



Analytical Philosophies of 'Custom': Georg Henrik von Wright and Bruno Celano

VIRGINIA PRESI

PhD Student in "Scienze Giuridiche - Cesare Beccaria"

Università degli Studi di Milano

virginia.presi@unimi.it

ABSTRACT

In the tradition of analytical philosophy of norms, the subject of custom has received limited attention. This paper seeks to address whether the term 'custom' denotes a *univocal* phenomenon or encompasses *various* normative phenomena due to its polysemy. To this end, this paper examines the perspectives offered by the Finnish philosopher Georg Henrik von Wright and the Italian philosopher of law Bruno Celano. These two analyses offer distinct responses to the question: What do we refer to when we say, 'custom'? Overall, this paper contends that a *redefinition* of the nature of customs could not be separated from a preliminary analysis of the uses and the meaning of the term 'custom', representing a methodological rephrasing of the research at hand.



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It should first be determined whether 'custom' is one of those words that has a family of meanings. If it is, though it may have blurred edges itself, perhaps the interests of clarity will be served if we can distinguish at least some of the members of the family from one another².

SUMMARY: 1. What are we referring to when we say, "custom"? – 2. The place of custom in von Wright's ontology of the normative. – 2.1. Custom and habits. – 2.2. Custom and laws of nature. – 2.3. Customs and prescriptions. – 2.4. Custom and rules. – 2.5. Custom and moral norms. – 2.6. Custom and language. – 2.7. Von Wright's analysis of 'custom' at key points. – 3. The three meanings of 'custom' in Celano's analysis. – 3.1. 'Custom' in terms of *normative behavior*. – 3.2. 'Custom' in terms of *convention*. – 3.3. 'Custom' in terms of *pre-convention*. – 4. Concluding remarks. – 5. Bibliographical references.

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² B.M. Leiser, *Custom, Law, and Morality. Conflict and Continuity in Social Behavior*, Anchor Books Doubleday & Company, Inc. Garden City, New York, 1969, p. 9.

1. What are we referring to when we say, “custom”?³

The range of cases in which the English term ‘custom’ (EN) [*costume* (IT), *Sitte* (DE), *Käytäntö* (FIN), *Kutym* (SV)]⁴ is used, along with its plurality of meanings, has been rarely investigated in the tradition of analytical philosophy of norms⁵.

The ambiguity surrounding the uses and meanings of the term ‘custom’ could be justified by the variety of related concepts that often overlap and are frequently regarded as synonymous, such as habit, practices, conventions, social norms, propriety, morals, and ethics⁶.

At first glance, it seems necessary to unveil whether ‘custom’ denotes a *univocal* phenomenon or is a *polysemic* term that could denote *various* normative phenomena⁷.

³ Against the background of analytical language studies, the title of this paragraph is inspired by the question “What do we mean when we say ...?” Moreover, Bruno Celano himself titles a chapter of his book *Lezioni di filosofia del diritto*, published in 2018, with the similar expression “what are we talking about when we speak the language of law? [Di che cosa parliamo, quando parliamo il linguaggio del diritto?]”, see B. Celano, *Lezioni di filosofia del diritto. Costituzionalismo, stato di diritto, codificazione, positivismo giuridico*, G. Giappichelli Editore, Torino, 2018, p. 9.

⁴ We mention here the Finnish and the Swedish terms for ‘custom’ in honor of the Finnish Georg H. von Wright, Swedish native speaker, whose works we analyze in this article.

⁵ Among the exemptions, it is noteworthy that the American philosopher Burton M. Leiser attempts to analyze the circumstances in which the term ‘custom’ is employed starting from “typical sentences using ‘custom’” such as “It was Kahn’s custom to pass by this corner at seven o’clock each morning”, “It is customary for wills to be witnessed by two persons”, “It is customary for the fork to be placed to the left of the plate”, “It is customary for people not to break their promises”, see B.M. Leiser, *Custom, Law and Morality*, cit., p. 10-12.

⁶ Complicating the scenario, within certain languages, the term ‘custom’ corresponds to a plurality of (not always equivalent) terms. The paradigmatic case of this could be the Italian term ‘*consuetudine*’, assumable as equivalent to the German term ‘*Gewohnheit*’, which is not directly translatable into English. Rudolf von Jhering is one of the very first authors interested in drawing clear conceptual boundaries between the concept of ‘*Sitte*’ and the concept of ‘*Gewohnheit*’ in *Der Zweck im Recht. Zweiter Band. Zweite umgearbeitete Auflage*, Breitkopf & Härtel, Leipzig, 1883, 21886. Traduzione italiana dell’edizione 21886 a cura di M.G. Losano, *Lo scopo nel diritto, vol. II*, Nino Aragno Editore, Torino, 2021. See R. v. Jhering, *Der Zweck im Recht*, cit, p. 211-213, and a few critical remarks about it in V. Presi *Sittengesetz in Rudolf von Jhering: la teoria del costume tra sociologia del diritto e ontologia sociale*, in *Sociologia del diritto*, 2023, Vol. 50, n. 1, p. 67-70.

⁷ In the Oxford Research Encyclopedias, in the section of linguistics, under the label ‘polysemy’, Agustín Vicente and Ingrid L. Falkum write: “polysemy is characterized as the phenomenon whereby a single word form is associated with two or several related senses. It is distinguished from monosemy, where one word form is associated with a single meaning, and homonymy, where a single word form is associated with two or several

In this regard, the works of the Finnish philosopher Georg Henrik von Wright and the Italian philosopher of law Bruno Celano share the common purpose of bringing clarity to the linguistic complexity of the phenomenon of customs. In fact, they both challenge the question “What are we referring to when we say, “custom”?”⁸.

By keeping this question in mind, this article addresses the two different answers these authors provide: we can say ‘custom’ referring to a *norm-like* entity (von Wright) as well as to *normative behaviors, legal customs, and pre-conventions* (Celano).

Therefore, this article will present the respective contributions by von Wright and Celano, envisioning a hypothetical dialogue between their works⁹.

Firstly, this article will examine how von Wright analyzes the linguistic uses of the term ‘custom’ within the context of his map of the normative, seeking similarities and divergences with other forms of normativity to identify the specific place of customs (§ 2.).

Secondly, this article will explore how Celano investigates what the term ‘custom’ can specifically denote and his attempts to define the various features of the phenomena denoted by that term (§ 3.).

Hence, in light of the arguments put forth by von Wright and Celano, this article emphasizes the necessity of terminological clarity as a basis for refining the research methodology on customs, by the means of *redefining* the nature of customs. This entails initially reframing the investigation by revisiting both traditional and new *stipulative definitions*¹⁰.

unrelated meanings”, see A. Vincente & I. L. Falkum, *Polisemy*, in *Oxford Research Encyclopedia of Linguistics*, Oxford University Press, July 27, 2017.

⁸ Generally speaking, the necessity to reframe the subject under discussion, thereby *redefining* it by considering and surpassing both traditional and new *stipulative definitions*, has been particularly emphasized within the analytical tradition of philosophy of law since the 20th century, particularly in the investigation of the nature of norms. Among the literature in this regard, the following ones stand out: Hart, *Definition and Theory in Jurisprudence*, Clarendon Press, Oxford, 1953; Scarpelli, *Il problema della definizione e il concetto di diritto*, Casa Editrice Nuvoletti, Milano, 1955; Scarpelli, *Contributo alla semantica del linguaggio normativo*, Accademia delle Scienze, Torino, 1959. Nuova edizione a cura di A. Pintore, Giuffrè, Milano, 1985.

⁹ It is important to remark that Celano does not directly quote von Wright’s works on customs, although Celano often quotes von Wright regarding other subjects, as in B. Celano, *Law as Power. Two Rule of Law Requirement*, in W. Waluchow & S. Sciaraffa (eds.), *Philosophical Foundation of the Nature of Law*, Oxford University Press, Oxford, 2013, p. 129-151. It is noteworthy that Celano wrote a chapter of his doctoral defense on von Wright’s explication of the ‘ought’ and ‘is’ topic, namely B. Celano, *Dialettica della giustificazione pratica. Saggio sulla legge di Hume*, Giappichelli, Torino, 1994.

¹⁰ Regarding the feature and the procedure of the *stipulative definition*, see R. Robinson *Definition*, Clarendon Press, Oxford, 1954.

2. The place of custom in von Wright's ontology of the normative¹¹

In *Norm and action*,¹² precisely the first chapter titled *On Norm in General* (p. 1-16), the Finnish philosopher Georg Henrik von Wright attempts to provide for an overall map of the “very heterogeneous field of meaning” covered by “the term ‘norm’”,¹³ crossed by what “we should not hesitate to call [...] ‘normative’” even though are not strictly assumable as norms¹⁴.

Von Wright justifies this position by saying that:

A restricted theory of norms runs the risk of being defective if it does not pay due attention to conceptual affinities and logical relationships between the various parts of the whole field of meaning¹⁵.

Hence, the taxonomy offered by von Wright consists in “three major groups of norms” – *rules, prescriptions, and directives* – and “three minor groups of particular importance” – *customs, moral norms, and ideal rules*¹⁶.

The difference between the three major groups and the three minor groups lies on the fact that, if the types of norms belonging to the three major groups have their own characteristics, whereby they are defined, on the other hand “the minor groups [...] show affinities to more than one of the major groups – they fall, so to speak, ‘between’ the major groups”¹⁷.

Therefore, it is in this scenario that von Wright assigns a place for custom within the varieties of the different meanings of ‘norms’ by contending custom as ‘norm-like’, as follow:

¹¹ The following explication of the nature of customs in von Wright is solely based on the limited discussion he provided on this topic in *Norm and Action*, published in 1963. However, I recently had the opportunity to become acquainted with unpublished works by von Wright during my stay as a visiting researcher at Helsinki in the ‘von Wright and Wittgenstein Archives’. I hope to be able to comment on these new findings in future publications, and I extend my gratitude to Bernt Österman and Thomas Wallgren for keeping me informed.

¹² G.H. v. Wright, *Norm and action. A logical inquiry*, Routledge & Kegan Paul, London; The Humanities Press, New York, 1963.

¹³ *Ivi*, p. viii.

¹⁴ *Ivi*, p. 1. For a brief and clear introduction to the map of normative of von Wright, see P. Di Lucia & L. Passerini Glazel, *Norm and Action. A cento anni dalla nascita di Georg Henrik von Wright (1916-2003). Presentazione. Georg Henrik von Wright, dalla logica deontica alla filosofia del normativo*, in *Notizie di POLITEIA*, Vol. XXXIV (130), 2018.

¹⁵ *Ibidem*.

¹⁶ *Ivi*, p. 15. For a deeper account of von Wright's philosophy of the normative, see P. Di Lucia, *Deontica in von Wright*, Giuffrè, Milano, 1992.

¹⁷ *Ivi*, p. 16.

A group of norms which are in some respects like rules and in other respects like prescriptions are customs¹⁸.

Von Wright thus proceeds in two ways to briefly characterize custom: first, by comparing it with its “sister-categories”,¹⁹ such as *habits* (§ 2.1.), *laws of nature* (§ 2.2.), *prescriptions* (§ 2.3.), *rules* (§ 2.4.), and *moral norms* (§ 2.5.); secondly, by adding few remarks on custom and language (§ 2.6.).

2.1. Custom and habit

If a habit is “primarily a regularity in an individual’s behavior, a disposition or tendency to do similar things on similar occasions or in recurrent circumstances”, von Wright claims that “customs may be regarded as *social habits*” since “they are patterns of behavior for the members of a community”²⁰. Under this light, von Wright tentatively single out custom as follow:

Customs have to do with the way people greet each other, eat, dress, get married, bury their dead, etc. Ceremony, fashion, and manner are sister-categories of custom. It is a custom of my country, but not of the Anglo-Saxon countries, to thank the hosts or the heads of a family when the meal is finished. This is regularly done²¹.

Moreover, von Wright adds that, as habits are acquired and not innate,²² similarly customs “are acquired by the community in the course of its history and imposed on its members rather than acquired by them individually”²³.

2.2. Custom and laws of nature

The explication of customs as social habits challenges the question whether customs are simple social *regularities*, or also normative *regulated* behaviors. In

¹⁸ G.H. v. Wright, *Norm and Action*, cit., p. 8.

¹⁹ *Ibidem*.

²⁰ *Ibidem*.

²¹ *Ibidem*.

²² The explication of habits as acquired rather than innate is highly debate. As examples of authors that adopt similar theses to von Wright, one could cite the German sociologists Ferdinand Tönnies and Max Weber. In fact, they consider habits [*Bräuche*] and conventions [*Konventionen*] as socially constructed regardless the feeling of automatism we experience while we perform a norm of customs. According to Tönnies, in fact, the essence of habits and customs lies on the actual practice and what now feel instinctive we had to learn it first. On this point, see V. Presi, *Custom in Action. Ferdinand Tönnies’ Ontology of the Normative*, in *Phenomenology and Mind*, 2013, Vol. 24, p. 199.

²³ G.H. v. Wright, *Norm and Action*, cit., p. 8.

order to unveil this point, von Wright questions: To what extent are customs different from *regularities of nature*?²⁴

From one hand, von Wright says that “social anthropology is largely a *science des mœurs*” as “it is ‘*descriptive*’ in much the same sense in which natural science is descriptive”²⁵.

However, on the other hand, von Wright points out a difference in principle between laws of nature and customs: laws of nature, unlike customs, are “‘*nomic*’ and exceptionless”²⁶.

The difference lies in the *way* in which exceptions may occur. There is a sense in which the human individual can ‘break’ the rule of custom and in which the course of nature cannot ‘break’ its (causal or statistical) laws. We can characterize this difference between customs and laws of nature by saying that the former present a genuinely *normative* or *prescriptive* aspect which the latter lack²⁷.

2.3. Custom and prescriptions

The feature of ‘*prescriptive aspect*’ of customs leads von Wright to a deep analysis of the relation between customs and prescriptions, wherein he emphasizes one similarity and two differences.

The similarity lies in the fact that customs *influence* behavior in a manner closely resembling the influence of prescriptions. In fact, he says:

Customs are ‘*norm-like*’ in the sense that they *influence* conduct; they exert a ‘*normative pressure*’ on the individual members of the community whose customs they are. The existence of this pressure is reflected in the various punitive measures whereby the community reacts to those of its members who do not conform to its customs²⁸.

As evidence of this, von Wright underlines one existent social way of punishing the conduct of breaking of a custom, namely the *disapproval*²⁹.

²⁴ Von Wright attempts an analysis of regularities of nature in the section ‘*law*’ among *laws of the state*, *laws of nature* and *laws of logic* (and mathematics), see G.H. v. Wright, *Norm and Action*, cit, p. 1-3.

²⁵ *Ivi*, p. 8, emphasis added.

²⁶ *Ibidem*. A definition of the concept ‘*nomic*’ as a regularity without any deontic properties is given also in A. G. Conte, *Sociologia filosofica del diritto*, prefazione di Vincenzo Ferrari, G. Giappichelli Editore, Torino, 2011.

²⁷ *Ibidem*.

²⁸ *Ivi*, p. 9.

²⁹ The topic of social punishment recurs within customs’ analysis. For instance, see R. v. Jhering, *Der Zweck im Recht*, cit, p. 125; V. Presi, *Sittengesetz in Rudolf von Jhering*, cit., p. 66.

A member of the community who-either exceptionally or habitually-does not [follow the custom] is regarded with *disapproval*³⁰.

Yet, the first crucial difference between customs and prescriptions consists in the fact that “customs are not *given* by any authority to subjects”³¹. Under this light, von Wright hypothesizes that customs may be *anonymous* prescriptions by saying that:

If we can speak of an authority behind the customs at all this authority would be the community itself, including both its past and present members. Customs could aptly be characterized as *anonymous* norms or prescriptions. But this characterization must not encourage any mysticism about the nature of the community as norm-giver³².

Additionally, the second crucial difference between customs and prescriptions consists in the fact that customs “do not require promulgation by means of symbolic marks”³³. Under this light, von Wright hypothesizes that customs may be *implicit* prescriptions by saying that:

[customs] need not be 'written down' anywhere in so many words. On this ground they could also be called *implicit* prescriptions. It is an interesting problem whether, within an animal or other community without a language, customs which exert a normative pressure on the members are (logically) possible³⁴.

2.4. Custom and rules

Von Wright compares also customs with *rules* in strict sense³⁵. In this regard, he stresses that “there are some respects in which customs are more like rules than like prescriptions”³⁶.

Under which circumstances are customs more like rules than like prescriptions? In response, von Wright specifically indicates the circumstance in which customs play a role in *defining* the way in which people treat each-others. Notably, Von Wright uses the expression '*to live in accordance with*' customs rather

³⁰ G.H. v. Wright, *Norm and Action*, cit, p. 8, emphasis added.

³¹ *Ivi*, p. 9.

³² *Ibidem*.

³³ *Ibidem*.

³⁴ *Ibidem*.

³⁵ In the said chapter, von Wright offers a wide example of rules: e.g., rules of language, rules of grammar, rules of logic and mathematics. Nevertheless, he affirms: “as a prototype of rule we instance the rule of a game”, G.H. v. Wright, *Norm and Action*, cit., p. 15.

³⁶ G.H. v. Wright, *Norm and Action*, cit., p. 9.

than the well-known formulas 'to act in accordance with...' and 'to follow...'³⁷. For clarity, consider the whole paragraph:

Customs determine, or as it were 'define', ways of living which are characteristic of a certain community. A member *who does not live in accordance with custom* is seldom sought out for punishment in the same way as he who breaks the laws. The awkwardness of his position is more like that of a child who stands aside and does not want to join in the games of his playmates. He becomes a 'stranger' to his community rather than an 'outlaw'³⁸.

Similarly, von Wright adds that, since customs defines ways of living, "a 'foreigner' to the community may be excused for not knowing or not adopting the custom"³⁹.

2.5. Custom and moral norms

Von Wright concludes his analysis of customs against other normative phenomena by comparing customs with another type of norms, namely moral norms. In particular, he questions: "Are moral norms to be classified with the *customs* of a society (community)?"⁴⁰.

Even in this case, von Wright underlies one similarity and one difference between custom and moral norms.

Speaking of the similarity, von Wright quotes the common etymological origin by saying that "it is noteworthy that the word 'moral' derives from the Latin *mos*, which means custom"⁴¹. According to von Wright, the shared etymology would have caused the conviction in some moral philosophers to reduce "ethics to a branch of a general *science des mœurs*"⁴².

³⁷ "Über *Sitte non est disputandum*" says K. Frerichs, *Sitte, Gesetz und Bedeutung. Eine semiotisch-logische Denkfigur bei Ferdinand Tönnies und Ludwig Wittgenstein*, in L. Clausen & K. Schlüter (eds.), *Hundert Jahre "Gemeinschaft und Gesellschaft". Ferdinand Tönnies in der internationalen Diskussion*, Leske-Budrich, Opladen, 1991, p. 273, as remarked by M. Basso, *Prefazione. L'abitudine come norma*, in F. Tönnies, *Il costume.*, Morcelliana, Brescia, 2019, p. 27. For an analysis on the possibility of saying 'to act in accordance with customs', see V. Presi, *Custom in Action*, cit, p. 198-199. The author of this paper is grateful to Bernt Österman for his remark that von Wright could have borrowed the idea of 'to live in accordance with customs' from his magister and friend's idea, namely the idea of 'form of life' (*Lebensform*) by Wittgenstein. It is worthy to be mentioned that the aforementioned philosopher Burton M. Leiser started his investigation regarding customs from Wittgenstein's idea of family resemblance to study the words of customs, in *Custom, Law and Morality*, cit.

³⁸ G.H. v. Wright, *Norm and Action*, cit, p. 9, emphases added.

³⁹ *Ivi*, p. 8.

⁴⁰ *Ivi*, p. 12.

⁴¹ *Ibidem*.

⁴² *Ibidem*.

Nevertheless, even though “some moral ideas can be profitably viewed by the philosopher too against a background of the customs (traditions) or a community”,⁴³ von Wright points out an important difference between customs and moral norms.

The difference consists in the origin of the coercive force of customs and moral norms: the coercive force behind moral norms seems to exceed the simple ‘normative pressure’ customs exert. In fact, von Wright says:

To try to explain the obligation to keep promises, for example, in terms of the ‘normative pressure’ of customs seems utterly out of place⁴⁴.

This difference, as noted by von Wright, undermines the relevance of moral norms when evaluated exclusively through the framework of customs⁴⁵.

2.6. Custom and language

But what does it mean that customs could be understood as *anonymous* prescriptions (§ 2.2.)?

Let us first consider the explication of von Wright of the establishment of prescriptions and the centrality of language during it.

In *Norm and Action*, we can find von Wright affirming that a prescription is being given “when use of prescriptive language leads to or results in the establishment of this relationship between a norm-authority and some norm-subject(s)”⁴⁶.

Similar words could be found in *The Foundation of Norms and Normative Statements*,⁴⁷ where von Wright indicates the process of the establishment of norms as:

⁴³ *Ibidem*.

⁴⁴ *Ibidem*. Please note that, in this quotation, von Wright seems to single out promises in terms of moral norms. This position is not broadly shared, see P. Di Lucia, *L'universale della promessa*, Giuffrè, Milano, 1997.

⁴⁵ This article is not the place for a broad analysis of the relation between customs and morals. This topic is extensively addressed in the sociological and anthropological literature, under the perspective of ethics. For instance, see R. v. Jhering, *Der Zweck im Recht*, cit; E. Westermarck, *The Origin and Development of the Moral Ideas*, Volume I, Second Edition, Macmillan and Co., London, 1921; N. S. Timasheff, *An Introduction to the Sociology of Law*, Harvard university committee on research in the social sciences, Cambridge, 1939.

⁴⁶ G.H. v. Wright, *Norm and Action*, cit, p. 118. In this quotation emerges the subject of prescriptive language, typically compared to the descriptive one. For an explication on this comparison in von Wright's work, see von Wright, *The Foundation of Norms and Normative Statement*, in *Practical Reason*, Basil Blackwell, Oxford, 1983, p. 67-82.

⁴⁷ G.H. v. Wright, *The Foundation of Norms and Normative Statement*, cit.

Norms are given by some agent to a certain other agent or agents. I shall call the first agent norm-*authority* and the second norm-*subject(s)*⁴⁸.

But what could be said about customs that are missing of a norm-authority other than the community it-self?

According to von Wright, customs are an exemption of the typical process of establishment of prescriptions: while prescriptions are *language-dependent* for the normative act of their promulgation, customs are *the least language-dependent*. Von Wright says:

Customs are not 'laid down' in the way rules (of a game) normally are; nor are they 'promulgated' as are laws and other prescriptions. Thus, in the origination of customs language plays no prominent or typical role. Of all the things which may reasonably become included under the heading 'norms', customs are probably *the least language-dependent*⁴⁹.

Furthermore, von Wright questions whether language in customs plays any *necessary* role or not, by remarking that:

It is a question of some interest whether it should be regarded as essential to customs that they can exist only within communities with a language or whether one can speak of customs proper in animal communities too; i.e. the discussion of this question may contribute interestingly to the formation of the concept of a custom⁵⁰.

2.7. Von Wright's analysis of 'custom' at key points

At this point of the article, we shall promote a brief collection of customs' characteristics recalled by von Wright.

Customs *are*:

- 1) regularities of behaviors within a community, like social habits;
- 2) socially punished by (at least) disapproval;
- 3) descriptive of regularities, like laws of nature;
- 4) capable of being broken, like prescriptions;
- 5) capable of influencing conducts, like prescriptions;
- 6) reinforced by the 'normative pressure' they exert;
- 7) capable of defining ways of living of a community, like rules;
- 8) language-independent when promulgated.

Customs *are not*:

- 1) simple regularities, unlike habits;

⁴⁸ *Ivi*, p. 68.

⁴⁹ G.H. v. Wright, *Norm and Action*, cit., p. 95.

⁵⁰ *Ibidem*.

- 2) 'nomic' and exceptionless, unlike laws of nature;
- 3) given by any authority to subjects, unlike prescriptions;
- 4) written down by means of any symbolic marks, unlike prescriptions;
- 5) applied to the foreigners of the community, like rules;
- 6) set by a norm-authority other than community it-self;
- 7) comprehensive of all moral norms.

3. Three meanings of 'custom' in Celano's analysis

After having discussed the explication of customs in von Wright's analytical philosophy of the normative, let us proceed to the second author considered in this paper.

Among the topics studied by the Italian philosopher of law Bruno Celano, recurrent interest in customs stands out. It is worth taking an overall look at his work on customs, as we can discern three distinct approaches aimed at uncovering the nature of this normative phenomenon. The presence of these three different approaches is justified by Celano's theoretical assertion that the term 'custom' encompasses (at least) three different – neither mutually exclusive nor necessarily related – normative phenomena: *normative behaviors* (§ 3.1.), *legal customs* (§ 3.2.) and *pre-conventions* (§ 3.3.).

Celano's theoretical assertion regarding the (at least) three meanings of the term 'custom' is, in turn, supported by a preceding analysis Celano conducted on the term 'custom' itself and its ambiguity.

Indeed, Celano acknowledges an “ongoing ambiguity in the use of the term”⁵¹ and questions the causes of this ambiguity.

In response, Celano asserts that the ambiguity of the meanings of this term could be read as a reflex of the ambiguity of the uses of this term. In fact, he says that:

custom [*consuetudine*] is a not a univocal term, referring to a multiplicity of different and in many respects heterogeneous situations⁵².

Moreover, according to Celano, the phenomena encompassed by the term 'custom' are situated within “a family of concepts”, such as “social norms, ways of behaving”⁵³.

⁵¹ B. Celano, *Pre-conventions*, in *Revus*, 2016, Vol. 30, p. 10.

⁵² B. Celano, *Fatti istituzionali, consuetudini, convenzioni*, Aracne Editrice, Roma, 2010, p. 175, mine trans. Consider the original Italian: “‘consuetudine’ è un termine plurivoco, riferibile ad una molteplicità di situazioni diverse, e sotto molti aspetti eterogenee”.

⁵³ B. Celano, *Pre-conventions*, cit., p. 16.

In other words, Celano argues that it is crucial to consider the different meanings of 'custom'. Only through such a comprehensive analysis can one aspire to clarify the different phenomena covered by the term 'custom'⁵⁴.

3.1. 'Custom' in terms of *normative behavior*

Celano mostly attempts the nature of the phenomenon of 'custom' [*consuetudine*]⁵⁵ as *behavior*, as follow:

A custom is a recurrent behavior (a regularity of conduct) by the generality of the members of a given social group, which each of them adopts (to which each of them conforms) because this is how it is done 'as a rule', or normally⁵⁶.

Nevertheless, the nature of *regular* behavior does not imply that custom [*consuetudine*] is just a regularity: on the contrary, according to Celano, customary behavior is *normative* since it represents a rule to which individuals will orient their behaviors by imitating other behaviors, and it represents a rule to the conformity of which individuals assign normative expectations⁵⁷.

⁵⁴ In this regard, consult also the original Italian version of the paper, namely B. Celano, *Pre-convenzioni: un frammento dello Sfondo*, in *Ragion pratica*, 2014, Vol. 2, p. 613.

⁵⁵ As remarked in the introduction (§ 1.), it is important to recognize that Italian, as well as German, has specific terms to differentiate between the phenomena of '*costume*' (*Sitte*) and of '*consuetudine*' (*Gewohnheit*), whereas English typically uses the term '*custom*' for both cases. This lack of equivalence often leads to translation ambiguities, making it unclear to which of the two phenomena the work in question is referring.

⁵⁶ B. Celano, *Fatti istituzionali, consuetudini, convenzioni*, cit. p. 187, mine trans. Consider the original Italian: "Una consuetudine è un comportamento ripetuto (una regolarità di condotta) da parte della generalità degli appartenenti a un gruppo sociale dato, che ciascuno di costoro tiene (cui ciascuno di costoro si uniforma) perché così si fa 'di norma', o normalmente".

⁵⁷ In revisiting Celano's theory of customs in terms of normative behavior, the Italian philosopher of law Pierluigi Chiassoni underlines the difference of acting in accordance with customs for conformity [*conformità*] or for an expectation of *reciprocity* [*aspettativa di reciprocità*]. According to Chiassoni, the latter case is theorized by Celano within the 'strategic interaction' perspective. See P. Chiassoni, *Tre buoni filosofi contro i cattivi costumi (Giurisprudenza analitica e teoria della consuetudine)*, in S. Zorzetto (a cura di), *La consuetudine giuridica. Teoria, storia, ambiti disciplinari*, ETS, Pisa, 2008, p. 95-105. Similarly to Celano, the Italian philosopher of law Giorgio Lazzaro studied customs in terms of expectations of *reciprocity* [*aspettative di reciprocità*], see G. Lazzaro, *Reciprocità e consuetudine*, in U. Scarpelli (ed.), *La teoria generale del diritto. Problemi e tendenze attuali. Studi dedicati a Norberto Bobbio*, Edizioni di comunità, Milano, 1983.

Each of the group members, in short, does A because they believe they have to do A, and they conclude they have to do A because they believe that, for each of the group members, exactly these same conditions apply⁵⁸.

In this regard, Celano indicates that the basis for imitation of custom [*consuetudine*] lies in the belief that one must adhere to the actions of others, both past and present. When articulated, this belief manifests as 'I have to act as others do because it has always been done as such' and it becomes a reason for acting in accordance with custom [*consuetudine*]⁵⁹.

As an explanation of the prescriptiveness of the linguistic formulation 'I have to act as others do because it has always been done as such', Celano imagines a conversation within two individuals (that we will call as 'A' and 'B').

A: "Why do you think you have to act as such in this circumstance?"

B: "Because it is customary, and it has always been done as such in the past".

A: "Well, but why the fact that it is customary and that it has always been done as such in the past is for you a reason to conclude that you have to act as such in this circumstance?"

⁵⁸ B. Celano, *Fatti istituzionali, consuetudini, convenzioni*, cit., p. 196, mine trans. Consider the original Italian: "Ciascuno dei membri del gruppo, insomma, fa A perché ritiene di dover fare A, e conclude di dover fare A perché ritiene che, di ciascuno dei membri del gruppo, valgono esattamente queste stesse condizioni".

⁵⁹ Within the Italian analytical philosophy of law's tradition, previously to Celano's contribution, we can also find the Italian legal philosopher Norberto Bobbio who proposed his-own formula for articulating the normative authority of the past recurrence of behaviors in the context of customs. In fact, we can read "I act like this because countless others belonging to the sphere of my same social organization have acted in this way before me [*Io agisco così perché infiniti altri appartenenti alla sfera della mia stessa organizzazione sociale hanno agito in questo modo prima di me*]", N. Bobbio, *La consuetudine come un fatto normativo*, Giappichelli, Torino, 2010 (Original work: 1942), p. 32. For a recent review on Bobbio's text and theory of 'consuetudine come fatto normativo', see P. Di Lucia, *Il mistero della consuetudine. Rileggendo Bobbio filosofo della normatività*, in G. Bombelli & P. Heritier (eds.), *I volti molteplici della consuetudine. Volume 1. Origini*, Mimesis Edizioni, Milano-Udine, 2022, p. 19-57. Nevertheless, we can find a slight – yet important – difference between Celano and Bobbio's theses. In fact, while Celano draws the attention to the concept of the past, Bobbio writes about the *tradition*, in terms of a "fact that unfolds over time [*la tradizione è un fatto che si svolge nel tempo*]", N. Bobbio, *La consuetudine come fatto normativo*, cit., p. 31. Therefore, according to Bobbio, "customary norm is established by the authority of tradition [*la norma consuetudinaria ha dietro di sé l'autorità della tradizione*]", N. Bobbio, *La consuetudine come fatto normativo*, cit., p. 32. Bobbio elaborates this thesis in the context of distinguishing the authority of tradition behind customary norms from the voluntary act of lawmakers behind the statutory laws.

B: "Because, generally, we have to act as it is customary and as it has always been done"⁶⁰.

3.2. 'Custom' in terms of *convention*

Celano singles out a second explication of customs, which is similar to the first one (custom as *normative behavior*), but still, this second explication presents an important difference.

In fact, Celano recognizes that custom in terms of *normative behavior* could explain two different circumstances based on the source of the normativity of that behavior:

- 1) when the source is the social expectation of acting in conformity with the social group's customary behavior, customs are *normative behaviors* in terms of 'strategic interaction' among the members of the same social group⁶¹;
- 2) when the source is the *opinion iuris* given by the jurisprudence, customs are *normative behaviors* in terms of legal customs⁶².

Let us consider the second circumstance, given that we have already attempted to the first circumstance in the previous paragraph (§ 3.1.).

Celano often analyzes legal customs, for instance in relation to established legal practices in international law and constitutional law⁶³.

Furthermore, Celano studies legal customs under the light of a classical challenging question against the background of the theory of law, namely customs in terms of source of law⁶⁴.

It is noteworthy that, before delving into an analysis of technical-legal custom, Celano issues a warning:

⁶⁰ B. Celano, *Fatti istituzionali, consuetudini, convenzioni*, cit., p. 190, mine trans. Consider the original Italian: "Perché ritieni di dover fare questa azione in questa circostanza?" "Perché così si fa normalmente, e si è sempre fatto in passato". "Ma perché il fatto che si fa normalmente e si è sempre fatto è per te una ragione per concludere di dover fare questa azione in questa circostanza?" "Perché, in generale, si deve fare ciò che si fa normalmente, e che si è sempre fatto in passato".

⁶¹ For a deeper analysis on this point, see B. Celano, *Fatti istituzionali, consuetudini, convenzioni*, cit, p. 194.

⁶² The subject of *opinio iuris* is widely and controversially debated in the literature of customary law. Celano goes into details about it in B. Celano, *Fatti istituzionali, consuetudini, convenzioni*, cit, p. 180.

⁶³ For instance, see B. Celano, *Fatti istituzionali, consuetudini, convenzioni*, cit., p. 220-226. For the purpose of this article, we will provisionally set aside this perspective.

⁶⁴ B. Celano, *Fatti istituzionali, consuetudini, convenzioni*, cit., p. 233-280. A fundamental Italian classic on this subject is the aforementioned N. Bobbio, *La consuetudine come un fatto normativo*, cit. See the recent volume regarding different features of the phenomenon of custom in the context of legal theory and philosophy of law, namely G. Bombelli & P. Heritier, *I volti molteplici della consuetudine. Volume 1. Origini*, 2022.

The conceptions of custom developed within theoretical-legal frameworks are often flawed either by neglecting to consider custom as a social phenomenon (by ignoring the issue of what constitutes, as such, a custom, or by adopting reductionist and overly simplistic views of custom as a social phenomenon), or by confusing the problem of analyzing custom in general with the issue of the legal foundation of custom⁶⁵.

Therefore, when approaching technical-legal custom, Celano remains interested in understanding its nature in dialogue with the first explication of custom, namely as *normative behavior* of strategic interaction.

For instance, according to Celano, the case of what are typically known as 'constitutional customs', against the background of constitutional law, could be understood and explained throughout the understanding of customs as *normative behaviors*. Consider Celano's words:

Constitutional customs [*convenzioni costituzionali*] are often practices, uses, patterns of conduct that everyone expects everyone else to expect – and so on – compliance [*osservanza*] with, based on the observation of past compliance (and the fact that it is known to all parties involved, it is known to all that it is known to all, etc.)⁶⁶.

3.3. 'Custom' in terms of *pre-convention*

Aligned with his expertise on analytical philosophy and social ontology, in *Pre-conventions. A fragment of the Background*⁶⁷, Celano addresses a third explication of the nature of customs in terms of those kinds of conventions that are

⁶⁵ *Ivi*, p. 179, mine trans. Consider the original Italian: "le concezioni della consuetudine elaborate in ambito teorico-giuridico sono spesso viziate o dalla mancata considerazione della consuetudine come fenomeno sociale (dal disconoscimento del problema di che cosa sia, come tale, una consuetudine, o da concezioni riduzionistiche, inevitabilmente semplificatrici, della consuetudine come fenomeno sociale, o ancora dalla confusione fra il problema di un'analisi della consuetudine in generale ed il problema del fondamento di giuridicità della consuetudine".

⁶⁶ B. Celano, *Fatti istituzionali, consuetudini, convenzioni*, cit, p. 218, mine trans. Consider the original Italian: "Le convenzioni costituzionali sono spesso pratiche, usi, regolarità di condotta di cui tutti si aspettano che tutti si aspettino – e così via – l'osservanza, sulla base della constatazione dell'osservanza passata (e del fatto che essa è nota a tutti i soggetti coinvolti, è noto a tutti che sia nota a tutti, ecc.)."

⁶⁷ B. Celano, *Pre-conventions*, cit. Celano's contribution regarding the concept of 'pre-conventions' is the focus of the article of Ana Esher, published in this volume of *Milan Law Review*, namely *Normativity Naturalized? Some Thoughts on Bruno Celano's Pre-Conventions*. Regarding the international debate grown after the publication of *Pre-conventions* by Celano, see also M, Žgur, *Pre-conventions: towards a psychological jurisprudence? A discussion with Bruno Celano*, in *REVUS*, 2016, Vol. 30, p. 7-8; P. Chiassoni, *Do jurists need pre-conventions?*, in *REVUS*, 2017, Vol. 33, p. 36-43; S. Figueroa Rubio, *How can we explain pre-conventions?*, in *REVUS*, 2017, Vol. 33, p. 45-51.

“consolidated by tradition”⁶⁸, ‘tacit’, ‘automatic’, almost like a ‘second nature’⁶⁹. In this light, these kinds of conventions might be outlined as *pre-conventions* in terms of:

Regular convergent behavior that, while not a biological regularity (e.g. breathing), is spontaneous, unreflective, fast, fluid, effortless⁷⁰.

To what extent can we distinguish a *pre-convention* from a *convention*?

As we saw in (§ 3.2.), the topic of ‘convention’ is central in the works of Celano. In fact, Celano analyzes conventions from the perspectives of the well-known David Lewis⁷¹ and, against the studies of ‘strategic interaction’, Celano contents that a convention is a

regularity of behavior held by a set of mutually expectations of conduct (of increasing level), and conditional preferences for conformity, mutually known, such that, once established, the aforementioned regularity perpetuates itself⁷².

Thus, in *Pre-convention*,⁷³ Celano asserts that the primary distinction between conventions and pre-conventions is that conventions are typically framed in explicit agreements, whereas pre-conventions are framed in tacit agreements.

Yet, according to Celano, pre-conventions are *not* sets of *rules*, nor simple *regularities*.

Human life is full of things like that: a certain way of walking, of sitting ... these things are not sets of rules. We can certainly, in many such cases, identify or conjecture relevant rules – rules that maybe we cannot formulate. But *the correct stroke* in crawl (not, of course, *a* stroke, a token, but the type), the way of walking

⁶⁸ B. Celano, *Fatti istituzionali, consuetudini, convenzioni*, cit, p. 10.

⁶⁹ It is well-known that Blaise Pascal explained custom in terms of ‘second nature’. To date, this concept has been questioned by, among the others, the aforementioned German sociologist Ferdinand Tönnies. Tönnies affirms that custom, if understood in terms of action, cannot be conceived as innate, even though, similarly to spontaneous natural phenomena, we often have an experience of customs as automatic actions. The argument of Tönnies is that what it is customary for us, we had to learn it first, see F. Tönnies, *Custom. An essay on social codes*, Free Press of Glencoe, New York, 1961, p. 31-32. For a comment on this point, see V. Presi, *Custom in Action*, cit, p. 199.

⁷⁰ B. Celano, *Pre-conventions*, cit, p. 11.

⁷¹ D. Lewis, *Convention. A Philosophical Study*, Blackwell, Oxford, 1969.

⁷² B. Celano, *Fatti istituzionali, consuetudini, convenzioni*, cit, p. 326, mine trans. Consider the original Italian: “una regolarità di comportamento sostenuta da un insieme di aspettative reciproche di condotta (di livello crescente), e di preferenze condizionali di conformità, reciprocamente note, tale da far sì che, una volta instauratasi, la regolarità in questione si perpetui da sé”.

⁷³ B. Celano, *Pre-convention*, cit, 11.

we call 'marching' etc., are not, in themselves, sets of rules. Nor are they, on the other hand, *de facto* regularities. Granted, when one or more individuals swim the crawl, or march, their behaviors are, under some respect, regular. But *the correct stroke* of front crawl, or the way of walking we call 'marching', are precisely the respect under which their behaviors are regular, and what *guides* these behaviors⁷⁴.

Therefore, Celano questions the nature of these *pre-conventions* that are in some respect '*embedded*' regularities in the manner of a 'second nature', and in others respect '*normative facts*' as they guide us to "what is the *correct*, the right or proper way to proceed"⁷⁵.

In response, Celano claims that the nature of these *pre-conventions* – such as social norms, customs, and ways of behaving – is explicable in terms of embedded disposition (*habitus*)⁷⁶ that we have in 'background'⁷⁷.

[one has] a *disposition* to choose in a certain way. But this is not a disposition of the same kind as, e.g., the disposition to close one's eyes in the presence of a strong light source, or a conditioned reflex. It is a disposition to choose in the *right* way [...]. Therefore, it is a *normative* disposition⁷⁸.

Contrary to traditional literature which recognizes fashion as an example of one custom with coercive force,⁷⁹ Celano cites the examples of 'style' and of '(good) taste', affirming that "style and (good) taste are notoriously not sets of rules" because (at least) of two reasons.

First, "purported codifications of style or taste in handbooks or manuals ('The Art of ...') have something hopelessly contrived and cloying" given that "the

⁷⁴ *Ibidem*.

⁷⁵ *Ivi*, p. 12.

⁷⁶ The concept of *habitus* as disposition is well-known within the Greek philosophy. Recently, it has been developed by P. Bourdieu, *Outline of a Theory of Practice*, Cambridge University Press, Cambridge, 1977.

⁷⁷ Celano recalls the concept of 'background' developed by the American scholar on social ontology John R. Searle, who writes: "As the skier gets better, he does not internalize the rules better, but rather the rules become progressively irrelevant. The rules do not become 'wired in' as unconscious Intentional contents, but the repeated experiences create physical capacities, presumably realized as neural pathways, that make the rules simply irrelevant. 'Practice makes perfect' not because practice results in a perfect memorization of the rules, but because repeated practice enables the body to take over and the rules to recede into the Background", see J. R. Searle, *Intentionality. An Essay in the Philosophy of Mind*, Cambridge University Press, Cambridge, 1983, p. 150-151.

⁷⁸ B. Celano, *Pre-conventions*, cit, p. 14.

⁷⁹ For instance, among the traditional literature, we could mention R. v. Jhering, *Der Zweck im Recht*, cit, who claimed that fashion (*Mode*) is one coercive phenomenon regulated by custom (*Sitte*).

very idea of a codification (of style, or taste) betrays a misunderstanding [...], a certain lack of style, shows bad taste"⁸⁰.

Secondly, "someone who has style, or has good taste, does not choose this or that by applying rules but spontaneously" since "style and taste, in themselves, are precisely what exceeds the mere application of rules – or, if you will, they are the right way of applying them"⁸¹.

4. Concluding remarks

As we highlighted (§ 2.), Von Wright attempts to situate custom – in terms of *norm-like* phenomenon – in his map of the normative. As a result, von Wright describes various features of the same 'custom' phenomenon compared to other normative phenomena (§ 2.7.). In contrast, from a different perspective and, consequently, using a different methodology, Celano primarily addresses 'custom' as a form of *normative behavior* (§ 3.1.), which serves as the common basis for other phenomena originating from it, namely *convention* (§ 3.2.), and *pre-convention* (§ 3.3.).

Further research on the nature of custom undoubtedly benefits from comparing von Wright's and Celano's different answers to the issue of whether 'custom' denotes one specific phenomenon or various phenomena.

Beyond the points already stressed, this paper highlights one final intersection where these two theories complement each other. In fact, among the advantages of Celano's analysis on customs in terms of a normative behaviors, Celano stresses the *authority of the past* as a coercive source of reasons of acting in conformity with customs⁸². As mentioned (§ 3.1.), Celano underscores the

⁸⁰ B. Celano, *Pre-conventions*, cit, p. 13.

⁸¹ *Ibidem*.

⁸² The concept of the authority of the past has been studied both in anthropological studies (such as L. Assier Andrieur, *L'autorité du passé: essai anthropologique sur la Common law*, 2011), and in sociological studies. Speaking about the latter, the aforementioned Ferdinand Tönnies quotes few common expressions throughout we can stress the authority of the past in common knowledge, such as: „wir müssen und wollen ebenso handeln, wie' unsere Vorfahren gehandelt haben, nach ihren Beispielen und Vorbilde müssen und wollen wir uns richten.“ [...] „denn die Alten wußten, wie es richtig sei, ihre Weisheit ist der unseren überlegen“ und „wie sie getan haben, so ist es bewährt oder erprobt, eben als das Altherkömmliche, als die Weise, die sich in der Überlieferung erhalten hat“. [...] „Es ist eine uralte Sitte“, „es ist von jeher so gewesen“, „seit Menschengedenken“. see F. Tönnies, *Die Sitte*, Rütten & Loening, Frankfurt, 1909, p. 17-18. In the English translation: "we must and we want to act as our forefathers have acted; we must and we want to follow their example and their precedents" [...] "since our elders knew what is right, their wisdom is greater than ours" and "the way they have done things has been tried out and proven as immemorial usage, as the way in which tradition has maintained itself." [...] "It is a very ancient custom," "it has been so forever," "since time immemorial . . ." see F. Tönnies, *Custom*, cit, p. 43-44.

significance of the formula 'I have to act as others do because it has always been done as such'.

The recognition of the authority of the past, evident in the aforementioned Celano's formula, can be seen as an original element in dialogue with von Wright's perspective. By doing so, in fact, Celano complements von Wright's explication of customs by drawing the attention to an analysis of the role of the past. This addition broadens the perspective beyond von Wright's hypothesis, which uniquely frames the community as holding normative authority regarding customs (§2.3.).

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