Defeasibility and Practical Errors

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ABSTRACT
Defeasibility is usually understood as the possibility that rules contain implicit exceptions. It is a problem that has generated a wide bibliography in the last decades, normally linked to analytic legal positivism. The present paper will deal with the matter of defeasibility as a theoretical problem, that is, a problem of the theories of law. In particular, two of the most refined proposals of contemporary legal positivism will be analyzed: the deep conventionalism of Juan Carlos Bayón and the inclusive legal positivism of José Juan Moreso and his theory of defeaters. Once these positions have been analyzed, the basic theses of legal postpositivism will be presented, highlighting the idea of practical error, showing how for legal postpositivism the problem of defeasibility is nothing other than that of the rationality of legal decisions, of making implicit law explicit, and that in this regard there are rational criteria that help us to solve hard cases and avoid making practical errors.

KEYWORDS
defeasibility, positivism, postpositivism, practical errors

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1. *Introduction* – 2. *Legal positivism* – 3. *Legal postpositivism* – 4. *Conclusions*

1. *Introduction*

Defeasibility is usually understood as the possibility that rules contain implicit exceptions. It is a traditional problem in philosophy of law, which was already present in Aristotle and his idea of equity, and which Hart baptized in 1948 with the name of defeasibility (HART 1948), generating a profuse discussion ever since. A discussion that has produced a very wide bibliography[1] mostly in the context of analytical legal positivism[2]. Nevertheless, it seems to me that the so-called problem of defeasibility is not strictly a problem of ambiguity of the term, nor of vagueness of the concept, but a theoretical problem. What I mean is that the concept of defeasibility is affected, as most concepts, by ambiguity and vagueness (both extensional and intensional), but that we are not dealing with semantic difficulties that can be solved by fixing a list of descriptive properties, but instead with difficulties that arise from the fact that the properties of the concept are centrally evaluative. This is so because the problem of defeasibility in law is inevitably linked to the discussion on the necessity of its foundation[3]. And in this discussion, the theories of law from which the problem is approached take on special relevance.

I will lay out the problem as a theoretical confrontation between positivism and post-positivism, as referents of the two most relevant theories of law in contemporary discussion. For that purpose, I will follow the traditional classification within legal positivism between exclusive legal positivism, inclusive legal positivism and ethical positivism. Later on, I will focus on two of the most refined positivist proposals: the deep conventionalism of Juan Carlos Bayón and the inclusive legal positivism of José Juan Moreso and his theorization of defeaters. Once these positions have been analyzed, I will try to show that the problem of defeasibility is essentially a practical problem that tries to avoid a practical error and that, for this reason, legal postpositivism is a much more adequate theory to explain and operate with the phenomenon.

2. *Legal positivism*

Roughly speaking, legal positivism is characterized by being a theory of law that conceives of the legal system as a set of rules understood as norms that correlate the closed description of a case with a normative solution. Among these rules there are logical relationships of deducibility[4], so that the model of legal reasoning is fundamentally subsumptive. For a legal positivist, being loyal to a rule is, basically, to be so to its expression and to its meaning. These rules are not identified by their content, but by their form, and for that reason they hold that the origin of rules is what determines their legality. All the law is based on conventions, on sources

* All translations made of literal quotes in Spanish are my own.

1 A good presentation of the topic and of the various contemporary currents can be found in CARPENTIER 2014. More recently in GARCÍA YZAGUIRRE 2022.

2 A sample of the most relevant positions, not only positivist, can be found in FERRER & RATTI 2012.

3 As happens with many of the legal concepts, for example, that of punishment. See TORRES ORTEGA 2020, 330.

4 The title (and content) of a recent writing of two contemporary legal positivists is very illustrative: *La derrotabilidad jurídica como relación sistemática compleja* (DOLCETTI & RATTI 2016).

of law, and everything beyond conventions is not legal. Hence a clear or easy case is one which has a single conventionally acceptable answer, and a controversial or hard case is one which has more than one conventionally acceptable answer. In this last case, as the legal system (the applicable convention) does not determine one single answer, the judge has the discretion to decide (AGUILÓ 2007).

However, this characterization of legal positivism is too coarse and does not account for the multiplicity of currents that it holds. Without going into detail, we could say that the three main currents are exclusive legal positivism, inclusive legal positivism and ethical positivism, all of them developed in the context of Hart's conventionalist turn in his *Postscript* (HART 1984; on this point GARCÍA FIGUEROA 2019). These three theories differ, in essence, with regard to their characterization of the rule of recognition and, in the end, to the criteria of legal validity. Exclusive legal positivism holds that the identification of law cannot depend on its adequacy to morality; inclusive legal positivism holds that the dependence on morality to identify the law is contingent; and, finally, the position of ethical positivism is that the identification of law must not depend on its adequacy to morality.

Within these theories, I am interested in highlighting two particularly refined approaches: the deep conventionalism of Juan Carlos Bayón and the inclusive legal positivism of José Juan Moreso and his theory of defeaters.

Bayón, following Michael Moore's terminology, wants to take legal conventionalism to its last consequences, calling his theory "deep conventionalism" (BAYÓN 2002b, 51 ff.). According to conventionalism, which Bayón understands as the minimum content of legal positivism, the limits of the law are the limits of our conventions and, therefore, the identification of the law is, in principle, a mere matter of social facts. However, for deep conventionalism, an agreement in all cases by all subjects would not be necessary to affirm the existence of a convention, but instead it would be enough to have simply «the agreement regarding certain paradigmatic cases that are recognized as correct applications of the rule». That is, what defines a rule as correct would not be the explicit agreement on its particular applications, but instead the background of shared criteria. For that reason, to identify the law it is not enough (as for classic conventionalism) to limit our analysis to the simple observation of uncontroversial social facts, but it is rather necessary to accept that the determination of the content of the law will take the form of a coherentist deliberation.

Bayón's aim, as GARCÍA FIGUEROA (2018) shows, is none other than isolating the theory of law from moral philosophy in order to identify the law in a premoral stage, oblivious to the need of correctness[5]. But this theoretical thesis has, at least, two consequences. The first one is that it radically contrasts conventionality with correctness, understanding the latter as what is not conventional, with the clear objection that there are partially conventional moral theories, such as ethical constructivism. And the second one is that the outline of the limits of the convention is two-dimensional. If we follow the distinction proposed by VEGA (2021) between "dintorno", "contorno" and "entorno" [6] to analyze the theories of law in their conceptions of the limits of what is juridical, we can see how Bayón, who tries to outline the sphere of autonomy of the law, has a circular and negative idea of limit, that is, a self-referential one. Thus, Bayón

[5] As Bayón says «however complex and controversial the reasoning aimed at establishing the content of our conventions may be, it should not be confused with genuine moral reasoning, which is precisely the one that operates as a critical instance from which to evaluate the content of any kind of conventional rule» (BAYÓN 2002b, 54, fn. 53; my translation).

[6] The "dintorno" refers to the unity of the legal category, the "contorno" to the demarcation of said category and the "entorno" to the environment of the "dintorno" and the "contorno". The image of a circle may be the one that best illustrates this distinction. The "dintorno" would be the inside part of the circle, the "contorno" would be the line with which you separate the "dintorno" from the "entorno" and the "entorno" is what lies beyond the drawn line.

draws the limits of conventions only regarding their closure in relation to its "dintorno". He is concerned only about the outline of its "contorno". However, the "contorno" must necessarily be defined by the "entorno" and, therefore, it must be set up from the outside too. The drawing of a limit, in this case the limit of a convention also has to be externally demarcated, because the "contorno" is formed both by the "entorno" and the "dintorno", which requires a more complex reasoning in order to show the diversity of the relationships "entorno-contorno-dintorno" than that of the simple demarcation between inside and outside. The separation between the system of rules of a conventional basis and the critical ethico-political ideals is based on the self-closing postulate of the conventional system, creating a "dintorno" held by itself, which, as Vega states, could be called a Münchhausen strategy.

And, as far as our problem is concerned, the pertinent question is: what is a practical error for a deep conventionalist? Answering this question already presupposes the adoption of the internal point of view and the internal point of view is precisely what distort deep conventionalism. Even if practical error is defined on the basis of the agreement on certain shared criteria based on certain paradigmatic cases of error, it is necessary to leave the convention, at the risk of falling in a consensus by convention and not by conviction (DWORKIN 1977). We have a problem, precisely, with the limits of convention, and convention itself cannot be what determines the result, just like the acceptance of a convention cannot come from the convention itself[7]. In short, modulating an ancient adage, we could say that the exception confirms the convention.

On the other hand, Moreso adheres to inclusive legal positivism. Let us remember that inclusive legal positivism is that theory of law that maintains the contingent connection between law and morality. More precisely, it maintains that for the identification of the law it is neither necessary nor impossible to appeal to moral criteria. This theory has been argued mainly by WALUCHOW (1994), COLEMAN (2001) and, among Spanish scholars, by MORESO (2001). For the issue at hand, Moreso has proposed an image of law that challenges the postpositivist approach[8].

Moreso argues, along Hart's lines, that the conception of law in two levels[9], those of rules and principles, collapses and must be replaced by an image with a single level composed of rules and defeaters (MORESO 2020, 87). Let us go step by step.

First, focusing on Atienza and Ruiz Manero, Moreso argues that the distinction in two levels of legal reasoning does not destroy the objection, announced by RAZ (1972, 823-854), that in the two-level approach not only the principles are *pro tanto* guidelines, but that rules would be so too. If one of the main functions of principles is to make exceptions to rules, then rules would not have closed conditions of application, and so they would only apply when they were not

[7] Even though we understood by convention the background of shared criteria. Curiously, Bayón recognized this fact in 1991: «the last operative reasons of a justificative legal reasoning (of one that takes into account the fact of the existence of legal rules) cannot be legal reasons, that is, the legal norms themselves, including the last norm which is the rule of recognition of the system: because either they are considered as practical judgements that are accepted for their content (and then their acceptance is indistinguishable from that of an ordinary moral judgment, i.e., of one that is not dependent on the fact of the existence of those rules), or else the fact of their existence is taken into account as an auxiliary reason, in which case the last operative reasons that give practical relevance to the existence of the last legal dispositions, and which it makes no sense to qualify in turn as legal, are presupposed as operative reasons. They also cannot be prudential reasons of the subject who develops the reasoning, since a prudential practical reasoning that takes into account the existence of legal norms is not apt to justify decisions that are imposed to others whatever their interests are: one can do what the law demands for prudential reasons, but one cannot appeal merely to their own interests to justify that another must do something. Thus, in the end, the operative reasons of a justificative legal reasoning must be moral reasons» (BAYÓN 1991, 737; my translation).

[8] Despite that, Moreso has recently indicated his coincidence with authors such as Atienza and Ruiz Manero in MORESO 2017, 205, and MORESO 2022, 564.

[9] Just as it was proposed by DWORKIN 1977, ch. 2 and then by ALEXY 1986, ch. 3 and ATIENZA & RUIZ MANERO 1996.

defeated by the force of a principle. This argument, according to Moreso, would cause the second floor of the building to collapse into the first one: principles end up usurping the place of rules, and there is only space left for a jurisprudence of reasons (MORESO 2018, 125 ff.).

Secondly, Moreso's proposal is built on the supposed failure of the previous one. He proposes an image of a single level where rules coexist with defeaters. For Moreso, defeaters are mechanisms available to the law to activate access to underlying reasons (MORESO 2021, 569), to authorize the return to the deep level of reasoning (MORESO 2016, 17) or, in short, to resort to moral reasoning (MORESO 2020, 87). Some examples of defeaters in law would be defences and excuses in criminal law, the conditions of invalidity in contract law, or indeterminate legal concepts.

In this respect, MORESO (2020b, 182) compiles a list of defeaters along the line of POLLOCK (1974; 1986), SINNOT-AMSTRONG (1988; 1999), MONTAGUE (1995) and BAGNOLI (2018):

1. *Cancelling defeaters*. For example, when my friend lends me a book and he says that I can keep it. In this case my duty of giving it back is cancelled.
2. *Excusing defeaters*. Moreso uses the case of coercion in criminal law: the action is still obligatory or forbidden but the author is not responsible.
3. *Overriding defeaters*. When there is a conflict of duties, but one of them prevails over the other[10].

Eventually, Moreso advocates for a model in which rules and the way of activating their exceptions can coexist in the same building without collapsing into a jurisprudence of reasons (MORESO 2018, 129). According to him, this is the way in which the law tries to preserve the ideal of the rule of law, combining legal certainty with formal justice and equity (MORESO 2018, 116).

Although interesting, Moreso's approach seems to have some problems. To begin with, the adoption of a one-level model with rules and defeaters does not take into account one of the fundamental reasons why postpositivist scholars use a two-level system precisely within the framework of the constitutional rule of law, that is, because rules are nothing but the result of the balancing of principles, so that, by definition, they cannot be at the same level. Principles give sense to rules and justify them. Also, as Ródenas has shown developing the posture of Atienza and Ruiz Manero, it is

> «perfectly conceivable that a subject, before applying a rule, deliberates on whether the result of applying it is compatible with the compromise between reasons that is expressed in the latter, without for that stopping to consider said rule as a peremptory reason for action. Whoever, before applying a rule, asks himself about its scope or exceptions (in the terms that I have pointed out here) does not question the compromise or judgment of prevalence between reasons that the rule expresses. Hence an agent can consider a rule as peremptory and not apply it to a case that he considers excluded or outside of its scope» (RÓDENAS 1998, 118 ff.).

Furthermore, it seems that the reconstruction of Moreso only accounts for explicit exceptions, that is, for the mechanisms that are already provided by the law to defeat rules. Nevertheless, the genuine problem of defeasibility appears, precisely, when there is no applicable legal convention. These problems generate, at least, the following questions: what is the place for principles in the model proposed by Moreso? In the case of the absence of an applicable legal convention, what happens in this zone of entrance of the defeaters: discretionality or right answer in material terms? And, finally, the most general and important question of all: what are

[10] Here Moreso makes two distinctions: (a) First distinction: (i) Strong: without residue; (ii) Weak: with residue (duty of compensation). (b) Second distinction: (i) Rebutting (from prohibited to obligatory, from obligatory to prohibited); (ii) Undercutting (from obligatory or prohibited to facultative).

really the defeaters? Regarding this last question, it may be reasonable to answer that the defeaters are mechanisms to avoid possible practical errors working as a conveyor belt between the level of rules and the level of principles. I will come back to this point later.

3. *Legal postpositivism*

By postpositivism I mean, in very general terms and for the point at hand, the theory of law (represented by Dworkin, Alexy, Nino, the last MacCormick, and Atienza) which holds that, besides rules, there are also in law other patterns of conduct such as principles, that are norms that establish what ought to be without specifying when their normative solutions are applicable. Consequently, the model of legal reasoning will be subsumption in the case of rules and balancing in the case of principles. Now the relationships between norms will not only be relationships of deducibility but also of justification: principles ground rules, they justify them, and thus rules are not seen as the product of purely authoritative acts of creation, but as the result of acts of developing, concretizing and balancing principles. Law is based on sources, on conventions, but not everything within the law is convention: beyond the criteria of formal validity there are criteria of material validity, which bring as a corollary the problem of implicit law. Taking this issue seriously implies that in law there are no unregulated relevant cases or, seen from another perspective, that the Dworkinian regulative ideal of "(only) one right answer" is assumed: cases are easy if there is an answer provided by the legal system which is logically consistent with other rules of the system *and*, at the same time, which has evaluative coherence with the principles of the system itself; and cases are hard when the system does not directly provide a predetermined solution and, therefore, it is necessary to unfold an intense argumentative activity to find it. From this point of view, discretion is not pure freedom of choice, but a responsibility of the adjudicator; indeterminacy is not confused with uncertainty[11].

If we follow postpositivist reasoning, defeasibility ceases to be seen as a problem of systematic relationships between rules and becomes a practical problem: the problem of implicit law. Implicit exceptions are not the result of the creative and discretionary activity of the judge, but rather justified reasons (arguments) brought out, precisely, from implicit law. And, consequently, the fundamental questions of postpositivism turn on the problem of whether there is or not a rational legal method to explicitly state implicit law. From the perspective of legal postpositivism, defeasibility is not seen as a problem of such dimensions (it is said that defeasibility can challenge the basis of exclusive positivism) but as a consequence of law's being a social practice: the fact that there is not an answer more or less directly predetermined by the system does not necessarily mean that there is no answer, but that it is more difficult to find it, and that it can usually be found because there are principles in the law. If defeasibility is seen as a problem of coherence, of adjusting the directive dimension of rules to its value dimension, the "one right answer" thesis still makes sense, at least as a "regulative idea". Moreover, in most legal systems there are mechanisms to adjust the value dimension of law to its directive dimension[12].

It seems that some positivist scholars stop at the Dworkinian "interpretative" stage, when they confirm that there is more than one conventionally acceptable answer to a case and that, consequently, the judge has to choose discretionarily one of those answers. They disregard the

[11] As Aguiló argues, following Dworkin, the thesis of judicial discretion leads us to the thesis of indeterminacy of law in controversial cases, while the one right answer thesis leads us to the thesis of uncertainty in hard cases (Aguiló 2021, 18).

[12] It is the case, for example, of atypical illicit acts (abuse of right, legal fraud, and deviation of power). See Atienza & Ruiz Manero 2000.

idea of a "postinterpretative" moment, the moment of judging which of these alternative answers is the best, the correct one[13].

But let us continue pulling on the thread of exceptions. The idea of implicit exception itself is directly related to implicit law, which only makes sense to talk about when we try to solve cases using legal rules. For legal positivism, implicit exceptions, if they are not the product of logical derivation from other explicit rules, since they do not refer to any convention (there is no behavioral guide), are inevitably discretionary acts of judicial creation.

In contrast, for legal postpositivism, implicit rules are those that are neither logical consequences of the explicit rules nor products of acts of will (AGUILÓ 2000, 183). If we look at the problem from the point of view of the sources of the law, which revolves around the connection between legal norms and the processes of which they are a product, talk about "implicit law" (product) and talk about "legal method" (process) cannot be separated. Having said that, from this point of view, the legal method takes into account, in addition to the directive dimension of rules, the value dimension of law. This means that, next to the criteria of normative logical *consistency* typical of legal positivism (nonconflicting duties), we need to add the criteria of evaluative coherence (nonconflicting values).

Considering duties independently of their orientation towards certain purposes has the consequence of accepting that for the law ritualist behavior is not a deviated form of behavior[14]. If we reject this image of law and we accept that every duty is linked to at least one purpose from which it gets its cause, law appears to us as an institution primarily aimed at the protection of certain goods.

In this light, defeasibility, therefore, is just another way of talking about the problem of the rationality of legal decisions. If we look at it from the perspective of building and justifying particular solutions using general rules, instead of that of finding in general rules the built-in solutions to particular cases, there appears the figure of the legal agency, the legal operator or adjudicator, which is completely overshadowed in the positivist vision described above. In these cases, the judge has to unfold an intense argumentative activity to provide reasons for the existence of a normative problem, a gap, from which comes the force of apparently self-contradictory assertions such as that "the exception confirms the rule". However, the justification of the problem goes hand in hand with the argumentative operations that are oriented to its solution. It is not merely a chronological procedure: there is a constant interaction between the various stages of the argumentative process (there is a recurrence both to the system, to the raw legal materials, and to the various normative propositions that are constructed). The judge has to construct the rule that is going to be the normative premise of his legal reasoning, he has to formulate and justify the rule that resolves the case.

Postpositivism endorses a strong view of practical reason and of practical error. However, the notion of practical error needs to be developed. For present purposes, the idea of practical error can be elucidated resorting to Atienza's three dimensions of argumentation (ATIENZA 2006): formal, material and pragmatic.

Very briefly, according to the formal dimension, legal reasoning is a set of non-interpreted sentences, that is, a reasoning in which we abstract from the truth or correctness of their content. Its aim is to determine whether from certain sentences with a certain form (premises) you can pass on to other sentences (conclusion). Thus, the criteria of validity are given by the

[13] AGUILÓ 2021, 17. For an extensive treatment of this problem and of the evaluation criteria of judicial argumentations, see ATIENZA 2013, ch. VII.

[14] For example, if we followed the thesis of Alchourrón and Bulygin, we would have to hold that the judges of the case *Riggs v. Palmer* acted incorrectly when they denied the inheritance to the grandson that had murdered his grandfather. That is the position, for example, of MARTÍN FARRELL 2014.

rules of inference. Under the material dimension, legal reasoning is conceived as a theory of premises understood as good reasons. Its aim is answering questions such as what action is due or what beliefs are valid as premises and conclusions. It focuses, then, on the semantic aspects of language, on content, for the assessment of which we have justification criteria, maxims of experience, scientific laws, etc. Finally, the pragmatic dimension focuses on the use of argumentation, that, from this perspective, is seen as an activity, as a practice and a social relationship, and it is divided into rhetoric and dialectics.

On the basis of these assumptions, it is possible to classify practical errors into formal, material and pragmatic (dialectical and rhetorical) errors. However, it seems to me that it is necessary to take into account the codetermination between the three dimensions, not only to avoid unjustified reductionism, but also to understand that in practical errors —even if, of course, they can be linked to the formal and pragmatic dimensions— what matters the most is the material dimension, because all practical errors presuppose the interplay between law, morals and politics.

Going back to the thread of the exposition, what is important for the problem of defeasibility is to realize how naturally postpositivists approaches incorporate it. There are, no doubt, various illustrations of this. Let us take, for example, the concept of rule in the sense of «the normative premise of a finished legal reasoning» formulated by AGUILÓ (2000, 185 ff.; my translation).

According to Aguiló, this notion of rule 1) is a construction of legal agents; 2) contains all relevant factors to the solution of the particular case; 3) has no specific normative hierarchy; 4) has the "force of law", of the whole legal system; and 5) its purpose is to justify the particular judgement taken by the judge.

That the rule is constructed by legal agents is a corollary of what said above. The judge has to decide to use the authoritative materials he has identified as legal. His process of building or constructing the rule is the step—or set of steps—that goes from the «normative statement to be interpreted» to the «interpreted normative statement» (i.e., the rule)—the link between them being an «interpretative statement» that solves a problem of interpretation. To state it more clearly: the construction of the rule is the step from «the rule that the judge has the duty to apply» to «the rule that the judge [finally] applies».

That this (final) general rule contains all of the relevant factors for resolving the case refers to the fact that the judge, in constructing the normative premise of her reasoning, has to articulate and resolve all the tensions of the systematic relationships that arise at the time of application: hierarchical, semantic, chronologic, genetic, etc., but also the tension dependent on the indeterminacy of both law and the facts[15].

The consequence of having resolved in the previous step all systematic relations, including hierarchical ones, is that the final rule has no hierarchy: it is the solution all-things-considered, once the whole legal order has been revised and once the one voice with which the law as a whole has to speak has been articulated. Hence, we affirm that this construction has the "force of law" and that its main purpose is to justify the judgement, i.e., how that particular case is decided.

This concept of rule is thus an attempt to account for the transition from the rules of objective law to the result of their interpretation after all things have been considered[16]. The fact that the law must speak with a single voice is independent of the fact that objective law is

[15] It must be noted that a good part of the theorists of defeasibility confine it exclusively to the scope of solving systematic relationships, trying to solve the problem in terms of rule validity and closing their reasoning with a last master rule, either presupposed by the theorist (Kelsen's *Grundnorm*) or empirically observable as a social practice (Hart's rule of recognition). But, as Nino observed, what is really interesting is not whether a rule belongs to a legal system in a descriptive sense, but if the rule must be applied to justify an action or decision (NINO 1992, 49).

[16] The idea behind this reasoning can be summarized in the expression «the construction of the case», which was extensively treated by the hermeneutic doctrine of authors such as Larenz or Hruschka (see TARUFFO 2011, 100 ff.).

unitary. It is a matter of translating the unity of law into action: all systematic and value relationships in tension have already been resolved and, therefore, the conclusion of this reasoning is a practical proposition, the representation of an action as justified, correct.

What I am trying to show is that defeasibility in law cannot be separated from the idea of problem. Defeating a rule always presupposes the detection of a problem resulting from a judgement of relevance made by the judge, and this problem always consists in a practical error. Legal reasoning begins by being systematic: if the system provides an answer to the case the judge will limit himself to constructing the normative premise by giving meaning to the relevant legal materials provided by the system itself[17]. If the system does not give an answer or gives an evaluatively unacceptable answer, we consider that there is a problem. And again, the fact that this problem does not have a predetermined solution does not mean that the law is indeterminate, but that it is uncertain.

4. *Conclusions*

After presenting the problem of defeasibility from the point of view of the theories of law, two proposals of contemporary legal positivism have been analyzed: Bayón's deep conventionalism and Moreso's inclusive legal positivism and his theory of defeaters. Facing the insufficiencies of both theories to account for the problem of defeasibility, the basic theses of legal postpositivism have been presented, going deeper in the idea of practical error and in the concept of rule as a premise of a finished legal reasoning, as proof that the problem of defeasibility is nothing other than that of the rationality of legal decisions, of making implicit law explicit, and that in this regard there are rational criteria that help us to solve hard cases and avoid making practical errors.

[17] I am referring, again, to the process that lies between identifying the normative materials and the decision to use those normative materials. That is, the step from the raw legal materials to normative premises. As Nino puts it, this is the step we make when we pass from the judgement "the constituent C has prescribed: 'no one can be detained without a written order of the competent authority'", that does not allow to justify any action or decision, to "no one can be detained without a written order of the competent authority", that does allow it. He explains that, in order to make this step, it is not only necessary to presuppose a principle such as "the constituent C is a legitimate authority and must be obeyed", but it is also necessary a rule of interpretation that allows to remove the quotation marks in the first sentence (NINO 1992, 82).

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