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The Consequences of Defeasibility*

1. *Introductory Remarks*

According to Marmor (2005: 96), the distinction between easy (in Hart's terminology, clear) cases, where the law can be understood and applied straightforwardly, and hard (or unclear) cases, where the law is undetermined, and so must be interpreted and applied by reference to the real or counterfactual intentions of the normative authority, is required by the positivistic distinction between the law as it is and the law as it ought to be. This double pair (easy/hard cases; law as it is/ought to be), and its connections, have been criticized on the ground of arguments from defeasibility, according to which the construction of all rule-formulations always involves evaluative considerations, so that no clear-cut distinction can be made between the law as it is and as it ought to be.

In this paper, I want to analyze Marmor's theses about the tenability of some of these arguments and argue for a different reconstruction of the relations between positivistic tenets and legal defeasibility. In detail, I will try to show that legal positivism is not necessarily committed to maintaining the distinction between easy and hard cases and rejecting defeasibility, since defeasibility does not necessarily imply rejecting the separation of law as it is and law as it ought to be (or, in other words, of law and morals).

2. *Defeasibility and Legal Interpretation*

Marmor's (stipulated) basis for his analysis of defeasibility is the following: interpretation intervenes (or should intervene) only when rule-formulations are undetermined (or underdetermined), as in most cases the law can simply be understood, followed, and applied straightforwardly. This thesis relies on an interpretation of Wittgenstein's theory of meaning, whose detailed analysis exceeds the purposes of this contribution and has been examined elsewhere¹. Suffice it to say that, according to Marmor's interpretation of Wittgenstein, knowing the meaning of a generic expression – a concept-word – consists in the possibility of

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¹ See Chiassoni (2007) and Poggi (2007).

applying such expression to particular instances in an unproblematic way (2005: 96), whereas interpretation amounts to substituting a certain formulation with another formulation. According to Marmor, contending that in all cases of application of a rule there is the need for the reformulation of a normative provision is, to say the least, incongruous (2005: 118).

The gist of Marmor's arguments against defeasibility is a sort of *petitio principii*, whose conclusions are implicit in the premises. If understanding and interpreting a rule-formulation are two different and irreducible activities, and if theories which do not distinguish between the two activities amount to «an obvious absurdity» (118), then it follows that theories of defeasibility – according to which one can “understand” a rule-formulation only in view of its alleged purpose, so that one has to interpret rule-formulations in any case – are absurd, since they violate the distinction between understanding (and following) a rule and interpreting it (see Marmor 2005: 117)². Manifestly, this reasoning is a matter of stipulation, and requires no particular theory of meaning. This is a sound argument, since its conclusions follow from the premises, but it is not very interesting.

It seems more interesting to examine Marmor's stipulations (i.e. premises) about legal interpretation that directly regard defeasibility.

First of all, Marmor repeatedly affirms that easy cases are those «where the law can simply be understood and applied straightforwardly» (2005: 95) and that theories of defeasibility necessarily reject the distinction between easy and hard cases, because they maintain that in no case the law can be thus understood and applied. This thesis needs some clarifications. Defeasibility, as it is usually understood, occurs when a rule-formulation has a clear meaning or, despite having an original undetermined meaning, its meaning has been clearly stipulated, so that the case at hand can be regarded as an easy one³. Consequently, holding that there are easy cases, because sometimes the law can be easily understood and followed, is a completely useless tenet with regard to defeasibility. Defeasibility makes cases hard just when they are (considered) *prima facie* easy: in other words, «a rule is only defeated if it was not applied even though it was applicable» (Atria 2002: 123). From this perspective, defeasibility may be understood as a problem regarding the development of the logical consequences of a normative set, and not as a problem regarding the interpretation of a set of legal sources. This explains why defeasibility is relevant with regard to any interpretive outcome.

However, defeasibility may also be regarded as a purely interpretative problem, according to current juristic practice. This reading of defeasibility requires a change of perspective. From this perspective, defeasibility may be reduced to the

² This is made clear by Atria (2002: 124), who points out: «legal rules cannot be legally defeasible once [...] the view that the meaning of a rule determines its application, is accepted».

³ See Alchourrón (1996b: 340 ff.). In Atria's terms, defeasibility brings about evaluative hard cases, not regulative hard cases (2002: 75).

outcome of some well-known interpretive techniques, such as distinguishing, the so-called “argument from dissociation”, the reference to counterfactual intentions, systematic interpretation, etc. All these techniques are commonly used by jurists and are capable, so to speak, of defeating the original or *prima facie* rule (which, in its turn, is not always the outcome of a literal interpretation). Usually, the standard positivistic theses about the literal understanding of rules does not grasp this important aspect of what we can call ‘interpretive defeasibility’, since they take for granted that the only way used to approach the meaning of a legal text is a literal one.

Moreover, Marmor does not take into account the hypothesis that (some) modern legal systems indeed require norms to be defeasible (Atria 2002: 115 ff.). In the first place, Marmor’s arguments become clearly normative, insofar as they do not take into account positive interpretive rules that compel to mitigate or even discard the literal meaning of a rule-formulation (whatever it might be)⁴. In the second place, his arguments do not take into account those interpretive practices of most modern legal systems, which require judges (and interpreters in general) to modify the consequences of legal rules in accordance with other general rules. In many legal orders, the principle of equality – according to which like cases should be treated alike, and different cases should be treated differently – is used to produce axiological gaps⁵, which occur when a case is provided with an “unsatisfactory” legal solution, since the legislators did not take into account a property which should have been regarded as relevant. In other words, there is a norm that is clearly applicable to a certain case, but there are reasons of equality that push towards the direction of making that norm defeasible. In these circumstances the interpreter holds: either 1) that the legislators did not take into account a “relevant” difference between two cases, so providing the two different cases with the same normative consequence and missing out the adoption of a “differentiating” norm; or 2) that the legislators differentiated two cases, which are “substantially” alike, missing out the adoption of an “equalizing” norm (Guastini 2006: 30, 151-152).

As a matter of methodological analysis, it seems to be a plain truth that all rule-formulations are open to interpretive defeasibility: all rule-formulations can be (re)interpreted so that some cases can be excluded from (or included in) the

⁴ Cf., for instance, the formulation of the “Golden Rule” which is found in *Grey v. Pearson* (1857) 6 HL Cas 1, «the ordinary sense of the words is to be adhered to, unless it would lead to absurdity, when the ordinary sense may be modified to avoid the absurdity but no further». Or see, e.g., Article 9 of the Louisiana Civil Code: «Art. 9. *Clear and unambiguous law*. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be in search of the intent of the legislature».

⁵ About the concept of an ‘axiological gap’, see Alchourrón and Bulygin (1971: 106 ff.); Rodríguez (2000).

original scope of a rule. This is not different from saying that every rule-formulation can be interpreted restrictively, and that this restriction of meaning can be justified by means of differentiating two generic cases in the light of an allegedly relevant element, or that every rule-formulation can be read extensively and that this extension of meaning can be justified by means of making equal two generic cases in the light of an allegedly irrelevant element. It is worth observing that the meaning to be extended or restricted is not necessarily the literal meaning of a rule-formulation. In this regard, Marmor's distinction between «simply understanding the law and just applying it» and «modifying and creating it» (2005: 95), based on the semantic consideration that «one does not interpret that which is determined by rules or conventions» (2005: 16), is unconvincing, for at least two significant reasons.

In the first place, the primary non-reflexive meaning of a legal sentence (of a source of law) does not necessarily consist in its literal meaning, i.e. the meaning determined by linguistic rules or conventions. To put it differently, even though the literal meaning of a legal sentence is determined by semantic rules or conventions, this does not mean that this legal sentence will (or can, or should) not be interpreted. Legal culture and legal scholarship often (if not always) “filter” the meaning of legal sentences, so that when one approaches legal sentences does not act as a “semantically original” interpreter, but as someone who sorts out the meaning of legal sentences through a web of previously construed, and often differing, legal concepts and juristic conceptions⁶.

In the second place, as Sullivan (1999) points out, ‘literal meaning’ or ‘plain meaning’ are often vacuous terms, used by jurists to pretend they discovered an objective and unquestionable meaning (determined by semantic rules), when in fact they chose the meaning to attribute to a text. The supposed easy nature of clear cases, in effect, depends at least upon four factors, related to the supposed “plain meaning” of a legal source: 1) the choice of the text to be interpreted⁷; 2) the choice of the co-text in whose scope the text is read⁸; 3) the very sense of

⁶ Marmor (2005: 97) accepts this tenet (even though he does not stress it as it deserves) when observes that «most of the legal rules judges are required to rely upon are already directly or indirectly “loaded” with previous judicial interpretations» and that «the individuation of legal rules often depends upon other legal rules or fragments of them». Even more importantly, legal provisions – at least in civil-law legal orders – are often (if not always) read through the lenses of concepts created by legal dogmatics, so that the supposed literal meaning is often obfuscated by the conceptual web produced by jurists (See Guastini 2004: 71 ff.).

⁷ Sullivan (1999: 162): «[...] sometimes identifying the text-to-be-interpreted involves choosing between alternative texts which favour different outcomes. When this happens, the outcome of the dispute cannot really be blamed on the meaning of the text, for it actually depends (at least in part) on the initial choice of text».

⁸ Sullivan (1999: 165): «If you pay close attention, you’ll notice that in judgments that rely on the plain meaning rule, the co-text is marvelously elastic. Sometimes it includes a sin-

‘plain or literal meaning’, understood in different, and sometimes, incompatible ways⁹; 4) the (social and historical) context in which the text is read¹⁰.

Consequently, the clearness (or the hardness) of a case does depend not on the immediate character of the understanding of the literal meaning of a sentence, but on the conventional (and always revisable) agreement on a particular interpretation of a specific rule-formulation. To put it in other words, the real (and interesting) difference is between legal-conventionally clear and legal-conventionally hard cases, not – as Marmor seems to think – between linguistically clear and hard cases. A case is regarded as easy not because of the literal and non-reflexive meaning of the sources that provide its solution, but because of jurists’ agreement on their meaning and construction.

Hart (1983: 106) himself – whose view Marmor supposedly intends to preserve – corroborates this view, by correctly highlighting the specific nature of *legal* interpretation:

The clear cases are those in which there is general agreement that they fall within the scope of a rule, and it is tempting to ascribe such agreements simply to the fact that there are necessarily such agreements in the use of the shared conventions of language. *But this would be an oversimplification because it does not allow for the special conventions of the legal use of words, which may diverge from their common use, or for the way in which the meaning of words may be clearly controlled by reference to purpose of a statutory enactment which itself may be either explicitly stated or generally agreed.* A full exploration of these questions is the subject-matter of the study of the interpretation of statute (emphases added).

Marmor’s thesis, reformulated accordingly, should run as follows: legal positivism is committed to the thesis that a distinction exists between easy cases

gle section. Sometimes it expands to take in the entire statute. But more often it shrinks to nothing at all, when the court insists that the text-to-be-interpreted must be looked at in isolation».

⁹ Sullivan (1999: 168): «Anyone who reads statutory interpretation cases soon notices that the courts have a dozen and more different ways of referring to meaning. There’s ordinary meaning, literal meaning, common sense meaning, ordinary and grammatical sense, natural sense, and so on. These terms have no fixed or precise reference. Sometimes they are used as synonyms for ‘plain meaning’ but it is also clear that different judges mean different things by them. This ever-shifting terminology is a shell game».

¹⁰ Sullivan (1999: 172): «The plain meaning rule is based on the fundamental proposition that once a text is written, it “contains” a meaning that does not change, but remains stable regardless of the context in which the text is read and regardless of the different knowledge and expectations readers bring to the text. Recent work in linguistics has discredited this view. Texts do not “contain” meanings; rather they invite readers to infer meanings from the words chosen, the arrangement of the words, the circumstance of utterance and other aspects of context. The text of legislation may be fixed once and for all, but the context cannot be».

where there is an overall agreement, among the members of a certain legal community, on the meaning of the sources of law, and hard cases, where this interpretive agreement lacks. As I will try to show in what follows, however, legal positivism is by no means committed to this thesis either.

3. *Apagogic Defeasibility*

As I mentioned earlier, Marmor (2005) mainly discusses defeasibility while dealing with Fuller's *axiological* or *moral* objection to the positivist distinctions between easy and hard cases, on the one hand, and law and morals, on the other hand. According to Marmor, the main contention of Fuller (1958) is that no rule can be identified without resorting to its purposes, so that we cannot identify law without resorting to morality.

This first argument from defeasibility (which I propose to name 'apagogic defeasibility') is reconstructed by Marmor (2005: 104) as a sort of (fallacious) attempt of *reductio ad absurdum*. Since any rule, when construed literally, can bring about absurd, immoral, or otherwise anomalous results, it follows that no rule can be interpreted literally. Surely, in this reading the argument appears to be flawed by a fallacy of unjustified generalization.

But there are many different (and more charitable) ways to reconstruct the argument from apagogic defeasibility.

The first one is to understand it as an argument about the logical development of a normative set. From this standpoint, the defeasibility thesis is about whether applying to a certain normative set the logical law of the strengthening of the antecedent, or not (Alchourrón 1996a). I will expand on it in section 4. Suffice it to say, by now, that legal positivism seems conceptually linked neither to the acceptance, nor to the rejection, of this logical law, and this shows, in turn, that positivism is not committed to the distinction between easy and hard cases.

A second reconstruction lies on the consideration that rule-formulations can be construed in many ways, according to different canons of interpretation. The argument from apagogic defeasibility requires discarding those interpretations of a rule-formulation that bring about absurd results. According to this reading of the thesis of apagogic defeasibility, an interpretive result is always revisable in the light of its (logical, para-logical, or axiological) consequences. So understood, this argument is neither about the application of rules (already interpreted), nor about the ascription of a meaning to a rule-formulation, but deals with the exclusion of all the attributions of meaning to a text that appear, for some reasons, to be absurd¹¹.

A third – and perhaps more interesting – interpretation is the following: since any rule-formulation can be interpreted in the light of some (supposed) underlying

¹¹ Tarello (1980: 369-370); Guastini (2004: 176-177).

value, the interpretative outcome of a literal ascription of meaning is always defeasible in the light of this value, read as the canon of “normality” (or “non-absurdity”) of the rule¹². Here again we are faced with a problem of logical deduction. In ordinary legal language, the antecedent of a rule-formulation is usually taken to be a necessary, but not sufficient, condition of the consequent. The implicit “normal” circumstances are those entailed by the value(s) underlying the rule. It is true that this does not mean that rule-formulations cannot be construed literally, but this does mean that literal meaning is always vulnerable to underlying reasons. Only the unrestricted acceptance of an “opaque” model of normative relevance can deny such conceptual circumstance.

Only the ascription of a meaning to a text (be it literal or else) *plus* the acceptance of the strengthening of the antecedent can induce Marmor to say that an easy case is that to which the law, previously understood, can be applied straightforwardly. In this sense, Marmor’s account of easy cases is forced to accept the two following logical laws (Alchourrón 1993: 58 ff.)¹³:

(Strengthening of the Antecedent) $(a \rightarrow Ob) \supset (a \& c \rightarrow Ob)$

(Deontic Modus Ponens) $(a \rightarrow Ob) \supset (a \supset Ob)$

The absurd results, mentioned by Marmor and Fuller, are the results of an unrestricted application of the law of the strengthening of the antecedent. Here, literal interpretation has almost no role to play. Any rule, construed in any way, can bring about results regarded as anomalous. Take Pufendorf’s famous example of the Bolognese statute prohibiting to ‘letting blood in the street’. This was, admittedly, a law designed to prevent dueling and public fighting, but was applied to a surgeon carrying out emergency surgery in the street (Schauer 1991: 213). Now, that the expression ‘letting blood’, interpreted literally, applies to a surgeon performing emergency surgery, or to a kid whose nose is bleeding, is highly controversial. As Bulygin (2005: 75) observes, the judge who intends to apply this rule to the surgeon or to the kid, «simply would apply this norm to a case which is clearly beyond its scope. One could say that the judge did not grasp the meaning of ‘letting blood in the street’». Usual interpretation, however, understands that the cases of the surgeon or of the kid fall into the core of the rule, literally con-

¹² See Schauer (1998: 236).

¹³ The symbol ‘ \rightarrow ’ designates the strict conditional, whereas the sign ‘ $>$ ’ stays for the weak (alias, defeasible) conditional. The symbol ‘ \supset ’ refers to material conditional, ‘ $\&$ ’ designates the conjunction, and ‘ \sim ’ the negation. The symbol ‘ f ’ represents the revision operator of weak normative conditionals. Lowercase letters are variables for propositional contents. ‘ O ’ is the deontic operator ‘Obligatory’, being ‘ $O\sim$ ’ the symbol for ‘Prohibited’, and ‘ $\sim O\sim$ ’ the symbol for ‘Permitted’ (so that ‘ $O\sim p$ ’ means ‘Prohibited that p ’ and ‘ $\sim O\sim p$ ’ means ‘Permitted that p ’).

strued. Be it as it may, the problems follow to the decision of interpreting ‘letting blood’ in the sense of ‘pouring whoever’s blood’, and applying it without restriction. If it is of no relevance the circumstance that one is performing emergency surgery or the circumstance that one is letting his own blood, then the strengthening of the antecedent is applied when they occur. It follows from that that a certain interpretation *plus* the decision to apply this logical law bring about the absurd results in question.

4. *Open Texture and Empirical Defeasibility*

Marmor’s analysis of empirical defeasibility deals with Moore’s theory of indexical predicates, intended as an objection to Wittgenstein’s conventionalism (2005: 106-112). Since I substantially agree with Marmor that Moore’s theory is highly implausible, I will not elaborate on this point.

I will turn, instead, to another kind of “empirical” defeasibility, which is related to open texture, and which, I submit, may prove troublesome for Marmor’s theory of legal interpretation.

Open texture is usually connected to vagueness, but it is not to be confused with it. It is rather a sort of *possibility of vagueness* (Waismann 1993: 120), related to the fact that we cannot completely foresee all the possible circumstances in which a certain statement is true or false. In normative contexts, this means that we cannot completely foresee when all the “operative facts” of a rule are given, and so the rules we create are left open to possible future defeat¹⁴.

Marmor (2005: 102) very briefly touches upon open texture, using an argument *ab auctoritate*: «that Wittgenstein would subscribe to the view that most of the words in our language are at least possibly vague is quite indisputable yet one would be on safe ground presuming that he would not have attached great significance to this fact». Open texture seems far more important than Marmor’s interpretation of Wittgenstein seems to hold, at least for defeasibility in law.

As Carrió (2006: 35) correctly points out, any rule cannot be but open-textured, since properties that have not been taken into account in bringing a rule into a legal system are not, for this reason alone, excluded from future consideration. When a case occurs, where some of these properties appear, it usually follows that interpreters are puzzled with doubts which cannot be eliminated by a straightforward application of the literal (or current, or conventional) meaning of a concept-word. The use of the concept-word (and, consequently, of the rule) is, therefore, open to reduction or extension. Since any general rule presents, necessarily (i.e. for conceptual reasons), an area of open texture, we can conclude that all rules can be reinterpreted

¹⁴ MacCormick (1995: 103) affirms: «Law has to be stated in general terms, yet conditions formulated generally are always capable of omitting reference to some element which can turn out to be the key operative fact in a given case».

extensively or restrictively as to infinite previously unconsidered properties. This mechanism would be prevented only where a legal system includes a “rule of closure of normative relevance”, according to which the properties that the legislature did not consider are to be regarded as irrelevant¹⁵: obviously, the membership of this rule of closure to a legal system is a matter of contingency (as a matter of fact, the membership of such a rule is quite unusual).

We can try to express the tenet of open-texture-originated defeasibility more formally, by means of classical propositional logic and the standard system of deontic monadic operators. For any rule-formulation R , we may assume that a certain conventional (not necessarily literal) meaning x is accepted by a community C . Let’s suppose that the conventional meaning of a rule-formulation R_1 can be rationally reconstructed as follows:

$$[1] p \rightarrow Oq$$

The thesis in question is that all rules which are the products of a first interpretation can always be reinterpreted in at least two alternative ways, depending on whether we accept an extensive interpretation or a conservative interpretation of the rule-formulation at hand, in relation with a supplementary and previously unconsidered property s (a “marginal” property whatsoever):

$$[1'] p \ \& \ s \rightarrow Oq$$

$$[1''] p \ \& \ s \rightarrow \sim Oq$$

In the first case, reinterpretation amounts to deciding that the property s is *all-things-considered* irrelevant. That is to say, the interpreter decides that the property at hand does not change the legal consequence attached to the antecedent of the rule: something that the legislator had not considered. From a logical point of view, it amounts to applying the law of the strengthening of the antecedent to [1] and so deriving logically [1’].

In the second case, on the contrary, reinterpretation brings about the relevance of s , in the sense that its presence (or absence) changes the normative qualification of the normative content q . It amounts to rejecting the strengthening of the antecedent to [1] and so “creating” [1’].

An example can clarify this line of argument. Art. 70 of the Spanish Civil Code provides that «The spouses shall choose in common agreement the conjugal domicile and, in case of a discrepancy, the judge shall decide, taking into account the interest of the family». Let us imagine a married couple, which does not agree on the place where to go on a two-month holiday. The husband sues the wife,

¹⁵ See Navarro and Rodríguez (2000), and Schauer (1991: 195, footnote 38).

asking the judge to decide on the issue. Of course, in 1889, when the Spanish Civil Code was written, holidays were not usual and we can conjecture that the legislators did not have in mind this circumstance when they laid down art. 70. The judicial decision depends on whether the fact that the discrepancy is about a holiday-home is relevant. Is the choice of a two-month rented holiday-home an operative fact regarding art. 70? It depends on whether the judge interprets it reductively or extensively.

Let's use 'd' to symbolize the discrepancy between the members of the couple as to establish their domicile. The letter 'v' stays for the circumstance that the couple does not agree on where to spend the holiday period. The consequent 'Oj' stays for the obligation of the judge to take a decision on the issue.

Rationally reconstructed, art. 70 expresses the rule:

[2] $d \rightarrow Oj$

Which of the two following rules does express when property v is taken into consideration?

[2'] $d \ \& \ v \rightarrow Oj$

[2''] $d \ \& \ v \rightarrow \sim Oj$

In [2'], the marginal property v is regarded as irrelevant, whereas in [2''] is considered relevant. In the first case, the rule applies despite new circumstances coming in. In the second case, the presence of v changes the legal consequence of the norm. In this second case, the fact that the domicile to be chosen is a holiday-home can be regarded as a reason not to apply [2]: the judge does not have any obligation to find on the matter, and so can reject the plaintiff's claim.

It could be objected at this point that what Marmor's theory of meaning maintains is that there are some standard instances of application of a rule, not that all instances are clear. But this would not be a conclusive objection. Open texture always requires reinterpretation. It calls for reformulating any rule into another rule, by discarding or accepting the relevance of a "marginal" property whatsoever, and consequently deciding on the logical consequences of the original rule. Since this occurs as to generic cases, we can never know the exact scope of a rule, which can always be submitted to a re-interpretive decision. This is completely overlooked by those theories of interpretation that regards open texture as an insignificant or secondary phenomenon. As is known, Hart's theory is far from considering open texture as a secondary phenomenon¹⁶. Furthermore, Hart's the-

¹⁶ According to Atria (2002: 91) «Open texture [...] is not an external limit that language imposes on the levels of certainty human beings can achieve, but the consequence of a normative decision, i.e. a decision about best to balance the requirements of certainty with

ory (1961: 135-137) accepts that norms suffer from implicit exceptions that cannot be exhaustively listed: rules are “open” and call for a fresh judgment whenever cases fall into the penumbral zone of their application. In Hart (1961: 123) rules are thus considered “empirically” defeasible¹⁷: new combinations of properties can bring about cases to which it is dubious whether the rule does apply or not¹⁸. For example, the ‘No vehicle in the park’ rule clearly forbids buses. What about brand-new, modern, clean-gas-propelled, ultra-silent buses, whose existence could not be foreseen when the regulation was laid down? It would be really unconvincing to affirm: these new buses are vehicles and so they cannot be admitted into the park, period. The property ‘clean-gas-propelled and ultra-silent’ was, *ex hypothesi*, undetermined as an exception at the time of the enactment of the norm (Alchourrón 1996b: 342). It is not a straightforward solution to say that since buses at large fall into the category of vehicles they cannot enter the park. At the time of the bringing in of the rule, ‘being a vehicle’ could not consist in ‘being clean-gas-propelled and ultra-silent’, so that the meaning of ‘vehicle’ could not include buses with such characteristics. It follows that including these new vehicles into the larger category of vehicles, as thought of at the moment of the passing of the bill, is the result of a choice and not a simple understanding of the rule.

This empirical defeasibility calls for an evaluative judgment (Hart 1961: 125-128), beyond semantic observations. Again, we are faced with the inclusion or the exclusion of a finer case into a more generic case.

Marmor (2005: 116) is well aware of this problem, when affirms: «rules, formulated in a natural language, such as legal rules, are bound to employ general concept-words with various degrees of vagueness. [...] our understanding of the rule will always be deficient, as there will always be instances where one cannot tell whether or not the rule applies. Hence, if we want to allow for a complete understanding of rules [...] we must also admit that every rule is bound to be interpreted».

In order to reply to this argument, Marmor (2005: 117) writes: «just as it is misguided to presume that unless one can specify necessary and sufficient conditions for the applicability of a concept-word, one’s grasp of its sense is in some way incomplete, it is equally misguided to assume that the complete understanding of a rule must remove all possible doubts about its applicability», so that «one has a complete grasp of a rule, *if under normal circumstances*, one is able to spec-

those of appropriateness». On the possible different interpretations of the notion of ‘open texture’ in Hart (1961), see Bayón (2000: 97-101).

¹⁷ On the concept of defeasibility and the connections between open texture and defeasibility in Hart’s works, see Loui (1995: 29) and (1997: 346, footnote 2).

¹⁸ Hart (1961: 123) affirms that cases where it is not clear whether a rule applies are «*fact-situations*, continually thrown up by nature or human invention, which possess only some of the features of the plain cases but others which they lack» (emphasis added).

ify which acts are in accord with the rule, and hence, which would go against it» (emphasis added). But this is exactly what open-texture-generated-defeasibility is all about. The “prima facie understanding” of the rule, *plus* the judgment regarding the fact we are in normal circumstances, allows applying the rule straightforwardly, since the revised antecedent of the rule constitutes the set of the conditions which are regarded as sufficient to its application. And here we have implicitly accepted a revised kind of modus ponens and strengthening of the antecedent, which apply to defeasible conditionals (Alchourrón 1996a: 14):

(Special Defeasible Deontic Modus Ponens) $(a > Ob) \supset (f\bar{a} \supset Ob)$

(Special Defeasible Strengthening of the Antecedent)
 $(a > Ob) \supset (f\bar{a} \& n \rightarrow Ob)$ ¹⁹

These formulae show the condition for deriving the consequent from a defeasible normative conditional, i.e. when we have the antecedent jointly with all the other implied assumptions (Marmor’s “normal circumstances”). And this explains that, unless we pass from ‘a’ to ‘fā’ (i.e. to the function of revision of ‘a’ in normal circumstances) we cannot have indefeasible conditionals: but since the revision operator *f* is a variable of evaluative decisions (what is “normal” and what is not) it follows – contrary to Marmor’s view – that the scope of every (indefeasible) rule is the outcome of “interpretation”.

5. Defeasibility and Logical Consequences

It is not uncommon, among legal theorists, to hold that legal rules have logical consequences. In other words, their semantic content can be logically made explicit by means of (deductive) inferences. The question to be discussed here is whether all logical consequences follow from a rule, or only some of them. Contrary to the view Marmor seems to hold in Chapter 7, which was analyzed in the previous paragraphs, there are materials in Chapter 8 that make it possible to conjecture that Marmor (2005: 127) does subscribe to the first view:

When we ask ourselves what it is the legislator sought to achieve by enacting the law, we will always find that certain purposes are manifest in the language of the law itself, as a matter of logic, while others, though they exist, are not. Consider [...] the ‘No vehicles in the park’ rule. Surely it must have been one of the intentions of the legislator

¹⁹ This formula can be probably reformulated more properly as $(a > Ob) \supset (f\bar{a} \rightarrow Ob)$, provided that ‘n’ can be included in the revision function ‘f’: what implies that revised modus ponens and revised strengthening of the antecedent correspond (this is hardly surprising, since the former entails the latter).

that *if anything is a vehicle it should not enter the park*. The legislator cannot deny such an intention without breaching the rules of language or logic, or what speech-act theorists call the condition of sincerity. Admittedly, this is a rather trivial point, but trivialities sometimes tend to be forgotten, or muddled (emphasis added).

This point seems to me anything but trivial. In its apparent simplicity, it looks like the key-vault of the problem of logical consequences and defeasibility in law.

Marmor's words seem to imply that, *as a matter of logic*, legislators must subscribe to the law of the strengthening of the antecedent. This tenet, in conjunction with the tenet that rule-formulations, in most cases, can simply be understood in their literal meaning and not interpreted, entails that the circumstances (or properties) which are referred to in the antecedents of legal rule-formulations are to be regarded as sufficient conditions for the application of the normative consequent.

In order to capture these tenets more thoroughly, it may be useful to provide a (possible) logical formalization of the 'No vehicle in the park' rule:

$$[3] p \rightarrow O\sim q$$

which can be read 'Being a vehicle is a sufficient condition for the obligation of not entering into the park' or – which is the same – 'If anything is a vehicle, then it has a duty not to enter into the park'. From this formalization it follows that any other property, which is added to the antecedent of the rule, does not change its outcome.

In other words, from [3] it follows that²⁰:

$$[3'] p \& r \& \dots n \rightarrow O\sim q$$

As has been seen, from the perspective of lawyers and legal scholars, this view is a very problematic one (Prakken 1997: 46-47), since the unrestricted application of the strengthening of the antecedent is liable to bring about undesirable results, from both a systematic perspective and an axiological one.

A set formed, say, by [3] and

$$[4] r \rightarrow \sim O\sim q$$

is of course inconsistent, if the set is logically developed by means of the strengthening of the antecedent, as it is proved by the following formulae:

$$[5] p \& r \rightarrow O\sim q$$

$$[6] p \& r \rightarrow \sim O\sim q$$

²⁰ Alchourrón (1996a), (1996b).

If we want to safeguard the monotonic nature of our reasoning with this set of rules, and we are not allowed to re-interpret a clear literal meaning, we can only rule out the resulting inconsistency by ordering the rules of the set. In many cases, the law itself provides some ordering (meta-)rules (such as *lex superior*, *lex posterior*, and *lex specialis*). But when it does not happen, jurists have to make up their ordering rules, consequently changing the conceptual content of a set of rules, despite the literal meaning of its rule-formulations. This shows, in a first approximation to the problem, that we may have hard cases also when the literal meaning of a legal provision is, by definition, clear and effortlessly understood. Marmor could object that what we have here is the intersection of two easy cases, but it would be a very puzzling way of speaking about the situation at hand.

Axiological “anomalies” are more difficult to formalize²¹. They come into being when a certain property, regarded as irrelevant, should have been or should be regarded, from a certain evaluative perspective, as relevant, so that its presence in the case prevents us from applying the strengthening of the antecedent to the original rule.

Being [3] the ‘No vehicle in the park’ rule, we can imagine that the relevance of property *s* (being a vehicle equipped with a life-saving apparatus) can be argued for, say, by reference to a generic principle of life safeguard, and can render an unrestricted monotonic inference revisable.

Put in other words, we can conjecture that, from a principle of life safeguard, we can (indirectly) obtain:

$$[7] s \rightarrow \sim O \sim q$$

Once more we are faced with the inconsistency of the set of rules at hand, since [3] implies:

$$[8] p \ \& \ s \rightarrow O \sim q$$

That is obviously inconsistent with:

$$[9] p \ \& \ s \rightarrow \sim O \sim q$$

which, in turn, is entailed by [7].

However, both situations of inconsistency, though very similar in the outcome, have different sources. The first one is a common antinomy, brought about by the presence of two contradictory rules in a normative set. The second one is a conflict between a set of rules and a set of values that supposedly underlies or justifies the set of rules. This set of values can be of different nature: e.g. the Consti-

²¹ Peczenik (1997).

tution, thought of as a set of values which underlie (or must underlie) legislation; the set of reasons which can be extracted from legislative rules and considered as their “best” justification; the set of principles or objectives the legislature wants to enhance.

As to the latter case, Marmor (2005: 127) holds:

Apart from the aims which are manifest in the language of the law itself, the legislators are likely to have had a variety of, what I shall call *further intentions*, in enacting the law. Thus, to revert to our example, the legislator might have enacted the law in order to enhance the safety of people who used the park; to reduce the level of pollution in the vicinity; to protect the safety of squirrels in the park; and, let us also presume, to enhance his chances of winning the forthcoming local elections.

Now, it is evident that, if we consider all these intentions, or reasons, as relevant, the logical development of our set of rules can vary accordingly. If the main aim of the legislator was to enhance the safety of people, the property of being a vehicle equipped with a life-saving apparatus (*s*) can, or should, be regarded as relevant, whereas the property of being a non-fuel-propelled vehicle (*g*) might not. If the aim was to reduce the level of pollution in the vicinity, then *g* might be considered as relevant, whereas being a taxi (*t*) might be irrelevant. This implies changes either in the election of our premises or in our inferential patterns.

All this occurs if we accept a model, which is “transparent” to the underlying reasons of legislation. Only the default acceptance of an “opaque” or entrenched model of norms can rule out the problems of logical development entailed by the consideration of the set of the underlying reasons of a set of rules.

As a matter of fact, jurists use both the “opaque” or entrenched model, as well as the “transparent” model, so that it is descriptively wrong and conceptually dubious to reconstruct easy cases like those cases which are solved by a clearly understandable and monotonically developed rule-formulation, since jurists often regard as easy those cases in which no discrepancy between rules and their underlying reasons is perceived.

However, Marmor (2005: 98) strongly objects to the view that Hart’s (and his) theory maintains that the application of rules to given facts is a matter of logical inference. He also affirms that those who maintain that subsuming individual cases into generic cases is a logical inference provide an «utterly confused picture» of legal reasoning. These remarks deserve a more detailed analysis.

Marmor repeatedly defends the view that interpretation is an evaluative enterprise that only occurs when a rule-formulation does not have a clear meaning. Moreover, he holds, following Wittgenstein, that in order to understand the meaning of a word we have to be able to identify some standard instances of the word itself. Marmor also affirms that Hart’s distinction between core and penumbra pertains to the classification of particulars, about which logic is silent. When particulars fall into the core, we have clear instances of application of a concept-word, whereas when the subsumption of a particular case is dubious (or penumbral)

we have to perform a decision. To put it in Marmor's terms, facts that clearly fall into the core of meaning of a word appearing in a rule-formulation, plus the penumbral facts we stipulate to fall into the scope of the rule, determine the rule-world relation.

However, once this relation is determined, what's left is deductive reasoning or rule-rule relation. Again, there is evidence that Hart does (and cannot but) subscribe to this view²². In fact, Hart (1983: 64) clearly affirms that *in penumbral cases* «men cannot live by deduction alone», implying (*a contrario*) that they can in easy (or clear) cases. Philosophers of law directly inspired by Hart, such as Bulygin and Carrió, indeed hold that in clear cases judicial application is (or can be reconstructed as) a logical deduction. But this is not necessarily a formalist view.

Contrary to what Marmor seems to think, the problem of formalism seems to reside not in the deductive nature of the judicial inference (or, *rectius*, of its rational reconstruction), but in the “frozen” nature of its premises. Marmor's theory pivots on the application of law, since assumes that (almost all) legal sentences *must be* provided with an objective and unquestionable meaning that can be easily acknowledged. But this is exactly what formalism is made of: law is a set of clear rules, whose meaning is evident and does not require construction; once one has understood their meaning, they can be applied straightforwardly to particular cases. As by now it should be clear, however, this is in no way entailed by methodological or conceptual legal positivism.

6. Concluding Remarks

In Anglo-American jurisprudence, it is usual to connect two topics that seem to be unrelated: the distinction between clear and hard cases and the separation of law as it is and law as it ought to be (i.e. law and morals). The former pertains to the analysis of judicial reasoning, whereas the latter belongs to a theory of the *wertfrei* nature of the science of law.

However, according to Marmor (2005: 95), «legal positivism cannot accept the view that law is always subject to interpretation. It just cannot be the case that every conclusion about what *the law is*, is a result of some interpretation or other».

In the light of the preceding sections, this seems to be questionable. I have tried to show that there are good reasons to accept that: 1) legal norms can be considered defeasible in the light of their supposed underlying values, and so involve interpretation, 2) legal formulations are conceptually defeasible because of open texture, and so involve interpretation and 3) only an opaque, formal, and straitjacket model of legal interpretation – whose legal force is contingent – can be used to object to these theses. However, we have also seen that Marmor him-

²² See Atria (2002: 172-173, especially footnote 8).

self wants to deny conceptually this model, even though it is not completely clear whether he suggests it normatively.

Legal positivism, conceived of as a neutral approach to law, does not require at all that, in most cases, rule-formulations can be simply understood and easily applied. Legal positivism, conceived of as a *wertfrei* scientific enterprise, only needs that the sources of law can be identified without resorting to evaluative considerations (see Leiter 2001). That all rule-formulations are open to a series of possible interpretations is something that some of the founding fathers of legal positivism did accept (see, e.g., Kelsen 1992: 80), without endangering their positivistic partisanship. According to this kind of positivism, the main task of scientific knowledge of law is precisely that of listing all the possible meanings of its sources.

At the end of his analysis, Marmor reaches the conclusion that the view according to which «the application of a rule always requires its translation into another rule [...] is an obvious absurdity» (Marmor 2005: 118). Far from this, it is (*hic et nunc*) an incontestable, although perhaps inconvenient, truth that legal positivism has no reason to deny. The fact that interpretation of rule-formulations always needs some evaluative operations does not entail that positivism is untenable. The separation between law and morals is not a thesis about interpretation: it is a thesis about the identification of the sources of positive law²³. It does not deal with the normative content of these sources, which depends on interpretation and not on the very concept of law. Legal positivism is concerned with a neutral approach to the legal phenomena and it is in no way impossible – as Kelsen suggests – that one can approach the law by identifying the sources of law and a framework of their possible interpretations (i.e.: meanings). Marmor's thesis, which connects the separation of law and morals with the easy/hard cases dichotomy, seems to mix up conceptual positivism and a version of formalism; indeed, the former only requires accepting the first thesis, whereas the latter requires accepting both.

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²³ As Chiassoni (2007) points out, this tenet can also (and perhaps more properly) be conceived of as a thesis about the knowledge of law.

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