

AN EXPERIMENTAL ESSAY ON THE ANTECEDENT AND ITS FORMULATION

David Duarte*

Abstract. As it is well known, legal norms are triadic structures, formed by an antecedent, a deontic operator and a consequence. The present paper is an analysis of the first element of that structure, the antecedent, which is, as stated here, the decisive element of norms regarding the tasks legal operators have to realize in order to solve legal problems. Within the analysis of the antecedent, some propositions are defended. For instance: the distinction between rules and principles has nothing to do with the one that divides categorical and hypothetical norms; that distinction is of structural nature and it is located in the antecedent; or, that distinction allows to see that the antecedent of principle norms is always formed by disjunctive conditions, without any necessary connection with the wording used by normative authorities in the norm sentence. Besides all this, the paper evaluates some other features of the antecedent: the relationship between the norm sentence and the antecedent described by the text; the amount of information that is given by this normative element; how it is formed; the possible connections between its internal conditions; or, the separation between its subjective and material parts.

Key words. Norm formulations, antecedent, hypothetical and categorical norms, rules and principles.

1. Norm formulations and norms: a complete norm and its antecedent

1.1 It is common knowledge in legal theory that norm formulations and norms are different entities with a meaning relationship: the content of norms is the meaning of the expression realized in norm formulations¹. It is also recognized, however, that the relationship

* Department of Speech Communication, Argumentation Theory and Rhetoric, University of Amsterdam e.t.feteris@uva.nl.

* Professor at the University of Lisbon School of Law.

¹ Among many, for instance, G. PINO, *Diritti e Interpretazione*, Il Mulino, Bologna, 2010, p. 15; C. NINO, *Introducción al Análisis del Derecho*, 11th ed. Ariel, Barcelona, 2003, p. 259; R. GUASTINI, *Distinguiendo*, Gedisa, Barcelona,

between these entities does not lead to an exact correspondence between them: it is usual to observe, in any legal order, norm formulations that do not express a complete norm or that express more than one². Different cases, only indicative, can illustrate this lack of correspondence: (i) the deontic operator and the consequence are in one norm formulation and the antecedent is in another, (ii) the norm formulation has two deontic modes for different consequences and or distinct antecedents, or (iii) the antecedent is not expressed in any norm formulation.

1.1.1 Next (i) with two norm formulations (NF) of one norm (N), next (ii) with a NF of two N, and next (iii) with a NF without reference to the antecedent (A) of the N expressed:

(i) NF1 = Spaces (bc) are restaurants (b) and bars (c); NF2 = In spaces is forbidden to smoke (x); N1 = $b \wedge c F x$;

(ii) NF3 = In restaurants (b), dogs (w) are not allowed but it is permitted to smoke (x); N2 = $b F w$; N3 = $b P x$;

(iii) NF4 = It is forbidden to smoke (x); N4 = $F x$.

1.2 Among all these cases, the last one is the most problematic to legal theory: at once, because without representation of the antecedent, the definition of the norm content is necessarily more than placing meanings within norm elements. But, also, because it is the case that raises broader questions. For instance, from a norm formulation without references to the antecedent it is pertinent to ask if the linguistic (or graphical) absence means that the norm has no antecedent at all, as it is justified to demand, more generally, if there are norms that can be categorized exactly by the property of having no antecedent. Furthermore, if any of the answers are negative, other questions arise,

1999, p. 10; A. AARNIO, *The Rational as Reasonable*, Reidel Publishing Company, Dordrecht, 1987, p. 28.

² Qualifying these two cases as "fragmentation" and "condensation" of norms. P. GRABOWSKI, *Enactment, Provision, Norm: Reflections on the Normativeness of Provisions Regulating the Process of Legislation. Investigationes Linguisticae* 2009, p. 130. On the matter, for instance, B. BROŻEK, *Defeasibility of Legal Reasoning*, Zakamycze. Krakow, 2004, p. 165; F. SCHAUER, *Playing by the Rules*, Oxford University Press, Oxford, 1991, p. 23; T. MAZZARESE, *Norm Proposition: Epistemic and Semantic Queries*, in: *Rechtstheorie*, 1991, p. 48.

such as what is the content of an unexpressed antecedent or if the absence of expression has consequences on its structure³.

1.2.1 Next (i), (ii) and (iii) with NF without expression of the A:

- (i) NF1 = It is forbidden to smoke (x);
- (ii) NF2 = Freedom of expression (k) is guaranteed;
- (iii) NF3 = Administrative bodies must act proportionally (z).

1.3 Nonetheless, and considering its immaterial nature, all answers depend on the definition of what a complete norm is, specifically in what regards the antecedent⁴. For this purpose, three propositions can be adopted: (i) normative conditions of validity are not part of the norm antecedent; (ii) common conditions of applicability are also not part of the antecedent, and (iii) negative conditions, or defeaters, are not part of the antecedent as well. Jointing these three propositions, and disregarding the deontic operator and the consequence, the following criterion of norm individuation appears: a norm is a deontic unit containing only its particular positive conditions of applicability⁵.

1.3.1 Next (i) with an A formed by conditions of validity, next (ii) with an A formed by common conditions of applicability, and next (iii) with an A formed by a negative condition:

- (i) NF1 = It is forbidden to smoke (x); N1 = [if produced respecting all applicable norms] F x;
- (ii) NF1 = It is forbidden to smoke (x); N2 = [for all the territory of the legal order and for the future] F x;

³ On this, among many, M. ZORRILLA, *Conflictos Constitucionales, Ponderación e Indeterminación Normativa*, Marcial Pons, Madrid, 2007, p. 75; E. BULYGIN and D. MENDONCA, *Normas y Sistemas Normativos*, Marical Pons, Madrid, 2005, p. 17; F. SCHAUER, cit., p. 24.

⁴ Naturally, the deontic operator and the consequence are not relevant in this context and, all things considered, the «complete norm problem» is clearly a matter of antecedent. On the problem,; L. DUARTE D'ALMEIDA, *Norme Giuridiche Complete*, in: *Analisi e Diritto*, 2009, p. 212; T. SPAAK, *Norms that Confer Competence*, in: *Ratio Juris*, 16, 2003, p. 97.

G. SARTOR, *The Structure of Norm Conditions and Nonmonotonic Reasoning in Law*, in: AA.VV. *Proceeding of the 3rd International Conference on Artificial Intelligence and Law*. ACM, New York, 1991, p. 155.

⁵ Rigorously, the minimal unit (as in J. RAZ, *The Concept of a Legal System*, 2nd ed. Oxford University Press, Oxford, 1980, p. 70) or just the essential for an autonomous significance.

(iii) NF1 = It is forbidden to smoke (x); NF2 = It is allowed to smoke Cuban cigars; N3 = [Unless it is a Cuban cigar] F x.

1.4 The explanation for removing conditions of validity from the antecedent, even though all its tradition, rests on the fact that those conditions are not requirements to which the consequence is subordinated, but, differently, requirements for considering the norm in question as an existing part of the legal order⁶. Thus, conditions of validity do not give any specific information about what the consequence depends on: they give information about the relationship between the norm and the legal order and, consequently, they are also conditions of the antecedent itself⁷. Even admitting that a specific norm can have specific conditions of validity, this feature shows that those conditions in the antecedent are useless and represent an effective distortion about what an antecedent is.

1.4.1 Next (i) with conditions of validity in an unexpressed A, next (ii) with conditions of validity in an expressed A, and next (iii) with the same N without conditions of validity:

(i) NF1 = It is forbidden to smoke (x); N1 = [if produced respecting all applicable norms] F x;

(ii) NF2 = While driving (d) is forbidden to smoke (x); N2 = [if produced respecting all applicable norms] \wedge d F x;

(iii) NF2 = While driving (d) is forbidden to smoke (x); N3 = d F x.

1.5 The distinction between common and particular conditions of applicability divides those that result from normal circumstances of space and time associated with the action of the normative authority from conditions that are out of that circle and, therefore, do not have to do with them or, if they do, that particularly change them. Disregarding common conditions in the antecedent is a conventional move justified by the fact that they are not specific to a norm adopted by the normative authority: if not changed, they are common to all norms produced by the normative authority. Thus, it seems closer to what happens in a

⁶ About the complete norm with conditions of validity, H. Kelsen, *Reine Rechtslehre*, 2^a ed. Franz Deuticke. Wien, 1960, p. 199.

⁷ See, G. PINO, cit., p. 24; L. DUARTE D'ALMEIDA, cit., p. 212; E. BULYGIN and D. MENDONCA, cit., p. 74.

legal order to consider that common conditions of applicability are expressed by other norms, specifically those that define the exercise of competence norms by the normative authority⁸.

1.5.1 Next (i) with an A formed by common conditions of applicability, next (ii) with an A formed by particular conditions of applicability, and next (iii) with an example of a N expressing common conditions of applicability (on the exercise of power conferring norms):

(i) NF1 = It is forbidden to smoke (x); N1 = [for the territory of the legal order and for the future] F x;

(ii) NF2 = In Lisbon (e) and until January 2015 (f) it is forbidden to smoke (x); N2 = e \wedge f F x;

(iii) NF3 = Norms produced (g) are valid for the territory of the legal order (s) and for the future (r); N3 = g O s \wedge r.

1.6 Regarding an antecedent, negative conditions are all that prevent the consequence to be the case, even when, of course, the positive ones ascertain. They are negative, not because they instantiate some absence or are expressed by any kind of negation, which is irrelevant on the matter, but because their presence stops normative conditionality: a negative condition is a sufficient condition to block the consequence. Withdrawing negative conditions from antecedents is justified by two main reasons⁹. First, if they behave as normative defeaters, by definition they have to be seen as exterior to the defeated norm. Second, if a legal order has a norm imposing that special norms defeat general ones (*lex specialis derogat legi generali*), the legal order itself qualifies a special norm as a distinct unit.

1.6.1 Next (i) with one NF and its N, next (ii) with a N that appears as a defeater, and next (iii) with one NF leading to different N (no defeater inside the first N):

⁸ See, R. GUASTINI, *Fragments of a Theory of Legal Sources*, in: *Ratio Juris*, 9, 1996, p. 375; A. CALSAMIGLIA, *Geografía de las Normas de Competencia*, in: *Doxa*, 1994, p. 759.

⁹ Using negative conditions inside a «complete norm», L. Duarte d'Almeida, 2009, p. 212; G. Sartor, 1991, p. 155; C. Alchourrón, 1991, p. 269. C. ALCHOURRÓN, *Condicionabilidad y la Representación de las Normas Jurídicas. Análisis Lógico y Derecho*, Centro de Estudios Constitucionales, Madrid, 1991, pp. 267-280.

- (i) NF1 = While driving (d), it is forbidden to smoke (x); $N1 = d F x$;
- (ii) NF2 = If it is a Cuban cigar (h), it is allowed to smoke (x); $N2 = h \sim F x$;
- (iii) NF3 = While driving (d), unless Cuban cigars (h), it is forbidden to smoke (x); $N3 = d \wedge h P x$.

2. The antecedent: its structure

2.1 The antecedent, also called hypothesis or factual predicate, consists in an indication of something: this means that this element, differently from the deontic operator, which constitutes the directive part of the norm, has a descriptive character¹⁰. Represented in the antecedent is, therefore, what belongs to the world of «sein», what is currently called facts, although the concept covers distinct things as empirical occurrences or immaterial entities¹¹. For the sake of simplicity, antecedent facts can be divided in two: (i) human actions, when the description has human behavior as object and (ii) states of affairs, when the content is any kind of reality that is not related to human behavior. Of course, examples of these two can be mixed in an antecedent.

2.1.1 Next (i) with an A formed by an human action, next (ii) with an A formed by a state of affairs, and next (iii) with an A formed by a state of affairs and an human action:

- (i) NF1 = While driving (d) is forbidden to smoke (x); $N1 = d F x$.
- (i) NF2 = If it rains (i) it is forbidden to smoke (x); $N2 = i F x$;
- (iii) NF3 = If it rains (i) and while driving (d), it is forbidden to smoke (x); $N3 = i \wedge d F x$.

2.2 Human actions and states of affairs within an antecedent can be organized in distinct units: conditions. These units are not easily individuated: because they can be properties of a human action or a complete one, and similarly for states of affairs, defining the extent of each one is a task commonly made under the wording used by

¹⁰ See, N. MACCORMICK, Neil, *Rhetoric and the Rule of Law*, Oxford University Press, Oxford, 2005, p. 36; F. SCHAUER, cit., p. 18.

¹¹ See, J. HAGE, *A Model of Juridical Acts: Part 1: the World of Law*, in: *Artificial Intelligence and Law*. 1, 2011, p. 33.

normative authorities in the norm formulation¹². Even though this is not satisfactory, considering a goal of objectiveness, it seems that there is no other alternative to admitting that conditions can be specified under distinct criteria of magnitude. Obviously, when comparing antecedents from different norms, relations of intersection, consumption and concordance have to be taken into account, even if conditions were semantically formed with distinct criteria of individuation.

2.2.1 Next (i) with a N with three conditions in its A, next (ii) with the same N but formed with only two conditions, and next (iii) with a N that also has two conditions, but, because it has a distinct semantic magnitude of conditions, creates a relation of intersection with the first N:

(i) NF1 = With water (j) falling from clouds (l) and while driving (d), it is forbidden to smoke (x); $N1 = j \wedge l \wedge d F x$;

(ii) NF2 = If it rains (i) and while driving (d), it is forbidden to smoke (x); $N2 = i \wedge d F x = N1 = j \wedge l \wedge d F x$;

(iii) NF3 = While driving (d) in unsafe conditions (m), it is forbidden to smoke (x); $N3 = d \wedge m F x$.

2.3 Accepting that the antecedent can be formulated as the normative authority wants to, obviously in a scenario where there is a norm formulation including this part of the norm, the composition of an antecedent can contain, in what regards its conditions, the most distinct combinations. With variable content, antecedents can have one or more conditions and, in this last case, they can be conjunctive or disjunctive. Naturally, when conditions are conjunctive all of them are necessary to trigger the norm consequence and when they are alternative only one is sufficient to produce the effect foreseen. Of course, nothing prevents antecedents with both conjunctive and disjunctive conditions.

2.3.1 Next (i) with a N that has conjunctive conditions, next (ii) with a N that has disjunctive conditions, and next (iii) with a N that has conjunctive and disjunctive conditions:

¹² Similarly, G. LARIGUET, *Dogmática Jurídica y Aplicación de Normas*, Fontanamara, Ciudad de México, 2007, p. 119; B. BROŽEK, *Defeasibility of Legal Reasoning*, Zakamycze, Krakow, 2004, p. 78.

- (i) NF1 = If it rains (i) and while driving (d), it is forbidden to smoke (x); $N1 = i \wedge d F x$;
- (ii) NF2 = If it rains (i) or snows (n), it is forbidden to smoke (x); $N2 = i \vee n F x$;
- (iii) NF3 = If it rains (i) or snows (n) and while driving (d), it is forbidden to smoke (x); $N1 = i \vee n \wedge d F x$.

2.4 Conditions of a consequence, as stated before, can be positive or negative. Under the criterion of norm individuation adopted, negative conditions are positive conditions of another norm, specifically a norm that defeats the first one. Nevertheless, concerning their formulation, conditions can be distinguished between: (i) positively formulated conditions, those that require an action or some affirmative state of affairs and (ii) negatively formulated conditions, those that ask for an absence or are formulated under any kind of negation. If the difference is not very interesting, its value lays on the distinction with positive and negative conditions: positively and negatively formulated conditions can be negative or positive conditions depending on the defeasibility they cause.

2.4.1 Next (i) with a N whose NF has positively formulated conditions, next (ii) with a N that has a negatively formulated condition (still a positive condition), and next (iii) with a N that has a negatively formulated condition that is effectively a negative condition (a positive one of another N):

- (i) NF1 = While driving (d), it is forbidden to smoke (x); $N1 = d F x$;
- (ii) NF2 = Without rain ($\sim i$) and while driving (d), it is forbidden to smoke (x); $N2 = \sim i \wedge d F x$;
- (iii) NF3 = While driving (d) and if does not rain ($\sim i$), it is allowed to smoke (x); $N1 = d F x$; $N3 = d \wedge \sim i \sim F x$;

2.5 Until now, only the material part of antecedents has been considered. However, when antecedents regard human actions they also have a component related to its addressees. Antecedent addressees form the circle of persons whose performance of the action foreseen can trigger the norm consequence. If there is no reference to them in the norm formulation, this means that antecedent addressees are all persons under the norm's common conditions of applicability. Naturally,

antecedent addressees can be defined in narrow circles of persons. Additionally, antecedents addressees can be foreseen disjunctively or conjunctively: in the first case, any member of the circle triggers the consequence, in the second the consequence is subordinated to an action performed by all members of the circle.

2.5.1 Next (i) with a NF without reference to A addressees, next (ii) with a NF that creates a narrow and disjunctive circle of A addressees, and next (iii) with a NF with a narrow circle of conjunctive A addressees:

(i) NF1 = While driving (d), it is forbidden to smoke (x); N1 = d [all persons] F x;

(ii) NF2 = While driving taxis (d'), it is forbidden to smoke (x); N2 = d [any taxi drivers] F x;

(iii) NF3 = If taxi drivers go on strike (o), public buses are free (q); N3 = o [all taxi drivers] O q.

2.6 These considerations already suggest that there is no necessary connection between antecedent addressees and consequence addressees. Norms can have the same addressees in the antecedent and in the consequence, as they can have distinct addressees in these two elements of the norm structure. However, this proposition enables the recognition of a more relevant one: the property of generality, that divides general and particular norms, is not located in the antecedent¹³. Because norms are general if and only if their consequence addressees are indeterminate, a norm is still general if the previous condition is satisfied although antecedent addressees are determinate.

2.6.1 Next (i) with a N that has the same A and consequence (C) addressees, next (ii) with a N that has different A and C addressees, and next (iii) with a N that has determinate A addressees but is still general:

(i) NF1 = If taxi drivers go on strike (o), they have to justify their reasons (t); N1 = o [taxi drivers] O [taxi drivers] t;

(ii) NF2 = If taxi drivers go on strike (o), labor unions have to announce it (u); N2 = o [taxi drivers] O [unions] u;

(iii) NF3 = If Smith goes on strike (o), labor unions have to announce it (u); N3 = o [Smith] O [unions] u.

¹³ On generality, for instance, Santiago Nino, 2003, p. 77; R. ALEXY, *Theorie der Grundrechte*. 3rd ed., Suhrkamp, Frankfurt am Main, 1996, p. 73 (11).

2.7 Differently from generality, the property of abstraction is clearly located in the norm antecedent. By abstraction it is meant that a norm is applicable to more than one case or, better said, to indeterminate cases of the kind foreseen¹⁴. The reason why abstraction is a property of antecedents seems to be easily comprehensible: in question is a feature related with the repeatability of the human action or the state of affairs to which the consequence is subordinated. Considering both properties, it seems justified to claim that while generality deals with indeterminacy in the subjective impact of a norm when applicable, abstraction is related with indeterminacy in the material impact of a norm regarding its applicability.

2.7.1 Next (i) with an abstract N, next (ii) with a concrete but general N, and next (iii) with an abstract and individual N (particular norm [PN]):

(i) NF1 = While driving (d), it is forbidden to smoke (x); N1 = d F x;

(ii) NF2 = In January 2015 (f'), it is forbidden to smoke (x); N2 = f F [all persons] x;

(iii) NF3 = While driving (d), Smith is forbidden to smoke (x); PN1 = d F [Smith] x;

3. The antecedent: its tasks

3.1 Within the norm structure, the antecedent realizes many tasks. The most intuitively perceptible one is to define what is necessary for the consequence to take place: applicability. This task of antecedents puts them in the role of being the criterion of choice among norms whenever there is a legal problem, which pushes norm consequences to be always and only indirectly chosen: solutions depend on a previous choice that has antecedents as leading figure. Applicability appears, thus, as the key to solve any legal problem and this task of antecedents makes visible that there are no legal solutions without choosing one of them.

¹⁴ Using "universality" for what is meant here as abstraction, Neil MacCormick, 2005, p. 93; M.C. REDONDO, *Legal Reasons: Between Universalism and Particularism*, in: *Journal of Moral Philosophy*, 2005, p. 50. About abstraction as "generality of situations", E. BULYGIN and D. MENDONCA, cit., p. 16.

3.1.1 Next (i) as a legal problem (LP), next (ii) with two N with their A, and next (iii) as the legal solution (LS) made under A choice:

(i) LP = Is it allowed to smoke a Cuban cigar while driving ?

(ii) NF = While driving (d), unless Cuban cigars (h), it is forbidden to smoke (x); $N1 = d \text{ F } x$; $N2 = d \wedge h \square \text{ F } x$;

(iii) LS = LP \rightarrow (d) \vee (d \wedge h) \rightarrow (d \wedge h) \rightarrow \sim F x; LS = \sim F x.

3.2 The previous point already suggests another task realized by antecedents: mapping normative conflicts. From the proposition, commonly accepted, that there is no incompatibility of legal effects if norms do not share conditions of applicability, it follows that the existence of normative conflicts depends on the overlap of two antecedents. Moreover, it is the type of overlapping that defines the nature of the conflict: consumption (total \leftrightarrow partial), intersection (partial \leftrightarrow partial) and concordance (total \leftrightarrow total) are connections usually appointed to norms that, rigorously, only regard their antecedent¹⁵. Thus, antecedents state whether a normative conflict is unsolvable or not.

3.2.1 Next (i) and (ii) with two NF that have four N, and (iii) with the distinct connections of their A as types of overlapping (creating normative conflicts with incompatibility of consequences):

(i) NF1 = While driving (d), unless Cuban cigars (h), it is forbidden to smoke (x); $N1 = d \text{ F } x$; $N2 = d \wedge h \sim \text{ F } x$;

(ii) NF2 = While driving (d), unless if it rains (i), it is allowed to smoke (x); $N3 = d \text{ P } x$; $N4 = d \wedge i \sim \text{ P } x$;

(iii) $N1 \leftrightarrow N3 = \text{ total } \leftrightarrow \text{ total}$; $N1 \leftrightarrow N2 = \text{ total } \leftrightarrow \text{ partial}$; $N2 \leftrightarrow N4 = \text{ partial } \leftrightarrow \text{ partial}$.

3.3 Antecedents also realize another task of most significance: creating non-conditions. Among the unlimited human actions and states of affairs possible, antecedents comprehend a selection of those whose occurrence triggers the foreseen consequence. With this, antecedents draw a line between human actions and states of affairs that are conditionally connected with the consequence and those that are not. In

¹⁵ Regarding the just the "norm", S. NINO, 2003, p. 274; A. Ross, *On Law and Justice*, Stevens & Sons, London, 1958, p. 128.

the negative side of the line are, hence, all human actions and states of affairs whose occurrence could not lead to the consequence to take place: they are, or they become, through the antecedent, non-conditions.

3.3.1 Next (i) with a NF with two N, next (ii) with the conditions selected by their A, and next (iii) with examples of non-conditions (NC) taken from the set of all remaining human actions and states of affairs (HASA):

(i) NF1 = While driving (d), unless Cuban cigars (h), it is forbidden to smoke (x); $N1 = d \supset F x$; $N2 = d \wedge h \supset \sim F x$;

(ii) $N1 = d$; $N2 = d \wedge h$;

(iii) NC = (HASA) - $d \wedge h$ = for instance: walking, eating, raining, snowing...

3.4 Creating non-conditions is a task performed by antecedents that is decisive for conditionality of norms. If a norm has no non-conditions, that necessarily means that all human actions and states of affairs can trigger the consequence, which is accordingly always applicable and always in application: no matter what is happening now, it is fulfilling the antecedent. As this creates a scenario of permanent application of the norm, it is not possible to qualify it as conditional: conventionally, being conditional means that the norm is applicable, not that is applied. Thus, non-conditions are a necessary condition to conditionality.

3.4.1 Next (i) as a NF without A, next (ii) as the representation of a norm in permanent application, and next (iii) with the N in a conditional status through the recognition of a NC:

(i) NF1 = It is forbidden to smoke (x); $N1 = F x$;

(ii) If $N1 = \sim NC \supset F x \rightarrow$ unconditional norm \rightarrow always in application;

(iii) NF1 = It is forbidden to smoke (x); $N1 = F x$; $F x$ is conditional iff $NC1 \supset F x$; for instance $NC1 =$ sleeping.

4. The antecedent between hypothetical and categorical norms

4.1 The distinction between hypothetical and categorical norms has been seen, under some perspectives, as a division of norms with and

without antecedent or, which is the same for the present purposes, as a division of norms with and without conditions¹⁶. As was correctly sustained, this classification mistakes the distinction with another one, specifically the distinction between conditional and unconditional norms: both hypothetical and categorical norms are conditional and their consequence depends on both cases on an antecedent¹⁷. If this is true, then a norm is hypothetical or categorical under a different criterion.

4.1.1 Next (i) as an example of a categorical N, next (ii) as an example of an hypothetical N, and next (iii) with the connection between categorical N and unconditionality:

- (i) NF1 = It is forbidden to smoke (x); N1 = F x = categorical norm;
- (ii) NF2 = While driving (d), it is forbidden to smoke (x); N2 = d F x = hypothetical norm;
- (iii) If N1 = F x has an antecedent, then it is not categorical for being unconditional.

4.2 In order to show that norms are not categorical for being unconditional or, at least, that they can be reformulated as hypothetical, the introduction of a tautological antecedent has been proposed. A tautological antecedent is a strictly formal one containing opposite disjunctive conditions: the consequence depends on the alternative occurrence of two contrary conditions¹⁸. It seems clear, however, that the tautological antecedent does not show the conditional character of categorical norms. Even if it allows an appearance of antecedent, it is not acceptable to sustain conditionality through the tautological antecedent: at once, and as seen, without non-conditions there is no conditionality.

4.2.1 Next (i) with a categorical N, next (ii) with the introduction of a tautological A, and next (iii) with the equivalence between the tautological antecedent and the inexistence of NC:

- (i) NF1 = It is forbidden to smoke (x); N1 = F x = categorical norm;
- (ii) NF2 = while driving (d) or not driving ($\sim d$), it is forbidden to smoke (x); N1 = $d \vee \square d$ F x;
- (iii) N1 = $d \vee \sim d$ F x = $\sim NC$ F x \rightarrow N1 is not a conditional norm.

¹⁶ See, C. ALCHOURRÓN, E. BULYGIN, *Introducción a la Metodología de las Ciencias Jurídicas y Sociales*, Astrea, Buenos Aires, 1998, p. 79; A. ROSS, *Directives and Norms*, Routledge & Kegan Paul, London, 1968, p. 111.

¹⁷ See, M. ZORRILLA, cit., p. 126.

¹⁸ On this, D. MENDONCA, *Presumptions*, in: *Ratio Juris*, 11, 1998, p. 408.

4.3 However, if the distinction between categorical and hypothetical norms is based on the additional condition to the content criterion, besides a proper criterion for the difference, it is possible to show that categorical norms are effectively conditional¹⁹. Under this perspective, a norm is categorical if its condition is only exercising any opportunity for doing what is in its content: thus, in a categorical norm there is nothing more in the antecedent than an action related with the consequence. Differently, a norm is hypothetical if its condition, besides that exercise of any opportunity for doing what is in its content, has a further condition: it is this additional condition, hence, that makes the norm hypothetical²⁰. As it seems acceptable, this is a proper criterion for the difference: it defines categorical norms strictly on the basis of what is its content or, which is the same here, its consequence.

4.3.1 Next (i) with a categorical N, next (ii) with its conditions, next (iii) with an hypothetical N, and next (iv) with its conditions:

- (i) NF1 = It is forbidden to smoke (x); N1 = F x = categorical norm;
- (ii) N1 with its conditions = (exercise of any opportunity for x) F x;
- (iii) NF2 = While driving (d), it is forbidden to smoke (x); N2 = d F x;
- (iv) N2 with its conditions = (exercise of any opportunity for x) \wedge d F x;

4.4 Accepting the previous criterion as an adequate one to distinguish categorical and hypothetical norms, it becomes visible that categorical norms are conditional. If categorical norms are those that depend only on exercising opportunities for doing what is in its content, then the antecedent also creates non-conditions: here, they are the set of all human actions and states of affairs that are not opportunities for doing what is in the consequence²¹. In this negative side of the line drawn by the antecedent there is, thus, a set formed by empirical impossibilities or logical contradictions to what are those opportunities²².

¹⁹ Although the criterion designation was made here, the reference is, obviously, to what is sustained by G. VON WRIGHT, *Norm and Action*, London, 1963, p. 74.

²⁰ In Georg von Wright's own words, norms are hypothetical if "*its condition is the condition which must be satisfied if there is going to be an opportunity for doing the thing which is its content and some further condition*". *Ivi*, p. 74.

²¹ Besides opportunities not exercised, of course.

²² On incompatibility of these states of affairs, J. HAGE, *A Model of Juridical Acts: Part 1: the World of Law*, in: *Artificial Intelligence and Law*, 19, 2011, p. 43.

If this leads to non-conditions, then it is possible to claim that categorical norms are conditional.

4.4.1 Next (i) and next (iii) with categorical N with their A, and next (ii) and next (iv) with the set and an example of HASA that are NC:

(i) NF1 = It is forbidden to smoke (x); N1 = (exercise of any opportunity for x) F x;

(ii) NC of N1 = (HASA) - (opportunities for smoking) = for instance: states of affairs without tobacco;

(iii) NF2 = It is obligatory to close car doors (y); N2 = (exercise of any opportunity for y) O y;

(iv) NC of N2 = (HASA) - (opportunities for closing doors) = for instance: when car doors are closed;

5. The antecedent between rules and principles

5.1 The distinction between hypothetical and categorical norms, especially in what regards its antecedent, has been pointed as a possibility to explain the structural difference between norms that are rules and norms that are principles²³. The suggestion is even more appealing as it is known that, besides some vague explanations, there was never an analytical demonstration of the difference based on the structure of norms²⁴. In what regards antecedents and the role they play in the distinction between rules and principles the same can be said: it has not been clear whether they play or not a decisive part on the difference.

5.1.1 Next (i) and (ii) already assume examples of N that are principles (P), and next (iii) does the same towards a N that is a rule (R):

(i) NF1 = Freedom of expression (k) is guaranteed; N1 = P k;

²³ See, M. ATIENZA and J. MANERO, *Rules and Principles Revisited* in: *Associations*, 4, 2000, p. 150. Also, M. ATIENZA and J. MANERO, *Las Piezas del Derecho*, 2nd ed., Ariel, Barcelona, 2007, p. 33.

²⁴ Robert Alexy often speaks about a structural difference between rules and principles (for instance, R. ALEXY, cit., p. 294), but as a structural difference on the behavior of norms and not in their structure. In the same way, Manuel Atienza and Juan Manero speak about openness and closeness of antecedents, but, as it seems, without a structural demonstration (M. ATIENZA and J. MANERO, cit., p. 33).

(iii) NF2 = In their activity (p), administrative bodies must act proportionally (z); N2 = p O z;

(iii) NF3 = While driving (d), it is forbidden to smoke (x); N3 = d F x;

5.2 However, all this depends on how these two kinds of norms can be distinguished. In order to do it, two symptoms of the difference can be used. First, while a rule, if not defeated, applies completely its consequence, a principle seems to be more or less applicable or, in other words, seems to have a gradual applicability. Second, while a rule seems to define precisely its own borders, a principle behaves as an expansible norm (Optimierungsgebote), stopping only against contrary norms²⁵. Because they can be easily contradicted, other traditional symptoms of the difference can not be taken into account. For instance: (i) both rules and principles are prima facie norms since they can be both defeated by other norms, and (ii) both rules and principles can lead, depending on the kind of conflict, into the application of conflict norms or into a balancing²⁶.

5.2.1 Next (i) with a P and the statement that it can be more or less applied, next (ii) with the same P and the statement that its limits appear to come from other N and next (iii) with a R and the statement that those features are not recognizable in it:

(i)NF1 = Freedom of expression (k) is guaranteed; N1 = P k: freedom of expression can be more or less applied;

(ii) NF1 = Freedom of expression (k) is guaranteed; N1 = P k: freedom of expression stops with honor protection;

(iii) NF2 = While driving (d), it is forbidden to smoke (x); N2 = d F x: no gradualism and no expansibility.

²⁵ On these symptoms, J. SIECKMANN, *Balancing, Optimisation, and Alexy's "Weight Formula"*, in: AA.VV., *Legal Reasoning: The Methods of Balancing*, Franz Steiner Verlag, Stuttgart, 2011, p. 102; R. ALEXY, cit., p. 295; M. BOROWSKI, *Grundrechte Als Prinzipien*, Nomos Verlag, Baden-Baden, 1998, p. 76.

²⁶ Arguing that principles are in conflicts in the same way as rules, D. DUARTE, *Rebutting Defeasibility as Operative Normative Defeasibility*, in: AA.VV., *Liber Amicorum de José de Sousa Brito*, Almedina, Coimbra, 2009, p. 161.

J. HAGE and A. PECZENIK, *Law, Morals and Defeasibility*, in: *Ratio Juris*, 13, 2000, p. 308.

On the matter, B. BROŻEK, *Rationality and Discourse*. Oficyna, Warszawa, 2007, p. 248.

5.3 If the structural difference between hypothetical and categorical norms was the explanation for the difference between rules and principles, then it would be impossible to find hypothetical norms with the symptoms of principles or categorical norms with the antecedent of rules. However, that impossibility does not seem to be true²⁷. In any legal order, and now considering only the first connection, there are norms that are hypothetical and, simultaneously, behave as principles: (i) they intuitively show a gradual application, (ii) they tend to be expansible towards the limit provided by other norms, but (iii) they have an antecedent with additional conditions to the exercise of opportunities for doing what is in its content.

5.3.1 Next (i) with a N that is presented here as a P, next (ii) with that P and the statement that it can be more or less applied, next (iii) with the same P and the statement that its limits come from other norms and next (iv) with the P and its further condition identifying it as an hypothetical N:

(i) NF1 = In their activity (p), administrative bodies must act proportionally (z); N1 = p O z;

(ii) N1 is gradual: administrative bodies can choose, for instance, among more or less adequate alternatives;

(iii) N1 is expansible: proportional administrative activity stops, for instance, with the right to property;

(iv) N1 is an hypothetical norm: it has a further condition besides means-ends relations: administrative activity.

5.4 The same can be said about the second connection provided by this explanation: categorical norms and rules. Any legal order has norms with the features of rules that share the identifying property of categorical norms: (i) they have an antecedent only formed by the exercise of opportunities for doing what is in its content, without further conditions, (ii) they have no gradual applicability, and (iii) they are not expansible. With norms like these, in addition to what was mentioned previously, the hypothetical versus categorical explanation for the structural difference between rules and principles seems to fail completely.

²⁷ With the same result under different reasons, M.C. REDONDO, cit., 2005, p. 66.

5.4.1 Next (i) with a N that is presented here as a R, next (ii) with that R and the statement that it does not lead to a more or less application, next (iii) with the statement that its limits do not come from other norms and next (iv) with its identification as a categorical N:

- (i) NF1 = It is forbidden to smoke (x); N1 = F x;
- (ii) N1 is not gradual: or it is or it is not allowed to smoke;
- (iii) N1 is not expansible: the prohibition stops on human actions regarding smoking (the norm itself);
- (iv) N1 is a categorical norm: there is no further condition in the antecedent besides what comes from its content.

5.5 As it is claimed here, the structural explanation for the difference between rules and principles lays somewhere else: on the determinacy or indeterminacy of human actions and states of affairs foreseen in the antecedent of norms. Thus, while the antecedent of rules specifies what human actions or states of affairs trigger the consequence, principles have an antecedent that prevents knowing previously which and all human actions or states of affairs are prevised²⁸. Therefore, antecedents with this indeterminacy are antecedents of norms that are principles. The key for the difference is, consequently, on what such indeterminacy means in the structure of antecedents and, also, on what follows from that structure.

5.5.1 Next (i) with a N that is a R, next (ii) mentioning the specified HASA foreseen in the A, next (iii) with a N that is a P, and next (iv) with the condition that gives indeterminacy on the HASA foreseen:

- (i) NF1 = While driving (d), it is forbidden to smoke (x); N2 = d F x;
- (ii) N1 is a rule: HASA foreseen in the antecedent are determinate: driving (and smoking);
- (iii) NF2 = In their activity (p), administrative bodies must act proportionally (z); N2 = p O z;
- (iv) N2 is a principle: HASA in the antecedent are indeterminate: administrative activity (and means-ends).

5.6 Antecedents with this indeterminacy on human actions and states of affairs foreseen are antecedents formed by an unlimited extent of disjunctive conditions: all unknown human actions or states of affairs

²⁸ Thus, the criterion creates a material distinction and, additionally, a distinction that is independent from the norm formulation and detectable even if there is no expression of the antecedent.

represented. This means, of course, that each one is a sufficient condition for the consequence to take place. At the same time, these conditions are quite fluid, because indeterminacy implicates that there is a continuum among them: any of the human actions foreseen include all its shapes and distinct kinds of exercise without a clear border with the next one. Thus, any action of the world of «sein» fulfils many of these conditions. As it seems, this explains gradualism: the consequence is more or less applicable considering the quantity of conditions that become effectively subordinated to the consequence.

5.6.1 Next (i) with a N that is a P, next (ii) with the definition of its A, next (iii) and (iv) with the structure of the A provided by indeterminacy of HASA, next (v) with another feature of this structure, and next (vi) with the conclusion on gradualism:

- (i) NF1 = Freedom of expression (k) is guaranteed; N1 = P k;
- (ii) N1 has as antecedent the exercise of any opportunity for doing what is in its content: to express oneself (k);
- (iii) N1 foresees indeterminate human actions: make a movie (k1), write a letter (k2), talk loud (k8), etc.;
- (iv) N1 has unlimited disjunctive conditions: $k1 \vee k2 \vee k3...$;
- (v) N1 has continuous conditions: talk low (k7), talk loud (k8), talk loud at 03.00 am (k9), etc.;
- (vi) N1 consequence is more or less applicable depending on being applied only to k8 or to k8 and k9, and so on.

5.7 Antecedents with the structure given by indeterminacy on human actions or states of affairs are typically extensive and, therefore, particularly vulnerable to normative conflicts: the unlimited, disjunctive and continuous conditions create a sort of endless line with assorted human actions or states of affairs very often shared with other antecedents. As the consequence of the norm will be applied to any and all the conditions fulfilled by a fact of the world of «sein», it is within the conflict with a contrary norm that it is defined which part of reality is subordinated to each one of the consequences. This explains expansibility: without the contrary norm, the consequence would regulate any and all conditions fulfilled and it is within the collision with that contrary norm that is defined where the consequence stops.

5.7.1 Next (i) with a N that is a P, next (ii) with the definition of its A, next (iii) with human actions allowed under the structure of the A,

next (iv) with the particular vulnerability to normative conflicts, and next (v) and (vi) with the conclusion on expansibility:

- (i) NF1 = Freedom of expression (k) is guaranteed; N1 = P k;
- (ii) N1 has as antecedent the exercise of any opportunity for doing what is in its content: to express oneself (k);
- (iii) N1 allows all the following: call someone a nice person (k10), a born murderer (k11), a cripple (k12), etc.;
- (iv) N1 has two conditions certainly shared with the antecedent of the norm on honor protection (N2): k11 and k12;
- (v) If there was no N2 in the legal order, k10, k11 and k12 were all permitted;
- (vi) With N2, it is precisely within the conflict of N1 with N2 that k11 or k12 will be defined as allowed or forbidden.

5.8 Antecedents of norms where the indeterminacy on human actions and states of affairs is not detectable, following the criterion here claimed norms that are rules, do not have a structure as was now seen. Even though there might be rules with disjunctive conditions, they are not unlimited, each one of them specifies a precise domain, and if there is a continuum, it is, at best, inside conditions and not among them. This structure of antecedents implicates a normative behavior where the symptoms chosen to recognize principles, and independently from normative conflicts that can lead to a norm defeasibility, are not present: (i) the consequence is applied or not and there is no gradualism, and (ii) because it is applied or not, when it is the consequence is always and only applicable to a defined set of conditions²⁹.

²⁹ Although the structural difference between hypothetical and categorical norms does not explain the difference between rules and principles, it becomes visible, after this, that some categorical norms are principles: of course, as shown, it is not impossible that norms with an antecedent only formed by the exercise of opportunities for doing what is in its content to foresee indeterminate human actions or states of affairs. However, this is just an intersection of categories and no more than that. It is obviously possible that an antecedent like that leads to a determinate selection of human actions or states of affairs. And the main reason for it is that the antecedent of categorical norms is not formed by the opportunities for doing which is in its content, what would lead to a different relation between these categories of norms, but, differently, by an exercise of one of those opportunities. This point makes all the difference: it means, even though those opportunities are unlimited, that if the exercise of any and all of them is just a determinate human action or state of affairs, then the norm in question is a rule (any exercise of an opportunity to smoke is always smoking).

5.8.1 Next (i) with a N that is a R, next (ii) with the determinacy of HASA foreseen in the A, in this example one with disjunctive conditions, next (iii) with the conclusion of no gradualism, and next (iv) with the conclusion regarding the absence of expansibility:

(i) NF1 = While driving (d) or eating (a), it is forbidden to smoke (x);
N2 = $d \vee a \supset F x$;

(ii) N1 has as antecedent determinate HASA: driving, eating (and smoking);

(iii) N1 is not gradual: it is or it is not allowed to smoke and it is only for driving and eating;

(iv) N1 is not expansible: the prohibition stops on smoking while driving or eating.

5.9 It is important to note that indeterminacy of human actions and states of affairs is not necessarily connected with the use of vague words or other kinds of semantic uncertainty in the formulation of the norm antecedent, if there is one³⁰. Although it is possible to detect norms whose formulation have a vague word and that from its meaning follows an indeterminacy of human actions or states of affairs, the contrary is also possible to find: the semantic uncertainty does not confer this indeterminacy³¹. Therefore, the presented criterion for a structural distinction between rules and principles is, also for this reason, independent from language: semantic certainty and semantic uncertainty regarding the antecedent can both lead to determinacy or indeterminacy of human actions or states of affairs.

5.9.1 Next (i) with a NF with a vague word in the A, next (ii) with the conclusion that, even though, its N is a R, next (iii) with a NF without semantic uncertainties in the A, next (iv) with the conclusion that, even though, its N is a P:

(i) NF1 = While driving (d) in unsafe conditions (m), it is forbidden to smoke (x); N1 = $b \wedge m \supset F x$.

(ii) In NF1 «unsafe» is semantically uncertain; however N1 has determinate HASA: it is a rule.

(iii) NF2 = In their activity (p), administrative bodies must act proportionally (z); N2 = $p \supset O z$;

³⁰ With a similar analysis, G. PINO, cit., p. 54. On the matter, also, D. DUARTE, cit., p. 122.

³¹ Or does even more: confine the extent of human actions and states of affairs prevised.

(iv) In NF2 «administrative activity» is not vague; however, N2 has indeterminate HASA: it is a principle.

5.10 A final remark: it is evident that the criterion of determinacy or indeterminacy of human actions or states of affairs foreseen in the antecedent depends on what an human action is and on how a state of affairs is identifiable: it depends on a standard able to individuate them. And, as is commonly shown, this is everything but an uncontroversial and consistent matter³². This is not a reason, however, to withdraw it. Even if there might be a large area of penumbra on whether an antecedent foresees indeterminate or determinate human actions or states of affairs, it seems visible that this is a clearly recognizable distinction within antecedents with, as claimed, effective consequences on the behavior of norms in a legal order.

³² For instance, C. MAHER, *Action Individuation: a Normative Functionalist Approach*, in: *Philosophical Explorations*, 14, 2011, p. 99; C. CLELAND, *On the Individuation of Events*, in: *Synthese*, 86, 1991, p. 229.

References

- AARNIO, A., *The Rational as Reasonable*, Reidel Publishing Company, Dordrecht, 1997.
- ALCHOURRÓN, C., *Condicionabilidad y la Representación de las Normas Jurídicas. Análisis Lógico y Derecho*, Centro de Estudios Constitucionales Madrid, 1991, pp. 267-280.
- ALCHOURRÓN, C., BULYGIN, E., *Introducción a la Metodología de las Ciencias Jurídicas y Sociales*, Astrea, Buenos Aires, 1998.
- ALEXY, R., *Theorie der Grundrechte*. 3rd ed. Suhrkamp, Frankfurt am Main, 1996.
- ATIENZA, M; MANERO, J., *Las Piezas del Derecho*, 2nd ed., Ariel, Barcelona, 2007.
- ATIENZA, M; MANERO, J., *Rules and Principles Revisited. Associations*, 4, 2000, pp. 147-156.
- BOROWSKI, M., *Grundrechte Als Prinzipien*, Nomos Verlag, Baden-Baden, 1998.
- BROŹEK, B., *Rationality and Discourse*. Oficyna, Warszawa, 2007
- BROŹEK, B., *Defeasibility of Legal Reasoning*, Zakamycze, Krakow, 2004.
- CALSAMIGLIA, A., *Geografía de las Normas de Competencia*, in: *Doxa*, 1994, pp. 747-769.
- CLELAND, C., *On the Individuation of Events*, in: *Synthese*, 86. 1991, pp. 229-254.
- DUARTE, D., *Linguistic Objectivity in Norm Sentences: Alternatives in Literal Meaning*, in: *Ratio Juris*, 24, 2011, pp. 112-139.
- DUARTE, D., *Rebutting Defeasibility as Operative Normative Defeasibility*. in: AA.VV., *Liber Amicorum de José de Sousa Brito*, Almedina, Coimbra, 2009, pp. 161-175.
- DUARTE D'ALMEIDA, L., *Norme Giuridiche Complete*, in: *Analisi e Diritto*, 2009, pp. 197-212.
- GRABOWSKI, P., *Enactment, Provision, Norm: Reflections on the Normativeness of Provisions Regulating the Process of Legislation*, in: *Investigationes Linguisticae*, XVII, 2009, pp. 129-140.
- GUASTINI, R., *Distinguiendo*, Gedisa, Barcelona, 1999.
- GUASTINI, R., *Fragments of a Theory of Legal Sources*, in: *Ratio Juris*. 9, 1996, pp. 364-386.
- HAGE, J., *A Model of Juridical Acts: Part 1: the World of Law. Artificial Intelligence and Law*. 19, 2011, pp. 23-48.
- HAGE, J., PECZENIK, A. *Law, Morals and Defeasibility*, in: *Ratio Juris*, 13, 2000, pp. 305-325.
- KELSEN, H., *Reine Rechtslehre*, 2ª ed. Franz Deuticke Wien, 1960.

- LARIGUET, G., *Dogmática Jurídica y Aplicación de Normas*, Fontanamara, Ciudad de México, 2007.
- MACCORMICK, N., 2005. *Rhetoric and the Rule of Law*, Oxford University Press, Oxford, 2005.
- MAHER, C., 2011. *Action Individuation: a Normative Functionalist Approach*, in: *Philosophical Explorations*, 14, 2011, pp. 99-116.
- MARTINEZ ZORRILLA, D., *Conflictos Constitucionales, Ponderación e Indeterminación Normativa*, Marcial Pons Madrid, 2007
- MAZZARESE, T., *Norm Proposition: Epistemic and Semantic Queries*, in: *Rechtstheorie*, 22, 1991, pp. 39-70.
- MENDONCA, D., *Las Claves del Derecho*, Gedisa, Barcelona, 2000.
- MENDONCA, D., *Presumptions*, in: *Ratio Juris*, 11. 1998, pp. 399 - 412.
- NAVARRO, P., *Normas Condicionales y Falacia Naturalista*, in: *Doxa*. 30, 2007, pp. 602-616.
- PINO, G., *Diritti e Interpretazione*, Il Mulino, Bologna, 2010.
- RAZ, J., *The Concept of a Legal System*. 2nd ed., Oxford University Press, Oxford, 1980.
- REDONDO, M.C., *Legal Reasons: Between Universalism and Particularism*, in: *Journal of Moral Philosophy*, 2005, pp. 47-68.
- ROSS, A., *Directives and Norms*, Routledge & Kegan Paul, London, 1968.
- ROSS, A., *On Law and Justice*, Stevens & Sons, London, 1958.
- SANTIAGO NINO, C., *Introducción al Análisis del Derecho*, 11th ed., Ariel, Barcelona, 2003.
- SARTOR G., 1991, *The Structure of Norm Conditions and Nonmonotonic Reasoning*, in: AA.VV. *Law. Proceeding of the 3rd International Conference on Artificial Intelligence and Law*. ACM, New York, 1991, pp. 155-164.
- SCHAUER F., *Playing by the Rules*, Oxford University Press, Oxford, 1991.
- SIECKMANN JAN., *Balancing, Optimisation, and Alexy's "Weight Formula"*, in: AA.VV., *Legal Reasoning: The Methods of Balancing*, Franz Steiner Verlag Stuttgart, 2011, pp. 101-118.
- SPAAR, T., *Norms that Confer Competence*, in: *Ratio Juris*, 16, 2003, pp. 89-104.