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CUSTOM IN ACTION. FERDINAND TÖNNIES' ONTOLOGY OF THE NORMATIVE¹

abstract

This paper deals with custom in action, namely, with the relationship between custom and action against the background of Amedeo Giovanni Conte's nomotropism. Starting with Frerichs' provocation of the peculiarity of saying 'handeln nach der Sitte' (acting according to custom) in favor of 'sich handelnd nach was üblich ist' (acting after what is usual), this paper will begin an exploratory research regarding the semantics and the ontology of custom to investigate the possibility of a nomotropic behavior in the field of custom. Therefore, this paper will quote, at first, Rudolf von Jhering's theory, and, at second, Ferdinand Tönnies' theory. In conclusion, this paper suggests that an inquiry into custom in action (and in particular Tönnies' ontology of the normative) could benefit from the nomotropic categories of analysis – such as adeontic and deontic regularities.

keywords

nomotropism, normative behavior, customs, Tönnies, Jhering

¹ The author is grateful to Professor Paolo Di Lucia, Professor Edoardo Fittipaldi, Professor Lorenzo Passerini Glazel, and Professor Ignasi Terradas Saborit for their critics and suggestions on a previous draft of this paper. Moreover, the author thanks Professor Stefano Colloca for the access to the 'Fondo Conte' held in Collegio Giasone del Maino (PV, Italy).

*Wo die Sitte wirklich lebendig ist, da findet sie eben regelmäßig
Gehorsam, sie wird peinlich befolgt und wer von ihr abweicht,
erscheint, wenn es nichts Schlimmeres ist, fast wie ein Irrsinniger; als
so notwendig setzt sich regelmäßig die Sitte.*
Ferdinand Tönnies¹

*Di fronte all'esistenza di un comportamento regolare, come si rivela
l'esistenza di una norma?*
Norberto Bobbio²

**1. Accustomed
Acting ('gesittetes
Handeln')**
1.1. *Accustomed
Acting versus Acting
in Accordance with a
Law (or a Rule)*

Commenting on Tönnies' theory of custom, in *Sitte, Gesetz und Bedeutung. Eine semiotisch-logische Denkfigur bei Ferdinand Tönnies und Ludwig Wittgenstein* (1991) Klaus Frerichs claims that the relationship between custom and action appears different from the relationship between law and action: whereas we can say that someone acts *in accordance with* a 'Gesetz' (or with a 'Regel'), on the other hand we cannot properly say that someone acts *in accordance with the custom* [*nach der Sitte*].³

In support of this thesis, Frerichs stresses a difference between the two expressions used by German ordinary language:⁴

- 1) 'Handeln nach einem Gesetz' (or 'nach einer Regel').⁵
- 2) 'Handeln nach der Sitte'.

According to Frerichs, whereas the first expression seems to be well-formed ('handeln nach einem Gesetz'), the second one sounds peculiar ('handeln nach der Sitte').⁶ Frerichs seems to argue

1 See Tönnies (1909, p. 81). The English translation is: "Where it is truly alive, custom is regularly and conscientiously obeyed, and he who deviates from it appears almost deranged. This indicates how absolutely necessary custom considers itself" (Tönnies, 1961, p. 127).

2 "In the presence of regular behaviour, how is the existence of a norm revealed?" (Bobbio, 1980, p. 878, my translation).

3 Something similar could be said regarding 'handeln nach der Bildung'. Regarding cultural norms, see Mayer, (1903).

4 The topic regarding the relationship between reality, language and thought is widely discussed. See Strawson, 1959.

5 In Frerichs' work, the two expressions 'handeln nach einem Gesetz' and 'handeln nach einer Regel' are used as synonyms, see Frerichs (1991, p. 272).

6 Even if Frerichs' merit is to underline the conceptual peculiarity of the German expression 'handeln nach der Sitte', still he does not specify whether this peculiarity is at a semantical, syntactic or pragmatological level.

that the peculiarity of the German expression ‘*handeln nach der Sitte*’ is a linguistic cue of a deeper phenomenological distinction, namely, two different ways of experiencing normative behavior: ‘acting in accordance with a law (or a rule)’ versus ‘*gesittetes Handeln*’. The latter German expression can be translated into English with the paraphrase of ‘to be accustomed to act in that way’, henceforth ‘accustomed acting’.

Therefore, Frerichs suggests replacing ‘*handeln nach der Sitte*’ with the alternative expression ‘*sich handeln nach was üblich ist*’, literally ‘*acting after what is usual*’.⁷

Here is what Frerichs says in full:

Strictly speaking, one cannot act ‘according to custom’. One does or does not orient [*richten*] oneself according to a rule or a law. Custom is this acting after what is usual. Accustomed acting [*gesittetes Handeln*] is not acting in accordance with a rule but acting after... and therein an actual orienting of oneself after what is factual (1991, p. 272, my translation).⁸

Frerichs’ provocation stressing the peculiarity and the infelicity of the expression ‘*handeln nach der Sitte*’ in German addresses the attention to an important philosophical question: Does the peculiarity of the German expression conceal the ontological impossibility of the existence of an action oriented to custom? Why cannot ‘accustomed acting’ be defined in terms of acting in accordance with custom?

Frerichs’ provocation seems to address the impossibility of a nomotropic behavior in the field of custom.

In *Sociologia filosofica del diritto* (2011), the Italian philosopher of law Amedeo Giovanni Conte named ‘*nomotropismo*’ (nomotropism) the phenomenon of acting *in-function-of* rules.

Conte writes:

I named ‘*nomotropismo*’ [*Nomotropismus, Nomotropism, Nomotropisme, Nomotropizm*] acting *in-function-of* rules (2011, p. 47, my translation).⁹

Therefore, when Frerichs claims the peculiarity of the expression ‘*handeln nach der Sitte*’, he seems to deny the possibility of acting *in-function-of* rules of ‘*Sitte*’.

Speaking of that, I have combined Frerichs’ suggestions on customary behaviour with Conte’s theory of nomotropism because I contend that an analysis of ‘accustomed acting’ can benefit from the tools of nomotropism perspective. For instance, Conte’s theory of nomotropism considers a wider range of relationships between action and rules than Frerich’s analysis; as a proof of that, consider the following quote:

7 In Frerichs reconstruction, “*Sitte ist Norm, da die Mitglieder der ‘gesitteten’ (nicht: sittlichen) Gemeinschaft sich tatsächlich, d.h. handelnd, nach dem richten, was üblich ist [Custom is norm, since the members of the ‘customary’ (not: moral) community actually, i.e., act, according to what is usual]*” (Frerichs, 1991, p. 272, my translation).

Nevertheless, the normative of custom does *not* manifest it-self as a ‘*Richtschnur*’ (guideline), a ‘*Maßstab*’ (standard), a ‘*Regel*’ (rule), a ‘*Vorschrift*’ (regulation) to which one can orient their behaviour according to (Frerichs, 1991, p. 272).

8 The German original: “*Strenggenommen kann man sich nicht ‘nach der Sitte’ richten. Man richtet sich oder richtet sich nicht nach einer Regel oder einem Gesetz. Sitte ist dieses Sich-handelnd-nach-dem-Richten, was üblich ist. Gesittetes Handeln ist keine Regelbefolgung, sondern ein Handeln in der Nachfolge von... und darin ein tatsächliches Sich-Richten-nach-dem-Tatsächlichen*” (Frerichs, 1991, p. 272).

9 The Italian original: “*Ho chiamato ‘nomotropismo’ [Nomotropismus, Nomotropism, Nomotropisme, Nomotropizm] l’agire in-funzione-di regole*” (Conte, 2011, p. 47).

Not necessarily (and not universally) acting in-function-of rules consists in the conformity with it. Acting in-conformity-with a rule is just the ‘limiting case’ [*Grenzfall, caso limite, cas limite, przypadku ograniczenia*] of nomotropism (2011, p. 24, my translation).¹⁰

Whether the relationship between custom and action can be defined in terms of normative behavior is a question that has been briefly touched upon, but not considered yet by the philosophical disciplines such as analytical philosophy of law or social ontology.¹¹ Nevertheless, the works of the German jurist Rudolf von Jhering (1818-1892) and of the German sociologist Ferdinand Tönnies (1855-1936) could be considered as two paradigms of analysis of the nature of the relationship between ‘*Sitte*’ and action. Even though their works precede the development of the aforementioned disciplines (analytical philosophy of law and social ontology), their suggestions could have an impact on them.

2. Two Paradigms of Analysis of Custom in Action

2.0. From Semantics of ‘*Sitte*’ to Ontology of Custom

Jhering and Tönnies studied custom from different perspectives of analysis – namely, the juridical and the sociological ones, respectively – and they indirectly have contributed to laying the ground for an ontology of custom. In fact, even if they both started with studying ordinary language’s use of the term ‘*Sitte*’, they seem indirectly end up configuring two antithetical ontologies of ‘*Sitte*’.¹²

Jhering studies the complex phenomenon of ‘*Sitte*’ through the category of ‘purpose’ [*der*

10 The Italian original: “Non necessariamente (e non universalmente) l’agire in-funzione di una regola consiste nella conformità ad essa. L’agire in-conformità-alla regola è solo il caso-limite [*Grenzfall, limiting case, cas limite, przypadku ograniczenia*] del nomotropismo” (Conte, 2011, p. 24).

11 *Custom, Law, and Morality. Conflict and Continuity in Social Behaviour* (1969) by B. Leiser is an exception of systematic philosophical study about customs. A second exception is the economic analysis by E. Schlicht, called *On Custom in the Economy* (2018). Otherwise, ‘*Sitte*’ is at the centre of interest for juridical anthropologist studies, see Malinowski, 1926. Nevertheless, the philosopher of law G. H. von Wright inserts custom within his mapping of norms in *Norm and Action* (1963). Even if von Wright’s work is not a systematic one on customs, he outlines a normative mapping in which he inserts ‘rules’, ‘prescriptions’ and ‘technical norms’ (or ‘directiveness’), and, alongside this tripartition, he sets a parallel articulation, i.e., ‘customs’, ‘moral principles’ and ‘ideal rules’. Moreover, Von Wright uses the expression ‘live in accordance with’ custom underling the impact of custom on cultural values of a community: who violates a custom is considered as ‘stranger’ rather than ‘outlaw’ (von Wright, 1963, pp. 8-9). Finally, in the works of J. R. Searle, one of the major scholars within the social ontology framework, we can find the concept of ‘background’ and of ‘rules of community’, that can be compared with rules of customs. See Searle, 2019.

12 Jhering and Tönnies’ works are remarkable for their pioneer research into the etymological root of the term ‘*Sitte*’. Generally speaking, the term ‘*Sitte*’ [‘custom’, ‘costume’] could relate to a ‘polythetic classification’ (Needham, 1975) since it counts a plurality of meaning and uses in the majority of the European languages. In fact, within the ordinary language linked to the semantic of ‘*Sitte*’, it is common to find ‘false friends’ – such as ‘*custom*’, ‘*costume*’, ‘*coutumier*’ and ‘*costumbre*’ – thinking that they are synonymies while they cover different meanings. The etymology of terms ‘*Sitte*’, ‘*custom*’, ‘*costume*’ relates to the common Indo-European root **se-swodha*. This Indo-European root gave rise to the Greek substantive ἔθoς and the Latin substantive ‘*consuetudo*’. The Greek substantive ἔθoς, -oς means ‘habits’, ‘*Gewohnheit*’, ‘*abitudine*’, while its variant ἦθoς, -oς means ‘natural disposition’, giving rise to the substantive ἠθoλογία, i.e., the science of the relationship between the natural disposition of human being and goods and bad values. Moreover, ‘ethology’ has the same etymology. The Latin substantive ‘*consuetudo*’ comes from the verb ‘*consuescere*’. The verb ‘*consuescere*’ is composed of *con-* (*cum*), together, and the verb “*suesco, suēvi, suetum, ēre*” linked to the possessive pronoun ‘*suus*’, meaning “to make one’s own”, “*abituarsi*”, “*sich zur Gewohnheit machen*”. The first occurrence of the verb ‘*sueo, -re*’ is in Lucrezio I, 60. Later, in Cicero II the verb ‘*suesco, -ere*’ appears in the formula ‘*quod suesti*’, meaning “as you are used to”. See ‘*Sitte*’ in *Etymologisches Wörterbuch des Deutschen. Band Q-Z* (1989), p. 1639; ‘*Gewohnheit*’ in *Zur Lehre vom Rechtsbegriff* (1963), pp. 598-618; ἔθoς in *Etymon Lessico per radici. Guida all’apprendimento del lessico greco* (1993), p. 244; ἦθoς in *Dictionnaire étymologique de la langue grecque : histoire des mots* (1983), pp. 407-408; ‘*Custom*’ in *The Concise Dictionary of English Etymology* (1884), p. 106; ‘*Custom*’ in *The compact edition of the Oxford English dictionary: complete text reproduced micrographically* (1987), p. 168; ‘*Custom*’ in *Heinemann English Dictionary* (1979), p. 261; ‘*Costume*’ in *Dizionario etimologico della lingua italiana: l’origine delle nostre parole* (2005), p. 86.

Zweck]; by doing so, he attempts to frame the role that the purpose of the 'Sitte' plays alongside law and morality within 'die Weltordnung' (the mundane order).¹³ The outcome is a theory of 'Sitte' where 'Sitte' has a univocal meaning applied to a plurality of cases (§ 2.1.). Tönnies goes deep into the plurality of linguistic meanings and ontological dimensions of 'Sitte' in social reality by using the category of 'will' [*der Wille*] to focus on how individuals differently experience 'Sitte'. The outcome is a theory that distinguishes three linguistic meanings corresponding to a threefold ontological dimension of 'Sitte' (§ 2.2.).

2.1.1. Jhering is among the first authors who pointed out a semantical and ontological difference between the term 'Sitte' (custom) and the term 'Gewohnheit' (customary practice) in *Der Zweck im Recht. Zweiter Band* [1883, ²1886, *Law as a Means to an End. Second volume*, not translated into English yet].¹⁴

According to Jhering, while 'Gewohnheit' stands for a simple regular practice that needs to be accepted and then eventually codified by law to assume normative characteristic, 'Sitte' has an inner '*verbindende Kraft*' (normative force) of which 'Gewohnheit' is lacking.¹⁵

2.1.2. To what extent does this inner normative force characterize the 'Sitte'? According to Jhering, this inner normative force bears evidence of the nomologic nature of 'Sitte'. In fact, 'Sitte' has its own nomologic dimension, called by Jhering '*Sittengesetz*', i.e., law of customs.¹⁶ According to Jhering, the *Sittengesetz* acts autonomously in social reality beside law and morality, since *Sittengesetz* is characterized by a '*psychologische Zwang*' (a psychological-coercive dimension). Jhering says:

Just as the law has its mechanical coercion expressed by the state, so the law of custom has its psychological coercion expressed by society (1886, p. 181, my translation).¹⁷

The psychological coercion is exercised by public opinion and has the power to regulate individuals' behavior, sometimes even over and beyond prescriptions of statutory law.¹⁸ In fact, according to Jhering:

This coercion manifests itself in public opinion. It is the power that surrounds us everywhere, from which no one can escape, no matter how high his position, and

2.1. First Paradigm:
Rudolf von Jhering's
Ontological Thesis on
Custom

¹³ Jhering commonly uses the not so clear term 'Weltordnung' in *Der Zweck im Recht. Zweiter Band* to refer to the whole social matter.

¹⁴ Jhering is one of the very first scholars to address the urgent need of a deep analysis regarding customs phenomena. He says: "[D]ie Sitte bildet nicht bloss das jüngste, nachgeborene Kind der Ethik, sondern das verwahrloste, das Stiefkind: ihren beiden älteren Schwestern: der Moral und dem Rechte gegenüber ist ihr bisher das Los des Aschenbrödels zu Theil geworden [Sitte is not only the youngest child of ethics, but also its most neglected, its stepson, who has suffered the fate of Cinderella compared to his two older sisters, morality and law]" (Jhering, 1886, p. 332, my translation). Almost a century later, the philosopher Burton Leiser remarks the limited attention that the scientific literature has given to customs topic, saying: "of the great triumvirate – morals, law, and custom – only one has suffered virtually complete neglect at the hands of philosophers. [...] Moral philosophers have studied morals [...]. Legal philosophers have studied law [...]. But until now, there has been no philosopher of custom" (Leiser, 1969, p. 1).

¹⁵ For a broader explanation, see Jhering, 1886, pp. 21ff.

¹⁶ As well-known, Immanuel Kant uses the term '*Sittengesetz*' with the meaning of law of morality. For an insight into the different uses of this term, see Spiegelberg, 1935.

¹⁷ The German original: "Wie dem Rechtsgesetze die mechanische Zwangsgewalt des Staats, so correspondiert dem Sittengesetze die psychologische Zwangsgewalt der Gesellschaft" (Jhering, 1886, p. 181).

¹⁸ In this regard, Jhering provides a wide range of cases in which the content of customary norms conflicts with the obligations of statutory laws, for instance see the cases of the 'gambling debts', 1886, pp. 240-241.

that sues even those who cannot be reached by the arm of the law or who have been acquitted by the judge (1886, p. 181, my translation).¹⁹

2.1.3. Nevertheless, *Sittengesetz* is not customary law [*Gewohnheitsrecht*]. The latter, according to Jhering, is the result of the juridical qualification of a custom as a legal duty and not even more a social duty. Jhering says:

If the idea of social duty, animator of custom, is condensed into legal duty, custom is transformed into customary law (1886, p. 246, my translation).²⁰

2.1.4. But what are the phenomena ruled by *Sittengesetz*?

Jhering offers a specific mapping of social phenomena ruled by *Sittengesetz*, which he calls '*die Systematik der Sitte*' (systematics of *Sitte*). To map all the types of custom, Jhering adopts two different criteria.²¹

The first criterion is the social utility of the type of custom. Based on this first criterion, Jhering observes three different classes of custom.

- 1) Bad custom or misconduct [*die böse Sitte oder die Unsitte*].²²
- 2) Socially indifferent custom [*die social-indifferente Sitte*].²³
- 3) Good or socially useful custom [*die gute oder social-werthvolle Sitte*].²⁴

Furthermore, in order to determine to which type of custom a phenomenon belongs, Jhering employs a second criterion, namely, the criterion that considers the 'content of the obligation' of the analyzed custom: if the content is economic, then the analyzed custom is a '*Sitte des Gebens*' (*Sitte* of giving); if the content is not economic, then the custom analyzed is a '*Sitte des Lebens*' (*Sitte* of life).²⁵

Regarding 'customs of life', that are the manifestation of a non-economic '*Personalzwang*' (personal coercion), Jhering discovers three 'criteria' through which *Sittengesetz* acts on individual behavior.²⁶ Those are:

- 1) '*Höflichkeit*' (courtesy).
- 2) '*Anstand*' (*decorum*).
- 3) '*Takt*' (tact).²⁷

2.1.5. To sum up, Jhering analyzed custom as a phenomenon that runs alongside law and morality in the ruling of social reality. Therefore, starting from the focus on the purpose [*der*

19 The German original: "Sie bethätigt sich in der öffentlichen Meinung. Es ist die Macht, die uns auf Schritt und Tritt umgibt, der Niemand, auch der Höchste nicht, sich entziehen kann, und die auch diejenigen, welche der Arm des Gesetzes nicht erreichen kann, oder welche der Richter freigesprochen hat" (Jhering, 1886, p. 181).

20 The German original: "Verdichtet sich die in letzterer pulsierende Idee der socialen Verpflichtung zur rechtlichen, so wird die Sitte Gewohnheitsrecht" (Jhering, 1886, p. 246).

21 See Jhering, 1886, pp. 281ff.

22 Jhering provides as examples: tip, duel and paying gambling debts.

23 Jhering does not provide an example of socially indifferent customs.

24 Jhering provides as examples: gift-giving, Sunday holiday, clothing's rules.

25 To go into details, see Jhering, 1886, pp. 281ff.

26 The derivation of those tree criteria from the term '*Sitte*' is one of Jhering's concepts that Tönnies criticises. See Tönnies, 1909, p. 70; 1961, p. 113.

27 According to Jhering, the tact is the expression of the 'sense of expediency or demeanour' [*Schicklichkeitsgefühl, Anstandsgefühl*]. Regarding customs, Tack has a guiding role like the role of the 'sense of law' [*Rechtsgefühl*] in legal matters and the role of the 'sense of morality' [*Sittlichkeitsgefühl*] in moral matters. In particular, Jhering recognises the importance of the tact as an orienting rule, especially in uncertain circumstances when individuals have to find by them own a way of acting. In fact, Jhering analyzes the tact "in seiner praktischen Function als Wegweiser für das eigene Handeln [in its practical function as a guide for one's own actions]" (1886, p. 41, my translation).

Zweck] of the custom within this perspective, he ended up offering an ontology of custom in which custom has its own nomological dimension, i.e., the ‘*Sittengesetz*’.

Jhering maintains that the purpose [*der Zweck*] of custom is to play the role of “function of confirmation of morality” (1886, p. 275, my translation),²⁸ meaning that: “custom is the police of morality” (1886, p. 291, my translation).²⁹

In this regard, Jhering claims that custom plays the role of confirmation of morality as follow:

Custom forbids what is merely dangerous, morality what is intrinsically harmful (1886, p. 226, my translation).³⁰

2.2.1. Differently from Jhering’s univocal reconstruction of the nature of custom, Tönnies prospects a complex relationship between custom and action.³¹

In fact, in *Die Sitte* (1909, English translation: *Custom* 1961), according to Tönnies, the term ‘*Sitte*’ covers a threefold linguistic meaning [*Bedeutung*] commonly used in German ordinary language:³²

- 1) ‘*Sitte*’ as ‘*Tatsache*’ (mere matter of fact).
- 2) ‘*Sitte*’ as ‘*Gewohntsein*’ (individual habit),
- 3) ‘*Sitte*’ as norm established by ‘*sozialer Wille*’ (social will).

Tönnies says:

The word ‘*Sitte*’ (custom) embraces the threefold meaning [*Sinn*] of mere fact, of norm, and of the will which sets the norm (1961, p. 35).³³

2.2.2. The first meaning that the term ‘*Sitte*’ covers is the meaning of ‘*Tatsache*’, that refers to “a matter of fact [*Tatsache*] of an objective nature” (Tönnies, 1909, p. 7; 1961, p. 29). Waving goodbyes, giving presents, using language courtesy formulas, they all are simple facts, acts and gestures.

Here, Tönnies focuses the relationship between custom and the action of doing it. In fact, the noun ‘*Tatsache*’ is composed by ‘*Sache*’ (thing), and ‘*Tat*’ (action), meaning ‘*Sache der Tat*’ (matter of deed). The use of ‘*Tatsache*’ is meaningful: on the one hand, the normative dimension of custom as a rule is a fact; on the other hand, the effortless nature of performing a rule of custom is also a fact given the stratification over the time of the experience of customary acting. In fact, according to Tönnies, “the essence of custom lies in actual practice” (1899, p. 304).³⁴

²⁸ The German original: “sittlich-adminiculirende Bestimmung” (Jhering, 1886, p. 275).

²⁹ The German original: “die Sitte ist die Polizei im Dienste der Moral” (Jhering, 1886, p. 291).

³⁰ The German original: “[die Moral] verbietet das an sich Schädliche, [die Sitte] bloss das Gefährliche” (Jhering, 1886, p. 264).

³¹ Regarding the Jhering’s influence on Tönnies, see Presi, 2023. Tönnies’ interest in the terminology of ‘*Sitte*’ appears also in his previous work *Philosophical Terminology* (1899).

³² It is not clear whether Tönnies uses the term ‘*Bedeutung*’ to express ‘meaning’ or ‘referent’. Although he quotes the German ordinary language meanings of term ‘*Sitte*’, on the other hand, Tönnies seems to assign a concurrent threefold ontological dimension to them. In fact, we can see the matter of fact [*Tatsache*], an individual ontological dimension [*Gewohntsein*], and a social ontological dimension [*sozialer Wille*]. Those threefold meanings are called ‘*Strukturmomente*’ of custom by Frerichs (1991, p. 272).

³³ The German original: “Das Wort Sitte bedeckt jenen dreifachen Sinn, den der bloßen Tatsache, den der Norm und den des Willens, der die Norm setzt” (Tönnies, 1909, p. 12).

³⁴ Regarding this, Frerichs remarks that “*Über Sitte non est disputandum*” (Frerichs, 1991, p. 273). Michele Basso says that: “il fatto che la si voglia fare sta nella costatazione che la si fa, e mai viceversa [the fact that we want to perform it

Moreover, Tönnies explains ‘*Tatsache*’ as follows:

We mean nothing more than that one is ‘used to’ doing so, he does it regularly, it belongs to his way of life (1961, p. 30).³⁵

2.2.3. The second meaning that the term ‘*Sitte*’ covers is the meaning of ‘*Gewohntsein*’, that refers to “a rule, a norm [*Norm*], which a person establishes for himself” (Tönnies, 1961, p. 30),³⁶ such as taking a walk, getting up early, and taking a nap.

Tönnies designates the nature of this individual regularity through the concept of ‘*das Gewohntsein*’ (habituation, wontedness).³⁷ Tönnies says:

We may say “he has made it a habit” and, in the same sense, “he has made it a rule for himself” or even a “law”, and we mean that the habit operates like a law or like a “precept”. One follows it; one regards the habit as a binding command, a subjective creation which, however, has objective form and validity (1961, p. 30).³⁸

According to Tönnies, habituation is “conceived of as a characteristic of an individual” (1961, p. 31).³⁹ In this regard, it is noticeable Tönnies’ choice of using the term ‘*Gewohntesein*’, namely, the *quality* of state of being accustomed to.

Moreover, according to Tönnies, habituation is experienced by individuals as a ‘natural’ disposition, similar to a ‘spontaneous’ disposition.

Established habits imperceptibly change into the instinctive. What we do habitually we do ‘involuntarily’ just as we involuntarily make gestures, movements of welcome and of repulsion which have never been taught to us but in which we are skilled “by nature”. [...] However, what we are accustomed to do, we have had to learn and practice first (Tönnies, 1961, pp. 31-32).⁴⁰

In fact, according to Tönnies, it would be a mistake to conflate habituation with spontaneous action, because we often experience a habituation as a “*leidige Gewohnheit* [*annoying habit*]” (1909, p. 10; 1961, p. 34). That happens because habituation goes against our will,⁴¹ given that

lies in the observation that we are doing it, and never *vice versa*]” (Basso, 2019, p. 27, my translation).

35 The German original: “Er pflegt so zu tun, er tut es regelmäßig, es gehört zu seiner Lebensweise” (Tönnies, 1909, p. 7).

36 The German original: “Die Bedeutung einer Regel, einer Norm, die der Mensch sich selbst gibt” (Tönnies, 1909, p. 8).

37 This concept seems to recall the Aristotle’s concept of ‘ἕξις’ (hexis). The author is grateful to Professor Edoardo Fittipaldi for this suggestion.

38 The German original: “Wir sagen wohl: er hat es sich zur Gewohnheit gemacht, und im gleichen Sinne: er hat es sich zur Regel oder sogar zum “Gesetz” gemacht, und meinen, daß die Gewohnheit wirke wie ein Gesetz oder wie eine “Vorschrift” – man richtet sich danach, man schaut die Gewohnheit an, wie ein verpflichtendes Gebot, ein Gebilde von subjektiver Art, das aber objektive Form und Geltung hat” (Tönnies, 1909, p. 7).

39 The German original: “Das Gewohntsein [wird] als Eigenschaft eines Individuums gedacht [...]” (Tönnies, 1909, p. 8).

40 The German original: “Unmerklich geht das Gewohnheitmäßige in das Instinktive, das Triebartige über: was wir gewohnt sind zu tun, das tun wir “unwillkürlich”, ebenso wie wir unwillkürlich Gebärden machen, Bewegungen des Willkommenheißen und Abwehrbewegungen, die uns niemals gelehrt worden sind, die wir “von Natur” können [...]. Was wir aber gewohnt sind zu tun, das haben wir erst lernen und einüben müssen” (Tönnies, 1909, p. 9).

41 As remarked by Turner (1994, pp. 85-92), Max Weber inherits Tönnies’ hypothesis regarding an ‘*annoying habit*’ experienced in response to the attempt of going against a habit. From a biological point of view, Weber says: “Abweichungen davon [scheinen] äußerst beunruhigend [und] auf den Durchschnittsmenschen psychisch ganz ähnlich zu wirken wie Störungen organischer Funktionen [a [variation] from the customary [acts] on the psyche of the

habituation “also compels [us] to certain conduct and action” (Tönnies, 1961, p. 31).⁴² The concept of habituation as disposition to usually act after our individual norm and the feeling of ‘annoyance’ are cues of normative behaviors. Therefore, Tönnies seems to suggest that even the habituation meaning of the term ‘*Sitte*’ shows evidence of its normative character.

2.2.4. The third meaning that the term ‘*Sitte*’ covers is the meaning “expression of the ‘*sozialer Wille*’ (social will)”, that refers to the proper concept of customary norm in Tönnies, given that “the will sets the norm” (1961, p. 35).⁴³

In fact, when a rule of habituation, established by the individual will, becomes the expression of a social will, only then does that rule of habituation become a customary norm as “expressive of volition or of a will” (Tönnies, 1961, p. 30).⁴⁴

Tönnies also considers the case in which a norm of custom expressed by the ‘*sozialer Wille*’ conflicts with a statutory norm as proof of the normative force of custom:

We know that where law and the executive power of the state compete with custom, custom often proves itself to be superior, and that it is always held to be older and more sacred. We can thus understand custom as a *sort of legislative will* [gesetzgeberischer Wille] (1961, p. 42, emphasis added).⁴⁵

2.2.5. The nomologic dimension of custom as expression of ‘*sozialer Wille*’ is clear since Tönnies addresses a ‘general rule’ [*allgemeine Regel*]: “the ancestral practices are regarded as the essential basis for duty to which the living are bound” (1961, p. 44).⁴⁶

But what is the role of the ancestral practices? According to Tönnies, the nomologic dimension of custom does not consist in – as Jhering instead suggests – conforming our behavior to the normative prescription of a rule of custom (or of a ‘*Sittengesetz*’). On the contrary, the peculiarity of the nomologic dimension of custom is that we conform our behavior to what our ancestors *have done* in the past, not what they have decided to do. In fact, the social will is “based on tradition” (Tönnies, 1961, p. 42).

The fact that our forefathers held it ‘this way’ and practiced it, will always be given as

average individual like the disturbance of an organic function]” (Weber, 1922, p. 188; 1922/1978, p. 320).

42 The German original: “Sie nötigt auch zu bestimmtem Tun und Handeln” (Tönnies, 1909, p. 8-9).

43 The German original: “[D]er [Wille setzt] die Norm [...]” (Tönnies, 1909, p. 12). In a previous work, *Gemeinschaft und Gesellschaft* (1887), Tönnies hypothesized the existence of a human ‘*Wesenwille*’ [an essential will]. According to Tönnies, the *Wesenwille* is a necessary and rational will and it acts both on individuals and on communities, in fact: “Gewohnheit ist ein Ausdruck des individuellen, Sitte des sozialen Wesenwillens [Habit is an expression of individual *Wesenwille* and custom an expression of social *Wesenwille*]” (1909, p. 17; 1961, p. 42). Many authors – among them Weber – do not agree with the ontological assumption of the existence of a ‘social will’. This critic is subscribed also by the German philosopher of law Hans Kelsen, as reported in *Der Soziologische und der Juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses von Staat und Recht* (1920) and in *Der Begriff des Staates und die Sozialpsychologie: Mit besonderer Berücksichtigung von Freuds Theorie der Masse* (1922). The author thanks Professor Lorenzo Passerini Glazel for the indication of the latter Kelsen’s work.

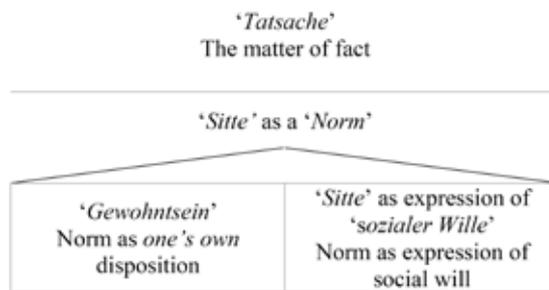
44 The German original: “Ausdruck für ein Wollendes oder einen Willen” (Tönnies, 1909, p. 7).

45 The German original: “Wissen wir, daß Sitte im Volks- und Völkerleben eine überschwängliche Gewalt besitzt, daß sie, auch wo das Gesetz und die dahinterstehende Staatsgewalt mit ihr konkurriert, oft sich als dieser überlegen an Stärke erweist, und daß sie überall älter ist und heiliger gehalten wird als diese. Wir können also die Sitte nach Art eines gesetzgeberischen Willens auffassen” (Tönnies, 1909, p. 17).

46 The German original: “Die Praxis der Vorfahren als wesentlicher Grund der Pflicht gilt, an die sich die Lebenden gebunden halten” (Tönnies, 1909, p. 19).

the decisive reason why we, too, should hold it this way and follow the same practice. [...] The main idea is not that *our ancestors wanted or demanded it, but that it is required because they have done it*. It is based on the common reasoning that we must and we want to act as our forefathers have acted; we must and we want to follow their example and their precedents (Tönnies, 1961, p. 43, emphasis added).⁴⁷

To sum up, Tönnies’ threefold theory of the meanings of the term ‘*Sitte*’ could be schematized as follows:



3. Concluding Remarks

Starting from Frerichs’ provocation of the hypothetical impossibility of acting *in-function-of* custom, as a response this paper reconstructs two paradigms of analysis of the relationship between custom and action.

The first paradigm is offered by Jhering, who draws an analogy between the field of custom and the field of law. In fact, the German jurist seems to admit the possibility of acting *in-function-of* custom, given that the normative behavior in the field of custom is regulated by a specific law, i.e., the ‘*Sittengesetz*’ (law of custom).

The second paradigm is offered by Tönnies, who provides a more articulated analysis. To properly account for Tönnies’ articulation, I suggest making use of a distinction elaborated by Conte in his theory of nomotropic behavior, namely the distinction between the phenomenon that he calls ‘*deontic regularity*’ [*regolarità deontica*] and the phenomenon that he calls ‘*adeontic regularity*’ (or ‘*ontic regularity*’) [*regolarità adeontica, regolarità ontica*] (see Conte, 2011, pp. 25ff.). While ‘*deontic regularity*’ designates a regularity of action that is oriented to a norm (regulated behavior), an ‘*adeontic regularity*’ designates a regularity of acting that is not oriented to a norm (regular behavior).⁴⁸ Conte writes:

I introduced the concept of *deontic regularity* (regularity in-function-of rules). The opposite of deontic regularity is the *adeontic regularity* (*non-deontic regularity, ontic regularity*). Adeontic regularity is the regularity which is *not in-function-of rules* (2011, p. 25, my translation).⁴⁹

47 The German original: “Die Tatsache, daß die Väter es so gehalten und geübt haben, wird regelmäßig als der entscheidende Grund dafür angegeben, daß wir es auch so halten und üben sollen oder müssen. [...] Nicht, daß die Vorfahren es gewollt oder geboten haben, sondern daß es geboten sei, weil sie es getan haben, ist der erste Gedanke” (Tönnies, 1909, p. 17).

48 The distinction between ‘*regular behaviour*’ and ‘*regulated behaviour*’ is also well-explained by the Italian philosopher of law Norberto Bobbio in *Enciclopedia Einaudi* (1980, pp. 877-878). In this occasion Bobbio does not deal with customs, but he did in *La consuetudine come fatto normativo* (2010, original work: 1942). For a recent comment regarding it, see Di Lucia, 2022.

49 The Italian original: “Ho introdotto il concetto di regolarità *deontica* (regolarità in-funzione-di regole). L’opposto della regolarità *deontica* è la regolarità *adeontica* (regolarità *non-deontica*, regolarità *ontica*). Regolarità *adeontica* è regolarità che *non è in-funzione-di regole*” (Conte, 2011, p. 25).

In the light of Conte's terminology, Tönnies seems to distinguish different normative behaviours in the field of custom based on the meaning of the term 'Sitte'. In fact, Tönnies seems to maintain that when 'Sitte' merely means a matter of fact [*Tatsache*], we are facing an *adeontic* regularity. Concurrently, Tönnies seems to affirm that when 'Sitte' means habituation [*Gewohntsein*] or expression of social will [*sozialer Wille*] we are facing *deontic* regularities.

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