Are *in concreto* Antinomies Predictable?

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- DRAFT VERSION –

(please ask before quoting)

Abstract

The paper investigates whether cases of *in concreto* antinomies (or indirect antinomies or normative conflicts due to facts) can be foreseen or not. I distinguish to main theoretical positions: "pro detection" argues that we can predict *in concreto* antinomies. "Unpredictability" argues that they cannot be predicted before they occur.

I exemplify the two positions relying on a disagreement which is found in the literature then, after reviewing such a disagreement, I provide arguments against "pro detection" highlighting how it rests on an untenable definition of predictability. I further point out how, in the debate, we are biased in favour of predictability because our case studies are almost toy examples: it is easy for us to say "there is a potential conflict in case circumstance XYZ happens".

Keywords

In concreto antinomies, normative conflicts, conflicts of rights

1. The General Question: Are *in concreto* Antinomies Predictable?

Legal systems care about rationality and coherence. Antinomies are a problem for both. Hence, legal systems take due care in (i) avoiding antinomies and (ii) solving them should they occur. One of the best way to avoid antinomies is to be able to predict and detect them.

We have various sorts of antinomies. Here I shall focus on the so-called *in concreto* antinomies because the issue of their predictability is a debated one. *In concreto* antinomies are antinomies that cannot be detected if we rely on the two most held definitions of antinomy: (i) the consequence-based one and (ii) the modality-based one. According to the consequence-based approach you have an antinomy when incompatible legal consequences are triggered, according to the modality-based approach antinomies are cashed out relying on pairing of incompatible modalities (such as prohibition and permission or others we can develop in deontic logic).[1]

This is so because of peculiar features of *in concreto* antinomies: (i) the conflicting norms range over *unrelated properties* – at least conceptually; (ii) *factual considerations* are relevant for judging the incompatibility of these unrelated properties. The latter point explains why the two definitions of antinomy fail with these *in concreto* cases.

Roughly the debate opposes two positions that we can label "pro-detection" and "unpredictability".[2] According to "pro-detection" *in concreto* cases are not special and do not differ from "classic" antinomies as far as their predictability is concerned: they can be easily detected "on paper" or before they actually occur. On the other hand, for "unpredictability" the *in concreto* cases are not something we can easily predict, we recognize them only *after* they occurred.[3]

In this paper I side with "unpredictability". The main argument against "pro-detection" relies on an analysis of their notion of "predictability" that I consider too weak and all-encompassing. Briefly, the idea of predictability will coincide with that of conflict of norms.

I shall approach the issue starting from disagreement between Pierluigi Chiassoni and Riccardo Guastini on the predictability of *in concreto* antinomies: Chiassoni is "pro-detection", Guastini favours "unpredictability". Such a disagreement is interesting because the two authors belong to the same philosophical tradition and share most definitions and assumptions, nonetheless they disagree.

I shall disentangle Chiassoni and Guastini's disagreement relying on (Martinez Zorrilla 2011b)'s classification of normative conflicts. To anticipate: Chiassoni identifies *in concreto* antinomies as Zorrilla's *contextual antinomies* while Guastini as *conflicts of instantiation*. Zorrilla explains that the

[1] The legal consequence-based approach was probably established by (Ross 1958). Such an approach is popular among legal theorists (Chiassoni 2007; Guastini 2011a, 2011b, Martinez Zorrilla 2007, 2011b, 2011a). The modality-based approach is found in (von Wright 1963) and is well-spread in deontic logics. Nonetheless, the idea of divorcing the two approaches along the lines of legal scholars *vs*. logicians is desperate. Ross himself uses the modality-based approach to sort out norms of competence in (Ross 1958, 1968). Kelsen reasons also in terms of modalities (*Sollen*) and not only legal consequences.

[2] I shall use 'predictability', 'foreseeability' and 'detection (in advance)' as conceptually equivalent. 'Detection' might be confused with 'identification'. Here we are dealing with an in advance detection and not with an *ex-post* detection.

[3] On the pro-detection side we have at least (Martinez Zorrilla 2011b; Chiassoni 2007; Pino 2010, 170; Martinez Zorrilla 2007). "Unpredictability" is stated at least by (Guastini 2011a, 2011b; Zucca 2008). According to (Martinez Zorrilla 2011b) "unpredictability" is the standard view, at least as far as conflicts of fundamental rights is concerned, and he attributes some commitment to the thesis also to Alexy and those following his theory of balancing.

first – contextual antinomies – are *in abstracto* and predictable cases while the latter – conflicts of instantiation – are conflicts genuinely due to empirical circumstances, thus not predictable.

It is important to remark that the issue of normative conflicts is not merely a theoretical one but it has important practical consequences. International lawyers are interested in conflicts and so are constitutional lawyers and discrimination theorists.[4]

The plan is the following. First, we review what *in concreto* antinomies are and focus on two of the most discussed examples: the cases of the traffic light in the military zone by Alchourrón and Guastini's hypothetical on unemployed citizens as tax payers (§ 2). We then show Guastini and Chiassoni's approach to these cases (§ 3) and use Martinez Zorrilla three-folded partition of normative conflict to explain their disagreement (§ 4).

Unfortunately, while helpful to clarify the disagreement between Chiassoni and Guastini, Martinez Zorrilla approach to *in concreto* antinomies is unsatisfactory. A careful review and critique of his approach is found in § 5 which defends unpredictability.

2. *In concreto* Antinomies: What they Are

Here we shall concentrate on two case studies of *in concreto* antinomies: the example of Alchourrón of traffic lights in the military zone and the toy example of Guastini of unemployed citizens as tax payers. These two case studies are motivated by the fact that they are among the most discussed.[5]

Before presenting them and see in which way they are *in concreto* antinomy a word of advice. Here we are interested in the foreseeability of these cases. The examples we have are obviously *already* a case of conflict. For us it is fairly easy to say "come on, it is clear that norms N1 and N2 do conflict in circumstance XYZ!". We are biased when looking at these examples. We have to keep this in mind when evaluating the issue. We are talking about the foreseeability of *the cases that will be there, not those we have already*. The target should be the next indirect conflict between EU law and a private law in Belgium, not these prototypical cases. With that in mind, let us examine the example in turns.

2.1. Alchourrón's Case of a Traffic Light in a Military Zone

[4] The UN 2006 summit dedicated to the fragmentation of international law is almost entirely dedicated to conflicts. See the report by (Koskenniemi 2006) and, on its influence, see (Murphy 2013). On the relevance of a definition of 'normative conflict' and its practical consequences see (Vranes 2006). On conflicts in constitutional law and on the case of conflicts between fundamental rights see (Zucca 2008). Theories of discriminations - e.g. in cases of gender parity – actually try to predict cases of intentional *in concreto* conflicts that will turn a norm intended to favour gender equality to actually end up prioritizing one gender over another. I thank Francesca Poggi for this latter point.

[5] We could have added more: the most notable one would be that on Jephthah's promise and the case of Orestes, but for the purposes of the paper the two examples will be enough. On such case called respectively 'predicament' and 'paranomia', see (von Wright 1968) and (Conte 1976). Also (Williams 1973) in moral philosophy talks about conflicts *via* the facts (his example is that of Orestes. On these see (Santurri 1987) and [REDUCTED]).

The first case we have to consider is that of the traffic light in a military zone and dates back to (Alchourrón 1981, 133).[6] It and goes as follows:

N1: "you ought to stop at red traffic lights";

N2: "you ought not to stop inside a military zone".

Assume that "ought to stop" and "ought not to stop" are at least incompatible if not contradictory. Now, in the case of having a traffic light in the military zone, when the traffic lights turn to red two incompatible legal consequences will be triggered namely to stop and not to stop.[7]

2.2. Guastini's Case of Unemployed Citizens as Tax Payers

The next example is due to (Guastini 2011a, 107). The example goes as follows:

N1: "Citizens ought to pay the taxes";

N2: "Those who are unemployed ought to pay no taxes".[8]

According to Guastini, N1 and N2 range over different legal circumstances: 'citizens' (N1) and 'unemployed persons' (N2). These two legal circumstances are conceptually independent, says Guastini. Arguably they are created using two different constitutive rules and they also have different sorts of sources.

Nonetheless, Guastini proceeds, we cannot rule out the chance of having citizens that are unemployed. In that case we are going to have a situation that triggers incompatible legal consequences (if we admit that there is at least something incompatible if not contradictory between 'out to pay the taxes' and 'ought to pay no taxes').

2.3. Comments on the Two Cases

Arguably, there is a difference between the sort of contingencies (or accidents or how you prefer to call them). In order to carry out this bit of reflection we have to agree that the two different normative scenarios are *given*. Of course, there are contingencies due to either a certain law giver plus factual circumstances (as in the case of the traffic light) or to a certain theorist that proposed the example.

The two examples nonetheless differ because of the sorts of contingencies involved. In Guastini's example there is probably no one who chooses unemployment voluntarily (unless we add more rules and assume people strategize on that). In the case of the traffic light there is, I think, the need to some sort of choice by someone that decides to add the traffic light in the military zone or declares a military zone in a place with crossroads and traffic lights.

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[6] I thank JJ Moreso for gifting me the paper. Guastini actually credits the example to (Rodríguez 2002, 93). (Martinez Zorrilla 2011b) points to the right source.

[7] Here we are using this only as an example. Nothing hinges on its linguistic formulation such as whether we distinguish two different words for stopping the car (*sostare* and *fermarsi* in Italian) or in the formulation of the norms (there's room to argue that both can be expressed with a more explicit conditional or temporal operator, i.e. 'when').

[8] The Italian says N1: "I cittadini devono pagare le imposte"; N2: "Nessuna imposta è dovuta dai disoccupati". The formulation has a noun 'cittadini' and a substantivized adjective 'disoccupati'.

3. Chiassoni and Guastini: for and against the Foreseeability of *in concreto* Antinomies

Now that we have the cases, let us add the theory of our two authors and try to see why the two authors disagree.

The shared premise is the following: both authors rely on the conception of antinomy of Ross (1958) according to which antinomy is defined as an incompatibility between legal consequences. The two authors agree on this general point – they are not using a modality-based approach (the one of deontic logic) nor an Hohfeldian account.[9]

This difference in the approaches comes up as soon as (Chiassoni 2007, 263) defines *in concreto* cases.

> "Implicit bilateral antinomies are indirect (or in concerto or accidental) antinomies. Given two norms that connects incompatible [*legal*] consequences to different types of circumstances that are characterized by conceptually irrelated and not mutually exclusive properties, one can individuate the class of the cases in which the norms are in conflict. In order to do that, one has to use the technique of the combined disposition [*combinato disposto*]: i.e. starting from two norms we obtain a third complex norm whose antecedent is the conjunction of the antecedents of the two simple norms and whose consequence is the conjunction of the legal consequences of the two simple norms [added]".[10]

There is quite a lot to unpack in this definition. First, let's give a scheme for the *combined disposition*: from N1 (S1, C1), i.e. a certain norm that qualifies situation S1 as having certain consequences C1 and N2 (S2, C2) we obtain N3 (S1 and S2, C1 and C2).

For Chiassoni we have abstract classes to which we can easily apply some diagrammatic representation - this can be seen as a Rossian development of his famous taxonomy of antinomies. Once we have this representation, it is all a matter of logic and calculations. Overlaps between sets representing the areas of application of the norms will turn out to be the *in concreto* cases, if the legal consequences attached to these norms are incompatible.

This representation is committed to at least the following features:

1) It presupposes that classes (types of circumstances, conditions of applications) triggering norms consequences are transparent;

[9] Chiassoni is probably adopting something more than the Rossian idea but rather the extremization of that idea as developed by Alchourrón and Bulygin in their *Normative Systems* (1971). As we shall see addressing critically Martinez Zorrilla's position (§ 5), this latter approach ends up forcing some sort of Leibnizianism as far as the foreseeability of the cases is concerned. The Universe of cases exhaust all the available options, detecting antinomies is just a matter of *calculemus*.

[10] My translation of (Chiassoni 2007: 267).

2) Such a transparency is achieved at a logical or conceptual level (conceptually irrelated types of circumstances, combined disposition);[11]
3) Even granting this transparency, for a law-giver to rely on these considerations we have to grant him something close to epistemic omniscience;
4) Factual-based considerations are not used to determine whether the classes conflict or not. In particular: (i) there is no mentioning or considerations for the norm-subjects (as in the joint-incompatibility test);[12] (ii) there is no considerations on whether the domains are empty or not.

All these conditions are demanding, and they turn out even more demanding if you move from a philosophical field into a practical one.[13] There is quite a lot to contest to all these points. One of the biggest problems is that of implementing transparency and granting the lawmaker access to such a transparency. The main issue is going to be epistemic. These are not knock-down arguments, but they still need to be taken into account in developing a full-blown theory of *in concreto* cases. The considerations pertaining 4) are the more pertinent for the present paper and will be developed later while evaluating Martinez Zorrilla's proposal (§§ 4-5).

Let's now move to Guastini. Here is his definition of *in concreto* antinomy:

> "we have an "in concreto" – or "accidental" – antinomy if, in the application phase of the two norms, we realize that those norms, while not conflicting in abstracto, nonetheless connect incompatible legal consequences to the same *concrete* legal circumstance. This happens every time a legal circumstance (or a subclass of legal circumstances) is simultaneously subsumed under two classes of legal circumstances that are *conceptually independent*. The law attaches incompatible legal consequences to these conceptually independent legal circumstances. It then follows that the antinomy can be detected only when we are applying the norms to a concrete case (to which, in fact, both norms are applicable by chance)".[14]

If we compare this definition with the previous one by Chiassoni the following facts will stikes us immediately. First, the mechanics of the case are the same: conceptually independent types of circumstances that attach incompatible legal consequences. Then the things change. In fact, for Guastini the Rossian machinery does not help in such cases. Probably despite talking about 'classes' Guastini is not committed to some Universe of cases as a (Platonic) type that is then instantiated as a token by the *in concreto* case.[15]

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[11] One of the features that helps having a conceptual/logical level that can do the job of having transparent classes is the assuming a nice and clear analytic/synthetic distinction which has nonetheless be heavily criticized in philosophy, see at least (Kripke 1980; Quine 1951).

[12] On the topic see at least (Hart 1983; Hamner Hill 1987).

[13] Remember that this discussion (as that of Ross as well as Guastini) is found in a book on interpretation.

[14] My translation of (Guastini 2011a, 107). The same definition occurs more or less *verbatim* in (Guastini 2011b, 293).

[15] Neither Guastini nor Chiassoni develop a theory about classes and connect it to a commitment to class as abstract objects or some nominalism about mathematical entities (classes of legal cases are likely to be mathematical entities, as far as ontology is concerned).

4. Explaining a Disagreement

Summing up, Chiassoni sides with "pro detection" and Guastini with "unpredictability".

In order to explain this disagreement between "pro detection" (Chiassoni) and "unpredictability" (Guastini), it is useful to consider Martinez Zorrilla's ideas on normative conflicts. Instead of having a two-faced classification of *in concreto* and *in abstracto* antinomies (such as Chiassoni and Guastini, for example), Martinez Zorrilla proposes a three-fold conception of normative conflicts.

Martinez Zorrilla distinguishes deontic contradictions (i.e. standard antinomy), conflicts of instantiation (truly empirically based conflicts) and contextual antinomies (i.e. cases such as our *in concreto* examples of the traffic light in a military zone and the case of unemployed citizens paying taxes that, for Martinez Zorrilla, are nonetheless conflicts *in abstracto*).[16]

Here is a how Martinez Zorrilla sums up the characteristics of these different kinds of conflict (numbers added):

> 1) "in "classic" antinomies, at least two different norms regulate the same generic action with different and incompatible deontic categories (for instance, while one norm obliges the agent to do the action '*p*', the other one prohibits the agent to do '*p*' under the same circumstances), so there's a logical inconsistency in the legal system.
> 2) In conflicts caused by strictly empirical circumstances, one (so there's no inconsistency) or more norms exist, which are not inconsistent and are jointly applicable in the circumstances, but the agent cannot satisfy all her obligations (prohibitions, etc.) due to some empirical limitations. For instance, perhaps the agent has acquired two items and can either pay the price of one or the other item to the seller, but cannot pay both. There's no logical inconsistency at all because both obligations are compatible; the problem is that she simply lacks the means to satisfy both of them.
> 3) But in conflicts of fundamental legal rights of this kind, things are different: the two norms involved are not logically inconsistent, but compatible (they regulate different and independent generic actions). There's an individual action that is subsumable in both genic actions, so the conflict arises necessarily, for logical reasons. Thus, they constitute a different category of normative conflict in their own right (although also conceivable as conflicts *in abstracto*)". (Martinez Zorrilla 2011b, 738–39)

It is useful to see which of the three kinds of conflict Chiassoni and Guastini have in mind when they describe their *in concreto* cases. It seems to me that Guastini conceptualizes *in concreto* antinomies as of the second type ('conflicts caused by strictly empirical circumstances' in the passage above) while Chiassoni conceptualize them as contextual antinomies ('conflicts of fundamental legal rights' in the passage above). That explains why the two authors disagree on the predictability on *in concreto* antinomies: for Martinez Zorrilla the second type of conflicts are unpredictable while contextual antinomies can be detected.

As we already know, Martinez Zorrilla is a "pro-detection" theorist. What is still left to be seen, understood and criticized is why Martinez Zorrilla sorts out the traffic light case as a contextual

[16] Martinez Zorrilla is one of the contemporary authors who argued for the need to add more kinds of conflicts than some distinctions on antinomy. Forerunners of that were (Munzer 1973), (Conte 1976), (von Wright 1968) and (Hamner Hill 1987). See [REDUCTED] for a reconstruction of this.

antinomy (and what he has in mind as a conflict of instantiation). Let's explore each of these issues separately. These issues will serve to start setting up the case to present my disagreement with Martinez Zorrilla.

4.1. The Traffic Light Case as a Contextual Antinomy

Commenting on the traffic light case, (Martinez Zorrilla 2011b, 734) reasons as follows:

> "one relevant point here is that these situations of conflict can be detected or foreseen *in abstracto*, as they don't depend on the empirical circumstances of the *individual* case. In contrast, they are related to *generic* cases, so a conflict will necessarily arise whenever there's an individual case subsumable in the generic case. That's why these conflicts can be categorized as *in abstracto*: they can be detected even if, as a matter of fact, there are no individual cases subsumable in the generic one and the conflict never actually arises. It could be the case, for instance, that there were no traffic lights in military zone. Nevertheless, it would still be true that whenever a driver found a red traffic light in a military zone, a conflict would arise".

The reasoning is peculiar. Martinez Zorrilla recognizes that the case is *in concreto*. In fact, we need an individual that is able to be subsumed under both circumstances. Nonetheless, he manages to sort it out as *in abstracto* because the case does not depend on the empirical circumstances of the *individual case* but (on the empirical circumstances) of the generic case. Martinez Zorrilla, in fact, is clear in recognizing the source of the conflict in the following empirical circumstance: "whenever a driver found a red light in a military zone". That is the situation we have to subsume the individual under two circumstances that will turn out to have incompatible outcomes.

Still, this is a weak intuition-based objection. We agree that empirical circumstances are the characteristic feature of the case at hand. We then have two options to sort out our case into a categorization: (a) *in abstracto*, which removes most of the links with empirical circumstances; (b) *in concreto*, which actually keeps it. Martinez Zorrilla opts for (a), probably because he reads *in concreto* as *individual*. Still, the two need not be conflated.

4.2. Conflicts of Instantiation

Martinez Zorrilla proposes the following norms-pair as a case of conflict of instantiation:

N1: "you ought to pay taxes";

N2: "you ought to pay for the price of goods or services that one gets".

Such cases for Martinez Zorrilla are those that truly depend on empirical circumstances and cannot be predicted, they are the "true" *in concreto* cases, if you want. As we have already seen, Guastini conceives *in concreto* antinomies along these lines.

The comment of Martinez Zorrilla about his example of conflicts of instantiation is the following:

> "The norms are consistent because the deontic character is the same one (obligation), and the content (actions deontically qualified) of both norms is logically independent (paying the

> income tax and paying the price). However, it is possible that, while the agent can empirically comply with each obligation individually considered, she cannot comply with both of them (for instance, because she doesn't have enough money). That's why this kind of conflict can be regarded as *in concreto*: it is related to the concrete circumstances of the individual case, and not to the logical structure of the norms involved" (Martinez Zorrilla 2011b, 735)

A first quick remark is that the logical structure of the other case said it is a matter of empirical circumstance, still it is filed as *in concreto*. A second remark is that we see once more the *in concreto* equals *individual* confusion. Let's develop these points.

5. Against Zorrilla and the *Normative System*-based Approach

It is time to properly evaluate Martinez Zorrilla's position. Zorrilla's development is fruitful as much as it helps us in understanding the disagreement between Chiassoni and Guastini. Nonetheless, Martinez Zorrilla has his own view on the issue of detecting *in concreto* conflicts. He says that these cases can be detected and develops the insights of *Normative System* to defend his thesis.

Before going on, a general remark. Martinez Zorrilla's position concern a particular case of normative conflicts: the case of conflicts of fundamental rights. Martinez Zorrilla proposes that not all of these conflicts are *in concreto*, a thesis that according to his reconstruction is the standard view.[17]

Let's keep focusing on Martinez Zorrilla's distinction between conflicts of instantiation and contextual antinomies. What does it mean that a conflict *in concreto* "depend solely on the empirical circumstances of the individual case" (Martinez Zorrilla 2011b, 737).

Norms need to be there if the conflict has to be there. Of course, it is a fact that norms in certain place and time are XYZ, but does this count as a reduction argument to have solely empirical circumstances? Of course not. Still, it is difficult for the position we are examining to specify what are the empirical components needed for a case to be *in concreto* and how we draw the line between *in concreto* and "depend(ing) solely on the empirical circumstances".

Martinez Zorrilla has already recognized that the empirical element of his contextual antinomies is something required. How much empirical elements make a conflict solely due to empirical circumstances?

Let's try to build a list of arguments and perplexities about Martinez Zorrilla's approach.

First, it forces us to adopt a precise conception of antinomy. The general outline is a Rossian one, i.e. antinomy defined in terms of incompatible legal consequences. More specifically, it adopts the logical developments of Ross developed by (Alchourrón and Bulygin 1971) in their *Normative Systems*. There's nothing wrong in assuming a certain conception of antinomies, but those choices need (i) to be conscious, (ii) to be defended. Actually, that is not a problem in the case of Martinez Zorrilla as

[17] Here is how Martinez Zorrilla states his goal and his thesis of adding a third kind of normative conflicts: "I think that many conflicts of fundamental legal rights are not *in concreto* in the sense that they depend solely on the empirical circumstances of the individual case. But I don't think that there's a logical inconsistency between the fundamental legal rights involved in the conflict. In my opinion, there's room for a third category of normative conflict, and at least *some* (and perhaps *most*) conflicts of fundamental legal rights belong to it. In these conflict, the norms involved are not logically inconsistent, but the conflict arises necessarily for logical reasons (so, they are also conflicts in abstracto)." (Martinez Zorrilla 2011b, 737).

he is not offering a full-blown account of normative conflicts but rather concentrating on fundamental rights. Further, he can reply saying he is using the consequence-based account of antinomy that is the easiest to be adopted if you are interested in dealing with practical conflict as that is the friendliest approach for judges and legal scientists in general.

Second, Martinez Zorrilla forgets the empirical element he himself acknowledges. By definitions, antinomies *in concreto* are *in concreto*, i.e. they involve some specific circumstance, accident, empirical element. This element is what, according to some other conceptions, determines the fact that the conflict is "indirect" in nature.[18]

Third, it uses a superweak notion of *detection*. This is the most interesting point we need to develop. In short: we can sum up Martinez Zorrilla's pro-detection argument by saying that at the end of the day we shall find two properties that are one the negation of the other. We know that two conflicting properties will be there in a case of conflict, and knowing this we are able to foresee the case. The problem here is that we use for evaluating the same idea we need to define the conflict. Both normative conflict and predictability of normative conflicts revolve on the same idea: incompatibility expressed by way of negation. In that way the conflict will necessarily be analytic. Briefly speaking: that is going to be question-begging.

There is probably another passage of Martinez Zorrilla worth quoting to better grasp what is at stake here and why he goes in the direction we reported. Martinez Zorrilla draws on (von Wright 1963, chap. 3, sect. 2)'s distinction between generic and individual action. He then says that: "individual actions (like individual cases) are real life events, and not mere logical categories. As such, they can be very complex, and one individual action can be simultaneously an instance of two (or more) generic actions" (Martinez Zorrilla 2011b, 737–38).

This is helpful to clarify what goes on. Rather than reading generic actions as a universal quantifier and individual as an existential quantifier (an individual action works only for a single token individual x, assuming he is in the domain), Martinez Zorrilla seems to use von Wright's logico-conceptual distinction detaching the two elements of the distinction and putting them in different boxes. Generic actions are mere logical action, individual actions are real-life and empirical. At the end of the day, von Wright's distinction is going to be a mixed distinction, half logical and half ontological and it will then be difficult to figure out what sort of distinction von Wright is making.

I think this reading of the distinction explains why Martinez Zorrilla underestimate the empirical elements he himself recognizes to *in concreto* cases when the files them as *in abstracto* and foreseeable.

Here is another all-encompassing explanation we need to analyse:

> "Generally speaking, whenever two or more norms are simultaneously applicable because the same individual action is an instance of two (or more) different generic actions which are qualified by those norms with incompatible deontic categories (such as permission and prohibition), then necessarily, for logical reasons, a conflict will arise. If, in a certain situation, the agent may do the generic action 'A', but she also has to refrain from doing the generic action 'B', given a certain individual action 'c' which is an instance of both 'A' and 'B', the

[18] We have seen almost all these labels in the above definition by Chiassoni and Guastini. On the indirect element see also von Wright and Conte on the case of Jephthah, named respectively 'predicament' and 'paranomy' [*paranomia*]. Williams mentioned 'conflicts *via* the fact'. These features of indirectness and fact-based conflicts are present also when we talk about constitutional dilemmas and conflicts of rights.

agent will be both allowed and disallowed to do 'c'. as this incompatibility depends on logical reasons we can regard this kind of conflict as *in abstracto*" (Zorrilla 2011: 738).

Here, there are at least two orders of considerations. First, does such a conflict really depend on logical reasons *only*? The trigger, 'c', is empirical. Second, what about the case of conflict of instantiation, i.e. the truly empirical cases? Why can't why say that they we have the same issue? 'A' and 'B' were giving money to different party, and 'c' was an insufficient amount.[19] Following Martinez Zorrilla all conflicts are logical and he is collapsing his own (really useful!) three-folded taxonomy. If we stick to this over-logicalization, conflicts of instantiation are going to be *in abstracto* and detectable as well because, at the end of the day, they need to feature some incompatibility we can express by way of negation in order to be conflicts.

Let me try another route to convey my perplexity against Martinez Zorrilla's point. Actually, it is no surprise that in a conflict of norm there is some contradictory or incompatible elements. If all we need to have a conflict is to have an incompatibility and we agree that negation works to cash out the incompatibility (as in the candy case of fn. 19), then all conflicts are going to be conflicts for logical reasons. No matter how empirical dependent or based on individual actions we will end up with 'A and not A'. Still, ending up with some form of logical incompatibility or logical contradictions does not force everything to be *in abstracto*.[20]

When (Martinez Zorrilla 2011b, 739) says: "There's no logical inconsistency at all because both obligations are compatible; the problem is that she simply lacks the means to satisfy both of them" he is performing a magic trick. He is affirming that the issue is empirical: he recognizes a triggering condition in the same 'c' that was triggering both norms in the *in concreto* (contextual antinomy case). Nonetheless, he dismisses that in this triggering fact there's logic involved as well. In fact, as we have already seen, empirical incompatibilities can be characterized logically.

Martinez Zorrilla might reply that the object we use to evaluate the incompatibility is different: empirical facts in the case of conflicts caused by strictly empirical circumstances, norms in the case of contextual antinomies. But this is not true: both conflicts are assumed to be such that there is no incompatibility between the norms, because they rule different and conceptually unrelated situations.

Replying that these different and unrelated situations are not so unrelated but connected is going to be a Pyrrhic victory for Martinez Zorrilla. He can work an argument to say that *in abstracto* we can foresee some circumstances that might create an intersection between the different unrelated concepts. Still, the triggers of these intersections are all going to be empirical circumstances whose empiric element cannot be denied.

Let's try to approach the issue in another way. If the overlap of A and B that are assumed to be unrelated norms can be detected and foreseen *in abstracto* with no appeal to empirical circumstances,

[19] There are many ways to cash out conflicts of instantiation as logical conflicts: A = x, B = y, c < x+y. If you want to focus on a situation of same amount A and B with 'c' being only equal to the amount for one of the two, you may figure out A and B as A and not A. Think about a similar case which matches the case of Martinez Zorrilla in which you have only a candy to give to A and B, and you can't split the candy. Here giving it to A amounts to not give it to B and the other way around.

[20] An analogy to the Quineian '7+2 = the number of the planets'. Despite '=' being something logical the Quiniean identity statement is neither logical nor *in abstracto*. For a defence and characterization of *in concreto* cases along these lines, see [REDUCTED].

then it should be fairly simple to conclude that it was false that the two norms were unrelated as the definition assumed.

Further, if the latter part of the quotation has to be taken to differentiate contextual antinomies from conflicts of instantiation, again, for Zorrilla's conflict of instantiation we can find "an individual action that is subsumable in both generic actions, so the conflicts arise necessarily, for logical reasons". My action 'c' of paying 50 euros files can be filed both as 'paying taxes' and 'paying for a service'. Once we chose where to file it we will find out, for logical reasons, that if we filed it under A it was not filed under B (and the other way around) and thus by doing 'c' I failed to comply with both 'A and B'.

This sort of flaw in Zorrilla's reasoning emerges when he considers another objection that can be raised against his view of conflicts of rights as *in abstracto* cases, hence predictable. One could grant that these conflicts are *in abstracto* (as Zorrilla does) but disagree that it is epistemically impossible to detect and foresee the circumstances in which they arise. Let's call this the 'epistemic impossibility objection'.

Zorrilla's defence is that such a reasoning will not deprive the conflict from being *in abstracto*. The more interesting issue is that, while such a reasoning will not affect the fact that the cases are *in abstracto*, I guess this will impact quite a lot the issue of whether those *in abstracto* cases are going to be *predictable*.

Let's see Zorrilla's argument against the epistemic impossibility objection:

> "it is true that the actual situations of conflict are rarely detectable prior to the concrete circumstances of the individual case, but this does not mean that the conflict shouldn't be regarded as *in abstracto*. The inconsistency (and hence the conflict) arises because certain cases have certain *properties*. Every individual situation that meets those properties will give rise to a conflict, even though the specific empirical circumstances of that situation are obviously indeterminate. We cannot predict which individual action will be jointly subsumable into both generic actions, but, to this extent, the situation is like the "classic" antinomies: we cannot predict the individual cases of conflict, but we know that every time that a certain individual case has some properties (i.e., is subsumable in the conditions of application of the norm), there will be a conflict" (Martinez Zorrilla 2011b, 739–40).

This argument runs as follows: it is true that we might not know exactly which empirical circumstances will trigger the case, i.e. which concrete situation is going to let us subsume the same individual under two conceptually irrelated norms that will bring about incompatible legal consequences. That is no surprise at all, the same holds for "classic" antinomies. Nonetheless, despite our not knowing the specific details of the case, we know both the logical structure of antinomy and that of *in concreto* cases.

Martinez Zorrilla is risking to self-defeat his own distinctions. The *in concreto* cases he wants to distinguish as *contextual antinomies* come so close to "classic" antinomies that one can question the relevance of the distinction. Martinez Zorrilla can reply that "classic" antinomies qualify the same circumstance in two incompatible ways – that's the standard definition, still it can be challenged as well.[21]

[21] Example. Take seriously the idea that legal circumstances are the products of the acts of legislation. Take seriously the idea that there are constitutive rules, i.e. rules that creates specific deontic states of affairs

The problem gets harder if we agree with Martinez Zorrilla's reasoning as far as classic and contextual antinomies are concerned and try to use what he is saying claiming that his truly empirical cases are no longer a *tertium datur*. The passage above prevents the epistemic impossibility objection turning on some mysterious properties or logical forms that the conflict will have. As said already, predictability in the weak sense of "properties" that we can articulate as "incompatibility we express via negation" is there also in (truly) empirical cases.

6. Summing Up

The critical analysis of Martinez Zorrilla's "pro-detection" provides an argument against the predictability of *in concreto* antinomy. The fact that each conflict a logical structure that is conflictual, i.e. that can be expressed by way of incompatibilities we articulate logically by way of negation is distinguished from our ability to foresee such a case. If we want to talk properly about predictability we need more than properties in Martinez Zorrilla's way, we need to actually find out which physical circumstance will be the proper antecedent of the combined disposition Chiassoni talks about. Again, saying (A and B) is not enough, we actually need to provide the description of the case relying on generic actions.

Doing such is not as easy as it seems, as we have seen. In fact, it is difficult also in the case of our examples. In the traffic light case the "property" is "some concrete individual installs a traffic light in a military area" or also "some concrete individual declares that a certain area full of crossroads and traffic lights is from now on considered a military area". We have at least two generic descriptions available. In Guastini's case we need either citizens that are also unemployed or unemployed that acquire the citizenship.

The next move to defend "unpredictability" is that of reminding ourselves of the biases we have in the cases of our discussion, something that was mentioned in the beginning of the paper as a methodological remark. We are so biased that we might not conceive them as *in concreto* antinomies any more. What the theory needs to predict are not these easy cases but the next we actually know anything about. Those are the cases that the literature with more practical import is eager to able to detect but nonetheless fails to (think about indirect and complex matter in international law) but are also the cases Martinez Zorrilla is interested in, i.e. conflicts of fundamental rights.

If you need an extra paradoxical proof that it is fairly epistemically demanding to detect indirect *in concreto* cases remember that God himself accepted Jephthah's promise as a genuine one (assuming promises to do the evil are no genuine promises and that a promise to kill is no genuine promise at all).[22]

(roughly, the consequences of the norms). Assume that there are no *mala in se* or at least that *mala prohibita* are legal artefacts (the idea of law as an artefact might help here). Assume also that power conferring rules have some constitutive power in creating the power they are conferring. Now the rules assigning incompatible consequences (or modalization in the modality-based conception) to the same activity X are actually creating two completely unrelated objects, X and Y. The reasoning holds, at least *prima facie*. There is quite a well spread agreement that there are constitutive rules as well. I actually believe the "no contradiction argument" for constitutive rule is mistaken. See [REDUCTED].

[22] You can reply that God knew that the promise might turn into a promise to kill but assigned a low probability to that outcome.

Now, assume we agree that *in concreto* cases are not predicable. What about the three-folded partition of Martinez Zorrilla, what about conflicts of instantiation?

I think we can distinguish conflicts along the axe of being affected by empirical considerations and not. "Classic" antinomies can be detected in whatever deontic logic you have. On the other hand, that is not true in the case of other conflicts. These cases such as *in concreto* cases and conflicts of instantiation require factually based considerations. In order to implement that, you need at least a deontic logic and a logic of action, i.e. you have to map the interactions between the what can happen, what the norms subjects are able to do and the way in which the law sorts out these actions and interactions.

Assuming we develop all this in a way that can actually be implemented in legal current practice, we may agree that some form of "predictability" will be possible also in that case. Still, as we showed, *in concreto* cases are quite hard to describe and often require many interpretative efforts (especially in the case of conflicts of fundamentals rights, e.g. in case of balancing). The "properties" of this predictability are rather different from those adopted in "classic" antinomies.

Anyway, I am not distinguishing the cases of conflict relying on their (non)predictability, I am rather using whether they require factual-based considerations or not. From that point of view, it is then relatively easy to sort out cases of contextual antinomies and conflicts of instantiations focusing on whether: (a) the triggering condition of the incompatibility is an external event or state of affair the agent has no control upon (e.g. the combination "military area and traffic light" obteins); (b) positive laws are such that a concrete individual is subsumed under different norms that triggers incompatible consequences (e.g. Guastini's example); (c) some accidental properties of the individual that are not ruled upon by the norms make it the case that the individual cannot comply with all norms of the case (e.g. the case in which one carries less money than those necessary pay all his debts, the case of having only one candy to give to two twins, etc.).

Along these lines we can get quite deep into the mechanics of the conflict and we can distinguish even more than Martinez Zorrilla does. In fact, above you have (a)-(c) and "classic" antinomies – i.e. deontic contradictions, while Martinez Zorrilla has three kinds of normative conflicts including deontic contradictions.[23]

A different theoretical framework that settles the issue of foreseeability together with that of the classification of the different kinds of conflicts is currently under development.[24]

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[23] We can be more specific than this (a)-(c) treatment if we focus on the trigger of the conditions. See [REDUCTED].

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