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ANTECEDENT OF NORMS AND IMPLICIT EXCEPTIONS AN ANALYSIS PROPOSAL**

In this article I analyze the concept of implicit exception and clarify if it allows us to present a structural component of the antecedent or not. For this, I carry out: i) an analysis of the notion of antecedent and its components; and ii) an analysis of the different ways of understanding the implicit exceptions in legal theory. I conclude that with the notion of implicit exception we are presenting types of operations and its results and not a structural component of the antecedent. Firstly, it may be used to present the process and result of better understanding the content of the antecedent of a norm. Secondly, it may be used to present the process and result of creation of the law by judges.

Keywords: *Implicit exceptions, antecedents, rules, judicial creation of law, normative conflict.*

1. INTRODUCTION

Jurists often point out that law enforcers, in order to avoid solving a normative problem incorrectly or unfairly, create implicit exceptions. This as a way of presenting that they have introduced a distinction in the antecedent of the norm in order to reduce its scope, and thereby generate that a subset of recipients of a regulation cease to be regulated. Along with this, implicit exceptions are usually considered by jurists to be a component of the antecedent, in the sense that we

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can differentiate, within the antecedent, which properties operate as implicit exceptions and which do not.

This brief presentation of a common idea among legal scholars has given rise to an extensive literature among legal theorists as to what they are trying to say[1]. In this regard, the purpose of this article is to resolve the following two questions: first, what are jurists saying when they use the expression "implicit exceptions"? And, second, does qualifying a given property as an "implicit exception" mean attributing some characteristic to it that is different from the rest of the properties of the antecedent?

To answer these questions, I will proceed in three steps. In the first place, I am going to present, from the studies on the structure of norms, what the antecedent of the norms is and how it is composed. Specifically, I am going to concentrate on analyzing how we can decompose its elements in order to verify, later, if any of these allow us or not to account the "implicit exceptions". Second, I will discuss the different ways in which legal theorists use the term "implicit exception". Within this section I am going to argue that "implicit exceptions" can be understood in two ways: i) as an explanation of an implicit presupposition on which the norm was formulated; or ii) as the substitution of a norm for another that contains, in comparison with the previous one, a new relevant property in the antecedent. Finally, in the third place, I am going to conclude that the notion of implicit exceptions, properly understood, does not account for a structural element of the antecedent, but rather is a way of presenting an operation and its result of identifying a norm.

2. THE ANTECEDENT OF THE RULES

In order to determine whether or not an implicit exception accounts for a type of fragment of the antecedent of a rule, it is necessary to start by making some conceptual clarifications about what the antecedent is and how we can decompose it. In order to fulfill the purposes of this article and not to extend it too much, I am going to focus on prescriptive norms.

[1] Many of them carried out within the set of discussions on the notion of defeasibility in law. In this regard, see: Ferrer, Ratti 2012; Bayón, Rodríguez 2003.

By prescriptive norms I mean norms that guides the conduct of its subjects (Alchourrón, Bulygin 2012, 173). That is, it is a norm that regulates whether a certain action (or set of actions) is mandatory, prohibited, permitted or empowered for a type of recipient. Following Riccardo Guastini (2018a, 49) on this point, prescriptive norms can be of two types, express or implicit, depending on the way in which they were identified[2].

By "explicit norm" I understand all those meanings that can be attributed to normative texts. In this sense, it accounts for the possible meanings that we can identify from a text using the available interpretation techniques (Chiassoni 2011, 311; 2019a, 22, 105). This notion includes all those interpretive results that have been formulated having applied, at least, some of the generally shared syntactic, semantic and pragmatic linguistic rules, the different interpretive techniques in use and/or the dogmatic theses spread in doctrine. In short, it refers to the possible meanings (in a certain space-time and in a legal community) of some normative texts[3].

By "implicit rule" I understand all those rules that have been created by a competent authority in the place of application of the law. In other words, these types of norms are the result of having used a legal construction technique (Guastini 2018a, 166)[4]. The latter means (in extreme synthesis) that they are norms that cannot be attributed as a possible meaning of a normative text, nor do they constitute logical implications of a norm.

As we can see, the difference between an explicit norm and an implicit norm is based on whether the norm is the product of an act of interpretation or legal construction (Guastini 2012a, 34; 2012b,

[2] In the article I will express myself in terms of norms and rules interchangeably to refer to this notion. To achieve the purposes of this article, it will not be necessary to delve into the discussions that differentiate rules from principles.

[3] The explicit norms, in this sense, would be all those norms that are part of the framework of possible meanings (those meanings identified through a cognitive interpretation). Having clarified the meaning of an express norm, this allows us to introduce some clarifications regarding what exactly legislators produce. Following Pierluigi Chiassoni (2019b, 111), legislators are creators of provisions, that is, of linguistic statements that are the object of interpretation. Which standards this provision expresses depends on the interpretive techniques available to interpreters in a given legal community. If this is so, then, the legislators do not create norms, but texts to which we can attribute a set of express norms.

[4] Following Chiassoni (2019b, 106), these are acts of elaboration of new norms by the interpreter (it is a case of a norm without normative formulation).

215–16; 2018a, 49; 2019a, 17). However, both types of norms share the same structure: they are composed of an antecedent, a connective and a consequent. From these three components, I will specify how to understand the antecedent[5].

The antecedent of the norms is composed of a generic case, that is, by a set of properties that, if they are verified in an individual case, then the prescription contained in the consequent follows[6]. By "generic case" is meant a class or set of classes of properties, that is, types of situations in which actions or events can occur (they establish the where, when, why, how, under what means, to whom, by whom). A generic case includes a normatively relevant property or a combination of normatively relevant properties. A property is expressed by a predicate applied to a subject, action, or state of affairs. The complementary case of a property expresses the negation of that property. By normatively relevant, following Carlos Alchourrón and Eugenio Bulygin (2012, 150–51), I mean that its presence or absence is correlated to different normative consequences[7].

[5] For precision purposes, it should be noted that the connective accounts for the implication relationship, that is, the type of connection that is intended to be expressed between the antecedent and the consequent. The consequent accounts for a deontically modalized action or activity that must be executed after verifying (in an individual case) the properties contained in the antecedent. Along with this, it is relevant to point out that the order of these elements is decisive with respect to the type of conditional norm that is intended to be accounted for. Briefly, the debate on representing the structure of legal conditional norms has been characterized by two competing positions: the bridge conception and the insular conception of norms (Rodríguez 2005). In this article I will assume the bridging conception of norms. According to this, the conditional norms are represented in the following way: (p->Oq). As we can see, the deontic operator only affects the consequent, which means that the deontic commitment assumed under this proposal is that the conditional norms are a bridge that links what is (or could be) a case with what it should be.

[6] Following George Von Wright (1970, 5–9), the antecedents are composed of application conditions. For a different terminology on this point see: Ross 1971, 107ff. In the main text, to analyze the content of the antecedent, I will follow the terminology used in: Alchourrón, Bulygin, 2012. For precision purposes, it should be noted that, depending on the authors, the terminology and theoretical language used to realize that idea. For other expressions see: Schauer 2004, 82; MacCormick 1978, 43; Shlag 1985, 38; Gottlieb 1968, 48; or Twining, Miers 2010, 90.

[7] Generic cases, by expressing classes, endow norms with a general character. For precision purposes, following Riccardo Guastini (2016, 53–54), when speaking of the generality of the antecedents, it is necessary to differentiate between the general and abstract character of the antecedents. The antecedents of the norms are general in the sense that they are not addressed to a single individual, but to a class of individuals. The antecedents of the norms are abstract in the sense that they do not apply to a

By "individual case", on the other hand, is meant a specific situation that is identifiable as having one or all of the properties provided for in the generic case, i.e. it is an instantiation or exemplification of the generic case (Alchourrón, Bulygin 2012, 43–44)[8]. A norm regulates an individual case as long as this is an instantiation or exemplification of the generic case contained in the antecedent of the norm (case that is subsumable in the scope of application of the general norm) (Von Wright 1970, 90; Mendonca 1997, 61).

The previous remark already allows us to identify a way of understanding the notion of an antecedent: it is a concept that accounts for the set of cases the norm has solved deductively (Navarro 2005, 118)[9]. Now, it is necessary to observe that the content of the antecedent of a norm is dependent on the type of components with which the generic case has been formed. I am going to further this point.

2.1. Components of the antecedent

I am going to start by specifying how to identify the content of the antecedent and, after that, it's different components[10]. The content of the antecedent can be identified expressly or by implication.

single fact, but to a class of facts. In a similar sense, see Francisco Laporta (2007, 89). On this point, Alchourrón identified three possible meanings of «generality of norms»: i) general in relation to regulated subjects, that is, to all members of a class of people (for example, all law students at the University of Lima, all women, all Peruvians, etc.); ii) general in relation to time, that is, to all the temporal instants that occur within a period of time (for example, every day within a certain period); and iii) general in relation to the circumstances, that is, to all events that belong to a class of events (for example, all events that are understood as the murder of someone or entering into a contract) (Alchourrón 2010 [1993], 83). In this regard, for the purposes of this article I will only take into account sense i) and iii), using the labels proposed by Guastini to identify them.

[8] On the distinction between generic case and individual case, also see: Von Wright 1970, 42–44.

[9] It should be noted that the antecedent of a norm is determined by the way in which the norm has been identified. In this sense, the scope of the norms is a descriptive notion of the way in which the interpreter has decided to attribute a certain meaning to a provision or to have formulated an implicit norm. On this precision see (Rodríguez, Vicente 2009, 191; Ferrer, Rodríguez 2011, 62).

[10] On this point I must make two clarifications. In the first place, I do not intend to make an exhaustive reconstruction of the discussions on how conditional norms have been understood in the specialized literature, I only intend to clarify some conceptual tools that will allow me to clarify the relationship between implicit exception and scope. For a brief presentation of how conditional structures are used

An antecedent is expressly identified when a normative authority has explicitly indicated what circumstances must be verified in order for the consequent of the norm to follow. Norms with this type of structure are called hypothetical norms. For example: "if a person is of legal age and national elections are held, then it is mandatory for them to vote". As we can see, the consequent of the norm ("it is mandatory to vote"), is followed every time it is verified that we are dealing with a person of legal age and in a context of national elections.

Instead, an antecedent is identified by implication when no express condition has been stated by a normative authority, but we can infer what it is from the consequent of the norm. Rules with this type of structure are called categorical rules. For example: "compulsory to pay taxes". The antecedent of this rule can be identified from the prescribed action: every time a person has the opportunity to pay their taxes, they must pay them. If you do not have the opportunity to pay them (for example, you have an exemption), then this rule does not apply. It should be noted that the presentation of a categorical norm can be translated into hypothetical or conditional. This will mean presenting a tautology in the antecedent with the action (or actions) foreseen in the consequent.

Now, how is an antecedent composed? The properties of a generic case do not necessarily operate in the same way. Within a generic case we can subdivide its properties into various types of conditions, i.e. structural units within the antecedent whose verification affects in a certain way the inference of the consequent. Each type of condition reflects a different way of understanding the antecedent of a norm.

For purposes of clarity, it is convenient to dwell briefly on some of the main ways of classifying and analyzing the conditions contained in the antecedent: i) basic and subordinate conditions; ii) positive conditions and negative conditions; and iii) main, alternative, conjunctive condition; and conditions for exceptive qualification[11]. Each of these

to express different types of connections (or connectives) and dependencies between elements (conceptual, causal and epistemic relationships between two objects) see: Cantwall 2018. Secondly, it should be noted that the discussions on the structure of norms are related to how to interpret legal material (linguistic statements), but they have their own problems. This type of discussion is about what are the minimum elements that a norm has and what properties each of these has. In this regard see: Raz 1986, 97–99; Hart 1982, 107.

[11] This list is not and is not intended to be exhaustive of all the possible ways to analyze the structure of the antecedents. I have only listed these to be useful for the purposes of this article.

distinctions, as we shall see, highlights different aspects of the elements contained in the antecedent (thus, they answer different theoretical questions). Let's see each one of them:

2.1.1. Basic and subordinate conditions

To realize an adequate analysis of the conditional norms, Von Wright proposed a distinction of types of conditions based on whether or not their presence guarantees the consequent. Under this proposal, in an "if A, then B" norm, the antecedent A can be understood as follows:

1. That property A is a sufficient condition for property B means that when A is present then B will also be present.
2. That property A is a necessary condition of property B means that whenever B is present then A will also be present, but not (necessarily) the other way around.
3. That property A is a necessary and sufficient condition of property B means that whenever and only when A is present then B is also present.
4. That property A is a contributing condition of property B means that A is a necessary condition of at least one sufficient condition of B.
5. That property A is a substitute condition for property B means that A is a sufficient condition for at least one necessary condition for B (Von Wright 1951, 66–74).

We can group these conditions into two types of conditions: basic, i.e. those that do not depend on other conditions; and subordinate, i.e. those that depend on other conditions (Alchourrón 2010 [1996a], 129; Moreso, Rodríguez 2010, 18). In this sense, basic conditions are sufficient conditions, as well as necessary and sufficient. Instead, substitute and contributing conditions are subordinate.

The identification of a condition as basic or subordinate will depend on the type of connection and dependency that wants to be represented between the consequent and the antecedent. From an antecedent composed only of subordinate conditions the consequent cannot be inferred[12]. On the other hand, different types of inferences can be formulated from an antecedent composed of basic conditions, depending on the type of condition used: i) if necessary and suffi-

[12] For an elaboration of this point see: García Yzaguirre 2020b.

cient conditions are used, the antecedent can be inferred from the consequent; and ii) of necessary conditions, the consequent can be inferred both by said conditions and by other conditions not indicated (because they are implicitly foreseen or because they are contained in other norms)[13].

The distinction between basic and subordinate conditions also allows us to present a difference between two types of norm presentations: i) norms with a weakened or *open antecedent*; and ii) norms with a strong or *closed antecedent*. Norms with a weakened antecedent are those composed of an antecedent from which the consequent is not inferred. For example, it accounts for norms with an antecedent composed of contributing conditions. On the other hand, norms with a strong antecedent are those composed of an antecedent from which the consequent is inferred. For example, it accounts for norms with an antecedent composed with at least one sufficient condition for the consequent[14].

2.1.2. Positive conditions and negative conditions

The properties and the complementary properties contained in the antecedent of a norm can be further differentiated between positive and negative conditions. This can be understood in two ways.

[13] For the purposes of clarity and precision, it is necessary to highlight the difference between identifying an antecedent composed of a sufficient or necessary and sufficient condition for the consequent from identifying a "complete" norm. The first supposes having identified a norm that can be applied as a normative premise in subsumptive judgments (it is subject to the *modus ponens* and the reinforcement of the antecedent). The second, on the other hand, is an ambiguous expression used to refer, at least, to: i) the specification in the antecedent of all the properties and complementary properties that determine its scope of application; or ii) an antecedent that includes a normative qualification of all the properties that characterize a certain individual case subject to evaluation. As we can see, the first gives an account of what information is necessary to determine the applicability of the consequent and the second gives an account of the exhaustiveness of the information that a normative system offers regarding the applicability of a consequent.

[14] In this regard, it should be noted, solely for purposes of clarity, that it is not correct to confuse a hypothetical or conditional norm composed of an *open antecedent*, with a categorical norm. As a norm with open antecedent is characterized a norm whose antecedent is composed of properties that are not sufficient for the consequent. This assumes that the interpreter considers that the set of application conditions has not been fully determined. On the other hand, a categorical norm has an antecedent that is tautological with the content of the norm (with the deontically modalized action), which is to say that the norm is applicable every time there is an opportunity to carry out the action contained in the normative consequent (which supposes having identified at least one sufficient condition for the consequent).

Firstly, the positive-negative distinction can be seen as a way of pointing out the same thing as the distinction between case and complementary case, respectively. In this way we have, on the one hand, a positive condition understood as a way of indicating a property, that is, the description of a type of action or state of affairs. On the other hand, a negative condition is a way of indicating a complementary property, that is, the description of an omission or non-existence of a state of affairs. As we can see, this possibility of understanding the distinction makes it redundant with others for which we already have technical terms. In light of this remark, I discard this way of using the distinction.

Secondly, the positive-negative distinction can be understood as a way of differentiating the effects of its verification in an individual case. In this way, positive conditions refer to all those properties that, if verified, allow a certain action or state of affairs to be classified under a conceptual category and that a specific legal consequence is applicable to it. By negative conditions, on the other hand, we refer to all those properties that, if verified, do not allow the action or state of affairs to be classified under a certain conceptual category[15].

This distinction was initially proposed by Wesley Newcomb Hohfeld (1991, 43) who, to exemplify his point, suggests to think about the properties that must be verified in order to indicate that we are facing a contract between A and B. The positive conditions could be, for example, that each party is human, at least a certain age, that one party has made an offer, the other party has accepted the offer, etc. The negative conditions could be the properties that describe A has maliciously misled B or A has coerced B into accepting his offer. As we can see, a positive or negative condition can be composed of properties and/or complementary properties[16].

This distinction, however, has two major problems. On the one hand, we lack criteria for distinguishing between positive and negative

[15] In this sense, the effect of verifying a negative condition in a case entail qualifying the individual case within a generic case that is either not correlated with a normative consequence (normative gap), or is correlated with a normative consequence that inverts the character of the consequent. By inverting the character of the consequent, I am referring to one of the following possible variations of the normative qualification of the action: i) the content (action deontically qualified) goes from being obligated to being prohibited or permitted to do or not to do; ii) the content goes from being prohibited to being obligated or permitted; or iii) the content goes from being permitted to being obligated or prohibited.

[16] For a similar distinction, but focused on the argumentation structure, see: Toulmin 2003, 136–38; Hart 1948–49.

conditions[17]. Indeed, any property, depending on how it is presented, can be understood as positive or negative. In that sense, this would be a useful distinction as long as the theoretical language can formulate a criterion that allows sustaining an exhaustive and exclusive difference between both types of conditions. Richard Susskind tried to solve this problem by introducing further clarifications, which I will give an account of in the next section. On the other hand, it is a distinction that does not allow much clarification. Assuming that we can differentiate between positive and negative conditions, we can always present the negation of a negative condition as a form of a positive condition. Following Hohfeld's example, if we understand "mislead" as a negative condition, then we can identify the positive condition as "has not been misled". Without prejudice to these theoretical problems (which I will not delve into), jurists often use this distinction to present the content of the antecedents.

2.1.3. Main, alternative, conjunctive and conditions for exceptive qualification

Susskind (1987, 133) has proposed assessing the antecedent of the norms differentiating four types of conditions: i) main conditions, ii) alternative conditions, iii) conjunctive conditions; and iv) conditions for exceptive qualification. Each of these conditions can refer to acts, actions, events or situations. This reference can be to a property, a complementary property, or a combination of both.

The notions of main, alternative and conjunctive conditions account for all the facts or actions that, if verified in an individual case, make a legal norm applicable. In this sense, these three types of conditions are different ways of presenting positive conditions. In greater detail, an antecedent composed of a main condition of application refers that the consequent is applied after verifying a fact or action (p); an alternative application condition refers that the consequent is applied after verifying multiple facts or actions, whether they occur together or at least one of these (pvq); and a conjunctive condition of application states that the consequent is applied after verifying multiple facts or actions as they occur together (p.q).

On the other hand, an application of an conditions for exceptive qualification refers to all the facts or actions that, if verified in an in-

[17] On this problem in the Hartian version of the distinction, see: Garcia Yzaguirre 2020c.

dividual case, make the rule inapplicable, since they would be outside its scope (p.¬q). As we can see, this presentation by Susskind tries to make Hohfeld 's distinction between positive and negative conditions more precise, being more precise with the type of positive conditions and varying from label to negative conditions by exception condition. I will come back later to the question how to understand what an exception is.

Now, having completed this reconstruction of the different ways of understanding an antecedent, what does it mean that we are facing an implicit exception? What does it tell us about the antecedent of a norm to point out that a certain property operates as an implicit exception?[18]

3. IMPLICIT EXCEPTIONS

I start with an example to clarify the kind of problem we face when talking about implicit exceptions. During the Covid-19 pandemic, a large number of countries have implemented a series of measures restricting freedom of movement in order to reduce the rate of infection. In this context, let us imagine a country that implements a mandatory quarantine regime that prohibits people from leaving their habitual residence, except for those accredited by the State to carry out work considered essential. Those who break the quarantine are sanctioned with an onerous fine. Naturally, confinement produces effects of various kinds (loss of work, loss of contact between family members, among many others), including subjecting those who suffer it to an intense and constant level of stress. This affectation is particularly severe for a certain group within the set of people who live with Autism Spectrum Disorder (ASD). For them, it supposes a disturbance of their daily routine that produced a noticeable increase in severe anxiety crises. Let us imagine, in this context, that the father of a minor with ASD decides to take his son out of the house and take a short walk down the street so that he feels better and does not have a new anxiety attack. Once in the park, a policeman stops them and imposes a fine (in addition to ordering and coercing them to return home). The fine is appealed and the competent judge considers that, despite having veri-

[18] On the different ways of understanding the notion of exception in legal theory, see: Garcia Yzaguirre 2020a.

fied the antecedent in the individual case, said normative consequence should not be imposed, since the departure from home was due to health needs which operate as implicit exceptions[19].

What does it mean in this case that "health need" operates as an implicit exception? In the following lines I am going to analyze two of the main ways of understanding "implicit exceptions" formulated in legal theory in order to clarify this point: as an explanation of a presupposition or as the substitution of a norm for another that contains, in comparison with the former, a new relevant property in the antecedent[20].

3.1. Implicit exceptions as implicit presuppositions contained in the antecedent

For a group of legal theorists, when jurists speak of "implicit exceptions" they refer to how norms should be identified. The main thesis is that, when identifying a norm, we tend to make incomplete presentations of the antecedent, since we assume certain properties that we leave unexpressed. When these presupposed properties are made explicit by the judges, they operate as limits to the scope of application, that is, as implicit exceptions. This means that the relevant point when asking about implicit exceptions is how we identify the implicit presuppositions and what it means to make them explicit [21].

I start by clarifying three possible (and very widespread) ways of understanding implicit presuppositions and their explanations.

[19] I express myself in terms of a hypothetical case, but I base myself on the events that occurred in Peru and Spain. It should be noted that these countries adopted, shortly after implementing mandatory quarantine measures and after verifying the type of situations described in the main text, a regimen of therapeutic outings for all those people who required, for medical reasons, to briefly leave their homes as useful measure to reduce stress levels.

[20] It should be stressed that the analysis of the notion of implicit exception depends both on the theoretical model adopted and on the object of study. In this sense, for example, if we analyze the notion of norm as a reason for action, then the list of possibilities on how to understand an exception would be focused on types of moral reasons that allow the variability of the importance of each norm. For a study of this type focused on (types of) moral principles (from a particularist approach) see (Strahovnil 2012). For a study of reasons and exceptions (or *defeaters*), see: Sinnot-Armstrong 2006, 68–69, 215; 1999, 5–6.

[21] I must specify that, to fulfill the purposes of this article, it is not necessary nor will I delve into how to understand the notion of implicit meaning of texts. For an analysis of this point see Sbisá 2017.

3.1.1. Review of relationships between norms

A first way of understanding the explanation of implicit presuppositions is as a result of a revision of our preferences about the relations between norms of a normative system. This means that, initially, our interpretation of the content of the antecedent of a norm qualified an action in a certain way. However, after taking into account the rest of the norms that are part of the normative system to which said norm belongs, we realize that this, properly understood, qualified said action in another way.

Said revision can be produced if we consider that an adequate interpretation of the norms implies assuming a relationship of preference between them[22]. The classic example to present the first assumption was formulated by Alchourrón (1991, 267), which I shall return to using current normative provisions. Consider the provisions of articles 106 and 20.2 of the Peruvian Penal Code[23]. From the first article, it is possible to interpret a norm that prescribes the obligation to punish those who commit homicide, while from the second, it is possible to interpret a prescriptive norm that prohibits punishing minors. We can present each of these rules as follows:

N1: mandatory to punish those who commit homicide

N2: minors should not be sanctioned.

Let us suppose a case in which John, a minor of 16 years, has killed Patrick. According to N1, a derived norm is inferred by which John should be punished (for having committed homicide). On the other hand, N2 infers a derived norm by which John should not be sanctioned (because he is a minor). This leads us to a case of normative conflict, since the judge with respect to John must, at the same time, sanction him (according to N1) and not sanction him (according to N2).

Now, if the judge considers that, properly understood N1 and N2, it is the case that "being a minor" operates as a limitation to the

[22] In this sense, for example, see Rodríguez 2003a, 98. In a similar sense (explanation of implicit exceptions based on legal principles), see Alonso 2010, 292.

[23] Article 106 states "Whoever kills another will be punished with imprisonment for not less than six nor more than twenty years". For its part, article 20.2 establishes "The following are exempt from criminal liability: 2. Anyone under 18 years of age". In my formal reconstruction, I have ignored, solely for reasons of clarity with the point to be exemplified, the specifications of the applicable sanctions, accounting only for the obligation and the prohibition that can be interpreted from each of these provisions.

cases of sanctioning homicides, then he must reformulate how he has identified the norms. In this sense, it will proceed to discard N1 and identify N1' which contains the following prescription: "if a person commits homicide and is not a minor, then it is obligatory to punish him". As we can see, in this way you have identified and made explicit an implicit exception.

3.1.2. Incorporation of new property

A second way of understanding the explicitation of implicit presuppositions is through the incorporation of a new property in the antecedent of the norm as a result of a "better" specification of the justification of the norm. For some jurists, standards are means to achieve purposes, so the interpretive work must be aimed at correctly identifying the prescriptions (according to the purpose) in each application. In view of this, they assume that the antecedent of the norms can (and should) be varied in order to reduce it if, in this way, we achieve a better specification of the object or purpose of the norm. In this sense, the purposes are the source of implicit exceptions to the prescriptions.

An example of how to understand implicit assumptions and the identification of implicit exceptions has been given by Eugenio Bulygin (2005b, 75). This author has proposed to differentiate between adequate and inadequate identifications of norms. The criterion to differentiate one from the other is whether or not the identified standard accounts for the purpose of the standard. In this sense, an adequate identification of the norm would be equivalent to interpreting a provision in such a way that the norm concretizes the justification of the norm. On the other hand, an inadequate identification of the norm refers to a deficient interpretation of a provision, i.e. the interpretative result attributed by a person who "did not understand the meaning of the expression" was legislatively adopted.

In order to clarify his point, the author uses as an example the famous case of the barber of Bologna proposed by Samuel Pufendorf. During the Middle Ages, the following provision was in force in the city of Bologna: "whoever sheds blood in the streets should be punished with the greatest severity". Under a literal interpretation, the most severe punishment prescription would be imposed on any person who spills blood in the streets, such as, for example, a barber who accidentally cuts his client and thereby spills his blood in the street,

the doctor who performs an emergency intervention in a street that involves the patient bleeding, or the case of a child who, playing with another, breaks his nose and makes his blood splash on the pavement. For Bulygin, this provision must be understood according to its purpose, that is, to discourage fights, duels or other violent acts on public roads. In this way, the above cases would be outside the scope of the standard (or, in more precise terms, we should interpret the provision in such a way that said cases are outside the scope of the standard) (Bulygin 2005b, 75; 2014, 78–79)[24]. To do this, it will be necessary to incorporate as many new properties as are necessary in the antecedent in order to exclude them, properties that are called implicit exceptions.

3.1.3. Intent of the legislator

A third way of understanding the explanation of implicit presuppositions is by replicating the previous exercise, but substituting the idea of "purpose of the norm" for "intention of the legislator of the norm". Briefly stated, an implicit exception is understood to be the distinction the legislator would have made if he had the opportunity to do so. In this sense, reference is made to the fact that if we make a counterfactual judgment of the will of the legislator, we can identify which normatively irrelevant property should be considered relevant in order to exclude a certain type of generic case from the scope of application of the norm.

An example of how to understand implicit presuppositions and the identification of implicit exceptions has been offered by Alchourrón in *On Law and Logic*. Very briefly, according to this author, we determine what are the implicit exceptions to a norm based on counterfactual judgments about what the disposition (evaluative attitude) of the legislator would be with respect to a certain circumstance (Rodriguez 2002, 376). In this sense, if in one case we have the norm "If A, then OB", circumstance C can be in one of the following assumptions (Alchourrón 2010 [1996b], 168)[25]: i) it is an implicit exception provided that the normative authority, at the moment of issuing the norm, she would have been willing to accept "If A.~C, then OB" and reject "If A.C, then OB"; ii) it is not an implicit exception as long as the regulatory authority, at the time of issuing the rule, would have been willing

[24] A similar strategy to this has been used by Hernández Marín (2012).

[25] I closely follow the description contained in (Ratti 2013a, 225).

to accept both "If A, then OB" and "If AC, then OB"; or iii) it does not constitute an implicit exception nor an implicit non-exception (it is indeterminate), provided that the regulatory authority, at the time of issuing the rule, had not had any of the provisions indicated in the previous points.

Implicit exceptions, in this sense, are a set of presupposed properties that must be made explicit for an adequate identification of the rule. Under Alchourrón's theorization, for its explanation it is necessary to ask what the legislator would have decided if he had taken into account a certain property that he did not value. Returning to the example of the Bologna law, one would have to ask how the legislator would have normatively qualified the case of a barber or a doctor who, in the exercise of his profession, sheds the blood of a person in the street? If we consider it justified that, had these assumptions been considered, it would have excluded these types of actions from the scope, then we are faced with an implicit exception.

3.1.4. Type of norm or structural component?

As we have been able to see, the three previous theoretical proposals understand (assuming different theoretical presuppositions) that an implicit exception is a property that is incorporated after the process of making one (or some) implicit presuppositions explicit. What does this notion of antecedents tell us?

I start by indicating that all these theories are assuming a way of understanding that the antecedent of the norms is not completely explicit. This in the sense that the interpreter must carry out subsequent interpretive acts to satisfactorily identify which is the norm that is part of the normative system. This implies that interpreters, by identifying implicit exceptions, are not changing the rule, but rather identifying it "correctly".

A norm with an incomplete antecedent (meaning it does not present all the presuppositions on which it has been formulated) expresses a norm with an antecedent that contains only subordinate conditions (more precisely, contributing conditions). In contrast, a norm with the full antecedent expresses a norm with an antecedent containing basic conditions. The implicit exceptions, comprehended this way, account for the properties that are incorporated (using express rules, purposes of the rules or the intention of the legislator) to be able to

consider that we have stopped having subordinate conditions to have basic conditions.

This point is theoretically important, since it allows us to affirm that due to "implicit exceptions" a structural component of the antecedent is not accounted for. In other words, it would not be differentiating between types of conditions, but rather it would be realizing the operations necessary to interpret a certain normative text "correctly".

The foregoing assumes that the notion of negative condition or exception, if used to account for implicit exceptions, does not allow a logical feature to be differentiated from a fragment of the antecedent. What does allow to distinguish, from the rest of the components of the antecedent, is why it was incorporated: to reduce the scope of the norm as a result of having made explicit an implicit presupposition.

3.2. Implicit exception as a result of substituting one rule for another

For another group of legal theorists, when jurists speak of "implicit exceptions", what they are doing is giving an account of the attribution of relevance to a property that, until then, was irrelevant. According to these positions, the judges replace norms so that the regulation of an action or state of affairs is in accordance with their evaluative preferences.

This means that the relevant point to analyze when describing implicit exceptions is what types of operations are performed when normative relevance is attributed to an irrelevant property in order to replace one rule with another. To clarify this statement, I am going to underline two ways of understanding this operation: i) creation of implicit exceptions as a result of resolving an axiological gap; and ii) creation of implicit exceptions as a result of resolving a conflict between an express rule and an implicit rule.

3.2.1. Implicit exceptions and axiological gaps

In certain cases, jurists consider that the antecedents are correlated with wrong solutions. Following Alchourrón and Bulygin, these are cases of axiological gaps, that is, cases in which the normative system offers, in the opinion of the interpreter, an axiologically unacceptable normative solution.

More precisely, these authors differentiate between relevance thesis and relevance hypothesis. Relevance thesis refers to the proposition with which we identify all the relevant properties in the normative system. In other words, it expresses a descriptive discourse of what properties are considered relevant by law. On the other hand, by hypothesis of relevance, the proposition with which we identify the properties that should be foreseen (or not foreseen) in the normative system so that it is axiologically adequate is named[26]. If the relevance thesis and the relevance hypothesis are coextensive (i.e. they coincide in identifying the same set of properties), then we will have an axiologically satisfactory normative system. If not, then we will have an axiologically unsatisfactory normative system (Alchourrón, Bulygin 2012, 154)[27].

If it is the case that the relevance hypothesis is more extensive (contains more properties) than the relevance thesis, then we will have created an axiological gap. That is, an axiologically inadequate case because the generic case of the norm does not contain a property that should have been introduced (according to the evaluative system of the interpreter). In simpler terms: the antecedent does not contain a distinction that it should contain.

The axiological gaps are resolved through a restrictive reinterpretation operation by the judge. To clarify this point, let's look at the following example: a person has a religious belief that prescribes not working on Saturdays (for example, a believer in the Adventist Christian creed). Your work activities as a dependent are governed, let us suppose, by the following rule "if a dependent worker, then it is compulsory to work from Monday to Saturday". As can be seen, this legal obligation supposes the impossibility of materializing their religious duty of not carrying out work on Saturdays[28].

[26] The hypothesis of relevance, thus understood, supposes the identification and use of an evaluative criterion (Alchourrón, Bulygin 2012, 154).

[27] It is worth highlighting the precision of these authors that the axiological adequacy of a normative system is a broader notion than that indicated in the main text. A normative system can be axiologically inadequate due to: unsatisfactory provisions for generic cases, that is, for having a relevance thesis that does not coincide with our relevance hypothesis; or for having adequately identified the generic cases, but correlated them with inappropriate normative consequences (for example, correlated them with an obligation when it should have been a prohibition) (Alchourrón, Bulygin, 2012, 154–55; Alonso, 2010, 139). In simpler terms, a system is unfair because it has chosen the cases poorly or because it has chosen them well, but has solved them poorly.

[28] As an example of this discussion, see the decision of the Supreme Court of the United States Sherbert vs. Vernes, the decision of the Constitutional Court of Peru No. 0895–2001-AA/TC or the decision of the Constitutional Court of Colombia T-839/09 for decisions in favor of including an exception to the duty of workers to

Let us now assume that the judge considers that the generic case contained in the antecedent, that is, "dependent worker", does not contain distinctions that it should have contained. According to the categories analyzed, "dependent worker" configures a relevance thesis (generic case composed of property p). Faced with this, the judge formulates a hypothesis of relevance under which a new property must be introduced. In this sense, it proposes that the labor normative formulation is better interpreted in the following way: "if a dependent worker and not an Adventist" (that is, as a generic case composed of the properties (p.¬r)). In this way, to properly identify the norm (stop being "unfair" and become "fair"), it should be "if a dependent worker and not an Adventist, then it is obligatory to work from Monday to Saturday".

The way to resolve the discrepancy between a relevance thesis and a relevance hypothesis is by substituting the chosen norm, that is, setting aside the relevance thesis and adopting the interpretation of the provision contained in the relevance hypothesis. In other words, to resolve an axiological gap we must treat the relevance hypothesis as the new relevance thesis. Understood in this way, the solution of the axiological gaps, as we can see, is realizing a process and result of identifying norms. In more precise terms, by substituting a relevance thesis for a relevance hypothesis, what we are realizing is a restrictive reinterpretation process whereby we discard one interpretation for another with a more restricted scope because it is more specific (in other terms, we substitute a generic case for another generic case that is finer, that is, one that contains one or more additional properties). In this sense, resolving a case of an axiological gap is to account for a case of reinterpretation or substitution of one norm for another.

A clear way of presenting the operation of creating and resolving an axiological gap is, as Guastini has rightly pointed out, through the dissociation argument (Guastini 2008). In short: i) we make a *prima facie* interpretation of a provision, according to the example, "if a dependent worker, then it is compulsory to work from Monday to Saturday"; ii) the identified generic case is subdivided into two types, following the indicated example, we subdivide the generic case "dependent workers" (p) into "dependent workers who are not Adventists" (p1) and "dependent workers who are Adventists" (p2); iii) the subclass

work on Saturdays for religious reasons. For a decision against creating such an exception see the ruling of the Spanish Constitutional Court No. 19/1985.

"dependent workers who are Adventists" (p2) together with the exclusion of the subclass "dependent workers who are not Adventists" (p1) is correlated with the normative consequence, that is, "if a dependent worker and not Adventist, then obligatory to work from Monday to Saturday"; iv) with the subclass "dependent workers who are Adventists" (p2) the interpreter has attributed normative relevance to a property that was irrelevant and, in this way, has created a normative gap (it is a relevant generic case that is not correlated to a normative solution); and v) in relation to the normative gap, the interpreter can resolve it through an extensive interpretation of another provision or by another implicit rule or leave the case indeterminate[29].

Now, from this proposal, what does an implicit exception mean? According to the above, we can differentiate between two norms: N1, that is, the norm that generated the axiological gap; and N2, that is, the norm that resulted from having resolved the axiological gap. The difference between N1 and N2 is that the latter contains more properties in the antecedent. Jurist calls these new properties implicit exceptions.

From this approach, these implicit exceptions show that they have attributed normative relevance to a normatively irrelevant property. This means that the judge has set aside an express norm (which did not contain said property) to use an implicit norm (which he himself has created and which does contain said property) to avoid generating an unfair result.

Following Guastini, with this theorization, an operation of creation of the law by the judges is being realized. The different structural distinctions are not relevant to account for this notion, which will only be relevant to specify how this new property is related to previously identified properties.

3.2.2. Implicit exceptions as a result of a conflict between an explicit rule and an implicit rule

By implicit exception one can refer, as Andrea Dolcetti and Giovanni Battista Ratti have presented (Dolcetti, Ratti 2017; 2020; Ratti 2020, 144–49), the result of resolving a conflict between an implicit norm and an explicit norm that entails preferring the applicability of the implicit norm. Let's look at the point in more detail.

The scenario that we are interested in evaluating is that of a norm derived from an explicit norm that is in normative conflict with

[29] See also (Chiassoni 2019b, 196).

a norm derived from an implicit norm. In this regard, as the authors point out, we have two possible solutions: i) the norm derived from an express norm prevails; or ii) the rule derived from the implicit rule prevails. If the judge resolves the normative conflict in favor of the norm derived from an express norm, we will be facing a case of what they call "direct reasoned application" (Dolcetti, Ratti 2016, 42). In these cases, the judge takes into consideration reasons against the application of a norm derived from an express norm offered by a norm derived from an implicit norm and considers that they are not sufficient to vary the normative qualification of an individual case. As we can see, they are accounting for the scenarios in which the judge has considered that there are better reasons to use the express standard.

If the judge resolves the normative conflict in favor of the norm derived from an implicit norm, we will be facing a case of creating an implicit exception (Dolcetti, Ratti 2016, 39)[30]. In these cases, the judges create a preference in favor of the norm derived from an implicit norm over the norm derived from an explicit norm. This supposes substituting an explicit norm for another that includes the normative evaluations of the judge that justify the creation of the implicit norm.

Let's see an example[31]. Let us consider a normative system in which members of the police are governed by the norm N1 «if police officer, then it is obligatory to rotate from police station every two years of service». This police station rotation duty implies the geographical relocation of the work center of police officers, that is, changing the city or town where the police service is lived and provided. Imagine the case in which a police officer is two weeks away from serving two years in a city and, moreover, is seven months pregnant. Suppose that the city where she has been performing her duties is where her partner and relatives live, so that the effects of the rule that prescribes rotation will imply that she stops living in the same place where they live during the last part of the pregnancy and for much of the first two years of the child's life.

The police officer judicially questioned that he be subjected to the rotation obligation, since she considered that such effects were unbearable. Under this assumption, let us assume, the judge carried out an act of legal construction in order to create the norm N2 "if pregnant police officer, then it is forbidden to relocate their work center outside the city

[30] In a similar sense (Luzzati 2018, 336–37).

[31] The example case is inspired by the facts resolved in the judgement No. 0167/2019-S2 of the Constitutional Court of Bolivia.

where they live", based on the idea of that a gestation is better carried out accompanied by its support networks (be they family, friends or the type of social network that has been built). This created a conflict between a norm derived from an explicit norm (N1) and a norm derived from an implicit norm (N2) (it is impossible for the police officer to comply with the order to rotate and the order not to rotate together).

Let us assume that the judge decides to prefer N2 over N1, in this way he has decided to create an implicit exception to the explicit rule. The norm that regulates the individual case would be "if police officer and not pregnant, then it is obligatory to rotate from station every two years of service". As we can see, with the "not pregnant" property, the scope of application of the express rule has been reduced. This is, as we see, the implicit exception[32].

This theorization proposes that jurists, when speaking of implicit exceptions, account for acts of creation of the law at the site of application. According to this, the judge creates an implicit norm (which contains the attribution of relevance to a property that, for the law, is normatively irrelevant) and makes it prevail over the explicit norm. This means that the express norm will be set aside and the implicit norm will be used to resolve the individual case.

As we can see, from this way of looking at implicit exceptions we are not accounting for a structural element of the antecedents either. What you are realizing is an operation with rules and its result.

4. IMPLICIT EXCEPTIONS: OPERATIONS WITH RULES AND NOT RULE FRAGMENTS

After having assessed these two ways of understanding implicit exceptions, it is now possible to make some statements about what this notion of the antecedent tells us. I proceed to differentiate what the

[32] This point allows us to highlight the difference between exempting and violating a rule. We are facing a violation of a norm in the case in which an agent who is in a subsumable circumstance in the generic case of a norm performs an action or generates a state of affairs that is normatively incompatible with the consequent of said norm (in other words, if the norm prescribed Phq, it will be a violation if the addressee performs q). Instead, we will be faced with an exception if the agent's action is normatively justified. As Bernard Gert (2005, 221–22) points out, justifying an exception to a duty is a way of presenting the justification of a duty itself. In a similar sense (Vavrynem 2009, 96; Holton 2010, 374ff).

theories tell us about implicit exceptions as identification of the antecedent and components of the antecedent (according to what was seen in section 2.1.).

On the one hand, theorizing about implicit exceptions clarifies relevant conceptual points as to how we identify the antecedent. Both ways of understanding implicit exceptions suppose the modification of the generic case contained in the antecedent of a norm in order to incorporate a new property in a conjunctive relationship with the previously identified properties. In formal terms, introducing an implicit exception (from both theories) means going from (p->Oq) to (p.r –>O¬q)[33].

If the above is correct, then this affects the identification of the antecedent in two ways: i) in the case of hypothetical norms, it involves incorporating an additional explicit property to the set of explicit properties already identified; and ii) in the case of categorical norms, it necessarily entails that it be presented as a hypothetical norm and that the antecedent ceases to be tautological with the consequent, since it will have explicit properties (the implicit exception).

On the other hand, in relation to the composition of the antecedent, it is worth making some clarifications and distinctions. In the first place, the different theoretical approaches about implicit exceptions do not try (and fail) to clarify a structural component of the antecedent. What they try to do (and achieve) is to clarify a set of operations and their results with rules. Let's look at each component distinction to prove this claim.

The distinction between basic and subordinate conditions is useful in presenting ways in which interpreters consider that the consequent is or is not guaranteed by the antecedent (and what kind of guarantee they have). The different theories about implicit exceptions, as we have seen, do not account for a new type of basic or subordinate condition. Instead, these only account for the incorporation of a new property that either allows passing from a subordinate condition to a basic one, or else allows changing the type of basic condition (from having necessary conditions to having a set of necessary conditions

[33] It should be noted that it is not normatively relevant if the new property is formalized as (r) or as its complement (¬). The positive or negative presentation is dependent on how we describe an action or state of affairs and we can always use one or the other to present the same fact. On this point (Williams 1988; García Yzaguirre 2020a).

that, together with the new property, operate together as a sufficient condition for the consequent).

Taking this distinction into account, the first set of views on implicit exceptions understand the explicitation of exceptions (or implicit presuppositions) as the necessary act to convert a norm with a weak antecedent into one with a strong antecedent. Likewise, it proposes that this act is understood as a better understanding of the norm in relation to the rest of the norms in the system that it is a part of – its purposes, or the intention of the legislator. In contrast, the second set of theorizing about implicit exceptions does not require or employ an understanding of norms with a weakened antecedent. Otherwise, it assumes and uses norms understood with a strong antecedent: what they propose is to replace a strong antecedent with another (only finer or with more distinctions).

The distinction between positive and negative conditions, as we have seen, suffers from the problem of not offering a criterion for differentiating one from the other. At this point, it is worth noting the different theories about the implicit exceptions that could be used as a criterion to identify negative conditions: they are all those that the judges identify, either by explicitation of an implicit presupposition, or by act of judicial creation of the law. Although it could be the case that this point allows us to formulate a new clarification: the distinction between positive and negative conditions, evaluated in such a way, would not differentiate between components of norms, but would be at the level of normative propositions. These notions do not account for elements of the rules, but rather allow us to describe, with some rhetorical-argumentative purpose, different ways of approaching certain fragments of the rules.

As for the distinction between the main, alternative, conjunctive and exceptions (proposed by Susskind), if we take into account these theories about implicit exceptions, a false distinction is highlighted: exception conditions and conjunctive conditions operate in the same way. This is done in two ways: i) two conjunctive properties have the effect of specifying the generic case, which is the same effect produced by the exception conditions; and ii) when including a new property (an implicit exception), it operates using a conjunction with the rest of the previously identified properties. This assumes that they are both labels that differentiate between non-differentiable objects[34].

[34] On this point see: Garcia Yzaguirre 2020c.

Secondly, it should be noted that each way of understanding implicit exceptions is a way of presenting and analyzing different discourses made by jurists. The first group of thoughts (implicit exception as an implicit presupposition contained in the antecedent) is trying to clarify what the jurists are saying when they point out that the identification of a new property does not imply a change in the norm but a better identification. her. On the other hand, the second group of thoughts (implicit exception as substitution of one norm for another), is trying to clarify discourses of jurists who consider that any modification of the antecedent implies identifying a new norm.

In addition to the different discourses of the jurists, each of these assumes a different way of understanding the background. The first assumes that the norms must be identified, at first, by using subordinate conditions. The second, on the other hand, assumes that norms must be identified by using basic conditions. In this sense, it is not that one set of theorizations is better than the other, each of these highlights different information and allows us to better present different discourses of jurists.

5. CONCLUSION

Legal theorists, by clarifying the notion of implicit exception, are not trying to clarify a new type of antecedent's component. They are clarifying processes and their results that interpreters carry out at the moment of identifying a norm, in a satisfactory way (according to their correctness criteria).

These processes can be of two types. Firstly, it may be about processes of better understanding the content of a norm. An implicit exception, within this type of theory, is understood as a property incorporated in the antecedent of a norm as a result of the explicitation of an implicit presupposition. These explanations can be made using, for example, the relations of the norm with other norms of the same reference normative system, the purpose of the prescription or the intention of the legislator.

On the other hand, it can be about processes of creation of the law by the judges. An implicit exception, within this type of theorizing, is understood as a property incorporated in the antecedent of a norm as a result of attributing normative relevance to an irrelevant property.

These acts of normative creation can be carried out, for example, by creating and resolving either an axiological gap, or a conflict between an express norm and an implicit norm.

The result of both ways of understanding the incorporation of a new property in the antecedent of a norm does not account for a new type of structural component of the antecedents. What has been created is a property that operates in conjunctive relation to the previously identified properties and that can have the effect of converting an antecedent, either composed of subordinate conditions to one with basic conditions, or else composed of a type of basic condition. to another type of basic condition.

The evaluations of the implicit exceptions, from the structure of the norms, shows us the same information as other notions that we already use to account for the antecedents. What this notion does allow us to clarify, with clarity and precision, is a set of operations and results that the judges carry out with the norms during an interpretive process.

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