen above, Alexy (1985/2002, p. 25) talks about "*Relieving the concept of a norm from the burden of validity*". We take him to mean that the burden of validity will impact on a norm's existence. If we have norms that are not valid they will nonetheless exist. That's why Alexy mentions "invalid norms" and "non-existent norms" (which we take to be "non-existent" according to some Positivism, i.e. because they are not valid or not written down in some legal code). Alexy's motivation seems to be that we are able to consider more cases. Alexy is not worried by parsimony consideration as far as the ontology of norms is concerned. While this sheds some light on his notion of validity (Alexy retains validity as formal enactment dropping validity-as-existence) it is harder to pin down his notion of existence. In the following we will propose that Alexy's idea is that of existence-as-possible-expression.

where we are. In doing so we are not only grasping deontic sentences and propositions (**C1** and **C2**) but also understanding the deontic states-of-affairs that corresponds to them.
The deontic noema seems to consist in a non-yet-valid norm. By definition it requires us to drop the validity-as-existence for norms.
If we do not distinguish validity and existence and keep an hyperpositivistic setting in which norms (i.e. **C2**) are reduced to provisions (i.e. **C1**),[12] the deontic state-of-affairs is conflated with the deontic sentence and the deontic proposition[13] (admitting a positivistic account is ready to recognize the two), whereas deontic noema is out of reach as non-valid law.
Strange as it may seem, a distinction between existence and validity is drawn also by a Legal Positivist such as Riccardo Guastini:

> "Both "validity" and "existence" are relational concepts. While "validity" refers to [*designa*] the relationship between a norm and other norms, "existence" refers to the relationship of *membership* [*relazione di appartenenza*] of a norm to a certain legal system [*ordinamento*]: all norms that belong to a legal system "exist" [*si dice esistente*]".[14]

Is Guastini's existence-as-legal-membership the same as the existence Conte and Alexy have in mind? Does Guastini's concept of existence-as-legal-membership make him closer to our two not-so-Positivist authors than it may appear at first sight?
First questions first. Alexy (1985/2002, p. 25) in the above quote talks about "validity or existence of norms" and, given his interest in actual legal systems, it seems that this existence takes a legal system as its context - i.e. it seems compatible with Guastini's existence-as-legal-membership.
Nonetheless, later on in the passage, Alexy talks about a norm "being expressed". We take this both as to be uttered and as to make reference to an intentional object. In that sense, this existence-as-possible-expression is broader than existence-as-legal-membership.
As far as Conte is concerned, it seems that his idea of existence is even broader. All the five referents "exist" in their own way. Conte's list is not meant to be conclusive. More referents may be discovered. You may accuse Conte of some sort of language-hypostatization fallacy. What concerns us here is that Conte's existence-as-having-a-referent seems even broader than Alexy's existence-as-possible-expression which in turn was broader than Guastini's existence-as-legal-membership.
As far as the second question is concerned, Guastini seems less distant from our two authors. All three authors drop the (Kelsenian) thesis of validity-as-existence, although they have different philosophical approaches and methodologies.
Guastini is not forced to recognize all the referents in his favourite philosophical ontology but it seems hard for him to deny their existence. Nonetheless, he may use his distinctions and concepts to try to reduce the referents to some other concepts (such as his distinction between validity and existence).

12 Guastini (2011b, p. 69) talks about "disposizioni senza norme" i.e. "**C1** without **C2**" for cases like inserting incorrect sorts of contents into the norm, such as praises to God or exhortations. By way of mentioning this possibility, Guastini relaxes the hyperpositivistic correspondence between (**C1**) and (**C2**). Nonetheless before considering this issue, Guastini (2011b, p. 65) claims that "norm [i.e. (**C2**)] is not ontologically distinct from the disposition [i.e. (**C1**)]: it is simply an *interpreted* disposition and thus reformulated". See also footnote 6 on noema and interpretation.
13 I.e. (**C2**) = (**C1**) = (**C4**).
14 According to Guastini (2013, p. 99), such a distinction can be found also in another prominent Italian scholar such as Luigi Ferrajoli. It is funny to find some Positivist author - though Legal, not Neo - claiming existence is (or maybe attests or refers to) a relationship. Existence is often *not* taken as a (relational) predicate. Meinonghians claim that existence is a predicate. Nonetheless, theirs is not the standard analytic legal positivist default background ontology.

4. Conclusion

In this paper we put forward three points.
First, we showed that Conte is not alone in identifying his five referents for the term 'norm'. Robert Alexy, well-known for other contributions, is able to encompass all the five referents of Conte in his framework.[15] Further, Alexy's work can now be used both in theoretical research (the philosophical questions of philosophy of law) and in practical ones.
Second, we linked the discussion of the list of referents with more substantial philosophical thesis concerning the ontology of the norm. One criticism voiced to Conte in general, and to the 2007 article on norms in particular, is that his work provides a really useful list but no substantial theory. It is more the presentation of a wonderful toolbox for philosophical craft that is not used in its full potential. Here we investigated the relationship between giving up with the thesis of validity-as-existence and fully appreciating deontic state of affairs[16] and deontic noema. The issue of whether the referents are reducible or irreducible was not discussed, nor was the issue of there being a hierarchy or priority among the referents.
Third, we pointed out how also an Analytic Legal Positivist such as Guastini is closer to Conte and Alexy than one may think as he drops the validity-as-existence thesis. This allows him to understand and recognize further referents than a standard Positivist will do. Of course, Guastini is free to (try to) reduce them or explain them away relying on some further subtle distinctions.

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15 That shows how Conte's ideas are more diffused than rivals theories and maybe Conte himself thought.
16 For a huge critique on this model of validity as based on (procedural) criteria written down on some legal code see Fittipaldi (2012)'s development of the insights of Leon Petrażycki.

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NORMATIVE EVENTS*

abstract

I introduce the novel concept of normative events and I defend the thesis that they are normatively heterogeneous but metaphysically homogenous.

keywords

events, norms, metaphysics of norms

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1. Introduction

In this work I introduce the novel concept of normative events and I defend *two* theses on the existence and nature of norm-related events.
First, I maintain that norm-related events are normatively *heterogeneous*. In particular, there is a significant difference between *nomophoric* events (events with norm-related consequences, such as the acquisition of property) and *nomogonic* events (events themselves generating norms or values).
Second, I maintain that norm-related events are metaphysically *homogenous*. In particular, they are neither abstract universals or properties, nor concrete particulars: normative events, I contend, are abstract particulars.
In §2 I shall defend my *first* thesis: norm-related events are normatively *heterogeneous*.
In §3 I shall defend my *second* thesis: norm-related events are metaphysically *homogenous*. I argue that normative events are abstract particulars (or tropes, as abstract particulars are possibly called).[1]

2. Norm-related Events as Normatively Heterogeneous

Prephilosophically, an event [*evento*, *Ereignis*, *évènement*, *wydarzenie* and *zdarzenie*] is a thing that happens: my yesterday walk, the sun rising here today, that girl's smile, Caesar's murder. For the purposes of this work, I will assume that there are events, without endorsing any particular metaphysical thesis.
I shall provide quite a few distinctions about norm-related events to clear the field.[2]

2.1. Nomophoric *vs* Nomogonic Events

First, there are *nomophoric* events: events that have norm-related consequences, that is, consequence established *ab extra* by some body of norms or rules. Birth, for instance, while being a perfectly natural event, has a normative valency (notably, in the Italian system, the acquisition of the so-called "capacità giuridica").
Second, there are what I call *nomogonic events*, that is, events that are intrinsically normative, events that generate norms or values, *ex* normative *nihilo*, as it were.[3]

1 In this work I don't take into account what Italian legal scholars call 'evento', that is, the consequences of criminally-relevant conduct. In this reading, "evento" (*Ereignis*) is merely an "esito" (*Ergebnis*), an outcome.
2 In this paper I just offer an abductive defense of the existence of normative events. I aim to show that they, if accepted, have greater explanatory power than existing theory.
3 On a lesser note, one can distinguish also between (i) events regulated (constituted) by rules, such as a wedding and (ii) events that are required, ordered, permitted (and so on) to happen; events that are the argument of an obligation, for one.

Possible examples are revolutions, referenda, consuetudes (customs) or, in certain legal systems such as common law, prior court sentences.
(Here I am using examples taken from the law, but the phenomenon I am describing is not at all confined to the legal domain. One can easily think of moral systems, or "un-legal" (extra-legal) systems, such as criminal organizations or mafias.)
An interesting objection at this point is that there is no such thing as nomogonic events; rather they are at best nomophoric events, and can be reduced to them. Consider a vote by a legislative assembly whereby new legislation is enacted. Yes, new norms are created, but this is not a nomogonic event: new norms are created because other, preexisting norms regulated such production. I shall come back to this objection *infra*.
Can nomogonic events be reduced to nomophoric events? No. In fact, neither the presuppositions nor the consequences of nomogonic and nomophoric events coincide.
First, their presuppositions differ: as for nomophoric events (events generating norm-related effects), they *presuppose* the norms they refer to. Nomogonic events (norm-generating events), on the contrary, *create* new norms, possibly even without presupposing any norm at all.
Second, their consequences differ: norm-related consequences aren't themselves norms, but merely norm-regulated possible extra-normative effects.
Third, were nomophoric events not to take place, then just some regulated consequences wouldn't occur. Quite on the contrary, were nomogonic events not to take place, then we wouldn't have any (new) norm, full stop.
Using a rather well-known (but metaphysically contentious) parlance (type *vs* token): without nomophoric events, we wouldn't have tokens; without nomogonic events, we wouldn't have (new) types.

2.2. Nomophoric Events

Nomophoric events are events with norm-related consequences. In a slight more formal definition:

> An event is *nomophoric* iff the happening of that event brings about (alone or jointly with other conditions) certain consequences established by one or more norms.

This seems to me the most common case, and examples abound. Births, for instance, are nomophoric events (in the Italian legal system). The event of someone's birth brings about his or her possession of the so-called "capacità giuridica", according to the Italian Civil Code. Deaths are another example of nomophoric events (at least in the Italian legal system). The event of someone's death simply renders one's crime void, extinguishing it ("La morte del reo avvenuta prima della condanna estingue il reato" Italian Penal Code, art. 150).

2.3. Nomogonic Events

Nomogonic events are norm-creating events. In a slight more formal definition:

> An event is *nomogonic* iff the happening of that event brings about (alone or jointly with other conditions, that may or may not take place with reference to already established norms) one or more norms, including norms repealing existing ones.

Nomogonic events are intuitively more problematic to grasp, because one would need a precise theory of what it is for a norm to come about, to come into being (German: *entstehen*), or, symmetrically, to go out of existence (German: *vergehen*).
Examples are harder to come by. I will consider three possible candidates: consuetudes, revolutions, referenda.
Consuetudes, or customs, make plausible candidates for nomogonic events. This partial

conclusion is subject to at least *two* conditions: *first*, that consuetudes can be understood as events; *second*, what stance one takes with regard to consuetudes in a legal system.
As for the first condition, whether consuetudes are genuine events depends on the metaphysical understanding of events one endorses.
As for the second condition, one may say that the fact that consuetudes produce new norms is (implicitly or explicitly) already recognized in and by a legal system; therefore, consuetudes would make at most a case of nomophoric events (events with norm-related consequences), but not one of nomogonic events (norm-creating events).
At the moment, I have no conclusive argument to solve the question of whether consuetudes are nomogonic events.
Revolutions are another plausible candidate for the role of nomogonic events. Revolutions alter the normative *status quo*, bringing about new norms and canceling others, often without any continuity. Intuitively, revolutions are events, and therefore revolutions are a plausible candidate for the role of nomogonic (norm-creating) events.
Referenda are of various kinds. In what follows I will consider what I label "constitutive" *referenda*, i.e. propositive, deliberative or legislative referenda. These kinds of referenda are all law-creating, and since (under plausible views of events) referenda are events, we seem to have a genuine example of nomogonic (norm-creating) events.
One possible objection would be to say that these referenda are regulated by rules and norms already established: these referenda are surely norm-creating, but this norm creation is already accounted for in the general legal system. Constitutive referenda would at most be a case of nomophoric events, not of nomogonic events.
One easy reply is the following: in normal cases it is true that referenda are already regulated. But history is full of cases of "spontaneous", previously unregulated referenda.
However, there is a conceptual argument for the existence of purely nomogonic events based on a *reductio*, and it is just a *regressus* argument. In fact, even admitting that each new norm is produced somehow according to a chain of previous norms, across societies, eras, and systems, there must be an event unconnected to previous norms originating the first ones. Of course this argument depends on two premises: first, that there is such a thing as norms; second, that norms come somehow into being, rather than co-existing at the same fundamental level as the rest of what there is. Not accepting either of these two premises results in the argument failure.

2.4. Structural Overlapping

In the preceding sections, I put forward a distinction between nomophoric and nomogonic events. While providing the definition and examples of nomophoric events (events with norm-related consequences) turned out to be apparently uncontentious, the examples of nomogonic (norm-creating) events turned out to be strained with difficulties.
These difficulties were threefold. *First*, there are difficulties caused by the metaphysical notion of event. *Second*, there are analogous difficulties caused by the notion of norm. *Third*, there are (I would say) structural difficulties in dealing with both nomophoric and nomogonic events. As matter of fact, every time I tried to isolate some genuine norm-creating, nomogonic event, it seemed that this event was already entrenched in a normative web. Thus, consuetudes create new norms as far as this generative mechanism is already accepted in the law; referenda are norm-creating if this is already accounted for by the rules on referenda.
In one sentence, it seems that nomogonic events are never independent from prior norms or rules, and therefore never independent from, say, nomophoric events. This last conclusion seems at odds with the mutual non-reducibility of nomophoric events to nomogonic events, and viceversa (non-reducibility that I maintained *supra* at §2.1.).
Of this phenomenon I propose a cause, and a possible way out.

The cause why nomogonic events seem to factually presuppose nomophoric events is relatively straightforward, and lies in the eye of the beholder. Nomogonic events seem to factually presuppose nomophoric events because I have always looked for examples in current (already established and highly regulated) normative systems. It is therefore quite easy to see that all licit means of creating new laws (say) are already catered for by existing laws.
But this is only a contingent matter. I don't see any conceptual reason to hold that, going back to "primitive" law, or considering exceptional, lawless circumstances, or moral systems, one cannot find example of genuine nomogonic events.
A possible way out to reconcile the irreducibility of nomophoric events and nomogonic events with the fact that they seem closely related is the following.
While being distinct and irreducible to one another, nomophoric and nomogonic events may be (mereologically) related: they may have parts in common, through an overlap.
Consider the following scenario: you have a nomophoric event, that is, an event α with norm-related consequences $(a_1, \ldots, a_n)$.
There is no conceptual reason to preclude the fact that the norm-related consequences $a_1, \ldots, a_n$ may themselves be events. In turn, one of these event: a_m, (with $1 \leq m \leq n$) may well be a nomogonic one, that is, it can create new norms while itself being the consequence of a previous, norm-related event. It must be noted that one may take the events $(a_1, \ldots, a_n)$ to be ordered. The ordering between events, which we may denote as "≤", it is not necessarily isomorphic to the number ordering. In fact it is more fruitful to require the event ordering to be a partial ordering representing a parthood relation.
In this scenario the nomophoric event α and the nomogonic event *am* are distinct but related through their overlapping parts. (They are nonetheless distinct because it is not the case that every part of α is a part of a_m and that every part of a_m is a part of α. Of course this way out is not metaphysically neutral. In particular, it admits that events have parts, and it subsumes the consequences of an event into that very event). A related interesting question is what to make of these "mixed" events, that is, whether they constitute a genuine new type, or can be reduced to or subsumed in one of the other.

2.5. To Sum Up

I have maintained that we can isolate, among generic events, a particular category of normative events. There are two kinds of normative events: nomophoric events (events with norm-related consequences) and nomogonic events (norm-creating events). I provided reasons to keep these two kinds distinct, and I tried to give definitions and examples of both. I argued that a nomogonic event can presuppose a nomophoric event without being reducible to it: normative events can in fact partially overlap without being reducible to one another. In what follows I deal with the metaphysics of normative events, and argue against normative events seen as *objects* (in §3.1), *facts* (in §3.3), and *properties* (in §3.2). I shall argue for the thesis that normative events are abstract particulars.

3. Norm-related Events ss Metaphysically Homogeneous

I will argue in §3.1 that normative events cannot be considered concrete particulars; in §3.2 that normative events cannot be considered universals; in §3.3 that normative events cannot be considered facts; in §3.4 that normative events are abstract particulars. In this section I hold that both nomophoric and nomogonic events share their nature: they aren't abstract universals nor concrete particulars; normative events are abstract particulars.

3.1. Normative Events as Concrete Particulars?

One may say that normative events can be reduced[4] to objects.[5] One notable proponent of the reduction of events to objects is (Quine, 1960): there is only one event for each and every spatiotemporal region, an event that coincides with the objects there. (Quine, along with Broad (1923), Whitehead (1929) and Goodman (1951) (among others), didn't conceive of objects as *three*-dimensional entities, but is rather a *quadrimensionalist,* i.e. objects would extend across time exactly as they extend across space. Davidson (1980) individuates events by their spacetime location, causes and effects.)

It seems unlikely that (normative) events can be reduced to objects (traditionally conceived) for *three* main reasons. *First*, objects are said to exist, whereas events happen (take place, occur). *Second*, objects occupy a defined spatial location, but have undefined temporal boundaries (whereas events have clear temporal boundaries, but often unclear spatial ones). *Third*, events tolerate co-location in a way objects don't seem to.[6]

For these reasons, the reduction of events (and *a fortiori* of normative events) to objects seems to come at considerable ontological costs.[7]

3.2. Normative Events as Abstract Universals or Properties?

Since properties are usually conceived of as universals, normative events could be considered as (normative) properties only if they are conceived of as universals. But this is controversial and rather counter-intuitive, because of *two* reasons: *first*. events would inherit all the problems of universals; *second*, the very possibility of token-events (of particular, one-time, unique events, such as my graduation last July, or — in Christian belief — Jesus' Resurrection) would be ruled out.[8]

Of course, properties can be construed not as universals, but as abstract particulars, or tropes. This is the view I favor, and on which I'll expand in §3.4.

3.3. Normative Events as Facts?

May normative events be reduced to facts, normative or otherwise? This remains unclear, also because it is unclear what facts are. On plausible reading, facts are a-spatial and a-temporal, whereas events (at least occurrences thereof) seem spatial and temporal. Adapting a rather well-known example of Ramsey (1927), the *event* of Caesar's crossing the Rubicon took place in Gaul in 49 b.C., but that Caesar crossed the Rubicon is a *fact* also here and now.

Thus, events and facts seem quite different, even if they are similar by many standards.

In the following section I will characterize normative events as abstract particulars or tropes.

4 The smallest and more accurate step would be to reduce normative events to normative objects. I won't consider this option in this work for simplicity's sake.

5 I am using 'object', here, as a mere signpost for concrete particulars, with no commitment either to an Aristotelian theory of substances, or to substratum or bundle theories. Substratum theories hold that a concrete particular is a whole made up by a substratum — a bare particular — and its various properties; Bundle theories hold that concrete particulars are just clusters of their properties.

6 For these and other general observations, see Casati and Varzi, 2010.

7 One can also add all the objections leveled against Kim's (1993) theory of events as concrete particulars of the form <object(s), property or relation, a time (or an interval of time)>. Kim also proposes existence (if the object(s) exemplifies the property) and identity conditions of events (point-wise identity).

8 An ingenious proposal is to treat events as properties of moments or times (Montague, 1969), during which certain statements hold (Van Benthem, 1983): my marriage is identified by an ordered triple $<t, s, \psi>$ where t is the relevant time frame, s the relevant region in space, ψ is the sentence 'I am married to a'. It is immediately apparent how this proposal would be appealing for a theory of the validity of norms in a specified spatiotemporal frame.

3.4. Normative Events as Abstract Particulars

That events cannot be universals (unless we are prepared to bear high ontological costs) I have argued *supra* at §3.2.
That normative events cannot be concrete particulars (or objects) I have argued *supra* at §3.1.
It seems plausible, however, to consider events as particulars: this perspective captures some basic intuitions, such as the fact that they seem to have clear temporal boundaries, to have spatial (though unclear) boundaries, to occur or recur — all traits oddly ascribed to universals. These are the reasons why I shall endorse a theory of events as *abstract particulars*.[9]
Abstract particulars are instantiations (hence 'particular') of entities of an abstract nature, such as properties. Of course one need not to have abstract universals to have abstract particulars. (In an other parlance, the existence of particular tokens doesn't entail the existence of real types: types might be only conceptualized.) The orangeness of the persimmon I have now in my left hand, be it even the same orangeness of that book cover, doesn't require "orangeness" to exist.
It is possible to conceive of events as abstract particulars: events so characterized would tolerate co-location (my persimmon can be orange and at the same time round; in the same time and place of my walk there can also be the event of me thinking this paper) and *a fortiori* be spatial and temporal (in a way that abstract universals cannot be).
Of course if one considers normative events to be abstract (particulars), then one has to explain how can "factual" consequences come from *non*-factual (abstract) entities. But this problem is — alas — common to a bunch of philosophical disciplines, from philosophy of mind, to the free will debate, beside metaphysics and the philosophy of normativity.

If there is such a thing as normative events, it would be extremely pressing to investigate their relationships with "norms", whatever they are. I defer a full exploration to future work; in the meantime let me map the field of their logical relations:

1) Normative events and norms are identical: every normative event (perhaps in the stronger sense of nomogonic event) *is* a norm, and viceversa.
2) Normative events and norms are equivalent: every time there is a normative event there is also a norm, and viceversa.
3) Normative events and norms are disjoint: not every norm presuppose a normative event (the other direction is precluded by the definition of a normative event proposed *supra*).
4) Any of (1) - (3) modalized, i.e. taking into account also all possible normative events and norms, and not just the actual ones.

It is trivial to show that (1) implies (2), but not viceversa; and to show that (3) does not imply (2), and therefore it does not imply (1) either.

Obvious open questions I hope to tackle in future work remain: what are the identity criteria for events (conceived as abstract particulars)? What are the identity criteria for norms? To what extent these coincide?
To what extent admitting normative events is a step towards the so-called "legal (or more generally, normative) abstractism [giusastrattismo]" (cf. Faroldi 2016)? Is the existence of *negative* normative events a good explanation for phenomena like omissions, derogation and desuetude?

9 The debate on abstract particulars in modern times probably started with (Stout 1923) and (Williams 1953).

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SECTION 4

SECTION 4

LOGICAL AND EPISTEMOLOGICAL DIMENSIONS OF NORMS

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THE CHALLENGE OF THE K-PRINCIPLE IN DEONTIC LOGIC (AND WELL BEYOND)

abstract

I go through various arguments why the K-principle (aka Distributivity Axiom), O(p→q)→(Op→Oq), a cornerstone of all deontic logic as the latter is standardly conceived, is of little use for the logical analysis of real-life deontic discourse. It is empirically false, I argue. Then I proceed to the question why it is so attractive, and I submit the hypothesis that to blame is Kripke semantics, making use of the imagery of possible worlds, accepted as a de facto standard in deontic logic. This semantics, however, is not attuned to the needs of controlling real-life deontic discourse, as the latter is mostly about things entirely this-worldly. For this-worldly relations possibly founding the deontic modalities the K-principle stands poor chance of working, I argue.

keywords

K-principle, deontic logic, possible worlds, deontic discourse, this-worldly relations

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1. The K-principle and why it is not obvious

There are various deontic logics in circulation, but what goes by the name of "standard deontic logic" (SDL)[1] features the so-called K[2]-principle as one of its axioms:

$$O(p \rightarrow q) \rightarrow (Op \rightarrow Oq).$$

In plain English: if it is obligatory that if *p* then *q*, then, if it is obligatory that *p*, then it is obligatory that *q*. Or equivalently: if it is obligatory that if *p*, then *q*, and if it is obligatory that *p*, then it is obligatory that *q*. In the sequel I shall presuppose without ceremony that something like "O*p*" always stands for something like: "It is obligatory/mandatory for agent someone-or-other to perform action something-or-other," the identity of the agent being fixed for the whole scope of "it is obligatory that...".
This K-principle is but a particular deontic version of the general distributivity axiom:

$$\Box(p \rightarrow q) \rightarrow (\Box p \rightarrow \Box q),$$

which is provably the most basic axiom of all modal logic (Hughes & Cresswell, 1996, p. 25; Garson, 2000; Halleck, n.d.).
However, as I have previously urged (Żełaniec, 2015[3]), this principle in the deontic domain[4] is rather awkward, and that for a number of reasons, some of which I shall set forth in this paper. As a result, it constitutes something of a challenge for a thinker who, like myself, firmly believes both in the applicability of formal logic to deontic discourse[5] *and* in the "logical respectability" of deontic discourse in the sense that there is, in it, much to which formal logic can, and perhaps should,[6] be applied.

1 See e.g. McNamara (2006) (as "A2" or "OB-K") or Forrester (2015, p. 26) (as "SDLT2"). In von Wright's "Old System" it is "law (iii) a," (1963) 13. In Bengt Hansson's version of SDL it is B1 (1969, p. 380).
2 In honour of Saul Kripke.
3 As documented in this work, I am far from being the first one to have seen the difficulties mentioned here.
4 Gardies thought, for instance, that all deontic logic had grown in the shadow of modal logic (Gardies, 1978, p. 186).
5 As distinct from Amselek, if I see right (Amselek, 1995, 2006). If the reader tends to understand "norm" in Amselek's sense, (s)he is hereby asked to substitute something like "a linguistic item in which a norm is expressed" for "norm".
6 "Should" in a purely epistemological, not a moral, sense (Shackel, 2014), but against this and any other "should" or perhaps even "can" between deontic logic and real-life deontic discourse: Amselek, see previous note, and perhaps Perelman (Melcer, 2010).

First of all, however, let me explain what I shall *not* consider a problem in the sequel (although it may be very much of a problem outside the scope of this paper). First: the nature of the obligation or obligatoriness involved here. I shall be using various more or less classical types of obligatoriness, such moral or legal obligatoriness, without going into the immense wealth of types and subtypes which abound within these both most general types. At the present stage of research the important thing seems to be to keep the type of obligatoriness constant throughout the formula. Second: what the variables "*p*", "*q*" and suchlike range over. I take them, somewhat ingenuously perhaps, to range over types of actions, rather than over states of affairs, or events, or propositions. I assume (though I am aware that this is open to debate) that, whenever something ought to be the case, it is obligatory for someone (though we need not know for whom, and the agent in question need not yet have been selected) to bring that state of affairs about, i.e. to perform the corresponding action.

If these two are not the challenge I mean, what is?

To begin with, it is not quite clear if there are, in real-life deontic discourse, any non-atomic sentences within the scope of deontic operators.[7] Deontic logicians usually take an answer in the affirmative for granted, because in their eyes deontic logic is, or at best tends to be, just one of so many variants of modal logic. But to "practicing" deonticians it is far from obvious that there are deontic sentences of the form ⌜deontic operator¬(⌜various sentences connected by logical connectives¬[8]), and that not just because they are not well-versed in formal logic. And yet, sometimes we seem to catch glimpses of such a possibility and that not just because we are "indoctrinated" by formal logic.

Take, for example, the venerable and very little controversial[9] norm of the Decalogue, the Fourth (or Fifth)[10] Commandment: "Honour thy father and thy mother!" Assuming this to be a norm, rather than an imperative,[11] we can, nay, we must ask: is it the case that it is obligatory to honour one's father and that it *also* is obligatory to honour one's mother? Or is it, much rather, obligatory to as it were in a single act (as when blowing out several candles in a single blow) honour both of one's parents? Or maybe the Commandment commands honouring one's parents not just distributively, as two different human beings, but collectively, as a couple, which implies, but does not reduce to, honouring them singly?[12] The choice is between reading the Commandment as having this form: $O(p \wedge q)$ or rather this one: $O(p) \wedge O(q)$.[13]

If this sounds too abstract, or too far-fetched, consider this example: let's assume, *per impossibile* and surely just for the sake of argument, that it is obligatory to inform the State

7 In the monumental work by Ferrajoli (2007), there are none. Neither are there any in the second-oldest (after von Wright, 1951) mature system of deontic logic (Kalinowski, 1953); see Kulicki & Trypuz (2015).

8 Note the Quinean "corner quotes" here.

9 Though today perhaps more controversial due to the on-going "deconstruction" of family.

10 Depending on with whom you count: the Jews, the Orthodox and Calvinists (V) or the Catholics and Lutherans (IV). Exodus 20:11: "kabbēd 'et'ābîkā, wĕ'et'immekā". Deuteronomy 5:15: "kabbēd 'et'ābîkā wĕ'et'immekā".

11 The Hebrew word "kabbēd" is in fact in the imperative mood (of a *pi'el* stem). In general, imperatives and norms must be distinguished, notwithstanding the fact that norms often make themselves known and felt in and by imperatives, such as for instance an imperative to stop smoking in a place where the person issuing the imperative knows and exploits the fact that there is a valid norm prohibiting smoking. The issue is too complex to receive a treatment here, but see Hage (2007), Gumański (1999a, p. 236) and Kalinowski (1981, pp. 92-93).

12 As expressed e.g. thus: "In fact, the Fifth Commandment, when understood in all of its depth, defines and safeguards the most basic of all human relationships—the family!" (Flurry, 2004).

13 It is possible, for instance (Gumański, 1999a, pp. 271f.; 1999b), that symbols like "∧" etc., embedded in the context of a deontic operator, acquire a different, non-extensional meaning, which has to be carefully distinguished from their regular extensional one. In the case of the IV/V Commandment, there could be a difference, in a deontic context, between honouring (one's father and one's mother), on one hand, and honouring one's father "and" one's mother, on the other. For another complex and difficult example with "$O(p \wedge q)$" (Weinberger, 1970, pp. 102f.).

Treasury of all of one's yearly income and to pay the commensurate tax on it. Now, does this mean that there are two separate obligations, one to inform the tax agency of one's total income and another one to pay the tax that the relevant laws define as commensurate with one's total income (O(p)∧O(q))? I am not sure if the Inland Revenue staff were not perplexed on receiving from you an amount entitled "tax on my yearly income 20..." if you had not previously properly declared that amount as your yearly income. Would they say "all right sir, you have duly discharged one of your fiscal duties, now it is time to discharge another"? Unlikely; which seems to suggest that the obligation in question is more adequately to be "regimented" as O(p∧q) than as O(p)∧O(q).[14] This speaks in favour of the existence of real-life deontic sentences with non-atomic formulas inside the scope of their deontic operator(s);[15] yet doubts, unavoidably, as it seems, persist.[16]

They get even stronger as soon as we start considering the dual (to being obligatory) deontic operator of being permitted ("P(...)). What is one to make of P(p∨q)? Does this formula mean that either p or q is permitted (P(p)∨P(q)), yet not necessarily both, and perhaps we don't know which one—then what use is a norm like that?[17]—or does it much rather, as we naturally tend to think—mean that both p and q are permitted? It seems so; yet, P(p∨q)→(P(p)&P(q)) is no theorem of SDL, and, what is much worse, adding this formula as axiom to SDL affords the conclusion that if anything is permitted in a system controlled by SLD, so is everything else,[18] and that, as a result, there is nothing obligatory.[19]

In particular—and understandably, given that "...→..." is equivalent to "~...∨...," and we have all along assumed that the deontic functors are extensional, that is, if p and q are logically equivalent, so are O(p) and O(q)[20]—we are doubtful whether, even if there are some non-atomic formulas in the scope of deontic operators, there are, in real-life normative discourse (say, moral treatises or codices of law) any sentences of the logical form "O(p→q)," which is the protasis of the K-principle. Kalinowski, e.g., thought there were none (Kalinowski, 1973, p. 56; 1981, p. 87f).[21]

It remains, in fact, a moot point whether such norms as "If you have borrowed money, you ought to pay it back in due time" are best symbolised as "O(p→q)" or rather as "p→O(q)" (Gumański, 1999a, p. 246). For psychological and educational reasons it is certainly better and more prudent to assume that every would-be borrower is under an obligation of the form "O(p→q)" even *before* he has borrowed any money. But since we are all, give or take (a) few exceptionally fortunate individuals, potential borrowers, are we our life long under the obligation to pay back our debts should we have any? This is little short of a nighmare... This

14 On other complexities of the "conjunctive obligation", i.e. one of the form "O(p∧q)" (Gumański, 1999a, p. 260).

15 In particular, a deontic logic without an axiom, or perhaps a definition, like Pp↔~O~p would be, presumably, of very little use.

16 Not the least because the case is conceivably asymmetrical, that is: if you first declared an income and then failed to pay the due tax, the IRS *would* probably say: "you have duly discharged one of your fiscal duties, now it is time to discharge another." However, I suspect that this shows that the logical form of the obligation at issue is more, not less, complex than "O(p∧q)" with regard to what occurs within the scope of the deontic operator. After all, the "it" in "... and to pay the commensurate tax on it" must be properly accounted for, and it exudes a suspiciously donkeyish odour (Neale, 1990).

17 Yet it (i.e. P(p∨q)↔ (P(p)∨P(q)) features as the Principle of Deontic Distribution in von Wright (1951, p. 7) and as an axiom of Gumański's version of SDL (1999a, p. 252) and the K-principle is easily derivable from it.

18 In the proof thereof in the Stanford Encyclopedia of Philosophy the K-principle is indirectly employed: (McNamara, 2006, note 37).

19 On other paradoxes of SDL see e.g. Gumański (1999a, p. 257).

20 (OB-RE) in McNamara (2006).

21 Weinberger claims that "'O(p→q)' *kommt* [...] *als Strukturschema des Bedingungsnormsatzes überhaupt nicht in Frage*" and that for structural reasons which he then goes on to set out (Weinberger, 1973, p. 288).

can be relieved by the observation that although we are permanently under that obligation, we are not under the obligation to pay back any definite debt (not O(q)) before this debt has actually been incurred (p), no matter how obligatory its incurring (O(p)) is or might have been. But this flies in the face of the K-principle, which requires us to think, und to labour under this thought, that we have an *actual* obligation of paying back a debt (O(q)) which we merely *ought to,* or ought to have, incur(red) (O(p)), given the antecedent principle "You ought to, if you have borrowed money, to pay it back" (O(p→q)).

Adolf Reinach (1983, p. 23) is perhaps more than most contemporary authors aware of the difference between "p→O(q)" and "O(p→q)," and "distinguish[es] as sharply as possible between the conditionality of the content and the conditionality of the act. The unconditional command with conditional content ["O(p→q)"] immediately makes binding the realization of a certain action when a possible future event occurs. It immediately produces—under certain presuppositions—the obligation to do or to omit something when an event occurs; the occurring of the event simply makes the obligation actual. By contrast, the conditional command with unconditional content ["p→O(q)"] makes an action binding only when the event occurs, and only at this moment does it produce an obligation prescribing an immediate doing or omitting." (Reinach, 1983, p. 23, cf. 27). Examples? "Transactions which are subject to a condition or a deadline, and one understands thereby the ones whose effect depends in part or entirely on the occurrence or non-occurrence of an uncertain future event or the approach of a future deadline" (Reinach, 1983, p. 61) for "p→O(q)" and "guarantee" (*Burgschaft*) as well as the right of preemption (*Vorkaufsrecht*). The guarantor is obliged to the creditor of some third party since the very moment the guarantee was formed, even before that third party (the principal) has failed to pay the amount owed to the creditor. The right of preemption concerns rights rather than obligations, but these two are obviously correlative and Reinach goes to great lengths to make it believable that a sentence of the form (R)ight(p→q) can and does exist in real legal life (1983, pp. 59–62).

Ziembiński (1976, p. 141) attends to the issue too, although he takes a somewhat different approach: There are conditional norms like "if you want to have light, you should turn the switch", he admits (Ziembiński, 1976, p. 128), but there are also unconditional ones, such as "everybody who is a janitor in this building should shut the windows during a storm" this norm is unconditional, Ziembiński thinks, although it prescribes an action "only on the occurrence of circumstances specified" (1976, p. 141). The difference is, presumably, that it is up to the addresee of the former norm to decide whether he wants to have light, but it is not up the janitor to decide if it is storming. Maybe it would be fair to say that from the perspective of a non-janitor the norm has the form "p→O(q)" ("if I were a janitor and it were storming, I'd be obliged to shut the window ... but luckily I am not a janitor, so I am not obliged to anything in this regard"), whereas from the perspective of the janitor it has the form "O(p→q)" ("I am a janitor here, so I am obliged to, should it be storming, shut the window, and I am under this obligation even now, when it is not yet storming; well, I'd better keep a watchful eye on the weather). This example is different from the previous ones in that the weather conditions are not the responsibility of the agent of q, i.e. of the janitor.

However, be it as it may in all of such dubious cases, obligations have a nice property: we can create them ourselves (some of them, perhaps not all), and as we know from Vico, this is the kind of thing we understand best, *verum et factum convertuntur.*[22]

I am issuing, let's imagine, a norm to my child (to do this effectively I must be at the very least

22 *De antiquissima Italorum sapientia,* bk. 1, ch. 1, *ad init.* (Vico, 1710, p. 14).

be entitled,[23] for instance in virtue of being my child's father, to issuing such norms): he ought to, as soon as he is back home from school immediately after lessons (perhaps I want him *not* to stop to talk with a Huck Finn on his way home), wash his hands and take a rest while staying away from the computer, and then start doing his homework. From this moment on, my child is under an absolute obligation with conditional content, as Reinach would have put it, O($p \rightarrow q$). Or else, I can put myself under an obligation, e.g. by promising: "I promise that, should I see O. again, I shall tell you about it." From this moment on, I am under an obligation to, in case I see O. again, tell this to the person I made that promise to, which is O($p \rightarrow q$), again. Or, to pick up a former example, it is obligatory, if one has declared a certain yearly income to the State Treasury, to pay the commensurate tax.

Now, it is possible and by all means feasible, that one has, aside from those absolute obligations with conditional content, an independent and absolute obligation (with nonconditional content) to divulge one's income to the relevant tax agency, or to see O., or to return from school immediately after classes—and yet, one does not, for a good or a bad reason, discharge this obligation. What then? Is one still obliged to pay the tax on the non-disclosed income, or to tell the promissee of one's promise that one has seen O., or to wash one's hands on returning home *not* directly after classes and to start doing one's homework? The first would be bizarre, the second dubious, the third would make hardly any sense (you can't have an obligation to wash your hands first thing after coming back from school directly after classes if you haven't got home directly after classes and can no longer do so, can you?). None of these seems to fit well with our deontic intuitions, least of all three probably the conclusion that one has to tell a lie (that one has seen O.). There might, obviously, be independent reasons and grounds for doing so; but it seems weird to suppose that one could have an obligation like that just in virtue of (i) the self-imposed obligation to, should one see O. again, inform the promisee of it,[24] (ii) the obligation to see O. again, and (iii) sheer (deontic) logic.

Worse still: such contrary-to-duty actions (or omissions) generate deontic contradictions. This is the gist of the so-called Chisholm paradox (Chisholm, 1963, pp. 34f.) that runs thus:

> (1) Let one McLeod have the obligation to go to the assistance of his neighbours, Op
> (2) and let it be obligatory for him that if he goes to the assistance of his neighbours, he tells them he is coming, O($p \rightarrow q$)
> (3) but if he does not go, let it be obligatory for him that he then does not tell them he is coming, $\sim p \rightarrow$O($\sim q$); this is probably the most intuitive of the premises here listed; and finally let's suppose that
> (4) McLeod (4) does not, after all, go to help his neighbours, $\sim p$.

By applying the K-principle to (1) and (2), we deduce that McLeod ought to tell his neighbours that he is coming, O(q). By applying the rule of detachment to (3) and (4), we deduce that he ought not to tell them he is coming O($\sim q$). And this flies in the face of one of the most fundamental theses of SDL.[25]

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23 E.g. in virtue of a "norm of competence" (see, for example, Ross, 1959, p. 207).

24 Clearly, if the anaphoric "it" here refers back to actually having seen O., there will be nothing, if one contravenes one's duty to see O., to inform the promissee of. For this reason, and in order not to make nonsense of the case right at the outset, I have above chosen the more cautious wording "to *tell the promissee* [...] *that one has seen O.*"

25 The thesis is that if there is an obligation to do p, then there is no obligation to do $\sim p$, O$p \rightarrow \sim$O$\sim p$. However, there are numerous deontic systems in which such normative contradictions persist, or from which they can be deduced. The essence of tragedy (in the ancient Greek sense) resides in a conflict like this. There are in deontic systems, too, diverse methods of resolving such conflicts, e.g. "*lex specialis derogat legi generali*" and the like. This only shows that

2. Problems behind the K-Principle: possible worlds

Since I am no logician, I shall not even try to find a way out of these and similar predicaments. I am certain, though, that one will be found. Perhaps skillful juggling with time indices or some such will do the trick (Arregui, 2008). Maybe a somewhat more careful wording helps; for instance, if I put my child under to obligation, no later than he returns home immediately after classes, to wash his hands etc. I actually make it mandatory for him to wash his hands etc. not immediately after returning home directly after classes (or so it could be argued), but directly after has returned home, at whatever time this would have happened (in which case my norm probably will no longer be pressable into the O($p \rightarrow q$) mould[26]). My impression is, in any case, that most logicians will not so much as consider dropping the K-principle—it is too fundamental for every modal logic to be dropped (Hughes & Cresswell, 1996, p. 20) and deontic logic is, for most practicing logicians, just a variant of modal logic. And even if it wasn't, what can you offer as a worthwhile deontic logic once you've bracketed out the K-principle?

It is not that I think the K principle must needs be dropped. It seems to be flatly wrong—as I assume the above examples have shown—yet maybe its understanding can be refined in such a way as to prevent those counterexamples from being such. However, I am inclined to think that the principle draws part of its appeal, not just from its intuitive obviousness (if it has any), but also from the standard Kripke semantics considered applicable to deontic logic, and with which it sits comfortably.

The standard Kripke semantics is that of possible worlds and the relation of accessibility between them.[27] It works very well for all the diverse versions of modal logic.[28] In it, "$\Box p$" (necessarily p) means that p in every possible world "accessible" from the actual world. Likewise, "Op" should mean that p is true in every possible world accessible from this one. This looks unproblematic as long as we do not ask what it is, for worlds, to be "accessible" from or for one another. After all, different possible worlds are literally worlds apart, so there is little literal accessibility there. Intuitively, and very grossly, "accessible" means "similar," "visible" (Hughes & Cresswell, 1996, p. 18) or "imaginable" and the like, in this context. Necessarily is the number four even. Necessarily whoever has all and only the moral qualities of St. Francis of Assisi is morally good (Hare, 1964, p. 145). That is: no matter how hard you try, you can't ever imagine or "conceive of" (in the Humean sense)[29] this not being the case. For deontic logic the accessibility is something like conformity to our deontic standards. This sets deontic logic apart from other modal logics, because in most of these the accessibility relation is reflexive, while in the deontic logic it most obviously isn't.[30]

Now if it is true, in this sense, that O($p \rightarrow q$), i.e. that in all possible and accessible worlds either both p and q are, or p isn't true, but there are no possible and accessible worlds in which just p, but not q, were true, then obviously if O(p), i.e. if in all possible and accessible worlds p is true, then in all of them q must be true, too, i.e. O(q) must be true in ours.

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the adequacy of SDL for deontic discourse is not yet quite clearly established. However, since such conflicts in deontic systems are seldom, if ever, the result of a simple error or negligence, let alone a diabolic wish to make life a Greek tragedy, I would lean, at this stage, to the position of a certain "deontic [not just legal] positivism," which presupposes that all deontic systems, including morals, should be first considered as they are rather than as they should be (even from the point of view of logic).

26 In the norm in hand as originally worded it was material that its addressee (the child) is home directly after school (taking into account the normal bus ride time). Should he have returned five hours later, a different agenda would have to be set for him, depending on what he spent those five hours doing.

27 For the first time in Kripke (1959, p. 2).

28 Depending how you define the accessibility relation, you get a semantics for various systems, e.g. if you define it as transitive you get S4. i.e. a modal logic in which whatever is necessary is necessarily so.

29 See e.g. *Treatise* 1.2.2.8, 1.3.6.5, *I Enquiry* 12.28, *Abstract* 11, http://davidhume.org/.

30 The relation of accessibly is reflexive in most, but not all systems of modal logic, see Zeman (1973-2002).

Recently, this standard Kripkean semantics has been criticised as inadequate, most prominently by Sven Ove Hansson (Hansson, 2006).[31] Hansson notes, among other things, that in a truly deontically ideal world there is no possibility to conform to certain rules, viz. the ones that prescribe how to act in case somebody else is not acting or has not acted in conformity with rules. In the ideal worlds there are no such cases and nobody is challenged to fight injustice. A possible remedy could consist in deciding that in this case rules are conformed with, and in particular injustice is fought, vacuously, much like a conditional is vacuously true if its antecedent is false. Hansson (Hansson, 2004) proposes a different solution, which involves a different, better, as he thinks, use of the possible worlds metaphor, and which deserves a scrutiny which I cannot attempt here. However this may be, my criticism of the possible worlds semantics is not that the deontically perfect worlds are "too perfect," but that, on the contrary, even the most ideal worlds need not be in perfect conformity with our deontic ideas. There can be all kinds of *vis maior* hindering the fulfillment of one's duty.[32] A world, by contrast, in which there are no such impediments is a not just deontically (but in other ways as well) perfect world.

The imagery of possible worlds is seductive. We look up to distant worlds and we see what, in ours, ought to, may, or must not be done or refrained from, just by seeing what *is the case* in them—always, sometimes, or never. Beautiful. But unfortunately, this is not quite exactly the way our knowledge about such matters develops and stabilises.

In real life, in order to establish what ought to, may, or must not be done or refrained from, we first consult various sources, codices (Gumański, 1999a, pp. 240ff.) and what not, to find out if the respective deontic modality has been created by an authority. If we find nothing, we try to deduce something *e silentio*, using one of the relevant instruments of legal interpretation. If this fails, and we are not happy with the position that the matter is simply indifferent, we take recourse to various meta-deontic regulations, such as that of the Swiss Civil Code, Art. 1, a):[33] "In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator,"[34] or to the equity principle (Akehurst, 1976), or by asking ourselves if a rational being can desire that the given action's being permissible, mandatory or prohibited should become a universal law, or by asking ourselves which course of action is likely to procure the greatest happiness of the greatest number, or to please the Great Leader, or some such. That is to say, we attempt to find out whether a particular specific entirely *this-wordly* relation obtains between the class of prospective agents and the class of possible (types of action) actions. This relation can be as weak as its being explicitely written in a book of statutes that all agents satisfying certain conditions ought to/must not/may perform certain types of actions and omissions under such-and-such circumstances, or again as complex as a given type of actions' being likely to bring forth an approving smile on the face of Our Belovèd Grande Leader.

Now it is worth noticing that if "O" in the K-Principle is read as founded on (not necessarily deontic) this-wordly relations, the K-principle will not hold. Take "...is easy for...." As we know from an author as authoritative as Lewis Carroll, it can be rather easy to "turn a back-somersault in at the door" (Carroll, n.d.) even if one is "most uncommonly fat," provided one was, in one's youth, conscientious in rubbing a particular ointment into one's skin, which wasn't, presumably, too difficult either; yet back-somersaults taken absolutely are difficult for

31 Not to confuse with Bengt Hansson. But long before him Weinberger, concerned with the applicability of deontic logic in law, voiced similar doubts, see e.g. Weinberger (1972).

32 For a few instructive and amusing examples see Veatch (1966, p. 166).

33 I owe this example to Amedeo G. Conte (1995).

34 https://www.admin.ch/opc/en/classified-compilation/19070042/index.html.

elderly and adipose persons, aren't they... Or, given the sort of person Achilles was, it was easy to enrage him, and it was not easy to get him to turn his back on the Greeks, yet to achieve the latter provided one has achieved the former was rather easy: it was enough to be Agamemnon before the walls of Troy to do the enraging. Again, there once was a saying that whoever has understood the concept of acceleration (second derivative of distance with respect to time) would have an easy time understanding the rest of physics; now it doesn't appear formidably difficult to understand acceleration while that of the rest of physics certainly does. Or "for ... it's a long way to ...". We know all too well that it can be (for us) no long way from A to B nor from B to C, and yet it can be a long way from A to C, even if one does not take the route via B but a shorter one. Such relations do not distribute over the material conditional, and while we have seen that being obligatory as standardly (in SDL) defined (truth in deontically ideal worlds) does distribute, we should not greatly wonder that conceived as (derived from or founded on) a this-worldly relation it does not.

The more difficult part is, now, to establish which this-worldly relation or relations that should or could be. Which this-wordly relation(s) between classes of agents and classes of types of actions are obligatoriness and other deontic modalities derived from or founded on? Is this question answered by quoting several *de facto* employed ones, as the ones just mentioned two paragraphs above?

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LOGICAL SEMANTICS AND NORMS: A KANTIAN PERSPECTIVE

abstract

It's widely accepted that normativity is not subject to truth values. The underlying reasoning is that truth values can only be predicated of descriptive statements; normative statements are prescriptive, not descriptive; thus truth value predicates cannot be assigned to normative statements. Hence, deonticity lacks logical semantics. This semantic monism has been challenged over the last decades from a series of perspectives that open the way for legal logics with imperative semantics. In the present paper I will go back to Kant and review his understanding of practical judgments, presenting it as supported by a pluralistic semantics. From this perspective a norm of Law is a logical expression that includes as content a generic description of a possible behavior by a generality of juridical agents, and assigns to that content the assertion of its obligatory character, accompanied by a disincentive for non-compliance. From this perspective legal norms can be syntactically formalized and assigned appropriate semantic values in such terms that they can be incorporated into valid inferential schemes. The consequence is that we can put together legal logics that handle both the phenomenal and the deontic dimensions of legality.

keywords

Kant, legal norm, logical semantics, legal logic, imperative semantics

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1. Introduction

According to a long-held perspective, normative statements are not subject to truth values. Imperatives such as "*John, leave this room!*" and permissions like "*Mary, you may enter now*" are neither true nor false.[1] This view, usually supported by either Predicate Logic (PL) or First Order Logic (FOL), assumes that truth-value semantics[2] applies to expressions such as "*John leaves this room*" or "*Mary enters this room*", expressions that describe facts in the world. From this perspective, since truth values can only be predicated of descriptive statements and since normative statements are prescriptive, not descriptive, truth values cannot be assigned to normative statements. Hence, deonticity lacks logical semantics.[3]

This semantic monism has been challenged from a series of perspectives, including alethic pluralism for which "the distinction between different domains of truth-apt discourse is not a purely verbal one. ... distinctions between different domains of discourse reflect significant differences in the nature of truth across domains" (Pedersen, 2014, p. 260), domains that include Law. If we stick to this perspective, "truth and falsity are the qualities of descriptions when things are or are not as they have been described, while *right* or *wrong* are the qualities of acts that are or are not in accordance with what has been prescribed" (Hansen, 2008, p. 7). If true and false are the values of a descriptive semantics, then the sentence "*John leaves this room* is true" is true if John leaves the room. Likewise, if right and wrong are the values of an imperative semantics, "*John leaves this room* is right" is right if John leaves this room.

For Kant judgments associate a syntactically defined content (specifying states of affairs or transformations of states of affairs) to a modal value that may concern either a descriptive or a normative semantics. Ascertaining that the content verifies or doesn't verify in the world is the function of a theoretical semantics that determines the status of things in the world; ascertaining that the content should or should not be willed to be in the world is the function of a practical semantics that determines how intentional action shapes things in the world. The present paper argues that this semantics may contribute to our understanding of normativity and provides valuable inputs for the development of the logic of Law.

1 For the purposes of the present paper normative statements include norms and imperatives/permissions.

2 Bivalent and monist (the semantics has a single set of two values).

3 While standard deontic logic pays little consideration to the applicability to norms of truth-value semantics (Weinberger, 1998, pp. 146-147, note 3), there are thinkers that work with both a deontic syntax and a deontic semantics (Kanger, Hintikka, Weinberger, Soetman or Vilanova), handle normativity with FOL (Klug, Hage), or approach it in purely syntactical terms without recourse to semantics (Alchourrón and Martino).

2. Syntax and Semantics in Kant's Logic

For Kant judgment results from the combination of four logical functions: Quantity, quality, relation and modality (*KrV*, p. A70/B95), of which the first three express the content of the judgment (*KrV*, p. A74/B100).[4] Consider "*John is in the room*"; it is quantitatively singular, qualitatively affirmative and establishes a categorical relation between John and the room.[5] Modality is not included in the content of the judgment, instead it relates the content (the syntactically well-formed-formula) to "thinking in general" (*KrV*, p. A74/B100). The key word is *general*. The modal relation of a judgment to other judgments is not direct, or they would be related in *particular*: The relation would be established syntactically with syntactical connectives leading to the formation of a complex judgment. Suppose we have the two formulas "*John leaves the room*" and "*John enters the kitchen*". We relate them with a connective and get a complex formula, for instance "*John leaves the room implies that John enters the kitchen*", where the two concrete formulas are related in *particular*. Modalities are different. The modal value attached to a judgment relates it to a *set of other judgments* that can possibly be formulated, each assigned a modal value. John can be in the room, the kitchen or in many other places; we may configure an indeterminate set of formulas corresponding to each possible location where he can be; yet, the moment we attach a modal value to "*John leaves the room*", we constrain how this judgment may relate to each of the other possible formulas the moment they are also assigned a modal value. This relation of a concrete judgment to the generality of other judgments through a modal value corresponds in Kantian logic to the truth-values of PL or FOL semantics.

Kantian semantics adds two further layers of sophistication to bivalent semantics. First, it works with three sets of bivalent values: *Problematic* (problematic – unproblematic); *assertoric* (assertoric – non-assertoric or true – false); *apodictic* (apodictic – non-apodictic).[6] If all judgments under consideration are assigned values from the same set, then inferences are drawn in terms similar to PL/FOL. Yet, one can *move* from one pair of values to the next (For instance, *KrV*, p. A76/B101):[7] We may start with a problematic judgment, *move* to an assertoric judgment, and next *move* to an apodictic judgment (we cannot jump from a problematic judgment to an apodictic judgment). We can only *move* from one moment to the next if the departing value is, so to speak, "positive": We can move from problematic to assertoric if the problematic judgment is *problematic*; and we can move from assertoric to apodictic if the assertoric judgment is *assertoric*.[8]

More relevantly for this paper, judgments associate a *logical form* with a *matter* that corresponds either to the domain of nature, subject to theoretical judgments that express our knowledge, or to the domain of freedom, framed with practical judgments that express our will (*KU*, p. 20:196). The *matter of the domain of nature*, the phenomenal data sensually and passively intuited by the person, is discursively represented in the syntactical content of the judgment by expressions such as "*John is in the room*". The *matter of domain of freedom* is delineated by the "principle of humanity, and in general of every rational nature, *as an end in*

4 This content can be broadly assimilated to the syntax of an atomic well-formed-formula in FOL with two provisos: Kant treats negation as an intra-propositional component of the formula, not as a unary connective; the relation forms contribute to the shape of atomic formulas, they don't correspond to inter-propositional connectives.

5 In FOL this may be formulated as "*in(John,Room)*", where *John* and *Room* are constants. The copula is expressed by the form "_(_,_)".

6 Kant is explicit that each modal moment has two values, but he doesn't name the members of each pair. The designations proposed were just extrapolated from his designations of the modal forms.

7 Notice that the syntax of the judgment doesn't change in the course of the movement.

8 In the process we may "freeze" each movement and form two instances of trivalent semantics: A problematic/assertoric semantics with the three values problematic – assertoric – non-assertoric; an assertoric/apodictic semantics with the three values assertoric – apodictic – non-apodictic.

itself (which is the supreme limiting condition of the freedom of action of every human being)" (*Grundlegung*, p. 4:430-431). The *rational nature as an end in itself* is the *subject of all ends*, "every rational being as an end in itself" (*Grundlegung*, p. 4:431), rational being that finds himself in a *Kingdom of Ends*, "the systematic combination of various rational beings through communal laws" (*Grundlegung*, p. 4:433). So, morality is about humans, entities with the faculty of free action and the ability to constrain their will through rules, norms or laws.
The domain of freedom is linked to the domain of nature since the will is exercised on phenomena. So, the correct syntactical expression of a practical judgment is "*A's will is that X*" where *X* is an expression of a state or an event in nature; for instance "*John's will is that (John is in the room)*". As Kant implies and as Geach enunciated (1965, pp. 453-454 and 456), an expression such as this is exponible into two expressions:[9]

"*John's will is that (John is in the room)*".
"*John is in the room*".

So far we have been dealing with the syntax of judgment. As by *the Frege point* (Geach, 1965, p. 449),[10] purely syntactical expressions with no semantic value assigned such as the two above are non-descriptive and non-prescriptive: They are free to be assigned a semantic value in an appropriate semantics.

3. Modal Categories

So, for Kant the same formal logic underscores reasoning about nature and about freedom, but it has different specifications in each domain through domain-specific concepts, the theoretical and practical categories. We thus have a theoretical semantics and a moral semantics:[11]

Moment of modality	**Nature**[12]	**Freedom**[13]
Problematic	Possible vs. impossible	Permitted vs. forbidden
Assertoric	Existent vs. non-existent	Duty vs. contrary to duty
Apodictic	Necessary vs. contingent	Perfect duty vs. imperfect duty

What do these categories mean?
In the domain of nature *problematic* means either *possible* or *impossible*. Impossible is what cannot obtain in nature, what does not belong to the phenomenal world; if John is dead, "*John is in the room* is impossible". By contrast, possible is what may or may not be true in nature, what we are incapable of dismissing as impossible or assert as true; if we don't know for sure where John is, then "*John is in the room* is possible". The theoretical true-false values, the *assertoric* categories in the domain of nature, are *existence* and *non-existence*.[14] If I judge that

9 Since for Kant theoretical judgments express knowledge, their syntactical form should be the exponible "*A knows that X*". The theoretical example corresponding to the practical judgment in the main text is "*Someone knows that (John is in the room)*" and "*John is in the room*". I'm thankful to the anonymous reviewer that pointed me to Geach's paper.
10 Such expressions are just *mere combination of ideas* (Frege, 1879, p. 11) or *indifferent modal substrates* (Kelsen, 1994, p. 72).
11 Note that Kant reserves for semantics expressions such as possible, necessary, prohibited, obligatory, etc., terms that in contemporary logic find their place in syntax.
12 *KrV*, p. A80/B106.
13 *KpV*, p. 5:66.
14 Against the usual Russellian and Quinean perspective, Kant works within the traditional understanding that

"*John is in the room* exists", I posit that John being in the room is the state of facts that actually obtains. Theoretical *apodictic* judgments are either necessary (*a priori* scientific laws) or contingent (regularities based on *a posteriori* observations of experience).
The practical *problematic* categories are *permitted* and *forbidden* (*MS*, p. 6:221-222). An action that does not concern the Kingdom of Ends is *permitted*, meaning that it is morally indifferent, has no moral value (*MS*, p. 6:223). John's hobby is to watch tv, who would blame him for that? In fact, we can judge that "*John's will is that (John watches tv during his leisure hours)* is permitted". *Forbidden* is harder to grasp. Kant uses an analogy taken from the "common use of language":

> "for example, it is *forbidden* to an orator, as such, to forge new words or constructions; this is to some extent *permitted* to a poet; in neither case is there any thought of duty. For if anyone is willing to forfeit his reputation as an orator, no one can prevent him" (*KpV*, p. 5:11, note).

Kant seems to be thinking about something like the technical rules or standards we find in industries or economic activities (quality standards, IT standards, etc.), rules that are not obligatory or indifferent. The juridical concept that better encapsulates this notion of *forbidden* is the concept of *onerous*. An onerous behavior, while not prohibited, may have collateral negative consequences for the agent. Consider John, a freelancer that watches tv during his working hours, in the process risking the loss of valuable business. We are likely to judge that "*John's will is that (John watches tv during his working hours)* is onerous (forbidden)".
Assertoric moral judgments may be either duties or contrary to duty. Duty is linked to *obligation*, "the necessity of a free action under a categorical imperative of reason" (*MS*, p. 6:222), moral necessitation (*MS*, p. 6:221). Kant clarifies, "In all [practical] lawgiving ... there are two elements: first, a *law*, which represents an action that is to be done as *objectively* necessary, that is, which makes the action a duty" (*MS*, p. 6:218). Notice, the moral law *represents* the action as objectively *necessary*. This necessity does not concern the moral modality, it concerns the modality of the behavior defined in the theoretical judgment presupposed by the moral judgment. This is a *possible* behavior[15] that the assertoric moral judgment *represents as necessary*. This representation of the (natural) behavior as being *apodictic* (necessary) should not be confused with the practical *assertion* of the will as a duty or contrary to duty. John should judge that "*John will is that (John watches tv during his working hours)* is contrary to duty", in the process representing "*John watches tv during his working hours*" as something that necessarily doesn't happen, even if theoretically possible.
Finally, what distinguishes moral apodicticity (moral law-giving) from moral assertion is that the apodictic moral judgment adds to the duty "an incentive, which connects a ground for determining choice to this action *subjectively* with the representation of the law" (*MS*, p. 6:218) to the extent that either the agent willingly acts according to duty, or he is compelled to act according to the moral judgment by the incentive that "necessitates" the obligatory behavior.[16]
If follows from what has been said up to now that the contrast between theory and practice is not between something that *is* and something that *should be*, it is between something that *is*

existence and quantity are not intrinsically related, quantity has no existential import (Priest, 2008; see also McGinn, 2000). Neither is existence treated in syntax through an existence predicate, since for Kant it is the expression of truth in the natural domain, a modal (semantic) concept.

15 What is impossible, what is existent or what is necessary cannot be determined by the will.

16 In law the incentive "is something other than the idea of duty [and] must be drawn from *pathological* determining grounds of choice, inclinations, and aversions"; in ethics the incentive is the duty itself (*MS*, p. 6:219).

(known as) possible/existent/necessary and something that *is (willed as) permitted/a duty/a perfect duty*. The something that *is* is the same in both cases; *should-be* contrasts with *exists-to-be*, *is-due* with *is-existent.*[17] Kant also contrasts a *be* (*happening*) with a *should-be* (*KU*, p. 5:403). Here *happening* expresses both existence (modality) and causality (relation), the existence of causal processes in nature. Likewise, *should-be* morally asserts a hypothetical relation, it expresses morally ordained causality by a free will.

4. Normative Judgments

Where do norms enter this picture? For Kant, norms (*laws*) are a specific type of judgment that's characterized as being quantitatively universal and modally necessary.
Thus far we have been looking at judgments about particular instances, *facts*, and we thus have natural facts and moral facts: "*John is in the room* is possible" is a problematic natural fact; "*John's will is that (John is in the room)* is obligatory" is an assertoric moral fact. Facts are quantitatively singular or particular (and they are modally either problematic or assertoric). Norms are not factual judgments: They are quantitatively universal, apply extensionally to all configurable cases with no exceptions; and they are apodictic. The result is that the contrast is not between a domain of *facts* (of nature) and a domain of *norms* (of freedom or moral), since we have both natural and moral norms (for instance, *MS*, p. 6:214), just as we have both natural and moral facts. In the specific case of Law, we find both a juridical factuality comprising concrete legal entities, situations and actions, and a juridical normativity integrating universal and necessary legal norms.
The universality of the legal norm is present in all the layers of its syntactical content. Consider the norm, *People must help those in need*. In order to make its proper quantification explicit, it's useful to express the implicit reference to the will:

"*People must will that people help those in need*".

We also should separate the syntactical content from the modality:

"*People's will is that people help those in need*" (content) vs. "*must*" (modality).

As we have seen before, an expression such as this is exponible into a practical content related to the will, and a theoretical content related to the willed behavior;[18]

Practical: "*People's will is that (people help those in need)*";
Theoretical: "*People help those in need*".

We can now quantify these expressions, ensuring that both are universal:

"*All people's will is that (all people help all those in all [situations of] need)*".
"*All people help all those in all [situations of] need*".

To the extent that a legal norm is a universal practical judgment, it imposes on all wills the same pattern of behavior in the situations under consideration. It's worth recalling that for

17 In Fichte's terms, "just as theoretical philosophy has to present that system of necessary thinking according to which our representations correspond to a being, so practical philosophy has to provide an exhaustive presentation of that system of necessary thinking according to which a being corresponds to and follows from our representations" (Fichte, 1798, p. 8).
18 We will not enunciate the hypothetical expression implicit in this seemingly categorical formula.

Kant morality concerns the Kingdom of Ends quantitatively, encompassing its free-willed subjects. If while judging the agent only considers his personal will (ignoring all other free-wills), his judgment is singular, his personal *maxim*. If instead he considers the judgments of other free-willed agents expressed in regular practices or resulting from a joint exchange of ideas among people, his judgment is morally *particular* (it takes into consideration a quantitatively variable set of homogeneous wills), a *precept*. Finally, if he judges according to the will of a universal legislator that legislates for all free wills comprised in the Kingdom of Ends, his judgment is morally *universal*, corresponds to the judgment that all members would produce according to reason, a *natural law*. There's a catch, though: Moral universality requires a degree of rationality in willing that is seldom achievable. Fortunately we can stick to a lower standard; we often frame *particular* judgments by considering a wide range of instances without exceptions. Such judgments are *general*, and we can use them as if they were (approximately) universal. This is the case of *positive laws*, precepts crafted through *customs* (behavioral regularities perceived as imperative) or resulting from agreements enshrined into *statutes*. "*People must help those in need*" may be just one such norm.
Up to this point we expressed the two well-formed-formulas expounded from our norm.
To conclude it's analysis, we have to assign the relevant modal values to the two formulas, respectively apodictic and problematic:

> "*All people's will is that (all people help all those in all [situations of] need)* is obligatory and enforceable".
> "*All people help all those in all [situations of] need* is possible".[19]

5. Conclusion

In the present paper we followed Kant in his analysis of practical judgments divided into two components: A syntactical expression, exponible into the expression of a will to behave and the expression of the willed behavior; a moral semantic value (a deontic concept) that expresses how the will must direct the action in the choice of an option among the phenomenal alternatives. Kant's insights provide ample material for handling the phenomenal and the deontic dimensions of legality, and for the construction of a logic for Law.

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19 A *possibility* represented as *practically necessary* by force of the obligation.

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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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SECTION

07

SECTION 5

NORMS, LANGUAGE, AND SOCIAL PRACTICES

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EXPRESSING RULES

abstract

The notion of conceptual normativity is grounded on the idea that our conceptual contents are established by the norms of the discursive social practices we engage in. This idea involves two major problems. First, where do the norms of discursive practices come from and how can the contents that they establish be objective? Second, what is the role of the vocabulary that we use to express such norms as explicit rules? This article draws the outline of an account that could possibly answer both questions. First, it explores the viability of a naturalism about conceptual normativity. Second, it defines the characters of a rational expressivist analysis of the language of the rules.

keywords

rule-following, normative inferentialism, pragmatic metavocabulary, naturalism, space of reasons

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1. Introduction

A very well-trodden tradition in the analytic philosophy, originated from Wittgenstein's reflections on language games and rule-following in the 1930s, maintains that conceptual contents are characterized by normative significance and that our grasp of them is to be understood in terms of our ability to engage in norm-governed social practices. Some years later, Sellars (1956) beautifully distilled the gist of this approach to rationality into the notion of a conceptually articulated and socially maintained *space of reasons*, where linguistic performances provide and are in need of justifications.

In effect, Wittgenstein's original focus on rules was part of an argumentative strategy aiming to undermine the venerable semantic view according to which an expression is contentful only in so far as it contributes to express representations of things in the world. Of course his criticism was directed primarily against the authors who had adopted such a view in the logical analysis of language, like Frege, Russell and the author of the *Tractatus Logico-Philosophicus* himself. The scope of his arguments, however, is crucially wider than linguistic analysis. On the one hand, by tackling the assumption that an explanation of conceptual contents *primarily* consists in the definition of homomorphic relations between linguistic expressions (or the mental episodes that they express) and states of affairs, he put into question the semantic grounds of the traditional accounts of empirical knowledge. On the other hand, by suggesting that linguistic practices are what confers contentful states to those who engage in them, he also undercut any meta-stance from which to judge the adequacy of conceptual contents. As Rorty (1979) pointed out, in this way he issued the challenge of rethinking the role not only of the epistemological, but also of any metaphysical and, in general, metalinguistic vocabulary that we use. In what follows, I argue that in order to really vindicate the objective notion of conceptual contents as they are articulated in a naturalistically construed space of reasons, metavocabularies must be reconsidered from an expressivist point of view.

2. Norms, rules and antirealism

The target of Wittgenstein's criticism can be identified as the view that the semantic metavocabulary of representationalism should play a privileged role in the articulation of conceptual contents. His focus on the plurality of language games questions such a privilege on many levels. The idea of the normativity of meaning that permeates the *Philosophical Investigations* is not simply the idea that the ways in which we use the expressions of a language are governed by rules. Rather, it is the idea that the conditions of correctness that govern the application of the conceptual contents (which are variously expressed in language

uses) are established by the complex pragmatic engagement with our environment that we undertake in our discursive practices or *forms of life*.

Of course, under this reading, Wittgenstein's approach puts a huge theoretical load on the analysis of the metavocabularies that we use to talk about the norms of our discursive practices. This burden has been variously described in the vast literature on rule-following that has been thriving with varying vigour since 1953. It is still worth rehearsing here its main characters, because they offer a very effective way to single out the problems that we are going to deal with. Thus, following McDowell (1984), we can say that the *Philosophical Investigations* should be read as presenting us with a dilemma.

The one horn consists in the view that norms are some kind of Fregean content that we just somehow grasp when we understand the rules of a discursive practice. In this picture, grasping a rule is like opening a mental eye on a Platonic object that exhaustively determines the criteria for the normative assessment of any performance that is governed by the rule. Wittgenstein counters this mythology by suggesting to look at the process of language learning, where it is clear that no appeal to any mental awareness of any normative content can *non-circularily* bridge the gap between merely regular verbal behavior and rule-governed linguistic one. This means, of course, that one is not allowed to postulate semantic super-facts to be represented by such contents.[1] But the real reason why this metaphysical approach will not work, as Sellars (1954) noticed straight away, is that, if we accept the normative characterization of conceptual contents that Wittgenstein advocates, then the very awareness of the norms must be understood as positions in the space of reasons. In other words, the problem is that the language of the rules is not pragmatically and thus not even semantically autonomous from the discursive practices whose norms it talks about.

The other horn of Wittgenstein's dilemma is a metalinguistic account of the language of the rules. According to such an account, a distinction must always be drawn between the object language that is used in a practice and the metalanguage that expresses the norms for its use. So that, in order for one to be treated as able to contentfully deploy the former, one must already be able to contentfully deploy the latter. In this account, norms are conceived as linguistic objects: as such, however, they are in need for an interpretation that can only be provided in a metalanguage. Of course, the problem with this approach is that it engenders the vicious regress famously described in §201 of the *Philosophical Investigations*. The conclusion to be drawn is that semantic metalanguages are not suitable to express the pragmatic significances that are established by the rules of discursive practices.

As it is well known, Wittgenstein's solution to slip between the horns of the dilemma is to acknowledge that "there is a way of grasping a rule which is *not an interpretation*" (Wittgenstein, 1953, §201), not to try to look beneath the *bedrock* of linguistic justifications (§217), and accept *forms of life* as the primitive given in the analysis of rationality (§247; pt. II, p. 226). In other words, he proposes to acknowledge that there is no position outside discursive practices where to evaluate them from, since the very possibility to provide any normative assessment is grounded on the discursive practices themselves. Unfortunately, this proposal raised more problems than it was supposed to solve. On the one hand, there are those who have substantially embraced Wittgenstein's maxim and tried to develop holistic accounts in which conceptual contents are determined exclusively in relation the one with the other. These authors, like Rorty or Brandom, have been accused of severing the connection between conceptual contents and the objective reality and to deliver a picture of the space of reasons as a wheel spinning in the void. On the other hand, there are those who have rejected

1 To this extent, of course, Kripke (1982) was right.

a demarcational interpretation of the bedrock and have followed instead the idea that our discursive practices are supported by causally established patterns of regular behavior, arising as a consequence of the responsive abilities to cope with the environment which we are endowed with by nature or education. The problem with the latter idea is that no matter how much complex a story can be told about our responsiveness to the environment, any piece of regular behavior that it establishes will always agree with more than a rule, so it will not ever suffice by itself to fully support the normativity of conceptual contents. A paradigmatic example of this problem are the hurdles encountered by the various forms of causal, informational or teleological semantics.

3. Naturalism and the space of reasons

The reason why Wittgenstein's path appears to be so unsatisfactory is that it is hard to happily accept to stand on the bedrock of the space of reasons while candidly being in the dark on what really supports it. In fact it is reasonable to acknowledge, with Davidson (1986), that there are no justifications for our beliefs from outside the space of reasons and yet require an explanation of what grounds the objectivity of our conceptual contents.
In order to vindicate realism within the space of reasons, the image of the bedrock must be acknowledged as a way to picture a categorial distinction that already in nature separates rational from non-rational beings, in so far as our ability to play the game of giving and asking for reasons is just the way in which our interactions with our environment are articulated. That does not mean, however, that philosophers should be content with the acknowledgment of such an ability as a "second nature" of ours, like McDowell (1994) suggests. Authors like Rouse believe that the task of contemporary naturalism is precisely to accommodate the social and normative grasp that we have on the world within scientific understanding:

> The primary phenomenon to understand naturalistically is not the content, justification, and truth of beliefs but instead the opening and sustaining of a "space of reasons" in which there could be conceptually articulated meaning and justification at all, including meaningful disagreement and conceptual difference (Rouse, 2015, p. 17).

There are, however, different ways to think of this task, because there are different ways to conceive our conceptual understanding. Rouse efficaciously distinguishes between considering it in terms of operative processes in cognition as opposed to normative statuses within discursive practices.
The first of these approaches has been certainly the more common one in cognitive sciences. It was championed, for instance, by Fodor (1998), who maintained that a scientific account of conceptual contents should explain how mental representations play certain causal roles in the mental life of an organism. In this approach, concept application is considered as a genus of the more general species of internal processes. Since non-conceptual processes pose less problems to scientific explanation, the task of naturalism is conceived as that of accounting for how conceptual processes arise beside or even from the other ones. So, this approach usually turns down the account of the normativity of conceptual contents. Things however do not really change in operative-process accounts that use biological evolution to support a normative analysis of an organism's responses to its environment. So, for instance, teleosemantics typically tries to explain the normative character of representational content in terms of the notions of indication and biological function: the intentional content that determines the correctness of the internal process of an organism as a representation should be what in the environment of the organism such a process has been naturally selected to causally covary with in a reliable way. However, the notion of biological function can account for error only by presupposing an independent determination of the trait types

that undergo natural selection (cf. Haugeland, 1998; Nanay, 2010). Consider for example the following analysis: an organism's syncopated heartbeat is a malfunction because the hearts of the organism's ancestors have contributed to their fitness by pumping blood regularly into their veins. The problem is whether it is possible to tell what a heart is, in the first place, without calling on teleological notions in turn. Likewise, a story can be told about how certain processes of an organism acquire the biological function to indicate distal targets. Yet, such a story presupposes that the proximal features of the environment, which the organism is evolutionarily attuned to, are already (not merely causally but) normatively related to distal substances.[2]

The normative-status approach, by contrast, focuses directly on the normative accountability of the behavior of an organism. As Rouse explains, in this approach "[c]onceptual understanding [...] need not be identified with any present component of the exercise of [practical-perceptual] skills as an operative process" (Rouse, 2015, p. 49). The idea behind this approach is to develop a naturalistic account that integrates both the social and the biological dimension of cognition. This is however a far less trodden path in cognitive sciences. Therefore, for the time being, it is wise for a philosopher to be content just with sketching what the outline of such a naturalist account of conceptual normativity should look like. In this brief space, I will only wave my hands in the direction of the work of Tomasello (2014). He has long maintained that human thinking is essentially cooperative. He has more recently argued that what philosophers of action call "shared intentionality", i.e. the ability that we have to engage in social practices with joint goals, joint intentions and mutual knowledge, is fundamental to our specific way to produce mental representations, drawing inferences and evaluate our own behavior. He believes that the origins of shared intentionality can be explained as the result of both a social selective pressure on the collaborative skills required for the collaborative activities that individuals could not perform by themselves and the diachronic transmission of those skills to the future generations through teaching and social norm enforcement. Although this is inevitably promissory-notish, it is still enough to envisage the path for a non-reductionist naturalism about the normative statuses that we acquire in our discursive practices. First, such an naturalist account must explain how forms of shared intentionality emerged, in the light of natural and cultural evolution. Second, it must explain how shared intentionality can support the peculiar discursive articulation of our conceptual understanding. This sort of naturalism should suggest to the philosopher an answer to the question about the origins of the norms and support the idea that the burden of realism is not to be carried by the homomorphisms between our judgments and the world, but by the normative articulation of our conceptual abilities to cope with the world.

4. Expressivism and the language of rules

When Sellars (1954) discussed the problem of rule-following, he shared Wittgenstein's view that the dilemma between the idea that rules require meta-linguistic interpretation to be followed and the idea that there are only regularities is a false dichotomy. He pointed to the fact that there is a sense in which an agent can be said to act in reason of the rules even if he or she has no intention whatsoever with respect to the content of the rules. This is the sense in which the worker bees, for instance, perform their waggle dance in accord to a certain pattern so to represent the position of the food, or children use linguistic expressions in accord to the pattern that their caregivers teach them to conform to. These pattern-governed sorts of behavior are not merely accidentally in accord with a rule. Sellars' pragmatist insight is that both are the result

2 Many of the arguments against teleosemantics, starting from Pietroski's (1992), can be read as underscoring this point.

of a selective pressure that makes them subject to normative assessment: in the first case the selective pressure is exerted by natural evolution, in the second by cultural learning.
At the time, however, Sellars adopted a non-cognitivist framework for the analysis of learning processes that tends to obfuscate another important point of his. In fact, while the explanation of the development of the waggle dance only requires the analysis of the attunement of the bees' internal processes with their environment, the cultural learning of linguistic behavior can only be explained in the context of already up and running social discursive practices. Suppose that a naturalistic account like the one envisaged in the previous section is available to explain the origins of these practices. Still, the problem remains of understanding the gap that a child, who has been initiated to the space of reasons, has to fill in order to eventually be considered a full-blown discursive practitioner. According to Sellars the gap is an expressivist one: the child has to learn the language of the rules.
In order to grasp this idea, it is important to clarify what a language of the rules for a discursive practice is. Such a language must contain the expressive resources to make explicit the pragmatic significance of the expressions of the language that is used in the practice. In this sense it certainly is a metalanguage. Usually, the sort of metalanguages we are familiar with are semantic ones. So, for instance, in the Tarskian approach of model-theoretic semantics, metalanguages are deployed to refer to the expressions of the object languages and to associate them with their extensions in some structure of interpretation. The language of the rules, instead, must contain the normative vocabulary to say that certain linguistic moves are permitted or obligatory. As Brandom (2008) put it, such a language is a *pragmatic* metavocabulary: it allows to *say* what one *does* when one meaningfully deploys a certain vocabulary in a certain practice.
The sense in which the expressive resources of a pragmatic metavocabulary make a difference with respect to conceptual understanding depends on the very articulation of the space of reasons. By making moves in the game of giving and asking for reasons speakers endorse entitlements and commitments to further moves. What is a reason for what depends on which moves are treated as correct. So, for instance, if the move from p to q is treated as correct, then p can be given as a reason for q. Now, pragmatic metalanguages just allow to say that a move is treated as correct. By way of illustration consider logical vocabularies and in particular the case of conditionals. The conditional "$p \rightarrow q$" allows to say something that could be otherwise only done by treating the inference from p to q as correct. The assertion of a conditional, in turn, is itself a move in the discursive practice, that can be given as a reason (for instance to argue by *modus ponens* from p to q) and for which reasons can be asked. In this sense, pragmatic metavocabularies bring into the game of giving and asking for reasons the very norms that regulate it. They provide discursive practices with the expressive resources that allow *in principle* to question any normative attitude: they illustrate why any privileged (either subjective or intersubjective) perspective in the game of giving and asking for reasons is structurally impossible.
The language of the rules for a discursive practice, then, is a pragmatic metavocabulary that allows to make explicit what ought to be the case and what ought to be done. Those who manage the language of rules are able to make assertions about the norms of the practice. Thus they are able to justify the others' and their own behavior in the light of those norms. Besides, they can also challenge those norms and develop the conceptual articulation of the contents that depend on them. This, in effect, is what makes of them full-blown discursive practitioners. By learning pragmatic metavocabularies, however, they do not gain access to any meta-stance: the authority of the assertions in the pragmatic metavocabularies is not grounded "from sideways on" (McDowell 1994), but on the normative interaction with the world that we engage in in the space of reasons.

5. Conclusions

In his *Philosophical Investigations* Wittgenstein challenged the standard representational approach in semantics in two fundamental senses. First, he argued that the content of linguistic expressions is to be explained in terms of the norms of the discursive practices in which they are used. Second, he impugned the metavocabulary that is used for semantic analysis. Any account of conceptual normativity that follows such a pragmatist approach, then, must face the problem of vindicating the objectivity of conceptual contents and the possibility to talk about them. My modest purpose here was just to describe a strategy to do that in terms of a naturalistic account of conceptual normativity and a rational expressivist analysis of the language of rules. I can be satisfied if the shape of such a strategy has been enough clarified.

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RECONSTRUCTING INTERSUBJECTIVE NORMS*

abstract

Robert Brandom famously attempts to provide an account of norms that are grounded in intersubjective practices, so dealing with problems raised by Wittgenstein's regress arguments. This relies upon providing an explanation of the correctness of those practices in terms of our dispositions to treat each other's practices as correct or incorrect. The view faces a number of hurdles, however, particularly when it comes to providing a non-circular account of the norms of practice, from within those practices themselves. This essay argues that Brandom's attempt to ground norms in intersubjective practices is circular, and requires communal stability. I go on to suggest that, by taking practices of interaction as foundational, we can ground norms in action coordination. Norms, on this view, become sedimented through our interactions, and explicit normative talk is required to keep our interactions coherent with each other.

keywords

norms, intersubjective, interaction, action coordination

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1. Brandom's Normative Pragmatics

According to Brandom's (1994) "normative pragmatics", we can think of the way in which our dialogical interactions take place against a background of norms regarding acceptable linguistic activity, the use and application of terms, the inferential associations between our terms, and so on. Yet, it is in these interactions that it is possible to modify that practice, since the processes of speaking together alters those norms. Such norms are not externally imposed, rather they are constructed, reinforced, and modified in and through our interactions with each other. Brandom takes this view to be corrective to *regulism*, in which the possibility of grounding norms in explicit rules yields to a vicious regress. As Wittgenstein argued, if objective rules are supposed to provide words with meaning, then, for any use of a word, there should be a means by which to count that use as correct or incorrect.[1] But, if all such inferential propriety requires an explicitly represented rule, or interpretation of it, we would need to appeal to another such rule or interpretation of a rule in order to determine whether *that* application was correct or incorrect. Famously, Wittgenstein argues that the regress shows "that there is a way of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call 'obeying the rule' and 'going against it' in actual cases" (Wittgenstein, 2009, §201). Brandom takes Wittgenstein's argument to motivate a pragmatic approach to rules: "there is a need for a pragmatist conception of norms – a notion of primitive correctnesses of performance implicit in practice that precede and are presupposed by their explicit formulation in rules and principles" (Brandom, 1994, p. 21). That is, Brandom's solution to the regress of explicit rules is to look for rules that are *implicit* in our practices. So, norms of reasoning are "instituted" through social practices in which certain rules of reasoning implicit in those practices may be made explicit through their public expression in language games.

Brandom also argues against *regularism*, which in this case, would say that implicit rules could simply be "read-off" from regularities in practice. One problem with regularism is that we could force a finite set of practices to conform to several distinct rules, and for any "deviant" form of practice, it can be made to cohere with some rule or other. As such, any attempt to distinguish between correct and incorrect practices would seem to quickly break down, and the idea that we could "read off" a set of rules from practice would seem to end-up with our "writing-away" all those occasions in which we do not reason according to the norms that

1 For discussion, see (Kripke, 1982; Schechter and Enoch, 2006; Williamson, 2007).

are supposedly implicit in our behavior. Brandom attempts to deal with this sort of problem by arguing that social norms can be identified by the way we *sanction* each other in ordinary linguistic practice. It is by taking an evaluative attitude towards each other's utterances, and judging them to be correct or incorrect, that we go on to sanction these utterances accordingly. But, as Brandom notes, sanctioning cannot itself be a matter of regularity, or disposition, since that would simply reintroduce the problem of regularist gerrymandering at the level of sanctions, rather than the level of first-order practices. As such, sanctions must themselves be normative, so we have "norms all the way down" (Brandom, 1994, p. 44). That is, Brandom effectively *postulates* the existence of proprieties of practice as normatively primitive, which determine our abilities to evaluate and sanction, each other. Whether or not this avoids the problems of regulism and regularism, is now reliant upon giving a decent account of this activity of sanctioning that is non-circular.

According to Brandom (2008), what is required to *say* something, rather than merely *do* something, is for an agent to both be able to have the algorithmic ability to elaborate practices to employ a vocabulary *and* to have *scorekeeping* abilities, where agents keep track of each other's commitments and entitlements, where commitments are sentences to which an agent is committed (though perhaps unknowingly as consequence of other commitments), and entitlements are sentences to which an agent is justified after having defended them successfully.[2] In the latter, however, we are being asked to think of norms, not as emerging from reciprocal interrelations and interactions between agents, but through a kind of checking-mechanism in the form of a detached observer. It is at the level of the community of scorekeepers, on Brandom's view, that meanings are determined, and norms instituted. The assessment of utterances is made, not by "an addressee who is expected to give the speaker an answer" (Habermas, 2000, p. 161), rather a community plays an authoritative role in considering what our utterances mean, and also which reasons are taken to be correct or incorrect: "what is correct is determined according to what the community of those who have command of the language hold to be correct" (Habermas, 2000, p. 336).

Sanctioning practices are inextricably related to the social attitudes defined on the basis of membership in a specific community, where membership in a community may also be understood to be normatively defined by means of those practices. This is both worryingly conservative, and asymmetric from the point of view of agents' ability to disagree and dissent from communal practices and sanctions. Indeed, if we say that meaning is determined by a set of specific inferences, and that those inferences must be at least substantially similar in order for communication to be possible, then not only would agents dissenting from some of those inferences not be able to communicate about the same thing, they may be accused of not even grasping the same concept (Williamson, 2007). For Brandom, scorekeeping practices allow agents to coordinate their commitments and entitlements in relation to other agents. It is through these processes that other agents are then able to understand and assess these utterances in terms of their relative weighting in relation to the commitments expressed by those agents. The obvious issue with this story of communication, however, is that it looks like it would introduce a fairly worrying form of indeterminacy to communication. As Scharp (2003) points out, the "inferential significance" of an utterance would differ from speaker, A, to listener, B, since the scorekeeping commitments of A and B will often (if not always) not coincide:[3]

2 On scorekeeping, see (Lewis, 1979; Stalnaker, 2002).

3 Scharp (2003) argues that Brandom's approach can deal with these issues by emphasising intersubjectivity. I agree with that emphasis, but argue that Brandom smuggles the third-person into the account by means of the detached perspective present in scorekeeping.

> Thus, B misunderstands A's utterance. The only case when this would not happen would be that in which A and B had the exact same set of background commitments (which is impossible and also eliminates the need for communication) (Scharp, 2003, p. 45).

It is, perhaps, for this reason, that Brandom's approach ultimately requires a surefooted scaffolding of the kind offered by either an implicit logical structure, or a communal perspective (e.g. Hendley, 2005). But, in this context, either would render his account circular since they require that certain norms of reasoning must be in place prior to linguistic interaction, yet are also supposed to be instituted by it.

2. Radically intersubjective norms

According to the above argument, Brandom fails to provide an account of intersubjective norms, and, in the process illuminates the inherent conservatism of social norms insofar as their circular construction is obfuscated. There is reason to think, however, that the coordination of linguistic interaction exists as a kind of shared understanding between agents without requiring objective scaffolding, or implicit rules[4]. In the following, I shall argue that such an account can be developed to construct a thoroughly intersubjective account of norms. Contra Brandom, linguistic interaction may be understood in terms of non-intentional coordination, underlying cooperative activities. Gregoromichelaki and Kempson (2013), provide evidence and argument that communication does not require the manipulation of propositional intentions, since agents often express "incomplete" thoughts without planning or aim regarding what they intend to "say", "expecting feedback to fully ground the significance of their utterance, to fully specify their intentions" (p. 72).[5] Moreover, this kind of coordination between agents is often sub-personal, involving mechanisms by which agents "synchronise" together prior to the level of communicative intention. In making utterances in interaction, we may "start off without fixed intentions, contribute without completing any fixed propositional content, and rely on others to complete the initiated structure, and so on" (Gregoromichelaki and Kempson, 2013, p. 80).[6] As such, it is argued that *meaning* should be understood by means of intentionally underspecified, yet incrementally goal-directed, dialogue.

By thinking of interaction as a form of action coordination, it is possible to see how our dispositions to make assessments of each other's actions may refer *to each other*, and are therefore also involved in the reinforcing and construction of meaningful dialogue. This can be understood in terms of our practical attitudes, which are just dispositions of differential response and interaction with certain patterns of stimuli, where these are typically low-level mechanistic processes that do not require explicit rationalization (Garrod and Anderson, 1987). So, for example, our linguistic expressions, which are mutually and incrementally forged into meaningful statements through our ongoing conversations, are subject to feedback mechanisms determining appropriateness of response at a sub-intentional level. It is through the interaction of our practical attitudes with each other in continuous feedback and adjustment, through which normative assessments become themselves instituted and also implicated within those very mechanisms. Our linguistic dispositions (and broader embodied practices), therefore signal and shape the appropriateness of each other's responses, and so

4 This builds upon cybernetic, calibrational, and action-coordination, additions to Brandom's account discussed in (Hill and Rubin, 2001; Kiesselbach, 2012; Scharp, 2003).

5 Broadly similar approaches can be found in (Arundale, 2008; Ginzburg, 2015; Pickering & Garrod, 2013). This view also coheres more generally with "interactivism", where cognitive activity (including the construction of meaning) is inextricable from agents' environment, both social and physical (Gallagher and Miyahara, 2012).

6 Pezzulo (Pezzulo, 2011) discusses (often sub-personal) "coordination tools".

our talk *about* meaning, or *about* the norms shaping our interaction, may also be understood to exhibit dispositions that become implicated in the feedback mechanism insofar as it affects those meanings or norms. Norms, therefore, become sedimented through our interactions, and the cases in which explicit normative talk is required to keep our interactions coherent with each other are decreased over time by the convergence of our practices. As Kiesselbach puts it, this gives us a way of understanding "normative talk as essentially calibrational" (Kiesselbach, 2012, p. 123).

It is, moreover, through understanding the interactional nature of dialogue and the institution of norms as consisting of primarily *sub-intentional* processes (Gregoromichelaki and Kempson, 2013), that we are able to understand the role that our embodied actions, feelings, and habits play in the coordination and socialisation of our dispositions. In other words, norms are just the regularities produced by adjustment and correcting mechanisms of feedback internal to interactions with each other, where these lead to the reinforcing of stabilities in those interactions, and their recognition as being appropriate or inappropriate (Hill and Rubin, 2001). Interactions give rise to norms when the relevant interactional activities reinforce certain patterns of behaviour as acceptable, or unacceptable, in social practices through recursively acting upon those underlying patterns. This can be understood in terms of recursive feedback loops that are generated through the interactions between patterns of behaviour, and so are apiece with the mechanisms that also generate patterns of behaviour, through mechanisms of differential response. As such, behaviour that can be understood in terms of norms is the same-in-kind with pattern-governed behavior.[7] So, rather than think about norms in terms of rules against which our practices can be judged, perhaps we should consider there to be a plurality of practices, of forms of interaction, and of distinct contexts, in which the norms of our language are felt, reinforced, and revised. In most communication, there is a continuous adjustment of phonological, gestural, lexical and grammatical features (Clark, 1996). These primary feedback and adjustment mechanisms shape the forms that norms will take, and are already shaped by the normative structure of our relationships.[8]

We then employ normative statements as part of a mechanism to repair conversations, or to sanction certain practices, which become implicated in feedback mechanisms to further embed those norms in our practical attitudes. If the processes and mechanisms of coordination and feedback go on smoothly, such normative language is not required to keep the interaction going. The use of normative vocabulary, then, would seem to come into play when agents are required to conceptualise interactional performances in which there is a need to engage in explicit deliberation, or to repair a conversation using explicit sanctions.[9]

3. Norms, Reasons, and Revisability

Norms, according to the above account, emerge from, yet also exert significant pressure on, our social and linguistic practices. The conservative nature of normative practice is endemic to Brandom's approach. Here, however, whilst our ability to diverge from accepted usage comes with a cost, the process of explicitly reasoning and considering our norms and the way in which they are sculpted is made possible by the fact that there are no precise normative rules (implicit or explicit) that we may appeal to in order to adjudicate those activities in the first place. Furthermore, whilst Brandom's account relies upon communal stability and the normative constraints of group membership in which a system of norms becomes visible

7 Extricating "rationality" from social norms in this context is both impossible and wrongheaded, since it would take an individualist approach to reasoning as assessable by external standards in a social vacuum.

8 See, for example, the analysis of power and control in conversational repair as including mechanisms of silencing, interruption, control of access to common ground, and so on (Schegloff, Jefferson, and Sacks, 1977).

9 In (Gregoromichelaki et al., 2013) there is a similar analysis of group tasks.

to that community, this approach suggests that it is not possible for a group to become explicitly aware of a system of norms that is being reinforced across that community. Indeed, by embedding the account in intersubjective interactions, we need not rely upon a notion of a stable "community", preferring instead to think of relatively stable groups, across which there are multiple and intersecting relationships. As such, the "harmonious" nature of much linguistic interaction may be understood to be an effect of the sedimentation of norms through the sanctioning of linguistic practice.

In these settings, whilst it is certainly the case that there are relative points of stability maintained through reinforcement and feedback through adjustment, calibration, and sanctioning (where required), even the activity of sanctioning would give rise to the possibility of *revising* local norms by explicitly reconstructing those norms in our interactions. This is because, unlike the effectively third-person standpoint of sanctioning practices required by Brandom, for us, the practice of sanctioning is "brought into the loop", so the sanctioning agent is equally implicated in their own practice of sanctioning. In this way, rather than understand sanctioning as simply reinforcing equilibrium, we may rather think of sanctioning as making available normative-talk for the reconstruction of differential patterns of linguistic activity. As such, interactions always have potential to construct new forms of activity that begin to construct new *norms* of practice. But note that this is not a matter of making explicit, since reasons, here, are emergent from interactions, rather than constitutive of speech-acts in the sense understood by Brandom. That is, reasons should not be thought of as driving communication, but rather as "discursive constructs" (Gregoromichelaki, Cann, and Kempson, 2013), which allow for explicit deliberation, particularly when the coordination of underlying dialogue breaks down. So, interactions are the foundation through which reasons may be constructed *a posteriori*, since we cannot determine in advance of the interaction, either what counts as a reason, or the meaning of expressions involved. On this, interactional, approach, we think of the construction of reasons over the course of a linguistic interaction through the coordinated relationship between agents who are directly involved in that interaction. All reasons, in this sense, are "joint reasons" in that they are the result of a process of joint articulation that is not reducible to, nor derivable from, facts about the individuals involved in the interaction.[10] Moreover, the norms structuring our reasoning together, and through which the meaning of terms are constructed, are always possibly modifiable, and indeed are constantly modified simply by the practices of interaction. These ideas require further development, particularly regarding the relationship between interactional practices and social power, to which I shall return in further work.

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10 See the discussion of "we-reasons" in (Laden, 2012).

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THE IMPERATIVE OF REPUTATION BETWEEN SOCIAL AND MORAL NORMS*

abstract

For the philosophy of normativity, the study of reputation helps a better understanding of the conflict that may arise between social and moral norms. It is a conflict which has been discussed in recent years and which has never been treated specifically from this perspective before. The paper discusses the dilemma, firstly showing its roots and meanings and secondly giving the reasons to choose one of the alternatives. This helps to show the normative conflict between social and moral norms and to explore its complexity, presenting some solutions. In so doing, the ontology of reputation is developed and discussed, also by presenting and discussing the two forms of the imperative of reputation.

keywords

reputation, social norms, moral norms, normative conflict

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Reputation, reputation, reputation! Oh, I have lost my reputation! I have lost the immortal part of myself, and what remains is bestial.
W. Shakespeare, *Othello*, II, 3

1. Introduction

At first glance, it may seem that reputation is a topic without philosophical depth and that all it can be said about reputation is only its extreme importance. Indeed, everybody knows that it is important to take care of one's own perceived image or to improve it. Cassio, in *Othello*, brilliantly expresses such common intuition, by calling reputation the "immortal part" of the self. On second thought, however, some interesting issues surface about reputation, such as the problem of collective reputation (e.g. Tirole, 1996), the social interpretation of the Berkelian principle "*esse est percipi*" (Carnevali, 2012). For the philosophy of normativity, the study of reputation can give a valuable contribution as well, because it helps a better understanding of the conflict that may arise between social and moral norms. It is a conflict which has been discussed in recent years and which has never been treated specifically from the perspective of reputation before (see e.g. Gilbert, 2014; Brennan *et al*., 2013). The study of the nature of norms finds in normative conflicts important instances to understand the types of normativity and their relationships. In fact, a conflict is triggered off by the imperative of reputation, especially by its strongest version (IR2): "Act in such a way to improve your reputation". Such version poses the agent a dilemma, as we will see. If on one side, from the perspective of the normativity of sociality, the agent must comply with it, from a moral perspective, it seems he must not.
This paper discusses the dilemma, firstly showing its roots and meanings and secondly giving the reasons to choose one of the alternatives. This will help to show the normative conflict between social and moral norms and to explore its complexity, at least to certain degree. In so doing, the ontology of reputation will be developed and discussed.

2. On reputation and reputation rank

Reputation is important for the single agent and for the social networks. It is the reason for the appraisal respect, a deserved esteem grounded on features meriting such respect (Darwall 1977; 2013). It gives information about how to act and about what to expect from the persons and the things evaluated. We mostly speak about reputation of persons, but there is also a reputation for things such as wines, hotels and institutions. In a context with limited information, reputation guides the decisions, the preferences and the social stances. A good

reputation, for example, can boost the price of a good wine up to twenty times the price of similar quality wine without the same reputation (Origgi, 2016, p. 161). On the other hand, a bad reputation can be tragic, since it can cause terrible pain and even death. Consider, for example, having the reputation of dissident in Russia under Stalin, or being counted as a witch during a witch-hunt. In social philosophy, reputation can be defined as a value assigned to someone or something. Its general form is:

R: the measure of *x*'s value perceived *y*, in the context *c*

As already said, *x* is not necessarily a social agent, it may be any entity, physical or social, of social interest the community should deal with. Here, the term "community" is used just to express the presence of social agents as members of a social network. This explains why, for instance, someone's glasses as such do not have a reputation, unlike the brand that has produced them. As a measure of *y*, reputation measures the entity *x* as well, but it does it always *secundum quid*. The *y* expresses the aspect under evaluation. For this reason, for example, one can have a very bad reputation, from a moral point of view, and yet he can be considered a great artist, or a good politician. This is important to give an account of multiple reputations of the same agent or entity. It may happen that the *y* under evaluation reveals something deeper, something of *x*, so that the reputation gained *secundum quid* ends being said *simpliciter*, without a fallacy. Usually, the general context determines what aspect *y* is under evaluation. For this reason, the *y* often remains implicit. Furthermore, the context of the evaluation is essential: the very same act could justify quite different reputations. For instance, going to a library to read books could be a very normal act, for a middle-class boy, or a matter of shame, for a professional criminal (see Goffman, 1990, p. 13). The community or, more weakly, the social network is expressed by the *c* in the formula. At this stage, the community plays a different role from that seen above. In the first case, the community's interest is a necessary condition for *x* to have a reputation, instead here the community plays the role of perceiving the value and conserving its measure. Finally, the reputation is not simply the value in itself, assuming that there is such a thing, rather the *socially perceived* value (of course, not said in a sensistic way). It is also important to notice that the social network measures and conserves the reputation in a nonlinear way (see e.g. the Matthew effect, Merton, 1968). This opens, within the social ontology, the important field – yet to be studied – of the distinction between grounded and ungrounded reputations.

The general form of reputation, despite some superficial similarities, should not be confused with Searle's Status Function Declaration, "X counts as Y in C" (Searle, 2010). The most obvious distinction, from a speech act perspective, is that R is not a Declaration, though it can be expressed through such a social device. "I give this Chianti 2013: 96" is a declaration that states a rating which, given by a recognized expert such as Robert Parker, spreads through the network and influences the wine stakeholders, saying that Chianti 2013 is excellent. One should however notice that even Parker does not have the power to state *the* reputation, though he can deeply influence the value collectively perceived. The reputation is a quality that emerges from the social network, so that there is no single social agent able to fully control it. Furthermore, from the point of view of ontology, the distinction is that while the Status Function Declaration institutes the social *entity*, the R formula gives the measure of a social *quality*. Therefore, they are irreducible to one another.

Reputation is not pursued just as such, but always in comparison with the reputation level of the peers. It is not an absolute value; it is always contingent, and relative to context and time. This establishes a mobile rank system and with it the agent has the possibility to desire to increase its own position. A well-recognized physician, for example, could be striving

to increase his reputation, as high as it may be, if he is in competition with a well-known colleague. A good reputation, if not confirmed through time, could fade away and it usually does, especially when time decreases the fitness. For this reason, for example, the reputation of a good soccer player is destined to lower as he grows old or if it turns out he is not training properly. A good reputation gives good opportunities or at least provides the evaluated entity with a good social rank within the field of the matter evaluated. The general ranking rule (RR) is that the higher the rank, the better the accessible opportunities.

3. The imperative to improve the reputation and the moral refusal of it

Considering RR, it is not surprising that people try hard to maintain and even to improve their reputation. The imperative of reputation comes into two versions. The first is "Act in such a way to maintain your good reputation" (IR1) and the other, of course, is: "Act in such a way to improve your reputation" (IR2). The second is usually more demanding and challenging for the agent in charge (who could be, for example, a marketing department employee). The adoption of one rather than the other imperative depends on social pressures on the agent and on its ambition. These two imperatives (IR1 and IR2) are social norms. Indeed, they both depend on the need to conserve and eventually promote a social rank: their goal is to influence strategically the social network. Such imperatives are blind to values and to moral good. This, of course, does not mean they are immoral, but just that they are premoral or, better, social. They are relevant both for charitable organisations or businessmen and for professional killers or ravagers. A professional killer, while hiding his true identity, will do his best to let the "right" people, from his point of view, know about his deeds. There may seem to be social reasons not to comply with IR, because "nothing is so unimpressive as behaviour designed to impress" (Elster, 1983, p. 66). Elster's remark, however, does not harm IR as such, in neither of its forms, it just shows the disaster of a strategic behaviour, unsuccessful in hiding its true goals.

The moral refusal of IR, on the other side, especially in its strongest version (IR2), for the sake of brevity could be designated as the anti-whitewashed tomb law (Mt 23,27). The strategic behaviour, even when it respects other moral laws and derived maxims (e.g. not to harm the people that could reveal the agent's trick, Origgi, 2016, p. 1), seems to be at least morally questionable. The social agent is not just ignoring the virtues of modesty and temperance, it is on the threshold of pride. Acting selfishly, it pursues its own interests to improve its appearances, if necessary despite the truth. It becomes fake, losing itself in a lie. The other people are manipulated through the strategic action which tries to hide the truth or to sell the appearance as true. The problem with IR is not with its ends, but with it as a rule to be followed. If one increases his own reputation, good for him. The problem arises when IR becomes the only or main reason for action. What can be fine and acceptable if it is an unintentional consequence of an intentional act, is here rejected if it is intentionally pursued. The increase of reputation should be supervenient on acts aimed at ends other than reputation. The *parvenu* is sanctioned by the community because he tries hard to gain a reputation not supported by his modest origins. There is a social sanction, because he tries to occupy a place in the social network he is not truly deserving. But this is not all. There is also a moral sanction in so far as the *parvenu* is trying, usually with modest if not hilarious results, to hide his origins. This attempted deception is morally regrettable.

4. The ways out of the dilemma

IR, on one side, and the anti-whitewashed tomb law, on the other, pose the social agent a difficult dilemma. It is not the simplistic alternative between *being* (authenticity) or *having*, in this case a good reputation (Fromm, 1973), where to be morally good one must choose the first. In fact, from the ontology of reputation, since reputation is a *perceived* value, it seems to be morally legitimate to improve a perception which is not committed to any objective value.

Where would the lie be, if there were no objective value the reputation should restrict to? If, in the social reality, *esse est percipi*, the perceived reputation is the truth. Also, social motives are often connected with the moral ones. And indeed, from a moral perspective, gaining a better reputation or maintaining a good one could help doing good things. For example, the Catholic Church had to deal with a moral dilemma initially solved covering cases of sexual abuse to avoid a crisis of consciences, as it turned out from 2002. To defend its reputation was a matter of moral rather than social concern. Or, on the other side, for a corporation to lose its good name because of a scandal, could trigger an economic crisis off, with workers fired. That is why there could be moral reasons aside the social ones for IR. After all, the reasons that make not clear which of the horns to choose are not weak, and that is why many adopted and tend to adopt IR as pre-empting its alternative.

A first classical way out of the dilemma comes from the field of the social normativity according to which it is necessary to stop increasing the reputation, to stop pursuing IR2. Its reason is the potential collapse of reputation, which results after the discovery of a fake. This also shows that in social reality *esse* is not just *percipi* and that an ungrounded reputation could be a serious problem to deal with. The mechanism of the reaction to betrayed trust punishes those who brag. From this perspective, the prudential need not to get an ungrounded reputation comes from self-interest, it is strategic and not moral. To have a reputation of a boaster is negative. At the same time and on the contrary, it is useful to be considered someone who avoids getting an ungrounded reputation. These two moments, the negative and the positive, are strong mechanisms for a strategic self-limitation. Also, it is important to consider that this is not effective with IR1 which already realizes a moderate attitude.

A second way out of the dilemma comes from the idea that moral normativity pre-empts social normativity in case of a conflict. Social bonds and social networks can become hell for mankind without the moral care for the good (Sartre, 1944).

For this reason, IR can be applied up to the point where it does not enter into conflict with what is required by morality.

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