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JUDGES AND EXCEPTIONS: DEFEASIBILITY OF NORMS BY JUDICIAL ACT

Víctor García Yzaguirre

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Víctor García Yzaguirre*

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The purpose of the paper is to show that the introduction of exceptions in rules by judges is a manifestation of creative role of courts of law that can be explained as an act of defeating norms. In order to achieve this objective, I will carry out the following steps: i) I will formulate a distinction of normal and abnormal cases in order to indicate what type of cases the judges consider it justified to except a rule; and ii) I will present two types of analysis of the operations carried out by the judges to justify the defeat of a rule, the first one based on the idea of loss of applicability by the creation of a hierarchy between norms, and the second one based on the idea of modification of the scope of the norm.

Keywords: *Applicability, exceptions, normative inconsistency, recalcitrant experiences, scope and force of norms.*

1. INTRODUCTION

The purpose of this paper is present to ways of analyzing how judges, through their jurisdictional decisions, can create exceptions to rules, whether these rules are identified from a law created by a parliament or contained in a precedent. In order to achieve this objective, I will proceed with the following steps: I will start by distinguishing between normal and abnormal cases in order to differentiate situations in which judges qualify cases where they should introduce an exception to a rule. After that I will present two types of alternative analysis on how to create an exception that have been offer by the studies in defeasibility of norms: i) as a result of a conflict between two norms; or ii) as a result of a conflict between a norm and its justification.

* Author is a PhD student of the Austral University of Chile and University of Genoa, *garciayzaguirre@gmail.com*

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In this regard, I must clarify that my analysis will solely focus on conditional prescriptive norms. In this sense, my analysis pretend only to be a possible way of explaining how judges create exceptions to rules composed of an antecedent and a normative consequence that contains a deontic qualified action or state of affairs.

2. THE DISTINCTION BETWEEN NORMAL CASES AND ABNORMAL CASES

Usually when we understand the composition of a rule by the structure "if p then q", we are not stating that verification of p is a sufficient condition of q, but what is being said is that "if p normally then q" (Navarro, Rodríguez 2014, 94). This means that we have two types of cases: i) normal cases in which it is not a problem to assume that p verification leads to q; and ii) abnormal cases in which p verification does not guarantee q. With this distinction between normality and abnormality we could clarify in which cases the law applicators carry out operations to exempt norms. In this sense, abnormality refers to all those cases that judges consider could create an exception.[1]

The term "normality" is ambiguous[2], so it is necessary to specify the meaning that interests us here. It seems relevant to me in this type

[1] I must point out that when facing a case of abnormality, judges could have at least two attitudes: either assuming that they must exempt the norm; or assuming that they have the faculty (understood as the permission to do and not to do) to create an exception to the norm, that is, that they are allowed to do so or not. I am only interested in clarifying the case in which the applicator of the law decides to except the rule, whether by assuming a prescription or a faculty.

[2] Among the many possible meanings that we can attribute to "normality" I have identified the following (this is not a closed list, it serves only to exemplify the problem of ambiguity):

1 Understood as an unjustified expectation, that is, as cases in which it is assumed that an event will occur, even though we have no guarantee that it will happen (for example, we see fish eggs and assume that there will be fish, without knowing the statistical success rate of how many fish are likely to be born in the circumstances in which those eggs are found).

2 Understood as a regularity, that is to say, as a generalization based on having information about a certain frequency of a certain event occurring after certain circumstances.

3 Understood as an unquestioned assertion. This in a prescriptive and descriptive sense. Prescriptive because it is an affirmation that, within public space, it is not admitted to doubt (for example, in some societies it is not allow to question in public debate the statement "it is wrong to

of discussion to consider a "normative normality" as a complex notion. Normality and abnormality are preached from the possible results that would be generated by the application of a rule, in other words, it refers to whether the judge is willing to order the execution of a certain consequence to a certain subject in a certain context.

This normative normality involves two types of alternative considerations: a systematic normality and evaluative normality. Systematic normality refers to the cases in which applying a rule does not contradict any other rule applicable to the same case. This is an analysis considering only the relation of the norm with other applicable norms. In this sense, normality refers to all those cases in which the normative system offers a univocal answer, in more precise manner: cases of systematic consistency.

The evaluative normality refers to cases in which the prescription contained in a norm is also covered by the justification of the same norm or by another principle also applicable to the case. This is an analysis of the impact of the application of the norm considering two aspects: either the relationship of the norm with its justification or the relationship of the norm with other evaluative considerations regarding how an action or state of affairs should be regulated.

The normative abnormality relates to the scenarios in which, if the norm were applied, it would generate unacceptable consequences.

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devour newborn children"). Descriptive as it is an affirmation that has not so far been controversial in public spaces.

4 Understood as a desired state. As a reference to how certain future events should be (according to some criteria of axiological correction).

5 Understood as a regulative model. It refers to the type of habitual supposition that is used to design normative frameworks. For example, this sense is used by the critical legal studies that sustains that the law in a certain country has been approved assuming that the regulated agents are male, between 20 and 50 years old, heterosexual, without any type of disability, white, catholic, economically autonomous, among others.

6 Understood as a standard of knowledge. It refers to those criteria that are used to evaluate the type of information that a person should possess, according to the factual circumstances in which they usually find themselves (for example, the reasonable consumer standard used in consumer protection).

7 Understood as a reference to the absence of change. It refers to those cases in which we want to realize that the contextual (relevant) elements have not changed (for example, the use of the clause *ceteris paribus*).

8 Understood as social moral. It refers to all of them criteria that are used as criteria of social moral correction.

Unacceptable in two senses: caused by identifying a normative inconsistency (systematic abnormality) or by lack of justification of the prescription contained in the norm (evaluative abnormality).[3]

According to the first option, there is an unacceptable consequence if the judge considers that the normative system prescribes the application of rules that are incompatible with each other. The judge, in order to recover normality (systematic consistency), must prefer one rule over the other. This implies the creation of a criterion of preference which implies the non-application of an applicable rule, in other words, defeat (or exempt) its application.

According to the second option, on the other hand, there is an unacceptable consequence if the prescription contained in a norm is outside the scope of the reasons justifying the norm. If the judge considers that the reasons justifying the rules are normatively relevant, then he will not apply the rule to all those cases that are covered by the justification. In other words, the non-correspondence between the prescription and its justification leads to the non-appliance of the prescription, that is to say, to defeat it or to exempt it. In the following lines I will specify each of these options.

It should be noted that normality does not imply immutability: the qualification of a case as normal or as abnormal depends on considerations on how we identify the norms and/or justifications applicable to the case. From this point, then, it is not possible to point out that the effects of applying a norm cannot be, at a later time, qualified as abnormal and, because of this, an exception could be created. Each moment represents an opportunity to make new judgments regarding the normality or abnormality of a case.

[3] It may be the case that our information on the events of the individual case also varies, which has as a consequence that norms considered up to the present moment irrelevant become relevant (and, at the same time, norms that were considered relevant, we now realize that they are irrelevant to the case). These are the cases where a better understanding of the (relevant) facts of the individual case allows us to identify which is the applicable standard. Let's look at the following example: one person hires another to transport goods on an agreed date. The date arrives and the goods have not arrived, so the case is applicable to the regulation on contract breaching. Sometime later we received information that the carrier endured a tsunami that destroyed his transports and, therefore, the goods. This rules out (according to the regulation of the country), the applicability of the rules of contract breaching. As we can see, this epistemic aspect is only relevant to determine which is the relevant norm or norms. Presented this way, the epistemic problem (what happened) precedes the normative problem (solving an inconsistency between norms) and the discussion on the creation of exceptions is normative, not epistemic.

2.1. Abnormality as a conflict between rules

Cases of systematic abnormality refer to cases in which judges have identified an inconsistency in the normative system. By inconsistency I mean the logical impossibility of compliance generated by at least two applicable rules that regulate the same generic case, but with different and incompatible normative consequences. To explain it in a more precise manner, we have a conflict every time we have a case of inconsistent deontic modalities in respect to two generic cases that are totally or partially identical (Ross 1963, 124; Bobbio 2002, 188; Gavazzi 1959, 52–55; Chiassoni 2011, 288; Navarro, Rodríguez 2014, 104).

In the context of judicial decision-making, cases of normative inconsistency are presented with rules that are applicable. The applicability of a rule refers to the duty imposed by a rule N1 to the law applicator (e.g., a judge) to use a rule N2 (whether or not belonging to the legal system), in the justification of his or her institutional decision to resolve a particular case (Rodriguez, Vicente 2009, 186; Navarro et al 2004, 337; Ferrer, Rodríguez 2011, 185; Pino 2010, 63).

As can be seen, under this way of understanding applicability, there is a relation between a norm that establishes a prescription to use another norm each time an individual case is verified that subsumes in its antecedent. This relationship implies, as Moreso and Navarro have differentiated, two notions related to each other: internal applicability and external applicability of general rules to particular cases.[4]

An N1 norm is internally applicable in a determined moment to a particular case whenever this is an instantiation or exemplification of the generic case contained in the antecedent of the norm. As can be seen, with this notion the relation between a norm and an individual case is described (case that subsumes in the scope of the general norm) (Von Wright 1970, 90). In more precise terms, internal applicability accounts for the scope of the norms, understanding this concept as the set of cases to which the norm has deductively resolved (Navarro 2005, 118).

An N1 norm is externally applicable in a specific moment to an individual case that is an example of the generic case C, provided that the following conditions are jointly satisfied: i) the generic case C is

[4] This distinction was initially introduced by Moreso and Navarro (2005, 201–209). In what follows I will assume the reconstructions and critiques contained in Navarro (2005, 107), Rodríguez and Vicente (2009, 190) and in Navarro, Rodríguez (2014, 132).

foreseen in the antecedent of the N1 norm, that is, is internally applicable; and ii) another N2 norm, belonging to the legal system, orders the law applicator to use N1 in the justification of his decisions each time they are faced with an example of the generic case C (Navarro, Rodríguez 2014, 129; Navarro et al 2004, 345; Rodriguez, Vicente 2009, 191; Ferrer, Rodríguez 2011, 61).

The external applicability of norms, in this sense, is a descriptive notion of the force of a general norm, this is, the aptitude of norms to operate as normative premises in the justification of institutional decisions. To be more precise, it counts for the duty of a law applicator of the right to apply this general rule in the solution of the case (Navarro 2005, 108–109). With this concept we can describe a triadic relationship between an N2 norm with an N1 norm (imposes the duty to apply it) and an individual case that is an instantiation of a generic C case.[5]

It should be pointed out that the set of rules applicable is not equivalent to the set of rules belonging to a legal system. The duty of the law applicator to apply a rule does not imply that this rule must belong to the legal system (Orunesu, Rodríguez, Sucar 2001, 29; Navarro, Rodríguez 2014, 135; Rodriguez, Vicente 2009, 192), since he may have the duty to apply rules that are part of non-legal normative systems or rules that no longer belong to the legal system. In these cases, the judges have the duty to apply a rule that is part of another legal system, therefore, an extra-legal[6] rule will be externally applicable.[7]

[5] For the purpose of clear and direct exposure, I refer to specific standards, without prejudice to the fact that applicability may be predicated to classes of standards. To be more precise, external applicability can be used to describe both a triadic relationship composed of specific rules and an individual case, and a triadic relationship composed of classes of rules and a class of cases. This same precision must be considered for the relations between norms and cases clarified by internal applicability.

[6] Navarro y Rodríguez explain this in following terms: «[u]nlike internal applicability of legal norms, the connection between the externally applicable norms and a certain case depends on *another* norm or set of norms containing a certain criterion of applicability. This is the reason why we said that the connection between externally applicable norms and cases is *extrinsic* or *institutional*» (Navarro, Rodríguez 2014, 135). See also: Ferrer, Rodríguez (2011, 181). In this sense, we have the following set of possibilities:

i. Inapplicable rule, but belonging to the legal system;
ii. Inapplicable rule that does not belong to the legal system;
iii. Applicable rule belonging to the legal system; or
iv. Applicable rule, but not part of the legal system.

[7] As we can see, this framework also could be used to explain an inconsistency between a legal rule and a moral rule in case we assume that moral rules are normative relevant in the solution of legal cases.

For example, this is usually the case with regulations in each country in the Private International Law area. In these cases, the judge must use as normative premises of his judgement norms that belong to normative systems of other countries. This doesn't mean that these rules belong to the national normative systems nor that they should belong. Another example are the cases where the judge must use moral rules to solve a case. In these cases, morality is applying a correction criterion without meaning that morals are law.

The case we are interested in is the one where the judge has to rule on a case, but has two internally and externally applicable rules, each of which has different and contradictory[8] normative consequences. In these cases, we must resolve the case by determining which of these two is the rule that the judge must apply to the case. In order to do this, we must create a preferential relation between the two rules.

A relation of preference between norms refers to the criteria by which one norm is privileged over another in case both are applicable to the same case. These criteria can be interpreted in two ways: (i) as preference criteria that affect the membership of a norm (these criteria are used to reject the entry of a new norm into the system because, if they were to enter, they would produce a situation of normative inconsistency); or (ii) as preference criteria that affect the (external) applicability of a norm (these criteria are used as directives addressed to the law applicator to determine which norm to apply in case of conflict and which not, without this implying that the norm not applied ceases to belong to the normative system). All preference criteria affect the external applicability of norms, the effect on membership depends on how each normative system has regulated this matter. In this sense I will sense I will focus on the effect that a preference criterion has on the force of norms.

[8] This allows me to introduce additional precision. It is usually a subject of argument, the we distinguish a precedent "because of a fact", but this is imprecise or, at least, enthymematic. Facts are not by themselves normatively relevant, what we need is for a standard to qualify them as such. In this sense, each time we consider that a fact should not be regulated by the norm what we are doing is pointing out that a norm qualifies this state or action with a different and incompatible deontic modalizer, which is applicable to the case in a way that creates a normative conflict. In this sense, what we do when we make a distinguish is to account for a conflict between two rules: between the rule provided in the preceding and another rule (of the legal system itself or morality or any other, provided that it is externally applicable) and it happens that we consider that we must apply, for the case to be resolved, the solution provided in that other rule. The result of giving preference to that other rule is that the scope of application of the precedent or its assumption of fact has been shortened or delimited.

Among the rules that are part of the system of applicable norms, we can identify or create preference criteria. This means that the rules of that system are related in such a way that some rules take precedence over others. This type of relationship can be created in at least the following ways (Alchourrón, Bulygin 1991, 144; Ferrer, Rodríguez 2011, 150; Bobbio 2002, 342–351; Rodriguez 2002, 159):

i Established by the legislator.[9] This is the case where enunciations which prescribe preferential relationships between other enunciations which are also part of the legal system have been introduced into the legal system;

ii Established by the applicator of the law using non-literalist interpretative directives. This is the case when the applicator introduces a new rule in order to create a hierarchical relationship between two rules that, until now, operated without being related to each other in this way. These criteria may be: by the date of promulgation of the provisions to which the hierarchical norms are attributed (*lex posterior*[10]); by the competence

[9] This point may generate confusion as to how we understand legal interpretation. In effect, if we assume a skeptical conception the legislator introduces dispositions and not norms, so that it is not the legislator, finally, who constructs the criterion of preference, but the interpreter (with more precision: the law applicator). Otherwise, from a non-skeptical conception, it can be attributed to the legislator to have introduced a rule in the sense that he has introduced a linguistic enunciation to the merit of the meanings of the words used. In other words, a literal interpretation of the introduced provision is assumed, so that it results in a normative system conformed by norms identified as clear cases (in a semantic sense). On this point it is not opportune to go deeper at this moment, but for precision purposes (and to make a charitable reconstruction of the theses I am following) for the effects of this section, pointing out that the legislator has created this preference I do so in the sense that a literal interpretation of the provision created legislatively has been chosen.

[10] The preference criteria allow a type of theoretical and practical analysis. Theoretical in the sense that they allow us to classify, according to the properties of the norms and how it relates to others, what kind of relationship it has. Also, practical in the sense that they allow us to determine which rule should be applied to the specific case (converts an inconsistent situation into a consistent one). In this sense, the *lex posterior* is a way of calling the relations between norms based on a chronological criterion. Understood as classification criterion, a relationship is identified between two norms by which one norm comes first and the other norm comes after the other, depending on its date of incorporation into the legal system. Understood as criterion of preference, in case a Previous standard and a Later standard establish incompatible solutions for a case to which both are applicable, then the Later standard is preferred.

The *lex superior* is a way of calling the relations between norms based on the hierarchy of their sources. Understood as a classification criterion, a relationship

possessed by the authorities that created the interpreted provision (*lex superior*); by the specialty relationship between the two norms (*lex specialis*); or preferences constructed on the basis of evaluative criteria (by legal construction).

Preferential relationships between rules allow us to resolve conflicts between them. Faced with two rules applicable to a case that prescribe legal consequences that are logically incompatible with each other, a third rule will be the one that determines which of these to choose to be applied to the specific case (Alchourrón, Bulygin 1991, 136). Likewise, it may be the case that we have a conflict between preference criteria (in other words, between conflict resolution criteria), that is to say, it may be the case that two norms that have established preference relations between norms come into conflict with each other.[11]

Preference relations between norms can be presented in two ways: as unconditional preferences or as conditional preferences (Ferrer, Rodríguez 2011, 156). Unconditional preference relationships refer to the preference of one norm (or type of norm) over and above the other norm (or type of norm) to which it relates in any case of possible conflict. In other words, a relation of priority of a norm has been established over all the supposed cases in which they come into conflict with each other. An example of this idea is to consider that whenever the *lex superior* criterion conflicts with the *lex posterior* criterion, we should, in any case, prefer the *lex superior* criterion.

On the other hand, conditional preference relationships refer to the fact that the preference of one norm (or type of norm) exceeds the other norm (or type of norm) with which it relates in the case of a conflict being resolved, but facing new cases of conflict such preference may be reversed. An example of this idea is to consider a case of conflict between rights in which, in light of the facts of the dispute, in some cases one right will be preferred over another, but in the face of different factual premises it will be resolved in an inverse manner.

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is identified between two norms by which one is Superior and the other is Lower one of the other, according to the competence of each authority that created the provision from which the norm was formulated. Understood as preference criterion, in case a Superior standard and an Inferior standard establish incompatible solutions for a case to which both are applicable, then the Superior standard is preferred.

[11] For a very precise and detailed analysis of this point see Guatinoni (2001, 547–558).

In favor of clarity, let's look at an example. We have a case in which a person wants to donate an organ, but is a minor. In this respect, we have two relevant rules:

N1: if discernment (d), then permitted to donate organs (Po)
N2: if minor (m), then prohibited to donate organs (Pho)

Within this microsystem of applicable rules to the case we would have a normative conflict each time the person has discernment and is a minor, because in such cases the action of donating[12] will be permitted and prohibited at the same time. As indicated, in order to resolve this conflict, the law applicator may create a preferential relationship between both norms that may be unconditional or conditional.

If an unconditional preference is built, then each time we have conflict between N1 and N2 it will be resolved so that one rule will prevail over the other. Let us assume, for the purposes of the example, that an unconditional preference of N2 over N1 is constructed, so that each time the properties d and m concur, the normative consequence of the N2 norm (prohibited to donate) will be applied. Under this assumption, the derivative norm (d.m-> Po) has lost its applicability (force).

If a conditional preference is constructed, then we will prefer one rule over the other whenever certain facts are verified, but this preference can be reversed before the occurrence of other facts. To continue with the example, let us consider that it is a minor, with discernment, who wants to donate an organ to his son (property h). Let us think that, for the applicator of the law, in this type of cases, the norm N1 (permissive) must prevail over the norm N2 (prohibitive). In this sense, a relationship of preference is created for permission over prohibition in cases of organ donation by minors, as long as the donation is for the benefit of the donor's child.

[12] We can verify this with the following matrix (Table 1):

Table 1: Matrix of applicable rules in cases of normative conflict

		N1 d->Po	N2 m->Php
d	m	Po	Pho
d	¬m	Po	
¬d	m		Pho
¬d	¬m		

Under this scenario, the derivative norm (d.m.h-> Po) has lost its applicability (force). It could be the case that N1 and N2 may have inverse preference relationships, for example, in the case that the donor is not the beneficiary's mother, or if the donor is 17 years and 11 months old. As noticed, when we are considering the property h what we are doing is blocking the applicability of certain norms derived from N1. This operation, as we see, does not generate a conceptual distinction between unconditional and conditional preferences, since in both the operation and the result is the same, it only differentiates the specification of the conditions that activate the preference relationship. In this sense, between an unconditional and a conditional preference there is a gradual difference.

What is previously explained is a way of presenting the hierarchy, but, as it may have noticed, by considering property h relevant we can understand that we are modifying the set of relevant properties foreseen in the antecedent of the norms. This operation, as we see, does not generate a conceptual distinction of the unconditional preferences with the conditional ones, but between both there is a gradual difference.[13]

As we can see, when judges defeat a rule or, in other words, when they create an exception to a rule (in cases of systematic abnormality) what they do is introduce a preference criterion (unconditional or conditional) between two conflicting rules. In this sense, any judge can create exceptions, since by doing so they only affect the applicability of a rule.

2.2. Abnormality as a conflict between prescription and its justification

An alternative to the previous proposal is to consider the justifications of the rules as normatively relevant in order to determine their applicability. Judges create exceptions each time prescriptions regulate cases that cannot be subsumed in the justification of the rule. But this approach has different theoretical presuppositions that will be now clarified.

[13] As Navarro y Rodríguez point out, Robert Alexy's weight dimension is a metaphorical way of accounting for the construction of conditioned preference criteria that, in addition, would allow the idea of weighting in the light of the circumstances of the case to be reconciled with the pretension of an argumentative university (Navarro, Rodríguez 2014, 158).

I will start by specifying that I will use the theoretical instruments proposed by Frederick Schauer to address this point. For this author norms are understood as a generalization constructed from a purpose or justification (Schauer 2004, 76). In this way, the selection of properties (understood as identifiers of states of things or actions) with which we construct an antecedent of the norm is determined by this justification (in other words, a rule would be a specification of a justification).

This model norm is composed of two levels: a) a prescriptive level or generalization of a justification that possesses a prescription (a conditional norm that contains an order or prohibition to take an action); and b) a justifying level or of reasons that are behind the rules (justification or purpose of the rules, hereinafter underlying reasons). When analyzing whether a rule is applicable to an individual case, one of the following scenarios may occur:

1. The individual case is within the linguistic uses of the terms used at the prescriptive level and within the scope of application of the underlying reasons.
2. The individual case is within the linguistic uses of the terms used at the prescriptive level and outside the scope of the underlying reasons.
3. The individual case is not within the linguistic uses of the terms used at the prescriptive level, but within the scope of the underlying reasons.
4. The individual case is outside the linguistic uses of the terms used at the prescriptive level and outside the scope of the underlying reasons.

The first and fourth cases are not problematic, as they are situations of application and non-application respectively. We are concerned with the second and third cases, those in which the antecedent constitutes an inadequate specification of the justifying level. These are recalcitrant experiences (Schauer 2004, 98) or cases in which we have reasons based on the underlying reasons of the rule to vary the verdict that would be obtained by applying the prescriptive level. These are classified as over-inclusive and under-inclusive.

Over-inclusive recalcitrant experiences are those in which the individual case is subsumable at the prescriptive level, but is not covered by the scope of application of the justifying level. In these cases,

the antecedent should have included more qualities or assets in order to exclude the individual case with the consequence.

Under-inclusive recalcitrant experiences are those in which the individual case is not subsumable at the prescriptive level, but is covered by the scope of application of the justifying level. In these cases, the antecedent must be expanded to cover all the cases for which the prescriptive dimension was formulated (this is achieve eliminating one property contain in the antecedent).

I think we can stablish a conceptual connection with the over-inclusive recalcitrant experiences and defeasibility or the creation of exceptions. Let us clarify a few points:

A case of over-inclusive experience only brings us to ask ourselves about how to solve a conflict between the solution foreseen by the prescriptive level and the solution that we can derive from the justifying level. One possibility is to assume the suboptimal result, that is, to resolve the individual case in spite of the fact that the verdict is not entirely correct based on some criterion of extra systemic correction. The other option is to create an exception to the norm or to defeat it. Defeasibility, in this way, alludes to the fact that in any case of recalcitrant over-inclusive experience, priority must be given in favor of the solution derived from the underlying (Rodriguez 2002, 95) reasons.

There is a difference between this way of understanding the creation of exceptions and the previous one (creation of a hierarchy by stablishing a preference criteria). When we resolve an over-inclusive recalcitrant experience by applying the justification over the prescription, it means that we have to reconsidered how we have made the generalization that ended in a norm. To be more precise, we have to reconsider the content of the antecedent of the norm, in the sense we must include a new property in order to exclude some cases of the scope of the rule. As we can see, this not a problem of external applicability, but of internal applicability.

By this approach, we can create an exception to a rule when its application there are good reasons for not applying the rule. Good reasons are all those with a force greater than would have been sufficient to determine the result in the absence of the rule (Schauer 2004, 238).

The idea of "good reasons" starts from the premise that not every contradiction between prescriptive and justifiable levels should imply that the former should yield. This is for two reasons: i) if so, it

would not have any purpose to have a prescriptive level, since all cases would be resolved by directly analyzing the justifying level; and ii) the prescriptive level incorporates predictability, certainty, uniformity and distribution of power (for our purposes we will call this "legal certainty" (Schauer 1998, 237)), elements that should not be dismissed, unless there is a reason to do so. In this sense, a good reason is one that has enough weight to indicate why we should regulate conduct in a certain way and this reason should be more valuable than legal certainty. Following these theses, we can create an exception to a rule (defeat it) as long as the operator considers that there are good reasons, in cases of over-inclusive experiencer, for not applying them.

Consequently, exceptions can be created in those cases in which the application of rules depends on the occurrence of a fact that: i) is subsumable within a linguistic use of a term contained in the prescriptive level; ii) is not within the scope of application of the justifying dimension, or is a recalcitrant experience over-inclusive; and iii) the weight of the reasons in favor of the underlying reasons is greater than the legal certainty possessed by the prescriptive level of the rule.

It should be noted that not every non-application to merit of the underlying reasons is the same. At this point Schauer distinguishes between two phenomena (Schauer 2004, 179): i) situations in which the rule does not apply because the prescriptive level does not adequately specify the justifiable level (lack of application generated by reasons linked to the justifiable level of the rule itself)[14]; and ii) situations in which the norm does not apply due to underlying reasons specific to other norms.[15] In this second scenario, we are in the case of contradiction at the justifiable level, in which the underlying reasons of one rule are in contradiction with those of another.

As we can see, standards can be approached in different ways depending on the relevance we give them to the effects of their application. The creation of exceptions, in this sense, depends on the way in which the decision-making processes (Rodríguez 2002, 95) are carried out. In other words, it depends on what we are willing to sacrifice. The law applicators, following Schauer, apply one of these models (Schauer

[14] The result would be a reformulation of the rule resulting in a more precise or more correct specification (from the point of view of the interpreter) of the prescriptive level with respect to the justifiable level.

[15] The result would be a reformulation of the rule with the result that some fragments of the antecedent exclude scenarios of application of the rule based on underlying reasons different from the underlying reason of the rule.

1998, 236–237): i) formalist model, based on an applicator that only seems relevant to check whether the individual case is subsumable or not in the general case; or a ii) adaptability model, based on an applicator that seems relevant to consider whether an unforeseen event and certain effects (because it gives a result that it considers wrong because it is insufficient to capture changes in human experience), which affects the application or not of a rule.

This idea is additionally linked to a normative claim as to how the applicators of the law should be. But it is important to emphasize that under this form of resolving cases the sacrifice of eliminating recalcitrant experiences is in that we cannot sustain that the rules continue being rules. If a rule applies only when the prescriptive level is consistent with the justifiable level, then the normative force of the former is dissolved in the latter (Schauer 1998, 237).

The law applicator will have to choose between two models of application of norms that translates into: i) consider that the judge can't create exceptions in spite of an over-inclusive recalcitrant experience, which leads to suffer from all the suboptimal cases; or ii) consider that the judge can create exceptions in cases of over-inclusive recalcitrant experience, which leads to the prescriptions not being determinant for the solution of individual cases.

This moves the discussion towards debates about what kind of law-applicator we should have. For Schauer, the discussion is often divided into two sets of arguments that can be summarized as follows (Schauer 2004, 86):

1. We have to prefer decisions taken by legislators16 over the discretions of the law applicators, because there are reasons to distrust them (corruption, technical incompetence, lack of time for decision making, precariousness of available resources, among others). Faced with this, we must have a formal model.

[16] It should be pointed out that here we are referring to the standard formulated by interpreters applying hermeneutic codes based on a literal interpretation. As we can see, this set of arguments are committed to a certain degree of stability which entails (normative thesis) that we have to suffer from suboptimal results (in other words, there is a requirement to guarantee legal security as we have understood it in this document). Within this notion there is a set of normative theses regarding how the State should be employed, including some theses on the functions of judges, within which it would be to defeat norms (Schauer 2004, 86–87).

2. We must have the means to avoid and prevent the application of suboptimal verdicts to those affected by them, since this would imply assuming that the absurd (what is foolish, unjust, inefficient or any other term we use to refer to something that should not happen by virtue of a criterion of extra juridical correction) is legally obligatory.

On this point, I believe, the problem remains about preferences for decision-making models, but not conceptual. What does it mean to consider that the justifications of the norms are not normatively relevant? I am going to characterize the judges who dismiss justifications as formalist judges who jointly assume these four theses: i) the rules are prescriptions independent of the reasons for which they were created; ii) the law must be applied by subsumption; iii) the practical effects of the decisions are irrelevant; and iv) the law applicators elaborate general rules that must be followed by themselves and hierarchically inferior (precedents) law applicators.

Theses (i) and (iii) are related. As indicated at the beginning of this subsection, prescriptions are not conceptually independent of their underlying reasons; these are specifications of justification. In this case, the rules are complex structures in which, on the basis of a decision-making model, the law applicators decide to ignore the underlying reasons of the rule itself or underlying reasons derived from other rules that would justify departing from the verdict. Thesis (iii) is an answer to the question of what to do in case of recalcitrant experiences (there its link with thesis (i) regarding how to deal with the justifying level). It is a shortcut to appeal to the fact that they are willing to sacrifice it when deciding individual cases and the type of judges one wishes to have: one is thinking of a judge who cannot avoid applying the law, no matter how absurd or suboptimal the consequence.

In regard to thesis (ii), on subsuntive application of law, it should be noted that the creation of exceptions does not change the idea of subsuntive application of rules. However, this does mean that we have to weigh up whether there are good reasons (the weight of the reasons for not applying the rule outweighs the reasons for regulating conduct in the manner envisaged at the prescriptive level and legal certainty). Consequently, in order for judges to create an exception to a norm, they have to commit themselves to an adaptive model of decision making, which implies assuming that they have to make decisions that affect the set of properties with which we compose the antecedent

(introducing new properties in order to reduce the scope of application of the norm in such a way that the suboptimal is excluded).

As for thesis iv), to create general rules for other law operators, this is linked to the legal certainty of the new antecedent constructed to avoid suboptimal results. Once the rule has been exempted, this translates into the recognition of an undesirable situation of application of the rule, so each time this scenario is replicated, it should be avoided.

As discussed in this sub-section, when judges create exceptions using the justification of standards they are doing the following: i) they are adopting a decision-making model in which justifications for prescriptions are considered normatively relevant; and ii) they have considered the case to be an over-inclusive recalcitrant experience in which there are good reasons to reduce the scope of the norm.

3. CONCLUSIONS

I have outlined two possible ways to reconstruct how the judges create exceptions. Both are alternatives to each other and we will choose one or the other depending on what we are interested in clarifying. Under the first proposal, to except as a result of building a hierarchy between norms we explain a loss of external applicability, that is, the norm maintains its composition, but it is considered that there are other norms with greater weight that must be used in the justification of the decision. On the other hand, under the second form, to except is a result of varying the content of the rule, that is, of a modification of the rule. This implies assuming, at least, that the justifying level of the norms is normatively relevant and a determined model of decision-making.

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