Legal Reasons. Between Universalism and Particularism

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Introduction

The conception of legal norms as a kind of reasons for action has become a common background in many contemporary legal theories. Within this framework, the philosophical discussion about the nature of reasons turns out to be directly relevant to the understanding of law. In this regard, in the first part of my paper, I will analyse two incompatible philosophical models of reasons for action: universalism and particularism. I will show how each model conceives the notion of reason and to what extent their conceptual proposals affect our notions of norm and norm-based reasoning.

First of all, I will distinguish three senses in which universality can be related to norms and reasons and, on the basis of such a distinction, I will criticise those theories that fail to recognise which kind of universality is in question in this debate. Specifically, I will criticise those conceptions that reduce this controversy to a logical discussion about the defeasible or non-defeasible character of norms and normative reasoning. I claim that this reduction is misleading particularly because the defeasible character of norms becomes ambiguous when such norms are analysed as constituting reasons for action. Norms and reasons can be defeated in different senses. These different kinds of defeasibility have been scarcely analysed in either moral or legal theory. However, much in the debate between universalism and particularism depends on them.

In the second part of my paper, some relevant conclusions for legal theory will be drawn from this debate. I will remark that, even if not explicitly, the discussion about the universalist or particularist character of legal reasons has been undertaken by legal philosophers concerned about the difference between two kinds of norms: rules and principles. In this respect, I will try to show that many legal theories which explicitly endorse universalism implicitly reject some of its necessary presuppositions and commitments. In doing so, they are actually offering a non universalist account of legal reasons.

First Part

Universalism vs. Particularism

A reason for (or against) an action *x* is the content of a relevant consideration for (or against) *x*. That something (a property or a state of affairs) is relevant to determine what ought to be done means that its consideration is pertinent to our practical reasoning or, in other words, that it has the capacity to make a positive or negative contribution to a practical verdict. This dimension of relevance is unanimously accepted as the central element of the concept of reason. To be a reason is to be relevant to a practical result. In this sense, if something is a reason it has some weight or value and should be taken into account at the time of making a decision.

According to universalism, the relevance of reasons is not necessarily absolute, but it is both uniform and invariable. Reasons mirror norms, and norms are regarded as strict conditionals that correlate certain circumstances or properties with a deontic consequence. In this approach norms establish what ought to be done under certain conditions (the presence of certain circumstances or properties). In doing this, if valid, norms indirectly establish that these conditions are uniformly and invariably relevant to the practical consequence, i.e. they indirectly constitute uniform and invariable reasons. In the universalist approach, we can say that the source of a reason is a universal norm because something is uniformly and invariably relevant only in virtue of a universal norm. In short, within this framework, reasons are norm-based and norms are universally quantified conditionals. With respect to this issue, two important remarks are in order. First, the logical form of universal norms implies nothing about their metaethical status, and second, it is also silent on the question of their *specific* stringency or force[1]. Concerning their metaethical status, a universalist conception of norms is compatible with realism, anti-realism, cognitivism, non-cognitivism, etc. As far as the weight of a norm is concerned, universal norms may have different strengths or they may be totally irrelevant, i. e. deprived of any force. For instance, unjustified norms lack relevance and they do not constitute any reason at all. Norms with insuperable force are said to constitute absolute reasons that override all other possible reasons. Finally, norms with relative or limited force constitute only *pro tanto* reasons that can be overruled (defeated) by other competing considerations[2].

It should be emphasised that even if most of the discussion about rules and rule-following behaviour is focused on the notion of absolute rules or norms, universal norms are not necessarily of this kind[3]. In other words, the universal relevance of a norm – which means that it constitutes a uniformly and invariably relevant reason – should not be confused with absolute force – which means that it is a standard with the highest justificatory power. In addition, when the interest is focused on the contrast between a universalist and a particularist conception of reasons the most appealing position, or the best situated rival of particularism, is that which conceives rules as universal conditionals constituting only *pro tanto* reasons. A justified (or relevant) norm with limited force (or weight) is still a universal norm if, and only if, every instantiation of its antecedent allows us to detach its consequent[4]. The crucial point here is that the consequent is a non-absolute duty. A non-absolute or *pro tanto* duty may be overridden by other, stronger considerations, but its existence cannot be ignored, since any time that the antecedent conditions of the norm obtain the *pro tanto* duty obtains as well. It always contributes to the conclusive result.

[1] See Russ Shafer-Landau, 'Moral Rules', *Ethics* 107 (1997), pp.584–585.

[2] This position is generally attributed to David Ross, *The Right and the Good*. I am avoiding, on purpose, any reference to the notion of *prima facie* norms, and I do so precisely because of its ambiguity. The *prima facie* character of a norm sometimes is taken to imply its defeasible conditional structure. In this sense, a *prima facie* norm does not admit the strengthening of the antecedent and cannot be the source of a uniformly and invariably relevant reason. In contrast, when the *prima facie* character of a norm refers to its limited or non-absolute force – without implying a defeasible conditional structure –, a *prima facie* norm is the source of a uniform and invariable *pro tanto* reason.

[3] This particularity is highly important. It means that even if the concept of rule is conceived as necessarily linked to a decision-making procedure, this procedure is not fixed before establishing whether the norm constitutes either a *pro tanto* or an absolute reason. In other words, according to this distinction, expressions like "to follow a rule" or "to apply a rule" are ambiguous. There is not only one way in which an action can be an instance of rule-following or rule-application behaviour. Unfortunately, scholars discuss rule-following behaviour as if rules could only be absolute.

[4] Notice that the relation between the antecedent and the consequent is not merely presumptive. Regarding this point, the analysis here presented does not follow Shafer-Landau's proposal.

Taking into account that absolute force is neither a defining feature of universal norms nor a necessary element of the universalist conception of reasons, in this paper I will not discuss the absolutist version of universalism.

At any rate, in a universalist conception, reasons and norms are two faces of the same coin. In virtue of this special relationship the term "reason" is ambiguous. Sometimes "reason" means the universal connection established by a certain norm. Sometimes it designates those features that make a norm applicable to a specific situation. Finally, it may also refer to individual situations, i.e. instantiations of the antecedent of such a norm. In other words, reasons can be regarded as norms, properties, or individual normative facts, i.e. facts that can be seen only when a norm is presupposed and applied. Even if it is really difficult to avoid this ambiguity, in this essay I will try to keep the distinction between reasons and norms. In a universalist view, reasons are the facts or properties that become relevant in virtue of a justified norm. In this sense, I have said that, if justified, norms constitute reasons or are the source of reasons.

Universal predicates, universal quantifiers and universal relevance

At least three different senses of “universality” as an attribute of norms must be clearly distinguished. First, “universality” may mean *semantic generality*. In this respect, a universal norm does not refer to a particular case, but to a class of circumstances. Under this presupposition, the semantic generality of a norm is a gradual property. A norm N1 is more general than a norm N2 when the class of cases regulated by N1 is larger than the class of cases governed by N2[5].

There is a second (and more specific) sense in which universality may be regarded as a crucial character of norms. A norm can be universal in a *logical* sense. This occurs when the logical form attributed to a norm is a universally quantified conditional (or a strict implication) as opposed to a defeasible conditional[6]. According to this second sense, a norm establishes a correlation to which it is possible to apply the rules of strengthening the antecedent and factual detachment (or deontic Modus Ponens). To put it briefly, any time the antecedent conditions are satisfied we can obtain the consequence.

These two senses of universality are part of the concept of norm in a universalist outlook. Norms are strict conditionals connecting a deontic consequence to a generic case identified through universal predicates.

A third sense of universality refers to the *relevance* of norms in our practical (moral or legal) deliberations. To say that a norm is relevant means that it constitutes a reason for action and makes a contribution to a practical result. A logically universal norm is also universally relevant when it is substantially valid or justified. Validity is not necessarily part of the universalist *concept* of norm but it is a *sine qua non* condition for its capacity to constitute reasons for action. A set of properties can be uniformly and invariably relevant only in virtue

[5] Regarding this semantic sense of universality see Carlos E. Alchourrón and Eugenio Bulygin, *Normative Systems* (Vienna/New York: Springer Verlag, 1971), p. 78.
[6] Regarding this contrast, see Carlos E. Alchourrón, ‘Detachment and Defeasibility in Deontic Logic’, *Studia Logica* 57 (1996), pp. 5-18.

of a universally relevant norm, and this happens only when the norm is valid or justified[7]. The circumstances or properties mentioned in the antecedent of a universally relevant norm *always* have the capacity to advocate for, or against, a practical outcome[8].

Consequently, the universalist conception of reasons implies a double commitment. First of all, it assumes a universalist concept of norm. Secondly, it claims that there are some valid or substantially justified norms. Succinctly, this position asserts that there are some universally relevant norms which constitute uniformly and invariably relevant reasons for action[9].

As we can see, the core of this proposal regarding reasons is related to the universal relevance of norms, but it is important to note that it also requires the logical universality of such norms. This is so because reasons in this conception presuppose nomological relations and logical universality is a necessary feature of the conditionals expressing such relations. In what follows, each time I refer to "universal reasons" without specifications I mean relevant properties that have their source in universally justified norms[10].

Particularism challenges the universalist conception of reasons. No property is uniformly and invariably relevant. One and the same feature may constitute a reason either for or against a certain action, or it may be absolutely irrelevant, depending on the actual setting in which an action must be performed. The context of the action makes the practical difference and explains the changing valency that one and the same property can have in practical reasoning[11].

It must be pointed out that particularists are not sceptical regarding reasons; rather, they are sceptical about the existence of universal correlations between natural properties and deontic (or evaluative) consequences. There is no hope (or interest) in searching for universal law-like normative relations. Even if we can identify reasons for or against an action in a given context, particularists maintain that this identification does not result from a norm-based process. They defend a contextual-holistic conception of reasons and, from this standpoint, no property has invariant relevance and any property may become relevant depending on the actual traits of individual cases.

Particularism has no reason to discard universality understood as a semantic quality of practical statements or predicates. Moreover, it is worth noticing that particularists need not reject either logical universalizations or deductive arguments in practical contexts. As a matter of fact they could express their claim in at least two alternative ways.

[7] Needless to say that the concept of norm is not always analysed as constituting a reason for action. For instance, according to an externalist conception, a duty – even if established by a valid norm – does not imply the existence of a reason. Only this third sense of "universality" is related to the classical universalizability thesis discussed in moral philosophy. Cf. Georg Meggle, 'The Universalizability Problem in Moral Philosophy', in Rosaria Egidi, Massimo Dell'Utri and Mario De Caro (eds.), *Normatività, fatti, valori* (Roma: Quodlibet, 2003), pp. 71–87, at p. 71 and p. 79.

[8] Notice that the notion of universal relevance includes a temporal reference. The universal relevance of a norm N excludes the possibility that it constitutes a reason at time t and not at time t-1. This feature rules out a probabilistic reading of the relationship established by a norm because it is compatible with the contribution of an instantiation being zero. Cf. Shafer-Landau, 'Moral Rules', p. 585.

[9] From a universalist perspective only a limited number of independent norms may be universally relevant or justified. If this were not the case, that is, if any norm could be considered as constituting reasons for action, this position would collapse into particularism.

[10] The universal relevance of norms implies logical and semantic universality. However, the implication in the opposite direction does not hold. Semantic universality of norms does not imply logical universality (universal quantification), and logical universality (universal quantification), in turn, does not imply universal relevance.

[11] See Jonathan Dancy, *Moral Reasons* (Oxford: Blackwell, 1993), p. 61.

1. When the universalist concept of norm is taken for granted and not questioned, particularists are bound to be sceptical regarding the *relevance* of norms. They argue that when we decide how to act, and ask for reasons for or against an action, we do not, and should not, follow norms. In this case, they are accepting a universalist concept of norm, but at the same time they are saying that norms play no role at all in our practical reasoning. In this scenario, particularists would be admitting that a norm is the content of a universally quantified conditional allowing for the application of Modus Ponens. However, the conclusions we can deductively obtain from these conditionals might be totally deprived of weight. Modus Ponens allows us to obtain conclusions, but a *logical conclusion* – resulting form a deductive argument – must not be confused with a *conclusive reason* for action – resulting from a balance of reasons. What is more, nothing ensures that a logical conclusion expresses any reason at all. A statement – be it a premise or a conclusion of a deductive argument – expresses a reason for action depending not on logic, but on a substantive moral theory. According to a particularist moral theory, the relevance of reasons has its source not in norms but in context. In an individual case, we can identify sufficient reasons, and we can obtain a conclusion, but we are not authorised to repeat this reasoning and apply this conclusion to any *different* case.

This approach sharply separates the logical issues from the practical ones. This would be a way to stress that the particularist view is challenging not a classical conception of logic (deductibility), but a classical conception of morality (generalism or universalism).

2. However, I believe that this is not the best way to put the particularist conception of reasons. If the dispute actually represents a philosophical (conceptual) disagreement, particularists cannot accept the universalist concept of norm and discuss just the relevance of such norms. They are trying to provide a different way of thinking about practical reasoning; therefore, they have to offer a different understanding of the concepts of both norms and reasons.

When a defeasible conception of norms is accepted, particularists need not be sceptical regarding the relevance of norms[12]. The defeasible conception is appropriate precisely because it allows particularists to show how they can deal with these so called “norms” without betraying their substantive moral thesis. In this view, norms are no longer universal law-like relations, but sheer reminders of “the sort of importance that a property *can* have in the suitable circumstances” [13]. These norms *can* express sufficient conditions for their deontic consequence, in a particular context, but they do not *necessarily* express sufficient conditions for this consequence in every other context. Within a defeasible conception, the properties mentioned in the antecedent of a norm are neither uniformly nor invariably relevant.

Adopting this position particularists are subscribing to a logical thesis that gives support to their substantive practical claims. Under this light, particularists are not sceptical *universalists*, as they seemed to be according to the former presentation. Actually, they are repealing the universalist philosophical (conceptual) proposal. At the same time, they are arguing for a new concept of norm and, consequently, a new logical pattern of norm-based reasoning.

[12] See Dancy’s view about the default polarity of reasons. Jonathan Dancy, ‘On the Logical and Moral Adequacy of Particularism’, *Theoria* (1999), pp. 144–155, at pp. 144–46 and 154–55.
[13] Cf. Dancy, *Moral Reasons,* p. 67 and p. 70.

Two senses of "defeasibility"

Defeasible conditionals as opposed to universal conditionals

Defeasible reasons as opposed to absolute reasons

The contrast between these philosophical conceptions seems both deep and substantial. They maintain opposed theses about important features of our practical rationality. In this regard, it should be pointed out that this contrast cannot be formulated only as a discussion about the logical defeasibility (or universality) of norms.

First, the defeasible conception of norms and reasoning is only *one* of the characteristics necessary to make the existence of relevant norms compatible with a particularist conception of reasons. In fact, from this perspective, norm-based reasoning should not only be defeasible, but also analogical[14]. The defeasible character explains why, even if the antecedent conditions obtain, under certain new or unusual circumstances the norm turns out to be inapplicable. That is to say, we cannot draw a conclusion from it. In turn, the analogical application of a norm shows why, even if the norm's antecedent is not satisfied, when certain similar conditions obtain we can still apply the norm and draw the conclusion. Both attributes are implied in a conception where norms are rules of thumb; that is, they are merely useful tools to summarise the properties that are more commonly relevant in certain kinds of circumstances.

Second, I think that characterising this debate in terms of what kind of logic or logical conditionals are apt to express norms can be misleading. On the one hand, it is true that in order to constitute a uniformly and invariably relevant reason a norm should have the logical form of a universal (non-defeasible) conditional, but it must also be substantially valid or correct. Therefore, it would be a mistake to reduce the discussion about universal reasons to a discussion about universal conditionals. The logical form of a norm, by itself, does not give sufficient information about the kind of reason established by the norm. What is more, it does not guarantee that the norm constitutes any reason at all. On the other hand, It has been correctly emphasised that norms construed as defeasible conditionals do not assure conclusive statements regarding what ought to be done. However, this idea incorrectly suggests that norms conceived as universal conditionals do assure conclusive statements on this matter[15]. Universal normative conditionals, if justified, constitute universal reasons, but these reasons are neither necessarily absolute nor conclusive. Therefore, universally justified norms do not guarantee conclusive statements regarding what ought to be done. Reasons based on universally valid norms – if *pro tanto* – might be defeated by other conflicting reasons. This invites us to distinguish two kinds or senses of defeasibility. The first one is related to the logical form of norms and norm-based practical reasoning. Defeasible norms are not apt to express uniformly and invariably relevant reasons. Their antecedent may be specified through the introduction of *new exceptions* that modify their identity and prevent both the applicability of the original norm and the constitution of a reason to act in the exceptional situation. This necessarily results in the non-deductive character of the reasoning

[14] See Jaap C. Hage, *Reasoning with Rules. An Essay on Legal Reasoning and Its Underlying Logic* (Dordrecht: Kluwer Academic Publishers, 1997), p. 123.

[15] This is the case only when norms are conceived as absolute norms (norms constituting absolute reasons).

based on such norms. The second kind of defeasibility, by contrast, is related to the limited force of universal reasons. In other words, it refers to a universally relevant norm, which constitutes a *pro tanto* reason. A *pro tanto* reason is a universal reason that can be overcome by other *conflicting* considerations in a so-called "balance" of reasons. A "balance" of universal reasons is a comparative pattern of practical reasoning which is not reducible to a (defeasible) norm-based one. This is so because universal reasons cannot be expressed through defeasible conditional norms. If conflicting universal reasons bear on the same case it is implied that conflicting universally relevant norms are applicable. However, the presence of a conflicting universally valid norm leaves intact the identity of the one with which it conflicts and it does not prevent the norm from constituting a reason for action[16].

Briefly put, universalists affirm that behind each reason there is always a justified universal norm that expresses a set of relevant properties. This, however, does not amount to saying that this norm expresses *all* the possible relevant properties of an individual case. The presence of a universal reason says nothing about the presence or absence of other conforming or conflicting reasons, which – if universal – result from the application of further universally relevant norms. Then, in case of conflict of universal reasons, if there is no further universal norm that establishes a hierarchical order, what ought to be done conclusively cannot be determined through the deductive application of *a* universal valid norm, i.e. through a deductive model of practical reasoning. Moreover, this question could not be determined through norm-based defeasible reasoning. As we have already seen, a conflict of universal reasons cannot be treated, on pain of contradiction, as a case of norm-defeasibility where the conflicting factors introduce specifications (exceptions) to a defeasible norm. In such cases, the only way to answer the question about how to act is through a balance of reasons (resulting from the conflicting *universal* norms)[17].

The universalist conception of reasons has been correctly connected to a deductive model of practical reasoning. This is so because in an individual case a universal reason exists if, and only if, such a case is an instantiation of the antecedent of a universal relevant norm. We can say that here a deductive syllogism provides an appropriate model to reconstruct the existence of a reason for action in an individual case[18]. However, universalists are certainly not committed to accept only the deductive model of norm-based practical reasoning, they

[16] See Hage, *Reasoning with Rules*, p. 124.

[17] A universalist theory of (moral or legal) reasons can hypothesise different kinds of conflicting situations and offer subtle guidelines with which to make a decision, without establishing a formal hierarchy of reasons. A universalist theory of (moral or legal) reasons delimits *a* realm of universal (moral or legal) reasons. This kind of theory, however, neither necessarily exhausts the realm of reasons in general nor excludes the possibility of partial indetermination, that is the possibility that the normative (moral or legal) status of a case is not determined by the universalist theory. In this regard, it is also interesting to note that universal valid norms may be *definitively* formulated, or may be not. In other words, universalists can admit that it is possible to change (specify) the current norm-*formulations* in order to grasp or express a valid norm-*content* better. In contrast, particularists accept the possibility to change valid norm-*contents* (as far as they conceive norms as defeasible conditionals), in order to grasp an individual case better.
A different opinion can be read in José Juan Moreso, 'Conflitti tra principii costituzionali', *Ragion Pratica* 18 (2002), pp. 201–221; Bruno Celano, '"Defeasibilty" e bilanciamento. Sulla possibilità di revisioni stabili', *Ragion Pratica* 18 (2002), pp. 223–239; and José Juan Moreso, 'A proposito di revisioni stabili, casi paradigmatici e ideali regolativi: replica a Celano', *Ragion Pratica* 18 (2002), pp. 241–248. These authors do not distinguish between the revision of norm-formulations and norm-contents. In their view, conflicts of reasons always lead to the revision of norm-*contents*. According to my analysis, this position already implies giving up a universalist model.

[18] Von Wright suggests this reconstructive function in several essays where he treats the so-called "practical inference" as a pattern that allows explaining and understanding intentional action. For instance, see Georg Henrik von Wright, 'On So-called Practical Inference', in G.H. von Wright, *Practical Reason*. *Philosophical Papers*, Vol. I (Ithaca: Cornell University Press, 1983), pp. 18–34, at pp. 18–19.

can also admit a comparative pattern of practical reasoning. This is so because they do not reject the possibility that conflicting reasons bear on the same individual situation. In this hypothesis, if there is no hierarchy of reasons, a balance is required in order to decide, all things considered, what ought to be done.

Taking into account these considerations, it would be misleading and partial to equate *tout court* universalism with the rejection of defeasibility and particularism with the rejection of deductibility. Universalists can accept that the reasons constituted by universal norms may be defeasible or *pro tanto* – even if they clearly reject defeasibility as the kind of logical relation established by norms. In turn, particularists can accept deductibility – even if they reject it as an appropriate pattern to identify reasons for action[19]. Finally, both positions may admit that, when conflicting reasons have to be compared and evaluated, deductive reasoning is not a suitable model to determine a definitive answer to the question about how to act.

Some remarkable consequences

If this analysis is correct, it is worth noticing some of the consequences arising from it.

1. The universalist or particularist conceptions of reasons are directly linked to incompatible conceptions of norms. On the one hand, a universalist conception of reasons necessarily implies a universal conception of norms and rejects a defeasible one. On the other hand, particularism denies a universal conception of norms and, if it accepts to talk about norms, it calls for a defeasible model. Positions that try to defend the defeasible character of norms preserving the universalist conception of reasons are, at first sight, inconsistent because they are not aware of this fundamental link. I will return to this point later.

As a consequence, the universalist or particular character of a reason is not a gradual but an all-or-nothing exclusive property: a reason either has its source in a universal law-like relation or it does not. This means that regarding a given domain of reasons, you cannot be more or less particularist (or universalist) because it is not a matter of degree.

2. What is stated above means that universalism and particularism are mutually exclusive. This, however, does not mean they are exhaustive positions. That is to say, these two positions do not exhaust all possible positions in relation to the reasons for action. For example, a sceptical position denies the existence of universally relevant norms, just as a particularist one does, but it also rejects the particularist conception. In this sense, scepticism represents a third possibility rejecting both universalism and particularism.

3. One of the most significant consequences of the contrast between the universalist and the particularist models is related to the distinction between the existence and the identity of a norm-content, on the one hand, and its formulation and application to an individual case, on the other.

[19] Further arguments stressing that particularists do not challenge a certain kind of *ceteris paribus* reasoning, and can accept inductive and explanatory generalisations, can be found in Margaret O. Little, 'Moral Generalities Revisited', in B. Hooker and M. Little (eds.), *Moral Particularism* (Oxford: Oxford University Press, 2000), pp. 276–304, at pp. 290–291 and 298–303.

If the idea of a norm independent of the individual cases of application is not viable, then there is no hope for universalism. According to this position, norms govern our behaviour in individual cases precisely because, independently of them, norms establish what properties are relevant in order to decide what to do. If the identity of norms depends on individual cases, it would be rather surprising to say that norms regulate such cases. Instead, from the particularist perspective, the existence of a reason and, if admitted, the identity of a correlative defeasible norm, must be established at exactly the same time in which we are supposed to apply such a norm and decide how to act. In a few words, a universalist conception of reasons presupposes the stability of the norm-contents in which reasons are based. A particularist conception rejects the possibility of stable norm-contents.

4. This last distinction is tied up to another one, which is also important for this debate: the distinction between the concepts of exception and conflict. Both exceptions and conflicts should be based on reasons. The crucial difference between them is that reasons bringing about exceptions affect the identity of a norm and its capacity to constitute a reason for action in the exceptional case, whereas reasons bringing about conflicts do not. They leave untouched the reason that the conflicting norm constitutes and compete with it.

While taking into account this difference, it should be clear that a universalist model of reasons could accept the actual context of application as a potential source of conflicting particularist reasons[20]. Nevertheless, universalism could never accept context-dependent exceptions. Admitting contextual exceptions would mean that the norm-content is contextually grounded and this would imply the breakdown of the universal relevance of reasons.

In the legal domain, this difference reveals two ways of dealing with problems arising from demands for equity, that is, individual cases in which the solution established by a norm is unsatisfactory. For those who accept a universalist conception of norms, an equitable decision is suitable, paradigmatically, in a case that cannot be resolved *fairly* by a norm. To be precise, it is a case of conflict between what is demanded by a norm and what is demanded by justice on one particular occasion. In these circumstances, if the requirement of justice prevails, the norm fails to determine what ought to be done. In a defeasible conception, by contrast, norms are appropriate for dealing with equity claims since they are open to the introduction of new conditions of application which will allow these situations to be satisfactorily resolved. Actually, an equity claim makes the defeasible nature of norms explicit. In these situations, a norm need not be left aside; it may be applied once its conditions of application have been revised to adequately respond to the problematic case. It is clear that the content of the norm, from this perspective, is not stable and is fixed at the particular time of application.

Second Part

Legal reasons.

[20] This means that a universalist conception of reasons may be accepted only for a certain domain of reasons. See Shafer-Landau, 'Moral Rules'.

It may be suggested that the moral debate between universalism and particularism cannot be legitimately translated into legal terms. Moral philosophy is concerned with the possibility of universal law-like relations between natural and deontic (or evaluative) properties. Legal theory deals with institutions, which are man-made realities independent of this metaphysical problem. However, to the extent that the philosophical proposals of universalism and particularism can be seen as providing two rational *ideals* of decision-making processes, the questions arising from this debate are not only pertinent but also extremely interesting for legal theory.

Applying the former considerations to the legal domain, we can say that a universalist conception should analyse the law as composed of universal norms which are the sources of universal legal reasons. In contrast, a particularist position should claim the contextual character of legal reasons and the impossibility of identifying legal norms that can be universally relevant. Additionally, as we will see, these conceptions could be defended either as general theses regarding a whole legal system, or as limited ones applicable to a specific legal branch.

Universalism in the legal domain

The analysis of law in terms of reasons for action is complex because, in this approach, valid legal norms not only constitute, but also presuppose and represent underlying reasons. According to a well-known conception, a valid legal norm constitutes a second-order exclusionary reason along with a first order ordinary one[21]. I will not discuss here the different models of rule-following behaviour analysed in legal philosophy[22]. In the view I am assuming here, legal norms are universal in a triple perspective: 1) they are universal semantic contents, 2) they have the logical form of a strict universal conditional, and 3) if valid, they are universally relevant, that is, they constitute uniform and invariable reasons resulting from a balance of pre-existing underlying reasons[23]. The semantic and practical dimensions of a norm explain why its identity can be analysed as a function of both the meaning of the language in which the norm-content is expressed, and the pre-existing reasons that this content is supposed to represent. To be precise, underlying reasons should be excluded at the time of making legal decisions, but in many cases they are admitted as implicit contents of law that, when made explicit, modify the actual norm-*formulations*[24]. Thus, they are crucial to the question about what the law is.

Leaving aside the underlying reasons, any other relevant consideration which is not part of the justification of a norm should be considered an independent reason. These reasons do not affect the identity of legal norms. They can conflict with legal reasons, and they are obviously relevant to the question about what ought to be done conclusively.

[21] These are called protected reasons. See Joseph Raz, *Practical Reason and Norms,* 2nd edn (Princeton: Princeton University Press, 1990), Ch. 2.
[22] See Frederick Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon, 1991). Especially Ch. 5.
[23] Angeles Ródenas, 'Entre la transparencia y la opacidad. Análisis del papel de las reglas en el razonamiento judicial', *Doxa* 21 (1998), pp. 99–121. See p. 117. Ródenas is concerned with other problems, but she clearly distinguishes both semantical and practical aspects of norms.
[24] These cases of divergence between what is required by the norm-formulation and what is required by underlying reasons have been called recalcitrant experiences of over- and under-inclusiveness. See, Schauer, *Playing by the Rules*, pp. 31-34.

The claim of universalism in the legal domain is that, if there are legal reasons, they are uniformly and invariably relevant. The first implication of this universalist thesis is that the identity of a legal norm (the norm-content) is independent of individual cases. If the content of a legal norm is identified in each context of application, the property of universal relevance vanishes[25]. This is so because in such a case, legal reasons would completely depend on the decision-making context. As a consequence, a universalist conception of reasons is compatible with most legal theories except with those which accept a radical contextual theory of meaning or interpretation. The second implication of the universalist thesis is that the logical form of a legal norm cannot be a defeasible conditional. Universal legal reasons require the logical universality of the norms on which they are based. Such norms have to be represented through logically universal conditionals expressing a sufficient – though not necessarily conclusive – condition for a deontic consequence[26]. This means that when a legal norm has been correctly identified it should exclude any *new* content. If it does not, it would be false to say that the norm has been correctly identified or that it expresses a sufficient condition. Notice that this exclusionary character only regards considerations affecting the *identity* of universal legal norms. It says nothing regarding their force at the moment of deciding what ought to be done conclusively. In this situation, other independent considerations may be relevant, and reasons constituted by universal legal norms do not necessarily exclude independent considerations.

Legal norms, like any other kind of norms, are usually analysed as providing a specific model of decision-making procedure. Such a model is strictly linked to the kind of reasons that legal norms are supposed to create. According to universalism, to follow a legal norm that constitutes universal reasons implies that the decision-maker always takes into account – as uniformly and invariably relevant – the properties established in the antecedent of the legal norm. In other words, a norm is treated as the source of universal reasons if, any time it applies, it commits the decision-makers not to defeat it.

A universalist position does not assign a specific weight to universal legal reasons and it is not bound to a specific theory concerning legal validity. As a consequence, it is compatible with positivist and anti-positivist conceptions of law. The central thesis of universalism is that the properties or circumstances established by a *valid* legal norm – be it the result of empirical facts or a moral reasoning – are uniform and invariable contributors to a legal verdict.

Particularism in the legal domain

[25] The extent to which the norm-contents depend on language, legislator's intentions, underlying reasons, etc. is determined by specific theories of legal interpretation, and it is not part of the universalism-particularism debate. It may be interesting to point out that the rejection of contextual interpretation assumed by universalism does not lead to any specific theory of legal interpretation as it seems to follow from Schauer's analysis. Particularly, it does not lead to Hart's theory of legal interpretation. See Schauer, *Playing by the Rules,* p. 213.

[26] I am aware that an important part of legal theorists maintain that the defeasible character of legal norms may be based only on *legal* considerations. That is to say, legal norms only admit *legal* exceptions and cannot be defeated by moral or other non-legal reasons. Taken literally, these positions are defending a specific kind of legal particularism. However, it is highly probable that even if they talk about the defeasible character of *norms*, they actually refer to the provisional character of norm-*formulations*. Universalism need not deny the possibility of errors in the identification of the norm-contents. Nevertheless, it would be a category mistake to formulate this thesis as a defeasible conception of *norms*. As I have already pointed out, universalism is compatible with the possibility of modifying or changing norm-formulations in order to grasp the universal legal norm-content better.

Important arguments for particularism can be found in the debate concerning the relation between law and morality, especially when the problem of equity is taken into account[27]. However, it is usual to find this moral concern presented as if it were a semantic problem. To be sure, there are also genuine semantic difficulties on which particularist legal theories can rely. In either case, the crucial question refers to the possibility and desirability of *identifying* (or interpreting) legal norms independently of contextually relevant considerations.

From the point of view of legal interpretation, all theories that present pragmatical contextual considerations as unavoidable in the correct identification of law are bound to assume a particularist conception of legal reasons. This is so because, except as a rhetorical resort, we cannot state the universal relevance of such reasons once we have said that it is impossible to identify legal norms without taking into account the actual features of each individual case. A theory of legal interpretation is certainly not a theory concerning the kind of reasons legal norms are able to create. However, certain theses regarding legal interpretation can affect or even determine a theory about legal reasons. In this regard, some conceptions of interpretation, as far as they maintain that the law, or some parts of the law, cannot be identified as a set of strict universal norms, imply the withdrawal of the universalist ideal. For instance, this is the case when some kinds of "realist" thesis are accepted. According to these positions, the law does not bind courts because 'the law is what the courts say it is'[28]. Something similar occurs when radically contextual conceptions of meaning are applied to the identification of legal norms[29]. Moreover, when we assume "interpretative" or "hermeneutic" theories defending that the understanding of a legal text – as the understanding of any cultural object from a hermeneutic point of view – is dynamic, it partially depends on the interpreters and should not be fixed before taking into account the whole system to which it belongs[30].

The impossibility of fixing the content of a legal provision before facing an individual case may be defended as a theoretical thesis regarding language (or the law) in general, or may be proposed as a contingent thesis limited to specific parts of a legal system, such as constitutional law[31], criminal law[32], or specific kinds of legal clauses expressing highly abstract standards[33].

[27] See, for instance, Lawrence B. Solum, 'Equity and the Rule of Law', in I. Shapiro (ed.), *The Rule of Law*. *Nomos XXXVI* (New York/London: New York University Press, 1994), pp. 120–147.

[28] Following Herbert Hart, from this perspective, the judge's rulings '[would be both final and infallible - or rather the question whether they were fallible or infallible would be meaningless; for there would be nothing for him to get "right" or "wrong"]', Herbert L. A. Hart, *The Concept of Law*, 2nd edn (Oxford: Clarendon Press, 1994), p. 144. It is interesting to stress that these realist positions are clearly non-universalist but they are also clearly non-particularist. This is so because realists are sceptical regarding the existence of universal norms and they are also sceptical regarding the possibility of determining a right answer based on contextual reasoning.

[29] These conceptions should not be confused with those that stress the importance of context, when the concept of context refers to different branches of law, such as civil, criminal, commercial law, etc. These last positions are clearly compatible with universalism. See, Timothy Endicott, 'Law and Language', in J. Coleman and S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford: Oxford University Press, 2002), pp. 935–968, at pp. 946–955.

[30] Francesco Viola and Giuseppe Zaccaria, *Diritto e interpretazione. Lineamenti di teoria ermeneutica del diritto* (Roma/Bari: Laterza, 1999). A universalist position could admit that the identity of a norm is related to the content of other norms belonging to the same normative system, but it cannot accept that this identity is dynamic or that it depends on the interpreter.

[31] See Frederick Schauer, 'The Jurisprudence of Reasons', *Michigan Law Review* 6 (1987), pp. 847–870. See p. 869.

[32] See José Juan Moreso, 'Principio de legalidad y causas de justificación. (Sobre el alcance de la taxatividad)', *Doxa* 24 (2001), pp. 525–545.

[33] See Hart, *The Concept of Law*, pp. 131–133.

From a moral point of view, the commitment to a particularist approach is a consequence of a two-step argument. First of all, it presupposes either a necessary or a contingent relation between morality and the *content* of law. In other words, it presupposes an *interpretative* connection between law and morality[34]. Second, but not less important, it requires a particularist conception of moral reasons. In a few words, the thesis that defends the connection between law and morality does not lead to particularism when morality is understood in a universalist way, or when the relationship defended is not interpretative, but ideal or justificatory[35].

Once again, from this moral perspective, the particularist thesis may have either a global or a local scope, and a necessary or a contingent status. We have a global and necessary thesis when a particularist moral evaluation is conceived as an inescapable step in the identification of a valid legal reason. We have a local and contingent proposal when the consideration of particularist moral reasons is viewed, for instance, as incorporated into law as a matter of fact because of a specific allusion to morality or the presence of a morally controversial concept. When the particularist thesis is defended with local scope, it is implicitly suggested that in order to analyse the law both conceptions of reasons are needed, since sometimes law constitutes universally relevant reasons, and sometimes it does not[36].

Only a few legal theories would be willing to call themselves particularists[37]. As a matter of fact, it is difficult to mention examples of legal theories that openly apply the proposals of ethical particularism to the legal domain. However, if my account is correct, the particularist position, though not explicitly accepted, can be considered a non-intentional result of some legal theories concerning legal interpretation and/or the relationship between law and morality.

The debate in legal theory

Within legal theory, the distinction between these two conceptions of reasons has been presented in terms of a contrast between two kinds of norms: rules and principles. In this respect, the thesis presented by Ronald Dworkin has had a high impact among legal philosophers and has set the bases of an ongoing discussion. The debate regarding Dworkin's proposal has brought about various conceptions of principles and the way in which they differ from rules. The characterisation of principles gains great importance insofar as it is accepted that they are at the base of any legal system and provide the grounds for its justification. These principles contribute to the identification of the rules and thus affect the reasons established by them. It could therefore be said that the characterisation of the reasons that the law is able to create ultimately depends on the characterisation of principles. In the following section I shall limit myself to briefly presenting only three ways of understanding this kind of norms. As will become clear, only one of them is committed to the

[34] According to some Natural Law theories this relation obtains in every possible world and, in this sense, is conceptual and necessary. According to some versions of Inclusive Legal Positivism the relation holds in virtue of the existence of a social rule of recognition and, in this sense, is conventional and contingent. See Jules Coleman, 'Incorporationism, Conventionality and The Practical Difference Thesis'*, Legal Theory* 4 (1998), pp. 381-425, at pp. 403-411.

[35] On these different kinds of relations between law and morality, see Carlos S. Nino, *Derecho Moral y Política* (Barcelona: Ariel, 1994). Also Robert Alexy, 'On Necessary Relations Between Law and Morality', *Ratio Juris*, vol. 2, N°2 (1989), pp. 167-183.

[36] Schauer, 'The Jurisprudence of Reasons', p. 869.

[37] A particularist position is explicitly defended by Solum, 'Equity and the Rule of Law', pp. 120-147.

thesis of the universal relevance of legal reasons and gives evidence of a practical difference between two possible ways of regulating behaviour.

a) Many authors believe that the difference between rules and principles is only a matter of degree, i.e. principles are more abstract, have a wider scope, and - for this reason - determine a result to a lesser extent than rules. This means that they situate the difference in the semantic generality of each kind of norms[38]. Concerning this thesis some remarks are in order.

If this approach is correct the distinction between rules and principles has no practical import. The difference in semantic generality has no influence on the kind of reasons that rules and principles are able to create. Therefore, the practical difference between them, if any, is not captured by this semantic divergence.

If the discussion about rules and principles reflects a concern about the different ways in which law can offer reasons for action, the variance in semantic generality, even if it exists, is not only irrelevant, but also misleading. Theories stressing the (semantic) universal status of principles believe that they are still defending a universalist model of reasons. However, it is not the case when principles are considered defeasible norms so dynamic and mutable that they can only be grasped in the face of a specific case.

b) According to a second approach, both rules and principles are conditional statements that correlate cases (an antecedent) to the normative qualification of a certain behaviour (a consequent). The difference between them is that rules have a closed antecedent whereas principles have an open one. Regarding principles, we cannot formulate a finite or closed list of properties in which they are applicable[39]. This proposal regarding the rules/principles distinction suggests that the practical difference between them should be found in the structure attached to each kind of norm. Rules have closed antecedents and can be treated as strict universal norms that admit the strengthening of the antecedent and deontic Modus Ponens. That is to say, rules may be deductively applied. Principles, by contrast, are defeasible conditionals because their conditions of application are not only vague, they are not even generically determined.

Analysed in this way, principles cannot constitute universally relevant properties. The law's claim to universality, from this perspective, would be based on the existence of logically non-defeasible rules independent from principles. It is important to highlight the need for this independence since, if principles had a bearing on the conditions of application of rules, these would in turn have open antecedents and would be defeasible.

This position suggests that we can preserve a universalist model of legal reasons even if we accept a defeasible conception of the principles which are at the base of the legal order. In my opinion, this belief shows a lack of awareness regarding two important issues. First, it overlooks the necessary distinction between two senses of "universality" as a property of norms. In this approach, principles are universal contents involving universal predicates but they are not universally *relevant* since, though applicable to an individual case - in virtue of a new condition of application -, they can be defeated, left aside and not taken into account.

[38] This position may be attributed to Hart. See Hart, *The Concept of Law,* pp. 259-263.
[39] See Manuel Atienza and Juan Ruiz Manero, *A Theory of Legal Sentences* (Dordrecht: Kluwer Academic Publishers, 1998), pp. 8-9. This is only one of the ways in which the authors trace the differences between rules and principles.

Second, this belief ignores the necessary connection between what I have called the "two faces of the same coin", that is, that universal reasons presuppose universally quantified norms. Therefore, principles understood as defeasible norms, even if semantically universal, are not the appropriate bases for universal reasons. Defeasible norms cannot constitute universal reasons.

As a consequence of this idea, it is interesting to point out that it is not possible to support a universalist thesis in relation to *legal* reasons and, simultaneously, admit that they depend on, or may be modified in virtue of, the presence of moral reasons. Regarding the relation between law and morality we have to accept one of the following incompatible theses. On the one hand, if we seriously claim that the content of legal norms (be they rules or principles) can depend on moral reasons, we should acknowledge that legal norms are not universally relevant and do not constitute universal reasons for action. Legal *norms* are just provisional *formulations* of genuine universal norms: the moral ones. When these universally relevant norms are applicable they can modify legal formulations and prevent them from constituting any reason at all. On the other hand, if we do not want to accept this consequence and insist on the thesis that legal norms do constitute universally relevant reasons, we must modify our position and accept that moral norms cannot modify legal ones. That is to say, morality cannot *defeat* legal norms by introducing exceptions or new conditions of application. On the contrary, these moral norms *conflict* with legal ones leaving untouched their identity and force. In either case, if a position defends the universalist character of legal reasons it cannot accept the defeasibility model for legal norms.

At any rate, it should be clear that the universal logical form of norms (or, what amounts to the same, the rejection of logical defeasibility) is a necessary but not a sufficient step in order to defend a universalist theory of legal reasons. Indeed, the admission of the logical universality of norms may be as misleading as the admission of the semantic one. Positions defending the constitutive character of judicial interpretation might stress the universal logical form of legal norms. However (and paradoxically), the reasons established by these universal norms meet exactly the particularist characterisation of reasons, insofar as their existence or content depends on each individual context of decision[40]. These positions deny one of the basic presuppositions of the universalist conception of reasons: the stability of norm-contents.

c) A third characterisation of the contrast between rules and principles takes the following two features into special consideration. Firstly, rules are applicable in an all-or-nothing fashion. They are either applicable and determine a decision, or inapplicable and contribute nothing to it. In contrast, principles allow for gradual application. That is to say, while a principle may contribute to determine a result, a rule, if valid, necessitates a particular one[41]. This implies that in the case of a conflict between rules, the final decision can only take one of them into consideration, i.e. only one rule is valid or applicable[42]. In contrast, when principles conflict, it may be possible for all of them to be partially satisfied. The final decision

[40] Following Schauer we can say that, if universal: '[…rules entrench the *status quo* and allocate the power to the past and away from present…the allocation of power here is temporal]'. Schauer, *Playing by the Rules,* p. 160. '[Secondly…rules can allocate power horizontally, determining who, at a given slice of time, is to determine what…the "No vehicles in the park" regulation…allocates power away from the park-user and to the rule maker]' Schauer, *Playing by the Rules,* p. 161.
[41] Cf. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977), p.24-25. See also Robert Alexy, 'Sistema jurídico, principios jurídicos y razón práctica', *Doxa* 5 (1988), p. 143.
[42] Cf. Dworkin, *Taking Rights Seriously*, p. 27.

can and should be the result of the balance of all the principles involved. In this sense, it can and should honour them, at least in part.

An additional feature of rules is that only with respect to them - and not to principles – is it possible to admit exceptions[43]. By virtue of its all-or-nothing nature, in an exceptional case, a rule is downright inapplicable; it does not constitute a reason and should not be taken into account[44]. Even if this feature of rules were to be interpreted as a symptom of their defeasible character, the reasons that the law ultimately offers may be universal. This is so only insofar as every exception to a legal rule (i.e. any case of logical defeasibility) finds its basis in a finite set of universal (indefeasible) principles. In this case, the properties that must be taken into consideration to justify a legal decision are, by virtue of the principles, uniformly and invariably relevant[45].

With regard to this position, the analysis proposed in the first part of this work enables us to extract at least two corollaries:

1. Principles, insofar as they *are* - or directly constitute - universal reasons, should be formally represented as strict conditionals. The *practical* universality of this sort of norm presupposes the *logical* universality of the link between a specific circumstance - or any circumstance - and the relevance of a certain property.

For example:

“Life ought to be respected” This principle may be represented as a conditional according to which: “In all circumstances, life is a relevant property”. It is a categorical principle since according to it, life is always valuable and, as such, it must be taken into account every time we make a decision[46].

Another example:

“In every issue concerning civil law the autonomy of the will must be respected”. This is a hypothetical principle since it has a specific condition of application, the invariable relevance of the autonomy of the will is circumscribed to matters of civil law.

It should be clear that the ascription of a conditional structure to a principle does not mean that its superficial configuration should be that of a conditional statement. Moreover, it does not mean that it is a hypothetical principle, i.e. that its applicability depends on the presence of specific circumstances. In other words, that principles should always have the *logical*

[43] Cf. Dworkin, *Taking Rights Seriously*, pp.24-25.

[44] In this sense it could be said that defeasibility is conceptually possible only in relation to rules but not principles. In any case, it is necessary to observe that for Dworkin, the possibility that rules have exceptions is not a sign of their defeasible nature so much as one of their incomplete formulation. Cf. Dworkin, *Taking Rights Seriously*, p. 25.

[45] It should be obvious that this third characterisation of principles reflects Ronald Dworkin’s conception only approximately and partially. His proposal takes into account many other features that I have not mentioned here. Some of them, which refer to the identification of principles, could put Dworkin‘s universalist commitment in doubt. For instance, in Dworkin’s theory the stability of universal norm-contents (or principles) is not assured. If the identity of principles can be changed through interpretation, their universal *relevance* vanishes.

[46] Following from Alchourrón, a categorical norm may be logically represented as a conditional with a tautological antecedent. That is to say, accepting O (/) as the primitive deontic opertator, we can define the categorical duty to do A as O (A / T). See, Alchourrón, ‘Detachment and Defeasibility in Deontic Logic’, pp. 5-7. This characterization is compatible with von Wright’s view according to which every norm (including categorical norms) has a condition of application. The condition of application of a categorical norm is “the opportunity for doing the thing which is its content, and no further condition”. Cf. Georg Henrik von Wright, *Norm and Action. A Logical Enquire* (London: Routledge & Kegan Paul, 1963), p. 74.

structure of a conditional does not require them to have a conditional formulation and does not prevent some of them from being hypothetical and others categorical.

The strict conditional structure of principles can be easily accepted as long as it is remembered that the consequent of this kind of norm does not qualify an action, i.e. does not answer the question “What ought to be done (or decided)”. Instead, it confers value to a property which, as a consequence, becomes relevant – i.e. constitutes a reason - and must be considered in the practical reasoning justifying a decision. It is important to emphasise this feature: in accordance with a principle, what becomes a duty or obligation (if we are to conserve this deontic operator) is this giving relevance to a certain property. This way, principles indirectly have an impact on what ought to be done.

2. This presentation emphasises the fact that there are at least two different techniques to guide behaviour. Firstly, motivation may be achieved through rules that establish the deontic qualification of an action and in doing so, give a direct answer to the practical question regarding how one should act. Secondly, the motivation may also be achieved through principles that establish what properties are relevant for deciding what should be done. Principles, contrary to rules, do not determine an action directly or immediately. Actually, they are or determine reasons for or against an action, and, in this sense, they indirectly guide behaviour. A particularist position holds that these principles are not *normative*. In fact, they are *empirical generalisations* that remind us which properties are normally relevant. In contrast, a universalist position holds that principles are a special kind of norms, which establish what properties are relevant, i.e. they establish what counts as a reason when deciding how to act.

Concluding remarks

Regarding the question about what conception of reasons best explains our notion of legal reasons, I believe it is of utmost importance not to confuse three levels of discussion: the conceptual, the evaluative, and the empirical. Much of the debate on reasons and models of reasoning is ambiguous in this sense and it is not always easy to identify at which of these different levels the discussion is taking place.

In this essay I have provided an outline of the conceptual differences between the universalist and the particularist models. At this conceptual level both models offer a coherent account of the concept of reason and it is difficult to find conclusive philosophical arguments for or against either one of them without presupposing the very conception of reasons we are trying to argue for. This implies that it is logically possible for a legal order to be conceived of as fitting one conception or the other. However, if the question is a descriptive one regarding a specific legal order, it is not possible to ascribe to it both conceptions at the same time. Moreover, it is not possible for a specific legal order to be presented alternatively as some times particularist and some other times universalist. On the one hand, we should remember that these conceptions are mutually exclusive. On the other hand, we should also keep in mind that stability or temporal invariance of reason is a necessary presupposition of universalism. From this point of view, the thesis according to which we can reconstruct a legal provision - or a whole legal system - in a universalist fashion at one time and in a particularist one at another time is a contradiction in terms since it negates a basic presupposition of universalism.

If the question is how we *should* conceive law, it is important to stress that when we decide to treat, or advocate for treating, a public institution like the law as bringing about a specific kind of reasons for action, we are committing ourselves to certain values. Universalism is usually linked to the value of certainty, predictability, formal equality, etc. Particularism, in turn, is mainly related with equity, flexibility, fairness, etc. Eventually, in order to choose the best philosophical approach to legal reasons, we have to go into an evaluative level of discourse and explicitly state the values that each model endorses and the advantages and disadvantages we can obtain through its implementation. The particularist or universalist character of legal reasons depends on the way in which legal operators conceive of the law. Provided that both models are logically and empirically viable, it could be a matter of choice. Certainly, a choice linked to important conceptual and substantial consequences[47].

[47] A shorter version of this work was presented at the IVR World Congress, Lund, August 2003. I am indebted to Ricardo Caracciolo, Riccardo Guastini, Eugenio Bulygin, Mauro Barberis and Marisa Iglesias who discussed with me a preliminary version of this paper.