Defeasibility and Balancing

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ABSTRACT
"Defeasibility" and "balancing" are expressions introduced in recent times to deal with long-standing legal phenomena, which in the context of the constitutional state acquire a special prominence. What is at issue, in fact, is the necessity to recognise exceptions implicit in the norms, in order to provide the legal system with the flexibility needed to maximise the chances of finding a correct—just—answer without abandoning the legal system; and (which to a large extent is another aspect of the same phenomenon) to resolve difficult cases (those for which there is no predefined rule, but only principles) argumentatively, by resorting to a procedure, balancing, the use of which does not necessarily imply an exercise in arbitrariness, although it does involve certain risks that recommend a prudent and limited use of this resource. The last part of the paper summarises the ideas that legal theorists and practitioners should bear in mind in order to understand and make proper use of these two controversial but indispensable notions.

KEYWORDS
Balancing, defeasibility, rules and principles, implicit exceptions, constitutional state

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1. *Introduction. New names for traditional concepts*

Defeasibility and balancing are more or less new names for phenomena that are not new; they could not be, because they are closely related to basic features of legal systems and legal practice.

Let us start with "defeasibility". The expression (defeasibility) was introduced into legal theory at the end of the 1940s by Herbert Hart in one of his first writings: "The Ascription of Responsibility and Rights" (HART 1948). It is a work that Hart did not want to publish again later, but for reasons that do not seem to have had anything to do with this notion, but rather with that of ascription or, more precisely, with an excessively wide conception of ascriptivism, of the weight assigned to the ascriptive use of language, which entailed (Hart reached this conclusion as a consequence of various criticisms that were directed against his writing) a risk of incurring in reductionism (see LACEY 2006, 146)[1]. In fact, it seems that Hart was «unusually proud throughout his life» of having found something that showed the importance of paying attention to the legal use of language in order to develop notions of general philosophical interest (LACEY 2006, 144).

Hart's "discovery" is relatively simple, and he explains it with the clarity and elegance that always characterised him. It is that certain legal concepts, such as 'contract' or 'trespass', and, more generally, many of the most typical ones in criminal law, cannot be completely understood (defined) in terms of necessary and sufficient conditions, but rather that it is indispensable to include in their characterisation an "unless" clause:

> «In consequence, it is usually not possible to define a legal concept such as 'trespass' or 'contract' by specifying the necessary and sufficient conditions for its application. For any set of conditions may be adequate in some cases but not in others and such concepts can only be explained with the aid of a list of exceptions or negative examples showing where the concept may not be applied or may only be applied in a weakened form» (HART 1948, 174).

[*] Translated from Spanish by Mª Carmen Martínez Gómez.

[1] Anna Pintore, in a 1990 book (PINTORE 1990), considers that work of Hart to represent an initial and "deviant" stage from a path that leads (fundamentally in *The Concept of Law*) to «a conception of law and legal concepts that is commonly considered to be closed and belonging to legal positivism» (9). According to Pintore, the defeasibility of legal concepts that Hart defends here (and which would be something different from conceptual vagueness) takes us to an image of the law «as an open system, with no boundaries» (15). Hart, again according to Pintore, would have abandoned, in his mature stage, that idea of law «not as a system, and even less as a closed system of rules and concepts» (18) which, however, would have been assumed by someone like Neil MacCormick, who would represent (it is important to remember that Pintore writes in 1990), a "third way" between Hartian positivism and Dworkinian principialism; and, to carry out that operation, MacCormick would be based precisely in the defeasible character of legal concepts (PINTORE 1990, 183 ff.; all translations from Italian are mine). Anyway, the development of that notion in MacCormick's work is found in MACCORMICK 1995 (which later was part of MACCORMICK 2005).

In a later essay (see CHIASSONI 2019, 233) the conditions that would go behind the "unless" clause are classified by Hart into two categories: excusing conditions or invalidating conditions. But what is perhaps more interesting to highlight here is that Hart thought that there was no word in ordinary English to account for this feature, and his choice of "defeat" or "defeasible" was, in fact, a consequence of his familiarity with legal practice (of his experience as a lawyer), and also shows what has already been pointed out: that the careful analysis of legal language can have a more general scope:

> «This characteristic of legal concepts [needing the 'unless' clause] is one for which no word exists in ordinary English. The words 'conditional' and 'negative' have the wrong implications, but the law has a word which with some hesitation I borrow and extend: this is the word '*defeasible*' used of a legal interest in property which is subject to termination or '*defeat*' in a number of different contingencies but remains intact if no such contingencies mature. In this sense then, contract is a defeasible concept» (HART 1948, 175).

About a decade later, Stephen Toulmin, in a book that is often considered as the beginning of studies on "informal logic", *The uses of argument* (TOULMIN 1958), introduces the same idea to account for a typical feature of argumentation, as he understands it[2].

In short, what Toulmin proposes there is an approach to argumentation seen as a social interaction, which takes place between a proponent and an opponent (the classic scheme of dialectics). At the beginning of the argumentation, the proponent holds a thesis (*claim*: for example, "Harry is a British subject"), which can be objected to by the opponent; otherwise, there would be no need to argue. If so, if it is objected, then the proponent has to give reasons (*data* or *ground*) in favour of his initial claim, which are at the same time relevant and sufficient (for example: "Harry was born in Bermuda"). The opponent may now dispute those reasons, those facts, but even if he accepts them, he can require the proponent to justify the step from the *data* to the *claim*. The general statements that authorise said step constitute the *warrant*, that is, a statement that is not descriptive, and that Toulmin explains by making an analogy with the role that a recipe has in the baking of a cake, and once all the ingredients are in place (for example: "A man born in Bermuda will generally be a British subject"). Finally, it is sometimes necessary to show that the guarantee is valid, relevant and of enough weight, which constitutes the *backing* of the argument (in our example: "On account of the following statutes and other legal provisions: ..."). Those elements are enough to account for when we have a valid or correct argument. But the *strength* of an argument depends on two other factors that, when added to the previous ones, allow us to obtain a general model of argumentation: the *qualifiers* that graduate the strength with which the *data*, the *warrant* and the *backing* provide support for the *claim* ("most certainly", "presumably", "most likely"...); and the *rebuttals*, that is, the support provided for the claim may stop existing or weaken when certain extraordinary circumstances or certain exceptions occur (for example: "unless both his parents were aliens, or he has become a naturalised American").

[2] It is worth clarifying here that Toulmin's way of understanding argumentation is not that of classic logic, of formal deductive logic. His model, as I will now explain, is that of traditional dialectics, which consists of seeing argumentation as an interaction, as an activity. Juan Carlos Bayón has questioned the idea that legal reasoning is defeasible and, with it, also the need or pertinence of building a type of non-classic (non-monotonic) logic to account for justificatory judicial reasoning. But he understands argumentation, the justifying judicial reasoning, in the sense of classic logic, that is, as «la inferencia con la que se justifica una determinada conclusión acerca del derecho aplicable a un caso individual» (BAYÓN 2001, 50). He is right, but Toulmin's idea of defeasibility (of refutability) refers to something different, namely, to the process of argumentation, to argumentation seen from a pragmatic perspective.

Toulmin, by the way, points out that this last element coincides with what Hart had called "defeasibility" in his work. At the same time, he underlines that Hart had shown that this phenomenon had relevance not only in the field of law, but also in the field of philosophy (regarding notions such as freedom of will or responsibility), and suggests what could have been the cause of Hart's discovery: «It is probably no accident that he reached these results while working in the borderland between jurisprudence and philosophy» (TOULMIN 1958, 142).

As a precursor of this notion, in the field of ethics, Toulmin also refers to the thesis defended by David Ross in his influential book, of 1930, *The Right and the Good*, according to which it is necessary to recognise that all moral norms have exceptions. As it is well known, Ross introduced there the distinction between *prima facie* duties and real or absolute duties, in order to account for the (according to him—that is, according to the distinction he introduces—only apparent) conflicts between moral duties. So, for example, the duty to tell the truth or to keep a promise may have an exception in certain circumstances, for instance, in a case in which acting in accordance with these duties would cause a person unjustified harm:

> «If, as almost all moralists except Kant are agreed, and as most plain men think, it is sometimes right to tell a lie or to break a promise, it must be maintained that there is a difference between *prima facie* duty and actual or absolute duty. When we think ourselves justified in breaking, and indeed morally obliged to break, a promise in order to relieve some one's distress, we do not for a moment cease to recognize a *prima facie* duty to keep our promise, and this leads us to feel, not indeed shame or repentance, but certainly compunction, for behaving as we do» (ROSS 1930, 28).

I believe it is important to highlight here some features that Ross underlines in relation to ethics, which contrast what happens in other fields of experience and which would explain the need to introduce the distinction in question. One is that Ross considers that the opinions of the majority of people or of the wise people play a very important role in ethics, and would constitute something like a starting point of the ethical method[3], which could not be said, of course, of the physical sciences, which construct theories and hypotheses that seem to move further, and increasingly further away, from our intuitions about how the physical world is and how it works. Another one is that mathematical notions, such as that of the isosceles triangle, differ from those of an ethical nature, for example: that of correctness, because the former could be defined—we could say—by a set of necessary and sufficient properties: thus, a triangle that has two equal angles is isosceles, independently of any other feature it possesses; but this does not happen in relation to the rightness of acts. And the third characteristic (a consequence of the previous one) is that the (moral) rightness of a particular act (as opposed to its *prima facie* rightness) depends on a set of circumstances[4] or, in other words, the act in question falls under various moral standards, so that according to one (for example, "no lying") it could be wrong, but, according to another, it could be right ("no causing unjustified harm").

Furthermore, what we understand today as defeasibility (that rules contain implicit exceptions) has such remote antecedents that they could be placed in the very emergence of philosophy; at least, of practical philosophy. In a way, it is what lies behind Plato's distrust of

[3] What Ross defends as a method of ethics, both in that book and in a later book, *Foundations of Ethics* (ROSS 1939), is nothing but a version of the "reflective equilibrium".

[4] «But no act is ever, in virtue of falling under some general description, necessarily actually right; its rightness depends on its whole nature and not on any element in it. The reason is that no mathematical object (no figure, for instance, or angle) ever has two characteristics that tend to give it opposite resultant characteristics, while moral acts often (as everyone knows) and indeed always (we must admit after reflecting) have different characteristics that tend to make them at the same time *prima facie* right and *prima facie* wrong; there is probably no act, for instance, which does good to anyone without doing harm to someone else, and *vice versa*» (ROSS 1930, 33 f.).

legislation, of the government of men by means of general rules, as it emerges from dialogues such as *The Republic* (PLATO 1997a) or *The Statesman* (PLATO 1997b). In the latter, government by laws (and customs) appears as a kind of rationality of the second best, since «the best thing» says the Stranger (who in the dialogue represents the role usually played by Socrates), «is not that the laws should prevail, but rather the kingly man who possesses wisdom» that is, the wise and good man: the philosopher. And the reason for this would be that

> «the law could never accurately embrace what is best and most just for all at the same time, and so prescribe what is best. For the dissimilarities between human beings and their actions, and the fact that practically nothing in human affairs remains stable, prevent any sort of expertise whatsoever from making any simple decision in any sphere that covers all cases and will last for all time» (PLATO 1997a, 294a).

And the idea of defeasibility is also one of those underlying Aristotle's presentation of the concept of equity, in one of the most brilliant pages, in my opinion, in the entire history of philosophy of law. Aristotle defends the need to deviate in certain cases from the literal meaning of the law, that is, to introduce an exception, in order to account for the singularities of the specific case, which the legislator could not foresee, due to the «nature [...] of practical affairs». The text deserves to be quoted at some length:

> «the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which will be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over-simplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, viz. that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite the rule also is indefinite, like the lead rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts» (ARISTOTLE 1984a, book V, sect. 10, 1137b-1138a)[5].

[5] References to these classical texts can also be found in SCHAUER (2012), who rightly recalls the importance of courts of equity in the development of law (including, of course, common law). Curiously enough, the way of understanding defeasibility in law proposed by Alchourrón, what he calls "dispositional approach", is precisely the same as Aristotle regarding equity. According to Alchourrón, the circumstance C can be considered as an implicit exception from the moment of the enactment of a law, even if the legislator did not consider it at the moment, but as long as there are reasons to think that, if he had considered it, he would have introduced it. Alchourrón thinks that many of the conditional sentences in our everyday language (and that is also for legal language) are defeasible: we formulate our sentences for normal circumstances, knowing that in certain situations our sentences will be defeated. And that because «las construcciones condicionales de la forma 'Si A entonces B' son frecuentemente usadas de un modo tal que no se pretende con ellas afirmar que el antecedente A es una condición suficiente del consecuente B, sino sólo que el antecedente, sumado a un conjunto de presupuestos aceptados en el contexto de emisión del condicional, es condición suficiente del consecuente B» (ALCHOURRÓN 2000, 23-26).

With regard to the other term, "balancing", something very similar could be said, precisely because, in reality, defeasibility and balancing are different aspects of the same reality, instruments, one could say, with which one tries to achieve the same purpose (speaking in abstract terms): to avoid excessive rigidity in the law and to contribute to bringing the law closer to justice.

In recent times, the person who seems to have contributed most to spreading the idea of balancing in legal theory—mainly, in the Latin world—has been Robert Alexy. This notion (the German expression is "Abwägung"), by the way, does not appear in the German author's first work, from 1978, dedicated to legal argumentation (ALEXY 1989), but instead, years later, when he deals with fundamental rights (ALEXY 2002)[6] and introduces the distinction (essentially inspired by Dworkin) between rules and principles. Fundamental rights, for Alexy, are essentially principles. Unlike rules, which would be norms that order something definitely, principles would be characterised as "optimisation commands", that is, norms that order something to be achieved to the highest possible degree, according to the existing factual and legal possibilities. Well, while the application of rules requires subsumptive reasoning, in the case of principles the type of argumentation to be resorted to would be balancing. I will not go now into other details about the way in which Alexy understands balancing (I will say more about this later), but I am interested in highlighting these two points.

The first is that Alexy's conception of balancing has not undergone any change that can be considered essential throughout all these years (about 40, during which it has been discussed *ad nauseam*), but it has undergone some additions and adjustments. One of them consists precisely of the following. In his recent polemic with POSCHER (2022), the latter reproaches him, among other things, that principles cannot be conceived as "optimisation commands", simply because an optimisation requirement, following Alexy's definitions, would be a rule: it orders something to be done (whatever the optimisation consists of, that is, the achievement of something "to the highest possible degree") in a definitive manner. Well, to face this criticism (which had already been made by AARNIO 1990 and by SIECKMAN 1990), Alexy establishes a distinction between an "optimisation command" and a "command to be optimised" (which is what principles would be), and for that he relies precisely on Ross' differentiation between two types of duties, that was previously mentioned. Therefore, in short, what Alexy holds is that the key distinction to understanding balancing is the one that can be established between two types of duties: ideal duties, *prima facie* or *pro tanto* (fixed in principles), and real duties, definitive or considering all the circumstances of the case (fixed in the rules resulting from the balancing of principles). And the other point I want to make here is that Alexy's elaboration of the method of balancing does not pretend to be anything other than a rationalisation of the way in which the German Constitutional Court and other European courts proceed when solving problems that involve conflicts between rights (between principles): balancing is, one might say, a way of solving those conflicts by moving from the principles to the rule, from ideal duties (which conflict with each other) to the duty considering all the circumstances of the case.

The idea of balancing, under this or another name, has always been present both in the practice of law and in its theorisation, in what has traditionally been called legal methodology. Precisely, one of the most influential methodological directions—not only in Germany, but in all civil law countries—in the 20th century has been the so-called "Jurisprudence of interests", headed by Philip Heck and inspired—inevitably—by the work of the second Jhering. The basic idea (as happens with all anti-formalist directions) is that conflicting, hard cases can arise in law (cases of legal gaps, contradiction, etc.), which cannot be solved simply by applying the legal rules, in accordance with their literal or textual meaning, but instead, to solve them it is

[6] The first edition of his *Theory of Constitutional Rights* is from 1986.

necessary to do a "balancing" of the interests at stake; and, in turn, the law itself would be nothing else, for Heck, than what results from an opposition of forces, of interests, which pull in different directions[7].

Moreover, the usual assertion that the balancing method is preferred by those who promote a finalist interpretation of the norms (the anti-formalists) and who are, therefore, opposed to those in favour of a strict, literal, interpretation of the law (the formalists), seems to me to be questionable or, at least, in need of some nuance. And not only because of the usual imprecision with which these terms are usually used ("formalism" and "anti-formalism"), but also because, at least very often, those who are supposed to—those who say they do—take their decisions strictly bound by the law (the formalists or legalists), do not fail to also really consider the interests, the purposes, that are at stake when interpreting a rule and arriving to a decision; in other words, they do not fail to balance. A typical example of this can be found in the famous *Lochner* case, decided by the Supreme Court of the United States in 1905, and which is usually considered (the majority's decision—and its justification—which was opposed—as is well known—by Holmes' dissenting vote—which was not the only one) as the epitome of legal formalism. Well, what was at issue there, as is well known, was whether a New York State law limiting work in bakeries to 10 hours a day and six days a week should be considered constitutional or not. And what I find interesting to remark here is that both the anti-formalist Holmes (who defended the constitutionality of the law) and the majority of the Court (who overturned the law because they considered it unconstitutional) resorted to a ponderative type of scheme, which, by the way, does not imply at all an abandonment of formal logic. As far as the majority is concerned, the ruling is based on the observation that, on the one hand, there is the freedom of contract established in the 14th Amendment of the US Constitution, and, on the other hand, the "police powers" that grant each State of the Union the competence to legislate (and limit freedom of contract) for reasons of health, safety, etc. And what had to be determined then was «which shall prevail—the right of the individual to labor for such time as he may choose or the right of the State to prevent the individual from laboring or from entering into any contract to labor beyond a certain time prescribed by the State»; for reasons that are not to be noted now (and neither whether or not they were justified), the Court opted for the former. And that same balancing scheme (which, I insist, does not imply any distancing from deductive logic, despite some of Holmes' misguided expressions in that respect[8]) is the one used by the dissenting judge, but with an opposite result to that of the majority, since he made the second of the rights prevail or, rather, the reasons in favour of recognising a State the competence to establish those limits to freedom of contract[9].

Finally, as happened in the case of defeasibility, the notion of balancing, of pondering, of weighing the interests, the reasons, of opposite signs and which may be present in certain cases requiring a decision to be taken, is so rooted in the very idea of law that, as is well known, the scales are part of the usual symbolism of the administration of justice: in the deliberation that must take place in conflicting, hard cases, the two sides of the scales represent the places where the arguments, the reasons, for and against, should be placed in order to reach a "balanced"

[7] This is an analogical use of the "parallelogram of forces" method, which shows the result of applying two forces to a (physical) object. In *La jurisprudencia de intereses de Philipp Heck*, the author, María José García Salgado, concludes that «puede verse la Jurisprudencia de intereses como una teoría normativa de la ponderación de intereses, cuya finalidad es proporcionar al juez pautas que le permitan proteger, en caso de conflicto, el interés preferido por el legislador» (GARCÍA SALGADO 2010, 242). And in a later work she connects these ideas directly with the contemporary discussion on balancing (GARCÍA SALGADO 2019).

[8] Particularly in *The Path of the Law* (HOLMES 1897).

[9] Hart was right when, commenting on this case, he pointed out that what here «is stigmatized as 'mechanical' and 'automatic' is a determined choice made indeed in the light of a social aim, but of a conservative social aim» (HART, 1958, 611).

decision. But it is not only that, but also that the scales, the "scales of reason", have been the image that has dominated conceptions of rationality in the West. Marcelo Dascal has studied this metaphor of the scales of reason which, according to him, allows, at least, two interpretations: a "metric" or "algorithmic" one, that leads to a "hard" conception of reason; and another of a "dialectical" nature and which leads to a "soft" conception of rationality. In his opinion, both are complementary, but the second is the one that should be used fundamentally in contingent matters and in matters linked to the notions of "burden of proof" and "presumption". And he illustrates this with a statement by Leibniz (in whose work both senses, both conceptions, of reason would be present), according to which «no one has as yet pointed out the scales [for weighing and evaluating considerations that go against each other until a decision is reached], though no one has come closer to doing so and offered more help than the jurists» (DASCAL 1996, nt. 24).

2. *Defeasibility, balancing and conceptions of law*

At the beginning I said that the abundance in law of references to the notions of defeasibility and balancing were related to basic—intrinsic—characteristics of legal systems and legal practice[10]. The examples could be multiplied. Thus, the classic—structural—theory of crime in the criminal dogmatics of continental law could very well be considered as a scheme of defeasibility: a typical action is unlawful unless... and if it is typical and unlawful, then it is guilty unless... Presumptions, the burden of proof, maxims of experience or rules of evidence are constructions that presume something like a legal institutionalisation of defeasibility: if the circumstances X and Y are present, then it is understood that event H has occurred, unless... The same could be said of courts of equity, whose function would be precisely to avoid the bad consequences that the application without exceptions of general rules could have (but without going against the principle of universality—generality is not the same as universality). "Atypical torts" (such as abuse of law, legal fraud or deviation of power) are also examples of the defeasibility of rules and of the use of a balanced reasoning (see ATIENZA & RUIZ MANERO 2000). The procedure for deviating, in general, from a merely literal interpretation of a rule involves a balancing judgement (in order to be able to create an exception). Also the "judgement of proportionality" to which jurists very often resort is nothing other than a balancing exercise. The resolution of conflicts between rights—a central problem in the law of the Constitutional State—inevitably involves resorting to balancing. Et cetera, et cetera[11].

But, at the same time, all those statements may be more or less obvious, depending on one's conception of law. And the way of understanding those notions and of assigning them a role of greater or lesser significance in the theory and practice of law is also dependent on that—on how one conceives the law. Moreover, I have the impression that much of the (very abundant) literature on defeasibility and balancing that exists today is at risk of focusing on rather irrelevant issues or, in any case, of little interest, simply because many of the authors of all those texts do not seem to be aware (or are not aware to an adequate extent) of the main conclusion that is drawn from what I pointed out in the previous section. It is that law is, above all, a social practice, an activity, aimed at the satisfaction of certain ends and values. And practical questions (in the sense of traditional practical reason) cannot be solved in the same

[10] According to Guastini, the notion of defeasibility (and of the axiological gap) does not belong to the theory of legal systems, but to that of interpretation (GUASTINI 2008, 149). But this can only be understood if it is connected with a certain conception of law—the one that he holds—and to which I will later refer, in critical terms.

[11] Schauer gives many examples of defeasibility in law, some of them characteristic of common law. See SCHAUER 2012, 79.

way as would be appropriate for problems posed in the empirical sciences or in the formal sciences; which does not mean, beyond that, that empirical or formal knowledge can be disregarded in the resolution of practical problems. But what seems fundamental is to realise that law, morality or politics are "rational enterprises" (to use Toulmin's expression) with their own peculiarities, and hence the importance of paying attention to the way in which we argue within those practices. And, when this is done, the result is that the concepts involved cannot always be defined by a set of necessary and sufficient properties, the correct answer to a moral (or legal) case requires carrying out an analysis that takes into account what Ross called toti-resultant attributes and not parti-resultant attributes (see ROSS 1930, 28, and nt. 5), because—to use the poetic expression of the Platonic dialogue— «nothing in human affairs remains stable», but instead "the nature of practical affairs" means that not all the circumstances of future cases can be foreseen. Hence, the task of governing human behaviour by means of rules cannot be done by resorting exclusively to classificatory (subsumptive) operations, but instead, it is sometimes necessary to deliberate, to use balancing; in other words, to generate new rules in a coherent way, respecting the established system, but including in that system the reasons underlying the rules, that is, the purposes and values that underlie them. To put it extremely synthetically, the phenomena of defeasibility and balancing can only be properly understood if law is fundamentally considered as a social practice, as an activity, and not exclusively as an object, that is, as a type of reality consisting simply of a set of statements, a normative system. And it is not that the normative system is not part of law, but rather, that it is a necessary, but not sufficient, component. Law is not only a (coercive and dynamic) system of norms but, above all—to put it in Jhering's terms—means to an end; norms (and coercion) constitute (indispensable) organisational means for the achievement of that end, for the satisfaction of certain social needs[12].

The latter (the post-positivist conception) constitutes, in my opinion, the most appropriate way of understanding law, especially if what is pursued is to account for the rights of the Constitutional State and the era of globalisation. But, of course, it is not the only existing one, and not even the dominant one.

It is, for example, very different from the one held by Niklas Luhmann, which seems to continue being a considerable influence on sociologists (and theorists) of law. Although I do not believe that Luhmann's schemes have ever served to satisfactorily explain legal phenomena, it could nevertheless be accepted that they capture some features of law in the age of legal positivism that have nevertheless become, so to speak, obsolete. For example, the process of positivisation of law which has been taking place (in some European countries or countries of European influence) since the beginning of the 19th century, implied, according to him, that the legitimisation of law would no longer depended on any material element, but exclusively on procedure; but that—I would say—has been clearly refuted in recent times with the introduction in Constitutions of declarations of fundamental rights (and the institutionalisation of constitutional courts) which precisely set a limit to the very idea of positivisation: the law is not established and valid simply, or in all cases, by virtue of a decision that can be transformed at any time (see LUHMANN 1977 and LUHMANN 1990, spec. 115 ff.): the law cannot have any content. And the same could be said of his thesis of the progressive autonomisation of law and its configuration as an autopoietic system, which is self-regulating and self-reproducing regardless of the other social subsystems and guided solely by the idea of reducing complexity; on the contrary, the evolution of our legal systems goes towards making more and more permeable the boundaries between law and politics, morality, economy... All of which explains,

[12] Recall Jhering's definition of law: «Law is the sum of the conditions of social life in the widest sense of the term, as secured by the power of the State through the means of external compulsion» (JHERING 1913, 380).

in my opinion, that even though the phenomenon of defeasibility and the use of balancing have always been an important aspect of legal practice, it could be said that nowadays their weight has increased considerably. Therefore, a conception such as Luhmann's, which is "obsessed" with the value of security, which leaves little room for "openness" to ideas of justice, and which sees—we could say—law almost exclusively in terms of rules, does not seem to be functional in relation to the legal systems of our time[13].

But post-positivism is also not the dominant conception in contemporary legal theory. In particular, it is not so in the Latin world where, on the other hand, there has been much discussion in recent times about defeasibility and about balancing, and also about whether the vindication (or recognition) of these phenomena implies or not the abandonment of legal positivism. Thus, Riccardo Guastini (par excellence representative of the "realist" positivism of the Genoese school) considers that defeasibility of legal norms has nothing to do with legal positivism, despite what the following reasoning seems to suggest:

> «Legal positivism claims that law can be identified independently of any moral evaluation. But if legal norms are defeasible, their content cannot be identified without moral evaluations. Then the scientific project of legal positivism is doomed to failure: in order to identify the law, moral evaluations must be assumed».

However, this reasoning is not valid, according to him, among other things, because it leads to the following confusion:

> «It is one thing to identify something—specifically a normative text—as law, it is quite another thing to determine its normative content: what is commanded (permitted, prohibited), to whom, under what circumstances. Legal positivism simply says that the first of these two things can be done without evaluation; it says nothing about the second. Methodological legal positivism is not, and does not include, a theory of interpretation» (GUASTINI 2008, 155; my translation).

But if this is so, that is, if legal positivism means only that, then the only comment that can be added is that such a poor conception of law simply lacks interest, regardless of whether its theses are true or not[14].

Going back to an earlier idea. The greater importance (and visibility) of the phenomena of defeasibility and balancing in recent times perhaps allows us to explain (and solve) a certain controversy that can be detected among researchers of defeasibility: while some, such as RODRÍGUEZ & SUCAR (1998) or POGGI (2021), are in favour of abandoning the notion, as it would be nothing but a new label for designating things that are well known, others, such as Chiassoni, think that this would be a mistake, because the turn towards defeasibility in contemporary legal thought points towards central problems of law that could be clarified if this notion is carefully analysed (CHIASSONI 2019, 229).

This last author, precisely, has distinguished up to 11 different notions of defeasibility, that is, there would be—according to him—11 types of entities, of objects, to which philosophers of Law attribute this feature[15]; and it is possible that a similar analysis could be made with regard to

[13] Although perhaps that cannot be said of the last Luhmann, according to whom the legal form just as we know it would have been a "European anomaly" linked to the Nation-state, but which would stop being functional in relation to the law of the global society. On this see CAMPOS 2023, ch. 1.

[14] A critique of Guastini's conception can be found in ATIENZA 2018.

[15] They are the following: «(1) defeasible *facts*; (2) defeasible *beliefs*; (3) defeasible legal *concepts*; (4) defeasible legal *provisions* or legal *texts*; (5) defeasible legal *interpretations*, or defeasible *meaning*, of legal provisions; (6) defeasible legal *norms*, rules, principles, standards, etc. (norm defeasibility); (7) defeasible legal *reasoning*; (8) defeasible legal

balancing: many things can be balanced and the activity of balancing can also be seen from very different points of view. But Chiassoni himself concludes that many of those uses are parasitic and that the truly relevant and interesting notion is that of defeasible rule[16]. Well, although I personally consider that Chiassoni's analysis of defeasibility (and of the indeterminacy of law) clarifies some things, it seems to me that the most fruitful (I would also say the most "natural") way of proceeding to analyse this notion (and also that of balancing) consists of starting from the two main instances that can be distinguished in legal practice: the activity of establishing general rules (I leave out contracts, wills and other legal transactions, although here too both balancing and defeasibility play a role) and that of interpreting and applying them in the solution of cases. In both instances it is about ensuring that the law can satisfy the characteristic aims and values of practice, and that is what explains, as I said, why those two notions—and others to which I have already referred in part—have acquired a singular importance in contemporary legal theory. Let us see.

3. *Defeasibility and balancing in the process of legislation. Rules and principles*

Although when we speak of balancing we usually refer to the balancing carried out by judges, the bodies that apply the law, it should not be forgotten that the establishment of general rules, of laws (or of other types of measures that may not have a general scope) is fundamentally governed by the idea of balancing, of deliberation. This is why, for example, the rhetorical tradition called the type of (persuasive) discourse that took place in the assembly "deliberative genre", whose time horizon was the future (as opposed to the judicial genre, which looked at the past) and which included what we would call today legislative argumentation: to establish laws. Aristotle pointed out in his *Rhetoric* that we only deliberate about matters which are contingent (not about what must necessarily happen), and which are also under our control ("which we have it in our power to set going") (ARISTOTLE 1984b, book I, sect. 4, 1359[b]). The ultimate goal of deliberation, in general terms, would be, for him, happiness (*eudaimonia*), which consists of different parts, of different goods, although what is actually deliberated upon—let us say, the most immediate goal—would be constituted by the means, by the actions that are convenient to achieve those ends (ARISTOTLE 1984b, book I, sect. 6, 1362[a]).

Well, what could be called the "internal justification" of legislative argumentation could then be seen as a type of balancing, not of subsumption: each of the normative provisions of a legal text would be the fruit of a deliberation in which the "balance of reason" would have given a certain statement as a result (the resultant of the parallelogram of forces in Heck's metaphor). But it is a balancing that is very different from the reasoning to which, sometimes, judges have to resort to and which is called by that name. The fundamental difference is that legislative argumentation is much more open than judicial argumentation, the reasons to which a legislator can (must) resort are not authoritatively determined or, to put it differently, those limits are much wider, so that, in short, it is about a more complex rationality which does not admit, for example, its reduction to a binary scheme: it is not a matter of choosing between the

positions, jural relations, legal entitlements, etc. (status defeasibility); (9) defeasible legal *arrangements*, like contracts, wills, etc. (legal arrangements defeasibility); (10) defeasible legal *claims;* (11) defeasible legal *conclusions*)» (CHIASSONI 2019, 231).

[16] The definition he gives is this: «*Defeasible norm:* a norm is defeasible, if and only if, the normative consequence it states is liable (i.e., may be subject) to a set of negative conditions of application ('exceptions', 'defeaters', 'defeating conditions')» (CHIASSONI 2019, 249). And then he establishes more specific notions, depending on whether they are explicitly or implicitly defeasible norms, and whether the norms are closed-defeasible (of different types) or "open-defeasible". In total there would be seven more specific notions of "defeasible norm".

constitutionality or unconstitutionality of a law or between the conviction or acquittal of the accused, but of choosing a text from a plurality, almost an infinity, of possibilities.

In order to carry out this task[17], the legislator needs to mobilise scientific and technical knowledge of many different kinds; as well as starting on the basis of a moral and political philosophy. In other words, the ends to be achieved through legislative intervention must be morally justified or, at least, they must not contradict constitutional values and principles; the established statements—the rules—must be drafted with sufficient clarity; they must fit harmoniously into the previously existing legal system (so as not to generate gaps or contradictions); the appropriate subjective incentives (sanctions in the broad sense) and objective means (financial, institutional...) must be established so that the addressees comply with the requirements of the rules (to make the transition from law in texts to law in action); and it is also necessary to ensure that compliance with the provisions of the law leads to the achievement of the pursued goals (the transition from effectiveness to social effectiveness); but all of this must also be done in a reasonable (efficient) way. Well, within this extremely complex task, one aspect of considerable importance is the choice of the types of legal statements (I am referring, then, to the formal aspect, not to the contents) that are most suitable for achieving all those purposes.

Here it is worth starting by recalling that legislative statements do not only express norms[18]. There are also definitions—theoretical statements—, practical statements that express normative acts (for example, that of repealing a law) or evaluative statements. And, within norms, we should make a distinction between those of a deontic or regulative nature (they establish that, given certain conditions, the performance of an action or the achievement of a state of affairs is deontically modulated as obligatory, prohibited or permitted) and constitutive norms (if certain conditions are met, then a certain normative result is produced—constituted—: a legal event or a legal action). All these statements differ in terms of their structure, but also with regard to the role they play within legal reasoning and in relation to the social system (inasmuch as they articulate in a certain way the social and individual powers and interests).

In order to deal with the problem of defeasibility, I will focus on regulative norms, because this is where the distinction between rules and principles is situated, which, as will be seen, is of particular significance. However, this does not mean that defeasibility only has a place here; for example, when it comes to establishing the conditions of validity of a contract (one of Hart's examples) we would be in the context of constitutive rules: those conditions of validity, at least on many occasions, cannot be established—as he told us—by pointing out a set of necessary and sufficient conditions, but instead, the list would have to be followed by the famous "unless" clause. The same could be said, of course, of legislative definitions. And, in any case, the classifications that can be made of legal statements must always be understood in an open, functional, and—so to speak—contextual sense: it is not only that there may be penumbral cases (statements that do not fully fit into any of these categories), but also that each one of those statements can only be properly understood if we take into consideration its relation to other statements of the other types: what functions as a unit is the set of statements, articulated in a certain way, that makes legislatively created law (or a fragment of it) capable of fulfilling its purpose.

Well, principles and rules (which—I insist—are characteristic types of legal statements, but are not the only pieces of law) differ from each other, as I said, from diverse perspectives. Thus, both rules and principles have a conditional structure, but the difference would be that the antecedent (the conditions of application) in the case of principles have an "open" character, while in rules it is "closed"; which could also be expressed, following von Wright's

[17] I present here a summary of different works on the theory and technique of legislation, now collected in Atienza 2019.

[18] I take the classification of legal sentences that can be found in Atienza & Ruiz Manero 1996.

terminology[19], by saying that principles are categorical norms, that is, their conditions of application do not contain other properties than those derived from the content of the norm itself, while in rules there are additional conditions of application. To illustrate this with an example: "it is forbidden to discriminate on the basis of sex (whenever there is an opportunity to perform such an act)" is a principle; "it is forbidden to pay a woman a lower wage than a man, if both do the same work", is a rule. From the point of view of how they operate in legal reasoning, rules work as peremptory or exclusionary reasons, so that, if the fixed conditions of application are met, then what is established in the rule must be done, without entering into any type of deliberation, whereas principles provide only non-peremptory reasons (thus, weaker reasons, with less force, but with a wider scope)[20], that must be weighed against other reasons (to return to the example, reverse discrimination or affirmative action may be justified in some cases). And, finally, principles limit the pursuit of individual and social interests (which is a way of saying that they establish rights) and promote the satisfaction of social interests; and rules also play this role, but by imposing positive and negative duties and thus generating reciprocal restrictions (without the need for balancing) or by granting a power of discretionality (rules of end[21]) that would affect only the means.

Those differences can also be seen in terms of defeasibility, in the following way. Principles are conditional statements (norms) that are presented as intrinsically defeasible: they are non-peremptory reasons; that is, *prima facie* reasons to carry out a certain conduct, but that, when balanced against others, can be defeated, all circumstances considered. This is what we saw in Ross's classic book (or in Alexy): they presuppose the existence of a distinction between two types of duties: ideal and real. Whereas the vocation of rules, we could say, is to not be defeated (to operate as peremptory reasons), although we cannot discard that exceptionally they may be, that is, that they include implicit exceptions. And we have already seen why: human affairs cannot stand still[22] and it is impossible that the legislator, who necessarily has to express himself in general and future-referring terms, has taken into account all the elements that are relevant regarding the reasons underlying the rules, that is, the aims and values they seek to achieve[23].

[19] See on this AGUILÓ 2000, 135 f.; VON WRIGHT 1963.

[20] The way of drawing the distinction between rules and principles (ATIENZA & RUIZ MANERO 1996) is very similar to that found in HAGE & PECZENIK 2000. They speak of decisive reasons and contributive reasons, but the meaning is the same as the one we outlined between peremptory or exclusionary reasons and non-peremptory reasons. One difference with our analysis, however, is that they assume Alexy's conception of principles: principles «only generate (as opposed to rules) reasons that plead for actions that contribute as much as possible to goal states» (HAGE & PECZENIK 2000, 306). And I do not see clearly the point of constructing two different kinds of logical functors—of conditionals—to symbolise a rule or a principle.

[21] In our scheme, the distinction between rules and principles is combined with the other distinction we made between action rules and end rules (see ATIENZA & RUIZ MANERO 1996).

[22] So defeasibility is not simply due to certain features of natural language, but rather to certain features of law. On this, see SCHAUER 2012, 77.

[23] There is a clarification to be made here. Authors such as Guastini (in general, the members of the Genoese school) start from a basic distinction between provision and norm, that is, one thing is the text, the statement, and another thing is what it means, the norm; so that norms only exist when statements are interpreted; Guastini insists, for example, that it is a mistake to confuse a statement with its literal interpretation. As a consequence of all this, he affirms that defeasibility can only be a feature of norms, not of provisions (see CHIASSONI 2019, 249, who—following Guastini's thesis—thinks that legal provisions would only be defeasible in a metonymic sense); or, in other words, defeasibility does not exist prior to the interpretation, but instead it depends on the interpretation. And hence the statement I referred to earlier, according to which defeasibility would not belong to the theory of normative systems (norms understood here as mere dispositions), but to that of interpretation. In my opinion, it is a way of speaking that does not contribute much to clarifying things, for the following reasons. I believe that, sometimes, the distinction in question is indeed relevant, but not always. Frequently, a jurist will refer to such and such an article of a law, and by this he may (usually) be alluding both to the text and to something like its basic meaning; no one (or almost no one), I believe, speaks of a legal system by referring exclusively to a set of

In relation to the above, there are a few things to be clarified. To begin with—and I return to something I said earlier—this difference between rules and principles must be seen in relative terms; to put it differently, it is a distinction within a continuum, in the sense that the "open" or "closed" character of the conditions of application is an obviously gradable element: between very specific guidelines for conduct (indubitable rules) and very abstract principles there is a very wide intermediate zone; and the same could be said of the more or less peremptory character of a reason. This also translates into a greater or lesser tendency for rules to have exceptions, to be defeasible. It is sometimes said that, if all norms are defeasible, then the very distinction between rules and principles collapses or, at the very least, that it could not be seen as a qualitative, strong distinction. Well, I believe that this distinction is of great importance (indispensable to understand many aspects of our legal systems), but it certainly cannot be interpreted in essentialist terms, but in the functional and dynamic way I suggested before. I am not so sure that it can be said that *all* legal rules (like all conditionals) are defeasible[24], but, certainly, most of them are (they can be defeated in some occasion), even in very extraordinary circumstances[25]. And this difference between what happens usually or extraordinarily is what allows us to maintain the distinction in question: principles usually function (whether they are principles explicitly fixed by the legislator or by the constituent, or—implicit—principles

statements, and excluding any idea of what the statements mean. But, in addition, there is a certain ambiguity in the use of the expression "interpretation" which, it seems to me, Guastini does not take into account in his work. Because "interpretative statement" can be understood as a statement of the form "T means S" (GUASTINI 2008, 152), but such utterances are only relevant in case there is any doubt about T. So one thing is interpretation in the noetic sense (as a mere act of apprehension of a meaning) and another in the dianoetic sense (when it is a matter of solving a doubt and a discursive activity is carried out). On this, see LIFANTE 1999. In short, I believe that there is no reason not to speak of defeasibility from the perspective of the system of norms, as long as norms are understood in the sense in which they are usually understood in the language of jurists. When a rule is established, the legislator may have formulated a general mandate or permission (or the conditions of validity of an act or of a rule) and added to it some explicit exceptions (which, indeed, has nothing to do with defeasibility) and he may also (having taken them into consideration or not) have left others unexplicit. When that rule has to be applied to solve a controversial case, interpretative activity will, of course, have to be carried out. But defeasibility is also a phenomenon that is present in the practice of the establishment of rules. The legislator can (must) count on the existence of this phenomenon.

[24] Recall what was said above (fn. 5) regarding Alchourrón's opinion. Also for MacCormick all or almost all legal rules (or instead, the formulations of rules) are refutable (I believe that the expression "rebatible" and "rebatibilidad" used in the Spanish translation is correct), in the sense that «[the rules] should be considered as stating 'ordinarily necessary and presumptively sufficient conditions' for the normative consequences they attach to the operative facts they stipulate». The reason why this is so is that «the principles and the implicit values of such a system interact with the more specific provisions to be found in the texts of statutes or in the more narrowly defined *rationes* of binding precedents» (MACCORMICK 2005, 251, 241).

[25] The prohibition of torture is often given as an example of an indefeasible norm. Perhaps it could be said that examples of indefeasibility refer to institutional actions. But, in any case, for what I am trying to defend here, the thesis that many of the norms (and, therefore, of the rules) can indeed have implicit exceptions is enough. Juan Carlos Bayón is right when he says that the possibility of implicit exceptions to rules existing or not (for reasons of principle) is a contingent question. Indeed, a legal system (or the practice of rule application) could exclude that possibility, or limit it a lot (it could be Schauer's "entrenched model" of rule application). But it seems to me that this is not what happens in our constitutional law systems... Schauer, by the way, has a very nuanced opinion in this respect: he thinks that sometimes rules are treated (by the applicators) as not defeasible and that defeasibility is not always desirable (which seems to presuppose that, in general, it is), see SCHAUER 2012, 85, 87. He distinguishes (a distinction that seems useful to me) regarding whether defeasibility is an essential feature of law, between a descriptive, a prescriptive and a conceptual level. His conclusion: «Defeasibility may well be a desirable component of some parts of some legal systems at some times, but it is far from being an essential property of law itself» (2012, 88). In other words, I conclude myself, rules cannot be completely opaque regarding the underlying reasons, but neither can they be completely translucent. And another (I think equivalent) way of saying the same thing: in normal cases the applicator does not (should not) consider the possibility of whether implicit exceptions exist, but he also cannot completely exclude the possibility of extraordinary (or very extraordinary) circumstances happening. See BAYÓN 2001, 54.

"discovered" by the interpreter) as non-peremptory reasons, to serve as ingredients in a deliberation, and that is why they can be defeated; whereas, regarding rules, this (that they are defeated) can only occur very extraordinarily. Moreover, this distinction does not exactly correspond to the often drawn distinction between easy cases and hard cases. Easy cases are those that can be solved with rules, that is, when the interpretation of the text—including, of course, possible explicit exceptions to a general command or permission—does not raise doubts; principles play here no other role than that of certifying—it is not properly a question of deliberating—that the solution to the case can be obtained by simply applying a pre-existing rule. Hard cases, on the other hand, are those that require balancing and in which, therefore, principles play a relevant role: either because, in the absence of an applicable rule, one must resort to principles, or because the rule has to be corrected (to broaden or restrict its scope) and this can only be done by appealing to principles.

And all of the above leads us to the following. When trying to control people's behaviour by means of general rules, the legislator has to cope with the open, contingent character of the future, and has to do so by trying to harmonise (balance) two fundamental values: one is that of giving as much certainty as possible to the addressees of the rules, that is, they should be in a position to know in advance the (legal) consequences of their behaviour; and the other is to avoid that such application of pre-existing rules produces counterproductive effects, that is, effects that are contrary to the aims and values that inspired the legislation, to the reasons underlying the rules. Rules essentially fulfil the first function, that is, they are in a very special way mechanisms of certainty; and principles fulfil the second, they allow the openness of the system, they avoid what would otherwise be excessive rigidity. But they act together, that is, legal practice needs to have both rules that are established with relatively closed cases and which can only be defeated in very exceptional circumstances, and principles, with norms whose cases are open, so that their defeasibility, as I said before, is previously programmed. And if this is so, then it is pointless to conceive a legal system as consisting essentially of either rules or principles; both types of statements are necessary. However, depending on the subject matter and other circumstances, it is possible that sometimes regulation must be done fundamentally by means of rules (for example, when establishing criminal offences), while on other occasions it is necessary to leave more room for principles (for example, when regulating matters such as assisted human reproduction, which is highly dependent on technological changes that happen in a practically incessant pace, that cannot be anticipated and, therefore, that prevent a regulation in very specific terms).

4. *Defeasibility in the process of interpretation and application*

Let us turn now to the other instance, that of the application of the rules, of the, so to say, raw legal materials (which in reality are not only rules), for the resolution of hard, controversial cases. The "easy cases/hard cases" distinction does not correspond exactly (but only approximately), as we saw before, with the pair "cases solved exclusively using rules/cases that also require principles"; and it would be more accurate to say that the correspondence is between cases that do not require deliberation/cases that do. Because principles, as I said before, also play a role in determining that a case is easy. But for that, one only needs to take a simple glance and realise that the case is covered by some rule (or, better, by a group of statements including rules) that does not contradict any principle of the system; whereas, in hard cases, that is not enough: an in-depth look is needed, concerning rules and principles; deliberation is needed. This distinction coincides, by the way, with the one that psychologists are used to making today (see KAHNEMAN 2011) between quick thinking and reflective thinking. Thus, recognising a case as normal or easy and whose resolution requires a "simple look" would be a way of referring to system 1 of thinking

which, as we know, is intuitive thinking that includes both the use of heuristics and expert thinking; while there are problems (abnormal, hard cases) that cannot be solved in this way, but instead require an "in-depth look", which would be, in turn, the way of referring to *system 2* of thinking, to slow and reflective thinking, which Kahneman links precisely with deliberation. To put it more briefly: our *system 1* is the one that comes into operation when we have (when a judge has) to solve problems of rule application, while the solution of problems that involve principles (that involve deliberation) means activating *system 2*[26].

In legal theory, various typologies of hard cases have been constructed. A widely followed one is that of MacCormick, who, on the basis of the scheme of the judicial syllogism, differentiates between problems of proof and qualification (referring to the factual premise), and problems of interpretation and relevance (referring to the normative premise) (MACCORMICK 1978). It is, undoubtedly, of considerable interest, but it falls short, in my opinion (see ATIENZA 2013), because, in his scheme, MacCormick starts, as a major premise, from a type of norm, a rule of action, and does not consider other possibilities. In particular, he does not take into account a situation in which there is (let us say, at first) no rule, but the applicator simply has principles to solve the case. Such a situation is a particular instance of a hard case, which is what, strictly speaking, can be called a balancing problem. This is distinguished from a (more) simple question of interpretation, which would be solved by simply opting for one of the different possible meanings of an expression. But when it comes to balancing, there is something more, that is, the applicator, in the beginning, has only principles and, therefore, he needs to make a step from the principles to the rule. Otherwise, there would be nothing to oppose to speaking of "interpretation" in these situations, but it would be a special type of interpretation. And the classifications of hard cases must, of course, be understood in a flexible and instrumental way: nothing prevents that for the resolution of problems of the other indicated types some balancing must also be done; at least, in the broad sense of the term: when a decision or action has to be taken, and there are several possibilities, opt for the one in favour of which there are the heaviest reasons[27].

[26] The idea of connecting the distinction between cases that require deliberation and cases that do not with Kahneman's two systems of thought occurred to me when I was trying to face a critique from Bruno Celano. According to Celano, the proposal of distinguishing two tiers in legal reasoning (the level of rules and that of principles) fails because it is not possible to know, in a specific case, whether the applicable rule is a rule that must be reconsidered or not, without reconsidering it: «to establish whether a cursory glance is enough or whether it is necessary to look closely, it is necessary to look closely»; so, ultimately, the distinction between rules and principles would vanish, because it would always be necessary to deliberate, to ponder, and, in consequence, there would be no rules that fulfill the function of simplification of the decision-making process (that avoid deliberating). It seems to me, however, that Celano's proposal to distinguish between normal and non-normal cases (easy cases and hard cases) in a "psychological key" is actually not different from the above. According to him, «whether or not a certain rule, in a given case, is a reason to act [a justifying reason, this is the crucial point] depends on our psychological make-up»; «what reasons we have—what we should do, what judgment we should adopt—depends (when the alleged reasons in question are rules) on a background condition, a regime of normality. Given a properly justified rule, which applies to a given case, it is reasonable to follow it only under a regime of normality. Whether this condition is satisfied or not depends on mental facts»; «It is not up to *us* to determine, in each of the cases that fall under their antecedent, whether the rule is to be reconsidered: It is up to our *mind*» (see CELANO 2017, my translation; the same ideas are defended in Celano's chapter in this book). However, why would we have reasons to trust that our mind is able to tell the difference between non-normal and normal cases (those in which a rule must or must not be reconsidered), but, nevertheless, it is not able to tell the difference between those cases in which a simple glance is enough to consider that they are normal and those that we detect as non-normal and that, therefore, require a deeper look? In short, it is about establishing a distinction between those two situations or cases (which seems essential), and for this a theory such as Kahneman's is really useful (which, by the way, has a clear precedent in a 1924 article by John Dewey about the logical method and law, DEWEY 1924). (See ATIENZA 2017b, 428 f.)

[27] This would be the principle of practical rationality which Raz calls "principle P1" (RAZ 1975, 36) and which Bayón explains as follows: «siempre se debe hacer lo que se tiene una razón concluyente para hacer, esto es, lo que resulte en

The recourse to balancing is of particular importance (and visibility) when it is used to solve a conflict between rights, which in our legal systems happens with some frequency; precisely as a consequence of the phenomenon of the constitutionalisation of legal systems, and of the impossibility of fundamental rights being fixed in the Constitution only or almost exclusively by means of rules, without resorting to principles. In reality, it is about the problem, already raised by David Ross, of the transition from *prima facie* duties to real duties, but in law it is more complicated (than in morality) because of the importance that institutional elements have gained: what is "correct" legally speaking has a moral component, but not only, in the sense that the judgement of correctness also has to take into account the characteristic aims and values of legal practice. The whole recent discussion on (judicial) balancing could be summarised, in my opinion (ATIENZA 2017a, ch. 6), along these three questions: 1) what does balancing consist of?; 2) when should we resort to it?; and 3) is balancing a rational instrument or a simple excuse to act arbitrarily? And the answers, from my point of view, would be these.

Balancing is a type of reasoning structured in two phases. In the first one—balancing in the strict sense—we move from the level of principles to that of rules: therefore, creating a new rule that did not previously exist in the system in question. Then, in a second phase, the starting point is the created rule and the case to be solved is subsumed in it. What could be called the "internal justification" of this first step is a reasoning with two premises. The first premise simply states that, in relation to a given case, there are two applicable principles (or sets of principles), each of which would lead to solving the case in mutually incompatible ways: for example, the principle of freedom of expression, to consider this type of conduct permitted; and the principle of respect for privacy, to consider it forbidden. The second premise establishes that, given the particular circumstances of the case, one of the two principles (for example, the principle of freedom of expression) defeats the other, it has a greater weight. And the conclusion would be a general rule, expressed in terms of universality, linking the above circumstances with the legal consequence of the prevailing principle: for example, if circumstances X, Y and Z are present, then conduct C is permitted.

Naturally, the difficulty of that reasoning lies in the second premise, and this is precisely where we find Robert Alexy's famous "weight formula", which would be, therefore, the "external justification" of the second premise. This doctrine is well known, and I am not going to explain it here[28]. What I am interested in clarifying is that this approach, at least as it has been understood by many jurists (not so much by Alexy himself), constitutes a fairly clear example of what Vaz Ferreira called the fallacy of false precision (VAZ FERREIRA 1962; ATIENZA 2013, 162 ff.). For, as is well known, Alexy proposes to attribute a mathematical value to each of the variables in his formula and thus constructs an arithmetical rule that creates the false impression that the balancing problems can be solved by means of an algorithm, thereby concealing the fact that the key to the formula lies, as is quite obvious, in the attribution of those values: that is, in determining whether the effect on a principle is intense, moderate or slight, etc. However, if the Alexian construction were to be understood in a sensible way, we would have something like an argumentative scheme that includes diverse topics and which can be very useful when constructing the external justification of that second premise: what it would mean is that, when it comes to solving conflicts between goods or rights (or between the principles that express them:

cada ocasión del balance global de razones a favor y en contra sopesadas según su fuerza relativa». But given the existence of reasons not only of the first order, but also of the second order, there would be another principle "P2" which is stated as follows: «no se debe actuar según el balance de razones si las razones que lo deciden son excluidas por una razón excluyente no derrotada». And the principle that would gather the two situations (the true practical rationality) would be "P3": «siempre es el caso que uno debe, habida cuenta de todos los factores relevantes, actuar por una razón no derrotada» (BAYÓN 1991).

[28] Anyway, I have dealt with it on several occasions. See ATIENZA 2019.

X and Y) and we have to decide whether measure M is justified or not, we need to construct a type of argument that contains premises such as (it could also be presented as a group of "critical questions" to be asked): "measure M is ideal to achieve X"; "there is no other measure M' that allows satisfying X without harming Y"; "in the circumstances of the case (or in the abstract) X outweighs—is more important—than Y"; and so on (see ATIENZA 2019).

In relation to the question of when does a judicial body have to balance, the answer is that it has to do so when the rules of the system do not provide an adequate answer to a case (there is a gap at the level of the rules); that is, when it is faced with a hard case and the judge needs to resort (explicitly) to the principles. Here, in turn, it is important to distinguish between two types of gaps (I insist: gaps at the level of rules): normative gaps, when there is no rule, no specific guideline of conduct that regulates the case; and axiological gaps, when the rule exists but establishes an axiologically inadequate solution, so that in this second case, so to speak, it is the applicator or the interpreter (not the legislator) who generates the gap.

Well, if we understand that the law, the legal system, is not necessarily complete at the level of rules, that is, that it can have normative gaps, then there is no other option but to accept that the judge (who cannot refuse to solve a case) has to do so by resorting in these cases to principles, that is, by balancing. Whereas, in relation to axiological gaps, the judge could resolve without balancing, but would then run the risk of incurring in formalism, that is, he would not be able to comply, in those cases of evaluative imbalances, with the claim to do justice through the law. In other words, there are certain situations in which the recourse to balancing by judges is simply unavoidable (although not for all judges: there can be an established rule that, when a judge is faced with such a situation, he must defer the case to a higher body). Whereas in relation to the others (with the cases of axiological gaps) a distinction should, in my opinion, be made between three types of imbalances: a) between what is stated in (the wording of) the rule and the reasons underlying the rule itself: the purposes for which it was made; b) between the reasons underlying the rule and the reasons (values and principles) of the legal system as a whole or of a part of it; c) between the reasons underlying the rule (and eventually the legal system) and others coming from a moral system or some moral principle not incorporated in the legal system. Without going into detail, I think it could be said (that legal common sense tells us) that in the first case it is not difficult to justify balancing (without considering here whether any judge should do it or whether the operation should be reserved for judges of supreme or constitutional courts); that in the third it is never difficult, as it would mean to stop playing "the game of law"; and that in the second is where the most complex cases arise: sometimes balancing may be justified (sometimes not), but it will have to be done with special care and assuming that the burden of argumentation lies in the one who intends to establish an exception to the rule (the one who creates the gap).

The recourse to balancing presupposes, therefore, the phenomenon of the defeasibility of norms. And it is true, as GUASTINI (2008, 150) says, that both the identification of a normative gap and (if you like, the creation) of an axiological gap are operations that require interpretation. But in different ways. In relation to normative gaps, it must be determined that there is no rule of the system whose literal meaning refers to the case, and that naturally requires interpretation, but it could simply be a matter of what has been called (see above fn. 23) a noetic interpretation. And if it is so (if there is no applicable rule), then it will be necessary to resort to principles, that is, to intrinsically defeasible rules, to see which one is stronger, given the circumstances. Whereas in axiological gaps, the interpretation is much more complex (and controversial), since it deals with a deviation from the literal interpretation of the rule, on the grounds that there is some implicit exception[29]. And in order to justify the existence of this

[29] It would mean moving from a literal interpretation to a restrictive one. But, in reality, it could also happen that the transition was to a broadening interpretation: the formulation of the rule did not include something that it should have included. In other words, the problem consists of an imbalance between the wording of the rule and its

exception (that is, the transition to—the creation of—a new rule), one must turn to principles. In the article by Guastini to which I have referred several times (GUASTINI 2008), there are some examples which I think may serve to illustrate what I mean. One of them consists of a constitutional provision which establishes that "The President of the Republic may veto the promulgation of laws", and this provision is interpreted as referring only to ordinary laws, and not to laws of constitutional revision (which means creating the axiological gap and solving it in a certain way). For this, instead of "principles", Guastini prefers to speak of "legal theories" and "dogmatic theses", but this is obviously balancing: the reasons in favour of that restrictive interpretation are stronger than those in favour of sticking to the literal meaning.

Finally, arguing that balancing is a rational procedure, does not mean asserting that, in fact, it always is, that is, it seems obvious that it is possible to balance badly (to appeal to balancing to conceal arbitrary behaviour) or to balance when (or by whom) it should not be done. But on many occasions, when one examines the argumentation—the balancing argumentation—carried out, for example, by a court in a series of cases involving, let us suppose, a type of conflict between two certain principles, one can detect the existence of a type of rationality, which consists of the following (see ATIENZA 1996). On the one hand, in the construction of a taxonomy (based on the properties that are considered relevant) that makes it possible to establish increasingly specific categories of cases: for example, not only the conflict between principle P1 and P2, but also between principle P1 accompanied by circumstance X and principle P2 accompanied by circumstance Y, etc. On the other hand, in the elaboration of rules of priority: for example, when those two principles are confronted while these circumstances apply, the first principle prevails over the second. And finally in the respect, regarding the configuration of the taxonomy and the rules of priority, to the criteria of practical rationality: consistency, universality, coherence, adequacy of consequences, reasonableness... Properly understood, properly put into practice, balancing is not a purely casuistic, arbitrary mechanism. The person who ponders must have the pretension that the solutions that he is configuring will serve as a guideline for the future, as a mechanism of prediction, even though it is an imperfect mechanism, in the sense that new circumstances may always arise that had not been taken into account until then and which may force to introduce changes in the taxonomy and in the rules. In particular, the rules that are constructed by means of balancing inevitably have an open character, they are defeasible. But that, as we know, is a characteristic feature of practical rationality[30].

5. *Defeasibility, balancing and juridical common sense*

Sometimes there are many different ways of saying the same thing, or almost the same thing. And this is what happens, in my opinion, with many discussions that take place in the field of legal theory in general or of more specific legal theories: what we usually call—in the world of

underlying reasons, its justification. On this see ATIENZA & RUIZ MANERO 2000.

[30] Guastini, criticising Hart, states that the idea that «a rule that concludes with the expression 'unless...' is still a rule [...] seems to me to be totally absurd» (GUASTINI 2008, 154, fn. 34). And that would be because a "defeasible rule" « cannot be used as a premise in any normative reasoning» (my translation). The latter is true, in the sense that in the premise of a justificative judicial reasoning, what will appear will be that norm interpreted in a certain way (the "defeated" norm). But I think Guastini is forgetting that norms also fulfil other functions such as, for example, serving as a guide (and as justification criteria) for conduct (and not only for that of judges). And a defeasible rule does fulfill this function, even if the addressee knows that, *exceptionally*, things could be otherwise. For the rest, it seems to me that Juan Carlos Bayón is right when he states that Hart's affirmation is sustainable «siempre que quepa reemplazar los puntos suspensivos por criterios o pautas que de alguna forma sean internos al propio derecho» (BAYÓN 2001, 56). A defense of Hart's theses (basically in the same terms as Bayón) can be found in MACCORMICK 2005, 253 f.

continental law—legal dogmatics. This may be due to an excessive desire for originality, to the desire for imitating what happens in the "hard sciences", to the existence of different traditions or schools of thought which, in turn, may have their origin in different legal cultures (for example, those of continental law and those of common law, formalist or anti-formalist), to the growing climate of isolation in which theories of law are developed (and I believe that the tendency to "intellectual autism" is far from being exclusive to jurists), or to various other causes. It is possible, moreover, that "enlarging" a small difference is sometimes important: it allows a better understanding of some concept, some relevant aspect of the law and, as a consequence, it can serve to develop the knowledge (and improve the practice) of law. But I believe that other (many) times this is not the case, and in particular it is not usually the case for—let us say—ordinary jurists (not the theorists or legal philosophers) who, in my opinion, should be the privileged recipients of these theoretical elaborations: those who have to solve legal problems, of whatever kind, and who could supposedly find some help in legal theory to do so. It should also be taken into account that in law (there is a reason why it is also part of practical reason) happens something similar to what David Ross pointed out about ethics: theories of law cannot deviate much from what we might call the good common sense of jurists; the legal method must also consist of some version of what has come to be called "reflective equilibrium". In order to avoid, therefore, as far as possible, that this work might contribute to increasing the risk I am warning about, I will point out the conclusions that follow, in my opinion, from what has been written in the previous sections and which, it seems to me, can be perfectly integrated into this legal common sense.

1. Defeasibility and balancing are more or less new names for realities that are not. And they are not, because they obey the intrinsic needs of any legal system: to regulate human conduct by facing, as far as possible, the unpredictability of the future, avoiding excessive rigidity and contributing, in short, to making the—unavoidable—breach that will always exist between law and justice as narrow as possible.
2. Defeasibility means that general rules may in some cases have implicit exceptions and, thus, that reasoning with rules may be affected by this: there may be extraordinary circumstances that force us to modify a conclusion that would justifiably have been reached under—let us say—normal conditions.
3. In a broad sense, to balance means to deliberate, that is, when a decision or an action has to be taken, and there are several possibilities, to opt for the one in favour of which there are the heaviest reasons. This is what defines the activity of the legislator, whose deliberations—from the legal point of view—are carried out within very broad limits. However, the law-applicator can only resort to balancing in relatively exceptional situations, and has to carry out this operation within much stricter limits.
4. The above means that the justificatory legal reasoning is not exclusively of a classificatory (subsumptive) type. It cannot be so in the case of the legislator, for obvious reasons: legislating does not consist simply of including a law—a norm—under some constitutional precept (or one of a higher rank than that of the new norm). And, on occasions, it is not so in relation to the applicator of the law either: when there is no rule with sufficiently determined conditions of application to be able to say that the case is subsumed in the norm, or when the subsumption of the case in the conditions of application of some norm is not enough to justify the decision.
5. To clarify the above, it is necessary to resort to a distinction between rules and principles, even if legal sentences are not simply of these two types. But in legal systems there are both specific patterns of conduct that operate as peremptory or conclusive reasons—rules—and very open rules that operate only as non-peremptory or non-conclusive reasons—principles. The distinction need not be seen in rigid terms (the properties closed/open or

peremptory/non-peremptory are given as a continuum), but it allows to explain that when there is a rule that is strictly applicable to the case, the case is solved (or its solution is justified) by subsumption; whereas the latter does not happen if only principles are available.

6. In establishing a general *rule* of conduct (and this is also true for constitutive rules or definitions), the legislator usually lays down explicit exceptions: in relation to what is ordered, to the conditions that must be met for a rule or a valid act to be produced, for a definition to be satisfied... But one cannot entirely exclude the possibility of implicit exceptions, which can be attributed to diverse factors (careless drafting of the text, impossibility of predicting future contingencies, acceleration of social change, growth of legal requirements as a consequence of the culture of rights...). Recognising the existence of implicit exceptions means recognising that the rule in question (and the reasoning that incorporates it) is defeasible. As well as the necessity of having to carry out a balancing exercise in the process of its application.
7. In the case of *principles*, and given their nature as open norms, it does not make sense to speak of exceptions, but it does make sense to speak of balancing. Principles are not defeasible like rules (because they provide non-exclusive, non-peremptory reasons, they do not present the typical resistance of rules). But the balancing of principles in a certain case does lead to a rule, whose case contains the open conditions of application of the applicable principles as well as the specific (closed) conditions that justified giving priority to one of the conflicting principles, and whose legal consequence will be precisely the one stated in the prevailing principle. Such a rule is not only general, but also universalizable: what it establishes applies (or should apply) as long as the (generic) conditions laid down in its case are met.
8. The importance that is nowadays recognised, in the theory and practice of law, of the existence of rules with implicit exceptions (which can be defeated in extraordinary situations) and of principles whose application generally leads to a process of balancing, has to do with changes that affect the reality of our legal systems and is linked to what is usually called the phenomenon of constitutionalisation. In particular, if what justifies law—the supreme value of constitutionalism—is the guarantee of fundamental rights, this could not be achieved within the scope of a very formalist culture that denies—or tries to reduce to a minimum—these two phenomena, linked to each other: the acknowledgement of implicit exceptions (defeasibility) and the recourse to balancing.
9. But the fact that we must leave a considerable space for the use of these two instruments does not mean that we must not set limits to them, that anything goes and that the law is completely or fundamentally indeterminate. It is not, among other things because, if it were, we would in fact cease to have rights: if rules were easily defeated, and law-appliers could solve the cases they were presented with by resorting to a balancing exercise whenever they thought (even with good reasons) that they would thereby make fairer decisions, the idea of having a right would vanish.
10. Law must be seen as an authoritative enterprise with which certain ends and values are to be achieved. The jurist, in his practical and theoretical work, cannot forget either of these two components. The authoritative element (the materials established by the authorities recognised as having such power in a state under the rule of law) sets the limits within which this finalistic and axiological activity can be carried out. These materials are (have to be) interpreted (in the broadest sense of the latter expression), but interpreting is not the same as inventing, creating something *ex nihilo*. Interpreting law requires going back to some moral and political philosophy that accounts for the legal materials; or, rather, to the one that best accounts for those materials.
11. If we transfer the above premise to the problem of balancing, what follows is that this operation can only be carried out, in the application of the law, in extraordinary situations: a) when there

is no rule—specific guideline—applicable to the situation, in other words, we would be faced with what is usually called a normative gap; b) when such a guideline does exist, but what it establishes—according to the textual or literal meaning—entails a conflict of some importance with the principles (and values) of the legal system: or, said in other words, when there is an imbalance between what is established in the rule and the underlying reasons.

12. With regard to normative gaps, the use of balancing involves an easily recognisable logical scheme that is articulated in two phases: the first one concludes with the establishment of a (general and universalizable) rule; the second one consists of a simple subsumption. It is therefore a more complex procedure than simple subsumption (deduction), but it is nonetheless rational; the criteria of rationality that can be used for its control are, in addition to those of deductive logic, those characteristic of practical rationality, in which coherence must play a particularly important role.
13. Axiological gaps present a more complex situation. As the applicator always has at his disposal the possibility of solving the case by applying the rule "on his own terms", he will have to start by carrying out a balancing whose result is that the reasons for creating the gap are of greater weight than those existing for simply applying the rule. In short, he has to justify the existence of an exception in the norm—in the rule—which would be implicit. This cannot be done without resorting to principles and, therefore, to values; but those values cannot be other than those of the legal system of reference.
14. Defeasibility and balancing are mechanisms for the innovation of the law, but coherently, that is, in accordance with the authoritatively established purposes and values; and it should be remembered that, in constitutional states, this authority is of a democratic nature. Moreover, this process of innovation has an open character (as is generally the case with practical rationality), so that the new rules that are made (and the new interpretations of principles and values) will also continue to present the characteristic of defeasibility.

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