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BETWEEN APPARENCY AND INDETERMINACY[***]

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The concept of prima facie norms is frequently used in legal theory but remains ambiguous, encompassing both epistemic and normative interpretations. This article examines these dual meanings to clarify their implications for legal decision-making. The epistemic sense views prima facie norms as provisional obligations arising in contexts of incomplete information. Such norms require further inquiry to confirm their applicability, ensuring that legal determinations are based on all relevant conditions. In contrast, the normative sense addresses conflicts between norms, highlighting the absence of inherent hierarchies to resolve such disputes. This perspective necessitates an evaluative framework to prioritise one norm over another, allowing for justified resolutions based on broader principles or contextual considerations. The article also explores practical distinctions between these interpretations. In the epistemic sense, norms deemed irrelevant to a case are excluded without implying violation. Conversely, the normative sense recognises that unresolved conflicts may result in norm violations, generating moral residue or compensatory obligations. These differences illustrate how prima facie norms function as mechanisms for navigating legal indeterminacies.

Key words: *legal reasoning, norms, normative conflicts, indeterminacy, prima facie*

1. INTRODUCTION

Many jurists consider that norms have a "prima facie" character. While this is a common assertion, it is not always clear what they mean. To address this issue, the aim of this article is to reconstruct the meaning of "prima facie" and identify the various theoretical and practical implications of each conceptualization.

In line with this objective, the article begins by examining W. D. Ross's original formulation of *prima facie* duties, which serves as a foundation for understanding

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moral and legal conflicts. The discussion explores how legal theorists have adapted these concepts to address normative dilemmas, particularly in situations where duties or norms appear to conflict.

The text analyses two primary interpretations of *prima facie* duties: the epistemic sense, which views such duties as apparent or preliminary obligations requiring further investigation to confirm their applicability; and the normative sense, which considers them genuine but defeasible duties that may conflict with other norms, necessitating a preference criterion to resolve the conflict. The article further investigates how prima facie duties operate as contributing conditions in a defeasible conditional structure, contrasting them with the notion of ATC (all-things-considered) duties.

The paper also addresses the theoretical frameworks used to understand normative conflicts, including logical and functional incompatibilities between norms, and the role of preference criteria in establishing material or axiological hierarchies. Finally, the article highlights the implications of non-preferred norms, their continued relevance, and their potential to generate compensatory obligations or moral residue. This comprehensive analysis contributes to a deeper understanding of how legal practitioners navigate normative indeterminacies, resolve conflicts, and balance competing duties within legal and institutional decision-making processes.

2. NORMS AS "PRIMA FACIE"

The notion of "*prima facie*" was introduced by W. D. Ross to identify and clarify specific features of how moral duties operate in cases of dilemmas or conflicts between moral duties. He defined it as follows: "[I] suggest 'prima facie duty' or 'conditional duty' as a brief way of referring to the characteristic (quite distinct from that of being a duty proper) which an act has in virtue of being of a certain kind (e.g., the keeping of a promise) of being an act which would be a duty proper if it were not at the same time of another kind which is morally significant"[1]. After this incorporation, jurists adopted it for their own discussions.

We must clarify that W. D. Ross was expressing two ideas. On the one hand, he created an opposition between *prima facie* duties and so-called "actual", "all things considered", "definitive" or "conclusive" duties (for the purposes of this article, we will refer to these duties as ATC). On the other hand, he indicated that *prima facie* duties are applicable to an individual case unless it possesses some normatively relevant property that subsumes it under another duty (the ATC duty).

[1] Ross, W. D., *The Right and the Good*, Oxford University Press, 1930, pp. 19-20.

What is the problem with this proposal? W. D. Ross's proposed definition is ambiguous.[2] In brief, a *prima facie* duty can be understood as: (1) an apparent or cancellable duty (*prima facie* in an epistemic sense); or (2) a defeasible duty (*prima facie* in a normative sense).

On one hand, to predicate the *prima facie* character of a duty in an epistemic sense is to indicate that a preliminary identification of how behaviour should be guided has been made, but this identification is inconclusive. This means that what seems to be the applicable duty has been identified, but it is necessary to complement the available information to offer a conclusive or definitive response (the ATC duty).

On the other hand, to predicate the *prima facie* character of a duty in a normative sense is to indicate that we are dealing with a genuine duty that regulates an action (i.e., a duty already identified), but it is not determined what to do in situations of inconsistency with other duty(ies). More precisely, it is noted that if the identified duty conflicts with another duty (each prescribing contradictory or contrary actions), a normative conflict will arise, the solution to which is not determined by the normative system they belong to. In this scenario, each duty is *prima facie* applicable to the case. In this situation, the agent must create a preference relation between them to decide on one of the two duties (choosing which one to use to guide conduct), which means choosing the ATC duty, i.e., the duty with greater force.

As we can see (we will delve into this further in the following lines), each sense of "*prima facie*" presents a different problem and operation. The epistemic sense accounts for a lack of information due to not having exhausted the task of investigating the elements that configure both the individual case and the content of the duty. In contrast, the normative sense accounts for a lack of ordering of duties that are part of a normative system.[3]

In contrast, *prima facie* in a normative sense presents a reason for action that is relevant, but its strength in relation to another relevant reason for action has not been determined. This highlights that if both reasons for action come into conflict, the

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[2] Searle, J., "Prima facie obligations", in Raz, J. (ed.), *Practical Reasoning*, Oxford, Oxford University Press, 1978; Brink, D., *Moral Conflict and Its Structure*, The Philosophical Review, Vol. 103, No. 2, 1994, pp. 216-218; Pérez Bermejo, J., "Principles, Conflicts, and Defeats: An Approach from a Coherentist Theory", in Ferrer, J. and Ratti, G. B. (eds.), *The Logic of Legal Requirements: Essays on Defeasibility*, Oxford, Oxford University Press, 2012, pp. 297-298 and 300; Bayón, J. C., *La normatividad del Derecho: deber jurídico y razones para la acción*, Madrid, CEC 1991, pp. 385 and 395; Redondo, M. C., "Reasons for Action and Defeasibility", in Ferrer, J. and Ratti, G. B. (eds.), *The Logic of Legal Requirements: Essays on Defeasibility*, Oxford, Oxford University Press, 2012; Kramer, M., *The Ethics of Capital Punishment*: A Philosophical Investigation of Evil and its Consequences, Oxford, Oxford University Press, 2011, pp. 53-54; Kramer, M., *In Defense of Legal Positivism: Law Without Trimmings*, Oxford, Oxford University Press, 1991, pp. 267-269; Reisner, A., "Prima Facie and Pro Tanto Oughts", in LaFollete, H. (ed.), *The International Encyclopedia of Ethics*, Oxford, Blackwell, 2013.

[3] Following Searle closely, the difference between both senses, in summary, would be the following: (1) a *prima facie* norm in the epistemic sense is not a genuine norm; and (2) a *prima facie* norm in the normative sense is a genuine norm. Searle, *op. cit.* in fn 2, p. 85. For a use of this distinction as a way to clarify what the principalists are trying to say when they talk about the "weight" of legal principles (see Keršić, M. and García Yzaguirre, V., *El "peso" de los principios: descifrando la metáfora*, Ius et Praxis, Vol. 28, No. 1, 2022).

regulated agent must create a preference relation between them, i.e., must choose which of the two is the more important reason for action (the ATC reason).[4]

This distinction still needs further clarification. Now, let's examine how jurists have used these senses and some of the main theoretical frameworks employed to express each of them.

3. *PRIMA FACIE* IN THE EPISTEMIC SENSE

Many jurists predicate the *prima facie* character of a norm to indicate that, based on the available information, it is apparently applicable to resolve an individual case, but it is necessary to carry out further acts to confirm this information. In other words, this characterization indicates that: (1) after a first analysis of both the individual case to be resolved and the reference normative system, a case has been identified as subsumable under a particular norm; and (2) the first analyses are not sufficient to determine the applicability of a norm to an individual case, as further actions are necessary to determine whether: (2.1) this first approximation was correct; or (2.2) it should be discarded for not having taken into account normatively relevant aspects of either the individual case, the reference normative system, or both. Once the actions provided in ii) have been carried out, we will have identified the ATC norm, i.e., the norm applicable to the individual case once all normatively relevant aspects have been considered.

A *prima facie* norm operates similarly to a hypothesis of solution.[5] This means it is a first proposal for how to understand the analysed case and the reference normative system. In this sense, indicating that a *prima facie* norm becomes an ATC norm is a way of indicating that the hypothesis has been confirmed. This means that no additional information (about the analysed case and the reference normative system) has been sufficient to discard that we have identified the relevant norm for the case.

In contrast, indicating that a *prima facie* norm does not become an ATC norm is a way of indicating that the hypothesis has been discarded. This means that additional information (about the analysed case and the reference normative system) has been sufficient to discard that we have identified the relevant norm for the case.

To clarify, let's look at two of the most relevant theoretical languages that use this sense of *prima facie*.

[4] Kramer, M., *Torture and Moral Integrity: A Philosophical Enquiry*, Oxford, Oxford University press, 2014, p. 8.

[5] Zimmerman, M., *The Concept of Moral Obligation*, Cambridge, Cambridge University Press, 1996, p. 142.

3.1. Characterisation of *prima facie* duty as a tendency to be a duty

W. D. Ross, to clarify his theoretical proposal, argued that there are acts that tend to be duties by virtue of possessing certain characteristics. He argues the following:

"When we try to formulate laws of nature, we find that if we are to state them in a universal form which admits of no exception, we must state them not as laws of actual operation but as laws of tendency. We cannot say, for instance, that a certain force impinging on a body of a certain mass will always cause it to move with a certain velocity in the line of the force; for if the body is acted on by an equal and opposite force, it actually remains at rest; and if it is acted on by a forcé operating in some third direction, it will move in a line which is oblique to the lines of both forces. We can only say that any force *tends* to make the body move in the line of the force. Thus alone do we get a perfectly universal law. In the same way if we want to formulate universal moral laws, we can only formulate them as laws of *prima facie* obligation, laws stating the tendencies of actions to be obligatory in virtue of this characteristic or of that. It is the overlooking of the distinction between obligations and responsibilities, between actual obligatoriness and the tendency to be obligatory, that leads to the apparent problem of conflict of duties, and it is by drawing the distinction that we solve the problem, or rather show it to be non-existent".[6]

To present this point, he uses an interesting but problematic analogy. He proposes imagining a body subjected to a force that would move it in one direction. This body is simultaneously subjected to another force that would move it in the opposite direction. If both forces are equivalent, the body will not move. If one force is stronger than the other, it will move in the direction it is oriented. Ross argues that moral duties operate analogously: they guide action.

One way to understand Ross's idea is that the *prima facie* characterization operates as a preview of a norm's content. This indicates that an incomplete description of the norm is being made. Evidently, this clarification is insufficient. The main problem lies in the fact that the expression "tendency" is metaphorical, so we need to translate it into more precise language. In this regard, we consider that "tendency" can be translated as a way of presenting a dispositional property.

"Tendency", understood as a dispositional property refers to the characteristic of a particular object to have the potential, capacity, or propensity to react in a certain way under certain circumstances. In the present case, predicating the prima facie character of norms indicates that they may, after further investigative operations, become ATC norms.

Following Jordi Ferrer[7], we can predicate a dispositional property of: (1) an object, which accounts for an intrinsic characteristic of it (e.g., the solubility of sugar, as a sugar cube dissolves when exposed to water); or (2) a person, which accounts for

[6] Ross, W. D., *The Foundation of Ethics*, Oxford, Oxford University Press, 1939, p. 86.

[7] Ferrer, J., *Las normas de competencia. Un aspecto de la dinámica jurídica*, Madrid, CEPC, 2000, p. 135.

one of their capacities or abilities (e.g., stating that a lawyer is capable of defending a person in a judicial process). Dispositional properties that describe people can be those they possess due to their human condition (actual human capacities) or due to normative reasons (capacities dependent on competence norms).

Considering these clarifications and the epistemic problem presented by "tendency" to be a duty, it becomes clear that the best way to understand this point is not as a feature of norms but as a type of activity we perform with them (a feature of people). Indeed, characterizing a norm as *prima facie* expresses the intention (or recognition of the need) to carry out further investigative actions to determine the "correct" identification of the norm applicable to the individual case. If this is the case, the prima facie characterization accounts for people's capacity to perform investigative operations (both factual and normative premises) within an institutionalized decision-making process. Thus, stating that a prima facie norm has the tendency to be a duty is merely a way of presenting that a legal practitioner can: (1) identify an initial applicable norm; (2) conduct a better study of the individual case and the normative system; and (3) determine, after resolving the epistemic problem, the ATC norm (or norm applicable to the case).[8]

3.2. *Prima facie* norm as a norm with an antecedent of a norm composed of contributing conditions

In the legal literature, one of the main ways to understand the prima facie characterization is as an alternative way of presenting that the norm possesses a defeasible conditional structure. To clarify this point, we will present the theses of one of the most important authors in the field, Carlos Alchourrón, who argued that this way of understanding norms is behind Ross's theses.[9]

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[8] In relation to this point, Aqvist noted that when formalizing obligations (p->Oq, for example) we should, for clarity and precision, use different operators to present each type of discourse. On one hand, a *prima facie* norm of the type "obligatory, prima facie, q" (using the characterization described in the main text) is only a way of indicating that there is a possible state of affairs p from which obligatory q can be inferred. For the purpose of presenting this point, we should express it using an operator other than O to avoid ambiguities: (p->Opfq). On the other hand, an ATC norm is a way of indicating that the state of affairs p, together with having considered all other normatively relevant aspects, will infer Oq. To present this point, we should use an operator that expresses a genuine deontic modalizer: (p->Oq). Åqvist, L., "Prima Facie Oughtness vs. Oughtness All Things Considered in Deontic Logic: A Chisholmian Approach", in Ejerhed, E. and Lindstrom, S. (eds.), *Logic, Action and Cognition. Essays in Philosophical Logic*, Dordrecht, Springer, 1997, pp. 90-93. The difference between Opfq and Oq, in this case, shows us two moments of our understanding of the reference normative system: Opfq presents an initial (and possibly isolated) understanding of a duty, and Oq presents a subsequent (and possibly systematic) understanding of a duty (which, it should be noted, we are willing to qualify as the prescription that the reference normative system orders us).

[9] Alchourrón, C. E., "Fundamentos filosoficos de la logica deontica y la logica de los condicionales derrotables", in Alchourrón, C. E., *Fundamentos para una Teoría General de los Deberes*, Madrid, Marcial Pons, 2010 [1993], p. 106 and 109. Alchourrón, C. E., "Para una lógica de razones prima facie", in Alchourrón, C. E., *Fundamentos para una Teoría General de los Deberes*, Madrid, Marcial Pons, 2010 [1996a], p. 131.

The notion of *prima facie* is a conceptual tool commonly used in the language of reasons. For Alchourrón, it was relevant to determine what this expression means in the language of norms. He started from the problem that the expression "A is a reason for B" is ambiguous. On one hand, it can be used to refer to one of two types of reasons: a justificatory reason or an explanatory reason (also called practical and theoretical reasons, respectively). On the other hand, "reason" can be understood as a type of condition for a consequent, but it is not clear to which type of condition it refers. Both ways of understanding this expression (as a type of reason and as a type of condition) are complementary to each other.

In terms of the type of reason, justificatory or practical reasons have a prescriptive sense. With them, we account for reasons for action, in other words, those used to guide the conduct of a recipient. The way to represent this type of reason is under the scheme "A R OB," which reads: A is a reason to hold that B is obligatory. In this case, OB is a deontically modalized statement that prescribes the duty of doing B to the agent.[10]

Explanatory or theoretical reasons, on the other hand, have a descriptive sense. With them, we account for what happens, happened, or will happen in the world. In other words, following Alchourrón, this type of reason is identified with the expression "to be the cause of". The way to represent this type of reason is under the scheme "A R B", which reads: A is a reason for B. In this case, B is a descriptive statement that lacks a deontic operator, meaning that whenever A occurs, B will happen.[11]

In terms of the type of condition, a proposition being a reason (explanatory or justificatory) for another proposition can be understood based on the type of condition it offers. That is, a reason can be: a sufficient reason, a necessary and sufficient reason, a contributing reason, or a substitutive reason.[12]

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[10] Alchourrón, C. E., *op. cit.* in fn 9, (2010 [1996a]), p. 129. Alchourrón, C. E. and Bulygin, E., "Norma jurídica", in Garzón Valdes, E. and Laporta, F. (eds.), *Enciclopedia Iberoamericana de Filosofía, El Derecho y la Justicia*, Madrid, Trotta, 2016, p. 143.

[11] Alchourrón, *ibid.*, p. 130.

[12] We proceed to clarify the meaning of each condition:

1. Property A being a sufficient condition for property B means that when A is present, B will also be present.
2. Property A being a necessary condition for property B means that every time B is present, A will also be present, but not (necessarily) the other way around.
3. Property A being a necessary and sufficient condition for property B means that always and only when A is present, B will also be present.
4. Property A being a contributing condition for property B means that A is a necessary condition for at least one sufficient condition of B.
5. Property A being a substitutive condition for property B means that A is a sufficient condition for at least one necessary condition of B.

We can group these conditions into two types of conditions: (1) basic, that is, conditions that do not depend on other conditions; and (2) subordinate, that is, conditions that depend on other conditions. In this sense, basic conditions include sufficient properties, necessary properties, and necessary and sufficient properties. On the other hand, subordinate conditions include substitutive conditions and contributing conditions. See Von Wright, G. H., *A Treatise on Induction and Probability*, London, Routledge, 1951, pp. 66-74.

Under this scheme, we have a double classification. A reason can be either explanatory or justificatory and operates as a type of condition. Within this range of possibilities, we can ask ourselves, what combination is the prima facie characterization presenting?

Prima facie duties account for scenarios where a justificatory reason is not sufficient because new reasons may arise that cancel the consequent. Let's look at an example of a *prima facie* justificatory reason offered by Alchourrón: today is my son's birthday (A), which is a reason that justifies the duty to take him to the amusement park (B) (formally represented as A R OB). But it also happens that today my son has a fever (D), which is a justificatory reason for the duty not to take him to the amusement park (¬B) (formally represented as D R O¬B).[13]

We are in a situation where the properties "it is my son's birthday" and "my son has fever" occur together, that is, (A.D). This leads us to the discussion of how to behave: should I take him to the amusement park (OB) or not take him to the amusement park (O¬B)? The *prima facie* characterization serves to account for this type of scenario: the justificatory reason will be sufficient as long as we do not have a contrary and stronger justificatory reason. We will only know what to do after balancing each of the reasons and determining which has greater force.[14]

In this case, a possible scenario is that D (that my son has fever) defeats A (today is my son's birthday). In other words, I consider that D is a reason not to take my son to the amusement park. In this sense, what I am asserting is that my son's birthday is not a sufficient reason to take him to the amusement park, as it can be canceled in the presence of other reasons that justify the opposite duty (such as the fact that he has fever).

This example clearly presents the conceptual connection between prima facie duty and defeasible conditional norm: the antecedent of the reasons is not governed by the principle of antecedent reinforcement and therefore not by modus ponens. At the level of the type of condition, this is understood as the prima facie character being equivalent to predicating that the reason operates as a type of contributing reason.

From this approach, the expression "A is a prima facie reason for B" can be accounted for as a defeasible conditional structure. In this sense, the notion of prima facie duty is understood as a statement expressed using defeasible conditionals.

Now, Alchourrón considered that abandoning antecedent reinforcement and modus ponens generated an unnecessary rationality cost. To be able to reconstruct this concept from a deductivist conception of deontic logic (justified by the need to maintain the inferential power of conditional norms), he proposed a way to understand and represent a defeasible norm.

The notion of a defeasible conditional norm has been formulated to account for all those cases where the antecedent of the norm does not guarantee the consequent.

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[13] Alchourrón, C. E., *op. cit.* in fn 9, (2010 [1996a]), pp. 130-31.

[14] Alchourrón, C. E., *ibid.*, p. 132.

More precisely, it refers to a norm composed of an antecedent that only foresees contributing conditions. One way to understand and represent this idea is to indicate (fp => Oq). This shows that we have identified properties that by themselves are not sufficient to infer the consequent.

For Alchourrón, the best way to understand this point (from a deductivist approach) is as a way of indicating that the antecedent of the norm has been identified incompletely. More precisely, a defeasible conditional norm from this theorization is a norm whose antecedent is composed of contributing conditions and other conditions that have not been made explicit (mainly because they operate as implicit assumptions). This shows that contributing conditions cannot guarantee the consequent because it is possible that an implicit assumption, when made explicit, excludes the individual case from the scope of the norm. After making this explicit, the antecedent will be composed of the contributing conditions and the rest of the conditions, to which the antecedent reinforcement and modus ponens can be applied. As we can see, the antecedent is understood as a generic case composed of explicit properties and implicit assumptions, which together operate as the sufficient condition for the consequent.

In this sense, it is necessary to distinguish two ways of representing our understanding of norms. At time T1, we identify a norm with an antecedent composed of explicit conditions (which operate as contributing conditions) along with a set of implicit conditions. To represent this point, Alchourrón proposed the incorporation of the revision operator f. Thus, "fp" accounts for the joint assertion of the property p and the set of its consistent implicit assumptions. Indeed, by expressing fp, we account for p and a conceptual expansion of it. Thus, a defeasible conditional norm (or prima facie norm) is represented as (fp => Oq), i.e., a norm whose antecedent requires the explicitness of all its implicit assumptions.

At time T2, we make an explicitness of those implicit assumptions to identify the sufficient condition for the consequent. It should be noted that this explicitness operation can be performed in different ways: (1) as a result of having identified hierarchical relationships between norms; (2) as a result of having carried out a systematic interpretation; (3) as a result of having correctly understood the legislator's intention when enacting the norm; among others.

At time T3, after having made this explicitness, we identify a norm with an antecedent composed of at least one sufficient condition for the consequent. This will be understood as an indefeasible conditional norm represented as (p => Oq).

In this sense, the prima facie character of norms is a way of accounting for having formulated an antecedent that contains explicit conditions along with implicit assumptions. Whenever we assert the prima facie character in this way, we account for not losing sight of a series of unexplicit assumptions that together with the explicit properties form the sufficient condition for the consequent (whether in the case of a conditional norm that expresses either an explanation or a justification).

This way of understanding the *prima facie* characterization can be summarized in four points:

(1) The characterization of *prima facie* duties accounts for them being reasons (explanatory or justificatory) that operate as a type of contributing condition.

(2) The *prima facie* character of a reason is formally represented as a defeasible conditional, which is understood as a conditional norm composed of a revisable antecedent ((*f*p => q) or (*f*p => Oq)).

(3) A *prima facie* duty is a justificatory reason put forward by an agent in a certain context, meaning its content is determined by a series of assumptions made by the agent who issued the reason statement. It should be added that the implicit assumptions of a reason statement directly refer to who the agent was and the context in which it was made. In other words, the set of implicit assumptions of a prima facie duty depends on both the speaker and the context in which the reason statement was formulated.

(4) The notion of *prima facie* duty refers to the notion of a defeasible duty, and the notion of ATC duty (the duty we will use as the normative premise to guide our behavior) refers to the notion of an indefeasible duty.

From this approach, as we can see, the elements of the normative system can be understood in two different ways: understanding them as indefeasible norms (ATC norms) or as defeasible norms (or *prima facie* norms). However, it should be noted that whenever we have a defeasible conditional norm and the antecedent along with its implicit assumptions is verified, then we will have identified it completely, i.e., as an indefeasible norm.[15]

4. *PRIMA FACIE* IN NORMATIVE SENSE

What has been discussed in the previous section does not exhaust the different uses of the *prima facie* characterization of norms. Many other jurists predicate the *prima facie* character of a norm to indicate that by itself, it is not sufficient to determine the normative qualification of an individual case. This means that a norm is applicable to an individual case, but when considering the rest of the jointly applicable norms, it may not be used as the normative premise in the qualification of the fact or action. From this perspective, the *prima facie* character indicates that a norm will determine the qualification of an individual case unless another norm surpasses it (due to a decision by the legal practitioner, it has a higher order). Unlike

[15] Alchourrón, C. E., "Separación y derrotabilidad en lógica deóntica", in *Fundamentos para una Teoría General de los Deberes*, Madrid, Marcial Pons, 2010 [1996b], p. 152. From this last idea, following Rodríguez and Navarro, some implications can be specified: (1) an undefeatable conditional obligation implies a defeasible one; and (2) an undefeatable unconditional obligation implies a defeasible one. More generally, the undefeatable nature of a duty implies the defeasible nature of that same duty (in other words, having sufficient conditions implies the explicit contributing conditions along with the rest of its implicit assumptions). But this does not work the other way around, that is, the defeasible nature of a duty does not imply its undefeatability, as it will only be undefeatable once the implicit assumptions have been made explicit and not before. Navarro, P. and Rodríguez, J., *Deontic Logic and Legal Systems*, Cambridge, Cambridge University, 2014, p. 94.

what was indicated in the previous section, for this assertion to make sense, we must be facing an applicable norm and not an apparently applicable norm.[16]

Characterizing a norm as *prima facie* in a normative sense assumes that this is an identified norm that guides our behavior (it is applicable to an individual case), but all things considered, it may be the case that the legal practitioner does not use it. This is because the agent considers that in the face of an individual case, another norm offers a better normative qualification.

At this point, it should be noted that the transition from a *prima facie* norm to an ATC norm can occur either because it is the only relevant norm to regulate the individual case (absence of normative conflicts) or because it is the best of all available norms to regulate the individual case (a normative conflict has been resolved). The first assumption does not generate much controversy. The second, however, highlights theoretically relevant aspects.

To reconstruct the transition from a *prima facie* norm to an ATC norm, we will present three points: (1) conflicts between norms; (2) preference criteria as a way to resolve a conflict between norms; and (3) the status of the non-preferred norm.

4.1. On normative conflicts

Within legal theory, in extreme synthesis, two criteria are usually used to determine that two norms are in normative conflict with each other: (1) as the impossibility of joint compliance by the recipient; and (2) non-logical incompatibility.[17]

First, jurists often indicate that we are facing a normative conflict in those cases where the recipient of the norms cannot comply with two or more legal obligations applicable in the same time-space. In this sense, a normative conflict occurs between two norms whenever their generic cases (totally or partially identical) have inconsistent deontic modalizations. In other words, if two norms correlate the same

[16] Searle, *op. cit.* in fn 2, p. 83. Loewer, B. and Belzer, M., "Prima facie obligation: its deconstruction and reconstruction", in Lepore, E. and Van Gulick, R. (ed.), *John Searle and his Critics*, Cambridge, Basil Blackwell, 1991, pp. 362-64. Farrel, M., "Las obligaciones jurídicas como obligaciones prima facie", in Bulygin, E., Farrel, M., Nino, C. and Rabossi, E. (comps.), *El lenguaje del derecho: homenaje a Genaro R. Carrió*, Buenos Aires, Abeledo Perrot, 1983, pp. 136ff. Dancy, J., "Una ética de los deberes prima facie", in Singer, P. (ed.), *Compendio de ética*, Madrid, Allianza, 2004, pp. 314-16.

[17] Within the specialized literature, it should be noted that it is possible to identify a third criterion for identifying normative conflicts: a situation of irrationality on the part of the legislator. In short, for some authors, two norms conflict with each other due to the discrepancy between what a rational legislator intends to prescribe and the terms used to do so. This proposal was formulated as an alternative way to address the problem of how to account for this type of logical defect in the system without abandoning the idea that norms lack truth values. For example, according to Alchourrón and Bulygin, if we have a normative set composed of Op and O¬p, we can say that these are incompatible with each other because they are incompatible with the intentions of the normative authority. The incompatibility arises because one order from the legislator could not be carried out together with another order from the same legislator. See Alchourrón, C. E. and Bulygin, E., "Fundamentos pragmáticos para una lógica de normas", in Alchourrón, C. E. and Bulygin, E., *Análisis lógico y derecho*, Madrid, Centro de Estudios Constituionales, 1991 [1984], pp. 160ff. We will not delve deeper into this way of understanding normative conflicts, nor will the analysis of prima facie characterization take these theses into account, as it would require further analysis that would divert us from the objective of this article.

generic case with different and incompatible normative consequences, they create a situation where the recipient faces the logical impossibility of fulfilling all their duties.

Second, for a group of theorists, the logical impossibility of joint compliance with two norms is not sufficient to account for the notion of normative conflict as understood by jurists. In this sense, some proposals have been formulated based on the idea that we can justify that two norms are in conflict with each other whenever the reasons underlying these norms cannot be executed simultaneously.[18] According to this way of understanding conflicts, each norm is instrumental to a purpose, which does not necessarily imply performing the same actions. We will have a case of conflict whenever the purpose of one norm entails the non-compliance with the purpose of another norm, without this implying a contradiction or contrariety of deontic operators.

Under this conception, we are facing a case of functional incompatibility, referring to cases where fulfilling the function (purpose) of one norm leads to the frustration of the function (purpose) of another. Frustration is understood as creating a state of affairs that generates detriment or impossibility for the function of the other norm. We use the notion of purpose ambiguously at this point, as the justification for this mutual non-compliance between norms (for non-logical reasons) has been reconstructed in various ways (which we will not delve into[19]).

Now, whether we are facing a logical or non-logical normative conflict, the case will be that the legal practitioner: (1) is facing two norms applicable to an individual case and there is no hierarchical relationship between them; and (2) must choose one norm out of two in conflict. The *prima facie* characterization in a normative sense allows us to present this idea: they are norms relevant to the individual case but, in case of conflict with another, it is not determined whether this one should prevail or not. This implies that they are norms that by themselves do not determine the qualification of the individual case within an institutionalized decision-making process, as they must be weighed against others. To be used by a legal practitioner (i.e., to be ATC norms), they must use a third norm that gives priority over the rest of the norms (i.e., must create and use a preference criterion). Let's briefly look at this point.

4.2. On preference criteria

In situations of normative conflict, legal practitioners must create a third norm that establishes a hierarchical relationship between them to determine which of the two will be used to qualify the individual case. This hierarchical relationship can be material or axiological.

[18] Hammer Hill, H., *A Functional Taxonomy of Normative Conflict, Law and Philosophy*, Vol. 6, No. 2, 1987, p. 238.

[19] See Chiassoni, P., *Técnicas de interpretación jurídica*. Brevario para juristas, Madrid, Marcial Pons, 2011, pp. 303-309.

Following Guastini[20], a material hierarchy accounts for the relationship between two norms (or classes of norms) where the content of the hierarchically inferior cannot contradict the content of the hierarchically superior. In contrast, an axiological hierarchy refers to a relationship between two norms where the interpreter considers one norm superior to the other for value reasons (ethical-political preferences). In this way, a norm is qualified as more valuable than another for being more suitable to our value preference criteria (it seems fairer, more efficient, or any other valuation criterion). In both cases, the superiority is created by a third norm, which establishes that in case of conflict between these two norms, the superior norm prevails. This third norm is called the preference criterion.

Preference criteria can be the result of interpreting provisions (express norms) or the legal practitioner can create one through a legal construction act (implicit norm). Preference criteria allow us to resolve normative conflicts between norms so that the legal qualification of a type of action depends on both the content of the norm and its ordering (if we change the preference criterion, the legal qualification of the generic case changes). This can happen in two ways: (1) in the face of two norms in normative conflict (logical or non-logical), a third norm will determine which one the judge should use in the justification contained in the decision resolving the case[21]; or (2) it may be that we have a conflict between preference criteria, i.e., between two norms that have established preference relationships between norms, which is resolved by introducing a meta-preference criterion.[22]

Preference criteria necessarily determine the norm that is all things considered applicable to the case. In Rodríguez's terms, "the priority of one of the norms over the other for all individual cases subsumable in a certain subclass of collision cases is pre-established." An example of this idea is considering a case of conflict between rights where, in light of the facts of the dispute, in some cases, one right will be preferred over the other, but under different factual premises, it will be resolved inversely.[23]

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[20] Guastini, R., *Interpretar y argumentar*, (2nd ed.), Madrid, CEPC, 2018, pp. 175-180.

[21] Alchourrón, C. E. and Bulygin, E., "La concepción expresiva de las normas", in Alchourrón, C. E. and Bulygin, E., *Análisis lógico y derecho*, Madrid, Centro de Estudios Constituionales, 1991 [1981], p. 136.

[22] Guiboug, R. and Mendonca, D., *La odisea constitucional. Constitución, teoría y método*, Madrid, Marcial Pons, 2004, p. 130.

[23] A common example of this way of resolving conflict is the use of Alexy's law of balancing, which prescribes the greater the degree of non-satisfaction or detriment to one principle, the greater must be the satisfaction of the other. Alexy, R., *Teoría de los derechos fundamentales*, Madrid, CEPC, 1993, p. 161. According to this author, when two principles collide, we must balance them against each other. The result of this operation will be to create a justified preference relationship based on the "weight" of the conflicting principles, considering their effects based on the facts of the case. This scenario is defined by Alexy under the law of collision: "the conditions under which one principle takes precedence over another constitute the factual assumption of a rule that expresses the legal consequence of the preceding principle." Alexy, *ibid*., p. 94. If we use the language of preferences, balancing is a way of justifying the creation or modification of the conditional preference of one norm over another, as a method of resolving a conflict between them. In this same sense, but applied to moral reasons, see Peczenik, A., *Weighing values*, International Journal for the Semiotics of Law, Vol. 5, No. 14, 1992, pp. 139-41.

What has been said now allows us to present more precisely what we mean when we characterize a norm as *prima facie* and as ATC. On one hand, indicating that a norm is *prima facie* is a way of saying that it is a norm applicable to an individual case and whose material and/or axiological hierarchical relationships with other norms of the microsystem of applicable norms have not been determined. On the other hand, indicating that a norm is ATC expresses the result of having resolved this indeterminacy problem: a preference criterion (meta-norm) has been created, establishing a material or axiological hierarchy of this norm over the other, implying that in a normative conflict (logical or non-logical), this is the one that should be used in the decision justification.

This clarifies the status of the preferred norm or ATC norm. We need to ask ourselves, what is the status of the non-preferred *prima facie* norm?

4.3. On the status of the non-preferred norm

A non-preferred *prima facie* norm presents the case of a non-applied behavioral guide. But this does not necessarily imply that it is entirely irrelevant (or that it is now inapplicable to the case).

The clear example of this point is the case of a conflict between rights[24]: suppose a person owns a pharmacy and believes in a religion that considers all contraceptive methods sinful and reprehensible. Based on such beliefs (and exercising their freedom of belief), they decide not to sell morning-after pills or condoms in their pharmacy. Due to this omission, the Health Administration ordered the company to offer these products, considering a legal duty (which concretizes people's right to health) to have a minimum stock of these products available and offer them to the public. As we see in this case, the action "selling morning-after pills and condoms" is both prohibited and ordered (logical normative conflict between norms concretizing the right to freedom of belief and the right to health).

Suppose that in this case, the conflict is resolved by a legal practitioner creating a preference criterion that determines that the applicable norm to normatively qualify the ATC action is the norm that concretizes the right to health. Does this imply that freedom of belief becomes inapplicable to this case? Does it cease to be an action subsumable under that right?

That a norm is not preferred does not imply that it ceases to be relevant to regulate the action. In fact, depending on the case (and the affected parties), not applying this norm may result in the generation of compensatory duties (denominated in moral

[24] Example inspired by the judgment No. 145/2015 of the Spanish Constitutional Court.

discourse as moral residue[25]). In the indicated example, while the pharmacist can be obliged to sell contraceptive methods, the impact on their freedom of belief could trigger economic compensation.

This implies that non-preferred *prima facie* norms are non-applied norms, but they do not necessarily lose their applicability to the individual case. They continue to regulate that action, and in that circumstance and even in other cases, they could be treated as the ATC norm.

This point allows us to present more clearly the difference between the epistemic and normative senses of *prima facie*. The epistemic sense presents situations of discarding a norm, whereas the normative sense presents situations of justified non-use of a norm. The former is not apt to explain situations that generate moral residue (an irrelevant norm is not apt to generate any duty). The latter is apt to explain situations that generate moral residue.

To differentiate this sense from the one discussed in the previous section, it is often proposed to replace the expression *prima facie* with *pro tanto*.[26] Those who propose this argue that *prima facie* will be used to present an epistemic problem, and *pro tanto* will be used to describe that between two norms, there is no predetermined ordering.

5. CONCLUSIONS

Legal scholars frequently describe norms as *prima facie*, yet this characterisation is ambiguous and can be understood in two distinct ways: an epistemic sense and a normative sense. These perspectives reflect different conceptual approaches to the applicability and justification of legal norms.

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[25] Martínez Zorrilla, D., *Conflictos Constitucionales, ponderación e indeterminación normativa*, Madrid, Marcial Pons, 2007, pp. 289-90. It should be noted that, from a moral perspective, what is being attempted to reconstruct and theorize is the remorse of not having used an applicable norm. On this point, see Searle, *op. cit.* in fn 2, p. 83. In the same sense, Williams, B., "Conflict of Values", in Ryan, A. (ed.), *The Idea of Freedom: Essays in Honour of Isaiah Berlin*, Oxford, Oxford University Press, 1979, pp. 223-234. Williams, B., "Ethical Consistency", in Williams, B., *Problems of the Self. Philosophical Papers 1956-1972*, Cambridge, Cambridge University Press, 1973, pp. 172ff. Bayón, J. C., *La normatividad del Derecho: deber jurídico y razones para la acción*, Madrid, CEC, 1991, pp. 384-85. For an extensive analysis of obligations generated by moral residue, see Brummer, J., *The structure of residual obligations*, Journal of Social Philosophy, Vol. 27, No. 3, 1996.

[26] Hurtig explains that the Latinism "*pro tanto*" means "to the extent possible." Applied to reasons, this means that if p gives q a reason for x, it means that q has a reason (insofar as it concerns p) for x regardless of whether there are other reasons (i.e., different from the one provided by p) for x or ~x. This means they are justifying reasons, but it does not follow that they must be applied in all possible scenarios, as there may be another reason that justifies doing ~x or even z (which implies the impossibility of x) that is, for the specific case, considered a better justification. Hurtig, K., *On prima facie obligations and nonmonotonicity*, Journal of Philosophical Logic, Vol. 36, 2007, pp. 601-03. In the same sense, see Broome, J., "Reasons", in Wallace, J., Pettit, P., Scheffler, S. and Smith, M. (eds.), *Reasons and Value: Themes from the Moral Philosophy of Joseph Raz*, Oxford, Clarendon Press, 2004, pp. 36ff.; Kagan, S., *The Limits of Morality*, Oxford, Oxford University Press, 1989, pp. 17 ff. and Frederick, D., *Pro-Tanto Obligations and Ceteris-Paribus Rules*, Journal of Moral Philosophy, No. 12, 2015.

When used in an epistemic sense, the term *prima facie* highlights the provisional nature of a norm's formulation. It suggests that the determination of a norm's relevance or the normative classification of an action occurs within a context of incomplete information. This incompleteness may pertain to either the individual case or the broader normative system. From this perspective, further inquiry and investigation are required to confirm or discard the initial formulation, treating the norm's applicability as tentative and open to revision. The epistemic sense operates as a mechanism for refining legal interpretations, ensuring that a norm's applicability is established only after the necessary conditions are thoroughly examined.

By contrast, the normative sense of *prima facie* characterisation focuses on the absence of an inherent hierarchy between conflicting norms. In cases where two norms are in conflict, this perspective underscores the lack of predetermined criteria for resolving the conflict. The resolution, therefore, depends on constructing a justificatory framework that prioritises one norm over the other. The normative sense is thus concerned with the justificatory and evaluative process required to navigate conflicts within the legal system, enabling one norm to override another based on broader principles or contextual considerations.

The differences between these two interpretations extend beyond their conceptual frameworks and influence the practical application of norms. In the epistemic sense, the identification of certain conditions in a specific case may lead to the exclusion of a norm's applicability. This approach presents the norm as irrelevant to the case at hand, rendering it unnecessary for resolving the legal issue. In contrast, the normative sense allows for the justification of one norm over another, framing the resolution of conflicts as an evaluative process that involves prioritisation and potential justification of overriding norms.

Another distinction lies in their implications for the idea of norm violation. The normative sense accounts for the possibility of a norm being violated in the legal application process. Such violations may result in moral residue or compensatory obligations, recognising the normative significance of the disregarded rule. In contrast, the epistemic sense cannot explain this phenomenon; it merely determines that the excluded norm was never applicable to the case, precluding the possibility of a meaningful violation.

Understanding these distinctions is crucial for clarifying the role and function of prima facie norms in legal theory and practice. By distinguishing between their epistemic and normative dimensions, legal scholars can provide a more nuanced analysis of how norms operate within the legal system, both in terms of their provisional applicability and their role in resolving conflicts and justifying legal outcomes.

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