9

Defeasibility, Axiological Gaps, and Interpretation

*Riccardo Guastini**

A. Introduction

My aim in this paper is to connect systematically a couple of ideas encountered in Carlos Alchourrón's and Eugenio Bulygin's legal theory—*viz.* the idea of axiological gap and the idea of defeasibility—with a sceptical or realistic theory of legal interpretation.[1]

(1) *Axiological gap*. An axiological gap occurs whenever a certain case is regulated by a legal rule but—in the interpreter's opinion—such a regulation is unsatisfactory from an axiological point of view, since the legislature did not take into account a distinction that it should have considered. The interpreter assumes that the legislators decided the way they did because they did not take into account the distinction at hand: should they have considered such a distinction, their decision as to the regulation of the case would have been different.[2]

In other words, an axiological gap is not a case with no legal solution at all, but a case provided with a 'bad' solution.[3] It is clear that this kind of gap does not amount to the absence of any rule whatsoever, since the case is in fact regulated: the rule which is assumed to be missing is a 'satisfactory' or 'just' rule, namely a 'distinguishing' rule, i.e. a rule providing a different ruling in the case which, in the interpreter's view, is substantively different and therefore requires a different verdict.[4]

(2) *Defeasibility of rules*. Any legal rule can be reconstructed as a conditional sentence to the effect that 'if a, then b', the antecedent standing for a class of cases while the consequent stands for a class of legal consequences (such as obligations, permissions, prohibitions, sanctions, validity or invalidity of some kind of act, etc.).[5]

* Professor of Jurisprudence, University of Genoa.

[1] The basic tenets of such a theory can be met in G. Tarello, *L'interpretazione della Legge* (Milan: Giuffrè, 1980); R. Guastini, *L'interpretazione dei Documenti Normativi* (Milan: Giuffrè, 2004); P. Chiassoni, *Tecnica dell'interpretazione giuridica* (Bologna: Il Mulino, 2007); M. Troper, *La théorie du droit, le droit, l'État* (Paris: Presses Universitaires de France, 2001). Cf. also E. Diciotti, *Interpretazione della legge e discorso razionale* (Turin: Giappichelli, 1999).

[2] C.E. Alchourrón and E. Bulygin, *Normative Systems* (Vienna: Springer, 1971), 106ff.

[3] P. Navarro and J. Rodríguez, 'Derrotabilidad y sistematización de normas jurídicas', *Isonomía*, 13 (2000), 61–85.

[4] In this context I am not concerned with the different concept of axiological gap worked out by Rodríguez in J. Rodríguez, *Lógica de los sistemas jurídicos* (Madrid: Centro de Estudios Constitucionales, 2002), 76ff.

[5] This concept of rule is wider than the one assumed by Alchourrón and Bulygin in *Normative Systems*, since it includes sentences which express 'rules' (only) in the sense that they belong to a normative system, although embodying no deontic formula in their consequent.

Many of the normative formulations (maybe every rule formulation) that can be encountered in a legal system are defeasible, i.e. they are subject to implicit exceptions: there are fact situations which defeat the rule although they are in no way expressly stated by normative authorities,[6] in such a way that the legal obligation (or, generally speaking, the legal consequence) settled by the rule does not hold any more.[7]

Defeasibility entails two important consequences: first, the logical rule of the strengthening of the antecedent does not hold for defeasible conditionals; second, reasoning by *modus ponens* cannot be applied to defeasible conditionals.[8] The legal rule 'if p, then Oq' does not necessarily entail 'if p and r, then Oq'. The conjunction of the legal rule 'if p, then Oq' and the statement 'p' does not necessarily entail 'Oq'.

In other words, a defeasible rule is subject to implicit exceptions that nobody can spell out exhaustively in advance, and as a consequence nobody can list in advance the circumstances that are genuine sufficient conditions for the application of the rule.[9] With a view to showing the connection between axiological gaps, defeasibility, and interpretation, I shall introduce a number of fictitious (although not entirely fictitious) examples.

B. Some examples

(1) First example. In a republic ruled by a rigid constitution, a parliamentary form of government, and the judicial review of legislation carried out *a posteriori* by a special Constitutional Court, a constitutional provision grants to the President of the Republic the power of veto over parliamentary acts (i.e. statutes).

Which parliamentary acts are concerned by such a provision? The literal interpretation suggests all of them, both 'ordinary' and 'constitutional' statutes (i.e. statutes providing constitutional amendments), since the text does not distinguish in any way between statutes of different kinds.

Now, let us imagine a jurist arguing, more or less, in the following way.

(a) In the existing constitutional system, where the constitution is (rigid but) subject to revision, two classes of statutes are to be sharply distinguished: 'ordinary' and 'constitutional' statutes. (Such a move is an interpretative technique which can be named 'dissociation' or 'distinguishing'.)

(b) In the existing constitutional system (parliamentary government) the President of the Republic is not the 'head' of the Executive: he or she is rather a 'neutral' power—something like Benjamin Constant's *pouvoir neutre*—whose function is just 'guaranteeing' the constitution, i.e. the ordinary political–constitutional process. (Observe that this is not a strictly interpretative thesis, but rather a 'dogmatic' one—a thesis of so-called 'constitutional theory', if one prefers.)

[6] C.E. Alchourrón, 'On Law and Logic', in this volume Ch. 2, 45ff.

[7] See C.E. Alchourrón and E. Bulygin, 'Norma jurídica' in E. Garzón Valdés and F.J. Laporta (eds), *El derecho y la justicia* (Madrid, Enciclopedia Iberoamericana de Filosofía. Volume XI, 1996), 146. The aforementioned concept of defeasibility refers to *implicit* exceptions; it does not refer to exceptions *expressly* stated by other rules of the same normative system. Cf. M.C. Redondo, 'Teorías del derecho e indeterminación normativa', *Doxa*, 20 (1997), 177–96; and J. Rodríguez, *Lógica de los sistemas jurídicos*, 358, 364ff.

[8] C.E. Alchourrón and E. Bulygin, 'Norma jurídica', 145ff.

[9] J. Rodríguez and G. Sucar, 'Las trampas de la derrotabilidad. Niveles de análisis de la indeterminación del derecho' in J.C. Bayón and J. Rodríguez, *Relevancia normativa en la justificación de las decisiones judiciales* (Bogotá: Universidad Externado de Colombia, 2003), 210.

(c) The function of the veto power is to allow the President to exercise *a priori* control over the constitutionality of statutes, quite different from the *a posteriori* control assured by the Constitutional Court. In particular, the President may use his or her veto power (only) against statutes whose unconstitutionality is self-evident. (This is an interpretive–dogmatic thesis about the *ratio legis*, the *raison d'être*, the aim of the constitutional provision at stake.)

(d) However, problems of constitutionality can only arise regarding ordinary statutes: in no case can a 'constitutional' statute be deemed unconstitutional (except for 'formal' reasons, relating to parliamentary procedure), since any constitutional amendment consists precisely in changing the constitutional text. Hence, in a sense, any constitutional amendment 'contradicts' the constitution (is 'unconstitutional'), but it is authorized to do so. (Such a thesis is entailed by the commonly accepted concept of constitutional amendment.)

(e) Therefore, the constitutional provision concerning the veto power ought to be interpreted as referring only to ordinary statutes—constitutional statutes being excluded. (This is a first interpretive conclusion, deriving from the technique of distinguishing combined with certain dogmatic assumptions.)

(f) The constitution says nothing at all about the veto power over constitutional amendments. (This is a second conclusion deriving from a combination of distinguishing and constitutional theory.)

(g) As a consequence, the President has no veto power over statutes providing constitutional amendments. (This is a further interpretive conclusion derived *a contrario* from the 'silence' of the constitutional text: *inclusio unius est exclusio alterius*.)

This line of reasoning brings about a number of important consequences.

(i) First, by means of the technique of distinguishing, our imaginary jurist created an implicit exception in the constitutional provision at hand. He or she treated it as a defeasible rule—in fact, he or she defeated (in a sense, 'derogated') the rule.[10]

(ii) Second, in so doing, he or she proposed a restrictive interpretation of the provision: its application is now restricted to ordinary statutes (while, according to literal interpretation, it would be applicable to every kind of statute, with no exceptions).

(iii) Third, he or she produced a gap: the constitutional provision now regulates only the case of ordinary statutes, and there is no constitutional regulation at all concerning the veto power over constitutional statutes. Observe that for anyone interpreting that provision according to its literal meaning such a gap is not 'normative' in character, but axiological, since the case of constitutional statutes is actually regulated by the constitutional provision, which—in its literal meaning—refers to any kind of statute with no distinction at all.

(iv) Fourth, our imaginary jurist filled the gap that he or she just created by means of an 'implicit' (although not in a strictly logical sense) negative rule—an example of *Juristenrecht*—according to which the President definitely has no veto power over constitutional statutes.

[10] 'Derogating' meaning in this context the same as defeating, i.e. introducing implicit exceptions into a rule.

(2) Second example. In the same constitutional system the executive—*viz*. the government—is empowered to enact (under certain conditions) 'legislative' decrees, i.e. decrees derogating existing statutes. Such decrees, being provided with *la force de la loi*, like ordinary statutes are subject to the *a posteriori* review of the Constitutional Court. However, a constitutional provision states that the acts of the government are subject to *a priori* control by a special Court of Accounts, enabled to supervise *ex ante* the compliance of governmental acts with statutes, and in particular with the budget as passed—in a 'statutory form'—by the parliament.

Which acts are covered by such a provision? According to the literal interpretation, any act of the executive is covered, since the text does not distinguish in any way among different kinds of acts.

Let us imagine, however, a jurist arguing more or less in the following way.

(a) Two kinds of governmental acts are to be distinguished: legislative and non-legislative acts (by-laws, administrative decisions, and so forth).

(b) Legislative acts, as a matter of course, cannot be required to comply with existing statutes (remember that the state budget is passed in a statutory frame by the parliament)—on the contrary, legislative acts as such are permitted to derogate precedent statutes. They are required to comply only with the constitution.

(c) However, in the existing legal system the control over the constitutionality of legislative acts is within the competence of the Constitutional Court.

(d) Therefore, the constitutional provision at hand ought to be interpreted as referring only to non-legislative acts—legislative acts being excluded.

(e) The constitution says nothing about the competence of the Court of Accounts over the legislative decrees enacted by the government.

(f) As a consequence, the Court of Accounts has no competence at all over the legislative acts of the government.

As in the previous case our imaginary jurist has done four important things:

(i) By means of the technique of distinguishing he or she defeated the constitutional provision, by introducing an implicit exception—i.e. an exception which, according to literal interpretation, does not exist at all.

(ii) In this way, he or she proposed a restrictive interpretation of the provision concerned.

(iii) At the same time he or she created a gap: the constitution does not regulate the power of the Court of Accounts over governmental legislative acts. There is no need to say that for anyone interpreting the constitutional provision according to its literal meaning such a gap is not normative—since the text refers to all the acts of the Executive—but is axiological in character.

(iv) Finally our imaginary jurist filled the gap by a negative rule of *Juristenrecht* according to which the Court of Accounts is definitely not competent to control the legislative acts of the government.

(3) Third example. In the same legal system a constitutional provision states that no act of the President of the Republic is valid if it is not countersigned by the minister who proposed the act.

Literal interpretation: any Presidential act whatsoever ought to be countersigned by the minister who proposed the act. This supposes that every Presidential act requires a

minister proposing the act, i.e. a governmental proposal. In other words, there is no act that the President may accomplish except on the basis of a governmental proposal.

Let us imagine, however, a jurist reasoning more or less as follows.

(a) In a parliamentary form of government, the President of the Republic is not the head of the executive—he or she is rather a 'neutral' power whose function is guaranteeing the constitution, i.e. the compliance of the political–constitutional process with the constitution. (This is a dogmatic assumption we have already met.)

(b) Therefore, there must be acts that the President accomplishes in exercising such a function; such acts have no 'partisan'—politically biased—content; hence they do not presuppose or require any governmental proposal.

(c) As a consequence, two kinds of Presidential act should be distinguished: 'substantively' governmental acts (accomplished on the basis of governmental proposals) and 'strictly' presidential acts (without any previous governmental proposal).

(d) The aforementioned constitutional provision does not refer to all Presidential acts—it only refers to substantively governmental acts, while the remaining Presidential acts fall outside its scope.

(e) Therefore, strictly Presidential acts are not regulated by the constitution in any way.

(f) As a consequence, strictly Presidential acts do not require any countersignature.

Once more, our imaginary jurist has done four things.

(i) He or she defeated the constitutional provision at stake by introducing into it an implicit exception which, according to literal interpretation, would not exist.

(ii) In this way, he or she proposed a restrictive interpretation of such a provision.

(iii) The restrictive interpretation enabled him or her to identify a gap: the constitution does not regulate strictly Presidential acts (in connection with the countersignature). From the point of view of anyone preferring a literal interpretation, such a gap is obviously axiological since the constitutional text does not distinguish in any way and refers to Presidential acts without any further specification.

(iv) Finally, our jurist filled this gap by means of a negative rule, created by himself or herself, according to which strictly Presidential acts are not subject to countersignature.

C. Some conclusions

The examples could be easily multiplied—rejecting literal interpretation and defeating rules the way I have tried to show is commonplace in the juristic interpretive game. The examples (although more or less fictitious in character) suggest a number of interesting conclusions.

(1) The examples suggest that the concepts of axiological gap and defeasibility belong not to the theory of normative systems, but to the theory of legal interpretation. Such concepts denote phenomena which arise along the process of interpreting legal texts and depend on juristic (as well as judicial) interpretive strategies. Perhaps it is useful to recall that the logical systematization of the law (in the sense stipulated by Alchourrón

and Bulygin) does not precede, but follows interpretive decisions—no logical inferences are possible from not-yet-interpreted texts; inferences take place from meanings, and meanings presuppose interpretation.

(2) Axiological gaps and defeasibility often look like two faces of the same coin.[11] By defeating a rule one excludes from its scope certain factual situations (which according to a different interpretation would be regulated by that rule). Sometimes, such factual situations appear to be regulated by other rules in the legal system, but in other circumstances this is not the case—they are not regulated by any rule at all. In such a case, there is a gap in the system. Therefore, by defeating a rule, a gap has been produced.[12]

(3) The concept of axiological gap does not belong to juristic (or judicial) language—it belongs to the language of legal philosophy, understood as the logical analysis of juristic (as well as judicial) discourse.

This is to say that the jurist who asserts the existence of a gap—except when speaking in the mood of Bentham's 'censorial jurisprudence'[13]—will never acknowledge that such a gap is an axiological one. On the contrary, he or she will always insist that it is a genuine normative gap, an objective fault in the legal system, independent of any evaluation whatsoever.[14] Nevertheless, if we want to state—at the meta language level, from the 'external' point of view—that the gap at stake is not normative, but axiological, we must presuppose a different interpretation of the same text—different from the one proposed by the jurist who asserted the existence of that gap.

Hence, axiological gaps seem to depend on interpretation in a double sense. On the one hand, they depend on interpretation in the sense that those who assert the existence of an axiological gap presuppose a certain (normally restrictive) interpretation of a given text. On the other hand, they depend on interpretation in the sense that those who state, at a meta language level, that the gap at stake is not normative but axiological in character, presuppose in turn a different (normally literal) interpretation of the same text.

[11] J. Rodríguez, *Lógica de los sistemas jurídicos*, 377ff.

[12] By defeating a rule, an axiological gap is produced. But not all axiological gaps are produced by defeating rules. E.g. in the practice of some constitutional courts, one can find pieces of reasoning like these:

(a) The legislature, while regulating a certain class of cases in a certain way, *did not* regulate in the same way another class of cases which, according to the court, is 'substantively' equal to the regulated one.

(b) The legislature, while regulating a certain class of cases in a certain way, *did not* distinguish, within such a class, two sub-classes which, in the court's view, are 'substantively' different, and therefore require different regulations.

In both cases, we are faced with some sort of axiological gap. In the first case the missing rule is, so to say, an 'equalizing' rule, while in the second case the missing rule is a 'differentiating' one. In both cases the statute at hand is held unconstitutional because of the gap it contains. In the first case, however, no rule has been defeated (and there was no axiological gap in Alchourrón and Bulygin's sense). Cf. G. Parodi, 'Lacune e norme inespresse nella giurisprudenza costituzionale' in P. Comanducci and R. Guastini (eds), *Struttura e dinamica dei sistemi giuridici* (Turin: Giappichelli, 1996), 87ff.; G. Parodi, *La sentenza additiva a dispositivo generico* (Turin: Giappichelli, 1996), 131ff.; J. J. Moreso, *La indeterminación del derecho y la interpretación de la Constitución* (Madrid: Centro de Estudios Constitutionales, 1997), 171ff.

[13] Cf. J. Rodríguez, *Lógica de los sistemas jurídicos*, 82.

[14] I think Rodríguez is right in suggesting that often (maybe normally) the sentences which state the existence of a gap (an axiological one) are interpretive sentences—not sentences aiming at criticizing the existing legal system from an ethical or political standpoint. See J. Rodríguez, 'Lagunas axiológicas y relevancia normativa', *Doxa*, 22 (1999), 349–69.

All of this seems to have a further embarrassing consequence. According to a widespread view, axiological gaps depend on interpreters' evaluations, while normative gaps are 'objective' properties of the law. Things are not that simple, however. If axiological gaps cannot be distinguished from normative gaps independently of interpretation, then one and the same gap (every gap, indeed) can be deemed to be either normative or axiological from different interpretive standpoints.[15] And this means that normative gaps, too, are interpretation-dependent variables: according to interpretation A, a normative gap exists, while according to a different interpretation B, the gap surprisingly disappears, does not exist as a normative gap, and therefore turns into an axiological gap.[16]

(4) The concepts of defeasibility and axiological gaps are (more or less) new in legal-philosophical language, but the phenomena such concepts refer to are the result of a well-known ancient interpretive technique—restrictive interpretation, in which the scope of rules is reduced.

Now, restrictive interpretation is a relational concept: restrictive compared with what? To assert that a certain interpretation is restrictive, one has to presuppose a different interpretation: normally, literal interpretation. However, literal interpretation is still interpretation—less objectionable, perhaps, but not more 'objective' or 'neutral' (value-free) than any other possible interpretation.

Restrictive interpretation, like any other non-literal interpretation, expressly or tacitly supposes the rhetorical argument of *ratio legis*, i.e. the intention—often stated by means of a counterfactual sentence—of the normative authority. More precisely, those who reject literal interpretation assume: first, the existence of a mismatch between what the normative authority said and what it wanted to say (or do); and second, that intention should prevail over the text.[17] The latter assumption is plainly simply a political–juristic ideology. On the other hand, sentences concerning the intention of normative authorities cannot seriously be considered empirical statements: there is no access to the 'mind' of a legislature, especially if it is (as usual) a collegiate organ.[18] And, at any rate, counterfactual sentences have no truth-value.

(5) Restrictive interpretation is the outcome of a particular interpretive technique: the technique of distinguishing (a well-known intellectual procedure of judges in *common law* countries while interpreting precedents).

Such a technique simply consists in distinguishing where the normative authority did not distinguish at all—introducing into a rule 'new' distinctions, i.e. distinctions not made by the normative authority. The interpreter breaks up the class of fact situations mentioned by the text (literally interpreted) and draws two (or more) subclasses aiming at suggesting that such subclasses, being 'substantively' different, deserve different legal consequences.[19] The distinguishing technique is precisely the arguing strategy which allows the creation of axiological gaps and defeating rules.

[15] See M.C. Redondo, 'Reglas genuinas y positivismo jurídico' in P. Comanducci and R. Guastini (eds), *Analisi e diritto 1998* (Turin: Giappichelli, 1999), 256.

[16] 'A provision which may resolve a generic case under a certain interpretation may be a gap on a different understanding' C.E. Alchourrón, 'On Law and Logic', 44. 'An incomplete system (a system with gaps) can be transformed through interpretation . . . into a complete system (a system without gaps)' C.E. Alchourrón and E. Bulygin, *Normative Systems*, 94.

[17] F. Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (Oxford: Clarendon Press, 1991), 74ff.

[18] C.E. Alchourrón, 'On Law and Logic', 45ff.

[19] R. Guastini, *L'interpretazione dei documenti normativi* (Milan: Giuffrè, 2004), 163ff.; E. Diciotti, *Interpretazione della legge e discorso razionale* (Turin: Giappichelli, 1999), 451ff.

(6) Contrary to a widespread view, defeasibility is not peculiar to principles. Principles may possibly be 'intrinsically' defeasible, in such a way that defeasibility is part of the very concept of principle. But one thing is certain: any rule whatsoever can be treated as defeasible. As a matter of fact, jurists do it all the time.

(7) Some legal philosophers suggest that rule defeasibility and axiological gaps depend on the presence of principles within the legal system—rules would be defeated and axiological gaps produced precisely by principles, or, better, interpreters would defeat rules and create axiological gaps in view of applying principles. This is often true. But defeasibility and axiological gaps do not necessarily depend on principles, i.e. there is no logical relationship between them.

Defeasibility and axiological gaps simply depend on interpreters' evaluations, and such evaluations often take the form of juristic 'theories'—'dogmatic' theses framed by jurists in a moment logically previous to interpretation of any particular normative sentence and independently of interpretation.

It should be stressed that dogmatic theses—such as 'In a parliamentary frame of government the President of the Republic is a neutral power, whose function is guaranteeing the constitutional process', 'International custom arises from the consent of states', 'The European legal system and the legal systems of the Member States are mutually autonomous and independent', etc.—are not interpretive sentences: they are not reducible to the standard form of interpretive statements ('sentence S means M'). Sometimes they are but rules—'non-positive' rules, as a matter of course. Sometimes, they are stipulative definitions encompassing value judgements, (hidden) moral or political preferences, and entailing rules. Such definitions orient interpretation and, usually, allow the formulation of 'implicit' apocryphal rules.

Here is one example (a quite clear one). In a very well-known decision—*Marbury* (1803)—the Supreme Court of the USA stated that any written constitution includes (although tacitly) the intrinsic principle according to which 'a legislative act contrary to the constitution is not law'.[20] Such a statement is not an interpretive sentence: there is no rule formulation in the American Constitution which could be construed in such a way. At any rate, the Court itself does not even try and present its thesis as the conclusion of an interpretive reasoning. We are faced with a 'dogmatic' thesis, which directly expresses a rule and allows the Court to draw another 'implicit' rule—the rule which authorizes the Court itself to cast aside (not apply) unconstitutional statutes.

(8) According to Carlos Alchourrón, '[d]efeasibility, more than simple ambiguity, makes the identification of the norms of a legal system very difficult. So it is one of the factors that makes it necessary, in most situations, to introduce evaluative operations and the use of axiological standards in the interpretation of normative texts.'[21]

Such words seem to presuppose: on the one hand, that defeasibility is an objective property of rules, previous to interpretation; on the other hand, that interpretation is—at least in normal circumstances—an operation which does not require evaluations. Evaluations appear to be, in the interpretive process, *not a cause, but an effect* of defeasibility.

This is a somewhat naive conception of both defeasibility and interpretation. Defeasibility does not pre-exist interpretation—on the contrary, it is one of its possible results. And interpreters' evaluations are precisely a cause, not an effect, of rules defeasibility.

[20] *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).
[21] C.E. Alchourrón, 'On Law and Logic', 50.

Just as axiological gaps are not objective properties of the legal system, since they depend on interpreters' evaluations, in the same way defeasibility is not an objective property of rules (or normative sentences). It depends neither on the unavoidable vagueness or open texture of normative authorities' language, nor on the fact that normative authorities are unable to foresee the endless variety of future cases.[22] Open texture, in particular, is an objective and (unremovable) property of any predicate in natural languages, whilst rule defeasibility is the outcome of an interpretive operation.

(9) As a consequence, it makes no sense to ask whether legal rules (either some of them or all of them) are defeasible or not. Rules—or, better, rule formulations, poor devils—are inert, they do nothing: they let themselves be defeated, but do not defeat themselves. Just as beauty is in the eye of the beholder, defeasibility is not in rules, but in the attitudes of interpreters.[23]

(10) The question whether defeasibility is a property of rules or of rule formulations allows a simple answer. A rule formulation is a sentence—not yet interpreted. Defeasibility is a logical property. But before interpretation sentences have no logical property at all—only rules, understood as the meaning contents of normative sentences, can have such properties. Therefore, defeasibility is a property of rules, not of rule formulations.

There is no need to say that defeating a rule—e.g. 'if p, then Oq'—by introducing an exception into it—e.g. 'if p and not r, then not Oq'—amounts to changing the rule, *viz*. substituting the 'original' rule with a different one.

Perhaps the idea that defeasibility is a property of rule formulations arises from the fact that the rules, which are defeated by jurists, are the outcome of the literal interpretation of such formulations—they are 'prima facie rules'.[24] Now, the non-distinction between sentences and their plain (literal) meaning occurs frequently and this is unsurprising, since literal interpretation often amounts to the bare reiteration (without any new wording) of the interpreted text. Nevertheless, literal meaning—even when obvious, and unquestioned—is still a meaning, not a sentence—it depends on interpretation and the key is in the interpretation.

(11) We have to distinguish carefully between (diachronic) defeasibility of rules and the (synchronic, momentary) acts of rule-defeating.

Defeasibility is a dispositional property of any rule whatsoever (understood as the literal meaning of a normative sentence):[25] in other words, any rule is virtually subject to a defeating operation by some interpreter.[26] This amounts to saying that literal

[22] Both (mistaken) ideas can be met in Hart, Carrió, Schauer, and MacCormick. Cf. H.L.A. Hart, *The Concept of Law* (2nd edn, Oxford: Clarendon Press, 1961), ch. VII; H.L.A. Hart, 'The Ascription of Responsibility and Rights', *Proceedings of the Aristotelian Society*, 49 (1948), 171–94; G.R. Carrió, *Notas sobre derecho y lenguaje* (4th edn, Buenos Aires: Abeledo Perrot, 1994), 226; F. Schauer, *Playing by the Rules*, 34ff.; N. MacCormick, 'Defeasibility in law and logic' in Z. Bankowski, I. White, and U. Hahn (eds), *Informatics and the Foundations of Legal Reasoning* (Dordrecht: Kluwer, 1995), 99–117.

[23] Cf. J.C. Bayón, 'Derrotabilidad, indeterminación del derecho, y positivismo jurídico' in J.C. Bayón and J. Rodríguez, *Relevancia normativa en la justificación de las decisiones judiciales* (Bogota: Universidad Externado de Colombia, 2003).

[24] Cf. E. Diciotti, *Interpretazione della legge e discorso razionale*.

[25] C.E. Alchourrón, 'Detachment and Defeasibility in Deontic Logic', *Studia logica*, 57 (1996), 5–18.

[26] Needless to say that sometimes defeating a rule may amount to the infringement of an 'interpretive convention' (J.C. Bayón, 'Derrotabilidad, indeterminación del derecho, y positivismo jurídico'), or—as I prefer to say—may contradict the interpretation 'in force'. See A. Ross, *On Law and Justice* (London: Stevens and Sons, 1958), 108.

interpretation can always be discarded in favour of a restrictive interpretation with defeating effects.

In each given moment, however, any rule can only be either defeated (as the result of an interpretive defeating act) or not defeated.

Whatever the case, however, a defeasible rule, as long as it remains defeasible (i.e. subject to unspecified implicit exceptions), is not useful for deciding cases:[27] it neither allows strengthening of the antecedent nor reasoning in *modus ponens*. Hence it cannot be used as a premise in any normative reasoning. This is why jurists (and judges) do consider rules as defeasible conditionals, but they do not leave them defeasible indefinitely.[28] By defeating a rule, jurists include an exception in it, but the new rule, in its new formulation (with a restricted scope), remains synchronically indefeasible[29]—suitable to function as a premise in a normative reasoning in *modus ponens*, i.e. suitable for application. And—it is understood—diachronically liable to further defeating acts.[30]

(12) The same holds, more or less, for axiological gaps too: in the sense that axiological gaps have but an ephemeral existence.[31] By defeating rules, jurists create axiological gaps. However, they do not do so in view of maintaining (seriously) that the law is—with no remedy—incomplete (or in view of suggesting judges enact *non liquet* decisions). In fact, they immediately fill the gaps they have created by means of new 'apocryphal' rules.

D. A final remark

Is there any relationship between the defeasibility of rules and legal positivism? Prima facie, no relationship at all. Nonetheless, a relationship does seem to exist: it seems that admitting the defeasibility of rules could undermine the main tenet of (methodological) legal positivism.[32]

The argument runs, more or less, like this. Legal positivism claims that the law can be identified independently of any moral evaluation. But, if legal rules are defeasible, their contents cannot be identified without moral evaluations. Therefore, the scientific project of legal positivism is doomed to failure—the identification of law presupposes moral evaluations.

In the first place, such an argument plainly supposes that defeasibility is an objective property of legal rules: a problem 'for interpretation', not an outcome of interpretation. However, as I have been arguing, this is not the case.

In the second place, such an argument is grounded, I submit, on a double confusion.

(i) First confusion. Identifying a certain normative text as a piece of law is something quite different from determining the meaning contents of such a text—what is commanded (permitted, prohibited), to whom, in what circumstances. According to legal positivism, identifying a text as a source of law can be done without any

[27] J. Rodríguez, *Lógica de los sistemas jurídicos*, 361; F. Schauer, *Playing by the Rules*, 116. Hart's idea, often quoted, according to which 'a rule that ends with the words "unless . . . " is still a rule' looks senseless to me. *Tantoque dormitat Homerus*. H.L.A. Hart, *The Concept of Law*, 136.

[28] J. Rodríguez and G. Sucar, 'Las trampas de la derrotabilidad. Niveles de análisis de la indeterminación del derecho', 132.

[29] Alchourrón has made clear that, after the revision of a defeasible conditional, what remains is a strict conditional. C.E. Alchourrón, 'Detachment and Defeasibility in Deontic Logic'.

[30] B. Celano, '"Defeasibility" e bilanciamento. Sulla possibilità di revisioni stabili', *Ragion pratica*, 18 (2002), 223–39.

[31] E. Diciotti, *Interpretazione della legge e discorso razionale*, 454ff.

[32] J.C. Bayón and J. Rodríguez, *Relevancia normativa en la justificación de las decisiones judiciales*.

evaluation. But legal positivism, as such, has nothing to say about the ascription of meaning to such a text. Methodological legal positivism as such is not a—and does not include any—theory of interpretation.

The positivist thesis is quite simple after all: any command of the sovereign is law. And that means that the sovereign's commands need not be just to be law—unjust statutes and constitutions are still law. Legal positivism does not claim more than that.

Besides, in view of determining the normative contents of legal texts, interpretation is necessary. And interpretation usually supposes evaluations. Is there anybody nowadays who seriously maintains interpretation to be a *wertfrei*, value-free, activity?

(ii) Second confusion. The scientific knowledge of the law in force is quite different from interpreting legal texts.

Interpreting legal texts is not simply using received knowledge of the law, but contributing to establish it. If by 'law' we mean not a set of sentences, but a set of meanings, there is no law without interpretation: the law comes from a combination of legislation (in the 'material' sense: production of rules formulations) and interpretation. Hence interpreting is not identifying the law. Rather, it is *a part of the law itself*: an aspect of the object that scientific jurisprudence aims at identifying.

In other words, interpretation is not 'the science of law', but a part of its object. Legal knowledge is a second-order discourse (a meta language) bearing upon interpretive discourse.