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SHARED NORMS AND NOMOTROPHIC BEHAVIOUR

abstract

The paper proposes to construe the “interventions in the lives of others when one thinks that the others’ behaviour is wrong” (Devlin and Gilbert), and the “reactions to disappointment of normative expectations” (Niklas Luhmann) under the notion of “nomotrophic behaviour”, i.e. a behaviour that aims at the maintenance of a norm in the event of its infringement. Subsequently, some of the implications of nomotrophic behaviour at an epistemological level (as a clue for inferring norms from action), and at an ontological level (with respect to the existence of norms) are investigated. The paper then examines a possible norm-generating (nomogenic) effect of “nomotrophic behaviour am Phantasma”, and eventually inscribes the different forms of nomotrophic behaviour in the superordinate category of “meta-normative behaviour”.

keywords

nomotrophic behaviour, nomotropism, inference of norms, existence of norms, meta-normative behaviour

- 0. Introductory remarks** In *Shared Values, Social Unity, and Liberty* (2005, ²2014),¹ Margaret Gilbert deals with the question of social unity, that is to say with the question of when a plurality of persons constitutes a social group.
- 0.1.** Gilbert moves from Patrick Devlin's thesis that "society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. *A common morality is part of the bondage*" (Devlin 1959, ²1965, p. 10; italics mine).² Gilbert then reformulates the question of social unity in the following terms: "Is there a way of sharing values such that such sharing is sufficient for social unity?" (Gilbert 2014, p. 182). Following Devlin, Gilbert focuses on a peculiar phenomenon which she considers revealing for the question of social unity, a phenomenon connected with her salient notion of "joint commitment". This phenomenon is the "intervention" in the lives of others when one thinks that the others' behaviour is wrong with respect to a presupposed value or commitment (or, I would say, with respect to a presupposed norm). In the present paper I will focus on this phenomenon.
- 0.2.** I suggest to call "nomotrophic behaviour" the intervention in the lives of others when one thinks that the others' behaviour is wrong with respect to a presupposed value, commitment, or norm. By "nomotrophic behaviour" I mean a behaviour which aims at the maintenance of a norm in the event of its infringement: it typically consists in a reaction to the (actual or possible) infringement of that norm.³ The idea underlying the concept of nomotrophic behaviour is that a social norm that is repeatedly infringed with no reaction may slowly "atrophy" and vanish (by "desuetude"); and that its atrophy may be countered through different forms of *nomotrophic behaviour*.

1 The chapter "Shared values, social unity, and liberty" in the book *Joint Commitment* (2014) by Margaret Gilbert was first published in *Public Affairs Quarterly*, 19 (2005), pp. 25-49.

2 Quoted by Gilbert (2014, p. 205).

3 See Passerini Glazel (2013a, 2013b and 2015). The adjective 'nomotrophic' (with 'ph') is derived from Greek 'νόμος' 'nómos' ("norm") and 'τρέφω' 'tréphō' ("to nourish").

In principle, any norm can be the object of a nomotrophic behaviour, be it a norm deriving from a shared value or joint commitment, a moral norm, a legal norm, a conventional norm, a rule of a game, etc.

Nomotrophic behaviour (nomotrophic with ‘ph’) is a peculiar form of what Amedeo Giovanni Conte proposed to call “*nomotrophic* behaviour” (nomotrophic with ‘p’): *nomotrophic* behaviour is indeed a *species* of the *genus* of *nomotrophic* behaviour. **0.3.**

By “nomotrophic behaviour” Conte means “acting with-reference-to a norm”, which does not imply complying with that norm.⁴ In other words, nomotrophic behaviour is a behaviour that is oriented to a norm, without necessarily being in conformity with the norm itself.⁵

Here are three examples of nomotrophic behaviour.

- (i) The stealthily behaviour of a thief. As Max Weber (1922) remarked, a thief, in concealing his action, acts with-reference-to the norms of the criminal code that punish theft (even though he does not comply with those norms).
- (ii) The behaviour of a cheater illegally extracting an ace from his sleeve in the card game of poker. The cheater infringes the rules of poker, but he still acts with-reference-to those rules, given that it is only in virtue of those rules that an ace is an ace (and has its specific ludic value) in poker.
- (iii) Tax avoidance. Tax avoidance is a behaviour oriented to tax legislation, even though it is intended to avoid its application.

In the present paper I suggest to construe Devlin’s and Gilbert’s “interventions in the lives of others”, as well as Niklas Luhmann’s “reactions to disappointment of normative expectations”, as forms of (that peculiar kind of nomotrophic behaviour that is) *nomotrophic behaviour* (§ 1.). Subsequently, I will show some of the implications of nomotrophic behaviour at an *epistemological level*, as a clue for inferring norms from action (§2.), and at an *ontological level*, with respect to the existence of norms (§ 3.). I will then examine a possible norm-generating (nomogenic) effect of what I suggest to call “nomotrophic behaviour *am Phantasma*” (§ 4.), and finally I will propose to inscribe these different forms of nomotrophic behaviour in the superordinate category of “meta-normative behaviour” (§ 5.). **0.4.**

Devlin’s and Gilbert’s main concern in their analysis of the “intervention” in the lives of others (when one thinks that the others’ behaviour is wrong with respect to a presupposed value, commitment, or norm) is the question of the “standing to intervene”, that is the question of the *legitimacy* of such an intervention.

On my part, I will leave aside the question of the *standing* to intervene, as well as the conditions of the *legitimacy* of nomotrophic behaviour, and I will focus on the phenomenon itself, and on its relation to norms.⁶

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

⁴ Complying with a norm, and acting in conformity with a norm (as well as nomotrophic behaviour), are only peculiar cases of nomotrophic behaviour. See Conte (2011).

⁵ The adjective ‘*nomotrophic*’ (with ‘p’) is derived (on the model of ‘*heliotropic*’) from Greek ‘νόμος’ ‘*nómos*’ (“norm”) and ‘τρέπω’ ‘*trépo*’ (“to turn to”). On the concept of “nomotrophic behaviour”, see Conte (1975, 2000a, 2002, 2003, 2004, 2011, 2012a). Conte’s investigations on nomotropism are closely intertwined with Di Lucia’s investigations on “acting with-reference-to a norm” and on “effectiveness without fulfilment”: see Di Lucia (1996, 2002, 2003 and 2007). See also Passerini Glazel (2012b). Two very fruitful implementations of the concept of “nomotropism” can be found in Chiodelli & Moroni (2014) and in Lauer (2015).

In another context, Eric L. Santner employed the term ‘nomotropism’ in psychoanalysis: by nomotropism he means “the obsessive-compulsive preoccupation with *nomos*, with matters of law, justice, and ethics” (which for Freud “also comprised the compulsive dimension of the search for scientific truth, the *Zwang* internal to *Wissenschaft*”): see Santner (1999, 22000, p. 68).

The term ‘*nomo-tropism*’ is employed in yet another context by the cultural anthropologist Allen Feldman in correlation with the term ‘*trauma-tropism*’: see Feldman (2002).

⁶ I equally suspend any *value judgment* on nomotrophic behaviour itself.

What do Devlin and Gilbert mean by “intervening in the lives of others” though?

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 2014, p. 185).

Gilbert considers rebukes and demands as paradigmatic interventions.

I propose to construe *rebukes* as a form of backward-looking reaction to an actual (or supposed) infringement of a norm, and *demands* (in Gilbert’s sense) as a form of forward-looking reaction to a possible infringement of a norm.⁷

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

By “nomotrophic behaviour” I mean a behaviour aimed at the maintenance of a norm in the event of its infringement, that is to say a behaviour by which one reacts to the (actual or possible) infringement of a norm in order to prevent the relevant norm from being neglected, forgotten, abandoned, and eventually atrophying and vanishing.

Besides rebukes and demands, there are many other possible forms of nomotrophic behaviour.⁸

The imposition of a sanction is, of course, one of the possible forms of nomotrophic behaviour, and a prominent one. However, 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 may consider that a sanction would not be appropriate to the situation.

This point has been emphasized by the German sociologist Niklas Luhmann in *A Sociological Theory of Law* (1972). Luhmann criticizes those who define the concept of “norm” uniquely through the inclination to 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. 47).⁹

Besides the imposition of sanctions, there are many other forms of reaction to what Luhmann calls the “disappointment of normative expectations”.¹⁰

With regards to the question of the *legitimacy* of nomotrophic behaviour it may be noted that, in some cases, nomotrophic behaviour may bring about an *a posteriori* auto-legitimation (this can be the case, for instance, in what in § 3. I propose to call “nomotrophic behaviour *am Phantasma*”).

With regards to the possible *value judgments* on nomotrophic behaviour, I assume a scientific and neutral (anaxiological) point of view. It is worth noting, by the way, that any value judgment on a particular nomotrophic behaviour (which appears mainly as a contingent axiological question) seems at least in part related to a preliminary value judgment on the norm it is intended to maintain, or on its practical consequences. I am grateful to Helen Lauer for having drawn my attention on this point.

7 On the one side, a demand can be construed as a before-the-fact reaction to a possible infringement of a norm; on the other side, as Gilbert suggests, a rebuke can be construed “as an after-the-fact demand” (Gilbert 2014, p. 397) (or at least, I would add, as a demand not to reiterate the infringement of a particular norm in the future).

An icastic example of nomotrophic demand is the famous passage from Saint Catherine of Siena’s Letter 8 to Pope Gregory XI: “*Voi dovete venire: venite dunque* [You ought to come: come, then!]. I am grateful to Amedeo Giovanni Conte for this example.

I assume that both rebukes and demands presuppose a norm, with reference to which the others’ behaviour is qualified as wrong.

8 Gilbert remarks this point, and mentions as an example commending for conformity to a commitment in difficult circumstances: see Gilbert (2014, p. 199). Gilbert responds here to a comment by Jennifer Nadelsky.

9 See also Luhmann (1969).

10 For his sociological determination of the concept of “norm” Luhmann refers to Johan Galtung’s paradigm: “*cognitive expectations vs. normative expectations*” (Galtung 1959). A *cognitive* expectation is an expectation one is disposed to change or redefine in case of dissonance with respect to reality (following G.E.M. Anscombe (1957) and John R. Searle (1975, 2010) I would speak of an expectation-to-world direction of fit); on the contrary, a *normative*

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).¹¹

All the techniques mentioned by Luhmann “give the old norm the expression which is adapted to a new situation”, “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).

How do these techniques give “expression” to the infringed norm? It is important to remark that they do not do it necessarily in an *explicit*, or in a *linguistic* form.¹² My interpretation is that these techniques “give expression” to the infringed norm *modo obliquo*, in virtue of the fact that the reaction *presupposes* the existence of the infringed norm. The infringed norm is implied in the pragmatic presuppositions of the reaction to the infringement of a norm.

A brief analysis of the respective presuppositions of *conviction* (verdict of guilty) and *forgiveness* may contribute to clarify this point.¹³

Despite their opposite effects, conviction and forgiveness share three identical presuppositions:¹⁴

expectation is an expectation one is *not* disposed to change or redefine, so that, in case of dissonance, it is reality that has to be changed or redefined in order to match the expectation (world-to-expectation direction of fit).

11 See also Luhmann (1969, p. 39).

12 Gilbert, too, speaks of a “proposal and acceptance of a joint commitment”, which “need not be verbal” (see Gilbert 2014, p. 196).

13 My analysis follows Maria-Elisabeth Conte’s analysis of the presuppositions of forgiveness. See Maria-Elisabeth Conte (1992). See also Conte (1977), Fillmore (1971), Silvi (2004) and Passerini Glazel (2015).

14 “Great and honest kind of revenge is forgiveness”. Fra’ Bartolomeo da San Concordio, in *AmmaestramentidegliAntichi*, a work written presumably at the beginning of XIV century, attributes this maxim to Seneca, and quotes Seneca’s treaty *De quatuor virtutibus cardinalibus*; this treaty (probably modelled on a lost work

- (i) *factive* presupposition: the existence of the fact being sanctioned or forgiven respectively;
- (ii) *axiological* presupposition: the fact has a negative value with reference to a norm, whose existence is presupposed;
- (iii) presupposition of *responsibility*: the person respectively convicted or forgiven is responsible for the fact.¹⁵

The *axiological* presupposition is the essential presupposition for nomotrophic behaviour: any behaviour with this kind of presupposition implies a reference to a norm (or a value), and so does any nomotrophic behaviour.¹⁶

It is in virtue of this axiological presupposition that nomotrophic behaviour “gives expression” to the (actually or possibly) infringed norm.

2. Nomotrophic behaviour as a clue for inferring norms

The fact that nomotrophic behaviour (explicitly or implicitly) gives expression to the infringed norm has a particular relevance for the *epistemological* question concerning the conditions of possibility of the inference of norms from action.¹⁷

The inference of norms from action is made clearly easier when the relevant norms are *explicitly* and *linguistically* formulated. However, this is frequently not the case, not even within the law: the norms that operate within a given social group are not always *verbal* norms, nor are they always *verbalized* norms.¹⁸

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

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

First remark: An empirically observed *regularity* of behaviour (a regular pattern of behaviour) is not necessarily a *normative* regularity: it is not necessarily a regularity determined by a norm (or by a rule).¹⁹

The fact, for instance, that a family regularly eat fish on Fridays may well depend on a norm of the Catholic religion, but it may also be a mere (non-normative) habit (possibly derived from that particular religious norm being followed by past generations, although it was subsequently abandoned as a norm).

Second remark: Even when a behaviour is determined by a norm, it may be “semiotically mute” about the norm: it does not necessarily tell anything about the norm (or norms) which determined that particular behaviour: acting in compliance with a norm does not necessarily imply the (explicit or implicit) expression of that norm, nor does it imply the ability to express that norm in linguistic form.

by Seneca) is now attributed to Saint Martin of Braga (c. 520-580 A.D.), under the title *Formula vitae honestae, or De differentiis quatuor virtutum vitae honestae*.

¹⁵ It may be helpful to recall that in some cultures, and in some legal systems, one can be responsible for an action performed by another subject.

¹⁶ As I remarked in note 4, any norm, in principle, can be the object of a nomotrophic behaviour, be it a norm deriving from a shared value or joint commitment, a moral norm, a legal norm, a conventional norm, a rule of a game, etc. The axiological aspect of this presupposition lies in the fact that it refers to an *infringement* of a norm.

¹⁷ This question is strictly related to Ludwig Wittgenstein’s considerations on rule-following. Inspired by Wittgenstein, but partly in contrast with Wittgenstein, Amedeo Giovanni Conte investigated the presuppositions of the inference of a norm from action in many of his works: see, for instance, Conte (1990), Conte (2000b) and Conte (2002); see also Carcaterra (2002).

¹⁸ On the distinction between *non-verbal* norms and *non-verbalized* norms, see Sacco (2015), Caterina (2009), Passerini Glazel (2009).

¹⁹ The German sociologist Theodor Geiger calls *Regelhaftigkeit* a *non-normative* regularity, and *Regelmäßigkeit* a *normative* regularity (see Geiger 1947, trans. 1969, p. 44). See also Conte (1990), Conte (2000b) and Conte (2002).

Eating fish regularly on Fridays, for instance, is in itself semiotically mute about its possible determination by a norm.²⁰

On the contrary, a person who reacts to the infringement of a norm uses his nomotrophic behaviour as a manifestation of his thought.

On the one side, indeed, nomotrophic behaviour explicitly or implicitly qualifies the broken regularity as a *normative* regularity: it is a *reaction* to the *breaking* of that regularity.

On the other side, nomotrophic behaviour is semiotically pregnant, since (as I have shown in § 1.) it gives (explicit or implicit) expression to the norm implied in its presuppositions.

Thus, if a person in a family, for instance, rebukes another member of the family who has prepared meat for lunch on Friday, this is quite a relevant clue of the existence, in that family, of a norm on eating fish 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 a more salient clue to infer the existence (at least from the point of view of the person who acts nomotrophically) of a norm, especially in informal normative systems, where norms are generally not explicitly formulated.²¹

Nomotrophic behaviour, thus, has a particular relevance at an *epistemological* level; but it also has implications at an *ontological* level, in particular with reference to the issue of the *existence of norms*.

I said that “nomotrophic behaviour” is a behaviour by which one reacts to the (actual or possible) infringement of a norm in order to prevent that norm from being neglected, forgotten, or abandoned, and eventually atrophying or vanishing: it aims at the *maintenance* of a norm (or a value, or a normative expectation), by contrasting its possible atrophy.

Let me try to clarify this point.

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). The risk, thus, is that a continuously infringed norm loses its vitality, becomes inoperant, atrophies, and fades away by desuetude.

The aim of nomotrophic behaviour is to counter the possible atrophy and desuetude of the norm.²²

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

Desuetude (*desuetudo*)²³ is a particular way (alternative to explicit derogation) in which norms

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

20 This remark has been made, for instance, by the Italian legal anthropologist Rodolfo Sacco with reference to customary norms: “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 had no articulated language, 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 do not use their action as a manifestation of their own thought” (Sacco 2000, p. 121).

In contrast to Sacco’s claim is the claim by Emilio Betti according to which “any form of practical activity implies an implicit representative value” (Betti 1971, p. 7).

21 Gilbert seems to be aware of this epistemological salience when she focuses on the “standing to intervene” in her account of shared values based on the notion of joint commitment.

22 In many legal systems there is a phenomenon that closely resembles nomotrophic behaviour. If a right of a 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 non-existence.

23 On desuetude, and on the possible relations between *desuetudo* and *consuetudo*, I am working in a book to come (*Il farsi e il disfarsi delle norme*).

pass from *existence* to *non-existence*. Just like not every norm comes to *existence* in virtue of an explicit speech (verbal) act of enactment, not every norm comes to *non-existence* in virtue of an explicit speech (verbal) act of derogation.

In philosophy of law the existence of a norm is sometimes construed as its *validity* (by most legal positivists and normativists, for instance), sometimes as its *effectiveness* (by most legal realists, for instance); but, in principle, *validity* and *effectiveness* are two distinct phenomena.²⁴ Desuetude is a tricky phenomenon for this distinction: the *validity* of a norm ceases in virtue of the lack of *effectiveness* of that norm.²⁵

An interesting account of desuetude is suggested by Hans Kelsen. In the second edition of the *Pure Theory of Law* (1960) Kelsen writes:

A legal norm may lose its validity by never being applied or obeyed – by so-called desuetude (Kelsen, 1960, trans. 1967, p. 213).

Recalling his theory of the “basic norm” as the origin of the validity of every norm within a legal system, Kelsen writes:

In the basic norm the fact of creation and the effectiveness are made the conditions of the validity – “effectiveness” in the sense that it has to be added to the fact of creation, so that neither the legal order as a whole nor the individual legal norm shall lose their validity (Kelsen, 1960, trans. 1967, p. 212).

Kelsen clarifies that “effectiveness is a *condition* for the validity – but it’s not validity”:

A condition cannot be identical with that which it conditions. Thus, a man, in order to live, must have been born; but in order to remain alive other conditions must be fulfilled, for example, he must receive nutrition. If this condition is not fulfilled, he will lose his life. But life is neither identical to birth, nor with being nourished (Kelsen, 1960, trans. 1967, p. 212).

Also the Italian legal philosopher Norberto Bobbio makes use of the metaphor of “nourishment” with reference to norms. In *Consuetudine e fatto normativo* (1994), Bobbio writes:

In the long run, a normative system can survive only if the majority of its norms gives rise to corresponding customs. Custom is not only *optima legum interpres*, but also the nourisher and feeder of the statute law: it maintains statute law alive (Bobbio 1994, p. 45).

My notion of nomotrophic behaviour is precisely the notion of a behaviour which aims at nourishing norms against their possible atrophy; nomotrophic behaviour seems thus to have an incidence at the ontological level of the *existence* of norms, at least in so far as it may prevent a norm from coming to *non-existence*: it may play an important role in maintaining norms and normative systems (especially informal ones) alive.²⁶

²⁴ See, for instance, Bobbio (1993).

²⁵ Desuetude is a puzzling phenomenon for the philosophy of law, which has not been thoroughly studied yet. Incidentally, many legal systems tend to exclude the possibility of desuetude, at least with reference to statute laws.

²⁶ A specific phenomenon that could be fruitfully investigated under the concept of nomotrophic behaviour is, in anthropology of law, the phenomenon of self-protection (e.g. vendetta) in primitive law.

To norms may fit the following words from Johann Wolfgang Goethe's play *Torquato Tasso*:
 "Was gelten soll, muß wirken".²⁷

However, nomotrophic behaviour may not only contribute to the maintenance of the existing norms of a normative system: it may also give rise to new norms, it may have a norm-generating (nomogenic) effect.

This may be the case with what I propose to call "nomotrophism *am Phantasma*".²⁸

Nomotrophism *am Phantasma* occurs when one acts nomotrophically with reference to a non-existing norm, i.e. with reference to a mere representation of a norm, to a deontic noema,²⁹ which is not (yet) a shared or valid norm.

In some cases, one may act nomotrophically with reference to a non-existing norm because he erroneously thinks that that norm exists.

In certain situations, though, one may intentionally act nomotrophically with reference to a non-existing norm because he thinks that that norm would be appropriate for the situation.

Human rights movements may be an example: by reacting to the violation of what they believe to be human rights (in accordance with their normative representations, with their deontic noemata), human rights defenders act nomotrophically with reference to norms that are not (yet) valid in some legal systems, but which they promote, and resolutely propose to be recognized, shared and enacted within all legal systems.

This last case of nomotrophic behaviour *am Phantasma* implies a peculiar "normative will", such as an *animus inducendi consuetudinem* (a will to arouse a customary norm).

However, this normative will is quite different from the normative will implied in the formal enactment of a norm: it is not an immediately effective thetic (performative) will, which immediately creates a new norm. The normative will implied in this kind of nomotrophism *am Phantasma* is an indirect will: it consists in a *proposal* of a norm, appealing for a shared *a posteriori* recognition and validation of that norm.³⁰

In § 4. I stated that nomotrophic behaviour *am Phantasma* implies a peculiar indirect normative will: the will that a non-existing norm be recognized and shared, or enacted.

Even ordinary nomotrophic behaviour implies a kind of indirect normative will, though: the "normative will" that an existing norm remain operant and valid.

Thus, following a suggestion by Margaret Gilbert and Seamus Miller, nomotrophic behaviour, as well as nomotrophic behaviour *am Phantasma*, may be called "*meta-normative* behaviours".³¹

**4.
The norm-
generating effect
of nomotrophism
*am Phantasma***

**5.
Meta-normative
behaviour**

²⁷ Goethe (1790, act I, scene IV). I suggest two possible translations: "What ought to be valid, must be effective", and "What is to be valid, has to be operant". I interpret Goethe's passage taken out of context and of co-text.

²⁸ My idea of "nomotrophism *am Phantasma*" is inspired by the concept of "deixis *am Phantasma*", introduced in linguistics by Karl Bühler (1933). An example of deixis *am Phantasma* is when a speaker, while uttering a sentence, points at something that is not there, behaving as if it was there, by hands and gestures, for instance. See also the concept of "*praxis am Phantasma*" in Conte (2003).

²⁹ "Deontic noema" is a term proposed by Amedeo Giovanni Conte for a mental normative representation (in contrast with an actual normative state-of-affairs, a "deontic status"). See Conte (2012b).

³⁰ With reference to John Langshaw Austin's (1962) triadic paradigm "locutionary vs. illocutionary vs. perlocutionary", the immediate "nomothetic" effect of an act of enactment is evidently an *illocutionary* effect; the mediated nomogenic effect of nomotrophism *am Phantasma* may be considered a *perlocutionary* effect.

The normative will implied by nomotrophic behaviour *am Phantasma* may be compared to the will implied in Kant's categorical imperative: "Act only according to that maxim by which you can at the same time will that it should come a universal law" (Kant 1785, tr.1993, p. 30).

³¹ I am grateful to Margaret Gilbert and to Seamus Miller for this suggestion. Another possibility is to speak of "para-normative behaviour".

A different kind of meta-normative (or para-normative) behaviour is the phenomenon known in some places as

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“Italian strike”, or “*sciopero bianco*” (white strike), in English work-to-rule. Work-to-rule may be construed as an “hypertrophic nomotrophic behaviour”, a behaviour which (on the contrary of ordinary nomotrophic behaviour) aims, by contrast, at a nomo-annihilating effect, that is at the derogation of a norm (‘nomo-annihilating’ is a term proposed by Edoardo Fittipaldi 2012).

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