Why Is Legal Reasoning Defeasible?[*]

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Abstract. This paper analyses the claim that legal reasoning is defeasible, which is indeed a hallmark of some major contributions to the theory of legal reasoning in recent times. Before addressing the question of what kind of logical tools are needed to formalize defeasible reasoning, it must be explained why legal reasoning is supposed to be defeasible in the first place. Some arguments to this effect are taken into account (having to do with the allocation of burdens of proof in legal procedures, reasoning with incomplete information and the proper way of individuating norms), but it is held that none of them really proves that legal reasoning cannot be reconstructed as a deductive inference. The strongest argument to justify the claim that legal reasoning is defeasible seems then to be that all legal norms turn out to be defeasible: but here this argument is disputed, trying to show that it would lead us to embrace either wholesale indeterminacy or 'legal particularism', which is criticised as an untenable form of conceiving legal justification. Finally, it is suggested that there is indeed some limited sense in which it could be said that legal reasoning is defeasible (having to do with the idea that justification in law is a matter of coherence), but it is not grounded on the possibility that legal norms themselves be defeasible as well, and especially it does not call in question the subsumptive character of legal justification.

1. Legal theory behind a theory of legal reasoning

Some major contributions to the theory of legal reasoning appeared in recent times assume as a seemingly indisputable starting point that it is defeasible.[1] Of course, the claim that defeasibility is an essential trait of legal reasoning is by no means novel.[2] But only recently has this claim been put forward in a thorough and systematic way, making use of a set of notions and tools developed in the field of artificial intelligence. As it is upheld nowadays, the claim seems really to be twofold. First, on what could be called its jurisprudential side, the contention is that legal reasoning does have some distinctive features that make it non-monotonic. Therefore, any version of the claim includes some explanation about what is supposed to be the real source of defeasibility in legal reasoning. And secondly, on its logical side, what is contended is that classical logic is not suitable to formalize legal reasoning precisely because it is defeasible. Then, taking for granted that we require new logical tools to cope with defeasibility, the claim is coupled in its different versions with several proposals as to how the allegedly needed non-standard logic should look like.

Nevertheless, the claim has been contested on both sides.[3] As for the logical one, there are indeed some nagging doubts about the very idea of working out non-monotonic *logics*. It is sometimes said that it makes no sense to speak of a non-monotonic 'logic' unless one is prepared to accept a non-monotonic notion of inference. However, the idea of a defeasible conditional as a new kind of logical connective is often deemed to be flawed, indeed the product of conflating a standard notion of material implication with the change of our premises in a process of rational belief revision.[4] Hence, this purportedly new logical connective would hardly have any practical use, leading to systems of so-called 'non-monotonic logic' computationally inefficient. From this point of view there is no need to deny the genuine interest of framing models that intend to give formal expression to patterns of rational belief revision in non-monotonic or default reasoning: what is stressed is that it would be better not to think of them as 'logics' properly said. Of course, to this it can be replied that all hinges on what 'a logic properly said' is supposed to be.[5] These are complicated

[*] This essay has been published in A. Soeteman (ed. by) *Pluralism and Law*, Kluwer Academic Publishers, 2001

and much discussed questions in the philosophy of logic. Anyway, except for some scattered remarks, I shall take no stand on these issues, which lie in fact far beyond my competence.

My main concern here will be with the jurisprudential side of the claim. Before addressing the question whether any kind of non-classical logic is needed at all in order to formalize defeasible reasoning, it must be explained why legal reasoning is supposed to be defeasible in the first place. As we will see, several arguments have been advanced to this effect. However, it is not entirely clear what they prove, given that it is sometimes hard to pin down what is meant in these arguments by 'legal reasoning' (one can think indeed of different sorts of legal reasoning, or better, of legal reasoning carried out in different contexts or under different conditions), and exactly what and in what sense is supposed to be defeasible. In fact, several threads seem to be gathered together into the claim that legal reasoning is defeasible, and perhaps the beginning of wisdom in this debate is to realize in what sense both they are related and they differ from each other.

Be that as it may, the seemingly strongest and most resorted to of those arguments appears to be that legal reasoning is defeasible because legal norms themselves turn out to be defeasible[6], a suggestion that usually stems in its turn from a deeper view about the interplay between legal rules and principles that would take place in contemporary legal systems. But there is a host of difficulties around this argument, which in fact has been forcefully criticised in recent times. Thus, all that some authors are disposed to concede is that legal norms *can* be defeasible (Schauer 1998), which of course is very different from saying that defeasibility is a necessary feature of them. And even more radically, others have gone on to say that the claim that a legal norm is defeasible is simply untenable on closer inspection.[7] According to this line of criticism, the idea of a defeasible legal norm is hopelessly muddled, and once stripped of its apparent plausibility it would be all the better to drop it outright. And then, if it makes no sense to speak of defeasible legal norms, the claim that every legal reasoning has to be defeasible seems to be deprived of its main support and would supposedly come to naught.

Discussions aimed to ascertain whether and why legal reasoning is defeasible, therefore, bear unavoidably upon major issues at the very core of legal theory, such as the concept of legal principles and their interplay with legal rules. This should come as no surprise, given that as Neil MacCormick once reminded us "[a] satisfactory theory of legal reasoning indeed requires and is required by a satisfactory theory of law" (MacCormick [1978] 1994, p. 258). Thus, I plainly cannot do justice here to all the complexities of the matter, but anyway I would like to join this ongoing debate putting forward two main theses. First, that there can actually be defeasible legal norms: but those who hold that as a matter of fact *all* or nearly all legal norms are truly defeasible seem to be unaware that taken seriously this contention is strongly counterintuitive and likely false, an hence the support it could lend to the claim that legal reasoning is defeasible should be regarded with suspicion. And second, that there is indeed some sense in which it can be said that legal reasoning is defeasible, but it is not grounded on the possibility that legal norms themselves be defeasible as well, and especially it does not call in question the subsumptive character of legal justification. In order to clear the way for those theses, however, I think it is worthwhile to begin by paying attention to other arguments commonly used to back the claim that legal reasoning is defeasible.

2. Three arguments for defeasibility in legal reasoning

2.1. Procedural defeasibility

The first one of those arguments stems from what could be called the pragmatics of legal procedures[8], and it is usually put forward as follows. Legal norms can be conceived of as having a conditional structure, so that some legal consequence (of whatever sort) is subordinated to a certain set of conditions. The ascertainment of the whole set of conditions for any legal consequence shall likely be the upshot of putting into relation and combining many separate legal provisions, but by now this question can be left aside. We can call 'positive condition' any event or circumstance that must obtain for the purported legal consequence to be derived, and 'exception' any element in the norm antecedent so that the legal consequence is conditioned to its absence. For instance, we can have a legal norm according to which 'anyone is liable for damage *if* he has brought it about *and* he has acted knowingly, *unless* he acted out of duress *or* in self-defence', stating thereby two positive conditions that must obtain and two exceptions that must be absent in order to be legally liable for damage. Usually, the sum of positive conditions identifies the normal or typical situation for which the legislator has considered appropriate the legal consequence, whilst each of the exceptions indicates an special circumstance for which, despite the satisfaction of every positive condition, the legal consequence has not been deemed adequate.

A legal reasoning is an argument (or a set of arguments) aiming to show that a certain claim or decision is (or is not) justified according to the law. If both positive conditions and exceptions are part of the norm antecedent, one could think that a decision of applying a legal consequence to a particular case cannot be justified unless it is based on having ascertained that *all* these conditions are satisfied, that is, both that every positive condition obtains *and* that every exception is absent (and of course, to know that an exception is not present is different from not knowing that it is present).

However, what the argument now considered is eager to stress is precisely that in the context of legal adjudication things do not run like that. To start with, for the claimant to have a case all that she has to prove is that every positive condition (or even solely a certain subset of them[9]) is satisfied. As for exceptions (and possibly as to the unfulfilment of some positive conditions as well), the burden of proof is shifted to the defendant. The very point of allocating the burden of proof in a certain way lies in setting up a default assumption that will finally stand if contrary proof is not given, and therefore it is up to the defendant to refute the procedural default assumption that every exception is absent. In a context of litigation, therefore, we have to distinguish between facts to be proved and default assumptions to which contrary proof must not be given for the claimed legal consequence to be finally granted. Following the terminology proposed by Sartor, we could call the former *probanda* and the latter *non-refutanda* (Sartor 1995, p. 121). And the most important point to grasp would be that the claimant's case is defeated if the defendant succeeds in refuting any *non-refutandum*, but it does stand otherwise. This amounts to say that a judicial decision in an actual lawsuit will be justified merely by proving every *probandum*, provided that no *non-refutandum* has been refuted.

In fact, all this is rather commonplace. But according to those who hold the argument under examination nothing more would really be needed to support the conclusion that legal reasoning is logically non-monotonic or defeasible. Were it not, they say us, it would be impossible to explain how it is that a legal decision can be truly

justified from a set of premises P1 whose content is that every *probandum* has been proved, and nevertheless unjustifiable from an enlarged set P2 which adds to P1 the new premise that some *non-refutandum* has been refuted. In classical logic, of course, it cannot be the case that '$p \Rightarrow r$' and '$(p \wedge q) \Rightarrow \neg r$'. But what those who are prone to speak of non-monotonic inferences wish to point out is precisely that we can (non-monotonically) infer *r* from *p* (together with the absence of proof for *q*, which still is not equal to inferring it from '$p \wedge \neg q$'), despite the fact that it cannot be inferred from '$p \wedge q$'. Then, the allocation of burdens of proof would shape legal reasoning in such a way as to render classical logic unable to deal properly with it. Because, to put it in a nutshell, classical logic would simply have no resources to handle the notion of a default assumption, and then, from its point of view, the difference between *probanda* and *non-refutanda* would vanish. Thus, any exception *q* would have to be treated as just 'the condition that *not q*', which, as any other condition in the norm antecedent, would need to be proved for the legal consequence to be justifiably derived. And this is of course very different from assuming that any exception *q* to a legal consequence enters at first legal reasoning as 'the assumption, subject to refutation, that *not q*', allowing the granting of the claimed legal consequence as long as *q* is not proved (which, to repeat, differs from 'on condition that *not q* is proved'). Then, the argument concludes, legal reasoning turns out to be defeasible because of how legal procedures are shaped.

This argument from procedural defeasibility, however, strikes me as being less convincing than it could appear at first sight. In order to assess its real merits it would be better to bear in mind two caveats. First, those who underscore the consequences that distinguishing between *probanda* and *non-refutanda* would have for legal reasoning usually go on to hold as well that for no norm it is possible to provide an exhaustive list of all its exceptions (and then, given that a *non-refutandum* is the negation of an exception, that it is not possible to attain the complete list of *non-refutanda* for any legal consequence).[10] But these are logically independent questions that should be kept apart. It is one thing to say that as a result of the allocation of burdens of proof some components of the norm antecedent enter legal reasoning as *probanda* whereas the negations of others enter it as *non-refutanda*, and quite another to sustain that it is impossible to identify exhaustively all the *non-refutanda*. This latter claim, that surely deserves to be analysed separately, amounts to say that legal norms themselves are defeasible (and, as it was pointed out before, it seems to be the strongest of the arguments commonly used to explain why legal reasoning is defeasible). However, when both contentions are conjoined it becomes difficult to see which of them really carries the weight of demonstrating the conclusion they purport to justify. So, in order to determine whether the argument from procedural defeasibility has any merit by itself, let us provisionally suppose for the sake of discussion that legal norms are not defeasible and therefore all the *non-refutanda* for any legal consequence can be exhaustively identified.

Secondly, we should keep in mind the difference between legal reasoning by and large and judicial reasoning. Not every legal reasoning has to take place in the context of actual litigation and then under the rules of legal procedure. There are indeed a number of settings, apart from adjudicating an actual case, in which legal reasoning can be carried out, such as providing legal advice, trying to determine the legal consequences of an act of one's own, or reflecting on hypothetical cases when doing legal dogmatics. Then, one can wonder in what sense, if any, could the argument from procedural defeasibility help to establish the claim that every legal reasoning (and not

only judicial reasoning directed to adjudicate an actual suit) has of necessity to be defeasible. Therefore it seems wise to assess separately the merits of this argument when it is applied to judicial reasoning and to other contexts of legal reasoning outside actual adjudication.

Once supposed that legal norms are not defeasible, it seems trivially true that non-judicial legal reasoning could be reconstructed as an ordinary deductive inference if complete information (both about the facts and about the law) were available. Then, it could be sustained that it is precisely as a result of operating with incomplete information that defeasibility comes about anyhow in non-judicial contexts. And that, in this case, the distinction between *probanda* and *non refutanda* would still be in place, because reasoning under conditions of incomplete knowledge requires indeed default assumptions subject to the possibility of being refuted. Be that as it may, as problems surrounding reasoning with incomplete knowledge are complicated enough to deserve a separate treatment, I prefer to postpone this question to a later moment. For the time being, suffice it to say that, as far as it concerns the purported defeasibility of non-judicial legal reasoning, the argument from allocation of burdens of proof in legal procedures boils down to an argument from incomplete knowledge. Now, let me turn my attention back to judicial reasoning.

To put it bluntly, I think that the argument from procedural defeasibility misses the mark because it seems to have passed over the role that secondary legal norms play in judicial reasoning.[11] Suppose that according to the law if positive condition *p* obtains, provided that exception *e* does not obtain, then a certain legal consequence *c* is to be derived: '$(p \wedge \neg e) \Rightarrow c$'. Of course, given that '$(p \wedge e) \Rightarrow \neg c$', classical logic does not allow the judge to draw *c* from *p* alone. Then, what supporters of the argument say is that, if we think it is justified for the judges to grant *c* when all that has been proved is *p*, either we accept the unpalatable conclusion that judicial reasoning escapes the laws of logic or, as the argument suggests, it must be subject to the laws of *another kind* of logic (to wit, non-monotonic logic). Hence the conclusion that what allows the judge to draw *c* from *p* is a rule of non-monotonic inference.

But this is a mistake. What really licenses that step is simply a legal norm, a secondary rule of adjudication addressed to the judge prescribing her the granting of *c* whenever the claimant has proved *p and* the defendant has not proved *e* (and also that *c* not be granted, despite the fact that *p* has been proved, if the defendant proves *e* as well). The point to be grasped is then that we have to distinguish between a primary norm stating conditions for a certain legal consequence and a secondary norm stating conditions *for the judges to declare* this legal consequence when they adjudicate a case. The distinction between *probanda* and *non-refutanda* among the conditions in the antecedent of the first norm is an effect of how conditions in the antecedent of the second one are arranged. And among these the distinction between *probanda* and *non-refutanda* makes no sense: for the judge to grant the claimed legal consequence *all* the conditions in the antecedent of the secondary norm must be satisfied.[12] Therefore, taking this secondary legal norm as its premise, judicial reasoning need not be conceived of as anything different from an ordinary deductive inference.

To sum up, the argument from procedural defeasibility goes astray by mistaking a secondary legal rule of adjudication for a purported rule of non-monotonic inference. And then the allocation of burdens of proof in legal procedures does not entail that judicial reasoning is non-monotonic.[13]

2.2. Incomplete knowledge

Out of the context of actual adjudication, the claim that legal reasoning is defeasible arises in the first place from taking into account the peculiarities of reasoning with incomplete information. We can have all sorts of practical interests in determining whether a certain action or claim is (or is not) justified in a particular case according to the law. However, even supposing that theoretically the exceptions to any legal norm could be exhaustively identified, we can lack information both about the law and about the relevant facts: we can be unaware that there is according to the law a certain exception to a rule, or that some exception (whose relevance we know) is in fact present in the particular circumstances we are thinking about. Moreover, our knowledge of the relevant facts can be incomplete precisely as a result of our incomplete knowledge of the law. This is a consequence of what Stuart Hampshire called the 'inexhaustibility of description' (Hampshire 1978, pp. 30-31). As Hampshire pointed out, any situation we confront has an inexhaustible set of features, but we only notice a small part of them: we pick out precisely these features that our immediate concerns in approaching the situation make salient. Then, being unaware of the legal import of a circumstance as a relevant exception, the question of its presence or absence in the situation at stake simply goes unnoticed.

But in every-day life, in the legal domain as in any other, we do not stop holding beliefs (and holding them confidently) even though we know that additional evidence might eventually urge us to give them up. Our beliefs, then, are defeasible: provided that certain requirements are met, they can be rationally justified upon a given evidence, even if additional evidence available at a later time could show that sticking to them is no longer justified and they must be replaced.

Thus, reasoning with incomplete information is defeasible. Two remarks seem to be in point here. First, what is really at stake in this kind of reasoning is not truth, but justified belief.[14] What is true depends of course on what is the case, not on what is or is not shown to be the case. So, given two sets of premises P1 and P2 such that P2 adds some piece of information to P1 , it makes perfect sense to say that a belief *b* was justified on P1 but it is not justified upon P2 any more, whereas it would be nonsense to say that before the increasing of information from P1 to P2 it was true but after this extension it is false (cf. Peczenik 1997, p. 147). This point deserves careful attention as far as it concerns the legal domain. It has been sometimes said that the legal case is different, so that, for instance, one's liability for damage 'really does depend, not directly upon what is the case [e.g. that one was acting in self-defence], but upon what is proved' (Bankowski, White and Hahn 1995, p. 13). But there seems to be a disturbing ambiguity here. Being truly liable does depend on what is the case, even though being rightly declared liable in a trial does depend upon what is (or is not) proved to be the case. Then, we have to make clear the difference between conditions for a certain legal consequence as they are fixed by the law, conditions for being justified in believing (in the light of current information) that a legal consequence does apply to a certain situation, and conditions (settled by a secondary norm of procedure) for the judges to declare that legal consequence when they adjudicate an actual suit.

And second, that a belief can be rationally justified on certain evidence surely does not mean that it can be justified upon *any* evidence.[15] The key to form rational beliefs with incomplete information has to do with the notion of normality (which of course is contextual): if one at least knows that a set of conditions obtains which normally or typically allows us to draw a certain conclusion, then, absent any

information concerning possible exceptions, one can be justified in believing that this conclusion is true on the default assumption that no exceptional circumstance concurs (being ready to retract from this belief as soon as evidence of any exception becomes available). Turning again to the legal case, if the sum of positive conditions that qualify as *probanda* identifies the normal or typical situation for which the legislator has established a legal consequence as appropriate, one can be justified in believing that this legal consequence applies to a certain case as far as one knows that every *probandum* does obtain, provided that there is no evidence that any exception obtains as well.

Strictly speaking, we will never be sure that our beliefs will not have to undergo some revision. Of course we become aware of events as they unfold, so that we must always be ready to carry out as many revisions in our beliefs as new evidence could require. It is indeed a point in general epistemology that every belief is defeasible and that saying that a belief is justified amounts to say that, relative to current information, it stands undefeated.[16] Hence, this must be true of my belief that a certain legal consequence applies to a particular situation, just as it is true of any other belief. However, this seems to be a right but rather well-worn conclusion, and it is hard to accept that the claim that legal reasoning is defeasible really boils down to no more than that. As the point is important, let me elaborate on it.

My belief that a legal consequence applies to a particular situation is grounded on an argument whose premises, roughly said, have respectively to do with the content of the law and the facts of the case. Now one could say on some occasion, in a rather loose sense, that the conclusion of this argument has been 'defeated' merely to mean that one of the premises has proved false and that once replaced the old conclusion no longer holds. However, this would say absolutely nothing about *the argument itself* being defeasible in any interesting logical sense, since it would not call in question the deductive character of the inference from the premises to the conclusion. Then, to say that a reasoning is 'defeasible' just to mean that its conclusion has to be disowned if one of their premises turns out to be false is to conceive the idea of defeasibility in the rather trifling sense of mere fallibility.

On the contrary, the very gist of the idea of a defeasible or non-monotonic reasoning is usually said to lie in that even though the old premises are *retained* (i.e. they continue to be considered as true), its import can be undercut by additional information so that the old conclusion no longer holds, and then, it is said, the inference from the premises to the conclusion cannot be deductive. This is really what defenders of the claim that legal reasoning is defeasible want to emphasize. However, this form of expounding the layout of reasoning with incomplete information can be resisted. So-called non-monotonic reasoning relies in fact on default assumptions to derive justified conclusions from conditions of uncertainty, and it retracts from those conclusions as soon as we get some evidence contradicting the defaults. So, in a sense it is not really accurate to say that *nothing* is removed from the old premises when new information is added that displaces the old conclusion: among those old premises there was a default assumption that has proved false and has actually been replaced. Therefore, although it would doubtless be of outstanding interest to achieve a systematic account of the processes of rational belief revision (i.e. of patterns for selecting in each context the proper defaults and for considering them to be defeated), the search for a non-deductive rule of inference in defeasible reasoning, understood as reasoning by default with incomplete information, seems to be misconceived.

In the face of this kind of criticism, defenders of the claim that legal reasoning is defeasible usually retort that it is question-begging.[17] The criticism, they say, presupposes that the reasoning must have the form of *modus ponens*, and then a 'hidden premise' (the default assumption) is ascribed to it that does not seem to be part of the argument in its natural language rendering. Thus, the criticism would beg the question, because to say that nothing could be inferred without this hidden premise is just to take for granted that a valid form of inference cannot be but deductive.

Nevertheless, this kind of reply does not get us very far, as it fails to make the claim it seeks to defend any more convincing than the position it tries to dispute. After all, it has to be explained what would go wrong in accounting for the role of default assumptions in reasoning with incomplete information just in the more familiar and well-known way that is proposed by the view that this reply tries to disqualify. Therefore, the claim that reasoning with incomplete information cannot be modelled as a deductive inference in which premises are subject to revision needs some positive argument in its favour. In the case of legal reasoning, it is sometimes said that this argument could be derived from some requirements concerning how legal norms and their exceptions should be properly represented. Let me turn to this topic now.

2.3. Handling of exceptions in legal knowledge representation

Legal theorists discuss under the heading of 'individuation' the question of how to split up the whole mass of raw legal materials (as it is found in statutory texts) into discrete units which could be considered as complete and independent legal norms.[18] Until now, I have been presupposing the concept of a complete norm as the upshot of combining a number of separate legal provisions, so that all the relevant positive conditions and exceptions for a certain legal consequence were gathered into a total antecedent stating a sufficient condition for it. In legislation, positive conditions and exceptions to a legal consequence are sometimes stated in the same provision, but more often they have to be found in separate statutes. In this case, we could also describe the situation by saying that we have at a surface level a pair of norms which collide in a number of cases, whereas at a deeper level consistency between them can be restored by means of a (often unexpressed) meta-norm of precedence (such that in the cases in which they collide the condition of the norm that takes precedence is to be seen as an exception to the antecedent of the other one).

Defenders of the claim that legal reasoning is defeasible maintain that in order to model it there are indeed good reasons to individuate legal norms in this second way, so that the structural features that one actually finds in legislative sources (i.e. general rule and exceptions in separate norm formulations) should be preserved in a suitable formalization. Prakken, for instance, develops this point by assessing what are generally taken to be requirements for knowledge representation in the field of artificial intelligence (Prakken 1997, pp. 34-35 and 104-105). In order to build a knowledge base, it is said, it would be better to aim at an isomorphic formalization, that is, to try to get a representation of knowledge that structurally resembles as closely as possible the way it appears in the original sources. As far as it concerns the legal domain, this would entail to formalize general positive conditions and exceptions as separate norms. This way, the process of formalization should satisfy the requirement of 'modularity', that is, the possibility of formalizing an element or piece of information in the domain without having to consider each time the rest of it. And this would be desirable both for reasons of validation of the knowledge base (it is easier to avoid mistakes if in order to formalize a norm one need not consider a lot of interactions with the rest of elements in

the domain) and maintenance of it (it would not be necessary to reformulate other units already in the base each time a new item is added).

Now what is more to the point is that, according to Prakken, if we model legal reasoning being as faithful as possible to the structure of statutory texts (and then we formalize exceptions as separate norms) this would require the giving up of the standard or deductive notion of logical consequence (Prakken 1997, 33). For, it is said, what we would have is a framework for non-monotonic reasoning, in which it is possible that a conclusion be derived from applying a norm to the case at hand that nevertheless cannot hold any longer when it is added the information that the facts of the case also satisfy the condition of another norm, without this implying that the antecedent of the first norm was wrongly stated. Hence, taking norms in the way they appear formulated in statutory texts as the proper units of legal reasoning, the exceptions should be somehow handled by the logic itself (that therefore could not be classical logic), rather than by revising the premises to build them in (what instead would allow to stick to classical logic).

Nevertheless, I think that something is amiss in this kind of argument. To start with, what are the proper criteria for norm individuation seems to be, to use a felicitous expression by Susskind, a 'task-dependent' question (Susskind 1987, p. 121). So, rather than thinking in some criterion for norm individuation as the right one in the abstract, it should be admitted that there are different forms of individuating norms which are apposite for different theoretical purposes. Moreover, and without dwelling any further on the complicate problems that knowledge representation raises in artificial intelligence[19], it seems certainly to be an inescapable requirement that the representation be complete. Then, a legal knowledge base should incorporate every meta-norm of precedence between norms existing in the domain. And this seems to jeopardize modularity in the process of formalization (at least as far as it concerns these meta-norms of precedence), and, with it, the purported technical advantages of validation and maintenance.

Still, the argument could be recast in a different form that preserves its substance. Norms, it can be said, must serve as starting points for legal reasoning. But if we think of a norm as the result of combining separate legal provisions, so that all the relevant positive conditions and exceptions for a legal consequence are arranged in a total antecedent stating a sufficient condition for it, this could not be a starting point for legal reasoning at all: it will rather be its upshot. In other words, we cannot reason from norms so conceived because, in fact, we could only get at them when the reasoning has already reached its conclusion. Therefore, we should not think in a norm with all the relevant exceptions already built into its antecedent as a proper premise for legal reasoning (cf. Hage 1997, pp. 6-7).

This line of argument, however, exploits an ambiguity concerning what is meant by 'legal reasoning'. Understood dynamically, as the *process* of reasoning, it is true that it will likely start from the plain meaning of some legal provision as formulated in a source, together with some default assumptions (that there are no reasons to depart from this plain meaning, nor exceptions stemming from other provisions) that in the course of reasoning could be given up if they prove wrong. Anyway, what one is trying to attain all along this process is an 'all things considered' statement of the law applicable to a generic case, even if it has to be corrected as many times as one realizes that some things had been indeed poorly considered. And in as far as default assumptions have not been successfully challenged, one can be justified in believing that a certain all things

considered statement of the law applicable to a generic case, even if fallible, is true.

But one can also speak of 'legal reasoning' to refer not to this process of framing and reframing what purports to be an all things considered statement of the law for a generic case, but rather to the inference aimed at justifying some legal judgment about an individual case, which cannot have as its major premise but one of those all things considered (and notwithstanding fallible) statements. And, as explained above, this inference need not be considered as anything different from classical deduction merely because its conclusion would have to be disowned if one of their premises is recanted because it has been found wrong. Hence, the 'defeasibility' of the premise (understood as its fallibility or revisability) does not entail that the inference itself be defeasible (meaning that it is not deductive).

Nevertheless, in order to insist that legal reasoning is defeasible the argument could still be strengthened. The move, then, would be to claim that an all things considered statement of the law applicable to a *generic* case, understood as one which states a *sufficient* condition for the legal consequence, is not merely fallible, but strictly unattainable (i.e. necessarily doomed to fail).[20] This is tantamount to call in question the very idea that legal justification is a matter of bringing norms which involve a universal quantifier (however complex the predicate over which we quantify may be) to bear on particular situations. This is in fact the argument that legal reasoning is defeasible because legal norms themselves turn out to be defeasible, and now it is time to get to grips with it.

3. DEFEASIBILITY, INDETERMINACY, AND LEGAL JUSTIFICATION

3.1. Implied exceptions and indeterminacy

To say that legal norms are defeasible or have an open-ended character amounts to hold that they are subject to implied exceptions which cannot be exhaustively specified in advance. This contention seems to be quite widespread, whether it is expressly related to the claim that legal reasoning is defeasible or not.[21] Anyway, it is important not to confuse the view that legal norms are defeasible with other ideas that do not capture what is distinctive about this suggestion and which would indeed trivialize it. First, there can surely be overwhelming moral reasons to disregard a legal norm on a certain occasion, and it is even conceivable that a legal system could grant the judge the power to change the law when she thinks this to be the case. But the claim that legal norms are defeasible does not amount to this. Otherwise, one would be confusing the question of what abiding by the law consists in with that of whether the law as it is should morally be applied in the circumstances (Marmor 1992, p. 136). On the contrary, what is actually contended is that any norm is subject to exceptions because of its potential encounter with other *legal* norms, and that an unstated exception is not merely a *change* of the norm by a court in the very moment of its application. And secondly, it should be clear what it means to speak of exceptions that are unspecifiable in advance. It is not that we can identify the entire set of generic acts which would count as exceptions to any norm but we are nevertheless unable (because of vagueness) to specify in advance the full extension of each one of these exceptions (after all, we are also unable for the same reason to specify the full extension of every positive condition in the norm antecedent). What is really claimed in saying that legal norms are defeasible is that it is not even possible to specify in advance the whole set of its exceptions as *classes* of acts (i.e. as generic acts).[22]

It is usually held that the defeasibility of legal norms, so understood, arises from the interplay between principles and rules, and therefore the claim that legal norms are subject to unstated exceptions upon the occurrence of events which are generically unspecifiable in advance is closely linked to a two-layered picture of law. Overlooking the details of any particular theory, this picture could be outlined as follows.[23] In a first layer we have principles. Principles give reasons for (or against) certain states of affairs in so far as they embody the achievement (or frustration) of some value. However, any action has an inexhaustible set of features: that it can bring about (or maintain, or frustrate) the valuable state of affairs that a principle refers to is just one among them. Hence, the reason for an action that a principle provides can collide with other reasons stemming from other principles which different aspects of the situation also make relevant. So, an all things considered judgment about any particular case would require the weighing or balancing of all those principles.

For a host of reasons (having to do with unpredictability, the costs of decision-making, the proper allocation of authority etc.) it seems desirable to add to that picture a second layer, in which we find rules. With a rule the lawgiver intends to provide in advance the outcome of this kind of balancing process for a class of cases (i.e. relative to a generic act), what presupposes a certain view about which reasons are typically present in this class of cases and which is the relative weight that they typically have in them. And in order to frame a proper rule, its condition must be stated in terms that have semantic autonomy from the underlying reasons for the rule (Schauer 1991, pp. 55 and 61-62). Then, one could think that when the facts of the case satisfy a rule condition (leaving now aside any doubt concerning vagueness) the rule attaches a legal consequence to the case outright, without any need of weighing or balancing reasons at all (and of course this conclusion would still hold if exceptions to the rules were only to come from other rules).

However, defenders of the claim that every legal norm is defeasible insist that it is possible to find implied exceptions on grounds of principle to what might otherwise seem to be a clearly applicable rule. This could happen because of two reasons[24]. First, given what Schauer has called the under- and over-inclusiveness of rules (Schauer 1991, pp. 31-34), it is possible that the rule be applicable to cases to which it was not meant to apply, so that its application would go against its purpose or rationale. In this situation one could say that a case which is comprised in the norm condition does not deserve the norm solution according with the very weighing-of-reasons-in-advance in which the rule is grounded and that it purports to replace. Still, the justification to depart from the rule for this reason should likely be weighed against reasons for sticking to the rule (which are the reasons for having rules in the first place), such that balancing is anyhow required to decide the case. And secondly, in a case in which the rule is applicable, a reason grounded on a principle may concur that was not taken into account in this balance-in-advance expressed by the rule.[25] Hence a weighing is needed again to decide the case, now between what one could call the principle behind the rule (i.e. the outcome of that balance made in advance) and the principle outside it.

Thus, we could at last gather together all the pieces that would jointly make up the argument for the defeasibility of every legal norm: given that it is not possible to specify in advance in what generic cases a principle would prevail over others, and that it is possible to find implied exceptions on grounds of principle to any rule (what would ultimately involve a collision of principles), therefore any legal norm, be it a principle or a rule, is subject to implied exceptions generically unspecifiable in advance.

Now, I think that there are two main problems with this overall picture, and both have to do with depicting as *necessary* what indeed are at most *contingent* features of a legal system (or even of a part of it). To start with, it is a contingent matter, depending on the extant interpretative practices, that the possibility of introducing exceptions to a rule on grounds of principle be admitted at all.[26] Rules might indeed be applied according to what Schauer calls an 'entrenched model' of decision-making (Schauer 1991, pp. 51-52 and 77-78), in which case they would be seen as stating *sufficient* conditions for a legal consequence. The adoption of such an entrenched model of rule application may be desirable in some cases for several reasons (having to do with predictability, the need to achieve coordination or to encourage reliance etc.), and every legal system will likely treat a (greater or lesser) number of rules as entrenched. Hence, there can be indefeasible norms, and it is a contingent matter how many of them are so.

And second, the argument assumes that there are not definite meta-norms of precedence between colliding principles (and therefore that neither are they between principles and supposedly non-entrenched rules), not even of a partial or conditional character, that is, relative to certain *classes* of cases among all the conceivable situations in which they could collide (since otherwise it could at least be possible to formulate indefeasible statements of the law for these generic cases).[27] But, again, this seems to be a contingent matter. Indeed, one would say that there are at least some paradigmatic cases of collision in which the relation of precedence seems to be indisputably clear. In order to avoid misunderstandings, it should be evident that what is here at issue is the existence of meta-norms of precedence which are themselves part of the law (of course, that they not be enacted, but customary or conventional, is immaterial to the point). Hence, if the existence of such legal meta-norms of precedence (even partial or conditional) is contingent, so it is the existence of indefeasible legal norms. But what is now worth highlighting is that if they are actually lacking, the law leaves indeterminate every case in which the resulting defeasible norms are applicable. So, there can be truly defeasible legal norms, but wherever they are there is a pocket of indeterminacy in the legal system.

Then, it is important to get out into the open what kind of consequence would follow from the argument that all legal norms are truly defeasible. I want to stress that it is far more radical than its supporters seem to have appreciated. It is indeed that the law is pervasively indeterminate. That the law, so to speak, provides reasons to be weighed, but not ultimate grounds to weigh them, so that they should always be weighed according to non-legal standards. Assuming that law's objectivity is conventional, this would turn the legal system into something like a 'self-effacing convention', which at the end would always drive us beyond it to decide any case. That this be conceptually possible does not seem to be a good argument to accept the implausible view that this is indeed what our legal systems amount to.

Be that as it may, to embrace wholesale indeterminacy seems to be too high a price for a theory of legal reasoning to pay it. It remains to be seen whether it would be possible to hold the claim that all legal norms are defeasible and still to escape that unwelcome consequence.

3.2. Grounds of weight and legal particularism

Perhaps there could be a way out for those who insist that all legal norms are defeasible and yet would hesitate to accept that the law is wholly indeterminate. Recall that the argument to dismiss this last conclusion was that it seems indisputable that there

are at least some paradigmatic cases in which the relation of precedence between colliding principles is clearly settled by the law. However, a supporter of the claim that all legal norms are defeasible could readily concede this, on condition that we refer only to *individual* cases. From this point of view it would make sense to say that the law is indeed determinate (i.e. that there is a 'legally right answer') in many individual cases, even if it remains true that it is impossible to formulate indefeasible statements of the law for any generic case. The problem is that this entails a dubious understanding of how the process of 'weighing' operates and even of the very notion of legal justification. Let me pause on this for a while.

To begin, there is an opposite view on those matters, that I find more convincing, according to which the operation of weighing or balancing is not a form of norm application different in nature from subsumption, but merely a previous step to this.[28] Then, both principles and (non-entrenched) rules could be seen as having implied exceptions at a *prima facie* level of analysis. And the process of weighing would be conceived of precisely as the operation of making explicit some of those implied exceptions, by bringing to the surface and taking into account any conventional (and hence unexpressed) meta-norm of precedence relevant to the case. The key idea, therefore, is that even if at a *prima facie* level there are not exceptionless principles, exceptions to them must follow generalizable patterns. Of course there can be situations in which several principles collide where one can find no conventional meta-norm of precedence. But in this case there are no legal grounds of weight at all, and to speak of 'weighing' anything would be but a misnomer for what in fact would simply be sheer decision taken in a space of indeterminacy. Hence, one could accept Hart's famous saying that '[a] rule that ends with the word 'unless...' is still a rule' (Hart [1961] 1984, p. 139), provided that the dots can be filled in with standards or criteria internal anyhow to the law itself. When the operation of weighing is so conceived, its outcome is an all things considered statement of the law for a *generic* case (i.e. one that, from a logical point of view, involves a universal quantifier). And then, as a last step, legal justification would proceed by subsuming under it the present individual case.

This is the overall picture that has to be disputed by those who insist that all legal norms are truly defeasible but are not prepared to accept that the law is pervasively indeterminate. Instead of this, the alternative view they have to bet for could properly be called 'legal particularism'[29], as it turns out to be something like the legal counterpart of moral particularism, a well-known (and much disputed) doctrine in moral philosophy.[30] The particularist (legal or moral) defies the very idea that justification is a matter of bringing particulars under general standards. On the contrary, his motto is that the weight of any reason (or even its being a reason at all) would be irreducibly context-dependent or 'case-related' (Hage 1997, p. 116), that is, it would depend, in a way that escapes any attempt to articulate universally quantified conditionals, on what other features are present (or lacking) in each particular situation. This would supposedly call for a distinctive ability of 'judgment' or 'discernment' to be exercised on the case at hand in order to arrive to the right (legal or moral) answer, a purported 'sensitivity' that would amount, as Dancy says, 'to be able to get things right case by case' (Dancy 1993, p. 64). Thus, in the legal domain the operation of weighing should be conceived precisely as the exercise of that kind of discernment on the particular situation, which would lead us directly, without going through any subsumptive inference, to the right legal judgment about the individual case.

A detailed analysis of moral particularism would go well beyond my current

purposes. Anyhow, here it can be enough to highlight the major hurdle any form of particularism (legal or moral) has to overcome. It is to uncover what this rather mysterious ability of 'discernment' really consists in, once rejected the key idea that justification essentially involves an inference from an appropriate general standard (i.e., that it is, so to speak, essentially nom-governed). In fact, true particularism[31] seems to lack a convincing answer to the question of how a 'decision on the particular facts' could really be non-arbitrary. If the reason for this decision is adequate, one would rather say that it has to be an instance of a generality that holds through other contexts, that is, that it cannot be reducible to a claim about just this particular case and yet to pretend to be something different from a groundless decision. Therefore, it seems that those who hold that all legal norms are actually defeasible cannot simply rest on legal particularism to avoid the conclusion that the law is wholly indeterminate.

3.3. Justification and coherence

It flows from the previous discussion that it makes no sense to speak of a 'decision on the particulars' being right according to the law that is not seen at the same time as an instance of a generality that holds through other contexts. Justification, then, has a subsumptive character. And, if it is possible at all (i.e. if the law is not simply indeterminate), it presupposes conventional meta-norms of precedence concerning generic cases, such that they admit of consistent universalization.

This conclusion, however, could still be resisted, contending that the countless variability of circumstances turns deceptive any attempt to pick out conventional norms of precedence such as those. So, it seems that the particularist could stubbornly insist that agreement on paradigmatic cases does not warrant any reliable generalization. This kind of reply, nevertheless, would to my mind involve a rather odd view about the very idea of rule-following. This is of course a major issue that would require much careful analysis, too long to undertake here. But a few remarks may be in point.

When we share a practice, what we share, as Little says, outstrips any finite set of propositions (Little 2000, pp. 283 and 301). It is a truism that we come to understand a concept or a practice by reference to a number of illustrations and examples that must always be finite. But learning the practice involves moving from this finite set to an indefinitely wide range of future applications. Hence, the content of what is learned transcends the set of applications from which one comes to learn it. So, when a judgment on a fresh situation must be given, we invoke our competency as learned participants in the practice, which involves a shared sense of what is relevant and what counts as similar. But it is true that this competency, this 'knowing how' to go along with the practice, has an immanent content that in a sense is not disclosed until specific cases arise.

Therefore, the judgment on the new case involves a sort of analogical argument that attempts to articulate something that is already there in our shared -but partially unarticulated- understandings. This argument is carried out through a deliberation that searches for what seems to be salient in settled cases, formulates hypotheses about the criteria that those salient points seem to display, and then goes back to related actual or hypothetical seemingly clear cases in order to test these hypotheses about the shape of our criteria. Then, this going back and forth is to be seen as a search for coherence between what *we* are disposed to retain as unquestionably settled, and the best hypotheses we have carved to uncover the background of shared criteria which account for their clarity or for their being settled.

I think that this shows up something about the nature of legal knowledge that is worth mentioning. Any belief about the content of the law as it is at any given moment has a holistic warrant. In other words, justifications for these beliefs are a matter of coherence. And then one can safely say that in a certain sense any belief *b* that a certain all things considered statement of the law for a generic case is true turns out to be defeasible. This amounts to say that the warrant *b* has through its belonging to the most coherent system of beliefs about the content of the law that is available would be lost as soon as it is envisaged a more coherent system of beliefs which drops out *b*.

But to accept this is very far from endorsing sheer particularism.[32] It is only to accept that legal justification is 'defeasible' in the limited sense that its major premise, always understood as an all things considered statement of the law for a generic case, is defeasible (namely, fallible or revisable as explained). But one can readily accept this without any need to give up the idea that legal justification is subsumptive, and then a classical deductive inference.

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NOTES

[1] As e.g. (Sartor 1995), (Hage 1997) or (Prakken 1997). See also (Hage and Peczenik 2000).
[2] See (Hart [1948-49] 1960) –recanted thereafter in (Hart 1968, p. v)- and (Toulmin 1958, p. 142).
[3] That for the rest can be kept apart: it can be conceded that legal reasoning is defeasible while denying at the same time any credit to the notion of a 'defeasible implication' –as it is the case in (MacCormick 1995)-, what probably amounts to suggesting that in order to work out formal models of defeasible or non-monotonic reasoning we do not need any 'new logic' properly said.
[4] This kind of criticism can be found in (Alchourrón 1993).
[5] See (Sartor 1995, p. 140 and fn. 12 in p. 154) and (Prakken 1997, p. 98).
[6] The notion of a 'defeasible norm' (or 'rule') is endorsed by (Sartor 1995, pp. 143-144), (Prakken 1997, pp. 47-48) and (Prakken and Sartor [1996] 1997, p. 182). However, some supporters of the claim that legal reasoning is defeasible are not satisfied with this way of talking. Hage, for instance, holds that defeasibility must be ascribed to the *arguments* that have to do with rule application, not to the rules themselves (Hage 1997, p. 4, fn. 6).
[7] See (Marmor 1992, pp. 135-138) and (Marmor 1999, pp. 141-150). And specially the trenchant criticism of the idea of defeasibility as applied to legal theory and the theory of legal reasoning in a series of illuminating papers by J. Rodríguez, some of them co-authored with G. Sucar: see (Rodríguez 1997), (Rodríguez and Sucar 1998) and (Rodríguez 2000, pp. 164-166).
[8] The argument is best stated in (Sartor 1995, pp. 119-140). See also (MacCormick 1995, pp. 100 and 104-106) and (Prakken 1997, pp. 272-273).
[9] It may be easier for the defendant to prove that certain positive condition is *not* satisfied than for the claimant to prove that it is fulfilled. This is probably what happens with the positive condition of 'having acted knowingly' in the example I have proposed. And this can be a ground for the law to allocate on the defendant the burden of proving that this positive condition is not met, instead of burdening the claimant with the proof of its fulfilment. For the sake of clarity, nevertheless, I will henceforth disregard this complication.
[10] As a case in point, see (Sartor 1995, p. 143).
[11] The point is clearly stated in (Rodríguez and Sucar 1998, pp. 299-301). My approach here is much indebted to theirs.

[12] Notice that while '*e*' is an exception in the antecedent of the primary norm, what is an exception in the antecedent of the secondary one is that 'the defendant has proved *e*'. Then, for the judge to grant the claimed legal consequence it must be the case that this exception in the antecedent of the secondary norm does *not* obtain. It would be rather bizarre to say that the judge has to grant it 'as long as it is not proved that (the defendant has proved *e*)'.
[13] It is noteworthy that, commenting on Hart's pioneer analysis on defeasibility, Prakken reproaches him for regarding it as a mere 'aspect of legal procedures' without drawing out its 'implications for logic', and then leaving supposedly unexplained how that feature could be 'reconciled with the view that judicial reasoning is still subject to the laws of logic' (Prakken 1997, pp. 272-273). *Pace* Prakken, however, if what has been said above is right, the fact that Hart did not intend to draw any special 'implication for logic' should be seen as a merit of his rather than as a shortcoming.
[14] As MacCormick says, defeasible reasoning 'has more to do with (prudent) propositional attitudes than with propositions' (MacCormick 1995, p. 114).
[15] In the words of Brewka, '[w]e do not choose blindly among possible extensions of our knowledge' (Brewka 1991, p. 6).
[16] See (Chisholm [1966] 1989, pp. 49-60), (Pollock 1987, esp. p. 491) and (Pollock and Cruz 1999, pp. 36-38 and 197-200).
[17] A reply along this line can be found in (Hage 1977, pp. 5 ff.).
[18] On individuation, see (Raz [1970] 1980, pp. 140-147 and 216-224) and a useful survey of different positions on this issue in (Susskind 1987, pp. 118-128).
[19] On general criteria for knowledge representation, see (Susskind 1987, pp. 114-115).
[20] See (Sartor 1995, pp. 120 and 143-144), who speaks of the unattainability of 'perfect conditional norms', and (Prakken 1997, pp. 7 and 47-48).
[21] See (Twining and Miers [1976] 1982, pp. 216-217), (Honoré 1977, p. 109), (Harris 1979, p. 5), (Alexy [1985] 1986, pp. 88-89), (Susskind 1987, pp. 195-198), (Sartor 1995, pp. 120, and 143-144), (Sunstein 1996, pp. 124-128), (Fletcher 1996, pp. 57-58), (Prakken 1997, pp. 7 and 47-48).
[22] Except, as Sartor points out, in the bogus sense which would result from 'using vague evaluative formulations [...] which only refer to open classes of exceptions' (Sartor 1995, p. 143).
[23] This outline draws mainly on (Sartor 1995, pp. 141 and 143-144), (Hage 1997, pp. 106-129) and (Hage and Peczenik 2000, esp. pp. 307-318). For sure, there is sharp controversy in current legal theory about the very notions of legal rules and principles, but this is not the place to give a full account of it. Moreover, this discussion seems too often to be encumbered by an unwitting wavering of the meaning those terms are given, which to my mind leads many times to arguing at cross-purposes.
[24] See (Atienza and Ruiz Manero 2000, p. 152), who refer in their turn to (Ródenas 1998). It is noteworthy, however, that when Atienza and Ruiz Manero go on to explain these two ways in which there can be exceptions to a rule on grounds of principle, they are intending to *criticise* the claim that every legal norm is defeasible. How is this possible will be considered below.
[25] In both cases, therefore, it is just taken for granted that the content of this balance-in-advance behind the rule is easily identifiable. But the matter is less simple than it might appear at first sight, as it involves the problem of ascertaining legislative intent. Anyhow, I will not pursue this issue any further.
[26] See (Hart [1961] 1984, pp. 129-130), (Alexy [1985] 1986, p. 89) and (Schauer 1998, pp. 236-237). By the way, Schauer attributes to Hart, to my mind mistakenly, the view that defeasibility is a necessary feature of legal norms: see (Schauer 1998, p. 237).
[27] This is in fact what Sartor maintains, saying that relations of priority between norms are indeterminate (Sartor 1995, p. 144). In quite the same vein Prakken holds that 'like any other legal rule, legal collision rules are also defeasible' (Prakken 1997, p. 205).
[28] Here I follow closely (Atienza and Ruiz Manero 2000, pp. 151 and 153) and (Moreso 2000).
[29] I take this label, together with many clues about how to expound and criticise legal particularism, from (Burton 1994) and (Moreso 2000).
[30] The outstanding references here are (McDowell [1981] 1998), (McNaughton 1988), and especially (Dancy 1993).
[31] That is, particularism in the sense just explained, that is to be distinguished in any case from the open-endedness of the moral principles one holds, understood precisely as incompleteness or indeterminacy (a different sense which I think could be easily espoused by a moral expressivist). On this difference, see (Blackburn 1998, p. 309).
[32] If I understand her aright, this would be in line with what Little tries to show in (Little 2000).

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