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## Shared Norms and Nomotrophic Behaviour

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One of the topics investigated by Margaret Gilbert in *Joint Commitment* (Gilbert 2014, *passim*) is the topic of the “standing to intervene in the lives of the others” when one thinks that the others’ behaviour is wrong with respect to a presupposed value, obligation, or social norm<sup>1</sup>. Following Lord Patrick Devlin’s approach in *The Enforcement of Morals* (Devlin 1959, 1965<sup>2</sup>), Gilbert considers that “without a collective judgment, others lack the standing to intervene” (Gilbert 2014, p. 185).

What Devlin and Gilbert seem to be mainly interested in are the presuppositions in virtue of which one has the “standing” to intervene in the lives of the others. Gilbert’s question is: “When is it the case that one has the standing to intervene in the lives of others?”. Gilbert develops Devlin’s idea

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<sup>1</sup> For the purpose of the present paper, I will focus on behaviour that is qualified as “wrong” with reference to a *norm* (of whatever kind that norm may be), and not directly with reference to a *value*. One may say that the norm “is derived” from the value, or that the norm “is implied” by a value; others may say that the value “is constituted” by the norm: this issue will not be addressed here.

of a “collective judgment” in her own account of “shared values” as constituting the unity of a social group, and she makes frequently reference to the “standing to intervene” question in her account of her central notion of “joint commitment”.

In the present paper, I will take a slightly different direction. Rather than investigating when one has the standing to intervene in the lives of others in reaction to an actual or possible violation of a norm, I will focus on the phenomenon of intervening itself (suspending – so to say – the judgment about the legitimacy of such an intervention), and I will try to make clear some of its possible implications for further analysis of norms and of normative phenomena..

As a first step, I will construe the phenomenon of intervening in the life of others in reaction to the violation of a norm in terms of what I propose to call “nomotrophic behaviour”.

Subsequently, I will focus on the *epistemological* implications of nomotrophic behaviour, by considering its relevance as a clue for *inferring norms* from action.

I will then tentatively focus on the *ontological* implications of nomotrophic behaviour by inquiringly considering its incidence at the level of the *existence of shared norms*.

## **1. Intervening in the lives of others as a form of “nomotrophic behaviour”**

What do Devlin and Gilbert in their respective works mean by “intervening in the lives of others”? “How are we to construe ‘intervention’ in the present context”, as Gilbert says (Gilbert 2014, p. 185)?

According to Gilbert, “Devlin would surely include as interventions *rebuking* others for certain actions and, in advance, *demanding* that they act in a particular way”. Gilbert then takes rebukes and demands as paradigmatic interventions.

On my part, I propose to construe “rebukes” as a form of backward-looking reaction to an actual violation of a norm, and “demands” (in Gilbert’s sense) as a form of forward-looking reaction to a possible violation of a norm<sup>2</sup>.

Both rebukes and demands, in Gilbert’s sense, are two particular forms of what I propose to call “nomotrophic behaviour”.

By “nomotrophic behaviour” I mean a behaviour by which one reacts to the (actual or possible) violation of a norm, in order to avoid that the relevant norm be neglected, forgotten, abandoned, and that it eventually atrophies and vanishes.<sup>3</sup>

Besides rebukes and demands, there are many other possible forms of nomotrophic behaviour.

The imposition of a sanction is, of course, one of them. But we are not always in the position of imposing a sanction to someone: in Devlin and Gilbert terms, we do not always have the “standing” to impose a sanction to someone. Or we don’t simply think that a real sanction is appropriate to the situation. We thus often recur to different forms of nomotrophic behaviour.

This point has been emphasized by the German sociologist Niklas Luhmann. In his book *A Sociological Theory of Law*, Luhmann criticizes those who define the concept of “norm” uniquely through the inclination to

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<sup>2</sup> I understand, here, both rebuking and demanding as *reactions* to an actual or, respectively, possible violation of a norm. Gilbert symmetrically understands “a rebuke as an after-the-fact demand” (Gilbert 2014, 397).

<sup>3</sup> The adjective ‘nomotrophic’ is derived from Greek “νόμος” “*nómos*” (“norm”) and ‘τρέφω’ “*tréphō*” (“to nourish”): nomotrophic behaviour is intended to contrast the “atrophy” of a norm.

impose sanctions “in the event of disappointment”. According to Luhmann, “the repertory of possibilities is thus too strictly limited and often it is misunderstood that the retention of expectation is more important than being able to impose it” (Luhmann 1972, trans. 1985, p. 46).

Besides the imposition of sanctions, there are many other forms of reaction to what Luhmann calls the “disappointment of normative expectations”.

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

If I arrange to meet a friend in a café and do not meet him there, I do not only feel hurt in my cognitive, but also in my normative, expectations. He should be there! Some kind of ‘treatment’ of disappointment and expectation is now required, but there are various possibilities at my disposal which do not all have the character of a sanction. For example, I can ask the waiter about the friend and express my norm of expectation by undertones of disappointment, annoyance and worry [...]. However, I can also turn to him personally by telephoning him or reproaching him during a later meeting. As a consequence [an] apology may be forthcoming: I can accept an apology from my friend without imposing any type of sanction, which presumes that my expectation was justified in principle. [...]

A different type of strategy operates with the non-verbal characteristics of the given situation. I may leave the café immediately and expose the late-comer to his own injury. [...] On the other hand, I can remain sitting in the café to prove the meaning of the norm by the extent of my sacrifice. I can let it turn into scandal in order to enjoy to the full the social resonances of the scandal, if not the norm.

Techniques of making known and spreading about the case of disappointment, the escalation into scandal and the enjoyment of one’s own set-backs, the techniques that enjoin fulfilment of norms, of hurt or the tactful acceptance of excuses, techniques of self-effacement and enduring pain or techniques of innocent enlargement of injury and justifiable pleasure at the

other's injury [*Schadenfreude*] – there is a series of possibilities to give the old norm the expression which is adapted to a new situation (Luhmann 1972, trans. 1985, pp. 46-47; see also Luhmann 1969, p. 39).

All of the techniques mentioned above “give the old norm the expression which is adapted to a new situation”, Luhmann writes, “so that even the less robust natures are capable of carrying on life with their norms, even if they are not capable of imposing sanctions” (Luhmann 1972, trans. 1985, p. 47).

It is quite important to remark that the violated norm is not necessarily explicitly formulated in the nomotrophic behaviour of the person who reacts to its violation.

How, then, do these techniques give “expression” to the violated norm? They do it not necessarily in an *explicit*, and not necessarily in a *linguistic* form: Luhmann's example suggests that these techniques “give expression” to the violated norm in virtue of the fact that the reaction *presupposes* the existence of the violated norm. The expression of the violated norm is implied in the pragmatic presuppositions of the reaction to the violation of a norm.

## **2. Nomotrophic behaviour as a clue for inferring norms**

The fact that nomotrophic behaviour gives (explicitly or implicitly) expression to the violated norm has a particular relevance on an *epistemological* level.

In investigating social phenomena and social reality, philosophers as well as sociologists are often to reconstruct the norms that determine or underlie a particular social phenomenon (or a particular social entity).

The task of reconstructing the norms that determine or underlie a particular social phenomenon (or a particular social entity) is evidently made easier when the relevant norms are *explicitly* and *linguistically* formulated (even more when norms are created through a formal act of enactment).

However, this is frequently not the case, even within the law: the norms that operate within a given social group are not always *verbal* norms, nor are they always *verbalized* norms.

What means can be used then to infer *non-verbal* and *non-verbalized* norms from the behaviour of people belonging to a social group?<sup>4</sup>

This question acquires even more importance if we take into account the two following remarks.

*First* remark: An empirically observed *regularity* in the behaviour (a regular pattern of behaviour) is not necessarily a *normative* regularity, i.e. it is not necessarily a regularity determined by a norm (or by a rule). There is not always a norm (or a rule) behind a regular pattern of behaviour, and it is not easy for an external observer to ascertain whether a regularity in the behaviour is a *normative* or a *non-normative* one.<sup>5</sup>

For instance, the fact that a family regularly eats fish on Fridays may depend on a norm of the Catholic religion, or it may be a mere (non-normative) habit (possibly derived from that particular religious norm being followed by past generations in the family, but being subsequently abandoned as a norm together with Catholic religion itself).

*Second* remark: Even in the case in which a behaviour is determined by a norm, that behaviour may be “semantically mute” about the norm, i.e. it doesn’t necessarily say anything about the norm (or norms) which could

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<sup>4</sup> On the distinction between *non-verbal* norms and *non-verbalized* norms, see ~~to be integrated~~.

<sup>5</sup> The German sociologist Theodor Geiger calls *Regelhaftigkeit* a *non-normative* regularity, and *Regelmäßigkeit* a *normative* regularity (see Geiger 1947, trans. 1969, 44).

have determined that particular behaviour. Acting in compliance with a norm does not necessarily imply the (explicit or implicit) expression of that norm, as well as it does not imply the ability to linguistically formulate that norm. This remark has been made for instance by the Italian legal anthropologist Rodolfo Sacco. In Sacco's words:

The quality of the psychological act preceding or concurring with the applying of a customary norm is the same in modern man (who often cannot verbalize the norm), in man who didn't have an articulated language yet, as well as in animals with a developed social organization [...]. A man who is not able to verbalize his own norm, our ancestor lacking speech, an animal studied by an ethologist, all of them don't use their action as a manifestation of their own thought (Rodolfo Sacco 2000, p. 121)<sup>6</sup>.

For instance, regularly eating fish on Fridays is in itself semantically mute about its possible determination by a norm.

On the contrary, nomotrophic behaviour, on the one side (with respect to my *first* remark), being a reaction to the breaking of a regularity, explicitly or implicitly qualifies that regularity as a *normative* regularity.

On the other side (with respect to my *second* remark), nomotrophic behaviour is semantically pregnant and semantically transparent, for it gives (explicit or implicit) expression to the presupposed norm.<sup>7</sup>

For instance, if a person in a family rebukes another member of the family that (maybe inadvertently) prepared meat for lunch on Friday, this is quite a relevant clue of the existence, in that family, of a norm on eating fish

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<sup>6</sup> Opposite to Sacco's claim is the claim by Emilio Betti according to which "any form of practical activity implies an implicit representative value" (Emilio Betti 1971, 7).

<sup>7</sup> I use here "semantically" in a broad sense, including the pragmatic dimension of communication, that is the meaning content that can be inferred through standard pragmatical competence on the basis of what Grice calls the "principle of cooperation".

on Friday (and consequently of the normative character of the relative regularity).

Nomotrophic behaviour, in comparison to behaviour in conformity with a norm, is thus undoubtedly a more salient clue (if not a proper evidence) to infer the presence (at least in the perspective of the person who acts nomotrophically) of a norm, especially in contexts where norms are generally not explicitly formulated. Nomotrophic behaviour has therefore a particular *epistemological* salience in the investigation of social-normative phenomena (and Gilbert seems obviously to be aware of this epistemological salience when she focuses on the “standing to intervene” in her accounts of shared values and joint commitment).

### **3. The incidence of nomotrophic behaviour at the level of the existence of shared norms**

After having considered the semiotic import of nomotrophic behaviour, and its relevance at an *epistemological* level, I shall now consider nomotrophic behaviour from a praxeological point of view, and tentatively try to sketch some of its possible implications at an *ontological* level, in particular at the level of the *existence of norms*.

I said that “nomotrophic behaviour” is a behaviour by which one reacts to the (actual or possible) violation of a norm, in order to avoid that the relevant norm be neglected, forgotten, or abandoned, and that it eventually atrophies or vanishes.

All of the forms of reaction to the violation of a norm mentioned by Luhmann, for example, as well as rebuking and demanding as mentioned by Gilbert, aim at the *maintenance* of a normative expectation, at the



*maintenance* of a norm, by contrasting its possible atrophy. What does this mean?

According to Luhmann, a normative expectation “that is continuously disappointed and is without expression fades away. It is inadvertently forgotten, and it is not believed any more” (Luhmann 1972, trans. 1985, p. 46). Thus, the risk run by a continuously violated norm is to lose vitality, to become inoperant, to atrophy, and to fade away and vanish by desuetude.<sup>8</sup>

The aim of nomotrophic behaviour is to avoid that a particular norm becomes inoperant and fades away: in other words, it is to counter its possible desuetude.

In many legal systems there is a phenomenon that closely resembles nomotrophic behaviour. If a right of certain kind (for example: a right to the compensation of damage deriving by a tort, in Italian law) is not exercised or claimed in a given (generally statutorily determined) lapse of time, that right may decay, may prescribe, and vanish. The holder of the right has to exercise or claim that right before the given period of time is elapsed to keep that right alive and to prevent that right from prescribing and coming to inexistence.

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

Norm atrophy, or desuetude, is indeed a particular way (alternative to explicit derogation) in which norms pass from *existence* to *inexistence*: just as not every norm comes to *existence* in virtue of an explicit speech act of

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<sup>8</sup> In legal philosophy, it is one of the most controversial question whether the *inoperancy* (the inefficacy or ineffectiveness) of a single legal norm can be a sufficient condition for that norm to lose its *validity*. I will not address this question here for two main reasons: firstly, because I am not concerned here exclusively with legal norms (and I assume that in many different systems of “informal” social norms the inoperancy of a norm can be a sufficient condition for that norm to lose its social existence); secondly, because I consider that even in legal theory and in philosophy of law the (intuitive) phenomenon of “desuetude” still lacks a thorough examination, and an analysis of nomotrophic behavior may contribute to shed a light on it.

enactment, not every norm comes to *inexistence* in virtue of an explicit speech act of derogation.

What John R. Searle says about institutions seem to hold for (at least some) 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 (Searle 2010, 104).

Norms are reinforced by continued usage. On the contrary, the continued *disuse*, the *desuetude*, can atrophy a norm, and make it vanish.

Nomotrophic behaviour seems thus to have an incidence at the (ontological) level of the *existence* of a shared norm, in so far as it may prevent a norm from coming to *inexistence*.

But nomotrophic behaviour may also be a way in which new socially shared norms come to *existence*. Imagine that a person thinks that a particular norm *would be* appropriate for a particular situation (at least within a particular social group). It is not impossible to imagine that, at least in some social contexts, that person may begin to rebuke the behaviour contrary to his hypothetical norm, in order to induce others to recognize that norm, and to share that norm with him (and possibly with the whole group).

In this particular case, I propose to speak of an initial “nomotrophism *am Phantasma*”, which (in case of successful influence on the other members of the group) can then lead to the emergence and the effective existence of a shared norm in a social group.<sup>9</sup>

As Antonio in Goethe’s *Torquato Tasso* says:

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<sup>9</sup> The notion of “nomotrophism *am Phantasma*” is inspired by the semiotic concept of “*Deixis am Phantasma*”.

“*Was gelten soll, muß wirken*” (Goethe 1790, act I, scene IV).

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