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NORMS, NORMS, AND NORMS: VALIDITY, EXISTENCE AND REFERENTS OF THE TERM *NORM* IN ALEXY, CONTE, AND GUASTINI*

abstract

In this paper we examine the interplay between validity and existence of a norm. We compare Amedeo Giovanni Conte's five-folded conception of norm with the "semantic" conception of Robert Alexy's and Riccardo Guastini's idea of existence-as-legal-membership. We show how Alexy's model encompasses all the referents of Conte.

We investigate the interplay between different theses on the relationships between validity and existence of norms and the referents for norm that a theory is able to admit. In particular, we show that if we want to encompass all five Contean referents we have to give up the (Kelsenian) validity-as-existence thesis.

keywords

ontology of norm, Amedeo Giovanni Conte, Robert Alexy, Riccardo Guastini, validity

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Is there an interplay between validity and existence of a norm? It seems so. What is exactly this interplay? This question is way more difficult to tackle.

Our route here will be somehow peculiar. ‘Norm’ is ambiguous: there are different sorts of entity that can be called ‘norm’ and different theories (of both validity and existence) rely on different entities.

We start from these different norms to tackle the validity-existence interplay. Given that there are way more things that can be called ‘norm’ than the standard (Kelsenian) validity-as-existence thesis allows, we are going to drop such a link.

Our aim is to distinguish and clarify the relationship between the (Kelsenian) validity-as-existence thesis, Guastini’s existence-as-legal-membership, Alexy’s existence-as-possible-expression and Conte’s existence-as-having-a-referent.¹

In section 1 we present the Conteian pluralistic account of ‘norm’ trying to highlight its remarkable features and focus on the fourth and the fifth referents of his list.

In section 2 we deal with Alexy’s “semantic”² model and we show some quotes that can be interpreted as an agreement with Conte’s pluralistic conception. The divorce between validity and existence of norms is the turning point of our analysis and is also the reason why Alexy’s conception encompasses all the Conteian referents.

In section 3 we compare Conte’s and Alexy’s account of validity with the positivist position of Riccardo Guastini (2011a, 2013) who sharply distinguishes between validity and existence of norms. From the comparison of these authors different accounts of this issue will emerge: Guastini’s account follows Kelsen as a less extremist positivism but precedes Alexy and Conte’s conceptions that are more sensitive to non-positivist frameworks.

1 Throughout the paper we follow the Kelsenian characterization of validity as formal enactment but we reject validity-as-existence. Retaining formal enactment without validity-as-existence is something Guastini, Alexy and (to some extent) Conte do as well.

2 We added the scare quotes because, in a Conteian setting, a “semantic conception of norm” is intended as a reductionistic or restrictive conception according to which the norm is only a semantic entity. Most often such entity is the written norm of a code (a sentence) or, otherwise, a deontic proposition. Alchourrón & Bulygin (1971: sect. 3.3 and 3.5; 1981)’s conception of a norm may be such an example (both the hyletic vs. expressivistic conception of norm and their concept of norms in *Normative Systems*). Further, the distinction between insular and bridge conception of norms applies mainly to this semantic conception. Alexy’s “semantic” is different and it encompasses all the Conteian referents (see sect. 2).

Conte tries to pinpoint the different referents of the term ‘norm’. Properly speaking, he is not committing himself to a specific ontology of norms (say the hyletic or the expressive conception of Alchourrón & Bulygin (1981)), rather he offers us a broader phenomenology of norm.

Norms and ‘ought’ (*ta deonta*, as Conte would put it) are told in many ways, Conte says. ‘Norm’ can refer to at least five different things; some are linguistic entities, some are not.

As linguistic entities we have:³

(C1) Deontic sentences, i.e. written pieces of normative texts.

(C2) Deontic propositions, i.e. abstract entities.⁴ It is deontic propositions we refer to when we say that two different legal provisions express the same norm.

(C3) Deontic utterances, i.e. speech acts such as those made in a Parliament, e.g. when derogating a norm.

Contemporary legal positivists that analyse legal language, such as Guastini (2011a, 2011b, 2013), are well aware of these referents and draw many distinctions about them.

To these three referents we can add two further referents that, though linguistically expressible, are not linguistic entities strictly speaking:

(C4) Deontic states-of-affairs. Sometimes a norm “is there” factually, it is - as the name says - a deontic state-of-affairs. Deontic states-of-affairs require us to drop the Is/Ought distinction. Identifying the “Is-element” of this Ought-state is complicated. Sometimes it is its effects or products (think about constitutive rules). Sometimes the Is-element(s) are factual situations and patterns of behaviours that you can grasp because there’s a rule.

Conte’s example is that of the rules we read in the *Sachsenspiegel*: these rules - if the book says the truth - were actually there in the Holy Roman Empire.

The deontic state-of-affairs is the anti-positivists’ and the sociologists’ best friend, since it relies on an (anti-Kelsenian) norm’s conception which gives up with the distinction between norm, norm’s validity and norm’s existence⁵ (see sect. 3).

We think this referent applies also to written norms (e.g. when constitutive rules produce their effects and deontic) despite Conte’s highlighting its impact to unwritten norms such as customs.

(C5) Deontic noema. This referent points out the propositional attitudes we have when we are discussing possible norms.⁶ Conte’s example is that of a law proposal, i.e. before its formal enactment.

1. Conte’s Pluralistic Account of the Term ‘Norm’

3 Throughout the paper we shall refer to Contean referents as (C1-C5) to make the comparisons with different conceptions easier.

4 ‘Propositions’ in their philosophical meaning, not according to the legal usage for which a proposition is a statement (most often a written text or an article of a code).

5 Much of what Sacco (2015) says about unspoken law (*diritto muto*) can be grasped as deontic state-of-affairs.

6 Guastini (1982) calls them normative-attitudes (*atteggiamenti normativi*), maybe to avoid talking (rectius: talking in disguise) about mental entities which are seen as suspect. In Guastini (2011a: 266) normative acts are defined as “(linguistic) behaviours that create (produce, promulgate) deontic provisions [*disposizioni*]”. These linguistic behaviours, if they require some mental act or before actually producing a valid deontic utterance, seem to involve noema. Probably you may argue that all interpretative acts involve deontic noema. Nonetheless this is the topic of another paper.

**2. Alexy's
Pluralistic
"Semantic"
Conception of
Norm**

Alexy (1985/2002) provides a "semantic" theory of norms which we claim is able to encompass all the five Conteian referents, through inspired by a different research agenda.⁷ Alexy (1985/2002: §1.1) aims to offer a "model" of norms that is both as comprehensive and wide as possible, in order to match with the majority of norms' conceptions, as well as strong enough to serve his theory of fundamental rights. Alexy is not interested in providing a full analysis of the concepts involved in the definition of 'norm'. Nonetheless, going through a few quotes seems enough to find out all the Conteian referents.

If we consider the Conteian distinction between a deontic sentence and a deontic proposition, we see that Alexy's (§1.2) semantic model (of norms) points up an analogous difference between "normative statement" (*Normsatz* - (C1)) and "norm" (*Norm* - (C2)). In fact, we have different normative statements (think about a normative disposition and its translation or about two textual evidences from a legal corpus that are said to state the same fundamental right) that express the same norm.

As far as Conte's third referent is concerned, i.e. deontic utterance (C3), Alexy is well aware that norms can be uttered and that there are specific speech acts that pertain to the normative sphere.⁸

As we have seen, it is fairly easy for an account of norms to meet these first three referents (C1-C3). After all, the vast majority of legal theories knows the distinction between how a norm is laid down (be it written or spoken) and its meaning, so it is fairly easy to have the distinction between deontic sentences and deontic propositions (think about the distinction of the Italian jurisprudence between *norma* and *disposizione*). Further, it is not surprising that a legal scholar who cares about practical matters as Alexy is able to focus on the peculiarities of the acts of law-making, hence encompassing also deontic utterances.

Nonetheless, it is surprising to have Alexy encompassing Conte's last two referents. As we shall see in a while (sect. 3), admitting the Conteian fourth and fifth reference (deontic state-of-affairs and deontic noema) involves non-standard choices as far as the relationships between norms, existence and validity are concerned. In particular, you need to drop the (Kelsenian) validity-as-existence thesis.

Norms, in fact, according to Alexy (and Conte as well), can be expressed without using deontic sentences (or utterances) and, given that, we can refer to them as deontic states-of-affairs (§1.2). Let's see this passage in full:

It should also be noted that norms can be expressed without the use of words at all, such as by traffic lights. This makes clear that the concept of a norm is prior to that of a normative statement. It is therefore appropriate to look for criteria for the identification of norms not at level of statements but at level of the norms itself. Such a criterion can be established with the help of deontic modes, and at this point only the basic deontic modes of command, prohibition, and permission need be considered (Alexy 1985/2002: 22).

Here Alexy clearly states that norms and normative sentences can be divorced.⁹ He makes

⁷ Conte develops his research on the referents in Conte (1970) while working on validity. The deontic noema is added in Conte (2007). Alexy's book is from 1985, the English translation from 2002. We refer to it as Alexy (1985/2002).

⁸ His section 1.5 is entitled *The Assertion and Creation of Norms*. Further, Alexy is well found both with the Searlean-Austinian speech acts theory and with Habermas' universal pragmatic and discourse ethic. On normative acts and deontic utterances see further e.g. Rescigno (1998).

⁹ Lorini & Moroni (2016) elaborate traffic signs as graphic norms, i.e. *verba* without a proper *dictum*. Please note that Conte's example of (C4) has way less written positive law (i.e. deontic sentences) than Alexy and Lorini & Moroni cases that are backup up by a traffic code. Reasons of space prevent us from going deeper on deontic drawings.

the example of a traffic light that is enough to realize a deontic state-of-affairs - one in which you ought to stop when certain conditions occur - without there being any normative statement. You may object that it is possible to have a traffic light because there is some positive law detailing traffic regulation but that is not necessary nor does Alexy establish such a connection. You may say that Alexy focuses more on the positive law side of the deontic state-of-affairs while Conte unleashes its sociological powers, still Alexy has the distinction. As we will see in the next quote, Alexy distinguishes a norm both from its validity and its existence, hence his model can also admit a more sociologically oriented reading. Further he gives priority to the norm (C2) rather than to the normative statement(s) (C1) that corresponds to it. This suggests that, for Alexy, there is no need to have an article in a code to have a norm.¹⁰

Last but not least, Alexy also considers something that we can interpret as a Conteian deontic noema. Let's see a passage that justifies our statement:

If there is an interest in speaking of the validity or existence of norms - and there is indeed such an interest - then there is also an interest in speaking of invalid and non-existent norms. But in that case the concept of norm must be defined in such a way as to include its validity or existence. Just as it is possible to 'express' a norm without laying it down as 'true', so also it has to be possible to express a norm without assuming that it is valid. *Relieving the concept of a norm from the burden of validity* seems at first glance to have the disadvantage that the universe of norms suddenly becomes overpopulated. Everybody can express as many norms with whatever content they please. But this does not give rise to any serious difficulty (Alexy 1985/2002: 25 emphasis added).

Alexy clearly states that we can express a norm without saying or assuming that it is valid. This fits with the idea and example of a deontic noema. When we are discussing a law in the Parliament or when we are drafting a law or a code the products of our normative enterprises are not (yet) valid.

We can see how Alexy is here divorcing - *contra* Kelsen - the fact that there's a norm from its validity and also from its existence. He is thus able of conceiving law proposals or laws-in-the-making-that-are-not-yet-laws as norms.

Alexy manages to identify the five Conteian referents because of a central feature of his model, that is the radical distinction between norms, their existence, and their validity. Alexy, therefore, abandons the Kelsenian paradigm of coincidence between norms and their existence and validity (validity-as-existence).¹¹

Let's see why to fully appreciate (C4-C5) you need to drop validity-as-existence.

The deontic state-of-affairs gives its best with non-valid norms. We can grasp what the institutions of Roman law are or what are the laws of different legal orders that are not valid

3. Guastini's Positivistic Divorce between Norms, Existence and Validity

¹⁰ At the end of the last quote Alexy suggests that we better use norms when we look for criteria of identification for the normative rather than normative statements and points out deontic modality as ingredient of this criteria.

¹¹ As we have seen above, Alexy (1985/2002, p. 25) talks about "*Relieving the concept of a norm from the burden of validity*". We take him to mean that the burden of validity will impact on a norm's existence. If we have norms that are not valid they will nonetheless exist. That's why Alexy mentions "invalid norms" and "non-existent norms" (which we take to be "non-existent" according to some Positivism, i.e. because they are not valid or not written down in some legal code). Alexy's motivation seems to be that we are able to consider more cases. Alexy is not worried by parsimony consideration as far as the ontology of norms is concerned. While this sheds some light on his notion of validity (Alexy retains validity as formal enactment dropping validity-as-existence) it is harder to pin down his notion of existence. In the following we will propose that Alexy's idea is that of existence-as-possible-expression.

where we are. In doing so we are not only grasping deontic sentences and propositions (C1 and C2) but also understanding the deontic states-of-affairs that corresponds to them.

The deontic noema seems to consist in a non-yet-valid norm. By definition it requires us to drop the validity-as-existence for norms.

If we do not distinguish validity and existence and keep an hyperpositivistic setting in which norms (i.e. C2) are reduced to provisions (i.e. C1),¹² the deontic state-of-affairs is conflated with the deontic sentence and the deontic proposition¹³ (admitting a positivistic account is ready to recognize the two), whereas deontic noema is out of reach as non-valid law.

Strange as it may seem, a distinction between existence and validity is drawn also by a Legal Positivist such as Riccardo Guastini:

“Both “validity” and “existence” are relational concepts. While “validity” refers to [*designa*] the relationship between a norm and other norms, “existence” refers to the relationship of *membership* [*relazione di appartenenza*] of a norm to a certain legal system [*ordinamento*]: all norms that belong to a legal system “exist” [*si dice esistente*].”¹⁴

Is Guastini’s existence-as-legal-membership the same as the existence Conte and Alexy have in mind? Does Guastini’s concept of existence-as-legal-membership make him closer to our two not-so-Positivist authors than it may appear at first sight?

First questions first. Alexy (1985/2002, p. 25) in the above quote talks about “validity or existence of norms” and, given his interest in actual legal systems, it seems that this existence takes a legal system as its context - i.e. it seems compatible with Guastini’s existence-as-legal-membership.

Nonetheless, later on in the passage, Alexy talks about a norm “being expressed”. We take this both as to be uttered and as to make reference to an intentional object. In that sense, this existence-as-possible-expression is broader than existence-as-legal-membership.

As far as Conte is concerned, it seems that his idea of existence is even broader. All the five referents “exist” in their own way. Conte’s list is not meant to be conclusive. More referents may be discovered. You may accuse Conte of some sort of language-hypostatization fallacy. What concerns us here is that Conte’s existence-as-having-a-referent seems even broader than Alexy’s existence-as-possible-expression which in turn was broader than Guastini’s existence-as-legal-membership.

As far as the second question is concerned, Guastini seems less distant from our two authors. All three authors drop the (Kelsenian) thesis of validity-as-existence, although they have different philosophical approaches and methodologies.

Guastini is not forced to recognize all the referents in his favourite philosophical ontology but it seems hard for him to deny their existence. Nonetheless, he may use his distinctions and concepts to try to reduce the referents to some other concepts (such as his distinction between validity and existence).

¹² Guastini (2011b, p. 69) talks about “disposizioni senza norme” i.e. “C1 without C2” for cases like inserting incorrect sorts of contents into the norm, such as praises to God or exhortations. By way of mentioning this possibility, Guastini relaxes the hyperpositivistic correspondence between (C1) and (C2). Nonetheless before considering this issue, Guastini (2011b, p. 65) claims that “norm [i.e. (C2)] is not ontologically distinct from the disposition [i.e. (C1)]: it is simply an *interpreted* disposition and thus reformulated”. See also footnote 6 on noema and interpretation.

¹³ I.e. (C2) = (C1) = (C4).

¹⁴ According to Guastini (2013, p. 99), such a distinction can be found also in another prominent Italian scholar such as Luigi Ferrajoli. It is funny to find some Positivist author - though Legal, not Neo - claiming existence is (or maybe attests or refers to) a relationship. Existence is often *not* taken as a (relational) predicate. Meinongians claim that existence is a predicate. Nonetheless, theirs is not the standard analytic legal positivist default background ontology.

In this paper we put forward three points.

First, we showed that Conte is not alone in identifying his five referents for the term 'norm'. Robert Alexy, well-known for other contributions, is able to encompass all the five referents of Conte in his framework.¹⁵ Further, Alexy's work can now be used both in theoretical research (the philosophical questions of philosophy of law) and in practical ones.

Second, we linked the discussion of the list of referents with more substantial philosophical thesis concerning the ontology of the norm. One criticism voiced to Conte in general, and to the 2007 article on norms in particular, is that his work provides a really useful list but no substantial theory. It is more the presentation of a wonderful toolbox for philosophical craft that is not used in its full potential. Here we investigated the relationship between giving up with the thesis of validity-as-existence and fully appreciating deontic state of affairs¹⁶ and deontic noema. The issue of whether the referents are reducible or irreducible was not discussed, nor was the issue of there being a hierarchy or priority among the referents.

Third, we pointed out how also an Analytic Legal Positivist such as Guastini is closer to Conte and Alexy than one may think as he drops the validity-as-existence thesis. This allows him to understand and recognize further referents than a standard Positivist will do. Of course, Guastini is free to (try to) reduce them or explain them away relying on some further subtle distinctions.

4. Conclusion

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¹⁵ That shows how Conte's ideas are more diffused than rivals theories and maybe Conte himself thought.

¹⁶ For a huge critique on this model of validity as based on (procedural) criteria written down on some legal code see Fittipaldi (2012)'s development of the insights of Leon Petrażycki.