

Dr. Lorenzo PASSERINI GLAZEL
Dipartimento dei Sistemi giuridici ed economici
Università degli Studi di Milano-Bicocca
Piazza dell'Ateneo Nuovo 1
I-20126 Milano
lorenzo.passerini@unimib.it

Grios 2011
The Nature of Social Reality
Arcavacata di Rende, October 13th-14th, 2011

Lorenzo PASSERINI GLAZEL
Disused Norms:
Norm Atrophy and Nomotrophic Behaviour

Draft

“Unlike shirts and shoes, institutions do not wear out with continued usage. On the contrary, the continued usage of such institutions as marriage, private property, and money reinforces the institutions.”

John R. Searle

“*Was gelten soll, muß wirken.*”

Johann Wolfgang Goethe

0. Introduction. The Mode of Existence of Norms
1. Reactions to Violation as an Evidence for Inferring Norms
2. The Incidence of Reactions to Violation at the Level of the Existence of Norms
3. Norm Atrophy and Nomotrophic Behaviour

0. Introduction. The Mode of Existence of Norms

0.1. In the construction of social reality, norms play an essential role.

Norms, in their turn, are themselves entities, objects, that form part of social reality (social entities, social objects which, in many cases, function as primitives in the construction of other, more and more complex, social entities and social objects).

But what is the mode of existence of norms?

In other words: Which is the ontological status of norms?

This is a question that recalls one of the 125 “*most compelling puzzles and questions facing scientists today*” selected by “Science” on occasion of the 125th anniversary of the journal: “What is the structure of water?”

As sure as *water* is almost everywhere around us, and we, as *living beings*, can’t do without it, *norms* are (in their own peculiar mode of being) almost everywhere around us, and maybe we, as *human beings* can’t do without them.

Nonetheless, as well as scientists haven’t found yet a univocal answer to the question on the structure of water yet, no univocal answer to the question on the mode of existence of norms has yet been found.

0.2. The philosopher who investigates social reality can hardly leave aside, in his inquiry, those peculiar entities that norms are.

Norms can, in the investigation of social reality, alternately (but not alternatively) be *point of departure* or *point of arrival*.

Norms are the *point of departure* in investigations on social reality when, starting from norms, the way in which they operate on social reality (the way they constitute, for instance, social entities, objects, structures) is investigated.

Norms are *point of arrival* in investigations on social reality when, starting from a given society, it is investigated which norms operate within that society (which norms determine, or concur to determine, the social entities, objects and structures that exist within that given society).

0.3. On the one side, it is prelude to any investigation aimed at determining in which way norms operate on social reality, the more general theoretical investigation of the different forms of norm-operancy.

The concept of “operancy of a norm” has been long distorted by a perspective error: it’s been flattened for long (as in a perspective with only one accidental point) on the concept of “effectiveness” of norms, particularly on the conception of effectiveness as fulfilment of norms.

That operancy of norms is not reducible either to (effectiveness as) fulfilment of norms, or to compliance with norms (the reconstruction of norms operancy within a society requires to adopt a perspective with more than one accidental point) is a happy intuition of Max Weber (1864-1920), which has

been developed in recent research on different kinds of “nomotropic behaviour” (different ways of acting norm-functionally) carried out by Amedeo G. Conte and Paolo Di Lucia.¹

0.4. On the other side, prelude to any empirical investigation aimed at determining which norms do operate within a particular society, is the theoretical investigation on the conditions of possibility of inferring norms from behaviour.

0.5. In my presentation I am going to draw attention on a particular form of norm-operancy (on a particular kind of nomotropic behaviour, of acting with-reference-to norms), which has a twofold relevance for the philosophy of norms: that is *nomotrophic behaviour*.

Nomotrophic behaviour is a particular form of norm-operancy, whose relevance shows both at the (epistemological) level of the *inference* of norms, and at the (ontological) level of the *existence* of norms.

1. Reactions to Violation as an Evidence for Inferring Norms

1.1. The task of those who investigate which norms operate within a given society (which norms determine, or concur to determine the social entities, structures and objects that exist within that society) is undoubtedly made easier when norms are created through a specific speech act of enactment.

Not every norm, however, is created through a linguistic act of enactment, as well as not every norm needs to be linguistically formulated to operate within a given society: not every norm is a *verbal* norm, nor every norm is a verbalized norm.

But what means, then, can be made use of to infer non-verbal and non-verbalized norms?

I can see no other mean than to turn directly to norm-operancy.

1.2. Among the clues a philosopher can find to infer (through abduction) the existence of a norm, certainly is that peculiar form of norm-operancy (that particular nomotropic behaviour) that is the reaction to the violation of a norm.

That the reaction to the violation of a norm counts as a clue for inferring that norm is an intuitive thesis: the reaction to the violation of a norm is a main evidence that an empirically observed regularity (the regularity that has been

¹ An example: norms do *operate* even on the behaviour of a thief, and on the (nomotropic) behaviour of a sharper, though in neither case we can speak of “norm fulfillment” or “compliance to norms”.

interrupted by the violation of the norm) is a *deontic* regularity (i.e. a norm-related regularity, a deontic *Regelmäßigkeit*, not an *adeontic* *Regelhaftigkeit*).²

The epistemological and inferential salience of the reaction to the violation of a norm has been recognized, for instance, by the German sociologist of law Theodor Geiger (1891-1952).

Geiger writes:

Within the general institutional framework one will find in the life of every individual family certain patterns [*Regelmäßigkeiten*] resulting neither from statutory law nor from the rules explicitly laid down by the head of the family. Certain correlations of the type $s \rightarrow g$ have become habitual through constant practice. It might appear as if this real order did not correspond to any system of norms.

That such a complex does exist, however, becomes evident the moment some member of the family deviates from the model $s \rightarrow g$ or prepares to do so. On the part of the actor there will be that inner uncertainty which we usually call a “bad conscience”. But if in spite of the warnings of his conscience he acts in violation of $s \rightarrow g$, the others will disapprove.

This indicates that actors as well as spectators regard g as the mode of behavior appropriate to s , which means that $s \rightarrow g$ is an active normative principle.³

1.3. Maybe the most obvious form of reaction to the violation of a norm is the imposition of a sanction.

Sanction is, indeed, an easily observable kind of behavior, and that’s the reason why it can be a valid evidence for inferring the existence of a norm.

But in the wide range of all possible forms of reaction to the violation of a norm, the imposition of a sanction is but a particular case.

Even if he admits that it could appear natural “to define the concept of “norm” through the inclination to impose sanctions in the event of disappointment”, the German sociologist Niklas Luhmann (1927-1998) criticizes those who define the concept of “norm” uniquely through the inclination to impose sanctions in the event disappointment.⁴

Luhmann writes:

In such a way [...] the repertoire of choices that actually exists is too reduced, and it is generally ignored that the maintenance of [normative] expectations is more important than their fulfillment.⁵

1.4. Beside the imposition of sanctions, according to Luhmann, many other forms of reaction to what he calls the “disappointment of normative expectations”.

² ‘*Regelmäßigkeit*’ and ‘*Regelhaftigkeit*’ are two *termini technici* that belong to the lexicon of the German sociologist Theodor Geiger (1891-1952).

³ Theodor GEIGER, *Vorstudien zu einer Soziologie des Rechtes* [*Prolegomeni ad una sociologia del diritto*]. Aarhus/København, Munksgaard/Universitetsforlaget, 1947 [= *Acta Jutlandica*, 19. 2.]. Partial English translation by Robert E. Peck in Theodor Geiger, *On Social Order and Mass Society. Selected Papers*. Edited by Renate Mayntz. Chicago and London, Chicago University Press, 1969, p. 44.

⁴ Niklas LUHMANN, *Rechtssoziologie*. Reinbeck bei Hamburg, Rowohlt Taschenbuch, 1972.

⁵ Niklas LUHMANN, *Rechtssoziologie*. Reinbeck bei Hamburg, Rowohlt Taschenbuch, 1972.

The variety of forms of reaction that are alternative to sanctions are shown by Luhmann through an example:

If I have a rendezvous with a friend in a coffee bar, and I don't find him there, I can address the waiter and inquire after my friend, giving expression to my expectation-norm [*Erwartungsnorm*] in a disappointed, irritated, worried tone. I can later reproach my friend, or get him to apologize, whose presupposition is that my expectation was legitimate. I can even keep sitting at the coffee bar and wait for an indefinite time, to show the importance of the norm in the proportion of my sacrifice. But I can also go away at once, leaving the latecomer to face his own detriment.

There are techniques consisting in giving notice and spreading the case of disappointment, in exaggerating up to scandal and thoroughly savour the social spreading (if not of the norm, at least of the scandal), techniques consisting in claiming for the fulfilment of the norm, or in tactfully accept apologies, techniques consisting in self-damaging behaviour or in stubborn suffering, or techniques consisting in increasing and taking a delight in someone else's damage [*Schadensfreude*].⁶

All of the techniques mentioned by Luhmann (as well as excuses, justifications, pretexts) “give the norm an expression fitting the new situation, so that even the weakest natures (unable by themselves to impose sanctions) may keep on living with their own norms”.⁷ And they give the violated norm an expression (not necessarily in an explicit, and not necessarily in a linguistic form) by virtue of the fact that that norm is the *premise* of the reaction, by virtue of the fact that the reaction *presupposes the existence of the violated norm*.

1.6. The behaviour of those who (in different manners) react to the violation of a norm (behaviour that has the existence of the norm as a specific presupposition) is an acting with-reference-to that norm, it is a peculiar form of *nomotropic* behaviour (a peculiar form of norm-operancy) that I propose to name “*nomotrophic* behaviour” (nomotropic with ‘ph’).⁸

It is properly because nomotrophic behaviour presupposes, and gives (explicit or implicit) expression to the violated norm, that it counts (at the epistemological level) as a possible evidence for inferring (for abducting) norms from action.

2. The Incidence of Reactions to Violation at the Level of the Existence of Norms

⁶ Niklas LUHMANN, *Normen in soziologische Perspektive*, in: “Soziale Welt”, 20 (1969), pp. 28-48 [pp. 30-39].

⁷ Niklas LUHMANN, *Rechtssoziologie*. Reinbeck bei Hamburg, Rowohlt Taschenbuch, 1972.

⁸ The adjective ‘nomotropic’ (with ‘p’) is derived (on the model of ‘heliotropic’) from Greek ‘νόμος’ ‘*nómos*’ (“norm”) and ‘τρέπειν’ ‘*trépein*’ (“turn”); the adjective that I propose, ‘nomotrophic’ (with ‘ph’) is derived (on the model of ‘nomotropic’) from Greek ‘νόμος’ ‘*nómos*’ (“norm”) and ‘τρέφειν’ ‘*tréphēin*’ (“nourish”).

2.1. The forms of reaction to the violation of a norm examined by Luhmann (as well as excuses, justifications, pretexts, *etc.*) aim at the maintenance of a normative expectation, at the maintenance of a norm.

According to Luhmann, indeed,

a [normative] expectation which is continuously disappointed, with no reaction being recorded, fades and vanishes. It is inadvertently forgotten, and it is not believed any more.⁹

The risk that a continuously violated norm runs, is to lose vitality, to become inoperative, and vanish.

The techniques examined by Luhmann are forms of a behaviour I propose to call “*nomotrophic*”, because their function is to confirm the rule, to give vitality again, to “nourish” the norm again.

2.2. Nomotrophic behaviour presupposes the existence (and violation) of a norm, and this is the reason why (as I argued *sub* 1.) it counts (at the epistemological level) as a cue, as an evidence for inferring rules from action.

But the relevance of nomotrophic behaviour doesn't restrict to the epistemological level of the *inference* of norms from action.

If it is true, indeed, that a continuously violated norm, with no reaction being recorded, atrophies and may vanish, then nomotrophic behaviour, opposing atrophy, can affect the ontological level of the *existence* of norms (in action).

Nomotrophic behaviour prevents the norm from coming to *inexistence*.

2.3. A similar phenomenon (which is generally expressly codified in modern legal systems), in the sphere of positive law, can be found in the actions aimed to prevent the prescription of a right.

A right, which is not exercised or claimed for a given (generally statutory) lapse of time, decays, prescribes, is forfeited.

The holder of that right can, before that lapse of time is elapsed, exercise, accomplish some actions to prevent his right from prescribing and keep it alive.

2.4. As well as actions aimed at preventing prescription of a right do *not* create, do *not* constitute, that right (which is, on the contrary, presupposed by those actions), they only keep alive a pre-existing right (otherwise doomed to decay), so nomotrophic behaviour does *not* create a new norm: it can only concur to keep alive a pre-existing rule.

Nomotrophic behaviour does *not* establish norms, it is *not* constitutive of norms: of nomotrophic behaviour the norm is *not* the *posé*, it is but the *présupposé*.

⁹ Niklas LUHMANN, *Rechtssoziologie*. Reinbeck bei Hamburg, Rowohlt Taschenbuch, 1972. Traduzione italiana di Alberto Febbrajo: *Sociologia del diritto*. Roma-Bari, Laterza, 1977, p. 72.

3. Norm Atrophy and Nomotrophic Behaviour

3.1. It seems, then, that what John R. Searle says about other institutional phenomena holds for norms, too:

Unlike shirts and shoes, institutions do not wear out with continued usage. On the contrary, the continued usage of such institutions as marriage, private property, and money reinforces the institutions.¹⁰

It is, on the contrary, the *disuse*, it is the *desuetude* (not the *use*) that can wear out, that can atrophy norms, and make them vanish.

3.2. The phenomenon of nomotrophic behaviour emphasizes, *ex negativo*, the correlative phenomenon of atrophy of norms.

The analysis of *live law*, can be fruitfully supported by an analysis of *dying law*.

Norm atrophy, desuetude, is indeed a particular way (alternative to abrogation) in which norms can move from *existence* to *inexistence*.

As well as not every norm comes to *existence* in virtue of an explicit speech act of enactment, not every norm comes to *inexistence* in virtue of an explicit speech act of abrogation.

3.3. To the inquiry on the specific mode of existence of norms, my short analysis of nomotrophic behaviour and of the correlative phenomenon of norm atrophy, intends to offer a (literally marginal, but maybe not unfruitful) contribution in drawing attention not so much on the way norms can come to *existence* as on a particular way they can come to *inexistence*: even the investigation of the ways in which an entity can vanish, can concur to cast a light upon the mode of existence of that entity.

And maybe, to the mode of existence of norms as social entities, suit the words of Antonio in Johann Wolfgang Goethe's (1749-1832) *Torquato Tasso*:

Was gelten soll, muß wirken.

Le norme possono, nell'indagine della realtà sociale, essere alternamente (ma non alternativamente) *punto di partenza* o *punto d'arrivo*.

- (i) Le norme sono *punto di partenza* nell'indagine della realtà sociale quando, a partire da norme, si indaga il modo in cui esse operino sulla realtà

¹⁰ John R. SEARLE, *Making the Social World*, 2010, p. 104.

sociale (il modo, o i modi, in cui, ad esempio, le norme determinano o costituiscono entità, strutture ed oggetti sociali);¹¹

- (ii)** Le norme sono *punto di arrivo* nell'indagine della realtà sociale quando, a partire da una società, si indaga quali norme siano in essa operanti (quali norme determinino, o contribuiscano a determinare, le entità, le strutture e gli oggetti sociali presenti in quella società).

¹¹ Si inscrivono in questo filone, fra altre, le ricerche sulla costitutività di regole e le elaborazioni di tipologie di regole.