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1 The so-called "ontological problem" of norms

1   According to Carlos Alchourrón and Eugenio Bulygin,[1] the history of legal philosophy is criss-crossed by two competing conceptions of norms, that they name the "hyletic" (i.e., semantic) and the "expressive" (i.e., pragmatic) conception respectively.[2] Each of them has different implications for the relationship between norms and logic.[3]

2   (1) On the hyletic conception, norms are semantic, proposition-like, entities. Both, norms and propositions are meanings, i.e., purely "abstract" entities. While propositions are the meaning-contents of cognitive or descriptive sentences, norms are the meaning-contents of prescriptive (normative, directive) sentences.[4]

3   (2) On the expressive conception, norms are pragmatic entities, since they are the output or result of prescriptive speech acts.[5] The nature of such an output, however, is far from clear. It seems that the word "normative" could refer only to certain speech acts, not to their products that have nothing specifically normative about them, and whose nature is not well defined.[6]

4   According to Alchourrón and Bulygin's presentation, these two conceptions claim to offer a solution – two incompatible solutions, indeed – to one and the same problem: in von Wright's language, "the ontological problem of norms".[7]

5   On a closer view, the so-called "ontological problem of norms" seems to be a conjunction of two different (and partially independent) problems:[8]

(*i*) determining the conditions for the existence of a norm,

(*ii*) determining what kind of entity a norm is.

6   Both problems are by and large discussed in the works of von Wright, Alchourrón, and Bulygin, as well as Kelsen, Klug, and Ross. Obviously, the first problem concerns what could be labelled as a "genetic" issue, that is, the process of the production of norms: how are norms "born", how do they come into existence? The second problem, on the

contrary, raises an issue concerning the product itself: what kind of entity is the product of the process of the production of norms?[9]

7   The first question seems to admit two (and maybe only two) competing answers: (*a*) norms acquire existence because of some kind of fact; (*b*) norms exist independently of whatever empirical fact.[10]

8   The second question too seems to admit two alternative answers, *prima facie* independent of the preceding ones: (*a*) norms are sentences;[11] (*b*) norms are the meaning-contents of sentences.[12]

9   It seems to me that each of the two conceptions, as pictured by Alchourrón and Bulygin, responds to one of the questions underlying "the ontological problem of norms", but not the other. At any rate, none of them responds satisfactorily to both questions. In particular, the pragmatic conception is related to the "genesis" of norms, while the semantic one is related to their nature.

10   If I am right, then, after all, the two conceptions are not necessarily incompatible.[13]

2 The genesis of norms

11   The subject of the pragmatic conception is the process of production of norms, but – at least according to Alchourrón and Bulygin's formulation – it has nothing to say about the nature (the "ontology") of the product.[14]

12   In the Italian language (but the same holds for other languages) the word "comando" (command) can refer, depending on the context, to either the act of commanding or the content of such an act, i.e., what is commanded.[15] There is no such ambiguity, on the contrary, in the usage of word "norm": a norm is the content, result, or product of a normative act (a norm-producing act); nobody would name "norm" the normative act as such.[16] A norm is one thing, a norm-formulating act is quite another thing.

13   This is why a norm cannot be identified *sic et simpliciter* with a speech act. It is quite plausible, rather, to identify a norm with the result of a speech act: namely, a normative speech act, i.e., the act of formulating a norm.[17]

14   However, it seems a matter of course that the product – and the "means of production" at the same time – of a speech act is but a linguistic entity in the strict sense (a syntactic, not semantic entity), that is, a sentence – although supposedly a meaningful sentence.

15   From this standpoint, norms are but meaningful sentences. Until now, however, nothing has been said about these particular meanings and the nature of meanings in general.

16   On the one hand, we did not exclude the existence of prescriptive meanings (i.e., norms, assumedly neither true nor false) side by side with descriptive meanings (i.e., true or false propositions) and maybe other kinds of meanings.[18]

17   On the other hand, we did not assume any ontological commitment concerning the nature of meanings. One can simply maintain meanings to be not entities, but relationships (dyadic predicates), namely, the relations of synonymy between two sentences, the interpreting sentence and the interpreted.[19]

18   Especially in the legal domain, one must distinguish between sentences and their meanings.[20] The reason why, however, is not that sentences and meanings are entities of different kinds – the reason is that there is no one-to-one relationship between them,

since a given (ambiguous) sentence can express more (alternative) meanings, one and the same meaning can be expressed by two or more (synonymous) sentences, and so forth.[21]

19   In reference to legal norms, Scarpelli wrote:[22]

> [W]e could paradoxically say that norms do not exist, they do not exist as separate entities, independent of interpreting processes. A norm is but the result of an interpreting process, it can be expressed in no other way than ascribing it to a sentence or set of sentences.

20   Remark, however, that no interpretation is possible without something to interpret – there are no meanings without meaning-bearers.

3 The nature of norms

21   The subject of the semantic conception, in turn, is the product of the norm creating process; it says nothing about the process itself, and that is not accidental.

22   On the contrary, this is because such a conception is usually (although contingently) coupled with the (strictly metaphysical) tenet that meanings, e.g., propositions, are abstract entities whose existence is completely independent of the sentences that express them,[23] in such a way that meanings are not the products of any processes of production – they exist independently of whatever process.[24]

23   In fact, according to a widespread idea, propositions have a completely a-temporal existence, independent of their actual formulation. In the sense that, e.g., the proposition that the earth turns around the sun was true before anyone formulated it, and since it is true, it would be true even if no one ever formulated it.

24   It seems to me, however, that this view confuses the existence of a proposition with its truth-value. Sure, the proposition that the earth turns around the sun was true before Nicolaus Copernicus. But in what sense did it "exist" before Copernicus? In no sense at all, I submit.[25]

25   Perhaps this view supposes a counter-intuitive concept of existence. In common parlance, we use "existent" (real, not abstract, not imaginary) to refer to any entity capable of causally interacting with the world. I see no plausible reason to depart from this common usage.[26] A proposition exists if, and only if, it was actually formulated.[27] Once more: no meanings without meaning-bearers.[28]

26   At any rate, even if this view were plausible for propositions, it cannot be applied to norms, unless one accepts some form of "normative cognitivism", i.e., the idea that norms depend (not on acts of will, but) on acts of cognition.[29]

27   From the standpoint of (ethical and legal) non-cognitivism,[30] norms are human artefacts: they are "made" by people, not "given" to them.[31] As a consequence, no moral or legal norm exists without a norm-creating act. There are no norms if nobody "posited" (or at least formulated[32]) them. "No imperative without an imperator".[33] Echoing Bulygin, the existence of "whatever norm [...] is contingent".[34]

28   As far as legal norms are concerned, the widely accepted view in modern legal thinking, since Bentham and Austin, is that norms only exist when, and only when, someone – the "sovereign", or a delegated authority – created or promulgated them. In other words, generally speaking, modern legal thinking assumes a pragmatic conception of legal

norms or, better, of their genesis: the existence of any norm depends on a norm-producing act.[35]

4 An eclectic view

29 As I said, if this is correct, then the two conceptions of norms are not necessarily incompatible.[36] It makes sense maintaining that norms are meanings and, nonetheless, that they acquire existence only through speech-acts.

30 From this standpoint:

(*a*) norms are the meanings of sentences used to prescribe (semantic conception), but at the same time

(*b*) no norm exists without a sentence expressing it (pragmatic conception).

31 Thus, a norm is a proposition-like entity not in the sense that it has an a-temporal existence,[37] but only in the sense that norms, just like propositions, should not be confused with the sentences that express them. A norm is nothing other than the meaning of a sentence,[38] therefore an interpreted sentence[39] or, if you prefer, the result of the interpretation[40] of a sentence.[41]

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NOTES

1. Alchourrón & Bulygin 1997, 1981, 1984 and 1989. See also Bulygin 1988.

2. I find Alchourrón and Bulygin's terminology ("hylétic" vs. "expressive" where the first term derives ethimologically from Greek "hyle" or matter, via Husserl's phenomenology) obscure. It seems to me that the opposition "semantic vs. pragmatic" can substitute that terminology without any loss of sense. Cf. González Lagier 2001: 62 ss. The two conceptions are discussed by Ferrer Beltrán & Rodríguez 2011: 30 ss.

3. I do not deal with such implications in this paper. Moreover, I do not deal with the relationships between conceptions of norms and conceptions of legal cognition, which are discussed in Troper 1989.

4. This view is widespread within Italian analytical legal philosophy of 20th century. See, e.g., Scarpelli 1953: ch. I; Bobbio 1958: ch. III; Tarello 1974: part II. These authors

distinguish between "descriptive propositions" (i.e., propositions *tout court*) and "prescriptive propositions" (understood not as propositions about norms, but as norms).

5. Cf., e.g., von Wright 1963: 116 ss). See also Searle 1969 and, most of all, Kelsen 1981 [1962], 1989 [1965] and 1991. Cf. also Ross 1982 [1941].

6. According to the pragmatic conception, the semantic content of a prescriptive act is but a proposition. However, norms cannot be seriously identified with (true or false) propositions.

7. Von Wright 1963: 107.

8. *Partially* independent, since the solution of the second problem necessarily conditions the solution of the first one (and probably *vice versa*). For example, if norms are a-temporal entities, asking for their genesis does not make sense.

9. A suggestion in this sense can be read in Mendonca 2012.

10. The first answer is connected with legal positivism, while the second is connected with (some) natural law doctrines.

11. In this context, the term "sentence" is used not in the sense of *sentence type*, but in the sense of *sentence token* (more precisely, one should say "utterance", inasmuch as a sentence is, strictly speaking, a class of utterances).

12. See Alchourrón and Bulygin (1989) who distinguish "norm-communication" (which presupposes that there is a relation between normative authority and the addressee), "norm-prescription" (which corresponds to an assertion), and "norm-lekton" (which corresponds to a proposition). Conte (1980) offers four concepts of norm: deontic sentence (that is, a *sentence type*), deontic utterance (a *sentence token*), deontic proposition (which corresponds to a proposition), and deontic status (which is the normative correspondent of a fact or a state of affairs, that is, of the reference of a proposition). Ferrer Beltrán and Rodríguez (2011: 35) distinguish four conceptions of norms: syntactic (norms as sentences), semantic (norms as meanings), syntactic-semantic (norms as interpreted sentences), and pragmatic (norms as the result of the prescriptive use of language).

13. The two conceptions are not incompatible as conceptions of norms. I do not discuss the issue of whether they are incompatible from the point of view of deontic logic. By the way, as stated by Searle (1969: ch. 2), the semantic and the pragmatic analyses of language are not incompatible, but complementary.

14. According to Troper (1989: 53) such a product is but a command.

15. Mendonca 2012: 124.

16. Guastini 1989. Many misunderstandings concerning the relationships between law and logic depend precisely on the non-distinction between speech acts and their products. See, e.g., Kelsen 1989 and 1991; Ferrajoli 2007. See Gianformaggio 1987. Logical rules apply – *if* they do – to the language of law, to norms (or, more plausibly, to propositions about the satisfaction or "doability" of norms). They do not apply to normative acts, which are facts. Logic rules language, not the world. Moreover, deducing is not deciding. Cf. von Wright 1991.

17. I am talking about norms in general, not about legal norms. In the legal domain, things are more complicated: formulating a norm is not sufficient to "introduce" it into a legal system.

18. For example, questions, requests, promises.

19. Hernández Marín 1999. The relations of synonymy, however, are not independent of interpretation; rather they are the result of interpretation – they are "made" (by interpreters), not "given" (to them).

20. That is, between the sentences (the legal "provisions") contained in the legal sources and the norms which are derived from them by means of interpretation.

21. Cf., e.g., Alchourrón & Bulygin 2007: 218 ss. However, the distinction between sentences and meanings (especially between normative sentences and norms) is a *topos* of the theory of interpretation. See Tarello1974: part II; Guastini 2011 and 2014a: ch. IV.

22. Scarpelli 1985: 570.

23. Alchourrón & Bulygin 1981: 96: "In this conception, norms are not language-dependent; they can only be expressed by linguistic means, but their existence is independent of any linguistic expression. There are norms that have not yet been formulated in any language and that perhaps will never be formulated. A norm is, in this view, an abstract, purely conceptual entity."

24. Independently of both the speech acts that formulate propositions or norms and the speech acts that interpret (ascribe meaning to) descriptive or prescriptive formulations. See Caracciolo 2009: 183 ss., 1996: 223 ss. Caracciolo's tenets are discussed in Guastini 2016.

25. Sure, propositions and norms can be conceived not as linguistic, but as mental entities: objects (or products) of thinking. In such a case, however, neither are entities susceptible of knowledge – and in this sense not "existing" – before their formulation in a language.

26. Berto 2010: ch. IV; Hernández Marín1998: 41.

27. Hernández Marín 1998: 50: "a proposition is the sense of a sentence; in absence of sentences, there are no propositions [...] for a semantic entity to exist, there must be an expression of which the former is a sense or meaning" (the original is in Spanish). This view can be traced back to Quine 1961.

28. Moreover, no meanings without interpretive (i.e., meaning-ascribing) acts. See Scarpelli's (1985: 570) quote at the end of the previous section. Interpretation, namely legal interpretation, however, is a subject for a different paper.

29. This is the view of natural law doctrines. See Bobbio1965: ch. VIII (natural law theory understood as a cognitivist meta-ethics).

30. Legal non-cognitivism is nothing other than legal positivism. (Nowadays, it is also called "the thesis of the social sources of law".)

31. Scarpelli 1989: 461.

32. This is the concept of the "factual existence" of a norm, which must not be confused with the "legal existence" of a norm. As I have said already, the articulation of a norm and its introduction into a legal system are two different things. See Guastini 2010: ch. XXIV. Different concepts of the existence of norms (including their factual existence) are discussed in Bulygin 1995: 200 ss.; Alchourrón & Bulygin 2007: 221 ss.

33. Kelsen 1989. Von Wright (1963: 116) put it well: "prescriptions originate, come into existence, through a peculiar mode of human action".

34. Bulygin 2010: 285.

35. However, in the legal domain, only *expressed* norms originate from norm-producing acts, since jurists admit the existence of *non-expressed* (so-called "implicit") norms, derived form the expressed ones by means of various arguments (some of which are deductive, but most of which are non-deductive, such as the argument *a contrario* or the argument by analogy).

36. González Lagier 2001: 66.

37. It is a matter of course that norms have a temporal existence within a legal system, since any legal norm can be derogated and/or declared null and void, and in this way lose its (legal) existence.

38. Tarello 1974.

39. Norms are interpreted sentences according to Alchourrón & Bulygin 1971. That means, if I understood correctly, that the existence of a norm depends on the existence of both normative sentences and their interpretation. ee981/1991a, 1984/1991b and 1989/1991c.use of languageon), and the deontic statusresseegs.

40. I am alluding here to the distinction between two senses of "interpretation": one referring to the interpretive activity, the other to its product. See Tarello 1976.

41. One could say that, in this sense, the existence of a norm depends on language twice: on the one hand, it is dependent on a speech act of formulation, on the other hand, it is dependent on the speech act of interpretation. Guastini 2014b: 303 ss. ee981/1991a, 1984/1991b and 1989/1991c.use of languageon), and the deontic statusresseegs.

ABSTRACTS

The author analyses the distinction between the hyletic and the expressive conception of norms. His main goal is to reject Alchourrón and Bulygin's thesis that these conceptions offer two incompatible solutions to one single problem. He argues that these conceptions deal with two different and partially independent issues. One issue regards the "genesis of norms", that is, the process of their production. The other issue regards the "nature of norms" and, therefore, the product of that process. The author concludes that these conceptions aren't necessarily incompatible, even though one's proposed solution to one of the problems somehow conditions her response to the other problem.

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