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**Norms, Analogy, and Neoconstitutionalism**

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## Expressing Norms

On Norm-Formulations and Other Entities in Legal Theory

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Maribel Narváez Mora\*

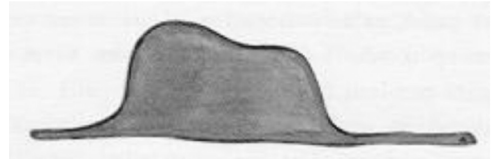
## Expressing Norms

### On Norm-Formulations and Other Entities in Legal Theory

The distinction between norms and norm-formulations commits legal theorists to treating legal norms as entities. In this article, the author first explores the path from meaning to entities built by some analytical philosophers of language. Later, she presents a set of problems produced by treating norms as entities. Whatever type of entities we deal with calls for a clear differentiation between the identification and individuation criteria of such entities. In the putative case of abstract entities, the differentiation collapses. By changing the notions of the intension and extension of words by extensional and intensional aspects of what we talk about, the author outlines a methodological programme for Law and Legal Theory. That programme is based in the identification of normativity.

**Key words:** norm, norm-formulation, abstract entity, identification and individuation of entities, extensional vs. intensional

*My Drawing Number One /.../ looked like this.*



*I showed my masterpiece to the grown-ups, and asked them whether the drawing frightened them.*

*But they answered. "Frighten? Why should anyone be frightened by a hat?"*

*My drawing was not a picture of a hat. It was a picture of a boa constrictor digesting an elephant.*

Saint-Exupéry (1974: 7–8)

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## 1 NORMS AND NORM-FORMULATIONS AS ENTITIES

In Legal Theory it is quite common to distinguish between norms and norm-formulations.<sup>1</sup> The distinction is based on the thesis that there is no one-to-one correspondence between the formulations contained in a legal text and the norms expressed by them: a norm can be expressed through various norm-formulations, and a norm-formulation can express different norms.<sup>2</sup>

Assuming that one thing is the legal norm and another thing the formulation by which the norm is expressed<sup>3</sup> leads to questions such as “What kind of entities (“things”) are norms?” If legal norms are not legal texts produced by legislation, but *what is expressed by norm-formulations*,<sup>4</sup> then we are naturally led to start an ontological enquiry about the “nature” of the entities that are expressed by such formulations.

The distinction between norms and norm-formulations mirrors the well-known one between meaning and syntactic form, between propositions and sentences, and is constructed employing certain specific categories taken from analytical philosophy. This kind of treatment, which seemed to afford some important advantages, was inspired in the past century by the linguistic turn. If we move our philosophical focus from the objects of knowledge, seen as named essences, to the sets of entities resulting from the use of concepts, we are able to clarify conflicting positions and contribute to philosophical progress.

The door was thus enthusiastically opened to linguistic and conceptual analysis.<sup>5</sup> Since what a term names is made dependent on how this term is defined, norms will be one thing or another by virtue of the meaning of the word “norm” – of the concept of norm – in question. The main purpose of such a method of analysis, for example in Rudolf Carnap’s semantics, was to debunk unscientific, metaphysical<sup>6</sup> positions. However, given that what we refer to depends on our definitions, semantic clarification, at least by itself, does not remove the onto-

1 Several synonyms of *norm-formulation* are available, including *disposition*, *legal text*, *expression of a norm*.

2 A rich combination of options relating to norms and norm-formulations can be found in Guastini 1992: 15, Guastini 1993 and Guastini 2004: 99–103.

3 According to an assumption that is not universally acknowledged, e.g. Jadacki, norms are verbalizations of obligations: “Obligations are verbalized by means of imperatives, norms, or declaratives sentences /.../ The sentence /.../ ‘The person B should cause S to occur’ [is] a norm. The main method of expressing (thetic) obligations is a *norm*.” See Jadacki 2013: 69.

4 Implying that a specific response is predetermined by the very question we can read: “If a rule is not a rule-formulation, and if we state rules by means of rule-formulations, then surely *what a rule is must be what is expressed by rule-formulations!* /.../ At this point the pressure to declare ‘Rules are abstract entities’ is very great”. Baker and Hacker 1985: 41.

5 For an in-depth treatment of the scope of conceptual analysis in Legal Theory see Raz 1998.

6 In the second half of the twentieth century, the works of Saul Kripke and Hilary Putnam disputed whether, by way of definition, metaphysical necessity could be made to disappear.

logical commitment for those who claim that referring relations take us from language to *what there is*. The point will be perceived as problematic only if the undertaken commitments are uncomfortable. Presumably, each conception will find the type of entity that meets its own ontological and epistemological needs.

The efforts of the Empiricists were aimed at preventing the incorporation of abstract entities into their ontology. But the systematic use of the available empirical ontologies seems to lead into the rule-following problem. Such a problem obliges us to accept that norms are objective abstract entities that are privately captured or nothing at all.<sup>7</sup>

What is advocated in this paper can be stated in a simple and direct way: legal norms are not entities of any kind. Saying that legal norms are entities of some kind is philosophical nonsense.<sup>8</sup> I do not intend to argue that what we refer to by using the word “norm” does not exist,<sup>9</sup> but that by speaking of norms, and using them, we do not need to accept any kind of entity (empirical, abstract, material, ideal, or factual<sup>10</sup>). The case of *norm* is similar to the case of *joke*. The word “joke” is not the name of a type of entity: jokes are not entities of any kind, but they are linguistically expressed, and we are able to distinguish the joke from the words used to tell it. Neither norms nor jokes are entities.<sup>11</sup>

One could argue that no one really holds that legal norms are entities. It would only be a manner of speaking, a merely heuristic recourse. Legal Theory, the reasoning would continue, would not be interested in any simple objects, but in complex social realities, and only for the purposes of simplification and convenience it would refer to norms as to entities. After all, no one is required to use a concept of a norm resulting from defining the word “norm” as the “*entity that is so-and-so*”. The concept of a legal norm provided by Legal Theory, one can claim, is much richer. It is descriptive sociology<sup>12</sup> and not merely linguistic

7 Cf. Kripke 1982: 54.

8 See Wittgenstein 1937, Hacker 1996 and Narváez 2010.

9 I will not consider here the variety of concepts of existence, although I am certainly not concerned with the formal concepts of existence of a class or of an element of a class.

10 To understand this position, let us compare the idea that norms are entities with a case of non-existent entities: witches. If someone says that witches are women with extraordinary powers under a deal with the devil, or defines the word “witch” by saying that it expresses the concept of a woman with extraordinary powers under a deal with the devil, it makes sense, after certain types of research, for her to conclude that witches do not exist. She may also present her conclusion claiming that witches are not entities of any kind. But that would be equivalent to saying that the predicate “being a witch” is not satisfied by any woman, that “there is nothing that satisfies the property of being a witch” or that the extension of the word “witch” is the empty set. What I’m saying is that the concept of norm is very different from the concept of witch: the second, but not the first, refers to a (non-existent) entity.

11 Later on, I will try to present the analogy in greater detail in order to make the core idea of this paper more intelligible.

12 As is well known, Hart (1961) purports to take into account social practices through such a method.

analysis, one may argue, that provides the input for a legal-theoretic conception of a norm.

Such reasoning would only be successful if membership and inclusion relations were mistakenly treated as equivalent. Selecting those norms that result from a set of complex social practices to generate subsets of legal norms does not make the norms belonging to these subsets complex social practices. When considering such practices, the distinction between the norms, *products* of a complex social practice, and the formulations used to express them remains untouched.

It should be noted that in presenting a philosophical or legal conception stating that norms are not any type of entity no external thesis is held. Indeed, to put forward such a thesis would first involve the provision of criteria for identifying some entities of any kind and then the denial of those entities' existence after the appropriate research. With extensional predication terms, that would clearly result in a contradiction, tantamount to saying "these entities (pointing to such and such things) do not exist". The same point could be rephrased in the set-theoretical vocabulary by saying that the set of norms is empty. The key point of the discussion is to clarify that although it makes sense to assert that there are infinite norms does not to say that they are any kind of entity.

My proposal is to put forward the following conception: it makes no sense to assert the ontological character of norms. What is advocated can be seen as a metaphysical position – a grammatical or conceptual standpoint, depending on the philosophical map in which it is inserted. It is not a true thesis about a material world nor about a world of abstract objects, but a rule of representation, an expression of sense, or a philosophical statement.<sup>13</sup>

If my aim were proving a thesis about an empirical or abstract world, the strategies might be different. For example, I might elaborate a test that proves that norms and norm-formulations do not fit in any ontological and epistemological available classifications. Another strategy could amount 1) to comprehensively examine the treatment of the distinction between norm and norm-formulation in the literature, 2) to consider the ontological commitments for each of these two elements and 3) to prove that under no ontological treatment could norms work as they actually do. But to propose an alternative that allows talking of existence without ontology and that offers the needed concepts is much more problematic. The underlying representation schemes – the concepts that each philosophical work displays and that should be considered – are not consistent with each other and the route of my proposal could only be carried out with partially equivalent elements of such works.

13 See Narváez 2002.

Therefore, I will briefly present:

- a) *précis* of the aspirations of analytical philosophy to rid itself of ontological commitments and the related difficulties;
- b) the problem of treating the concept of norm under the intension / extension scheme of analysis;
- c) an alternative scheme that recognizes that the meaning of what we do is not a matter of entities of any kind, and finally
- d) a purely programmatic proposal to apply this different methodological framework in Legal Theory.

## 2 AN ASPIRATION OF LOGICAL EMPIRICISM THROUGH ANALYTICAL PHILOSOPHY OF LANGUAGE

The question “What kind of entity are norms?” seems an extravagance, given that we have a much simpler one: “What are norms?”. However, in the framework of the analytical philosophy of language,<sup>14</sup> the two questions deserve different treatments. Following the Medieval logical tradition, the method for dealing with questions such as “What is x?” or “What are the x?” was to use real definitions, and particularly the Aristotelian definition *per genus proximum et differentiam specificam*. The first step consists in identifying a category or general class (the *genus*) to which the *definiens* belongs, the second in pointing out which traits (the *differentiae*) distinguished it from other items in that category. Real definitions aim at defining the true meaning of a name – *deffinitiones quid nominis* – or the true descriptions of the essential characteristics of an object – *deffinitiones quid rei*.<sup>15</sup>

Those who considered the discussions concerning real definitions to be sterile, envisaged in the new analysis of the relationships between words and meaning by Gottlob Frege, Bertrand Russell, Ludwig Wittgenstein and Carnap – among other architects of the linguistic turn – a chance for philosophical progress. These analyses were based on making explicit the meaning of the expressions through verbal definitions, according to which the relationship between words and their meanings is not essential but arbitrary. With verbal definitions, the criteria for the use of words in a language are provided, either through a description of the common usage or by a stipulation. Once the meaning of the words is clarified or established, mere verbal discussions – those in which each contestant attributes a different meaning to the same word – will

14 See Dummett 1982, D’Agostino 1997 and Glock 2008.

15 Cf. Robinson 1954: 152–156, Belvedere et al. 1979: 6–7 and Tarello 1980: 183.

be avoided, it would be possible to increase the knowledge of the object of discussion. More importantly, it will be possible to discover when assertions – understood in light of certain definitions of their terms – are not truth-apt, and therefore should not be incorporated into cognitive or scientific discourses.

The arbitrariness of the relationship between words and meaning is well known in recent history of philosophy, and was strongly advocated in Ferdinand de Saussure's *Cours de linguistique générale*. Note that Saussure's linguistic treatment of the words turned them into an inseparable union of signifier and signified. The signifier was conceived as the acoustic image of the word and the signified as the concept that the sign means. This is important, because what the linguistic relationships (considered as such) made arbitrary was the association of a determined concept or meaning with that acoustic image or signifier, and not the association of a meaning to a word.

In the field of linguistics, the question of whether the equivalence between the signs A and B, in a scheme of the type  $A=B$ , was correct, was answered in terms of equivalence between languages, as it ordinarily functions in translations.  $A=B$  is a correct equivalence if, being A and B different signs, both express the same concept or meaning.

In analytical philosophy this issue became much more complex. Frege started from contemplating the relationship of identity in schemes of the form  $A=B$ , wondering whether signs or objects were related in them. Evidence in favour of the claim that the relationship was between signs is the different cognitive value of  $A=A$  – a tautological expression – and  $A=B$  – a contingently true or false expression. If equality relates what the signs refer to, were  $A=B$  to be true, its cognitive value should be the same as  $A=A$ . It seems, therefore, that the relation is established between signs, that is, A and B, names that refer to the same object. The identity of reference would be the justification for the equivalence.

At this point, however, considering the arbitrariness with which the signs refer to objects, Frege understood that the expression  $A=B$  just shows the way of designation we use. The information obtained from the equivalence would be purely linguistic. Again, unless A is different from B (where A and B are intended as signs), then the cognitive value of  $A=A$  and  $A=B$  should be the same. It is necessary, therefore, that the sign, in addition to having a reference – as designated by the sign – has a sense,<sup>16</sup> that is, a certain way of presenting the selected object. Thus Frege concludes that in order for an identity statement to be informative, it is necessary that the difference between signs corresponds to a difference in the way of presenting what is designated.<sup>17</sup>

16 See Wienpahl 1950: 483–484.

17 In Anthony Kenny's (1995:127) words: "In 'Sense and Reference', Frege says that a statement of identity can be informative only if the difference between the signs corresponds to a difference in the mode of presentation of what is designated".

Nominative expressions are those signs or sets of signs that have as their reference an object, in a very broad sense, and as their “sense” a particular form of presenting that object. Predicative expressions, in turn, have as their reference a concept or function, and as their sense the incomplete part of a thought that serves as the criterion for determining the truth or falsity of an expression in which a nominative expression appears as an argument of such predicative expression.<sup>18</sup> This statement, however, is somewhat risky, since Frege did not develop any notion of sense for predicates.<sup>19</sup> Predicates or general terms are, in Fregean vocabulary, non-saturated expressions.

Frege’s model is summarized in the following scheme:<sup>20</sup>

Signs	Sense	Reference
Nominative expressions, logical names, singular terms or saturated expressions	Linguistic form of presentation of objects, Individual linguistic descriptions	Objects
Predicative expressions, logical predicates, general terms or non-saturated expressions	Non-saturated part of a thought or incomplete sense of a thought	Concepts, functions
Sentence expressions, assertive sentences or names of the Truth and the Falsehood	Content or thought	Truth values (objects)

Frege’s construction was interpreted as a model in which signs were understood as names of entities – their references – and this generated some difficulties, among which was the idea that complete assertive sentences were names of truth values. To overcome issues like that, in the paper *Meaning and Necessity*, Carnap, as a key point of his method, proposed to understand ‘an expression, not as naming anything, but as possessing an intension and an extension.’<sup>21</sup>

18 Cf. Wienpahl (1950: 486–487): “Frege’s discussion leaves us with the distinction between sense and referent, and with a clear meaning for the latter but none for the former. Since the sense of a sign is distinguishable from the objective elements (referent) and the subjective elements (conceptio, in Frege’s usage) connected with its employment, and since we do not know clearly what sense is, it has been regarded as a subsistent entity”.

19 However, Kenny (1995: 118, n. 9) highlights a brief commentary from Frege’s *Posthumous Writings* (1981: 119): “The unsaturated part of the thought we take to be a sense too: it is the sense of the part of the sentence over and above the proper name”.

20 Frege himself drew a diagram in a letter to Husserl (dated March 24, 1891). About this topic, see Wiggins 1984: 126.

21 Carnap 1947: v.



Carnap maintained that, despite the differences between his work and that of Frege, by whom he was inspired, the Fregean notion of sense (*Sinn*) and his notion of intension were assimilable in non-oblique contexts, while Frege's notion of reference (*Bedeutung*) and his notion of extension worked the same way.

However, the idea that referring led to extra-linguistic elements was not explicitly supported by Frege, while Carnap made it explicit.<sup>22</sup> According to Frege, there are two fundamental ontological non-definable categories. In the third column, they appear as references: objects and functions (or concepts). The references of nominative expressions and sentence expressions are objects. The references of predicative expressions are functions or concepts.

The sense of an expression can be understood by a competent user of the language at issue. When we grasp the sense of an expression, we can know which the truth conditions of the corresponding formulated assertion are. But in order to achieve certain knowledge, a reference is needed to reveal the semantic value of the assertion, i.e. its truth value.<sup>23</sup>

Frege's considerations about the connection, *via* reference, between language and the world, seem to place him into a realist ontological position, as asserted by M. Dummett:

For Frege, then, we really do succeed in talking about the real world, a world which exists independently of us, and in virtue of how things are in that world that the things we say are true or false: the thoughts that we express are true or false objectively, in virtue of how things stand in the real world – in the realm of reference – and independently of whether we know them to be true or false.<sup>24</sup>

It has also been claimed that Frege reviled the German idealist tradition of his time, and so such a conclusion is strengthened. However, other considerations do not find it necessary to reach that point.<sup>25</sup> Frege himself justifies the need to take into account the reference, appealing to the intention of those who use assertive sentences:

[...] in order to justify mention of the reference of a sign it is enough, at first, to point out our intention in speaking or thinking. (We must add the reservation: provided such reference exists).<sup>26</sup>

It is curious that Carnap, in developing his semantic method, explicitly recognized the extra-linguistic character of reference while also he claimed that it

<sup>22</sup> Carnap 1947: 19.

<sup>23</sup> Carl 1994: 117.

<sup>24</sup> Dummett 1973: 198.

<sup>25</sup> See Sluga 1977, Resnik 1979 and Carl 1995.

<sup>26</sup> Frege 1892: 9.

was possible to treat ontological matters as internal to a linguistic framework. Carnap introduced his model as follows:<sup>27</sup>

- 4-12. Two predicates *have the same extension* if and only if they are equivalent.
- 4-13. Two predicates *have the same intension* if and only if they are L-equivalent. /.../
- 4-14. The *extension of a predicate* (of degree one) is the corresponding class.
- 4-15. The *intension of a predicate* (of degree one) is the corresponding property.
- /.../ If this is applied to the predicate 'H' in  $S_1$ , we obtain:
- 4-16. The extension of 'H' is the class Human.
- 4-17. The intension of 'H' is the property Human.

One of the main purposes that Carnapian method, made explicit in his 1950 work *Empiricism, Semantics and Ontology*, aimed at reaching was to clarify how language can be used to refer to abstract entities without abandoning philosophical Empiricism. In his opinion, empiricists' fear of embracing more entities than those compatible with their scientific postulates came from not having clearly distinguished between what he called "internal" and "external" questions relative to a linguistic framework. He proposed analyzing talk about these types of entities as a creation of new ways of speaking subject to new norms; that is, he proposed to build a linguistic framework. This would allow separating questions about the existence of new types of entities within the frame -internal questions- from questions concerning the reality of the system of entities understood as a whole -external question-.<sup>28</sup>

Both the language about things and that about numbers and propositions constitute linguistic frameworks. The acceptance of each of these frameworks implies, in turn, the acceptance of appropriate ways of formulating, contrasting, rejecting or taking as true specific statements.<sup>29</sup>

Each linguistic framework enables the formulation of internal ontological questions, which will be settled either empirically or logically. Thus, a logical justification will be given to logical issues and empirical justification to empirical issues, depending on the type of theory we are dealing with. When a question arises about the ontological status of the entities incorporated in the linguistic framework, it has an external character. According to Carnap, even if external questions seem to have some kind of priority – because they ask whether the entities at issue possess an independent nature, or whether the class that incorporates them is empty or not –, they are actually pseudo-questions: an appropriate answer to such questions doesn't amount to formulating true or false assertions into a system about the reality of the entities, but to accepting

<sup>27</sup> Carnap 1947: 18–19.

<sup>28</sup> Carnap 1950: 426.

<sup>29</sup> Hence the "principle of critical tolerance", Carnap (1950: 434): 'Let us be cautious in making assertions and critical in examining them, but tolerant in permitting linguistic forms'.

or rejecting the framework as a whole. And this, after all, is a practical concern, not a theoretical one.<sup>30</sup>

Carnap's proposal involves distinguishing between internal questions, such as "Is every prime number the sum of two even numbers?", and external ones, such as "Do numbers exist?", and arguing that the latter could not receive a theoretical answer, since they can't be understood in the light of any linguistic framework.

### 3 ONTOLOGICAL COMMITMENT

The ontological commitment is an answer to the question of what we do when we "talk" about some kind of object, by the mere fact of using a language in which we refer, at least apparently, to such an object.

The explanations that allow W.V.O. Quine to criticize Carnap's position are based on the denial of the synthetic/analytic distinction, as presented in *Two Dogmas of Empiricism*. The two dogmas supported by verificationist empiricism were, according to Quine, reductionism (or translatability) and the synthetic/analytic distinction, and these were directly related to each other. The ability to make sense of a statement from the perspective of such empiricism required verification conditions, and these could only be empirical or logical. Thus, to make sense of the expressions by which we apparently do not refer to empirical objects, it is necessary that they can be translated into other expressions whose reference is clearly empirical. An ontological reduction was so achieved through certain semantic norms.

Quine agrees with Carnap in recognizing that it is one thing to ask which entities are assumed by a theory, and another to ask whether certain entities actually exist. However, he contests the way in which Carnap presents the construction of linguistic frameworks. According to Carnap, to build a linguistic framework

The two essential steps are [...] the following. First, the introduction of a general term, a predicate of higher level, for the new kind of entities, permitting us to say of any particular entity that it belongs to this kind (e.g. "Red is a property", "Five is a number"). Second, the introduction of variables of the new type. The new entities are values of these variables; the constants (and the closed compound expressions, if any) are substitutable for the variables. With the help of the variables, general sentences concerning the new entities can be formulated.<sup>31</sup>

Quine argues that given this construction there are two ways of understanding the question "Are there any such and such things?" The first, consists in con-

30 Carnap 1950: 432.

31 Carnap 1950: 429–430.

sidering it external: according to Quine, a categorial question is normally posed before building the linguistic framework, and concerns the desirability of new linguistic forms. The second way consists in constructing it as an internal issue, a subclass question, because it does not exhaust ‘the range of a special style of bound variables’.<sup>32</sup>

But categorial questions can become subclass questions by means of stratification: what is an external or categorial matter can become an internal or subclass matter. According to Quine, the same Carnap would not deny this triviality; but that goes against what the German philosopher attempts to prove: statements that are usually considered ontological claims, such as “physical objects exist” or “there are classes”, are merely analytical (or contradictory) statements in a given linguistic framework.<sup>33</sup> This is precisely what constitutes the second dogma of empiricism: statements of a certain kind, analytical statements, are confirmed for logical reasons.

According to Quine, accepting that the debate about the usefulness of a linguistic framework is a pragmatic question of tolerance fails to achieve the two intended purposes. It neither allows us to enjoy the systematic benefits of abstract objects without having to endure these same, nor substantiates the idea that the acceptance of such objects is a linguistic convention somehow distinct from serious opinions about reality.

The way to avoid the ontological commitment, says Quine,<sup>34</sup> has been based on holding the synthetic-analytic distinction, as if there were cases of statements whose truth depends solely on language: but this is not possible. From the empiricist point of view, the way to understand the truth of statements is to consider that it depends partly on a linguistic component and partly on a factual one. In his words, ‘in the extreme case that the only thing that matters is the component language, the statement is analytic’;<sup>35</sup> and this is the case with ‘physical objects exist’ and ‘classes exist’ when analyzed internally without semantic ascent.<sup>36</sup>

In short, both Quine and Carnap could agree that to admit a type of entities is to decide to quantify variables that take such entities as values.<sup>37</sup> In Carnap’s opinion, however, this has never been a factual question, but rather the choice of a linguistic framework or of an appropriate conceptual scheme. From Quine’s point of view, instead, distinguishing the ontological question – about what

32 Quine 1966: 207.

33 Quine 1966: 210.

34 Quine 1966: 203: ‘When I inquire into the *ontological commitments* of a given theory, I am merely asking what, according to that theory, there is’.

35 Quine 1951: 461.

36 The holistic position of Quine (1951: 452) has the same bases.

37 Quine 1953: 39 ss.

there is<sup>38</sup> – from about the convenience of accepting a linguistic framework, is a dogma: the distinction must rather be understood as a matter of degree along a continuum.<sup>39</sup>

## 4 THE PROBLEM: NORMS AS ENTITIES

Given this philosophical frame, the problem that the reification of norms generates is ultimately as follows. We need to distinguish between norms and norm-formulations because the same formulation can express different norms, and the same norm can be formulated in different ways. If the norm is not the sentence, text or formulation that expresses it, it will be something else, and that will depend on the concept of norm in place. If we assume Carnap's semantic model, once we determine intensionally the predicate "norm", we will need to specify what integrates the corresponding class, but it would be useless to merely say that the class of norms contains norms. When asked to give instances of norms, we have no choice but to offer normative formulations. However, normative formulations are not norms. By keeping the distinction between the expression (norm-formulation) and the expressed (norm) – whatever belongs to the extension of the predicate "norm" – we are lead to an infinite regress. To avoid this result, the concept of norm must be modified so as to norms could be not linguistically formulated, and consequently grasped through some (bizarre) methods. Actually, the occurrence of this infinite regress is another version of the philosophical problem of rule-following,<sup>40</sup> and the reason why that does not occur in extensional cases is that a clear difference between the identification criteria and individuation criteria is in place.<sup>41</sup> Notice that very often we talk about the identity of ob-

38 In Quine's view, "what is there?" expresses the simplicity and complexity of the ontological problem. Cf. Quine (1970: 189): 'A curious thing about the ontological problem is its simplicity. It can be put in three Anglo-Saxon monosyllables: "What is there?". It can be answered, moreover, in a word – "Everything" – and everyone will accept this answer as true. However, this is merely to say that there is what there is. There remains room for disagreement over cases; and so the issue has stayed alive down the centuries.'

39 Cf. Quine (1951: 462): 'Carnap, Lewis, and others take a pragmatic stand on the question of choosing between language forms, scientific frameworks; but their pragmatism leaves off at the imagination boundary between the analytic and the synthetic. In repudiating such boundary I espouse a more thorough pragmatism. Each man is given a scientific heritage plus a continuing barrage of sensory stimulation; and the considerations which guide him in warping his scientific heritage to fit his continuing sensory promptings are, where rational, pragmatic.'

40 This version of the problem of norm-following is more akin to that presented in 1982 by Caracciolo 2009.

41 The study of evidence in Criminalistics and Forensic Sciences differentiates between class characteristics (identification) and individual characteristic (individualization). To identify

jects as provided by definitional criteria for the use of words, but epistemically there is a huge difference between offering a criterion of identification of a type of object and to offer a criterion of individuation of one of those objects among the others of the same type.

If we try to use Carnap's method regarding the predicates "norm" and "norm-formulation" an obvious starting point is to accept that they are neither extensionally nor intensionally equivalent. We can try some semantic substitutions so as not to limit ourselves to consider that the intension of the predicate "norm" is the property of *being a norm*, that is, we can stipulate some definitions.

#### Concept of norm (1)

Intension of the predicate "norm": Normative qualification of an action or state of affairs.

Extension of the predicate "norm": The class of normative qualifications of actions or states of affairs.

#### Concept of norm (2)

Intension of the predicate "norm": Interpreted norm-formulation.

Extension of the predicate "norm": The class of interpreted norm-formulations.

#### Concept of norm (3)

Intension of the predicate "norm": Interpretation of inscriptions.

Extension of the predicate "norm": The class of interpretations of inscriptions.

Now we need to provide, albeit tentatively, normative qualifications of actions or interpreted norm-formulations, or interpretations of inscriptions, to be treated as members of the class at issue (or, in the Fregean vocabulary, references of the nominative expression "norm"). Let the list be represented by:

"Smoking is prohibited"

"No smoking allowed"

"[...]"

#### Concept (1)

The members of the list, by virtue of being members of the class of norms, cannot be descriptive statements or propositions. But, more importantly, neither

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the remains as human through certain characteristics and to individualize those remains as Sara's corpse through DNA testing can exemplify the main idea. Kaye 2009.

can they be norm-formulations. The class (extension) of norms cannot contain norm-formulations as its members. Furthermore, we cannot treat this class as extensionally equivalent to the class of norm-formulations precisely because the starting point of the distinction is the lack of correspondence between norms and norm-formulations. Yet undoubtedly the list as such is nothing more than a set of norm-formulations.

### Concept (2)

This second concept makes the class of interpreted norm-formulations a subset of the class of norm-formulations. We already know that this means that in a universe of discourse consisting only of norm-formulations, a partition has been made between those that have been and those that have not been interpreted. The above list could be something like the subset of articles on a legal text on which interpretations have been performed, but not the interpretations themselves. With this definitional change we could say that the class of norm-formulations contains uninterpreted formulations and the class of norms contains interpreted formulations. But now we have to specify the relationship between the two classes, which cannot be coextensive. If the class of interpreted formulations is a subset of the class of formulations, they are still formulations.

### Concept (3)

Here we have a class of interpretations that results from assigning a meaning to each norm-formulation. However, we have again a list of expressions formulated in a language, and the starting point obliges us to distinguish an expression from its sense.

That characteristic of norms (and legal norms), that norm-formulations and what they express are two different things, can in fact be found in all areas of social life. Heuristically, we can consider an analogy between norms and jokes<sup>42</sup> to clarify the *non-entity* character of norms. It is noteworthy that establishing an analogy cannot count as the defense of a homology. This is important because in the study of intensional issues, requiring an analogy to behave as a homology does produces perennial philosophical problems (or conceptual cramps).<sup>43</sup>

In the case of jokes too it's possible to distinguish the formulation of a joke from the joke itself: in fact, we can tell the same joke in different ways. We can also endorse a semantic substitute – a specific intension – for the word “joke”, e.g. “pleasantry”, “sally”, or “brief narrative or set of words that makes me laugh”. If we want, we can say that these semantic substitutes are different meanings of the word “joke”. But by saying that, no decision has been made about the

42 Besides jokes, this claim would also be valid for beliefs, intentions, desires or misunderstandings.

43 As an example of this type of problem, we can see what in the field of deontic logic has made the analogy between alethic and deontic operators.

equivalence between the concepts of joke; it could be the case they express the same concept of joke or not. These substitutes may be different interpretations of the *same* concept or expressions of *different* concepts. We will return later to this issue.

Let us consider the well-known joke about philosophers:

Causes of death of philosophers:

Frege: Fell under a concept

Ockham: Shaved beyond necessity

Paley: Bad design

/.../

Although I can tell the same joke – a joke (sense) in different ways (through different signifiers, different languages or different words) – I cannot individualize the joke without resorting to some sense: otherwise there would be no joke.

In addition, whether you are telling the same joke or not does not depend on the abstract nature of any entities. A different version of a joke can be told, but if it is similar enough to the first version, it does not surprise us and does not make us laugh like we did when we first heard the slightly different version of the same joke. We say then that we don't laugh because we already know the joke.

It is possible to conduct empirical research on jokes – on practices where jokes are told, invoked, named – to offer explanations of why an occurrence makes us laugh, and to naturalize their study.<sup>44</sup> Yet note that what is not part of such a kind of research (as a scrutinized entity) is a sense. As in the case of norms, we can continue to insist that the jokes have an abstract character, as do propositions or numbers. With this insistence, we create the illusion of two independent – and related – entities. Invoking the abstract character or intensional nature of anything is, again, only done in order to claim that what matters is its significance or sense: no entity is needed.

## 5 EXTENSIONAL AND INTENSIONAL ASPECTS OF WHAT WE TALK ABOUT

Carnap said his proposal was sufficiently in agreement with customary usage,<sup>45</sup> and maybe after having been used for sixty years in countless philosophical works this has come true. Nevertheless, I guess that considering predi-

<sup>44</sup> This is what is done, for example, in works such as McGraw & Warren 2010.

<sup>45</sup> Carnap 1947: 19.



cates as names of extensions by virtue of their intensions can be confusing. A very different intuition would allow us to distinguish extensional and intensional aspects of *what we talk about*. What we talk about has intensional and extensional aspects, but the *meanings* of the expressions we use to talk do not. Otherwise we would be treating what *we express and refer to with* our words as the *meaning of our words*. Of course if there is anything that can be expressed with our words, it is the meaning of our words: but that has no social, political, or legal interest, and it barely has philosophical relevance.

To put it another way, the problem<sup>46</sup> consists in having treated the schemes of Frege and Carnap as similar. For Frege, “norm” as a nominative expression (singular term) refers to an object, but “being a norm” as a predicative expression (general term) refers to a concept. For Carnap, “norm” and “being a norm” are predicates that, depending on their intensions, will have one or another extension. According to Carnap, the scheme of a membership criterion to an extensional class, which serves as identification criterion of the entity in question, should be different from the criterion for the individuation of the entities within the class.<sup>47</sup> Yet this methodological demand cannot be satisfied when abstract entities are in question. Norms and jokes cannot be identified without being individuated; purely intensional reality cannot be identified without being individuated: I cannot identify a norm without individuating it, I cannot identify a joke without individuating it.

How has this been done in Legal Theory? On one hand, by using formal notations: by letters that function as names or symbolic substitutes representing norms. Expressions like “the norm N1” or “N1” serve to exemplify and individuate norms. On the other hand – as it happens in ordinary language without difficulty – by identifying texts with extensional criteria: from the code of Hammurabi – a piece of diorite 2.4 meters high – to art. 427 of the Treaty of Versailles – the written text located after the number 427 in a document, identified extensionally.

Am I simply saying that predicates, concepts, or meanings are not extensional? This was already known. The problem is to keep looking for the entities named by words: if we need entities that cannot be extensional, let them be abstract. The point is that we do not need entities of any kind if we do not treat the reference of the word “norm” as an object or set of objects, or if we do not look for entities integrating the extension of the predicate “norm”.

46 The price Legal Theory paid for such confusion is known as the problem of the *semantic sting*.

47 Thus when, for obvious reasons, an empiricist rejects such entities, he looks for as many empirical entities as possible that he considers related to what he wants to talk about – that is to say that the empiricist is committed to the naturalization of his theories. See Haack 1993 about the different aims involved in the task of naturalizing philosophy.

What is advocated here is that what we talk about involves both extensional (matter, energy) and intensional (meaning or sense) aspects, but that the predicates we use when talking are not names of extensional or intensional entities. It is very curious that the arbitrary character of the “acoustic images” of words in natural languages can be used as the basis for answering ontological questions. As Saussure held, signifiers that are used to convey meaning in language are arbitrary, but concepts are not. Concepts are contingent, not arbitrary, and like any other aspect of social reality, dependent on the occurrence of certain social processes. We have the concepts we do, but we could have had others. Not only has the logical empiricist confused the arbitrariness of signifiers with the contingency of concepts, but so also has the culturalist who extracts colorful ontologies from narratives and discourses. We neither build Kock’s bacillus by language<sup>48</sup> nor discover the transmission of tuberculosis from definitions.

It is true that in using language we name entities for which we have identification criteria: but we primarily identify senses. That is, we understand what we see, hear, or read, and understanding is not produced by coming into contact with entities.

To avoid the problems caused by the type of conceptual analysis with a “concept of concept” that separates words, meanings and entities, we can resort to the notion of internal relation between meaning and cases of correct use of words.

The internal relationship is established between:

A. What we talk about

B. Extensional aspects of what we talk about: The extension eventually involved in what we talk about.

C. Intensional aspects of what we talk about: The sense we give to it or that it has.

With regard to A, the relevant question here is *what* we talk about (*aboutness*): this table, or tables, this mountain or mountains, a belief or beliefs, a legal norm or legal norms, a joke or jokes. But I can also talk about the tables that are sold at very low prices in Ikea, a mountain I would have liked to climb, the legal norm that the judge would not apply in that case, or the jokes about the causes of deaths of philosophers that run around the internet. The productivity of language always allows us to create new concepts or senses. But the productivity of language cannot generate extensional entities.

With regard to B, what we talk about can have extensional aspects or not. Tables can be made of wood or plastic, while beliefs and norms are not material.

48 A curious case can be found in Latour 2000.

With regard to C, what we talk about certainly has sense for someone. The sense is shown, for example, by replacing words with equivalent words according to someone's view.

We establish semantic equivalence relations, which are usually partial and temporary, between what we talk about and the sense we give to it. But we do not establish such equivalences for semantic reasons. Transformations of those equivalences in language are what determine, in effect, that the extensional aspects of what we talk about are how they are. So we can also talk about fiction, or about what does not exist. Of course, such transformations allow us to speak of both substitution and evolution in the concepts, and criteria for deciding when a substitution or change has taken place are not immanent to language.<sup>49</sup>

The word-meaning-entity scheme not only hinders the debate on the theory of norms, but is also a source of other philosophical puzzles. Both the paradox of the constitution and the paradox of analysis, as well as the rule-following problem, are based on the maintenance of this scheme.

Regarding the paradox of the constitution, the problem is that the predicate "being a sculpture" is not extensional, although sculptures have an extension. Everyone understands that sculptures are extensional<sup>50</sup> and that the concept of sculpture is intensional: but we fall prey of an equivocation when we say that the extension, the materials from which the sculpture is made are not what constitutes its being a sculpture because "being a sculpture" is not the same as "being the material the sculpture is made of". Of course not: they are two different predicates – although they could become equivalent predicates in a language (for a subject or a community) for reasons that may be explained.

In the case of the paradox of the analysis, the problem is similar to that of the constitution. If in the analysis A expresses the same as B, the analysis is trivial, but if it does not, then it is wrong. What is wrong, as we have seen, is to hold that "being a sculpture" expresses the same as "to be the material of which the sculpture is made": it will certainly never be trivial to provide a full or partial sense equivalent of "being a sculpture".

The rule-following problem is solved by clarifying the internal relationship between a rule and its application – in our case, between the rules for a correct use of the predicate "being a sculpture" and their application to sculptures. That relationship, which can be read as the fact of constituting an instance of statue, cannot be found in the material stuff the statue is made of, but in the way we

49 The reason why Frege's "concept of concept" does not work for natural language – which we know he did not intend it to – is its complete assimilation with the concept of function: 'What, in the function we call non-saturation, in the concept we can call it, its predicative nature.' Frege 1892–1895: 119.

50 When new technologies make sculptures with holograms, the extensional character of the identification will work in the same way.

correctly treat it. The internal relationship between stating something and the correct cases of identifying that something, or between norms and their cases of application, is not fixed, but shown by use (giving opinions, making judgments, etc.). Interpretations, for example, are offered as a justified replacement of one expression of the norm by another. Knowing what norms are expressions of is shown in the cases we call “following the norm/rule”. But this cannot be proven by the inspection of extensional aspects of what you do, say, or write.

The lack of extensionality in internal relations does not prevent intensionality from providing real constrictions. Indeed, internal relations are very powerful limits: they are limits to our understanding. I can say that, for some people, bullfights are cultural and artistic expressions, while for others they are expressions of cruelty and mistreatment of animals. But I have to be able to extensionally identify what is going on as one thing or the other, something that can be seen under both considerations, and that is not always possible. For example, if

(1) the relationship between “bullfight” and “cultural and artistic expression” is internal (for someone, in a context, ...etc.), and

(2) the relationship between “cultural and artistic expression” and “expression of cruelty and mistreatment” is exclusionary (for someone, in a context, ...etc.), then

(3) a “bullfight” cannot be considered (seen, understood, perceived as...) an expression of the cruelty and mistreatment of animals.

## 6 METHODOLOGICAL PROGRAMME: LAW AND LEGAL THEORY WITHOUT ENTITIES

Requiring Legal Theory not to reify norms for philosophical reasons could be criticized as practically irrelevant. Who cares if legal theoretical models reify norms?! If legislators, judges, or the police will continue doing what they do, fulfilling this request would only serve to modify specialized academic programs or sell new textbooks.

I think that a methodological proposal for a Legal Theory that rules out the reification of legal norms and that fits in turn into ordinary practices of legal training is useful not only for a better understanding of legal practice but also in empowering the agents participating in it. Here I would just sketch some programmatic lines of a renewed agenda.

The program has to make viable the dynamic identification of legal correctness and incorrectness. That means an identification of a constructed legal normativity that is always questioned and mutable in “real” interaction processes where “legal elements” are present. By “real” interactions I mean that their

effective implementation gives life to the transactions experienced by certain individuals, in specific areas and with concrete problems. In turn, saying that “legal elements” are present in such interactions involves the invocation of legal formal categories by those individuals.

More contested is the characterization of normativity as a central aspect of social practices. Generally speaking, when something has a normative character, it is subject to judgments of correctness and incorrectness. Our available semantic substitute for “norm”, because it involves less theoretical commitments, is “normative qualification of actions”. If we think about who made these qualifications, when and how they are performed, in which circumstances they are welcome, how are they secured, what the reactions of those who ignore them are, in which cases they are suspended or excepted, then we are performing a dynamic identification of norms, that is, considering a normative practice as a process of negotiation of sense. Of course, all our social activities participate in this dynamic.

In the case of law, relevant qualifications are generated through formalized institutional processes, but that is always a starting point and not a destination, because the concrete ways of using those qualifications are settled in interactions and negotiations of a very diverse nature.

The identification of normativity (of correctness and incorrectness) allows us to understand the sense of the practice that participants are generating in a dynamic and open way. This may appear homogeneous or dispersed in the light of the standards used by researchers, which are always located in their own space of normality.<sup>51</sup> Therefore, the subjects involved and the spatial and temporal context to be taken into account in negotiations about meaning will be marked by specific interest.<sup>52</sup>

The data of interest in this area has an intensional nature and are the result of taking into account shared beliefs, mutual expectations, or second order beliefs – that is, the result of knowing the attitudes of individuals, their claims and commitments.<sup>53</sup>

A conception of law that takes as its focal point the normative qualification of actions (with different backgrounds, lifetimes, purposes) that are invoked, dealt with and negotiated by a community, will have to face an obvious challenge. Is a similar conception “legal”? Are we not dealing with a case of gen-

51 Generally, interest in normal conditions comes from the breakdown of such conditions. The so called “Hidden Normality” is detected when it disappears unexpectedly. But this is an issue that is part of the researcher’s epistemological apparatus. For an analysis of the role of conditions of normality in the context of the construction of agents’ identity, see Medina 2006: 154–165.

52 Cf. the chapter “On the Chronology (and Topology) of the legal” in Melissaris 2009: 129–149.

53 See Narváez 2004: 336–341. Bicchieri 2006: 8–28. Melissaris 2009: 109–127.

eral sociological knowledge?<sup>54</sup> The relevance of that challenge is based on the point criticized here, the reification of norms: the assumption that “norm” is a term that applies to entities that have discrete character, are countable, and can be used in expressions like “/.../, a new norm”, “/.../ two norms”, “not so many norms” etc., has been incorporated into legal theory beyond the expressions’ metaphorical value. Such an assumption, in turn, makes it possible to classify norms into partitions, creating subsets of moral, legal, social, grammatical, and chess norms, among many others. But, as I said, to assume these traits would require two conditions to operate in research on legal norms.

The first is the establishment of identification criteria: what is a legal norm? The second is to count on individuation criteria: what differentiates a legal norm from any other norm, legal or not? Whenever we face extensional realities (physical objects, empirical entities), we can count on classification systems that allow us to individuate entities extensionally: what differentiates Earth from any other planet is (at least) its spatial-temporal location. But given the intensional character of norms (and also of jokes, greetings, misunderstandings, insults, etc.), we are faced with a dilemma that fosters the distinction between norms and normative formulations. We can use an extensional criterion of individuation – say a written sentence, a spoken word, an inscription: in which case the purpose of individuation is thwarted inasmuch as all such empirical entities are open to more than one single attribution of sense. Alternatively, we can use an approach that points to the sense of that entity, in which case we can no longer treat norms as “discrete objects” of knowledge or packages of meaning. As I said, this difficulty is a legacy of combining semantic empiricism and conventionalism, with an epistemology based upon the linguistic turn.<sup>55</sup>

Since Legal Theory aims at the study of legal norms and not other types of norms (otherwise it would be purely sociological research), it seems that the legality can only be marked by the presence of formal characteristics, as would be the existence of a legislative text and its mention-invocation in reasoning and justification. Yet, as we said, this is insufficient, because multiple interpretations are assignable to such texts (codes, sets of provisions, guidelines, or catalogs). If, as here understood, all our practices participate in normative dynamics, it seems that we need a criterion of “demarcation”. A plurality of conflicting normative qualifications, used, questioned, negotiated in processes to

54 This is a strong demand in the study of legal pluralism: ‘Where do we stop speaking of law and find ourselves simply describing social life? Is it useful to call these forms of ordering law? In writing about legal pluralism, I find that once legal centralism has been vanquished, calling all forms of ordering that are not state law by the term law confounds the analysis. The literature in this field has not yet clearly demarcated a boundary between normative orders that can and cannot be called law.’ Merry 1988: 878–879.

55 Cf. Winch 1958: 21.

achieve solutions seems to have to be explained and understood avoiding the problem of “demarcation”. However, could we not adopt the inverse approach? Why shouldn’t the study of the interactions that take place within the scope of the application of law be legal? What the application of law is or is not is also negotiated in producing legal sense.

It must be recognized that the possibility to make *everything* and *nothing* legal in a particular socio-political context comes from a characteristic of intensional domains. According to the received view in Legal Theory, we can use three analytical categories: the expressions, their sense, and the objects to which these expressions refer. The existence of such objects does not depend in any way on the availability of meaningful expressions to name them. However, when this model is applied to the analysis of intensional reality, that is, its meaningful aspects, the use of these three categories just creates problems: rules, jokes, (greetings, misunderstandings, or insults) depend entirely on meaningful expressions by which we invoke the normative existence of the very intensional reality we are analyzing.

If we want to say that different concepts of law refer to different normative practices/institutions, choosing among these concepts has to be done – and justified – for pragmatic, evaluative, or ethical reasons, but not because we recognize pre-existing entities. There is nothing outside of the practice of ascription and recognition of legal status that can count as a criterion of demarcation. What is at stake is to recognize to what extent a practice is legal while building its legal dimension. Yet this type of dispute only occurs when the recognition of the legal dimension is not automatic and invisible, or when decisions cease to converge, or, as is more usual in this context, when new agents claim their participation in this process.

Acknowledging that a formally legal normative qualification is just the same type of normative qualification as any other, is not equivalent to admitting that it is just a social qualification like any other.<sup>56</sup> It seems to be crucial to settle whether the norms are a general class and legal and social norms subclasses, or whether social norms are the general class and legal norms a subtype, just because both law and sociology have reified the reference of “norm” and produced different universes of discourse. However, the concurrence of and competition between producers of normative qualifications, ways of solving legal conflicts and assigning legal statuses, and the recognition of legal facts, take place in the social arena, within communities. In addition, production and decision range from micro-local to macro-global levels, and the former supremacy of the middle-state level is now questioned as many other structures were questioned before. Such a challenge has been incorporated into parcels of more specific legal

<sup>56</sup> See the project of self-sufficiency without autonomy for law in Croce 2012.



doctrines as clearly happened with Administrative Law,<sup>57</sup> Commercial Law,<sup>58</sup> and Tort Law. The middle space of state production is seen, then, as too affected by the global environment to be autonomous and has a decreasing incidence in multicultural local environments.

However, this whole scenario is the result of using certain representation schemes that can be modified to take relevance away from the demarcation question. In general, we use extensional schemes to characterize intensional realities without even noticing it. We think we are able to point to social or legal references by selecting sets of circumstances with certain characteristics, in the same way we point out natural references as sets of entities, located in space and time, with certain properties. Of course, social or cultural “objects” have an impact on physical extensions of all kinds; but the point is that the recognition of their “existence” takes place in the very normative practices on which their existence also depends.<sup>59</sup>

Using the rationale that understands norms as normative qualifications of actions, all one admits is that judgments of correctness and incorrectness are issued. There is neither qualification of correctness without a subject that sustains or has sustained it<sup>60</sup> nor correct/incorrect qualifications without a social community that assumes or rejects such qualifications. Actually expressing a norm, like expressing a meaning, is something done just derivatively, through texts. In practice, we follow procedures to recognize such qualifications and their authorship, although these can be questioned in turn. These qualifications can be maintained, presupposed, invoked, and used in a totally invisible way. Yet, in certain circumstances, the diversity of agents, the heterogeneity of interests, and the divergent understandings of narratives about past and present situations or future projects put the aforementioned invisibility at risk.<sup>61</sup> Notice that my reconstruction does not constitute a causal or functional explanation. I do not claim that heterogeneity or divergence generates, produces, or causes the visibility of conflicting normative qualifications, but rather that the presence of conflicting normative qualifications is identified as an expression of

57 This would apply, for example, to studies on soft-law, self-regulation, governance, etc.

58 This would be the case, for example, for studies on the new *Lex Mercatoria*.

59 This position is not similar to Edoardo Fittipaldi's normative solipscism. See Fittipaldi 2012: 9–18, where the author uses extensional vocabulary in order to “situate” the said entities, even though he treats normative ontologies as psychological. “[L]egal realities exist exclusively *in* the psyche of each individual”, “/.../ legal realities exist only *in* the psyches of each of us...” (Fittipaldi 2012: 10–11).

60 This duality (good / bad), however, is not equivalent to Teubner's binary code legal / illegal, which he says is not exclusive of national law. Cf. Teubner 1992: 1451.

61 When speaking our native language, we are keeping one of these qualifications by putting an adjective in the correct position in a sentence.



those diversity, heterogeneity, and divergence.<sup>62</sup> The interactions by which the relevance and content of this plurality is decided may be configured by elements which are diverse in origin. Thus they are considered from a particular located position and understanding. This will offer or divert some presence to the legal, and that will be realized in these very processes, hence its dynamic character. This requires a kind of judgment that seems to defy the meta-theoretical sense of legal research: a controversy can start over whether this or that is a new legal form of market regulation, or a non-legal one, or even if it is not a form of regulation. What happens is that even though it makes sense to speak of a meta-language when the object of that language is another speech, there is no way of having meta-practices: a “practice about a practice” is, if it is something, the very same practice.

The reason why this methodology does not close the door to categories and practices that are typically legal, is the evaluative weight of the term “legal”. As Mariano Croce says: ‘What is at stake here is the stock of symbolic power that is inevitably linked to the term ‘law’.<sup>63</sup> No group negotiating its position in a dynamic normative conflict – or self-evaluating its position as deserving insufficient recognition– will stop trying its claim achieves legal significance,<sup>64</sup> and that will continue as long as the legitimate monopoly of force, with its final effectiveness, remains in legal authorities.

When that is not the case, that is, when the satisfaction of the claim does not require the presence of legal elements, no one asks for recognition of legality, although such recognition could be asked for expressive reasons. Notice that the satisfaction which I refer to here has nothing to do with maximizing one specific type of achievement. It can be either symbolic capital or justice. Not only could it be explored if an interaction is built around normative qualifications that originate from institutional legal production methods, but the answers to be provided must be understandable and bearable by a legal environment if the reversal of the *status quo* is to have legal recognition.

62 A statement like “Conflicts are an expression of divergent interests” is not a theoretical statement, but the expression of a conception or a representation norm, that is, it functions as a partial definition of the expressions involved. It could also be seen as an analytic judgment from a Kantian perspective, where the predicate “being an expression of divergent interests” integrates the subject “conflicts”. See Narváez 2004b.

63 Cf. Croce 2012: xv.

64 The achievement of legal significance, like all intensional issues, is not verified by discovery, but constructed by social interactions. So either there is agreement about what does it mean to have legal significance (for example legal significance is achieved when Parliament passes a law that recognizes the rights x, y and z), and the point is to reach that situation, or the status to be modified counts as having legal significance. This task is often seen as part of judicial activism in case law systems, but also when courts are obliged to follow mandatory judicial interpretations from other superior courts.

Conceptions of law that pay attention to social practices<sup>65</sup> are best positioned to understand legal phenomena in the way outlined here. A conception of legality that is serious about the contingency of sense, its fragility and mutability will stop us from looking outside ourselves for justification and help us to take responsibility. The consolidation of new internal relationships between what we say, what we do and what is going on is usually detected when it is too late to change them, because their mechanisms of construction go hand in hand with our ability to detect changes. We detect what we see, and it is easier to see what we don't expect to see up there.

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