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(ESSAYS)**

Non-Application and Justified Violation of Norms. A Proposal for the Study of Defeasibility in the Theory of Law

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Abstract

This paper argues that the main conceptualisations of the notion of defeasibility proposed by legal theorists are useful to reconstruct and clarify two different processes. First, legal theorists use the concept of defeasibility to represent a process and the result of a restrictive reinterpretation in which a judge decides that a particular norm is no longer relevant for the regulation of an individual case. Secondly, legal theorists use the concept of defeasibility to describe a process and the result of justifying the non-application of a relevant norm to an individual case.

Keywords: Defeasibility. Interpretation. Antinomies.

1. Introduction

The objective of this article is to clarify what legal theorists say when they characterise a norm as “defeasible”. For the sake of clarity, I will first briefly present some (fictional and real) examples of the kind of legal practise that will be explained.

During the Covid-19 pandemic, many countries have taken a few measures to restrict freedom of movement and reduce the rate of infection. In this context, imagine a country that has introduced a mandatory quarantine that prohibits people from leaving their usual place of residence, except for those who are accredited by the state to carry out a job deemed important. Those who violate the quarantine are penalised with a heavy fine and must return to their place of residence.

The quarantine had various effects (loss of work, loss of contact between family members and much more) and exposed those affected to intense and constant levels

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of stress. These effects were particularly severe for a certain group within the group of people with autism spectrum disorder (ASD). For them, it meant a disruption to their daily routine, which led to an increase in severe anxiety crises. Suppose that the father of a minor with ASD decided to go out of the house with his son and take a short walk in the street so that he would feel better and not have another anxiety attack that day. In the park, they are stopped by a police officer, fined and forced to go home. Suppose that the fine is judicially appealed and the competent judge decided that the violation of the norm notwithstanding, the penalties ought to be lifted because the two left their house for health reasons, which ought to be considered implicit exceptions to the norm itself.

The most famous case in the specialised literature is a law from Bologna that stipulated: “whoever drew blood in the streets should be severely punished”¹. In this context, a barber accidentally cut off his customer’s pimple, which resulted in his blood being splashed onto the public street. He was taken to court for violating the above-mentioned law. The judge considered that although the antecedent of the norm (“drew blood in the streets”) was fulfilled, the norm, properly understood, was not applicable to such a case.

Two judgements from the case law of the US Supreme Court are usually mentioned in this context. The first, *United States v. Kirby*, dealt with the case of a police officer who arrested a mail carrier in compliance with a court order. As there was a law in force at the time (mid-19th century) that condemned any act that obstructed the delivery of mail, the officer was deemed to have prevented the mail from reaching its destination. In view of these facts, he was punished with a prison sentence. In this context, the Supreme Court ruled that the law should not be applied, as the scope of the norm must be understood in accordance with the purposes for which it was enacted, which did not include the situation analysed in the case in question.

In the second case, *United States v. Church of the Holy Trinity*, the Supreme Court decided the case of a church that hired a new pastor from England, which included, as part of the benefits, paying the cost of travelling to the country. At the time (late 19th century), a federal law was in effect that prohibited employers from paying for the passage of foreign workers to the United States. Given this situation, the court ruled that the fact that the individual was a “pastor” was significant and that if the legislature had considered such an element, they would have made an exception for them. Accordingly, they ruled that the prohibition did not apply in this case².

¹ This case was reported by Pufendorf in *De iure naturae et gentium*. Some authors usually present this example by pointing out that it was a surgeon performing a medical procedure on the street, rather than a barber (as appears in (Atria 2001, Schauer 1991) and in *United States v Kirby* of the US Supreme Court). In both versions, the point to be made is the same.

² The literature often mentions the case of *Riggs v Palmer* too. Similar to this see *R v National Insurance Commissioner ex p. Connor* of the High Court of Justice of England and Wales. And also, the

We can name or imagine an infinite number of other practical cases. They all show us a judge who takes measures to avoid certain practical consequences that he considers unacceptable from an axiological point of view. In this regard, numerous legal theorists have tried to explain the phenomenon of creating implicit exceptions. To this end, they have introduced a new theoretical concept: the notion of defeasibility.

Three clarifications are in order on this point. First, defeasibility is a concept that has been used in various fields of study (Araujo Kurth 2013). In legal theory, it was introduced by Hart (1948-1949), who used it to indicate that the satisfaction of the conditions of application of a concept is not sufficient to guarantee its application (for an analysis of this theory, see García Yzaguirre 2020b). Since Hart's publication, the term has become part of our legal theory culture and is used as a way of understanding different legal phenomena. Secondly, the term "defeasibility" is frequently and historically used among Anglo-Saxon jurists, especially in contract law, to designate a type of contract that is subject to a condition. When I say that this term is part of our "legal theory culture", I mean that it has been incorporated in: i) continental legal cultures where the creation of implicit exceptions is discussed, and ii) the theoretical language of various legal theories. Third, it is important to distinguish between the problem to be solved and the terms in which the discussion of how to solve the problem is conducted. In short, the problem of defeasibility refers to the discussions and operations carried out to avoid a normative qualification of an act that is considered unjust, inefficient, absurd, or in any other way that involves value disagreement. This problem has been discussed since antiquity (for example in Aristotle's *Nicomachean Ethics* or Sophocles' *Antigone*). The difference proposed by the various theories of defeasibility lies in the terms under which the discussion is conducted in our time. That is, in the type of language and the specific questions with which the problem is posed in today's normative systems.

If we say that a norm is defeasible, what are we saying about it? Legal theorists have formulated several answers to this question. One of the main problems with these theories is whether they use the same concept (approximated from different theoretical languages) or whether they use the same term to represent different concepts. In this article, I will argue that the main conceptualisations of the notion of defeasibility by legal theorists are useful to reconstruct and clarify two different operations. First, they use it to represent an operation and the result of a restrictive reinterpretation in which a judge decides that a certain norm is no longer relevant to regulate a case. Second, they use it to represent an operation and the result of justifying the non-application of a relevant norm.

To achieve this objective, I will take the following steps. In section 2, I will give a brief overview of the most important theories on the concept of defeasibility. I

judgement HR 7-12-1990, NJ 1991, 593 of the Supreme Court of the Netherlands (for an analysis of this particular case see Soeteman 1995).

have selected authors whose proposals have a notorious influence on current discussions. In this sense, I have selected authors whose theories: i) on which there are open discussions about their correctness or incorrectness; or ii) which serve as a starting point for the elaboration of new arguments. The proposals analysed include all those ideas that are commonly used in current debates on the notion of defeasibility. In accordance with the above criteria, I will analyse the works of: Riccardo Guastini, Frederick Schauer, Carlos Alchourrón and Andrea Dolcetti together with Giovanni Battista Ratti. In this way I will be able to do two things. Firstly, I will offer a reconstruction that will serve as an introduction to the specialised literature, and secondly, I will better present the question of whether or not all these theories use the same concept. Then, in section 3, I will formulate my proposal to distinguish between two senses of “defeasibility”, analysing the question of whether or not a defeated norm can be used to generate new duties. Finally, I must clarify that I presuppose a non-cognitivist interpretation theory and the bridge conception of conditional norms as theoretical premises for this analysis.

2. Theoretical Reconstructions of Legal Practice

The concept of defeasibility has been presented in various theoretical languages and formulated in various discussions. In particular, in discussions of i) how to identify a norm, ii) how conditional norms are structured, and iii) how normative conflicts are resolved. For the sake of clarity, I will organise the reconstruction of the different theories with these differences³.

2.1. Defeasibility and Identification of Norms

A number of legal theorists have proposed that the notion of defeasibility should be understood as a theoretical concept that sheds light on how interpreters identify a norm⁴. In particular, they conceptualised it to better account for a certain type of interpretative processes and outcomes. To introduce this point, I will (briefly) describe two of the main theoretical proposals on this topic: (i) defeasibility as a result of using the dissociation argument and (ii) defeasibility as a result of resolving a recalcitrant overinclusive experience.

³ For other reconstructions of the various theorisations of defeasibility in law see Hage 2005, Chiassoni 2012, Araszkievicz 2015: 419-20, Poggi 2021, Sartor 2018, Pérez Bermejo 2009, and Bayón 2003. It is also worth highlighting Ferrer and Ratti 2012, as it is one of the most successful compilations of the various ways of presenting defeasibility in law.

⁴ Discussions on norm identification encompass the proposals and debates on what criteria should be used to determine the identity of norms (what is a norm, what is a norm fragment, among others) (Raz 1986: 97).

(i) Defeasibility as a Result of the Use of the Dissociation Argument

A first way of explaining what judges do when they create an implicit exception to a norm (defeat it) is as a result of having employed the dissociation argument. This point has been presented with clarity by Riccardo Guastini.

The structure of the dissociation argument is as follows: First, the interpreter identifies a first possible meaning to be attributed to a normative text (Guastini 2012). This meaning is a norm that contains the normative qualification for a generic case (If p , then Oq). In other words, a *prima facie* meaning of a particular normative text is established.

Secondly, the same interpreter considers that this *prima facie* meaning is unjust, inefficient or some other qualifier used to show a disagreement between this meaning and his value preferences. Given this, he considers that distinctions in the scope of the norm must be made within the antecedent. This means that a distinction must be made between p_1 and p_2 within class p and each of these subclasses must be treated as normatively relevant⁵. In this way, a distinction is made between the cases p_1 and p_2 on the basis of an axiologically motivated interpretation preference.

Let us assume that the interpreter considers it appropriate to apply the normative consequence Oq only to the case p_1 , but not to the case p_2 . Guastini points out that interpreters create an implicit norm that has p_1 as an antecedent and adds the negation of p_2 . We then have “If $p_1 \cdot \neg p_2$, then Oq ”. At this point, it is worth making a distinction about what is being represented. Firstly, the formal representation is problematic if we assume that p_1 and p_2 are complementary cases (Alchourrón, Bulygin 2012: 149), i.e. that there is a logical opposition between them. If p_1 is present, this would mean that it is not logically possible for p_2 to be present. Conversely, if p_2 is present, this would mean that it is not logically possible for p_1 to be present. This shows us that the formulation “If p_1 and $\neg p_2$, then Oq ” need not emphasise the absence of p_2 ($\neg p_2$) for Oq to be present, since this follows from the verification of p_1 . Second, the formal representation is fortunate if we understand that p_1 and p_2 are species of the same genus. In this scenario, it follows that a particular token of a type is excluded from the scope of the norm (e.g., “if vehicle and not ambulance”). I assume this second option to allow an appropriate reconstruction.

In this sense, “If $p_1 \cdot \neg p_2$, then Oq ” has two possible scenarios with respect to p_2 : i) it is a generic case that can be subsumed under a different norm, so that it would have a different legal qualification (let us assume Or); or ii) we are dealing with a case in which a normative gap is created (it would be a normatively relevant property, but without normative qualification (Guastini 2016: 343-44)).

⁵ A normatively relevant property is understood as a property whose presence or absence leads to a change in the normative qualification of the action. In this sense, a normatively irrelevant property is understood as a property whose presence or absence does not affect the normative qualification of the action.

When faced with a normative gap the interpreter can do one of the following: (i) resolve it by an extensive interpretation or by creating another implicit norm that qualifies the generic case; or (ii) leave the case undetermined.

As we can see, the result of the dissociation argument is to have reduced the scope of a norm (If p , then Oq) to (If p_1 and $\neg p_2$, then Oq). That is, we have moved from a *prima facie* meaning with a certain scope to an all-considered meaning (implicit norm), which possesses, by comparison, a narrower scope, i.e. it possesses a finer (or more specified) generic case (Guastini 2012: 188-190). In this sense, narrowing the scope as an interpretative result, as we can see, is an act of norm change made by the interpreter.

(ii) Defeasibility as a Result of Resolving a Recalcitrant Experience

A second way to explain what judges do when they create an implicit exception to a norm (defeat it) is that they are refining the purpose of the norm⁶.

Frederick Schauer proposes that the identification of the antecedents of norms is the result of a generalisation of a purpose or justification. In other words, the selection of the properties contained in the antecedent is the result of a specification of a justification. In this way, a norm is the product of a reasoning composed of two levels: a) the prescriptive level or the generalisation of a justification that possesses a prescription (conditional norm that correlates a generic case with a normative consequence); and b) the justificatory level (purpose of the norm, hereafter: underlying reasons) (Schauer 2004: 76, 87, 89).

However, if we consider the relationship between an underlying reason and the selection of properties by a generalisation, this will result that in some circumstances: (i) the selected properties turn out to be unsatisfactory or undesirable for the realisation of the underlying reason; or (ii) properties that would have been satisfactory or desirable for the realisation of the underlying reason have been omitted. In this sense, there may be circumstances in which the generalisation is not useful in satisfying the underlying reason. Schauer called these situations “recalcitrant experiences” (Schauer 2004: 98, 103-04). More specifically, recalcitrant experience is a notion that presents that a particular interpretation is wrong or suboptimal in light of the underlying reason (Schauer 2020: 55).

We can distinguish different relationships between the prescriptive level and the justificatory level of a norm, depending on the different individual cases that arise. In this respect, we can identify the following possible relationships: (i) the individual case is within the linguistic uses of the terms used in the generalisation and within

⁶ The central theses of this proposal are contained in Schauer 2004, 2013. In relation to the notion of defeasibility, he has particularly elaborated on it in Schauer 1998, 2012, 2020. I should point out that in this article I will reconstruct this proposal from the perspective of the theory of interpretation (see footnote 5).

the scope of the underlying reasons; (ii) the individual case is within the linguistic uses of the terms used in the generalisation but outside the scope of the underlying reasons; (iii) the individual case is not within the linguistic uses of the terms used in the generalisation but is within the scope of the underlying reasons; and (iv) the individual case is outside the linguistic uses of the terms used in the generalisation and outside the scope of the underlying reasons.

The first and fourth cases are uncontroversial. The second and third cases are scenarios in which an antecedent contains an inadequate specification of the level of justification. They reflect the two types of recalcitrant experiences: overinclusive and underinclusive. Of these, only the former is of interest for this paper.

A case of over-inclusive experience presents a scenario in which the generalisations contained in the antecedent have introduced a property that, in an individual case, is undesirable since it generates effects that are not justifiable by the purpose of the norm. In other words, it is being pointed out that, by having included a certain property, the prescriptive level generates a state of affairs that is not coincident with the state of affairs justified by the underlying reasons because it regulates more cases than it should have regulated. Thus, to remedy this type of situation, it will be necessary to introduce a new specification to the generalisation (in other words, to introduce a distinction in the antecedent).

It should be clear that a case of overinclusive experience only invites us to ask ourselves how we can resolve a scenario of discrepancy between the solution envisaged by the prescriptive level and the solution we can derive from the justificatory level. One possibility is to accept the suboptimal result. The other possibility is to revise the antecedent of the norm so that it contains all the distinctions necessary to achieve an optimal outcome, i.e., to defeat it. Thus, defeasibility refers to the possibility of a judge, faced with an over-inclusive experience, to favour the solution derived from the underlying reasons, which manifests itself in the introduction of a new property in the antecedent (to incorporate distinctions) (Rodríguez 2012: 95)⁷.

A recalcitrant experience will seem to be a relevant problem or not, depending on the attitudes the judge has about how to deal with norms and whether or not he considers the underlying reasons to be relevant in determining the legal qualification of an action. Based on this, the defeasible character of a norm is not a necessary but a contingent feature according to this theory: it depends on the way in which decision-making processes are carried out (Rodríguez 2012: 95). In other words, it depends on what they are willing to sacrifice.

⁷ It should be noted that Schauer distinguishes between recalcitrant over-including experiences produced by: i) failure to satisfy either the underlying reasons justifying the norm; and ii) other underlying reasons relevant to the resolution of the particular case. To differentiate between the two problems, Schauer distinguishes between internal defeasibility of the norm and external defeasibility of the norm (Schauer 2004: 179, Schauer 2020: 58). For the purposes of this article, it is not necessary to elaborate on this point.

In extreme synthesis, judges apply one of these models⁸: i) the formalist model, based on a judge who only considers it relevant to examine whether or not the individual case can be subsumed under the antecedent case (the identified generalisation); or ii) the adaptability model, based on a judge who considers it relevant to concretise the state of affairs justified by the underlying reason, so that any recalcitrant experience is considered sufficient to make a revision of the norm.

Each of these options has an associated cost. A judge will have to choose between: i) treating norms as indefeasible, which entails making suboptimal outcomes suffer; or ii) treating norms as defeasible, which entails that only the underlying reasons determine the solution of individual cases (we sacrifice having rules) (Schauer 1998: 23). As we can see, this theoretical language makes it explicit that the defeasible character of norms is linked to a normative claim about how judges should regulate their interpretative codes.

2.2. Defeasibility and Structure of Norms

Another group of legal theorists has proposed understanding the notion of defeasibility as a theoretical concept that allows us to clarify the structure⁹ of a type of conditional norm. Of all these, in the present article I have concentrated only on Carlos Alchourrón's proposal to understand defeasibility as a way of presenting the revisable character of antecedents¹⁰.

(i) Defeasibility as a Feature of a Type of Conditional Norms

A third way to explain what judges do when they create an implicit exception to a norm (defeat it) is that they have made explicit the implicit assumptions that were taken into account in formulating the norm. This idea was best illustrated by Carlos Alchourrón. To clarify this point, I will make some preliminary remarks about the author and the topic.

⁸ This author differentiates between four models (Schauer 2004: 154 ff.), but they can be summarised (in extreme synthesis) in the two indicated in the main text.

⁹ The identification and structuring of norms are part of different, but closely linked, theoretical questions, since the answers to the latter shed light on the elements of the former. Discussions of norm structure, while dependent on the answer to the question of how to identify a norm, have their own theoretical problems. They encompass proposals on how to represent a norm, in the sense of determining what its components are and how they articulate with each other (Raz 1986: 97, Susskind 1987: 119).

¹⁰ Within this set of discussions, we can find a group of authors who hold a procedural notion of defeasibility. For reasons of space, I will not elaborate on these in this article. On this point see Hart 1948-1949, Baker 1977, Finkelstein 2000, Rodríguez 2017, MacCormick 2016, Sartor 1995, Prakken and Sartor 2009, Duarte 2015, and García Yzaguirre 2021b. Regarding the differences between a systematic conception of law (such as the one adopted in this article) and a dialogical conception of law (used in several procedural approaches of defeasibility), see Barth, Krabbe 1982.

With regard to the work of Carlos Alchourrón, it should be noted that he is one of the most important authors for the study of the concept of defeasibility. Firstly, Alchourrón and Bulygin presented a first way of understanding the defeasibility of rules as cases of systemic changes¹¹. Changes that can be represented as changes in interpretation or as changes in the rules of inference (Alchourrón, Bulygin 2012: 133-40). This type of discussion was later deepened by Alchourrón in the following articles: “Fundamentos filosóficos de la lógica deóntica y la lógica de los condicionales derrotables”, “Defeasible logics: demarcations and affinities”, “Para una lógica de razones prima facie”, “Separación y derrotabilidad en la lógica deóntica” and in “Sobre derecho y lógica”. In this respect, in these works we can distinguish two ways of understanding and presenting the concept of defeasibility in Alchourrón’s theory, each of which is useful for clarifying different legal processes. All these works share the thesis that the antecedents of norms contain explicit and implicit conditions and that, in order to determine a sufficient condition for the consequent, it is necessary to make its implicit conditions explicit. Notwithstanding this, we can identify two differences: the objectives pursued and the way in which the implicit presuppositions are to be understood. In relation to the objectives, Alchourrón showed in the first four articles that monotonic deontic logic is suitable to account for defeasible norms, so that it is not necessary to use formal representations and norms of inference that do not validate the strengthening of the antecedent or the *modus ponens* to describe these norms and their relations with other norms. This is what I will focus on in the main text. The aim pursued in “Sobre derecho y lógica” was to formulate a reconstructive model of certain ways of understanding normative systems and to characterise the problem of defeasibility as a problem of norm identification and also as a way of incorporating David Lewis’s dispositional theory of value into legal analysis. As for how to understand implicit presuppositions, Alchourrón understood in the first four articles that their explicitness (and, therefore, the defeat of the norm) is based on the identification of properties that the legislator actually valued. In contrast, in “Sobre derecho y lógica”, implicit presuppositions are made explicit on the basis of counterfactual judgements about how the legislator would have valued a particular (normatively irrelevant) property¹². In this article, I will only reconstruct the first position.

In relation with this topic, there has been and still is much discussion about deontic logic. Of these discussions, the one that is most interesting at the moment is the challenge posed by the theory of defeasible conditionals. Beng Hansson published the article “An analysis of some deontic logics” in 1969, in which he formulated a new concept of a conditional norm: a defeasible conditional norm. According to this proposal, the statement that a conditional norm is defeasible means that a

¹¹ This point was made by an anonymous referee, whom I thank for this reference.

¹² For an extended analysis see García Yzaguirre 2020a.

norm “if p , then Oq ” is no longer relevant (is cancelled) in the case of “ p and r ”. This means that the presence of r (copulative with p) has the consequence that the norm ceases to regulate the individual case (see 3.1.1.).

Hansson proposed to postulate the notion of defeasibility of conditional norms as an illuminating concept of the cancellability of duties: Under certain circumstances not expressed in the norm, the consequence does not follow. More precisely, this requires: i) the rejection of the strengthening of the antecedent and ii) the rejection of the use of the *modus ponens*.

If a proposition p implies the proposition q , then this implication also applies according to the strengthening of the antecedent when new properties are added. In this way, the consequences follow from the premises, even if other premises are included in the reasoning. Thus, if we have a proposition p that is sufficient for a proposition q , then whenever we have p , q follows, even in cases where p concurs with other conditions (say $(p.r)$). The *modus ponens* is a meta-rule on how to formulate inferences or deductions from norms. Accordingly, if we have a conditional norm and the statement of its antecedent, the consequent is inferred (Navarro, Rodríguez 2014: 62, 112).

Now, suppose we lack the strengthening of the antecedent: in these cases, adding the property r copulatively to p may be apt to prevent the consequent from being derived (Alchourrón 2010 [1996b]: 142). In view of this, the defeasibility paradigm’s attack on the standard system of deontic logic was to postulate that, to account for a defeasible conditional, our system of formal representation must not take into account the strengthening of the antecedent and, hence, neither the *modus ponens*. This meant adopting new types of logics¹³.

Within this new paradigm, it has been argued that the best way to understand the defeasibility of conditionals is to weaken the connective that correlates the antecedent with the consequent. To this end, a new connective, weaker than the substantive conditional, has been introduced into the technical language: the *corner* “ $>$ ” (Alchourrón 2010 [1993]: 108-89). This shows us that there is no material implication between antecedent and the consequent, but only a probabilistic implication.

Now, if we are committed to an ideal of rationality based on deduction (any conclusion derived from the premises is justified), then not using the strengthening of the antecedent and the *modus ponens* means that we renounce to make practical inferences with this kind of norms (Rodríguez 2002: 199, Soeteman 1989: 196). Faced with this type of position, Carlos Alchourrón proposed that the best way to understand this point is not to renounce a deductivist deontic logic, but to locate the problem in the right place: not in the connective, but in the identification of the antecedent. For this author, the defeasible character of conditional norms is a sign that the antecedent of the norm has not been completely identified. More precisely,

¹³ For a systematic study of non-classical logics see Palladino, Palladino 2007.

a defeasible conditional norm is a norm whose antecedent is composed of explicit contributory conditions and other conditions that have not been made explicit (mainly because they operate as implicit presuppositions). This shows that explicit conditions cannot guarantee the consequent, since it is possible that an implicit presupposition, when made explicit, excludes the individual case from the scope of the norm. Once this has been made explicit, the antecedent is composed of the contributing conditions and the other conditions to which the strengthening of the antecedent and the *modus ponens* can be applied (they operate as a sufficient condition for the consequent). In synthesis, the antecedent is understood as a generic case composed of explicit properties and implicit presuppositions, which together would operate as the sufficient condition for the consequent.

In this sense, three moments can be distinguished in the identification and application of a defeasible norm. In T1, we identify a norm with an antecedent composed of explicit conditions (which operate as contributing conditions), and also that there is a set of implicit conditions alongside it. To represent this point, Alchourrón proposed the incorporation of the revision operator f . In this way, a defeasible conditional norm is represented as $(fp \rightarrow Oq)$, that is, a norm whose antecedent requires making explicit all its implicit presuppositions in order to be applied (Alchourrón 2010 [1996a]: 135). If we represent an antecedent as fp , then it accounts for the joint assertion of property p and the set of its consistent implicit presuppositions. By expressing fp , what we are doing is giving an account of p and a conceptual expansion of it.

In T2, we make explicit these implicit presuppositions in order to identify the sufficient condition for the consequent. It should be noted that this operation of making explicit the implicit presuppositions can be carried out in different ways. To give some examples: i) as a result of having identified the hierarchical relationships between norms; ii) as a result of having carried out a systematic interpretation; iii) as a result of having correctly understood the legislator's intention when issuing the norm; among others (for an analysis of this point see García Yzaguirre 2021a).

At T3, after having made this explicit, we identify a norm with an antecedent composed of at least one sufficient condition for the consequent. It will be, in this sense, an undefeatable conditional norm which can be represented as follows: $(p \rightarrow Oq)$.

2.3. Defeasibility and Conflict between Norms

Another group of legal theorists has proposed that the notion of defeasibility should be understood as a theoretical concept that makes it possible to shed light on the process and outcome of the resolution of a normative conflict. To illustrate this point, I will (briefly) describe the proposal of Andrea Dolcetti and Giovanni Battista Ratti, who have theorised defeasibility as a case of a complex systematic relationship.

(i) Defeasibility as a Complex Systematic Relationship

A fourth way to explain what judges do when they create an implicit exception to a norm (defeat it) is the result of preferring an implicit norm over an explicit norm as a resolution of a normative conflict between them. One of the clearest theorisations of this idea was formulated by Andrea Dolcetti and Giovanni Battista Ratti (Dolcetti and Ratti 2016, 2020).

For these authors, defeasibility is a theoretical concept that allows us to clarify how implicit exceptions are created from the composition and resolution of a specific type of conflict. In their own terms: “legal defeasibility should be conceived of as a complex situation, in which a norm which is derived from an *implicit* norm is given priority over another norm, which is derived from an explicit/implicit norm” (Dolcetti and Ratti 2020: 113). To reconstruct the proposal of these authors, some preliminary remarks are in order. These authors have identified that legal operators operate with the following types of norms.

1. Express norms: norms established through normative formulations by normative authority.
2. Implicit norms: norms belonging to the normative system for reasons other than formal approval by a law-making authority (norms created by judges, for example).
3. Logically derived norms: norms that are inferred from expressed and/or implied norms using a logical reasoning scheme.
4. Legitimately derived norms: norms that are inferred from express and/or implicit norms by employing a non-logical reasoning scheme (e.g., using the *a contrario* argument).

These norms may conflict with each other. Among the possible combinations, we are particularly interested in one: the conflict between a norm derived from an explicit norm and a norm derived from an implicit norm. Here there are two possible solutions: (i) the norm derived from an explicit norm prevails; or (ii) the norm derived from an implicit norm prevails. The way in which prevalence is granted is through a preference norm between two norms (i.e. through the creation of a third norm) (Ferrer and Rodríguez 2011, Von Wright 1963).

When the judge resolves the normative conflict in favour of the norm derived from the express norm, we are dealing with a case that they call “reasoned direct application” (Dolcetti and Ratti 2016: 42). In these cases, the judge considers reasons against the application of a norm derived from an explicit norm that are offered by a norm derived from an implicit norm but considers that they are not sufficient to change the normative qualification of an individual case. As we can see, they are accounting for scenarios in which the judge has considered that there are better reasons to use the express norm than the implicit norm.

It should be made clear that this is the way to treat the express norm as a non-defeasible norm in a synchronic and not in a diachronic sense. It is non-defeasible in

the sense that no implicit exceptions to this norm can be introduced in relation to the case to which it is to be applied. However, this does not mean that in future cases this norm will be subject to a new implicit normative conflict in which it will be defeated by a norm derived from an implicit norm.

If the judge resolves the normative conflict in favour of the norm derived from the implicit norm, this is a case of defeasibility (Dolcetti and Ratti 2016: 39)¹⁴. In these cases, the judge creates a preference in favour of the norm derived from the implicit norm over the norm derived from the explicit norm. According to the authors, this is the way to introduce an implicit exception in an express norm.

3. Defeasibility: Different Languages for Two Different Problems

We have seen a selection of the most important theories on the concept of defeasibility in legal theory. They all try to clarify what a judge does when he decides to change the normative qualification of an individual case, using different theoretical languages and starting from different discussions. They are presenting that, at a first moment, an action has a qualification X and, at a second moment (after it has been defeated), it has a qualification Y. More precisely, (i) an action was obligatory and is now prohibited or facultative; (ii) an action was prohibited and is now obligatory, facultative or permitted; (iii) an action was facultative and is now either obligatory or prohibited; or (iv) an action was obligatory, prohibited, facultative or permitted and is now indeterminate.

Do all these theories represent the same process and the same result? Is “defeasibility” a term used to express different meanings or is it a term used to express the same meaning, just presented from different perspectives?¹⁵ I consider that the different theories of legal theorists use two different concepts.

It seems to me that the best way to determine whether there are two different senses is not to analyse the defeating norm, but to examine what normative status a defeated norm has (i.e. whether it is relevant to generate duties or not). From this perspective, there are authors who consider that the defeated norm becomes irrelevant to any legal situation (it is cancelled). For others, the defeated norm loses its applicability¹⁶ to qualify a certain action (its non-application is justified), but this does not mean that it cannot be used to justify subsequent duties. Given this difference, I will argue that the best way to understand what legal theorists explain is to distinguish between “internal defeasibility” and “external defeasibility”.

¹⁴ For a similar approach, Luzzati, 2018: 336-37.

¹⁵ For other metatheoretical proposals see Redondo 2012, Brożek 2004, Rodríguez and Sucar 2003.

¹⁶ I’m going to use the notion of applicability formulated by Bulygin 1991 [1982] and Moreso, Navarro 1996.

3.1. Internal Defeasibility

3.1.1. Defeasibility as Cancellability

One group of legal theorists characterises norms as defeasible in order to show the possibility of their cancellation by the interpreter. I will call this idea internal defeasibility. In short, they understand a defeasible norm as a way of expressing that an interpreter has identified a normative solution hypothesis for an individual case. Like any hypothesis, this hypothesis can be rejected or confirmed.

If the hypothesis is confirmed, this means that after collecting (and evaluating) all possible information about the individual case and the normative system of reference, it has been established that the norm identified at the beginning is the applicable norm. This means that no additional information beyond our initial investigation was sufficient to rule out the applicability of the norm. In the case of the rejection of the hypothesis, this means that after obtaining all possible information about the individual case and the normative system of reference, it was determined that the identified norm was an irrelevant norm for the individual case.

The point to emphasise is that, by characterising a norm as defeasible, what we are saying is that a proposed norm has been identified as requiring corroboration or confirmation by the interpreter. Now, the defeat of a norm (discarding of the hypothesis) may be brought about by: (i) change of the normative context; and/or (ii) change of the factual context¹⁷.

By change of normative context, I mean changes to the microsystem of norms applicable to the individual case. This can happen through the inclusion of new norms, the exclusion of norms or a combination of both. Such a change creates a new microsystem of norms that may contain logical problems: Inconsistency, incompleteness or redundancy. After ordering the microsystem (solving such problems), the normative qualification of the individual case may change, leading to the discarding of the qualification provided by the defeasible norm. More precisely, at a time T1, we had identified a set of norms that were systematised for determining the legal qualification of an individual case. At a time T2, we change our information about the norms that are part of this microsystem, as they were not considered in T1, which may result in the legal solution in T2 being different from the one identified in T1. For example, if in T1 we have identified a microsystem of applicable norms that only considers the provisions contained in the laws that imply a normative qualification of an individual case. In T2, the microsystem of applicable norms is varied to consider both the above-mentioned provisions and the relevant precedents, implying a different normative qualification of the same individual case.

I must clarify that by an applicable microsystem of norms I mean all those norms that are internally and externally applicable to the individual case, i.e.: i) that

¹⁷ On this point I closely follow Rodríguez 2002: 195 ff.

regulate the case deductively (internal applicability); and ii) the normative system prescribes that the judge must use them when justifying his institutional decision (external applicability). In this sense, the microsystem of applicable norms does not necessarily is composed of norms that simultaneously belong to the legal order (on the basis of legality or deduction criteria). The duty of the judge to apply a norm (external applicability) does not imply that this norm must belong to the legal system, as he may have the duty to apply norms that are part of non-legal normative systems or norms that no longer belong to the legal system¹⁸.

By change of the factual context, I mean changes in the available information about the individual case. This can happen through the inclusion of new (proven) information, the evaluation of which by the interpreter entails a change in the composition of the individual case. More specifically, at a time T1 we had identified a set of available information about an individual case, and then at a time T2 we realised that this information provided either an incomplete or an incorrect characterisation. To clarify this point, Orunesu, Navarro, Rodríguez and Sucar proposed the distinction between individual cases and judicial cases. Both are types of individual cases (identifiable objects in a given space-time), but they differ in the type of information that is presented. An individual case is an instantiation of a generic case. A judicial case, on the other hand, is: (i) an instantiation of a normatively relevant generic case (provided for in the antecedent of a legal norm); and (ii) whose identification depends on all those factual assertions that are taken as proven. Here I describe the variations that arise when a legal case is identified in T1 and varies in T2 after new evidential information is included (Navarro, Orunesu, Rodríguez, Sucar, 2004).

In this sense, the process and result of cancellation involves a way of determining that a norm is not relevant to regulate the normative qualification of an action or set of actions. In other words, the interpreter decides (for normative reasons or for reasons of assessment of new proven information on the factual premise) that a norm is not relevant to justify his decision in an individual case. This requires further clarification, which I will now develop.

3.1.2. To Defeat Norms as to Cancel Norms

From the problems indicated in the previous section, I am going to concentrate on the changes of the normative premise carried out by judges. Legal theorists who adopt this sense of defeasibility (internal defeasibility) are presenting (from various presuppositions and theoretical languages) a reinterpretable operation by which a norm is replaced by another norm which has, in comparison, a narrower scope (due that is composed of a finer generic case).

¹⁸ For a more detailed analysis of the notion of applicability and its relations with the notion of membership (of a norm to a legal system), see García Yzaguirre 2022: 26-39.

To clarify this analysis, it is useful to present what interpreters do when they identify a norm. They all start by identifying a first meaning attributable to a normative text (or *prima facie* meaning). This meaning is then evaluated to determine whether the first meaning should be confirmed or discarded.

This evaluation involves two axiological judgements that must be differentiated: (a) assessments of what criteria should be used to attribute relevance to properties; and (b) assessments of what interpretative attitudes and criteria of preference should be used to determine how the interpretative process should be carried out.

(a) First, in assessing what criteria should be used to assign relevance to properties, I mean the criteria that a judge thinks should be used to assess the correctness of the interpretation of a normative text. More specifically, I am referring to the criteria used to qualify whether the result of the application of a particular method of interpretation is satisfactory or not, depending on whether this interpretative product provides a general case that adequately identifies and specifies the actions and circumstances to be regulated. In other words, it is the criteria that make it possible to identify the antecedents of norms in a “correct” way (i.e. that he is willing to compromise). In this sense, this first set includes preferences about which normatively irrelevant properties should be considered relevant and which normatively relevant properties should be considered irrelevant.

These correctness criteria can be (i’) systemic or (ii’) inter-systemic. Under the (i’) systemic correctness criteria, I group criteria that prescribe that *prima facie* meanings must not produce normative conflicts with other norms of the normative system to which they belong. If conflicting normative systems are produced, then these meanings should be treated as defeasible. The latter means that the judge assumes that he must include one or more properties to produce a consistent normative system. In contrast, under the (ii’) criteria of inter-systemic correctness, I group criteria that require that *prima facie* meanings must be consistent with norms that are part of another normative system (e.g., with the normative system that constitutes the judge’s critical morality). Thus, if they are predicted to lead to such conflicts, then these meanings must be treated as defeasible. The latter means that the judge considers that he or she must include one or more properties to prevent the occurrence of such a normative conflict (i.e., that the scope of meaning must be all in all the same as that prescribed by the norms of the inter-systematic normative system). Judges may apply either fully systematic, fully inter-systematic or a combination of both criteria of correctness.

If the use of these criteria leads to the conclusion that the *prima facie* meaning is unsatisfactory, this brings the question: should I defeat it?

(b) With the second set of preferences (interpretative attitudes and preference criteria for the formulation of the interpretative process), I explain how the interpretative processes to be applied in a given context should be designed by judges.

Put in Schauer’s terms: I am referring to models of decision-making. Each of

these models reflects a set of norms for designing the interpretative activity to be carried out.

These criteria regulate whether the qualification of a *prima facie* meaning as axiologically unsatisfactory is relevant or not. If they decide that it is irrelevant, this means that they have assumed a way of understanding the interpretative process¹⁹ according to which every result of a given interpretative method must be considered as indefeasible. In these cases, we are thinking of a judge committed to prescriptive theses about how interpretation should be according to which certain interpretative results should be adopted without taking into account their consequences or what they themselves think of them.

For the sake of clarity, I must specify that preferences about which interpretative processes should be used do not necessarily coincide with our preferences about which properties should be relevant. The former are preferences about which interpretation methods should be used, while the latter are preferences about the criteria used to evaluate the results. There may be cases where the methods thought to be appropriate do not produce satisfactory results. An example of this is the case of a judge who (for various reasons) considers that he must interpret normative administrative texts literally and who is confronted with situations in which this meaning does not contain distinctions that should be included according to his criteria of correctness.

According to this distinction, a judge's decision to qualify a *prima facie* unsatisfactory meaning as relevant means that they have adopted an understanding of the interpretative process whereby the unsatisfactory meaning is to be treated as defeasible either in all circumstances or in certain circumstances. If they choose to devise a interpretative process in which it is treated as defeasible in all circumstances, the interpreter will determine the normative relevance of the properties that shape the general case in any process of application of the law.

If they decide to design an interpretative process in which the *prima facie* meaning is treated as defeasible only in certain circumstances, this is a way of expressing that not every qualification as axiologically unsatisfactory is relevant, since only those that exceed a certain degree of tolerance are relevant (or, in other words, those that are axiologically unsatisfactory to an intolerable degree are treated as defeasible). This means that judges apply a criterion that enables them to distinguish between axiologically unsatisfactory tolerable and axiologically unsatisfactory intolerable²⁰.

¹⁹ It should be made clear that it may be the case that an interpretative method offers more than one possible meaning. The scenario I am pointing out in the main text is one in which the judge has already foreseen norms of preference between possible meanings resulting from the same interpretative method. In short, I am reflecting on the case (just for clarity and simplicity) in which all the steps of the interpretative process have already been determined in advance.

²⁰ For clarity I briefly summarise these points: if we adopt this decision-making model and the use of these correctness criteria (the first set of criteria discussed above) leads to qualifying the *prima facie* meaning as satisfactory, then the judge would be willing to choose that meaning in order to attribute this

As we see, the act of defeating is determined by the judgements used to qualify the *prima facie* meanings, as well as by the attitude of the judges towards the outcome of these judgements. When we speak of defeasibility, however, we are not interested in every judgement of dissatisfaction, but only in those that lead us to believe that not all the distinctions that should have been included in the antecedent are included.

These distinctions allow us to present in a better way some of the ideas discussed in the first part of the article: (i) they allow us reconstruct the decisions a judge makes in order to use the dissociation argument (see section 2.1.(i)); ii) the type of decisions judges use when choosing whether to use the formalist or adaptability model when facing an over-inclusive recalcitrant experience (see section 2.1.(ii); and iii) reconstruct the necessity to identify and make explicit the implicit presuppositions of a norm (see section 2.2.). As we can see, the proposals of Guastini, Schauer and Alchourrón present this type of operation.

Each of the indicated theoretical languages presents different information, but all three, I consider, understand the defeat of a norm as its cancellation. Guastini's proposal highlights the type of argument used by judges who have decided to consider that: a) the result of the application of a certain interpretative method is not satisfactory; and b) who have adopted a decision-making model by which they consider that the dissociation argument can be used to solve this type of problem.

Schauer's proposal makes explicit the difference between identifying that a *prima facie* meaning will generate a result considered (axiologically) incorrect and deciding to adopt an interpretative process that involves avoiding such an outcome. Indeed, the difference that this author shows between the notion of recalcitrant experience and the judge's models makes it possible to show that these are two different evaluative decisions.

Alchourrón's proposal is illuminating in showing that the defeat of norms (as cancellation), properly understood, is part of the discussions on how to identify a norm and that the notion of defeasibility does not require to renounce the rules of inference of deductivist deontic logic (i.e., to renounce understanding justification as deduction). Likewise, the author proposed to present the structure of antecedents by incorporating a revision operator in the representation of the antecedent. In this way, a defeasible conditional norm refers to a norm whose generic case has not been completely identified: it is composed of express conditions and implicit presuppositions. This means that the judge must carry out operations of revision with regard to how the antecedent is composed in order to identify a sufficient condition for the consequent. To say that a norm is defeasible ($f_p \rightarrow Or$) is a way of expressing that we are faced with a meaning that is part of the reinterpretative process aimed at

norm to a normative text and, furthermore, to treat that norm as indefeasible (i.e., to consider that the antecedent is composed by a sufficient condition for the consequent). On the other hand, if it is unsatisfactory, the judge is considering that the meaning must be revised, i.e. cancel the norm (defeat it).

making the implicit presuppositions explicit.

As we have already seen, one way of understanding all this theoretical language is that the notion of defeasibility explains the cancellation of a norm as an enrichment of the generic case contained in the norm's antecedent. But this is imprecise.

The expression "enrichment of the generic case contained in the antecedent of the norm" is ambiguous, since it can be understood in two ways: (i) replacing one generic case with another containing a new property connected to the remaining property by a disjunction; or (ii) replacing one generic case with another containing a new property connected to the remaining property by a conjunction. Sense (i) considers acts of the judge that include a new property to extend the scope of the antecedent. This first sense is not relevant for explanations of defeasibility. In contrast, sense (ii) considers acts of the judge that achieve two different types of results. On the one hand, a new property can be included in a conjunctive relation with the other properties included in the generic case to reduce a problem of linguistic indeterminacy (semantic vagueness). This is the case when we are confronted with an individual case where we cannot determine whether it is within or outside the scope of a norm. One of the ways to determine whether this individual case is an instantiation of the generic case or not is to include a new property in conjunctive relation to the other properties. Such an operation involves determining the class of cases that exemplifies the analysed individual case outside the scope of the norm, without problems of linguistic indeterminacy. For this reason, this sense is not relevant for explanations of defeasibility. On the other hand, a new property can be included in conjunctive relation to the other properties contained in the generic case in order to vary the normative qualification of a certain type of individual case. This is the case when a judge considers that not all the elements of a category should have the same normative qualification, but that it is correct that part of these elements have such a normative qualification and the rest of the elements do not have the same normative qualification. The inclusion of the new property has the effect of specifying which elements should have a particular normative qualification and excluding the remaining elements that do not have this specification from this qualification. This is the sense in which this first understanding of defeasibility is best understood by many legal theorists.

In this sense, all these approaches, with different terminology, reconstruct legal practise as an enrichment of the generic case contained in the antecedent of the norm, understood as a case of restrictive corrective interpretation, i.e. an interpreter who rejects one *prima facie* meaning and chooses another that has a narrower scope of application in comparison, because it contains more distinctions in the antecedent. In other words, all these approaches to the notion of defeasibility share the thesis that "defeating" refers to the activity of comparing a first way of interpreting a provision with a more specific one and choosing the latter on the grounds that it contains a finer antecedent.

With these precisions, the notion of internal defeasibility presents an interpretative process in which judges: (i) identify a first meaning containing a generic case composed of a given set of relevant properties; (ii) identify a normatively irrelevant property; (iii) assess such a property and consider that it should be considered normatively relevant; (iv) identify a meaning containing a comparatively finer generic case, composed of the set of relevant properties of the first meaning together with the property they consider should be relevant (in conjunctive relation); (v) make, on the basis of their attitudes and preferences about how interpretative processes should be, an assessment of whether to retain the first identified generic case or whether to choose the second generic case; and (vi.a) if they decide to attribute to the provision under interpretation the meaning envisaged by the first generic case, then they have decided to treat that meaning as indefeasible; or (vi.b) if they decide to attribute to the provision under interpretation the meaning envisaged by the second generic case, then they have decided to defeat the first meaning and treat this second meaning, in relation to the individual case, as indefeasible.

The inevitable result of having carried out this operation is that the defeated norm is no longer relevant to the case. It is, as stated at the beginning of this subsection, cancelled. In all these cases, a defeated norm is a norm that is not apt to generate any subsequent duty, so it cannot be considered violated.

For clarity let us see how we could reconstruct the decision of a judge who was confronted with the case of the child living with ASD seen in the Introduction. In that case, as we saw, a judge considered that the quarantine regulation should not be used to regulate the conduct of a parent with a child living with ASD. This meant that they should neither be coerced to return home, nor should they be fined for leaving home during quarantine.

Initially, the *prima facie* meaning “If people leave home during quarantine, then it is obligatory to coerce them to return home and impose a fine” (in formal terms $(p \rightarrow Oq.r)$) had been identified. After having considered this normative qualification as unsatisfactory and having designed an interpretative process in which this unsatisfactoriness is considered normatively relevant, the interpreter carries out a restrictive corrective reinterpretation. As a result of such an operation the interpreter identifies and uses a new meaning: “If people leave home during quarantine and do not do so for safeguarding their personal mental health or of a person under their responsibility, then it is obligatory to coerce them to return home and impose a fine on them” (in formal terms: $(p.\neg s \rightarrow Oq.r)$). The result is to have narrowed the scope of the norm and thus to make it irrelevant for qualifying the conduct of leaving home during quarantine.

However, this is not the only idea that legal theorists are thinking about. Let us now analyse the second meaning of “defeasibility”.

3.2. External Defeasibility

3.2.1. Defeasibility as Justification

A second way of understanding the expression “defeasible norm” is to express that the norm determines the qualification of an individual case, unless another norm overrides it (has, as a product of a judge’s decision, a superior hierarchy). In contrast to what was stated in the previous section, the meaning of this statement imply that we are dealing with an applicable norm and not just an apparently applicable norm. I will refer to this idea as external defeasibility.

To characterise a norm as defeasible is not to present a hypothesis on the identification of a norm, but to present a norm whose belonging to the microsystem of norms applicable to an individual case is established (it is internally and externally applicable). At the same time, the possibility is recognised that it may give rise to situations of inconsistency with other norms and that the norm will not be applied once the inconsistency is resolved (although it is applicable)²¹. In this way, the statement that a norm is defeasible is an indication that it is applicable to an individual case, provided that this case does not have some normatively relevant property that makes it subsumable under another norm that has a higher hierarchy within the normative system (see also Hintikka 1969: 191, 204 ff.).

Regarding the hierarchy (or order) of norms within a system, we can be faced with two scenarios: (i) a system composed of ordered norms; and (ii) a system composed of unordered norms. Scenario (i) assumes a system in which the relationships between the norms are already established. This case is not relevant for the current discussion. Scenario (ii) assumes a system that suffers from indeterminacy in the case of inconsistencies. If two norms have the same hierarchical rank and offer incompatible normative consequences for the same individual case, then the judge has not rationally decided which norm to apply to the case. In such a case, it is within the judge’s discretion to decide which of the two norms should be applied to resolve the case, all things considered. This is the type of scenario that is relevant to the current discussions.

In this sense, the characterisation of defeasibility is descriptive and relational: it accounts for a feature of the type of relationship of one norm to another(s). Two norms are defeasible with respect to each other, but only one of them (the one decided by the judge) will be a norm that defeats the other. The defeating norm is the norm applied to qualify the individual case. The defeated norm does not lose its identity or its membership in the micro-system of applicable norms, as it still continues to regulate the individual case.

²¹ In argumentation theory this is often presented as the resolution of difficult cases. See MacCormick 1978: 257-58, MacCormick 1995:107.

The non-preferred norm (or defeated norm) can be violated²² which entails triggering (depending on each normative system) the execution of compensatory duties, i.e. actions or responses that repair the harm caused. These presuppose that the agent has a duty to repair the violation or to perform some duty as a result of his non-compliance.

In moral philosophy, this point is expressed as a case of breach of duty that creates a moral residue (Williams 1979: 223-34, Williams 1973: 172 ff, Bayón 1991: 384-85, Brummer 1996). In the theory of legal rights, the topic is discussed under the concept of the infringement of rights (Thomson 1986: 40 ff, Feinberg, 1978: 102 ff, Botterrell 2009). In deontic logic, the emergence of compensatory duties was (and is) discussed by examining the Chisholm paradox. This refers to the situation in which there are obligations that are a consequence of the violation of another obligation (Alarcón 1990: 188, Rodríguez 2002: 210, Ausín 2005: 66, Makinson 1999: 35).

These clarifications make the difference between the two senses explicit from the perspective of the defeated norm. If the cancellation of a norm is a way of signalling that it has been concluded that the norm is irrelevant for the individual case, then it is not possible to speak of a violation of such norms. A cancelled norm is not capable of giving rise to countervailing duties. In contrast, the justification for not applying a norm makes it possible to reconstruct the reasons that give rise to an ordering between norms. A defeated norm (or non-preferred norm) is not a norm that loses relevance or applicability to the individual case, it is just a norm that is not used (for justified reasons) in the justification of the institutional decision. Since the state of affairs prescribed by the norm has not been fulfilled, such an affectation may entail (depending on the normative system) that the affected person is redressed in some way (compensatory duties or moral residue are activated) (Raz 1974: 30-5, Chisholm 1974: 46). As we can see, cancellation and justification are operations that offer different results.

3.2.2. Defeating Norms as Justification for Non-Application

How do we justify the non-application of an applicable norm? Legal theorists who adopt this sense of defeasibility (external defeasibility) posit (under different assumptions and theoretical languages) the creation of a material hierarchy (Guastini 2018: 175-180) between two incompatible norms.

This conceptualisation has been formulated by those who consider that the judges, when resolving an inconsistency, introduce a criterion of preference between

²² Suppose we have a norm that prescribes an action ($p \rightarrow Oq$). The norm will not be violated if we are in a world p and in which we perform acts to be a world $p.q$ and/or we perform actions to prevent the world from being $\neg q$ (whether by compliance, coincidence, or norm-following). On this understanding, then, we violate that norm if we live in a world p and it is the case that: i) we do not perform actions to achieve q ; ii) we are in a world $p.q$ and we perform actions for $p.\neg q$; or iii) we are in a world $p.q$ and we do not prevent it from becoming $p.\neg q$.

two norms. This operation is carried out to determine which of these two norms should be used to justify the judicial decision²³.

Material hierarchy understood as a relationship of superiority refers to the preference of one norm over another created through criteria that deal with how to resolve conflicts between norms by using criteria of preference between norms.

As Ferrer and Rodríguez rightly point out, we must distinguish between two elements: firstly, the hierarchy between norms and, secondly, the preference relations between norms that create such a hierarchy. A hierarchical system refers to the assumption that within a set we have created jointly exhaustive and mutually exclusive subsets (creation partitions) that are in a chain of importance to each other (Ferrer and Rodríguez 2011: 151-154).

The preference criteria determine which norms are part of the system of norms applicable to the case. In other words, which norms should the judge use when deciding how to resolve the case. The preference criteria between the norms (and the hierarchies they create between the sets of norms) enable us to resolve normative conflicts.

The preference relations between norms can be constructed in two ways: as unconditional preferences or as conditional preferences (Ferrer and Rodríguez 2011: 156 ff)²⁴. The first possibility refers to the fact that whenever both norms are in conflict with each other, one is preferred over the other in all possible scenarios. In other words, when N1 is in conflict with N2, the preference relationship introduced by an N3 norm establishes that N1 always outweigh N2, for example.

On the other hand, conditional preference relations between one norm and another refer to the fact that one of these norms prevails over the other in certain circumstances, but this is not necessarily the case in other circumstances (the preference may be reversed). An example of this idea is the consideration of a conflict between rights, where in some cases one right is preferred to another, but in other circumstances the reverse must be resolved.

The difference between an unconditional and a conditional preference in this sense refers to the set of particular cases to which they are applicable. Unconditional preferences are constructed for any case of conflict between one particular norm and another. In contrast, conditional preferences are constructed for all cases in which one type of conflict occurs, but not for the other possibilities. These are not qualitative differences, but differences in the scope of the individual preference relationships.

²³ This type of conceptualisation is used, for example, by those who theorise about how to resolve a conflict between principles. See Kersic, García Yzaguirre, 2022.

²⁴ If we have a conflict between criteria of preference, it is possible to identify or create (depending on each normative system) a meta-criterion of preference, for example, by those who argue that in case the *lex superior* conflicts with the *lex posterior* criterion we must always prefer the *lex superior* criterion, supported, for example, as a way to guarantee constitutional supremacy over any other norm in the system.

Does this mean that the non-preferred norm is varied, and does it imply a restrictive reinterpretation that involves varying the normative qualification of an action? This sense of “defeasibility” is not intended to show an operation of changing the identification of the norm. This will continue to regulate the case, but it should not be used in the institutional decision on the matter. In the case of a conflict of rights, for example, we would have: i) two rights regulate the same action; ii) a reason has been created to operate as a criterion of preference that allows to answer, in a conditional or conditional manner, which is the better right; and iii) it has been determined that, using the criterion of preference, only one of the rights in collision is applicable to regulate the conduct (without the non-preferred right losing relevance).

These distinctions allow us to understand what the theoretical language of Dolcetti and Ratti (see section 2.3) is presenting. These authors are not trying to clarify a process of norm identification, instead they are presenting what we do when we resolve an inconsistency. In cases of antinomy between an express norm and an implicit norm, as we have seen, it will be necessary to create a criterion of preference that allows us to determine which has a higher hierarchy. Cases of “reasoned direct application” reflect a preference in favour of the express norm. The cases of creation of an implicit exception reflect a preference in favour of the implicit norm. These authors do not show that the defeated rule loses its identity, what they show is a loss of (external) applicability.

At this point it is worth explaining the difference between the assertion that a norm is defeasible and the assertion that it is indefeasible, as well as the normative status of the defeated norm: (i) The assertion that a norm is defeasible means that the norm is not ordered in relation to other(s), i.e., (ii) the predicate that a norm is indefeasible is an expression that can be used to indicate either that a norm is preferred over another norm, i.e. that in case of conflict a norm has a higher order (so that it cannot be overridden by it), or that a norm is preferred over any other norm in the normative system, i.e. that it can never be overridden (the judge has an absolute preference in favour of this norm); and iii) a defeated norm is a norm that loses its applicability only with the normative qualification of the action, but this does not imply that it cannot be violated and thus does not trigger compensatory duties.

In order to be clear, I will recapitulate and insist on the proposed distinction.

Internal and external defeasibility are distinguished by: i) the type of the object to which they refer; ii) the type of operation to which said object is subjected, and iii) the type of result that each operation has. These three points are just a clearer way of saying that, to defeat a norm or to create an implicit exception, the judge has two options (he will choose one or the other, depending on whether he is competent to do so and on his interpretative preferences).

Regarding i) (type of object). We have seen that the internal defeasibility or cancellation of norms alludes to possible meanings. That is, to make a hypothesis of the solution of a judicial case (as such, it is only a possible solution subject to evalua-

tion). On the other hand, the external defeasibility or justification of a violation of a norm refers to already identified norms, that is, normative solutions that are already part of the micro-system of norms applicable to the case.

Regarding ii) (type of operation to which the object is subjected). The notion of internal defeasibility as an operation of cancellation, as we have seen, is carried out in the process of identifying a norm and involves making a series of evaluative decisions about what is the best design of the interpretive process. If a judge considers that the axiological defects of a *prima facie* meaning should be considered normatively relevant, then they will decide to activate the necessary steps to perform a restrictive reinterpretation (i.e., to introduce distinctions in the antecedent of the *prima facie* meaning). This entails, as we have seen, making evaluative decisions as to what criteria should be used to attribute normative relevance to properties and how the interpretive process should be formulated.

Instead, the notion of external defeasibility as an operation to justify the violation of a norm is carried out during the process of application of a norm and implies, as we have seen, that the judge considers that he has concluded the process of identifying the relevant norms. This means that he considers that he has identified (at least) two norms, (each of these is a conditional norm whose antecedent contains, at least, a sufficient condition for the consequence), which are internally and externally applicable to the same individual case, and that are inconsistent with each other. To resolve the individual case, the judge must make an evaluative decision as to which of these norms best satisfies his criteria of correctness: he must create a preference relation.

As we can see, internal defeasibility supposes a process of assessing the meaning with which the interpreter is going to commit to defend as the identification of the “correct” norm. On the other hand, external defeasibility supposes a process of hierarchization of “correctly identified” norms. As we can see, both processes are different.

Regarding iii) (the result of the operation). Each of the operations supposes, due to the object and type of acts carried out, different results. Internal defeasibility supposes the defeat of a norm as its cancellation. This means that the evaluated meaning is discarded for not having all the specifications it should contain. In other words, it involves determining that the normative qualification identified by the *prima facie* meaning should not be applied, so it is decided to render it inapplicable (it is made internally and externally inapplicable). More precisely, it becomes irrelevant to the judicial case.

Instead, external defeasibility supposes the defeat of a norm as a way of justifying its violation. This means that the non-preferred norm in the hierarchy will not be used as the normative premise in judicial reasoning, but it does not mean that it is no longer relevant to the case. Its non-use to qualify the action is normatively relevant, in the sense that the legal system can activate (if so provided) a series of compensatory duties for the violation. As we can see, this external defeat supposes that the scope of the norm will not vary, but it will become externally inapplicable.

Each operation is carried out at different times, requires different valuations, is performed on different inputs, and generates different outputs. The cancellation process necessarily generates irrelevance of a meaning. The justification (or hierarchization) process necessarily generates a relevant norm that will not be used to resolve the case. Both are different ways of creating implicit exceptions that must be distinguished.

Cases of conflict between rights are useful to show the difference in these two ways of understanding the defeat of norms. On the one hand, cancelling a right as a way of resolving a conflict between rights involves the process and result of having designed an interpretative process by which it is determined that a person, at first, had the appearance of being the holder of a right, but all things considered it is determined that he is not the holder of that right. What we do, as we have seen, is to vary the scope of a norm (the one that attributes the right to a person) so that it ceases to regulate the individual case. On the other hand, justifying the non-application of a right implies the process and result of having created a (mobile) hierarchy among rights, by which it is determined that a person's right will not be protected. This operation does not imply that the agent ceases to be the holder of that right, but that its affectation is justified. This will generate, depending on the normative system, compensatory duties²⁵.

For clarity let see how the use of external defeasibility would impact in the resolution of the case of the child living with ASD seen in the Introduction. Let us assume that the judge considered that the protection of the child's mental health does not cancel the duty of quarantine, but rather justifies its violation.

In this scenario, unlike the previous section, the operation and outcome do not imply that the parent and child living with ASD are outside the scope of the quar-

²⁵ One of the reviewers, whose comments I am very grateful for, affirmed that there is no sharp distinction between cancellation with no normative residue, and overriding with normative residue and offered the following example to show this point. Let's imagine that I made a promise to visit him, but one of two scenarios occurs: a) my mother suffers an accident that requires me to take her to the hospital, or b) I have a headache. In both cases, he/she points out, I will have to apologize for breaking my promise to visit him. Against this, I believe that the proposed alternatives in the example make the same point. Both are scenarios in which regret is justified. In terms of Vranas, it is appropriate to feel this way and, therefore, the moral residue of having to offer apologies is activated (see Vranas 2018). In both cases the duty to fulfill a promise has been disobeyed and they express justified non-performance of it (each, as can be seen, for different reasons). Cases of cancellation with no normative residue are cases in which no such disobedience is generated, that is, the *pacta sunt servada* ceases to be normatively relevant. For example, suppose I promise a friend to paint his house, but then I find out that his house collapsed. In this scenario, the obligation to fulfill my promise is cancelled (it is irrelevant) and I will not have to give an apology for not going to paint. This would be a different case than, for example, not going to paint because my mother became severely ill and I decided to take care of her. In the latter case I will have to apologize for not going to paint (see Sinnott-Armstrong 2006: 68-69, 215). In other words, the difference between cancellation and justification will be determined by answering the question of whether the defeated norm still applies to the individual case or not. If it is still applicable, then countervailing duties may be triggered (if any).

antine norm. What the interpreter implies is that it is accepted that both individuals are in breach of the quarantine norm. Moreover, in the face of such a breach, the interpreter may establish several compensatory duties (either through a comprehensive interpretation of another norm within the normative system or through an act of judicial creation of law). Such compensatory duties could be, for example: i) the duty not to stay on the street for more than a certain time; ii) the duty to notify the local health authority in advance of leaving the street; iii) the duty to stay away from other people; and others. As we can see, this would be another way to solve the situation.

The difference between internal defeasibility and external defeasibility can be used to show different kinds of judicial creation of implicit exceptions. In other words, to say that the judge defeated the rule regulating quarantine is an ambiguous expression: it may imply that he cancelled it (rendered it irrelevant) or that he overrode it (rendered it inapplicable, but not irrelevant).

4. Conclusions

Legal theorists often characterise norms as “defeasible” to express that they are subject to implicit exceptions. The presentation of such a characterisation has taken place in different theoretical languages and in different discussions. From a meta-theoretical point of view, we can distinguish between authors who have conceptualised defeasibility as part of theories for identifying legal norms (Riccardo Guastini and Frederick Schauer), for representing the structure of legal norms (Carlos Alchourrón) and for resolving conflicts between norms (Andrea Dolcetti together with Giovanni Battista Ratti).

Given this diversity of conceptualisation proposals, this paper is concerned with the question of whether all these theories use the same concept (which is only approximated from different theoretical languages) or whether they use the same term to represent different concepts. In this context, I have argued that the main conceptualisations of defeasibility can be better understood if we distinguish them into two senses of defeasibility: internal defeasibility and external defeasibility.

Those who are interested in internal defeasibility argue that the creation of exceptions to a norm is a process and a result of a restrictive, corrective reinterpretation of a normative text. While using different theoretical vocabularies, they all agree that judges first establish a *prima facie* meaning. This meaning is then evaluated in conjunction with other possible meanings to determine which one is correct (according to their assumed systemic or inter-systemic criteria of correctness). Finally, they all consider that “defeating a norm” is a way of representing the actions necessary to avoid choosing the *prima facie* meaning in an interpretive process and instead choose another meaning that contains more distinctions in the antecedent.

The defeated meaning is cancelled, i.e. it is considered irrelevant for the regulation of the individual case. It is therefore a meaning that cannot be violated and that is not capable of generating compensatory duties (or moral residues).

Those who are interested in external defeasibility argue that the creation of exceptions to a norm is a process and a result of identifying a norm that is relevant to the individual case but must not be used to justify an institutional decision. While using different theoretical vocabularies, they all agree that judges first identify a microsystem of norms that is applicable to and inconsistent with the individual case. To resolve this inconsistency, they create a third norm that establishes a preferential relationship between the conflicting norms. The defeating norm is the preferred norm (and must be used as the normative premise for the decision) and the defeated norm is the non-preferred norm (and must not be used as the normative premise for the decision). It should be made clear that this defeated norm does not lose its identity, as it remains relevant to regulate behaviour in a way that can be violated and, in view of this, is apt to generate compensatory duties (or moral residues).

In this sense, if a norm is internally defeasible it doesn't inform us about its external defeasibility. Each account has different features and does not imply the other. A norm can be both internally defeasible and externally indefeasible and viceversa (?).

Finally, it is concluded that the defeasibility of a norm (whether in the internal or external sense) is not a property of norms, but a concept that represents a series of operations (and their results) performed by interpreters. The difference lies in whether it is an interpretative operation carried out with possible meanings or whether it is an ordering operation carried out with an identified norm.

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