The Explanatory Problem of Law's Normativity: A Proposal Based on Practical Attitudes and Normative Statuses

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Abstract

The aim of this article is to analyse the explanatory problem of law's normativity and to provide a novel solution to it. In a nutshell, this is not a practical problem, but a *theoretical* problem that consists in distinguishing, explaining and relating two common claims taken as ascertained: that the law is both a matter of facts and a matter of norms. The strategy of this work begins by distinguishing three fundamental problems, which I consider are implicit in the problem of law's normativity: the infinite regress of interpretations, the gerrymandering, and the individual criterion. It continues by offering a satisfactory answer to each of them. It then ends by showing how the explanatory problem of law's normativity can be solved. The solution appeals to three distinctions, four technical notions, and three conditions of adequacy to explain general normativity, which are crucial to distinguish, explain and relate, in an adequate manner, the factual and the normative dimensions of law.

Keywords: Nature of Law. Social Normativity. Legal Normativity. Ludwig Wittgenstein. Robert Brandom.

1. Introduction

This work is devoted to the analysis of what I will call "the explanatory problem of law's normativity". This problem centres on the scenario in which the law is conceived as a social practice that is composed of two kinds of elements that are mutually related: by factual elements and by normative elements (although it would have to be specified in which senses). This problem consists, then, in distinguishing, explaining and relating both statements: that law is composed of a set of facts and that law is composed of a set of norms.

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The position that the law is composed of factual and normative elements is the starting point of this work and in this article this claim will not be defended, but only assumed; although, it has been a controversial thesis in the history of legal theory. This point has also been assumed by Juan Carlos Bayón in the first paragraphs of his book "*La normatividad del derecho*".

> The problem of law's normativity (…) is none other than to accommodate two common claims regarding the law taken as ascertained. On the one hand, that law is a social institution –i.e., a set of complex social *facts*– that can be observed and described from an evaluative neutral point of view through statements that express true or false propositions. On the other hand, that law is essentially *practical*: it appeals to the norms that are part of *existing* law to *justify* actions and decisions, that is, where justificatory practical reasonings are developed, in which apparently legal norms –whose existence is a matter of facts– operate as *reasons* for action. (…) If it is assumed that the determination of what the law provides is *both* a matter of fact and a matter of the identification of a reason for action, it can be said that the problem of law's normativity is none other than explaining how these two things are possible at the same time (Bayón 1991: 17-18)[1].

It can be seen, from this quote, that there are two different kinds of problems about law's normativity should be made here. The first one is the *practical* problem of law's normativity, which is a problem about the *reasons* that law provides to act. The second one is the *explanatory* problem of law's normativity, which is a *theoretical* (or meta-theoretical) problem about how to distinguish, explain and relate the claims that law is a social practice composed of a set of facts and a set of norms. Actually, the *practical* problem of law's normativity *presupposes* the *explanatory* problem of law's normativity; since the practical reasons offered *by* law, either to act or to justify a decision, should be linked to, or grounded in, the norms that constitute the law. Because from these legal norms will emerge the reasons offered *by* law and not the reasons offered by other systems of social norms as morality or religion[2].

> The problem arises as soon as it is affirmed that what law "is" must (legally, not morally) be applied: because if the statements through which the law is identified are purely descriptive –whatever the nature of the phenomena they are supposed to describe is– it cannot be clearly seen how they can construct justifying practical

[1] Other formulations of this problem can be found in Greenberg 2004: 157 and Shapiro 2011: 7.

[2] From this point of view, the explanatory problem of law's normativity is also different from, and previous of, the *moral* problem of law's normativity. This problem is aimed at establishing, from the point of view of judges and other legal officials, whether the identification or determination of the content of law implies or presupposes moral content –Bayón (1991: 32-33) was also explicit on this point–, and from the point of view of citizens, whether or not we ought to obey legal norms –Raz (1979: 3-27, 233-249; and 1986) was very clear on this point, also Smith (1973) and Simmonds (1979).

> reasonings, in which their conclusions constitute a certain *practical attitude*, without this attitude already being present in their premises. Alternatively, if the statements about what the law provides are already practical statements, not merely descriptive, that is, if the law is conceived as a set of *duties* (…) we should clarify how it can be in *genetic or causal relationship* with social facts that belong to the nature of the world (Bayón 1991: 19)[3].

I believe that a distinction between three different dimensions of normativity should be drawn here, i.e., the factual dimension, the strictly normative dimension, and the practical dimension. In this book, it seems that Bayón does not make a sharp distinction between the strictly normative dimension and the practical dimension. However, if it is assumed that norms are social entities –as should be maintained by anyone who does not want to commit herself to the idea that norms are entities that govern only the action of those who recognised them and consider them in their practical reasoning–, then a distinction between the normative and social dimension and the practical and individual dimension should be made[4].

Thus, the explanatory problem of law's normativity, in the first place, is based on two general claims taken as ascertained –i.e. as a matter of facts to be explained– with respect to law. On the one hand, that law is composed of a set of complex social facts and, on the other hand, that law is composed of a set of norms[5]. In the second place, that this problem, however, does not consist in determining the truth or falsehood of these two general claims, because they are commonly accepted. In the third place, that this problem, instead, consists of the complex *explanatory* matter –i.e. not a practical one– about how these two commonly accepted claims about law should be accommodated (i.e., distinguish, explain and relate) into the same theoretical approach. In other words, the explanatory task that is being sought to be carried out in a satisfactory manner contains the following four steps. Firstly, in which sense law has a factual dimension. Secondly, in which sense law has a normative dimension. Thirdly, which is the correct relation between the factual and nor-

[3] Bayón continues saying that: «the problem of law's normativity, then, can also be presented as that of explaining how two concepts or meanings in which we talk about "norms" or we assert that "a norm exists" are related to each other: on the one hand, norms as *social phenomena* that can be said to have a duration in time, that exist in this or that group, but not in another, that have been created or have ceased to exist, etc.; on the other hand, norms as *normative judgments* that are used, in practical reasoning, to justify actions and decisions» (Bayón 1991: 20). Bayón's paragraphs quoted here have been translated by the author of this article.

[4] In this article, I will only focus on the distinction, explanation and relation between the factual and strictly normative dimensions of normativity. However, I believe that the same task of distinction, explanation and relation should be carried out with respect to the strictly normative dimension and the practical dimension of normativity.

[5] The disputed question of whether or not the set of legal norms constitutes a system of norms, in some sense, is not relevant to the argument that will be developed here.

mative dimensions of law. Fourthly, all this from a systematic theoretical approach that does not reduce the explanatory terms of one of them in the explanatory terms of the other.

The explanatory problem of law's normativity has not yet been satisfactorily solved or dissolved. Theorists of law have offered different proposals for solution, but none of them seem to be completely satisfactory. In general terms, these proposals: (i) do not distinguish adequately between the two mentioned common claims[6]; (ii) they distinguish them but do not explain and relate them adequately within a systematic theoretical approach[7]; (iii) they distinguish, explain and relate them within a systematic theoretical approach but reduce the explanatory terms of one in the explanatory terms of the other[8]; (iv) or they distinguish, explain and relate them within a systematic theoretical approach, without reductions, but not in an adequate, no problematic manner[9].

The central claim of this work is the theoretical or meta-theoretical thesis that the normative dimension of law is related to the factual dimension of law through a grounding relation between the notions of practical attitudes (factual side) and normative statuses (normative side). In other words, normative statuses are contents which are grounded in the practical attitudes of social practice's participants.

The hypothesis of this work is that Bayón's proposal as well as the other proposals fail because they do not offer correct solutions for other problems related, but conceptually different and even previous, to the explanatory problem of law's normativity. Based on this hypothesis, the strategy adopted in this investigation consists of stepping backwards in degrees of generality and abstraction regarding the specific explanatory problem of *law*'s normativity. This will be done with the purpose of (i) identifying more fundamental problems, in conceptual terms, and previous ones, in explanatory terms, (ii) offering adequate solutions for each of these

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6 Examples can be found in the classical theories of natural law.

7 An example of this position might be Alf Ross's proposal in (Ross, 1958), where this author combines an empiricist explanation, based on predictions, with a "normative" but internal explanation, based on the mental states of judges. Although, in this article the possibility of an adequate explanation of the normativity based on the supposed "normativity" of the mental states is questioned.

8 Examples can be found in many legal theories, both those from an only normativist order of explanation (rationalist or religious), as those from a purely empiricist order of explanation. Each of these two orders is committed to one of the two possible directions of a reductionist explanatory strategy. On the one hand, reducing the explanatory terms of the factual dimension in the normative dimension, such as, for example, the classical theories of natural law. On the other hand, reducing the explanatory terms of the normative dimension in the factual dimension, such as, for example, John Austin's theory of law explained in terms of sovereign's mandates, based on the probability of suffering a sanction.

9 I consider Bayón's proposal as an example of this position. His proposal has been considered by many scholars as one of the most solidly argued proposal so far about the law's normativity. However, I consider that Bayón's proposal makes an important mistake. There is no space in this paper to analyse his full proposal in detail, but the mistake will be identified and briefly analysed in the third section.

problems, and (iii) facing the explanatory problem of law's normativity from a solid and systematic theoretical approach, which is based on adequate responses to those more fundamental and previous problems.

As will be seen later, on the one hand, it will be held that there are three conceptually different, independent, and more fundamental, problems regarding the problem of law's normativity. These are the three problems that, as will be argued here, together compose the full version of "the rule-following paradox". On the other hand, it will be held that, in order to offer an adequate theoretical solution to the explanatory problem of law's normativity, adequate theoretical solutions should first be offered to each one of the three problems that compose the rule-following paradox. The rule-following paradox is composing of three problems, which are conceptually different and independent between them, and also conceptually different regarding the explanatory problem of law's normativity, but whose answers should have explanatory priority with respect to the adequate development of a satisfactory solution to the problem of law's normativity[10].

The proposal developed here is explicitly committed to a general philosophical program. It works as a metatheoretical framework to address the explanatory problem of law's normativity. This is the philosophical project outlined first by Ludwig Wittgenstein and later built in a systematic and comprehensive way by Robert Brandom. Wittgenstein-Brandom's project is constructed from a general pragmatist perspective about the conceptual content expressed by speech acts, states of mind, and intentional actions. This is a theory of conceptual content which is composed of a socio-normativist theoretical position regarding pragmatics, an inferentialist theoretical position regarding semantics, and a meta-theoretical position regarding the pragmatic-semantic relationship that gives explanatory priority to pragmatics over semantics[11].

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[10] The problems of the rule-following paradox are latent in general explanations about social normativity. In addition, they are persistently found, individually or jointly, in most of the particular explanations about *legal* normativity.

[11] Brandom's theory develops completely, within a systematic philosophical theory, the pragmatist idea of Wittgenstein's that the conceptual content (i.e., meaning, in a broad sense) of speech acts, state of mind or propositional attitudes, and intentional actions are determined by virtue of the uses of pieces of language by the speakers in the course of social practices. From this basis, Wittgenstein-Brandom's theoretical strategy starts by characterizing social practices (i.e., language games, in Wittgenstein terms) and continues with an explanation of the conceptual content that speech acts, states of mind and actions acquired by virtue of the role that they play in a particular social practice. This project is ambitious and radical because it seeks not to compromise in any way what is considered the dominant tendency in the analytical theories inherited from the paradigm of modern philosophy. This paradigm consists of the idea that our language, thought, knowledge and action capacities come from, or are a product of, a supposedly more basic capacity of having representations. Instead, Brandom proposes an alternative reconstruction of these capacities, which does not presuppose our representational capacities, but rather maintains that they come from, or are the product of, another capacity considered even more fundamental: the capacity of agents (participants in social practices), implicitly manifested in the explicit use of language, to acquire and develop practical skills and abilities (Brandom 1994: preface; and 2000: introduction).

Wittgenstein-Brandom's project is particularly relevant here, because (i) it clearly identifies the three problems that compose the rule-following paradox, (ii) it offers an adequate solution for each one of these problems, (iii) and it builds adequate means to offer a solution, as will be seen, to the explanatory problem of law's normativity. In this work, this project will not be discussed or contrasted with other theories in competition. Instead, the strategy is to reconstruct some of its theoretical positions –in the way I consider most clear, brief and relevant regarding the problem under analysis– and use them to offer a solution for the three problems of the rule-following paradox and then to build, based on that, a proposal for solution to the explanatory problem of law's normativity.

This work has the following structure. In the second section, the three problems that compose the rule-following paradox will be presented and distinguished. In the third section, Bayón's proposal will be briefly presented and what seems to be wrong will be pointed out. After that, in the fourth section, the solutions to each of the three problems that compose the rule-following paradox, from a well-defined theoretical approach, will be shown. Only then, once these tasks have been fulfilled, in the fifth and final section, the explanatory problem of law's normativity will be addressed. A proposal for solution to this problem in which the factual and the normative dimensions of the law are accommodated into a solid and systematic theoretical approach, which is not committed to any of the rule-following paradox problems, will be offered.

2. The Rule-Following Paradox: Three Different and Independent Problems

In this section, the rule-following paradox will be analysed. It will be held that this paradox is composed of three different and independent problems. Firstly, "the infinite regress of interpretations problem" triggered by the "regulist" positions. Secondly, "the gerrymandering problem" triggered by the "regularist" positions. Thirdly, "the individual or personal criterion problem" triggered by some kind of "subjectivist" positions. Over the course of this section, these problems will be presented, distinguished and explained; in the fourth section, adequate solutions for each of them will be proposed.

As has already been stated in the introduction, and will be argued in the last section, the rule-following paradox contains these three problems which are different and conceptually independent between them, and also with respect to the explanatory problem of law's normativity. However, the adequate solutions for these problems should have explanatory priority in order to develop an adequate answer to the explanatory problem of law's normativity.

The infinite regress of interpretation problem has been identified clearly by Wittgenstein in the *Philosophical Investigations*. This problem affects the notion

of rules (or norms, in the vocabulary that will be used here), and consequently the identification and determination of norms, when they are understood as sufficient criteria of correctness for performances based only on the explicit formulation of a normative statement. This is "the regulist position"[12].

The problem for this position lies specifically in the case in which it is understood, correctly, that norms are criteria of correctness to particular performances but, incorrectly, that they are nothing more than explicit linguistic formulations of those criteria. Because to determine the content of a norm, and to identify the norm, we ought to interpret the norm, i.e., its explicit linguistic formulation; but once this is done, the content of the norm that has been determined, which is another explicit linguistic formulation, can be interpreted again offering a new interpretation or content, and a new explicit linguistic formulation, for the same norm. For this reason, if we understand that norms are nothing other than sufficient criteria of correctness based only on the explicit linguistic formulations or even mental intellections of normative statements applicable to particular performances, then these criteria inevitably fall into an infinite regress of the interpretations of linguistic expressions (Wittgenstein 1953: § 191, § 198, § 201c, § 218)[13].

The second problem has been firstly identified by Wittgenstein in *Philosophical Investigations* and secondly explained more carefully by Kripke in *Wittgenstein On Rules and Private Language*. However, while Wittgenstein offered a correct solution to this problem, Kripke did not.

Kripkenstein (as Kripke's sceptical interpretation of Wittgenstein's reflections is often called) has presented the rule-following paradox in a more comprehensive manner than Wittgenstein's one. In Kripkenstein version, it is possible to see clearly that this paradox not only faces the previous problem but also the following one. Wittgenstein said that:

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here (Wittgenstein 1953: § 201a).

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[12] As Brandom said: «According to this intellectualist, Platonist conception of norms, common to Kant and Frege, to assess correctness is always to make at least implicit reference to a rule or principle that determines what is correct by explicitly *saying* so» (Brandom 1994: 20)

[13] Brandom said: «If the regulist understanding of all norms as rules is right, then applications of a rule should themselves be understood as a correct insofar as they accord with some further rule. Only if this is so can the rule-conception play the explanatory role of being the model for understanding all norms. A rule for applying a rule Wittgenstein calls an "interpretation"» (Brandom 1994: 20). Before, Wittgenstein said: «There is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term "interpretation" to the substitution of one expression of the rule for another» (Wittgenstein 1953: § 201c).

Kripkenstein develops his argument from this paragraph through the use of an imaginary example related to the mathematical function "plus" or, in technical terms, "addition". The example shows that there are no past facts that determine whether when we use the word "plus" or the symbol "+", we are applying the rule of addition or another rule. For example,

> In the past I gave myself only a finite number of examples instantiating this function [plus or addition]. All, we have supposed, involved numbers smaller than 57. So perhaps in the past I used 'plus' or '+' to denote a function which I will call 'quus' and symbolize by '⊕'. It is defined by: x⊕y = x + y, if x, y < 57; and ⊕ = 5 otherwise. Who is to say that is not the function I previously meant by '+'? The sceptic claims (or feigns to claim) that I am now misinterpreting my own previous usage. By 'plus', he says, I always meant quss (Kripke 1982: 8-9).

Kripkenstein concludes that there is no past application or use of the alleged norm that really determines a norm, because any past application or use can be made compatible with another norm, as the example of addition shows (Kripke 1982: 12-21). In other words, the problem that Kripkenstein evidences consists of the predicament that there will always be many different ways of extending the previous behaviour to present or future performances or, as Wittgenstein said, many different ways of "following in the same way". Because any finite number of cases are similar to each other in an infinite number of aspects and different from each other in infinite aspects[14].

I consider this argument, together with other authors (Wilson 1998, Weir 2007, Brandom 1994), to be both independent and complementary to the argument of infinite regress of interpretations. It is independent because one might not be committed to the explanation of the norms as the explicit formulation of a sufficient criterion of correctness but might be committed to the explanation that what determines the norms is only the past behaviour of the participants of that practice, and vice versa. It is also complementary because even if we try to determine the norm without any explicit formulation, we have to appeal, according to this argument, to some previous application or use of the supposed norm based on a set of performances –grouped together in a pattern– which supposedly would determine the relevant behaviour. Nevertheless, any past performance that is proposed as an instantiation of the relevant behaviour –i.e., the pattern that relates previous performances with a new one– can be made compatible with other behaviours.

[14] If this point of departure is granted to Kripkenstein, we have immediately fallen into his trap, because he can eliminate, one by one, all the past applications or uses proposed to him as candidates in order to determine the content of the norm. If we appeal to previous applications or uses in order to establish the criterion of correctness we inevitably fall into the sceptical trap.

The criteria of correctness adopted by Kripkenstein has two elements. The first consists of appealing to the previous behaviour that the participants of a certain community manifested in the social practice; therefore, avoiding the infinite regress of interpretation problem. The second consists of appealing to the previous and regular or irregular behaviour of the participants of the social practice to assess a performance as correct or incorrect; therefore, trying to incorporate an adequate criterion of correctness. In this way, the distinction between correct and incorrect performance is drawn with regard to a parallel distinction between regular and irregular behaviour, according to some pattern of regularity. This is "the regularist position".

The problem for this position arises specifically in the identification of the pattern of regularity, because in the task of identifying the criterion of regularity a problem known as "the gerrymandering problem" appears. According to this problem, in order to establish any criteria of correctness based on the relevant previous behaviour of a community, we ought to individualise the relevant previous behaviour or, better still, the aspects that comprised the relevant prior behaviour. However, this can only be done by manipulating in some way, arbitrarily, the different aspects that would possibly comprise the relevant previous behaviour[15]. In other words, any behaviour has a large number of different aspects and, to establish the aspects that comprise the relevant one, there is no other option than to crop reality in some way, which can then mean it has the potential to be made compatible with aspects of other behaviour. Therefore, the regularist position fails to offer adequate, non-circular, criteria of correctness (Brandom 1994: 26-30; McDowell 1984: 341ss).

Kripke did not consider the answer that Wittgenstein himself offered to this problem and inferred from the gerrymandering problem some sceptical consequences, that Wittgenstein himself blocked (Wittgenstein 1953: § 201b). According to Kripke, it follows from the gerrymandering problem that language and communication become unintelligible (Kripke 1982: 62), and that the attributions of meaning themselves become meaningless (Kripke 1982: 83). Kripke came to these consequences, because after identifying and explaining correctly this problem, he did not offer a correct solution to it, because he limited the explanation of normativity to a vocabulary of causal or empirical notions, that allow us to only explain the factual dimension of norms. This is an unnecessary restriction for an indispensable theoretical vocabulary to explain general normativity. Thus, Kripke analysis failed because he did not consider, as Wittgenstein did, the possibility of

[15] The expression "gerrymandering" originally comes from the political practice of the United States of America and is currently widely used in the contexts of science and political philosophy. This term was coined to refer to the action of a North American politician who had manipulated the electoral constituencies of one of the states in order to improve the chances of his party in an election. In the mentioned contexts, this term is generally used to express the disapproval of a manoeuvre that manipulates reality –uniting, separating, dividing, etcetera– with the purpose of producing some desired effect.

explaining general normativity through a vocabulary of genuine normative notions, that allows us to explain not only the factual dimension, but also the normative dimension of norms (McGinn 1984, McDowell 1984, Boghossian 1989, Wilson 1994, Brandom 1994).

The third problem has been presented also by Wittgenstein. This problem arises when the criterion of correctness for performances depends only on what one person, individually, considers correct or incorrect. The criterion of correctness of a performance cannot appeal only to the personal consideration of someone for assessing that performance as correct or incorrect. This would make the idea of "mistake" unintelligible. Because what a person considers a mistake ends up being a mistake (Wittgenstein 1953: § 206). In other words, if the criterion of correctness depends only on what a singular person, individually, considers correct or incorrect, then this person could not be wrong in her criterion of correctness, because «as Wittgenstein says, "whatever seems right to me is right", and that means that the notion of what is right goes missing» (Brandom 2014: 62).

This problem is also independent and complementary of the other two problems. It is independent because it arises even when the problem of the infinite regress of interpretation is avoided, appealing to its implicit manifestation in social practice; and even when the problem of gerrymandering is avoided, drawing on genuine and non-circular normative notions for the criteria of correctness. This problem arises, even in that case, if the criteria of correctness are not independent of the personal consideration or assessment about what is correct or incorrect (Brandom 1994: 37). Therefore, this subjective position, which reduces norms to personal considerations or assessments, fails to offer adequate, intelligible, criteria of correctness.

3. Why Not Bayón's Proposal?

Bayón (1991) presented a proposal to explain and relate the factual dimension and the normative/practical dimension of law. It is not necessary to emphasize the extraordinary argumentative quality of this and other works from Bayón. However, his proposal does not seem completely correct, for the following reasons.

Firstly, Bayón's proposal does not seem to be completely correct because it fails on the grounds of the gerrymandering problem. Bayón began the presentation of the centre of his proposal arguing that:

> Explaining what a social rule is and under which conditions it can be affirmed that «it exists» within a group G is not a different or conceptually prior task to explaining the structure of the practical reasoning developed by the members of G considering the existence of these rules. This claim, however, may cause some suspicion of circularity: if a practical reasoning is constructed taking into account the existence

> of a rule, should it not necessarily be a logical *prius* with respect to it? If we look at it from the perspective of an isolated agent who develops his practical deliberation within G, this is indeed how things seem to be. But when that individual assumes as a fact the existence of a social rule in G, what he is assuming is the repetition of a series of behaviours, of other behaviours regarding the former, and a series of behavioural dispositions by the other members of G, many of which –although not necessarily all– adopt those behavioural dispositions (and therefore perform those behaviours) as a result of practical reasonings perform just taking into consideration the same facts. Therefore, what we have is not circularity, but *interdependence*: the behavioural dispositions of each agent are conditional on what she believes are the behavioural dispositions (equally conditional) of the other members (Bayón 1991: 450-451).

Bayón's proposal fails on the grounds of the gerrymandering problem because the notion of "behavioural dispositions" is not a normative notion, but an empirical one. Better said, this is an explanatory notion that is only able to account intelligibly for the empirical and natural dimension of norms, but not for their normative and social dimension. The problem specifically lies in that the notion of behavioural dispositions is conceptually committed to an order of explanation based only on empiricist principles that allows the development of theoretical explanations only in factual and causal terms. However, what it is needed to account for the normative dimension of social practices, as shown in the previous section, is the development of a theoretical explanation not only in factual and causal terms, but also in adequate social and normative terms, i.e., by means of adequate and not reductive normative notions.

Secondly, Bayón's proposal does not seem to be completely adequate because it seems to fail by virtue of the personal criterion of correctness problem. Bayón finished the presentation of the centre of his proposal saying that:

> Consequently, the conception of Shwayder seems particularly right to me, who presents social rules as complex networks of interdependent individual behavioural dispositions, as systems of mutual expectations that are reinforcing themselves and subsist precisely on the basis of their satisfaction in most cases (Bayón 1991: 451).

The reason why Bayón's proposal seems to fail by virtue of the personal criterion problem is that, on the one hand, the notion of behavioural disposition only appeals to the assessment of one individual agent and not the assessments of the other members of the community, this affects the *social* character of norms; and, on the other hand, if we consider social norms «as complex network of interdependent individual behavioural disposition» a problem of intelligibility appears in the way of explaining their *social* character. In other words, it is not clear enough how we can understand social norms «as complex networks of interdependent individual behavioural disposition» and these in turn in terms of «systems of mutual expectations that are

reinforcing themselves»; because the idea of mutual expectations seems to refer, on the one hand, to mental states that are lodged in the minds of each member of G and, on the other hand, to a self-reinforcing relationship between them. The way in which this would work is not really intelligible. Thus, there seems to be a problem of unintelligibility in this subjectivist and maybe communitarian but psychological or mentalist proposal. In order to this point would not be a second problem for Bayón's proposal, what is needed is a precise explanation about how the individual behaviour dispositions of the members of G, are interrelated between them to generate a system of mutual expectations that are reinforcing themselves. However, in any case, it does not seem that this can be done without appealing to causal or natural notions –i.e., psychological or mentalist notions– that reduce the normative and social dimension of norms rules in their factual and causal dimension.

4. The Rule-Following Paradox: One Solution for Each Problem

In this section, a way in which every one of these thorny philosophical problems can be solved or dissolved is presented. This is Wittgenstein-Brandom's theoretical proposal, which has been firstly developed by Wittgenstein mainly in *Philosophical Investigations,* and then systematised by Brandom mainly in *Making it Explicit: Reasoning, Representing and Discursive Commitment*[16].

Wittgenstein-Brandom's proposal offers, after rejecting the unnecessary restriction implicitly imposed by Kripkenstein, three conditions of adequacy to explain social normativity, each of which provides a distinction to deal with one of the problems presented under analysis. Specifically, the theory offers alternative a criterion of correctness (without infinite regress, without circularity and with intelligibility) based on genuine normative and not reductive notions, namely, *practical attitudes*, *normative statuses* and *social norms* (Brandom 1994: 18-66)[17].

[16] After *Making it Explicit* (1994), Brandom has been refining his proposal in books such as: *Articulating Reasons: An Introduction to Inferentialism* (2000), *Between Saying and Doing: Towards an Analytic Pragmatism* (2008), *Perspectives on Pragmatism: Classical, Recent, and Contemporary* (2011). Among the articles that should be noted, in the context of the discussion of legal normativity, there is: *A Hegelian Model of Legal Concept Determination: The Normative Fine Structure of the Judges's Chain Novel* (2014).

[17] Brandom subscribes a series of pragmatist positions that he attributes to a correct interpretation of the second Wittgenstein's thoughts. However, Brandom holds a pragmatist position that Wittgenstein did not hold. It is the rationalist pragmatism position that Brandom takes from Sellars. Later, we will see what this thesis consists of. Despite the rationalist pragmatism, Brandom's theory is built on the basis of the second Wittgenstein's project. This theory can be considered an innovative and radical theory of conceptual content (meaning, in a broad sense) that begins with a characterization of social practices, in the terms of linguistic and argumentative practices. Then continues with (in contrast to other semantic theories) an explanation of the pragmatic dimension of content (i.e., pragmatic significance) in terms of normative, social and historical interrelations among participants (in contrast to the pragmatic theories

The first condition establishes a non-circular means to distinguish between correct and incorrect performances. This condition is constructed from the gerrymandering problem. This problem suggests that we should not be committed to the regularistic position, but rather to a normative position about norms, based on a vocabulary of genuine normative notions that allow us to determine, without circularity, whether a performance has been made correctly or incorrectly. This is the "condition of normativity".

The distinction that is proposed in order to overcome this problem is one that lies between *performances* –i.e., speech acts and intentional actions– and *normative statuses* of the participants towards those performances –i.e., commitments and entitlements. This allows us to make a distinction between what is done in practice –i.e., *a performance*– and what ought to be done in practice –i.e., *a correct performance*.

> What is correct or appropriate, what is obligatory or permitted, what one is committed or entitled to do –these are normative matters. Without the distinction between what *is* done and what *ought to* be done, this insight is lost (Brandom 1994: 27).

Brandom defines the normative statuses based on the Kantian principle of practical autonomy, which states that the authority of norms over the participants is derived from their *attitudes* of *recognition* (or *acknowledgment*) toward the norms that compel them. This means that the binding character of norms comes just from the norms that they recognize or acknowledge.

> As natural beings, we act according to rules. As rational beings, we act according to *conceptions* of rules. (…) The rules do not immediately compel us, as natural ones do. Their compulsion is rather mediated by our *attitude* toward those rules. What makes us act as we do is not the rule or norm itself but our *acknowledgment* of it. It is the possibility of this intervening attitude that is missing in the relation between merely natural objects and the rules that govern them (Brandom 1994: 30-31). It must be possible to distinguish the attitude of acknowledging *implicitly* or *in practice* the correctness of some class of performances from merely exhibiting regularities of performance (Brandom 1994: 32).

In fact, the *attitudes* of *recognition* (or *acknowledgment*) of the participants are not only towards the norms that they recognize or acknowledge, but also towards the other participants, who they recognize or acknowledge, as members of the community. According to this view, each participant has the autonomy to be bound

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which explain it in terms of speaker's intentions). The theory then follows with an explanation of the semantic dimension of content (i.e., semantic content), in terms of inferential relations among pragmatic significances (in contrast to the semantic theories which explain it in terms of representations).

by norms in two different ways. On the one hand, each participant *is responsible* or *committed* to the other participants for their performances. On the other hand, when a participant makes a performance, she is granting *authority* to the other participants, because they are the ones who decide whether or not to grant an *entitlement* for that commitment to the participant (Brandom 1994: 159-160)[18].

The second condition establishes an adequate means to discern between correct and incorrect performances which is not committed to the infinite regress of interpretations problem. This condition is constructed from that problem (Wittgenstein 1953: § 191, § 198, § 201c, § 218). Wittgenstein has taught us that the notion of norms should be characterised as some sort of practical matter which is concretised or manifested in the social practice. It should not be committed to the regulist position about norms, but to a pragmatist position. This is the "pragmatist condition".

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here (Wittgenstein 1953: § 201a). It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us for at least a moment, until we thought of yet another standing behind it. What this shows is 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 1953: § 201b)[19].

[18] Brandom (2000) explains this point by linking it with the *rationalist* and expressivist principles of his pragmatist project: «It is a *rationalist* pragmatism, in giving pride of place to practices of giving and asking for reasons, understanding them as conferring conceptual content on performances, expressions, and states suitably caught up in those practices. (…) And it is a rationalist expressivism in that it understands *expressing* something, making it *explicit*, as putting it in a form in which it can both serve as and stand in need of *reasons*: a form in which it can serve as both premise and conclusion in *inferences*. Saying or thinking *that* things are thus-and-so is undertaking a distinctive kind of *inferentially* articulated commitment: putting it forward as a fit premise for further inferences, that is, *authorizing* its use as such a premise, and undertaking *responsibility* to entitle oneself to that commitment, to vindicate one's authority, under suitable circumstances, paradigmatically by exhibiting it as the conclusion of an inference from other such commitments to which one is or can become entitled» (Brandom 2000: 11).

[19] Italics have been introduced by the author of this article. See also Wittgenstein (1953: § 199, § 202). Brandom said: «The conclusion of the regress argument is that there is a need for a *pragmatist* conception of norms –a notion of primitive correctness of performance implicit in *practice* that precede and are presupposed by their explicit formulation in *rules* and *principles*» (Brandom 1994: 21); «That form is intelligible only against a background that includes norms that are *implicit* in what is *done*, rather than *explicit* in what is *said*. At least the norms involved in properly understanding what is said by rules, or indeed in properly understanding any explicit saying or thinking, must be construed as norms of practice, on pain of vicious regress» (Brandom 1994: 30). The regulist position presupposed the idea that the institution or constitution of norms and the application of norms are distinct and sequential phases in a process requiring both. First one fixes the content of the norm, and then one looks to see

The distinction that is proposed as a means of overcoming this problem is that between *normative statuses* –i.e., commitments and entitlements– and *normative attitudes* –i.e., undertakings and attributions.

> Kant's principle that we are the ones who act not only according to rules but according to a conception of them is the claim that we are not merely *subject* to norms but *sensitive* to them. This principle has been taken over here by saying that we are characterized not only by *normative statuses,* but *normative attitudes* –which is to say not only that our performances are correct or incorrect according to various rules but also that we can in our practice treat them as correct or incorrect according to various rules. Using 'assessment' to mean an assignment of normative significance –in the most basic case taking as correct or incorrect– the point may be put by saying that Kant's principle focuses demarcational interest on the normative *attitudes* exhibited by the activity of *assessing*, rather than just on the normative *statuses* being *assessed* (Brandom 1994: 33).

Normative attitudes are presented in two different ways: as *acknowledging* (*or undertaking*) of normative statuses –e.g., an explicit undertaking of one's own commitment– and as *attribution* of normative statuses (those can be done explicitly or implicitly) –e.g., an attribution of an entitlement to one of the other participants.

> The normative house has many mansions. The particular norms of concern in this work are *discursive* normative statuses, the sort of commitments and entitlement that the use of concepts involves. These norms, it will be claimed, are instituted by *social* practices. These are practices that incorporate the distinction of social perspective between two kinds of practical attitudes one can adopt toward a commitment: *acknowledging* it (one-self) and *attributing* it (to another) (Brandom 1994: 55)[20].

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which applications of them are correct, given that content. The pragmatist position, however, hold that the institution and application of norms should be understood as two simultaneous aspects of the same phenomenon rather than two diverse and consecutive phases. Institution and application of norms are, indeed, two aspects of the same phenomenon, rather than two different phenomena. For this reason, as Brandom said, «it is not possible to make sense of the notion of instituting norms independently of the notion of applying them, and vice versa» (Brandom 2014: 58).

[20] Later, Brandom makes the following clarifications regarding this point: «Two features of this simple commitment structure are worthy of note. First, for someone to *undertake* a commitment, according to this story, is to do something that makes it appropriate to *attribute* the commitment to that individual. That the performance of accepting the coin has the significance of altering the *status* of the one whose performance it is consists in the change it brings about in what *attitudes* are in order. It is by reference to the attitudes of others toward the deontic status (attributing a commitment) that the attitude of the one whose status is in question (acknowledging or undertaking a commitment) is to be understood. (…) Second, the basic notion of responsibility or commitment that is introduced by consideration of this simple practice can be understood in terms of the notion of authority or entitlement already discussed. For undertaking a commitment can be understood as authorizing, licensing, or entitling those who attribute that commitment to sanction non-performance» (Brandom 1994: 162-163).

Brandom sometimes uses the adjective "normative" to characterize also these *attitudes*, but rather they are *practical* attitudes (in the specific sense that they belong to the participant's *activities* in the *social practices*) which allows the relation of a participant's *performance* with the *normative statuses* that she recognizes for herself and the other participants recognize for her in the course of practice. Practical attitudes are manifested in practice in the way in which participants modify, guide and criticize their behaviour or they respond differently to a performance; and at the same time, practical attitudes manifest the normative statuses, for example, in the way in which the participant who made the performance treats herself as committed to or in the ways that the other participants treat the participant who made the performance, explicitly or implicitly, as entitled to the commitment that she signed when she made the performance[21].

Practical attitudes, unlike normative statuses, belong to the factual order. Practical attitudes are manifested in the behaviour of the participants during the course of the social practice, but normative statuses are not manifested in the world or, better said, they are not manifested *independently* of the practical attitudes of the participants.

> Deontic status of the sort to be considered here are creatures of practical attitudes. There were no commitments before people started treating each other as committed; they are not part of the natural furniture of the world. Rather they are social statuses, instituted by individuals attributing such statuses to each other, recognizing or acknowledging those statuses (Brandom 1994: 161)[22].

The institution or constitution of norms and the determination of the content of norms is *grounded* in the factual character of practical attitudes (Brandom 1994: 47, 292). There is nothing other than practical attitudes in the course of the social practices of recognizing or undertaking and acknowledging commitments and enti-

[21] Practical attitudes of the participants are attitudes of assessment and treatment performances, that are not necessarily made explicit in the form of linguistic expressions or speech acts (Brandom 1994: 63).

[22] This point is extremely important to understand the relation between the factual and the normative dimensions of social norms. The notion that Brandom 1994 proposes to explain this relationship is "supervenience". However, the usefulness and adequacy of the notion of supervenience has been discussed and questioned in the analytic metaphysical literature over the last ten years. Schaffer 2009 and Rosen 2010 have initiated a proliferating discussion about the good reasons for abandoning the notion of supervenience and replacing it with the notion of "grounding" as the adequate notion to explain this relationship. Epstein 2015, in turn, has questioned the notion of grounding and has proposed the notion of "anchoring" as a substitute. This article works with a notion of grounding, which will be specified in the last section. In general terms, grounding is an explanatory (non-causal) relation of metaphysical dependence that makes it possible to account for the relation between less fundamental entities and more fundamental entities of the reality. In this case, grounding is the relation of dependence that holds between the normative and the factual dimensions of social norms.

tlements. As Brandom said: «all the facts concerning normative *attitudes* settles all the facts concerning normative *statuses*» (Brandom 1994: 47).

However, although normative statuses are *grounded in* practical attitudes, the former are not reduced to the latter, because any practical attitude «is itself something that can be done correctly or incorrectly» (Brandom 1994: 52).

The third condition establishes an interpersonal, social, means to discern between correct and incorrect performances. This condition is constructed from the personal criterion of correctness problem. This problem shows that there is a risk that normative statuses of the participants (by means of which the participants individually assess the correctness of performances) are directly assimilated to norms (by means of which the correctness of performances is finally determined) and, in this way, whatever a participant considers to be correct ends up being correct. For this reason, a means of being able to avoid that situation wherein the correctness or incorrectness of the performance depends only on what is individually considered correct or incorrect should be established. The first condition established a distinction that allows us to declare correctness or incorrectness about *performances*, but the third condition establishes a distinction that allows us to declare correctness or incorrectness about the personal *criterion of correctness*. This is the "condition of objectivity"[23].

The distinction that is proposed as a means of overcoming this problem is one that lies between *normative statuses* –i.e., as seen before, commitments and entitlements– and *social norms* –i.e., criteria of correctness for performances. The claim is that norms are instituted, and their content determined, at the same time of their application, both from the interpersonal relationships among the participants of the social practice and from the inferential relations among the normative statuses recognized by the participants. From this point of view, the institution of norms and the determination of the content of norms arise from the intersection of the perspectives of the different participants and the interrelation of their normative statuses within this structure that Brandom calls "the structure of reciprocal recognition".

> Focusing on the distinction of social perspective between *acknowledging* (and thereby undertaking) a commitment oneself and *attributing* a commitment to another makes it possible to understand the objectivity of conceptual norms that consists in maintaining the distinction between the normative *statuses* they incorporate and the normative *attitudes* even of the whole community –while nonetheless understanding those statuses as instituted by the practical normative attitudes and assessments of community members. Far from precluding the possibility of conceptual objectivity,

[23] Brandom emphasizes that: «Kant underwrites not only the possibility of *mistakes of performance*, which was already claimed to be essential to there being norms in play, but also the possibility of *mistake of assessment*» (Brandom 1994: 52).

> understanding the essentially social character of the discursive practice in which conceptual norms are implicit is just what makes such objectivity intelligible (Brandom 1994: 54-55).

In relation to this point, Brandom draws a distinction between the *force* of norms and the *content* of norms. The force of norms depends only on each individual participant, while the content of norms depends on the other participants as well. The content of norms is socially determined. The participant who makes a performance has authority over the force of the norm to which she is binding, but she is not the only one who has authority over the content of the norm; instead, she is responsible for the performance she made, according to the norm socially determined by all the participants. In other words, the status of being bound or not by a norm depends on the participant who recognize some normative statuses through practical attitudes. However, the content of the norm –i.e., what the norm specifically requires– does not depend only on the participant who recognize some normative statuses, but on the social interaction among the participants of the practice, who finally determine the content of the norm. In this way, when a participant makes a performance, she implicitly authorises the other participants to assess the correctness of the performance she made and, thus, she authorises the other participants to administer the content of the norm (Brandom 1994: 52-53)[24].

The social interaction between participants, the structure of reciprocal recognition, which allows the objective determination of the content of norms, works in the following way. Firstly, a performance is made. Secondly, the performance made is linked to normative statuses through the manifestation of practical attitudes by the participants. So, when a participant makes a performance, she explicitly undertakes a commitment for that performance and, at the same time, she is implicitly authorizing the other participants to attribute to her, explicitly or implicitly, an entitlement for the commitment or to challenge the commitment, and not attribute the entitle-

[24] For example, if a participant uses the term "tellurium", she has committed herself to the concept of tellurium, the subscription of this commitment depends only on her, but the specific content of the concept tellurium does not depend only on her, but also on the other participants. As Brandom 2000 said: «Understanding or grasping a propositional content is here presented (…) as practical mastery of a certain kind of inferentially articulated doing: responding differentially according to the circumstances of proper application of a concept and distinguishing the proper inferential consequences of such application. This is not an all-or-none affair; the metallurgist understands the concept *tellurium* better than I do, for training has made her master of the inferential intricacies of its employment in a way that I can only crudely approximate. Thinking clearly is on this inferentialist rendering a matter of knowing what one is committing oneself to by a certain claim, and what would entitle one to that commitment. Writing clearly is providing enough clues for a reader to infer what one intends to be committed to by each claim, and what one takes it would entitle one to that commitment. Failure to grasp either of these components is failure to grasp the inferential commitment that use of the concept involves, and so failure to grasp its conceptual content» (Brandom 2000: 62-63).

ment, recognising in this way their *authority* regarding the administration of the content of that norm[25].

Thirdly, the content of the norm is socially determined through the normative statuses recognized by the participant (i.e., commitments), the normative statuses attributed to her by the other participants (i.e., entitlements), and other collateral normative statuses (i.e., commitments and entitlements) recognized and attributed by her and the other participants (Brandom, 1994: 139). Brandom conceives the structure of reciprocal recognition as a social game in which every participant keeps track of her own and each other's commitments and entitlements. They are (we are) deontic scorekeepers. In the scorekeeping practices –i.e., the linguistic and argumentative practice of asking and giving for reasons– each participant follows the deontic score of the other participants. Each participant keeps the deontic score of the normative statuses of each one of the participants, including themselves, according to each one of their performances. The content of the norm is determined by the perspective of each one of the participants of the social practice.

Fourthly, the norm is not only socially, but also historically determined. The process of determining the content of norms is always open to the continuous development of social practice. The content of the norm is determined through a selected trajectory of past practical attitudes of the participants and through the actual practical attitude regarding to the present performance. The community is not a closed group, it is open to the incorporation and consideration of new participants. In this way, the community allows a continuous evolution of the content of norms, because any practical attitude is, in itself, susceptible to a further practical assessment. The structure of reciprocal recognition allows us to make sense of the idea that the practical attitude of the participants towards their normative statuses might be erroneous, because practical attitudes are acts of assessment and treatment that might be susceptible to a later assessment that determines their correctness or incorrectness. The essential practical opening of the social and historical determination of the content of norms implies that «there is never any final answer to what is correct; everything, including our assessment of such correctness, is itself a subject for conversation and further assessment, challenge, defence, and correction» (Brandom 1994: 647).

Fifthly, the norm is not only socially and historically, but also inferentially deter-

[25] The commitment of a participant can be challenged by another participant, for example, explicitly, asking for more reasons to grant an entitlement. In this case, the participant will have to produce those reasons, or he can also delegate those reasons to another participant or to another time of the practice. The other participants assess and treat that performance, through their practical attitudes, to decide whether or not to attribute an entitlement regarding the performance made according to that norm. When the other participants attribute an entitlement for the commitment or challenge the commitment undertaken by the participant, regarding the performance made according to a norm, they are administering the content of that norm (Brandom 1994: 37).

mined. The performance made is linked to normative statuses and they are inferentially articulated[26]. The kind of inference whose correctness determines the content of norms is called, following Sellars, *material* inference.

> As examples, consider the inference from "Pittsburgh is to the west of Princeton" to "Princeton is to the east of Pittsburgh", and that from "Lightning is seen now" to "Thunder will be heard soon". It is the contents of the concepts *west* and *east* that make the first a good inference, and the contents of the concepts *lightning* and *thunder,* as well as the temporal concepts, that make the second appropriate. Endorsing these inferences is part of grasping or mastering those concepts, quite apart from any specifically *logical* competence (Brandom 2000: 52)[27].

Every performance made in the scorekeeping practices is involved in a set of normative statuses (at the beginning just commitment and then maybe entitlements) which are inferentially articulated regarding what follows from it (i.e., inferential commitment consequent), what is incompatible with it (i.e., incompatibility commitment consequent), and what it follows from (i.e., inferential commitment antecedent). Thus, normative statuses are inferentially connected, on the one hand, by antecedent circumstances for an appropriate performance and, on the other hand, by appropriate consequences of that performance[28]. However, more precisely, the antecedent and consequent relations that encode the content of the norms are of two different sorts: inferential and empirical (i.e., perceptual and practical) relations.

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[26] Brandom introduced this point saying that: «The leading idea of the approach to content and understanding to be developed here is due to Sellars. (…) To grasp or understand a concept is, according to Sellars, to have practical mastery over the inferences it is involved in –to know, in the practical sense of being able to distinguish, what follows from the applicability of a concept, and what it follows from. (…) Concepts are essentially inferentially articulated. Grasping them in practice is knowing one's way around the proprieties of inference and incompatibility they are caught up in. What makes a classification deserve to be called conceptual classification is its inferential role» (Brandom 1994: 89).

[27] «Inferring is a kind of doing. Acknowledgment of inferential proprieties need not be explicit in the endorsement of rules or principles of inference but may remain implicit in the capacity to take or treat inferential transitions as correct or incorrect in practice. Inferential relations among concepts are implicit in the practice of giving and asking for reasons» (Brandom 1994: 91).

[28] Brandom presented this point saying that: «The approach they suggest [Frege and Sellars] can be made more definite by considering a general model of conceptual contents as inferential roles that has been recommended (in somewhat different terms) by Dummett. According to that model, the use of any linguistic expression or concept has two aspects: the circumstances under which it is correctly applied, uttered, or used, and the appropriate consequences of its application, utterance, or use. Though Dummett does not put the point this way, this model connects to inferentialism of the Sellarsian sort via the principle that part of the content to which one is committed by using the concept or expression may be represented by the material inference one implicitly endorses by such use: the inference from the circumstances of appropriate employment to the appropriate consequences of such employment» (Brandom 1994: 117).

> The consequences of application are always themselves inferentially related to the concept in question (…). The circumstances of application need not themselves be linguistic. (…) The circumstances of appropriate application of a claim can include not only other claims (from which the one in question could be inferred) but also perceptual circumstances (to which one has been trained to respond non-inferentially by endorsing the target claim). The appropriate consequences of application of a claim can include not only the inferential acquisition of further beliefs whose contents follow from the contents of the belief in question but also, in the context of further contentful intentional states, the non-inferential responsive performance of actions, under the descriptions by which they can be exhibited as the conclusions of practical inferences (Brandom 1994: 119-120).

Accordingly, the content of the norms is characterized as a function that pairs two sets of normative statuses: on the one hand, those that constitute antecedent circumstances (inferential and maybe perceptual as well) under which a performance is correctly made and, on the other hand, those that constitute appropriate consequences (inferential and maybe practical as well) of making that performance. The content of a norm is in each moment of the practice partially determined by the trajectory of its past applications and its current determination is complemented and completed –although only synchronically– in the actual application by the social perspective of the different participants of the practice and the inferential relations among normative statuses undertaken and attributed through their practical attitudes[29].

From this point of view, the institution of norms and the determination of the content of norms are done in the same process of its application. The norm is instituted, and its content is determined, at the same time, through a unique social, linguistic, historical and inferential process.

5. The Explanatory Problem of Law's Normativity: A Proposal of Solution

In this last section, it will be shown how, from the theoretical approach presented in the last section, an adequate proposal can be offered to solve or dissolve

[29] Brandom said: «Linguistic practice as here described can be explained in terms of a score function that determines how the deontic score at each stage in a conversation constrains both what performances are appropriate and what the consequences of various performances are –that is, the way they alter the score. (…) In scorekeeping terms, the significance of a speech act consists in the way it interacts with the deontic score: how the current score affects the propriety of performing the speech act in question, and how performing that speech act in turn affects the score. Deontic scores consist in constellations of commitments and entitlements on the part of various interlocutors. (…) For at any stage, what one is permitted or obliged to do depends on the score, as do the consequences that doing has for the score. Being rational –understanding, knowing how in the sense of being able to play the game of giving and asking for reasons– is mastering in practice the evolution of the score. Talking and thinking is keeping score in this sort of game» (Brandom 1994: 182-183).

the explanatory problem of law's normativity. But, before that, it will be argued why the solutions offered for the problems of the rule-following paradox should be considered prior, from an explanatory point of view, with respect to the solution that should be offered for the explanatory problem of law's normativity. Finally, it will be indicated that this way of solving or dissolving this problem of law's normativity generates three specific benefits.

To summarize. In the introduction, it has been held that the explanatory problem of law's normativity consists of the complex explanatory matter of how to adequately accommodate (i.e. distinguish, explain and relate), within a systematic theoretical approach, these two common claims taken as ascertained: that the law is composed of a set of social facts, and that the law is composed of a set of norms. In the third section, it has been shown why (and how) the rule-following paradox is composed of three conceptually different and independent problems: the infinite regress of interpretations, the gerrymandering, and the personal criterion of correction. In the fourth section, adequate ways to solve or dissolve each one of these problems have been proposed. This task has been fulfilled by appealing to three distinctions and four technical notions to deal with the problems –i.e., performances and normative statuses, practical attitudes and normative statuses, normative statuses and social norms– which generated three conditions of adequacy to explain general and social normativity: the condition of normativity, the pragmatist condition, and the conditions of objectivity.

The first part of the point about why the answers to each of the problems of the rule-following paradox should be considered prior to, from an explanatory point of view, the answer to the explanatory problem of law's normativity is that the problems of the rule-following paradox are *conceptually* implicated or presupposed in the problem of law's normativity. The problem of law's normativity consists of how to adequately explain and relate the factual dimension and the normative dimension of law.

The problems of the rule-following paradox emerge from the attempt to present a general theory about social normativity, that is, about (i) what kind of entities norms are, and what kind of existence they have (ontological questions about norms), (ii) how the content of norms is determined (semantic question about norms), and (iii) how the participants of a communitarian practice identify and know the content of norms (epistemological question about norms).

In this sense, the problems of the rule-following paradox, as parts of a *general* understanding of *social* normativity, are conceptually implicated or presupposed in the *particular* understanding of *specific legal* normativity: firstly, about the normative dimension and, secondly, about its relation to the factual dimension of law[30].

[30] In this way, it is being held that *legal* normativity is a type, species or case of *social* normativity –i.e., that there is a relationship of genus-species or generality-specificity between them. Now, someone

The second part of this point is that the solutions that have already been offered to the problems of the rule-following paradox should be considered explanatorily prior answers with respect to an adequate answer that should be offered to the problem of law's normativity. The answers that have already been offered to the rule-following problem are: (i) that norms are entities composed of conceptual contents, which have a social existence –rather, they are in a normative dimension within the social reality; (ii) that the conceptual content of norms is determined through the social, historical and inferential process that has been presented in the previous section; and (iii) that this content is identified and known, with a certain objectivity, by the participants of a communitarian practice through the same social, historical and inferential process. These answers, which have already been considered adequate for a general explanation of the social normativity, condition (limit or restrict) the conceptual space of possibilities for an answer that should be offered for the explanatory problem of law's normativity. In the sense that the first answers condition (limit or restrict) not only the answer that should be offered for an adequate explanation of the normative dimension of law, but also for an adequate explanation of the factual dimension of law and, furthermore, for an adequate relationship between both dimensions.

Now, the concrete proposal that from this approach should be offered to solve or dissolve the explanatory problem of law's normativity can be presented in the following way. Firstly, the factual dimension of law is composed of performances (i.e., intentional actions and speech acts) and practical attitudes (i.e., undertakings and attributions) of the participants in the legal practice of a certain community. Performances can be understood as, for example, those intentional actions and speech acts performed by citizens[31]. Practical attitudes can be understood as, for example, speech acts performed by law-makers in the context of acts of promulgation of the law and speech acts performed by judicial officials in the context of acts of application of the law to a specific judicial case[32].

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may ask, what makes it the case that *social* norms acquire specifically *legal* character? The answer is the legal practice of a community; and the way to characterize the practice of a community as legal, in addition to social and linguistic, is precisely through a certain theory of law. There is no space here to evaluate the legal theories that are compatible with what has been upheld here, but clearly not every legal theory is compatible with what has been sustained so far. But now someone may insist, how is the community of participants determined? The answer is through the practical attitudes of recognition (or acknowledgment) of the community members who actively participate in the linguistic and argumentative practice. This is a constantly open process of incorporation and separation of members through reciprocal recognition (Brandom 1994: 30-32).

[31] The few specifications that will be made in these paragraphs, through examples, oversimplify the legal practice scenario. A more detailed example will be presented in the coming paragraphs. However, other examples regarding the extension of the technical notions of this theoretical approach to the legal practice scenario have been made by Canale (2009 and 2017). See also Matthias Klatt (2008).

[32] Practical attitudes, like speech acts performed by law-makers and judicial officials, should not

Secondly, the normative dimension of the law is composed of normative statuses of the participants (i.e., commitments and entitlements) and legal norms (i.e., social criteria of correctness for performances). Normative statuses could be understood as, for example, the commitments and entitlements undertaken and attributed by the law-makers in the context of acts of promulgation and by the judicial officials (and also other participants) in the context of the acts of application of the law to a specific judicial case. Legal norms are, as already specified, those criteria of correctness for performance or, better said, those criteria of correctness for individual criteria of assessment for performances (i.e., practical attitudes).

Thirdly, the relation established between the factual dimension and the normative dimension of law consists of that the normative statuses (i.e., normative and social dimension) is *grounded* in the practical attitudes (i.e., factual and causal dimension) of law. Nevertheless, the explanation of the normative and social dimension is not reduced in the explanatory terms of the factual and causal dimension, because any practical attitude is itself something that can be done correctly or incorrectly. This is the relation between the factual and the normative dimension of the law[33].

Legal norms are normative entities, which have a social existence, distinct from empirical entities, which have a natural existence. Legal norms are normative and social entities grounded in *practical attitudes*, which are a sort of empirical and natural entity. The long story is this: practical attitudes are personal assessments for performances; practical attitudes are manifested through normative statuses; normative statuses are grounded in practical attitudes; normative statuses are inferentially related among them; the content of legal norms is determined through an inferential and intersubjective relation. Putting in another order, legal norms are criteria of correctness grounded in the legal practice of a community where they have been manifested by the participants through a selected set of previous practical attitudes regarding previous performances and a current practical attitude regarding a present performance. Legal norms are constituted, and their content determined, by the social, linguistic, argumentative and historical relations among participants of the le-

be confused with or assimilated to the linguistic *statements* found in authoritative legal texts –i.e., independent of any speech act performance– found in authoritative legal texts, such as constitutions or laws, or judicial sentences, or doctrinal or dogmatic books of some practical relevance.

[33] From about five years ago, the aforementioned debate on the notions of supervenience and grounding (note 24), which began in the analytic metaphysics literature, reached the legal theory literature. Among the few works on this matter, the following articles stand out. Firstly, Brozek 2017, who argues that the notion of supervenience fails to adequately explain the normative dimension of law, basically because of its causal commitments. Secondly, Plunkett 2012, who rejects the antipositivist proposal of Greenberg 2004 and proposes a positivist explanation of the nature of law on a notion of grounding. Finally, Chilovi & Pavlakos 2019, who redefine the notion of grounding in a better and detailed way. Although in this article there is no space to analyse this last proposal, the present work is assembled with it to explain the relation between these two dimensions of law, without reductions. Thus, the normative dimension of law is grounded –i.e., a relation of non-causal dependence– in the factual dimensions of law.

gal practice (from personal practical attitudes to personal normative statuses)[34], and by the inferential mutual relations among the personal normative statuses of each participant (from personal normative statuses to social norms) within the structure of reciprocal recognition, now understood as the legal practice of a community[35].

The legal practice where legal norms are paradigmatically manifested is the judicial practice. This is the quintessential legal practice. Judicial practice is no longer paradigmatically but essentially argumentative. This is essentially a practice where reasons are given and asked in favour of legal claims. Although not only judicial practices are legal practices, an example of this sort of practice will be given here to illustrate the mechanism of the institution or constitution of legal norms and the determination of their content.

From this point of view, on the one hand, legal norms are found in the legal decisions developed until that moment as made by the lawmakers and judicial officials of the legal practice of the community where these norms have been manifested through their creation and application to specific past judgments. However, on the other hand, they are not only found in the legal creation practices and previous judicial application practices, but rather also in the current judicial practice that is being developed, that is, to the present controversy over a certain legal case. Therefore, it is in the context of a particular judicial case that the content of a particular norm is specifically determined by the manifestation of the participants regarding a selected trajectory of past practical attitudes and to the current practical attitude of the judicial official regarding the present case. According to this, the legal norm is determined by the judicial official within the framework of the structure of reciprocal recognition in which normative statuses of the perspectives of all the participants of that particular case are socially and inferentially related.

When the judicial official recognises previous applications of the norm as authorised precedents of the application of that norm, she selects the trajectory of the previous applications and, therefore, of the authorised applications of its content.

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[34] Legal practices are paradigmatically argumentative, in addition to social and linguistic, because they are practices in which reasons are provided in support of certain legal claims. Some theorists of language have criticized Brandom because this argumentative aspect does not seem to be a necessary element of all socio-linguistic practices. They have said that this aspect is too restrictive for the characterization of linguistic practices and does not allow for the reconstruction of those practices that we intuitively might consider social and linguistic. However, even if one agrees with this objection regarding the linguistic practices tout court, one might disagree with it regarding linguistic and legal practices, because one might consider, as I do, that social and legal practices embody paradigmatically this argumentative aspect, and then that this theory fits perfectly with legal practices.

[35] Specifically, the content of legal norms has both normative and evaluative character. Legal norms are *normative* criteria of correctness for certain actions –whose content consists mainly of the deontic qualification of certain actions as permitted, prohibited or obligatory– and *evaluative* criteria of correctness for certain decisions –whose content also plays the role of a reason that justifies a certain legal claim and with it probably the imposition of a reward or punishment.

In a similar vein, when a practical attitude is considered a case of correct application of the norm, it is included in the history of its correct applications. In this way, normative force is given to these applications of the norm. The judicial official exercises her authority over the practical attitudes of the community's previous members, considering that a series of applications of the norm is correct; in this way, she also assumes responsibility for the future participants for the consideration of that series of applications as correct. In this process, a trajectory of past applications is selected for the purpose of determining the content of the norm that can be considered correct in the present case and projected towards future cases, because past applications of the norm together with the current application of that norm also partially determine future applications of the same norm in future cases (Brandom 2014: 74-75).

Given that there is not only one possible trajectory, "only one way to follow the rule", the judicial official should select the antecedent practical attitudes that she considers correct and, doing that, take a decision in the present dispute, in which she claims that the present case is or is not an instance of the same norm applied in certain previous judicial cases. She should integrate the selection of cases chosen in such a way that they can be synthesized into a norm that might be applicable to the particular performance analysed in the present case that she ought to resolve. In this way, she would propose the current case as another precedent, an instance of correct application of the norm. In doing so, she would determine the content of the norm by selecting the previous legal cases that she treats as precedents, the legal sources, the legal statements, and the factual characteristics of these cases that she takes as outstanding. Thus, the content of the norm is delimited, that is, the contours and limits that explicitly or implicitly have been governed by the entire sequence are specified (Brandom 2014: 76-77)[36].

According to this approach, the determination of the content of the norm is objective, in the following sense. The structure of reciprocal recognition allows that the content of the legal norm determined by the judicial official is not only dependent of her personal commitment, but dependent as well on the normative statuses of the other participants. The content of the norms does not depend only on the judicial official who recognizes and accepts the force of the norm, but also on the social communicative interaction among participants of the legal practice and the inferential relation between the normative statuses of all of them.

[36] From this perspective, it should be said that the content of legal norms (and finally the content of law) is, at the same time, a matter of "finding norms" –i.e., finding the correct trajectory of previous applications of the norms– and a matter of "making norms" –i.e., making the correct trajectory by adding a novel case to the sequence. As Brandom asserted: «we make our concepts, or do we find them? Are we authoritative over them, or responsible to them? Hegel's answer is: "both." For both aspects are equally essential to the functioning of concepts in the ever-evolving constellation of concepts-and-commitments» (Brandom 2014: 85).

However, the content of a norm is only synchronically determined, because the norm socially, historical and inferentially determined in a time T1 might be erroneous in a time T2. The reason is that the normative statuses are grounded in the practical attitudes of assessment and treatment that are susceptible to a later assessment and treatment to determine their correctness or incorrectness. The selection that the judicial official makes in the present case is an implicit practical attitude. The claim that she makes in the present case saying that it is or is not an instance of the same norm applied in a certain set of previous judicial cases is an explicit practical attitude. Both normative positions, the retrospective selection and the projective demand, are practical attitudes and any practical attitude «is itself something that can be done correctly or incorrectly» (Brandom 1994: 52)[37].

This proposal generates three specific benefits. The first benefit is the possibility to draw an important distinction between the existence of legal practice and the existence of legal norms. From this approach it is possible to hold that legal practice and legal norms are two different sorts of entities that have different sorts of existence: the first are empirical entities that have a natural existence, and the second are normative entities that have a social existence. Legal norms are not found at the empirical level of the legal practice, but they are specifically found at the social and normative level that surface the legal practice of a community. Legal norms are social criteria of correctness for the (normative or evaluative) assessment of the performances that constitute the factual dimension of the legal practice[38].

The second benefit is the possibility of adequately relating the two dimensions of

[37] In each case, the judge acquires a consequent responsibility, firstly, with respect to the judicial community to which it is granted: «Any deciding judge is responsible to the content of the concepts whose applicability is being assessed, by being responsible to the authority exercised by the commitment of the prior judges whose decisions are available to provide precedent and rationales» (Brandom 2009: 86). Secondly, with respect to the administration that future judges will have to make of her decision: «The authority of the past applications, which instituted the conceptual norms, is administered on its behalf by future applications, which includes assessments of past ones […]. In doing so, the future applications exercise a reciprocal authority over past ones» (Brandom 2002: 230). Cf., Brandom 2009: 87.

[38] As Redondo recently said: «It is necessary to recognize that such rules [legal norms] are a different entity from such empirical practice: they consist of an ideal entity, in relation to which statements that capture their content can be evaluated, directly, as true or false» (Redondo 2019: 14); «The truth of the statements that identify norms –i.e., contents of duty– cannot be determined by the acts or practices of application of those norms. The truth of a statement that identifies a legal norm is directly determined by the existence of the norm» (Redondo 2019: 49); «The truth of the statements of duty does not depend on two different practices. The truth conditions of these statements are relative to a practice of recognition and application, but they do not consist of it because the duties are not reducible to empirical practices»; (Redondo 2019: 55). «In any case, it should be remembered that the rule is not the practice but the criteria that underlies the practice and, in this sense, it may be the case that there is a rule that establishes a duty, and that the practice misunderstands the rule or criteria that follows» (Redondo 2019: 68). These paragraphs have been translated by the author of this article.

law, within a solid and systematic theoretical approach, which does not reduce one dimension in the other. This proposal neither reduces legal norms –i.e., normative and social dimension– in legal practices –i.e., empirical and causal dimension– nor in the other way around. The existence of legal norms depends on empirical facts –i.e., norms arise from empirical facts– but norms are not reducible to empirical facts. Legal norms exist in a social and normative reality grounded on a natural and empirical reality. Legal norms are determined through normative statuses, which are grounded in the practical attitudes of the participants.

The third benefit is the dissolution of the so-called "problem of the naturalistic fallacy". Basically, because from this approach the application of norms, the rule-following activity, is inseparable from the practical attitudes of the members of the practice. The transition between past applications to the present application, the restriction of those over this, is conducted by the practical attitudes of the participants. Kripkenstein and many other regularist theorists insist that something should ensure the connection between past applications and the present, and even future, application of the norm. This way to raise the issue suggests that there is no way to fill a supposed gap between the empirical and natural order and the normative and social order. The appearance of discontinuity between the empirical and the normative order arises because the past applications were taken only as matters of fact, dispensing with the practical attitudes of the participants towards those matters. In this way, the connection between the order of performances and practical attitudes –i.e., empirical and natural order– and the order of normative statuses and norms –i.e., normative and social order– is problematic and mysterious. Instead, the Platonist and other regulist theorists treat this problem by arguing that there are platonic facts, constitutive of the content of norms, which determine in a univocal way the correct applications (past, present and future) in any imaginable situation. Thus, they reduce the normative aspect of present and future applications to platonic facts that in some mysterious way have already determined the content of norms. However, if it is accepted that past applications of norms can only count as cases of correct application when practical attitudes towards these applications are adopted, it can be considered that there is no explanatory gap to be filled. The past, present and future applications are revealed as normative issues, they are in the normative and social order. The relations between the different applications of norms are mediated by the social, linguistic, historical and inferential structure of reciprocal recognition: they are internal relations to this structure that institutes norms and determines their content.

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