RESTRICTIVE INTERPRETATION OF EXCEPTIONS: IDENTIFICATION AND HUNT OF IDEOLOGIES

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The objective of this article is to assert that jurists advocating for the restrictive interpretation of exceptions in rules, or exceptions to rules, often do so based on an underlying interpretive ideology. To achieve this goal, we will conduct a metatheoretical analysis of how legal theorists have conceptualized the notions of restrictive interpretation and exception. This analysis aims to demonstrate that, when viewed from this perspective, there is no conceptual relationship between these two notions.

Key words: exceptions; restrictive interpretation; rules; regulatory conflicts; interpretive ideology

1. INTRODUCTION

Many legal scholars tend to hold that the exceptions to rules must be interpreted restrictively.[1] Statements of this nature are often found both in judicial

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1 To present this idea they usually use one of these aphorisms: *singularia non sunt extendenda, exceptio stricti juris* or *exceptio est strictissimae interpretationis*. See also Peczenik, A., *On law and reason,* Springer, Dordrecht, 2008, p. 325; Wroblewski, J., *The judicial application of law*, Springer, Dordrecht, 1992, p. 103.

practice and in the works of scholars[2] and often have a significant impact on the way individual cases are resolved.

To illustrate the point, let us imagine the case of a person who is an irregular immigrant in a country and who, for this reason, has been detained by the administrative authorities. The latter, in the exercise of their competence, have initiated the expulsion process. During the administrative procedure, the person claims that, within the country's regulations, there is a rule that states the following: "if a person is an irregular immigrant, then it is mandatory to expel him, unless he is HIV-positive and the destination country does not have a health system that guarantees his or her care".[3] After that, he manages to prove that he lives with HIV and that his country of origin will not offer him adequate health care. As a result, the expulsion is stopped.

Given this scenario, many jurists would understand the following: (1) the fragment of the norm that comes after the "unless" clause is an exception; and (2) because it is an exception, it must be interpreted restrictively. The latter means two things. First, that law-appliers (judicial or administrative) are prohibited from using any interpretative method that involves expanding the scope of the norm. In the example this would mean that the law-appliers could neither use the analogy nor the purpose of the norm to justify an extensive reinterpretation to protect people in an irregular migratory situation who are living with terminal cancer. Second, that in case of vagueness, they must choose only clear cases. In the example, lets imagine that the destination country has medical infrastructure and medical programs only accessible to people with economic well-being, but for a person without financial autonomy there would be no possible benefit. This could be interpreted as a vague case of country that has a health system that guarantees his or her care. In this scenario, a restrictive interpretation would mean to exclude the case.

The terms "exception" and "restrictive interpretation" may be used to refer to different concepts depending on the legal theory, the theory of interpretation, and the legal community to which a particular author belongs. For the purposes of this article, we will focus on the analysis of the concept formulated

2 See, for example, Case 680-2005 *Supreme Court of Chile*; Queralt, J. M.; Lozano Serrano, C.; Tejerizo López, J. M.; Casado Ollero, G., *Curso de Derecho Financiero y Tributario*, Editorial Tecnos, Madrid, 2019, p. 177; Holzapfel H.; Werner, G., *Interpreting Exceptions in Intellectual Property Law*, in: Pyrmont, W.; Adelman, M. J.; Brauneis, R.; Drexl, J.; Nack, R. (eds.), *Patents and Technological Progress in a Globalized World*, Springer, Dordrecht, 2019, pp. 99-114.

3 This example is only intended to clarify the use of the concepts analyzed in the text and is not intended to describe any regulatory system of any country or international dogmatics.

by those dedicated to the study of what the dogmatists say: we will take the discourse of the analytic legal theorists as the object of study.

This article aims to demonstrate that between exceptions and restrictive interpretation, there is no conceptual relation, instead the link between them is an interpretative ideological thesis that is often (but not always) concealed.[4] To do this, the article is structured in the following way: in section 2 we start by presenting what "restrictive interpretation" means and what its relevance is in the interpretive processes. After that, in section 3, we propose a brief analysis of what "exception" means. Finally, we will show that the relationship between "restrictive interpretation" and "exception" is not conceptual.

Finally, we must point out that to achieve the objective and follow the outlined structure our analysis will focus exclusively on prescriptive norms.[5] Likewise, we will understand the legal interpretation activity from a non-cognitivist point of view.[6]

2. INTERPRETIVE PROCESS

2.1. General notion

By "interpretation" we understand the attribution of meaning to a legal text. More precisely, following Riccardo Guastini, we adopt the distinction between text and norm. A text is composed of linguistic signs that, in the case of a legal rule, are contained in a source of law (have been created by a normative authority). A norm, on the other hand, is the meaning that an interpreter attributes to a text contained in a source of law.[7]

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4 We define "ideology" as treating a quality or property that is only contingent as if it were a necessary quality. An interpretive ideology expresses that a statement must necessarily be interpreted in one way, regardless of any other possible interpretation.

5 We will understand that the norms are composed of an antecedent correlated with a normative consequent. The antecedent is composed of a generic case: they express classes of objects, people and/or actions. The normative consequence, for its part, is composed of an action or set of actions deontically modalized. Alchourrón, C.; Bulygin, E., *Sistemas Normativos*, Editorial Astrea, Buenos Aires, 2012, pp. 150-151; von Wright, G., *Norma y Acción*, Tecnos, Madrid, 1970, pp. 5-9.

6 We will follow closely the thesis expressed in Guastini, R., *Interpretar y argumentar*, CEPC, Madrid, 2014 [Croatian transl.: *Tumačenje i argumentacija*, Naklada Breza, Zagreb, 2023].

7 Guastini, R., *A Realistic View on Law and Legal Cognition*, Revus, no. 27, 2015, pp. 45-47.

Let us assume that an interpreter is faced with a normative problem.[8] This normative problem requires, to be solved, that the interpreter considers one or several normative texts to be interpreted. To these texts, interpreters attribute a first (and provisional) meaning, one that usually results from an understanding of text semantics. We will call this "*prima facie* meaning". After that, the interpreters will usually carry out a subsequent reflection, based on which they decide to attribute a meaning *all things considered*.

A *prima facie* meaning accounts for our first understandings of normative provisions. These meanings are typically associated with either a literal interpretation, or with the prevailing interpretation within the legal community that the interpreter belongs to (it may also be the case that the consolidated opinion among members of the legal community is to interpret the text according to the literal meaning of the words). Following this initial interpretation, interpreters can carry out a second interpretation in order to determine which of the possible meanings will be attributed to the provision. This process involves using other interpretative methods and/or prevailing doctrines to identify possible alternative meanings to be attributed to the text (for example, argument of *ratio legis* or the intention of the legislator).

The interpretative activity, in this sense, refers to the act of justifying the decisions made by the interpreter on whether they will decide to attribute the *prima facie* meaning to the provision, considering all relevant aspects. The interpreter may choose to confirm, amplify, reduce, or disregard the *prima facie* meaning altogether and choose a completely different meaning. In this last case, in which the interpreter chooses not to apply the *prima facie* meaning to replace it with another one, the interpreter engages in the process of reinterpretation.

To summarize, we understand "reinterpretation" to encompass the complex activity composed of: (i) reinterpreting a normative provision (step that takes place following the identification of the *prima facie* meaning); and (ii) attributing to the provision an alternative meaning (totally or partially) different from the *prima facie* meaning.[9]

[8] A normative problem is a question about the legal status of an action or a set of actions. It is a request to determine if an action, according to the legal system, is mandatory, prohibited, permitted or optional.

[9] Chiassoni, P., *Técnicas de interpretación jurídica. Breviario para juristas*, Marcial Pons, Madrid, 2011, p. 151.

2.2. Restrictive interpretation

Considering what has been discussed up to the previous point, it is worth specifying what "restrictive interpretation" refers. The term "restrictive" refers to a comparative relational notion.[10] It refers to a property that is present in at least two objects and, after a comparison between them we can conclude that the property is present in one of them, and is present to a lesser degree or only partially in the other one. A restrictive interpretation, in this way, allows us to present types of interpretive processes and results.[11] This requires further clarification.

Let us assume that one of the norms in comparison within the interpretive process is a norm that we have identified using a non-contextual literal interpretation of a provision, this is, a *prima facie* meaning.[12] In this case, we can differentiate, at least, two possible ways of carrying out a restrictive interpretation[13]: formalistic and semantic.

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10 Guastini, R., *Distinguiendo*, Barcelona, Gedisa, 1999, pp. 217ss.

11 In the discourse of jurists, we can differentiate two versions of the thesis that an exception must be interpreted restrictively: a strong one and a weak one. Those who adopt the strong version assume that the restrictive interpretation must be given in all cases that we are faced with an exception (that is, they order a categorical application). On the other hand, those who adopt the weak version assume that the restrictive interpretation must occur in all cases that we are faced with an exception and that do not present a certain condition (that is, they order a hypothetical application). This weak version, for example, is supported by Larenz who considers that the exceptions are interpreted in a restrictive manner, unless the result disproportionately contradicts the purposes of the legislator. Larenz, K., *Metodología de la ciencia del derecho*, Ariel, Barcelona (Spain), 1980, pp. 351-353. Similarly, Engisch, K., *Introduçao ao pensamento jurídico,* Fundação Calouste Gulbenkian, Lisboa, 2001, pp. 296-297. In this article we will analyze only the consequences of assuming a strong version of the thesis.

12 Chiassoni, P., *Significato letterale: giuristi e linguisti a confronto* (Another view of the Cathedral), in: Velluzzi, V. (ed.), *Significato letterale e interpretazione del diritto*, Giappichelli, Rome, 2000, pp. 1-64. Ratti, G. B., *An analysis of some juristic techniques for handling systematic defects in the law*, in: Bustamante, T.; Dahlman, C. (eds.), *Argument types and fallacies in legal argumentation*, Springer, Dordrecht, 2015, pp. 154-155.

13 A third form can be identified as a result of the dissociation argument. An interpreter initially identifies a meaning with a certain scope (p->Oq). In a second moment, using the dissociation argument, they distinguish the generic case foreseen in the antecedent in two subclasses (p1 and p2) in order to correlate the normative consequent only in one of those subclasses (we would have (p1.~p2-> Oq)). As we can see, in this scenario we have gone from a standard with a certain scope to another that has, in comparison, a smaller scope. See Guastini, R., *op. cit.* (fn. 6). Given that this meaning presents a case of judicial creation of law (a reinterpretation process),

A "formalistic restrictive interpretation" refers to the interpretative operation and outcome of evaluating a meaning against another with a greater scope and ultimately rejecting the latter. This takes place after comparing the product of a non-contextual literal interpretation against the product of an extensive interpretation produced, for example, by the using the teleological argument or the intention of the legislator. The interpreter then decides that the best way to identify the norm is to reject any extension of the scope of the antecedent of the norm. As we can see, this constitutes a case of confirmation of the *prima facie* meaning (the meaning *all things considered* is the same as the *prima facie* meaning).

A "semantic restrictive interpretation" refers to an interpretative operation and the subsequent outcome that allows the interpreter to solve a vagueness problem, by only using the clear cases. When we are faced with a problem of vagueness, we are unable to determine whether a certain object can be subsumed under a certain concept or not. There are two options to solve this problem: we can decide to include it within its scope, or we can decide to exclude it from its scope. A restrictive interpretation implies that we rejected the expansion and that the concept is only applicable to clear cases.[14]

As can we see, these two ways of understanding restrictive interpretations describe the creation and use of a preference criterion, *i.e.,* they refer to an interpretive directive that helps us to determine what is the interpretive result that the interpreter adopts or is willing to defend as correct.[15] This requires interpreters to carry out at least one of these two operations: (i) perform an interpretation of a legal text according to the non-contextual literal interpretation and reject any other extensive or analogical interpretations of the text; and/or (ii) only use clear cases and, in case of vagueness, reject the expansion of the concept.

In brief, a restrictive interpretation is understood, from a non-cognitivist approach, as a rejection to any possible reinterpretation of a legal text. What it expresses is a preference to shield the *prima facie* meaning from other alternative meanings. Let us now see how these concepts are related to the notion of exception and whether it is possible to identify a conceptual link between them.

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we do not include it in the analysis since it is not part of what is usually expressed with the aphorisms mentioned in fn. 1.

[14] Hart, H. L. A., *The concept of law*, Clarendom Press, Oxford, 1961, pp. 125-26.

[15] See Chiassoni, P., *Interpretation without truth. A realistic inquiry*, Springer, Dordrecht, 2019, pp. 60-72.

3. EXCEPTIONS

Exception is a relational notion in reference to a norm. When we talk about exceptions, we usually say that within the antecedent it is possible to identify an exception (that the norm does not regulate a certain case) or that one norm excepts another (two norms regulate a case, but one of them will be applied and the other will not, that is, it will be excepted).[16] This means that, to better understand what a norm is and what we do with them, it is important to understand what an exception is and what it means to except a norm.

[16] Some jurists tend to present this idea pointing out that "the exception proves the rule". This expression is unfortunate, as it suffers from ambiguity. Without claiming to be exhaustive, we believe that we can differentiate between two meanings. The first one operates as a way of indicating that, in the face of a non-excepted case, there is a rule. This is a descriptive speech that can be used to inform that a case is regulated according to a normative system, i.e., it formulates a proposition. This means: (i) affirming the relevance and applicability of a standard; and (ii) challenge the scope or applicability of the recognized (and justified) standard. This sense can be used, for example, to present that the relationship between two norms is governed by the *lex specialis* criterion and that the non-excepted case is regulated by a more general norm. This discourse is usually adopted, for example, by principalist authors who assume that, at the level of principles, the normative system is complete (so that there will always be a norm that regulates any action). The second meaning operates as a way of arguing for the creation of a rule for non-excepted cases. This implies: (i) identifying a regulatory gap; and (ii) filling the gap through an act of creating regulations. Let's look at an example to clarify the point. During the Roman Republic, the Senate was related to other towns through treaties. These documents used to include a clause that prohibited granting Roman citizenship to those who were part of these towns. Of all those, the treaty signed with Gades (in present-day Spain) did not include such a clause. It happened that Lucio Cornelio Balbo, a native of Gades, while he was building his political career in Rome, was questioned about granting him citizenship on the grounds that, for many, the aforementioned prohibition operated as a general rule. In this regard, Cicero argued that, on the contrary, these clauses operated as an exception to a general rule that allowed citizenship to be granted (see Holton, R., *The Exception Proves the Rule*, Journal of Political Philosophy *vol*. 18, no. 4, 2010, p. 370). In this case, as we can see, the possibility of the Gadeses being Romans was indeterminate (they were facing a legal gap: it was not expressly prohibited or allowed), which was filled using an *a contrario* constructive argument. As we can see, this expression can be used both to justify acts of creation of law (identification of norms) and to describe the content of a normative system (formulation of a proposition). If this is so, then it is an expression that serves us for its rhetorical force, but not necessarily to clarify our operations given its ambiguity.

Furthermore, the term exception is an emotionally charged concept.[17] This expression is generally associated with the fact that we must treat a subset of cases differently or that we are dealing with an extraordinary event. There are two different approaches that we can take to remove that emotional charge: (i) replace the word with another one that is not emotionally charged; or (ii) define it clearly and precisely to demystify preconceived ideas. In order to define what exceptions are we will take the second approach.

To clarify what legal theorists are saying when they refer to exceptions, we will categorize their discourses into two ways of understanding the concept.[18] On one hand, we can identify those who have a nominal approach. On the other hand, there are those who have a systematic approach.[19] We will discuss each approach in detail in the following sections.

3.1. Nominal approximation

Under this perspective, an exception is understood to be any text that the legislator has expressly designated as such. There are two versions of the nominal approximation, a strong one and a weak one.

Using the strong version of this approach, *exceptions* are all those texts that have been provided under the label "exceptions" in a law. In this sense, they are treated as exceptions to the rules (meanings) attributed to the provisions that the legislator himself explicitly classifies as such. This means that an exception is a nominal label that the legislator uses to classify a provision or set of provisions. This position is problematic because the conceptual link between "restriction of the scope of a rule" and "exception" would only be contingent. This

17 Carrió, G., *Notas sobre derecho y lenguaje*, Abeledo Perrot, Buenos Aires, 1986, p. 22.

18 It should be noted that it is possible to think of a third option: a procedural approach. According to this, an exception is a way of presenting all those properties contained in the antecedent of the norm on which the burden of proof and argumentation is attributed to the defendant. We will not deal with this approach in this article. See Sartor, G., *Defeasibility in legal reasoning,* in: Bankowski, Z. (ed.), *Informatics and the foundations of legal reasoning*, Springer, Dordrecht, 1995, pp. 119-158; Duarte D'Almeida, L., *Allowing for exceptions: A Theory of Defenses and Defeasibility in Law*, Oxford University Press, Oxford, 2015.

19 It should be noted that our proposal for distinction takes as a criterion of relevance the different conceptualizations of what an exception is. In the specialized literature it is possible to identify alternative proposals based on the effects of the implementation of a certain distinction in the antecedent of a norm. Greenawalt, K., *Exemptions: Necessary, Justified, or Misguided?,* Harvard University Press, Cambridge, Massachusetts, 2016, pp. 20-21.

position gives rise to cases of over or under inclusion that are counterintuitive.

Thus, and to illustrate a case of over inclusion, the legislator may create an "exceptions" section within a law, but it does not necessarily follow that within this section there are only provisions from which it is possible to identify rules that restrict the scope of another standard. If *exception* is understood simply as a form of classifying a section (and the linguistic statements it contains), then whether its content generates limitations to a rule would only be the product of good legislative technique, not a conceptual definition of a type of rule or a fragment of a rule. Additionally, this position would assume that in all those cases in which the legislator has not titled a section as "exceptions" or has not used the term "exception" to designate particular provision, no exceptions have been provided even if we can identify norms that restrict the scope of another norm. This is clearly incorrect. It is common for sections that are not titled *exceptions*, or reference them in any other way to contain provisions that can be classified as such. In short, this approach strips the notion of exception of its conceptual content and only seems to multiply our problems.

The weak version of this approach understands exceptions as fragments of rules that have the particularity of being identifiable from a type of text. That is, it states that exceptions exist every time the legislator employs linguistic expressions (semantic markers) usually used to formulate an adversative conjunction between two sentence elements. In this sense, the exceptions would be interpretations of words usually used to introduce a restriction in the antecedent of a norm.[20]

These semantic markers can take different forms. It is not possible to make an exhaustive list of them, much less analyze the criteria used by each legal system to identify them. Such a task falls outside of the scope of this article. For the sake of clarity, we will assume that, according to this approach, every time the legislator uses, for example, the expression "unless" in a provision, this could be understood as a way of presenting an exception. In this sense, if we had the provision "if civil association, unless its purpose is to promote the worship of a religion, then it is mandatory to pay income tax", we must interpret the "unless it is intended to promote the worship of a religion" as a fragment of norm that represents the exception since it establishes a particular case with respect to which the obligation to pay the tax is not generated.[21]

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[20] Stone, J., *Precedent and law*, Butterworths, Sydney, 1985, pp. 68-71; Bentham, J., *On law in general*, Athlone Press, London, 1970, p. 114; Raz, J., *The Concept of a Legal System. An Introduction to the Theory of Legal System*, Clarendon Press, London, 1980, pp. 56ss.

[21] If we represent "if civil association" as "p"; "civil association whose purpose is to

In more precise terms, according to this proposal, the positive properties provided in the antecedent of a norm are the requirements for a tax to be applicable to a class of subjects. Conversely, the negative properties (all those identified from semantic markers) would operate as exceptions, as their verification in an individual case leads it to fall outside the scope of the norm.[22] Although this theorization, unlike the previous one, has the appearance of being consistent with some dogmatic intuitions, when properly understood it generates more problems than solutions.

First, the use of a negative or positive property is just a way to describe a class of subjects or a class of events in the world. How the information is presented (as a positive or negative property) will depend on the references of the interpreter and what they deem appropriate to highlight in the text. In this regard, following Baker, the conditions to be included in the "unless" clause can be replaced by a positive condition allowing us to present an antecedent without exceptions.[23] In the previous example, to generate the obligation to pay taxes to non-religious civil associations, the antecedent can be replaced by "if secular civil associations" and we will have a norm without exceptions. In other words, the positive and negative conditions are alternative options to present the same information. Therefore, the use of negative properties is an interpretive choice, and can be seen as a strategic or rhetorical way of presenting the information.

The choice between presenting a rule with or without exceptions[24] (deliberately or out of necessity) is usually due to a lack of sufficiently precise linguistic tools (or a decision to ignore them) required to delimit the set of subjects or events that one intends to regulate. Following the example of Frederick Schauer[25], if we have rule 1 "if a person has sex, unless it is with their spouse,

promote the worship of a religion" as "r"; and "pay income tax" as Oq then it is being presented in the main text (p.¬r ->Oq). Within this, (¬r) is being qualified as an exception.

22 See Hohfeld, W. N., *Fundamental legal conceptions as applied in judicial reasoning*, The Yale Law Journal, *vol*. 23, no. 1, 1913, pp. 25-27. As we will see in a few moments in the main text, this distinction is not satisfactory.

23 Baker, G., *Defeasibility and Meaning*, in: Hacker, P. M. S.; Raz, J., (eds.), *Law, Morality and Society. Essays in Honour of H. L. A. Hart*, Clarendon Press, Oxford, 1977, p. 33.

24 At this point we are following, in part, Schauer, F., *On the Supposed Defeasibility of Legal Rules*, Current Legal Problems, *vol*. 51, no. 1, 1998, pp. 223-240; Finkelstein, C., *When the rule swallows the exception*, Penn Law: Legal Scholarship Repository, no. 19, 2000, pp. 147-175; and Schauer, F., *Rules, defeasibility, and the psychology of exceptions*, in: Bartels, L.; Paddeu, F. (eds.) *Exceptions in International Law*, Oxford University Press, Oxford, 2020, pp. 55-64.

25 Schauer, F., *Exceptions*, The University of Chicago Law Review, *vol*. 58, no. 3, 1991, p. 878.

then it is mandatory to punish them" (in formal terms (p.¬r-> Oq)) and rule 2 "if a person fornicates, then obligatory to sanction them" (in formal terms (f-> Oq)), both rules are equivalent. The use of a negative property as a tool is eliminated when we use more precise linguistic terms.[26] What does this tell us? That using a negative or positive property to identify the scope of an antecedent is an interchangeable choice.[27]

Secondly, this approach does not allow us to differentiate between (i) a requirement to apply a standard; and (ii) an exception. [28] The determining point to differentiate between positive and negative conditions in the antecedent and to point out that the negative ones are the exceptions, starts from the premise that they are different and differentiable components from the norms. Now, following Susskind[29], the notion of application requirement, in formal terms, can be presented in three ways: main application condition (the consequent follows after verifying a single property (p)); alternative condition of application (the consequent follows from the verification of two properties that occur together or at least one of these (pvq)); or as a conjunctive condition of application (the consequent follows from the verification of two properties jointly (p.q)). On the other hand, an exception would operate as a property that, verified jointly with a requirement, implies that the norm is not applicable (in formal terms (p.¬q)).

This shows that the notions of requirements that operate as conjunctive conditions and of exceptions account for the same thing: two properties contained in the antecedent related to each other with a conjunction that have the effect of delimiting the scope of a norm. This means that talking about exception as negative properties does not have any conceptual content that is different or distinguishable from the notion of application requirement, since both operate as specifications that determine the set of subjects regulated by a norm.

If the aforementioned is correct, then what jurists are doing when they talk about exceptions is to use said term with a rhetorical purpose given its emotional charge. What they are doing (those who use this approach) is labelling a type of specification in the antecedent as an exception to generate a certain perception in the interpreter and thus, influence how they should treat said

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26 *Ibid*., pp. 227-228.

27 Williams, G., *The logic of "exceptions"*, The Cambridge Law Journal, *vol*. 47, no. 2, 1988, p. 278.

28 Bentham, J., *op. cit.* (fn 20), p. 114; MacCormick, N., *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, Oxford University Press, Oxford, 2005, p. 246.

29 Susskind, R., *Expert Systems in Law. A jurisprudential inquiry*, Clarendon Press, Oxford, 1987, p. 133.

element. Indeed, it is not the same to present an antecedent as a "secular civil association" as to present it as a "civil association, unless it is religious". The use of one or the other option will depend on our rhetorical preferences in choosing to characterize a property as a positive or negative condition, but it is not a conceptual difference between them.[30]

Given these problems, we consider that the nominal approximation should be discarded. Both in its strong and weak versions, since they do not allow us to clearly define what an exception is.

3.2. Systematic approach

The limitations and problems of the nominal approximation allow us to present an alternative way of understanding exceptions that, we believe, is more useful. In the first place, to adequately identify exceptions, it is necessary to have a concept that allows us to differentiate them from a requirement for the application of a standard. In this regard, we suggest that this can be achieved by considering: (i) the justification for which each property of the antecedent was incorporated; and (ii) if said properties are part of the antecedent of another rule that prevents the emergence of an obligation. This can be demonstrated by analyzing the relationships between norms in one of two ways: (i) studying the antinomies between norms, or (ii) studying the conflicting relationship between a semantic literal interpretation with the purpose of the norm.

3.2.1. Resolution of antinomies

Suppose we have a case of antinomy between two rules that regulate the activity of a tax-collecting entity. We have a norm N1 that establishes "if civil association, then mandatory to apply tax"; and, in addition, in that same regulatory system, we have norm N2 that states "if a legal person with the corporate purpose of religious proselytism, then forbidden to apply tax". This

[30] This idea will be correct as long as we operate in a normative system that is complete because it incorporates a closure rule that eliminates any incompleteness problem (see Alchourrón, C.; Bulygin, E., *op. cit*. (fn 5), pp. 193-196. This would be the case, for example, of a tax system that regulates "if it is not obligatory to collect the tax, then it is prohibited to collect it." In cases where there is no closure rule, then the non-use of exceptions will generate normative gaps. In the case of "secular civil association" we will have a regulatory gap for non-secular civil associations. This shows us that the use of specifications can be useful to generate a good legislative technique. We are very grateful to one of the anonymous referees for his or her critics on this point.

generates an antinomy, since the tax administration charged with auditing in that country has, in the event of dealing with a civil association whose corporate purpose is to spread Catholicism, both the obligation to apply taxes and the prohibition to do so.[31]

In this type of scenario, to solve the antimony and determine what to do, the law-applier must reformulate one of the two conflicting norms by introducing a new property in the antecedent. In this way, they can either modify N1 to say: "if a civil association and that does not have religious proselytism as its corporate purpose, then it is mandatory to apply tax" (in formal terms p.¬r->Oq); or they can modify N2 in the following way: "if a legal person with a social purpose of religious proselytism, except for civil associations, then it is forbidden to apply tax" (in formal terms r.¬p->Phq).

Let us assume the hypothesis that the law-applier opted for the first option, that is, it modified N1. The incorporation of the property "civil association that does not have religious proselytism as its corporate purpose" (in formal terms (¬r)) is introduced in the antecedent of norm N1 to resolve an inconsistency within the normative system. This has the practical effect of introducing a distinction within the class of regulated subjects (civil associations), meaning it reduces the scope of the regulation. Consequently, the tax authority will no longer be able to demand the payment of the tax from civil associations whose corporate purpose is religious proselytism.[32]

We believe that this process allows us to identify exceptions: the new property incorporated in N1 operates as an exception to the tax obligation, since it reduces its scope due to its relationships with other norms within a normative system. Additionally, this property is provided for by another rule (N2) that prevents the emergence of a tax obligation.

In other words, according to this perspective, the exception is a notion that presents the result of having rearranged the norms (*i.e.,* the product of having created a material hierarchy among them), by which: (i) one of the norms has

[31] For purposes of formal demonstration, we will represent "civil association" as "p" and "legal person with a corporate purpose, religious proselytism" as "r". The case of a civil association whose corporate purpose is to spread Catholicism is a case of both p and r (p.r). This supposes that both N1 (p-> Oq) and N2 (r-> Phq) are applicable to it, which supposes that the applicator of the right must apply (pr->Oq.Phq).

[32] For clear cases of this approach see Mendonca, D., *Exceptions*, in Ferrer Beltrán, J.; Ratti, G. B. (eds.), *The logic of legal requirements, essays on defeasibility*, Oxford University Press, Oxford, 2012, pp. 202-208; Bulygin, E., *Essays in legal philosophy*, Oxford University Press, Oxford, 2015, pp. 220-234; Dolcetti, A., Ratti, G. B., *Derogation and defeasibility in international law*, in: Bartels, L.; Paddeu, F. (eds.), *Exceptions in International Law*, Oxford University Press, Oxford, 2020, pp. 108-124.

its scope reduced[33] by incorporating a new property, which means that a class of subjects is no longer regulated by the norm; and (ii) said property is part of the antecedent of another norm that prevents or prohibits the application of taxes.[34]

These considerations allow for a better understanding of the thesis adopted by the scholars that assume the nominal approximation in its weak version. As discussed above, to identify the tax exception, they use words typically used to formulate adversative conjunctions between sentence elements. In this regard, if we have norm N1 "if civil association, unless its purpose is to promote the worship of a religion, then it is mandatory to pay income tax", the "unless it is intended to promote the worship of a religion" operates as an exception.

However, in accordance to what has been stated, the exception does not depend on the legislator having written the text using a particular semantic marker. We propose, instead, that the best reconstruction of the process that leads to the identification of the exception involves the performance of three sequential operations: (i) verification that there is an N2 norm that prescribes "if a civil association with the purpose on promoting the cult of a religion, then it is optional not to pay taxes" in that same normative system; (ii) arrangement of N2 over N1 in such a way that, in all those cases of antinomy between both, N2 will be applied; and (iii) reduction of the scope of N1 so that it stops regulating the cases regulated by N2, for this purpose a new property or specification is introduced in the antecedent (in the example, the result of this step would be to incorporate "unless is intended to promote the worship of a religion").

If this is correct, then the nominal approximation in its weak version has the problem of being enthymematic because it leaves a series of theoretical premises unexplained in a complex operation. In contrast, the material-systematic proposal clarifies that the exceptions are a type of resolution of inconsistency problems within a tax regulatory system.

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33 Guastini, R., *op. cit.* (fn. 6), pp. 175-180.

34 Said arrangement occurs, among other possibilities, using a type of systematic interpretation understood as the prescription of interpreting provisions in such a way that they do not generate a conflict with previously identified norms. See, Velluzi, V., «*Interpretación sistemática»: ¿un concepto realmente útil? Consideraciones acerca del sistema jurídico como factor de interpretación*, Doxa, no. 21-I, 1998, pp. 77.

3.2.2. Conflicting relationship between prima facie *meaning and the purpose of the norm*

As previously discussed, norms are formulated to satisfy desired purposes or states of affairs. This allows us to analyze a second way of presenting the systematic model.

If we assume that each rule has a purpose, it follows that every time we make a literal non-contextual interpretation of a provision, we can obtain at least two results: (i) the scope of the rule according to the literal non-contextual interpretation method; and (ii) the scope that the norm should have according to the purpose (or end) for which it was introduced into the normative system. In a non-problematic scenario, both (i) and (ii) are coextensive (*i.e.,* they govern the same set of cases). However, problematic scenarios arise whenever this co-extensiveness does not occur. For clarity, we will use part of the theoretical language proposed by Schauer to present this point. This author calls this type of situation "recalcitrant experiences".[35]

Recalcitrant experiences can be of two types. On the one hand, the literal interpretation can regulate fewer cases than it should regulate according to the purpose of the norm, these are called "under-inclusive" experiences. In these cases, the literal interpretation has left out cases that, considering the purpose of the norm, should also be regulated to achieve the "state of affairs" desired by the legislator. These situations are not relevant to the study of exceptions, precisely because the problematic aspect of under-inclusiveness is the opposite situation.

On the other hand, the literal interpretation can regulate more cases than it should regulate according to the purpose of the norm, this is called "over-inclusive" experiences by the author. The problem, in these situations, is that the literal interpretation has included cases that, according to the purpose of the norm, should not be regulated by it to achieve the desired state of affairs. This means that not all the distinctions that should have been considered have been included in the interpretation. It is this type of problem that interests us.

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[35] Schauer, F., *Playing by the rules. A philosophical examination of rule-based decision-making in law and in life*, Clarendon Law Press, Oxford, 1993, p. 41. It should be noted that recalcitrant experiences account for a value judgment: it accuses that an interpretation is suboptimal considering its purpose.
Another way to reconstruct this process is through the dissociation argument. This has been proposed by Guastini, R., *Defettibilità, lacune assiologiche, e interpretazione*, Revus, *vol.* 14, 2010, pp. 57-72. For an analysis of the point see García Yzaguirre, V., *Antecedente de las normas y excepciones implícitas*, Diritto & Questioni Pubbliche, *vol.* XXI, no. 1, 2021, pp. 217-38.

The way to solve over-inclusive experiences[36] is by substituting the literal interpretation for another meaning that has a narrower scope (with more distinctions in the antecedent). In this regard, we believe that this operation and result allow us to better present what exceptions are and how to identify them. To do this, however, it is necessary to distinguish between two types of factors that can give rise to over-inclusive experiences: internal and external.[37]

Internal factors refer the non-co-extensiveness of the literal non-contextual meaning attributed to a provision to achieve the desired state of affairs in accordance with the purpose for which the provision was introduced. When the interpreter decides to resolve such cases, lawyers usually understand this point as the operation and result of presenting the content of the norm in a better way.[38] In more precise terms, the new specification incorporated in the antecedent will be justified in the standard itself, so there will be no substantive difference between the new property and the others contained in the antecedent (all are justified by the purpose of the standard). If this is correct, then the creation of distinctions by internal factors does not allow us to clarify the notion of exception, since we would fall into the same problems indicated previously: we would be presenting an application requirement with different labels to generate a rhetorical effect.

External factors, on the other hand, refer to the purposes of other rules that, regarding the case to be resolved, are jointly applicable. The over-inclusive experience occurs because satisfying the purpose of one norm entails failing or hindering the purpose of another norm. In other words, the scenario involves a purpose of an N1 norm that prevents the materialization of the purpose of an N2 norm. One way to solve this situation is by positioning the second purpose (N2) over the first (N1), which implies that the content of the N1 norm is modified. We will have to re-identify it in order to specify its own purpose along with specifying the purpose of N2, in order to exclude the class of subjects that, now, will only be regulated by N2.

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[36] It should be noted that an interpreter can decide whether to resolve this type of case. You could either decide to interpret according to the literal meaning by adopting, for example, a formalist ideology of interpretation, or you could decide to create the distinction by having, for example, an ideology linked to the duty to defer to the legislator.

[37] Schauer, F., *op. cit.* (fn. 24), p. 58.

[38] He is not trying to create a new regime for a certain set of regulated agents, what he is saying is that, well understood, the mandate dictated by the legislator must be applied in this way.

It should be noted that characterizing N2 as an external factor is ambiguous.[39] The N2 norm can be: a) a norm that is part of the normative system (hereinafter, systematic external factor); or b) a norm of another normative system, for example, a norm belonging to our axiological system (hereinafter, extra-systematic external factor).

In the first case, the interpreter would be solving a normative inconsistency within the normative system itself. In the second case, the interpreter would be solving a normative inconsistency between a legal norm and a non-legal norm, for example, a moral norm. In this case, what the interpreter does in solving the problem is an act of authoritative law-making whereby the interpreter uses their own judgments of fairness to identify a legal rule. In effect, the interpreter, in this case, is giving normative relevance to a distinction that is not justified within the normative system itself, but outside of it.

The analysis presented allows us to formulate a first conclusion: the best way to understand and identify an exception is from a systematic approach. By considering the justification of each property contained in the antecedent of a norm, we can make some distinctions. First, if new properties incorporated are justified by the purpose of the prescriptive norm, then it is not possible to differentiate this new element from the rest of the properties contained in the antecedent. In response to this, we believe, new delimitations will be incorporated into the standard that operate as application requirements. Second, if new properties are incorporated that are not justified by the purpose of the prescriptive norm, then it is possible to differentiate said element from the rest of the properties contained in the antecedent.[40]

It is pertinent to make a precision at this point: if the justification is due to systematic external factors, we are facing exceptions in a normative sense. This is because they are incorporations that continue to be justified in an adequate understanding of the legal system as a whole. On the other hand, if the justification is due to extra-systematic external factors, we are facing exceptions in an axiological sense. This is because they are incorporations that are justified in the competence of the interpreter to carry out acts of normative creation in the application of the law.

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[39] This point has been highlighted in Rodríguez, J., *Defeasibility and burden of proof*, Materiali per una storia della cultura giuridica, *vol*. XLVII, no. 1, 2017, p. 249.

[40] See Ródenas, A., *Los intersticios del derecho. Indeterminación, validez y positivismo jurídico,* Marcial Pons, Madrid, 2012, p. 39.

4. EXCEPTIONS AND RESTRICTIVE INTERPRETATION

In the previous pages we have discussed how non-cognitivist theorist in interpretation usually understands restrictive interpretation and analyzed two ways of conceptualizing the notion of exception. In this section we will analyze the relationship between these possibilities and whether there is a conceptual relationship between them, or one built by normative interpretive premises.

For clarity, we will briefly review some conceptual precisions. As previously discussed, by restrictive interpretation lawyers may be expressing one of two ideas (or even both). On the one hand, they may express a semantic restrictive interpretation, which is activated in cases in which an interpreter cannot (due to linguistic indeterminacy) classify a certain set of people, actions or objects as exemplifying or not exemplifying an exception. In these cases, it is stated that in all doubtful cases the interpreter must exclude the case and only apply the rule to linguistically determined cases.

On the other hand, they may express a formalist restrictive interpretation which is activated every time we have to determine the content of the exceptions. What lawyers are suggesting in this version is that whenever we identify an exception, we must use a literal non-contextual interpretation along with rejecting any extensive or analogical interpretation to determine the scope of the norm.

We propose that the relationship between restrictive interpretation and exceptions, as they are understood by the nominal approach, can be characterized in two ways: a strong version and a weak version.

The strong version supposes considering that the exceptions are texts, which, as we have seen, voids the notion of exceptions of any conceptual content. Therefore, we consider that the best way to understand its link with restrictive interpretation is under one of these two possibilities: (i) that the legislator has prescribed that what they dictate under the exception label must be interpreted in that manner; or (ii) it is a way of indicating that this is the best way to identify norms from this type of provision.

The first point states that within the legal material it is possible to identify mandates on how the interpretation of normative texts should be performed. Thus, in this way, the legislator regulates that the law-appliers must use the restrictive semantic and/or formalist interpretation. The problem is that this discourse would be correct only contingently, since it would have to be expressly regulated (that is, in the case of a restrictive interpretation, it would have to be an interpretative rule expressly regulated in the normative system).

Regarding the second point, this statement would be a prescriptive discourse. As discussed earlier, this would be a meta interpretation criterion formulated from an ideology. But the legislative technique of using "exception" in a provision would not necessarily follow this meta criterion. This would be an evaluative decision, which should be justified.

The weak version supposes considering that the exceptions are fragments of norms contained in the antecedent that can be identified from a particular use of words in the provision created by the tax legislator. This, linked to the restrictive interpretation, implies that every time the interpreter decides to identify rules using certain semantic markers ("unless", to give an example), the conceptual content of that fragment must be interpreted restrictively.

On this point we can show two ideological decisions by the interpreter. The first one is the decision to present the content of the antecedent using positive and negative properties to identify a class of subjects and/or state of affairs that is part of the antecedent of the norm. This decision involves choosing not to use only positive properties or use of more precise concepts. As we have seen, there is not a relation of conceptual necessity between a semantic marker in a disposition and using a negative property as an attributed meaning, instead, it is a volitional choice of the interpreter. The second decision the interpreter will be able to make: (i) to use the formalist restrictive interpretation or not, but it is not possible to indicate that there is a conceptual connection between this interpretation and a semantic marker; and (ii) that, in the event of vagueness or the possibility of extensive interpretations about the content of that property described in a negative way, expanding its scope will always be rejected. But between the identification of the problem and the solution criteria there is no conceptual connection, rather there is a preference for considering that this is the correct solution.

The link between restrictive interpretation and exceptions, as they are understood by the systematic approach can be characterized in the following way. This approach leads us to understand exceptions as all the properties contained in the antecedent that have been incorporated to reduce the scope of a norm and that, along with it, are provided in another norm.[41] If this is so, then it is worth asking what jurists are saying when they maintain that exceptions must be interpreted restrictively.

On the one hand, in relation to the restrictive semantic interpretation, as

[41] Expressed alternatively: the criterion for classifying a norm fragment as an exception is not a formal or linguistic feature, but a substantive (the justification for its inclusion in the antecedent) and systematic (another norm of the normative system correlates said property with a different normative qualification) one.

in the nominal approach, it does not follow as a conceptual thesis that every time we identify a case of vagueness, we must necessarily resolve it by excluding the individual case from the scope of the norm. This will be a decision subject to evaluations made by the interpreter themselves, that is, to their ideological considerations.

On the other hand, in relation to the formalist restrictive interpretation, it is useful for the sake of clarity to return to an example presented earlier in the text.[42] We have an N1 norm that establishes "if a civil association, then it is mandatory to collect taxes from it." In addition, in that same regulatory system, we have a norm N2 that states "if a legal entity with the corporate purpose of religious proselytism, then it is prohibited to collect taxes from it". We have determined that it is possible to introduce a limitation to the N1 antecedent (an exception) to obtain the following N1" norm: "if a civil association that does not have religious proselytism as its corporate purpose, then it is mandatory to collect taxes from it". As we can see, "civil association with the corporate purpose of religious proselytism" is the exception, since: (i) it reduces the scope of N1; and (ii) it is part of N2, which prohibits collecting taxes from religious entities.

Now we can present the problem more precisely: is there a conceptual relationship between solving an antinomy or an over-inclusive experience with using a literal non-contextual interpretation? Do they necessarily follow from each other? It seems that the answer to both questions is negative. The identification of an exception occurs due to having decided to prefer one rule over the other or to prefer one purpose over the other. This only means that the interpreter considered that there is a class of subjects, actions or objects that required a different treatment to the one provided by a tax regulation for justified reasons.

Deciding that such a result should, additionally, be interpreted using a literal non-contextual interpretation alongside the rejection of extensive interpretations is a value judgement. There are normative reasons that indicate that such a decision should be that way. What these normative reasons are is not usually made explicit by the jurisprudence, but the point we intend to highlight is that these reasons are ideological and not conceptual justifications.

[42] For the sake of brevity, we will only review the example of logical antinomies.

5. CONCLUSIONS

In the first place, we have disambiguated the various meanings of "restrictive interpretation" from a non-cognitivist approach to legal interpretation. As we have seen the expression is used to refer to an interpretative meta-criterion that: (i) solves problems of vagueness; and/or (ii) prescribes a literal non-contextual interpretation alongside the refusal to interpret extensively or analogically as an interpretive method to identify norms.

Secondly, we have analyzed two approaches to what is an exception. In this regard, we have argued that the best way to understand them is as properties contained in the antecedent of a norm that: (i) are not justified by the purpose of the norm itself; and (ii) they form part of the antecedent of another standard. In this sense, they are products of having resolved an antinomy or a recalcitrant over-inclusive experience.

Thirdly, we have demonstrated that between identifying an exception and an interpretative meta-criterion there is not a conceptual link but an ideological one. Indeed, the restrictive interpretation is one option, among many, regarding how to treat exceptions. This means that whoever wants to adopt such an interpretation must provide the normative reasons for doing so in order to offer a satisfactory justification of said decision.

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Sažetak

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SUŽENO TUMAČENJE IZNIMAKA – UTVRĐIVANJE I LOV NA IDEOLOGIJE

Cilj je ovoga rada dokazati da pravnici koji se zauzimaju za suženo (restriktivno) tumačenje iznimaka, u pravnim pravilima i od pravnih pravila, to često čine na temelju određene ideologije (ili doktrine) tumačenja. Radi postizanja navedene svrhe, u radu ćemo provesti metateorijsku analizu pravnoteorijskih shvaćanja pojmova suženog tumačenja i iznimke. Konačno, smisao je analize pokazati, promatrajući problem na ovaj način, da ne postoji pojmovna veza između dvaju pojmova (suženo tumačenje i iznimka).

Ključne riječi: iznimke, suženo tumačenje, pravila, sukobi pravila, ideologija tumačenja

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