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ON THE DEONTIC VALIDITY OF THE GENERAL EXCLUSIVE NORM

abstract

The paper concerns the following two questions: (i) is the general exclusive norm a proper legal norm? (ii) if the general exclusive norm is a proper legal norm, is it universally valid? It will be held that the general exclusive norm is a proper legal norm and not a logical principle. Therefore, as a legal norm, it can be said to be valid or invalid. The answer to the second question will be negative: the general exclusive norm, as a proper legal norm, is valid only in those legal systems in which it is positively established.

keywords

legal system, validity, general exclusive norm, principle of prohibition, legal gap

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1. On the Concept of General Exclusive Norm

In one of the first Italian modern essays on gaps and completeness of legal systems, Donato Donati investigates the validity of an unexpressed norm under which cases not expressly regulated by "particular provisions" fall.

> We say that a general norm of this content derives from the set of particular provisions, which, by considering certain cases, establish for them the existence of obligations: in all other cases there must be no limitation. [...] From the set of provisions themselves derives at the same time a set of particular inclusive norms and a general exclusive norm: a set of particular norms aimed at establishing obligations for the cases they particularly consider, and a general norm aimed at excluding any limitation for all other cases, not particularly considered (Donati, 1910, pp. 35-36).

The author argues for the existence of an unexpressed *general norm* that *excludes* any obligation or prohibition in all cases not expressly regulated through an imperative deontic modality.[1] The legal system is, therefore, conceived by him as a collection of particular inclusive norms and a general exclusive norm. Furthermore, Donati argues that the general exclusive norm (i) is a genuine norm, as it determines new legal relations not established by the particular provisions, and (ii) establishes the completeness of the legal system, leaving no conduct unqualified.
Norberto Bobbio and Amedeo G. Conte respectively come up with definitions of general exclusive norm similar to Donati's. Bobbio defines the general exclusive norm as follows:

> All conducts not included in the particular norm are governed by a *general exclusive norm*, i.e. by the norm that excludes (for this reason it is exclusive) all conducts (for this reason it is general) that do not fall within those envisaged by the particular norms. One could also say, with another turn of phrase, that norms are never born alone but in pairs: each particular norm, which we could call inclusive, is accompanied by the exclusive general norm, as if it were its own shadow (Bobbio, 1993, p. 252).[2]

1 By 'imperative' I mean – adopting the use made by Conte (1997a) – "either obligatory or forbidden".
2 With regard to the metaphor of the shadow, it can be remarked that, more properly, the general exclusive norm does not follow (as a shadow) each single inclusive particular norm: it follows (as a shadow) the set of inclusive

It might be useful to clarify the meaning of the adjective "particular" occurring in both Donati's[3] and Bobbio's[4] formulations. The two authors, respectively, by "particular provisions"/"particular norm[s]", do not refer to *individual* provisions/norms or *special* norms. I believe that the expressions "particular provisions"/"particular norm[s]" refer to provisions/norms that *directly* identify classes of cases, whereas the general exclusive general *indirectly*, *ex negativo*, identifies classes of cases.

Conte (1997b) defines the general exclusive norm as a "norm that qualifies deontically indifferent all behaviours not qualified by imperative norms (i.e. that states the deontic indifference of conducts not qualified as either obligatory or prohibited). Wherever there is neither obligation nor prohibition, there is deontic indifference" (p. 309).[5] Let us label [GEN Conte] the concept of general exclusive norm defined above. The general exclusive norm, according to Conte's reconstruction, is a norm that (i) deontically qualifies behaviours and (ii) qualifies them as indifferent (in other words, behaviours of which both commission and omission are permitted). According to both Conte and Donati, the exclusive general norm establishes the completeness of the legal system. However, while for Donati every legal system is endowed with a general exclusive norm, for Conte the validity of the general exclusive norm is a *matter of fact*, not a *matter of reason*, since it depends on whether the general exclusive norm is in force within a given legal system.[6]

In legal theory the general exclusive norm is often called "*principle of prohibition*". However, I will preserve the expression "*general exclusive norm*" for at least two reasons: (i) the philosophical debate which I start from (mainly developed in Italy in the 20th century) has more often used the expression "*norma generale esclusiva*"; (ii) the expression "*principle of prohibition*" is more vague, since it may refer either to a logical principle or to a legal principle, or to a legal rule.

Guastini (2011) defines the general exclusive norm as a "norm of closure"[7] according to which "everything that is not (expressly) forbidden is (tacitly) permitted". If it is in force, all conducts are therefore deontically qualified: "there are two cases and only two: either a conduct falls under the domain of a particular norm that prohibits it or, otherwise, it falls under the domain of the general norm that permits it" (pp. 143-144).[8] Let us label [GEN Guastini] the concept of general exclusive norm defined above. Guastini, like Conte (and unlike Donati), argues that the general exclusive norm is not universally valid: "It must be insisted, however, that the general exclusive norm completes all and only those legal systems in which it can be said to be law in force" (Guastini, 2011, p. 144). According to the author, it is possible to find such a rule even expressly stated. In the current Italian legal system – the author points out – the general exclusive norm is expressly stated only for a portion of the legal system, namely for the area of criminal law (art. 25, Const.; art. 1, criminal code).

particular norms as a whole. See also Bobbio (1994).

3 "Particular provisions" [*disposizioni particolari*].

4 "Particular norms" [*norme particolari*].

5 Englsh translation is mine. It is worth reminding that in Conte's lexicon 'imperative' means "either obligatory or forbidden" and 'indifferent' means "boh permitted and facultative".

6 According to Conte (1997a), "Undoubtedly if a general exclusive norm is valid in a given legal system, therefore that legal system is complete. I only remark that the general exclusive norm is valid, *wenn überhaupt*, only in some legal systems" (p. 155). On the general exclusive norm see also Poggi (2004).

7 While according to Guastini the general exclusive norm is a norm of closure, Conte (1966) distinguishes between completeness and closure, arguing that the completeness is not a necessary condition for the closure and the closure is not a sufficient condition for the completeness. See, among recent works that seem to deny this conceptual distinction, Arriagada Cáceres (2021) and Mañalich (2021).

8 See also Guastini (1998, pp. 247-248).

A clarification on the formulations so far reported is needed. There is, in fact, a difference between Conte's and Guastini's formulations.
Conte refers to *imperativeness* and *indifference*: according to the [GEN Conte] a conduct that is not expressly qualified as imperative is indifferent (it is permitted and facultative); in other words, of a conduct that is not expressly qualified as imperative both commission and omission are permitted. Guastini refers to *prohibition* and *permission*: according to the [GEN Guastini], a conduct that is not expressly qualified as prohibited is permitted; in other words, of a conduct that is not expressly qualified as prohibited, the commission is permitted. I intend to clarify that, despite the only apparent asymmetry, the two notions are equivalent in establishing the completeness of a legal system. As it is well known, due to the interdefinibility of the four deontic modalities obligatory, prohibited, permitted, facultative, each of them can be defined in terms of any of the other three deontic modalities.[9] According to the [GEN Conte], if wearing a blue suit is *neither prohibited nor obligatory* (i.e. if wearing a blue suit is *not imperative*), then wearing a blue suit is both *permitted and facultative* (i.e. then wearing a blue suit is *indifferent*). According to the [GEN Guastini], if wearing a blue suit is *not forbidden, then* wearing a blue suit is *permitted*; and if *omitting* to wear a blue suit is *not forbidden*, then *omitting* to wear a blue suit is *permitted*. As can be seen, both notions allow the same mechanism of completeness of legal systems. Saying that what is not forbidden is permitted and saying that what is not imperative is indifferent are equivalent formulations, because of the interdefinibility of the deontic modalities.
Strictly speaking, it should be pointed out that Conte reconstructs, in addition to the one already mentioned, two other interesting notions of the general exclusive norm: (i) the general exclusive norm as *basic norm*; (ii) the general exclusive norm as prescription of the *argumentum e contrario* [appeal from the contrary]. The general exclusive norm as *basic norm* is formulated as follows:

> These and only these are the valid norms; all and only valid norms are those that repeat their validity from the basic norm [*Grundnorm*]. Therefore, if these and only these are the obligations and prohibitions, in all other cases there is neither obligation nor prohibition, i.e. there are both permission and facultativity, i.e. there is indifference (Conte, 1997a, p. 158).

Let us label [GEN Conte basic norm] the notion of general exclusive norm defined above. However, Conte notices that this notion relies on the assumption that legal norms are all imperative (i.e. that there are no permissive norms), which is false. It is therefore necessary, Conte (1997a) argues, to redefine the general exclusive norm as a basic norm [*Grundnorm*] in this way: "These and only these are the obligations, these and only these are the prohibitions, these and only these are the indifferences" (p. 158). Yet, such a formulation, Conte argues, would lead to either incompleteness or inconsistency.
Another notion considered by Conte (1997a, p. 159) is the general exclusive norm as a *prescription* of the *argumentum e contrario* [appeal from the contrary, *Umkehrschluß*], i.e. a general norm that, in the case of a behaviour which is neither forbidden nor mandatory, *obliges* the interpreter to apply the *argumentum e contrario.* We will call it [GEN Conte argument]. According to the author, the [GEN Conte argument] is different from the [GEN Conte]. He holds that, of the two norms, only the latter establishes the completeness of the system, while the former leaves a behaviour which is neither forbidden nor mandatory without deontic

9 See Conte (1997a, pp. 83-85).

qualification:

> *argumentum e contrario* does not state the deontic *status* of the unqualified behaviour [...]. From a norm which deontically qualifies a behaviour according to a deontic modality *D*, we can only derive that the unqualified behaviour is not *D*. [...] in other words, we only establish what the unqualified behaviour *is not*, but we ignore what the unqualified behaviour *is* (Conte, 1997a, p. 139).[10]

Someone may also raise a second (and independent) reason against the foundation of completeness through the [GEN Conte argument]: a general exclusive norm as a *prescription* of the *argumentum e contrario* would only prescribe to the interpreter to fill the gap, but would not provide itself a qualification to the unqualified behaviour. According to this possible objection, an unqualified behaviour would remain unqualified: the [GEN Conte argument] would consist merely of a *prescription* to the judicial authority. In short, it would not transform the unqualified conduct into a qualified conduct (making the legal system complete), but would (i) *maintain the unqualification* of the conduct, thus leaving the system incomplete, and (ii) *prescribe* to the judicial authority the application of the *argument e contrario*. In other terms: a general exclusive norm of this kind would not *qualify*, but would only *prescribe to qualify*. I think that this objection would not be tenable. Although in the literal wording of the two exclusive general rules there is *prima facie* a difference ([GEN Conte] seems to qualify immediately, [GEN Conte argument] seems to qualify mediately), the two formulations refer to the same mechanism: the first is formulated in *nomostatic* terms and does not mention the judge-interpreter, but it is clear that it is nevertheless addressed to the judge-interpreter; the second is formulated in *nomodynamic* terms and refers to the judge-interpreter, stating that he/she is bound to acquit the defendant in case a behaviour is not expressly qualified.

2. The Problem of the Validity of the General Exclusive Norm

In any case, the central problem of the general exclusive norm, a problem that exists and is relevant to all the definitions set forth above, is the problem of its validity.
On the one hand, some authors, such as Bulygin, Conte and Guastini, hold that its validity is not necessary. Since it is a rule of positive law, even when unexpressed, it is valid only in those legal systems in which it is positively in force.
Other authors (we have already considered Donati) maintain, on the other hand, that it is universally valid. Among these, Kelsen is the best known and most convinced assertors of its necessary (universal) validity. I shall devote more space to Kelsen, both because of the wide influence he has exerted on scholars and legal practitioners, and because, unlike Donati or other authors, he has set the exclusive general rule in a very systematic philosophical doctrine.
It has been said that Kelsen is a convinced proponent of the general exclusive norm. However, as we shall see in a moment, in *Reine Rechtslehre* he calls it "negative norm" [German: *negative Norm*], rather than "exclusive norm". Kelsen introduces this notion before refuting the thesis of the existence of legal gaps. According to Kelsen there are no gaps since the legal system is complete, being endowed not only with the norm according to which one is obliged to a certain behaviour, but also with a "negative norm", whereby one is free to do or not to do what one is not obliged to do. "*Diese negative Norm ist es, die in einer Entscheidung zur Anwendung*

10 In Conte's lexicon a "deontic *status*" of a behaviour is a configuration in which both the commission and the omission of the behaviour are qualified. Only three deontic *status* are possible: obligation, prohibition, facultativity.

kommt, mit der ein Anspruch abgewiesen wird, der auf ein nicht zur Pflicht gemachtes Verhalten gerichtet ist" (Kelsen, 2008, p. 110). As already said, Kelsen calls it a "negative norm", despite the fact that it is common ground that its content is that of a general exclusive norm and not that of the *negative Norm* as conceived by Zitelmann (1903).

Kelsen argues, consistently, that when someone affirms that there is a gap despite the fact that the legal system by means of the general exclusive norm qualifies all the cases not expressly regulated, he/she is doing so erroneously. He/she is making no longer a descriptive judgement (descriptive of the validity of norms that express obligations, prohibitions, permissions, faculties), but an axiological judgement: he/she is arguing that a given case which is not expressly regulated would deserve to have a deontic qualification other than that of indifferent.

When someone states that there is a gap, he/she is not actually referring to a proper gap (to an absence of regulation *tout court*), but to the absence of a desirable/fair regulation. There would be gap whenever, for a relevant case that is not explicitly regulated, it is considered desirable to regulate it explicitly, qualifying it in a way other than indifferent. For the sake of clarity, we might say that Kelsen's theory distinguishes between two senses of the term 'gap', which I propose to call *absolute gap* and *relative gap*. The absolute gap is the absence of any regulation for a case; the relative gap is the absence of a regulation for a case that, according to the interpreter, deserves to be regulated as not indifferent. In this sense, the relative gap is, precisely, relative to an ideal, desired regulation, relative to a transcendent (not transcendental) *Sollen:*[11] it is the distance between the positive regulation and an ideal, desired regulation.

The thesis of the non-existence of absolute gaps is reaffirmed, in a more articulate manner, in the second edition of the *Reine Rechtslehre*, where Kelsen analyses the traditional error of considering gaps to exist.

> Going deeper, one can see that a 'gap' is only assumed to exist when the absence of such a legal norm is considered, by the body applying the law, to be indispensable from the point of view of legislative policy, and thus, for this legal-political reason, the body applying the law rejects the – albeit logically possible – application of the existing law, because it considers it to be unjust (Kelsen, 1960).

There is, says Kelsen, a discretionary power of the interpreter who for some forms of conduct (blowing a whistle five minutes before paying a tax, wearing a tailored suit, eating spaghetti al dente) does not see any gap (precisely because it seems right to him that they should be qualified as indifferent), whereas for other forms of conduct the intepreter does (precisely because it seems unjust to him/her that they are qualified as indifferent). The author also points out what we might call a second degree of discretion, which I believe to be, from a theoretical point of view, even more relevant: the application of the law may be considered unjust not only when the legal system does not contain an expressed general rule under which the concrete case may fall, but – says Kelsen – also when it does contain one. Why then do jurists or legal philosophers consider the interpreter more entitled not to follow the legal system in cases where there is no expressed norm than in cases where there is one? It could be objected to Kelsen that it is a question of legal certainty: in the first hypothesis (absence of an expressed rule) there is no certain law, in the second hypothesis (existence of an expressed rule) there is certain law. This is an objection to which it is rather easy to reply. Saying that in

11 For a discussion of the *Sollen* as a transcendental category see Colloca (2020), particularly Section 2.

the absence of an expressed general rule the law is uncertain is a *petitio principii*: it is to assume that the rule 'what is not legally prohibited is legally permitted' does not apply, which is precisely the matter of the discussion.
However, Kelsen's gap theory rests on the assumption, which is neither proved nor argued, that an exclusive general norm is deontically valid in every positive legal system. This is the point we need to discuss. Indeed, if we do not take this assumption, then the question of the existence of absolute gaps becomes much more relevant. Kelsen's theory of completeness relies on a precise conception of the legal system, which includes the thesis of the necessary validity (in and for every legal system) of the exclusive general norm. But it is precisely this thesis that needs to be discussed. The criticism I make of Kelsen is that he has derived (consistently, indeed analytically) the thesis of the non-existence of gaps simply by re-proposing analytically the content of the thesis of the validity (existence) of an exclusive general norm. The problem, it seems to me, has only been pushed backwards, to the grounds of the philosophical conception of legal systems.

3. On Bulygin's Criticism

To summarize, we can say that Kelsen's position on the general exclusive norm (or principle of prohibition) consists of three main theses. *First thesis*: it is a deontically valid *norm. Second thesis*: it precludes the existence of gaps, i.e. *it establishes the completeness* of the legal system. *Third thesis*: it has *universal* deontic validity, i.e. it is valid in every legal system. As shown before, some authors have supported the first and second theses and denied the third thesis. Other authors have criticised Kelsen's theory, also questioning the normative character itself of the exclusive general norm: for instance, Bulygin (2015) has held that "the principle 'What is not legally prohibited is legally permitted' (which is often used to maintain that all legal systems are necessarily complete) is [...] ambiguous" (p. 346). I reconstruct his argument thus:
(i) The principle of prohibition 'What is not legally prohibited is legally permitted' can be understood as a proper *positive norm* or as a *norm-proposition*.
(ii) If this principle is understood as a *positive norm*, then its existence is contingent: "it will exist only if and when it has been either issued by a legal authority or created by custom" (Bulygin, 2015, p. 346).
(iii) If this principle is understood as a *norm-proposition*, the meaning of the term 'permitted' needs to be understood: (iii.i) it can simply mean 'not prohibited' (weak permission), and then the principle would tautologically state that what is not prohibited is not prohibited (i.e. that there is no rule forbidding it), and would be 'analytically true but completely trivial'; (iii.ii) or it could mean 'positively permitted' (strong permission), and then the principle would state that what is not prohibited is positively permitted.
(iv) But if it is a permission in the positive sense (strong permission) – Bulygin concludes – then this principle is false, because from the absence of a prohibition the validity of a permissive norm cannot be inferred.[12]
Bulygin's conclusion is: "In short: *qua* norm, the principle of prohibition is contingent, *qua* norm-proposition, it is either vacuous or false. In no case can it support Kelsen's thesis that legal systems are necessarily complete" (p. 346).[13]
I raise a criticism of Bulygin's argument. An approach to the problem of the validity of the general exclusive norm that starts from the distinction between *norm* and *norm-proposition* is misleading. The norm-proposition just describes the validity (existence) of a norm (in this

12 For further relevant discussions of the distinction between weak permission and strong permission see, among others, von Wright (1957), Navarro & Rodríguez (2014) and Carcaterra (2015).
13 See also Alchourrón and Bulygin (1971).

case, of a general norm which permits all what is not forbidden by particular norms). If such norm exists in a legal system, the correspondent norm-proposition is true; if such norm does not exist in a legal system, the norm-proposition asserting its validity is false. The relevant question is not to determine whether the general exclusive norm is either a *norm* or a *norm-proposition*, but is to determine whether the general exclusive norm is either a *norm* or a *logical principle*: if one holds that it is a norm, then the norm-proposition asserting its validity is true for those legal system in which the general exclusive norm is in force; if one holds that it is a logical principle, he/she needs to prove that such logical principle applies to the validity of norms (and, mediately, to the truth of norm-propositions).
Beyond my specific criticism, I agree with this Bulyginian thesis of the non-universality (or non-necessity) of the exclusive general rule as a valid norm.

> From the mere absence of a prohibition we cannot infer the existence of a positive permissory norm. Whether or not such a positive permission exists in some given system is a purely contingent matter. (The principle of prohibition holds true only in one very special case: when the system happens to contain a general closure rule permitting all actions not prohibited by the system. The *nullum crimen sine lege* principle, which is characteristic of modern criminal law, would be an example of such a rule, but, again, whether or not any such rule exists is a contingent matter.) (Bulygin, 2015, p. 346).

Conte (1997a) holds the contingency of the validity of the [GEN Conte] saying: "The general exclusive norm[14] establishes the completeness for every behaviour, but not for every system. The foundation [of completeness] on the general exclusive norm undoubtedly holds for the legal systems where this norm is valid" (pp. 154-155).
Kelsen, on the one hand, when he speaks of the applicability of the rule of *logical* inference to judicial interpretation, brilliantly grasps that the question of the deontic validity of norms cannot be reduced to a question of logical inference: a legal norm, for the equation of validity and existence, is deontically valid if and only if it is, in fact, brought into existence in the legal system.[15] On the other hand, inconsistently, when he speaks of the qualification of conducts that no expressed norm qualifies as imperative, he seems to dissociate validity and existence, grounding the validity of the general exclusive norm on the logical principle of the excluded third. But the applicability of the *logical* principle of the excluded third to the validity of norms needs to be proved.
Whether these principles of logic apply to the validity of legal norms is not a problem of logic, but rather a problem of *meta-logic*.[16]

REFERENCES

Alchourrón, C. E., & Bulygin, E. (1971). *Normative systems*. Wien-New York: Springer-Verlag;
Arriagada Cáceres, M. B. (2021). The closure of the systems of legal norms of competence. *Revus*, (43). https://doi.org/10.4000/revus.7374;
Bobbio, N. (1993). *Teoria generale del diritto*. Torino: Giappichelli;
Bobbio. N. (1994). Lacune del diritto. In N. Bobbio, *Contributi ad un dizionario giuridico*. Torino: Giappichelli;

14 The [GEN Conte].
15 On the application of logical principles to deontic validity and the eqaution between validity and existence see Conte (1998). For a discussion of Conte's theory of validity and its development see Di Lucia & Passerini Glazel (2020).
16 All the direct quotations by Bobbio, Conte, Donati, Guastini, Kelsen have been translated in English by me.

Bulygin, E. (2015). Kelsen on the completeness and consistency of law. In Id., *Essays in legal philosophy* (pp. 337-353). Oxford: Oxford University Press;
Carcaterra, G. (2015). *La logica nella scienza giuridica*. Torino: Giappichelli;
Colloca, S. (2020). La rivoluzione copernicana di Kelsen e il diritto privato. *Teoria e storia del diritto privato*, 13, 1-20. Retrieved from http://teoriaestoriadeldirittoprivato.com;
Conte, A. G. (1966). Décision, complétude, clôture. *Logique et analyse*, 33(9), 1-18;
Conte, A. G. (1997a). Saggio sulla completezza degli ordinamenti giuridici. In A. G. Conte, *Filosofia dell'ordinamento normativo. Studi 1957-1968* (pp. 71-302). Torino: Giappichelli;
Conte, A. G. (1997b). Norma generale esclusiva. In A. G. Conte, *Filosofia dell'ordinamento normativo. Studi 1957-1968* (pp. 309-310). Torino: Giappichelli;
Conte, A. G. (1998). Hans Kelsen's deontics. In S. L. Paulson & B. Litschewski Paulson (Eds.), *Normativity and norms: Critical perspectives on Kelsenian themes* (pp. 331-341). Oxford: Clarendon Press;
Di Lucia, P., & Passerini Glazel, L. (2020). Amedeo G. Conte filosofo della validità. *Rivista di filosofia del diritto*, 9(1), 11-26. https://doi.org.10.4477/97016;
Donati, D. (1910). *Il problema delle lacune dell'ordinamento giuridico*. Milano: Società editrice libraria;
Guastini, R. (1998). *Teoria e dogmatica delle fonti*. Milano: Giuffrè;
Guastini, R. (2011). *Interpretare e argomentare*. Milano: Giuffrè;
Kelsen, H. (1960). *Reine Rechtslehre* (2nd edition). Wien: Deuticke;
Kelsen, H. (2008). *Reine Rechtslehre. Einleitung in die rechswissenschaftliche Problematik*. Tübingen: Mohr. (Original work 1934);
Mañalich R., J. P. (2021). The closure of systems of penal sanction: Norms as systems of constitutive rules. *Revus*, (44). https://doi.org10.4000/revus.7439;
Navarro, P. E., & Rodríguez, J. L. (2014). *Deontic logic and legal systems*. Cambridge: Cambridge University Press;
Poggi, F. (2004). *Norme permissive*. Torino: Giappichelli;
Wright, G. H. von. (1957). *Logical studies*. London: Routledge;
Zitelmann, E. (1903). *Lücken im Recht*. Leipzig: Duncker & Humblot.