

Legal Defeasibility: An Introduction

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Defeasibility is a problem which is on the agenda of many fields of knowledge including logic, epistemology, and moral philosophy, to name but a few. In recent years, a great many jurisprudential works have also, more or less directly, dealt with defeasibility in the legal domain.

However, the substantial amount of research on this topic has not yet produced a systematic treatment of the several phenomena referred to under the general heading of ‘defeasibility’. In fact, one often has the impression that the use of the same expression to refer to different, though sometimes interrelated, phenomena brings about a number of conceptual confusions. In light of these issues, this book aims to shed some light on the different meanings of ‘defeasibility’ and clarify the scope of the different ‘objects’ which are referred to by this expression.

To this end we have invited some of the most prominent legal philosophers in the Anglo-American and Continental traditions to deal with a specific aspect of what is understood by ‘defeasibility’ in the legal domain,¹ or in philosophical or logical domains which are presupposed by jurisprudence when coping with such a phenomenon. This explains and justifies the structure of the book, as we will see in the following paragraphs.

A. Legal and logical defeasibility

The first part (‘General Features of Defeasibility in Law and Logic’) is devoted to unravelling the basic concepts related to legal defeasibility, based on the idea that law, or its components, is liable to implicit exceptions, which cannot be specified *ex ante* (viz. before the law’s application to particular cases).

The first essay (by Jordi Ferrer Beltrán and Giovanni B. Ratti) is devoted to analysing recent trends in legal logic and legal theory and to providing a general reconstruction of the debate on legal defeasibility. With this aim in mind, the paper surveys, in an encyclopaedic mode, the main conceptions of the defeasibility of legal standards under the twofold perspectives of legal interpretation and legal validity. The final part of the paper is devoted to providing a proposal for reconstruction of the relations between defeasibility and validity of legal norms.

The following paper, by Carlos Alchourrón, is the only one which was not written with this collection in mind. In fact, it is a reissue of Alchourrón’s paper ‘On Law and Logic’, which was originally published in 1996. The reasons for this reissue are based on the relevance of Alchourrón’s results in dealing with legal defeasibility, and on the

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¹ Here and in what follows, ‘Continental’ is used, broadly, to denote civil-law legal culture.

fact that many of the contributors to the present collection have these results as their starting point. In particular, Alchourrón's treatment of the pragmatic defeasibility of legal conditionals has proved to be an outstanding contribution to the examination of the sources of legal indeterminacy. It also happens that this part of Alchourrón's work is less known than other research on the logic of belief change and the logic of declarative conditionals, a fact that further convinced us to include the paper in the present volume.

The third essay, by Juliano Maranhão, takes issue with Alchourrón's well-known attack against nonmonotonic logics. The paper surveys Alchourrón's convictions about legal epistemology and argues that they provided the impetus for his opposition to nonmonotonic logics. It also proposes the view that Alchourrón's approach to defeasibility leaves three important aspects aside, which seem to have been endorsed in his final writings: (i) that the legal system is a set of strict conditional rules (not of *prima facie* rules) which is subject to change into a system containing more refined strict conditional rules; (ii) that within the normative system explicit norms have different epistemic status to derived ones (not all derived norms are valid); (iii) that the defeat results from a creative intervention by the interpreter changing the system of rules into a more qualified and consistent system. One of the highlights of the paper consists in the introduction of a specific revision operator, called *refinement*, which is taken to capture these neglected aspects and provides better representation of the so-called 'epistemic conception' of legal defeasibility.

Essays 6 and 7 deal with defeasibility of reasoning in the deontic domain and the question of whether it may be extended, under certain conditions, to legal reasoning, if this is regarded as a subset of the deontic field. This conceptual possibility—for some others, indeed to be regarded as a normative necessity²—is forcefully argued for by Giovanni Sartor in essay 6, while resolutely rejected, on genuine conceptual grounds, by Rafael Hernández Marín in essay 7. Sartor argues that defeasibility is an essential feature of reasoning in general, and legal reasoning in particular. This is mainly due to the fact that legal concepts have to be applied to such diverse domains of instances that they can at best offer a tentative and generic characterization of the objects to which they apply, a characterization which has to be supplemented with exceptions. Defeasibility of legal reasoning also reflects the dialectics of judicial proceedings where each party provides arguments supporting its position, which conflict with the arguments of the other. Hernández Marín holds the opposite view, according to which defeasibility, far from being an essential feature of legal reasoning, is a highly obscure notion, which has no logical ground and must accordingly be rejected. Moreover, Hernández Marín argues that no logic is possible in the normative domain and that no defeasible logic is justified in the descriptive domain: hence, defeasible deontic logic must be regarded as mere curiosity or nonsense.

Frederick Schauer, in essay 4, advocates a 'third way' between the widespread and radical jurisprudential tenets that defeasibility is either a necessary feature of law or an impossible one. Schauer argues that it is a contingent feature of law, depending on the very content of each legal system. More specifically, Schauer argues that the key to the idea of defeasibility is the potential for some applier, interpreter, or enforcer of a rule to make an *ad hoc* adaptation in order to avoid an absurd or otherwise unacceptable rule-generated outcome. And this implies a very significant conclusion: according to

² See R.H.S. Tur, 'Defeasibilism', OJLS, 21 (2001), 355–68.

Schauer, defeasibility is not, properly speaking, a possible feature of rules; it is ‘rather a characteristic of how some decision-making system will choose to *treat* its rules’.³

In essay 5, Jorge Rodríguez discusses at length the pros and cons of regarding legal rules as defeasible, and concludes that, from a properly conceptual point of view, rules cannot be held as defeasible, in the sense that their application is contingent on the non-occurrence of unspecifiable rule-defeaters based on reasons having particular power. Rules’ presumptive force, in fact, would always call for an assessment of every member of such a list of unspecifiable defeaters and this would make it difficult (if not simply impossible) to carry out inferences with such rules as premises.

B. Defeasibility in legal interpretation

Part II—‘Defeasibility and Interpretation’—aims at disentangling the main relations between the issue of legal defeasibility and the issue of legal interpretation.

In the first paper of this section, Pierluigi Chiassoni analyses in full detail the different meanings which are usually attached to ‘defeasibility’ in the context of the contemporary jurisprudential debate, and the different ‘objects’ which are predicated to be defeasible (including e.g. reasoning, norm formulations, concepts, conclusions, norms), distinguishing in particular several kinds of defeasibility of legal norms. In so doing, he disentangles the different relations that defeasibility is said to have with the indeterminacy of law.

The papers by Guastini, Mendonca, and Caracciolo all share a common theoretical basis, much indebted to Carlos Alchourrón and Eugenio Bulygin—two major figures in Continental jurisprudence and deontic logic—and their seminal work *Normative Systems*.⁴ The paper by Riccardo Guastini reconstructs the notions of axiological gaps and defeasibility of legal rules as possible products of the meaning-ascribing activities that jurists carry out on legal sources. ‘Defeasibility’, according to Guastini, is just a novel name for two very well-known techniques of construction: restrictive interpretation, in civil-law legal orders, and distinguishing, in common law ones. Likewise, Daniel Mendonca (essay 11) provides a rational reconstruction of the concept of exception, which is crucial in dealing with the notion of defeasibility, showing the logical form of some intuitive arguments jurists use in tackling rules’ negative conditions. On a similar theoretical basis, Riccardo Caracciolo (essay 12), analyses two conceptions of legal defeasibility, propounded by Carlos Alchourrón in his last works, and rejects the plausibility of one of them—the ‘dispositional account’—which turns out to have some radically sceptical (and, for Caracciolo, unacceptable) consequences for legal interpretation.

Bix’s paper is devoted to enquiring into the connection of philosophical open texture, Hartian open texture, and defeasibility in legal reasoning. Bix, contrary to a relatively widespread view, argues that open texture and legal defeasibility are different phenomena. However, he reaches the significant conclusion that ‘defeasible forms of legal reasoning create . . . the same sort of range of available choices that judges face in the Hartian “open texture” of borderline cases’.⁵ They are, so to speak, different sources of strong discretion.

³ F. Schauer, ‘Is Defeasibility an Essential Property of Law?’, in this volume, ch. 4.

⁴ C.E. Alchourrón and E. Bulygin, *Normative Systems* (Vienna: Springer, 1971).

⁵ B. Bix, ‘Defeasibility and Open Texture’, in this volume, ch. 10.

C. Defeasibility and conceptions of law

Part III of the volume is dedicated to one of the most problematic issues in the history of jurisprudence: the connections between law and morality. These connections are examined from the perspective of legal defeasibility and its purported problematic nature for legal positivism.

In essay 13, José Juan Moreso argues that, in minimally developed legal systems, there is a sort of necessary connection between law and morality, which is due to the fact that legal rules are subject to moral defeaters. This, in turn, is due to the fact that a completely formalist or ‘opaque’ system (which may be found in ancient Roman law, Moreso argues) would contemporarily be regarded as a system flawed with paramount problems of institutional design and implementation.

In essay 14, Manuel Atienza and Juan Ruiz Manero, restating and refining some of the arguments they deployed in their *Theory of Legal Sentences*,⁶ advocate for the inherent (nearly necessary) defeasibility of law, on the basis of the idea (originally elaborated by Dworkin) that contemporary law is made on two axiological levels—principles and rules—and that defeasibility is but the ‘gap’ between these two levels. more precisely, it is the failure of the rule to give a correct implementation to its underlying principle or principles. This would refute legal positivism—or at least exclusive legal positivism in the formulation offered, alternatively, by Raz and Bulygin—for it famously does not admit any reference to moral reasoning in order to identify the content of the law.

A similar tenet is held by Juan Manuel Pérez Bermejo, who enquires into the defeasibility of legal principles and upholds that only a rightly interpreted theory of principles is able to reconcile law’s normativity and its necessity for adaptation to change. In so doing, he examines different versions of the principle thesis, eventually opting for what he calls a ‘coherence theory’ of law, as opposed to ‘weight theories’.

Contrary to this widespread view, Wilfrid Waluchow, in essay 15, defends the view that not only does defeasibility (or, to be more precise, the different phenomena this word designates) not pose any serious threat to legal positivism, but also defeasibility, properly understood, may be regarded as a valuable theoretical tool for overcoming the schism between inclusive and exclusive legal positivism. In fact, the Exclusive Positivists—argues Waluchow—may be correct when they say that legal validity is normally, and in the first instance, established by way of non-moral, source-based criteria of validity, whereas Inclusive Positivists are right in holding that legal validity may be defeated or cancelled on moral grounds.⁷

In his paper, Bruno Celano takes up the issue (also referred to by Pérez Bermejo) of the ‘particularist collapse’ of the defeasibilist theories. Celano analyses the specificationist strategy, which purports to be consistent with the identity assumption, i.e. the thesis according to which a norm, being defeasible, somehow survives the impact of recalcitrant cases. However, Celano shows that, on specificationist premises, the identity assumption withers away. Celano then goes on to distinguish two kinds of exceptions: prima facie and true ones, as a strategy to overcome the conclusion that, when a specificationist strategy is followed, all justified normative verdicts turn out to be particular. According to Celano, norms provide what are *normally* reasons for or

⁶ M. Atienza and J. Ruiz Manero, *A Theory of Legal Sentences* (Dordrecht: Kluwer, 1998).

⁷ For a metatheoretical analysis of the different relations between defeasibility and legal validity, cf. J. Ferrer Beltrán and G.B. Ratti, ‘Validity and Defeasibility in the Legal Domain’, *Law and Philosophy*, 29 (2010), 601–26. See also, ‘Defeasibility and Legality: A Survey’, in this volume, ch. 1.

against certain actions, or certain normative consequences. Norms are defeasible conditionals, which are then liable to true exceptions, when the antecedent is satisfied, under normal circumstances only.

In the concluding essay of this section, Cristina Redondo analyses the question whether reasons for action are, or can be considered, defeasible. Redondo distinguishes between two different kinds of defeasibility—epistemic and ontological—and applies these two concepts to reasons for action. Based on a realist understanding, the idea of a defeasible reason is simply nonsense: for if reasons are facts in the realist sense they cannot be defeasible. A statement in which defeasibility is predicated of a reason would thus be a self-contradictory statement. This is why, according to such a view, sentences such as ‘ ϕ is a prima facie (defeasible) reason for doing what has been ϕ -ed’ must necessarily be interpreted by alluding to an epistemic problem, if we want to avoid contradictions within a realistic stance. Following an alternative, ‘constructivist’ understanding, defeasibility may instead be regarded not only as a predicate of reasons, but also as an inescapable property of them, since the existence of a reason for a specific action depends on a set of human beliefs and attitudes: this in turn makes it possible to assert without contradiction that something is a reason and is defeasible in itself.

D. Defeasibility and adjudication

Part IV of the volume is devoted to analysing the relationships between defeasibility and legal adjudication, from the perspective of the justification of both the normative and the factual premises.

In an introductory essay, Atria deals with general features of government by general norms, and enquires into the history of ideas regarding general legislation and judicial application. By evoking Hart’s dichotomy between formalism and scepticism, Atria revisits some fundamental notions at the basis of contemporary legal systems, and the debates that accompanied their institutional implementation. Atria’s paper contains, in its final section, a prolonged criticism of what he calls the ‘judge as an automaton model’, which he innovatively assigns to formalists and sceptics alike. He goes on to provide a defence of a new model which ‘maximize[s] the possibility that all the relevant elements of the particular case before the judge are subject to a scrutiny as close as necessary, and [which] minimize[s] the possibility that when it comes to deciding the case the judge will pursue goals or ends different to giving each their own’.⁸

Richard Tur, in essay 20, offers and discusses in detail several paradigmatic examples of norms treated defeasibly by common law courts and, on this basis, proposes a challenge for contemporary positivist theories: whether any social sources thesis in general or Hart’s Rule of Recognition in particular can accommodate themselves to such endemic defeasibilism in adjudication. The answer that Tur suggests is that they cannot, ‘for the Rule of Recognition must either strive for greater and greater breadth in order to include all possible sources of override or that the Rule of Recognition must be understood as identifying some but not all relevant legal materials’.⁹

Essay 21, by Jonathan Nash, propounds the opposite view that in adjudication (at least in the US system, often regarded as the paradigm of defeasible-treated standards) norms are regarded, by and large, as indefeasible. In doing so, Nash provides a detailed

⁸ F. Atria, ‘Legislation and Adjudication’, in this volume, ch. 19.

⁹ R. Tur, ‘Defeasibility and Adjudication’, in this volume, ch. 20.

analysis of US jurisprudence, arguing that defeasibility is eminently a context-dependent concept.

Essay 22, by Bruce Chapman, discusses, inter alia, the moral argument that supports the process that private common law adjudication adopts under defeasible rules. According to Chapman, this process provides for interpersonal respect and accountability between the parties in a way that a single stage summary rule does not. Chapman argues that ‘in advancing arguments one way or the other under the single stage summary rule, each party looks past the other to the (moral) world and, more particularly, towards some (moral) fact in that world made salient by the rule. *It is as if each party really had no essential role for the other.*’¹⁰ The opposite of this model is the model of defeasible rules, which ‘shifts each party’s accountability from a world independent of them to a world which (to some extent at least) they construct themselves with the justifiable claims they make upon one another’. Under the model of defeasible rules, the parties are less accountable to what is morally correct or true, and more to what authoritative demands they can justifiably make upon one another, in back and forth fashion, as they construct the rule and set the scope of its final application. In this regard—Chapman argues—‘the model of defeasible rules provides more for the parties’ joint exercise of a collective or shared rationality under the developing rule than it does for the joint accountability of these parties to some shared reason under a more truthful rule.’¹¹ This in turn, as Chapman interestingly stresses in the conclusion, would be a powerful argument for considering Hart’s positivism as the winning party in the debate with Fuller’s or Dworkin’s antipositivism.

E. Epilogue: Rejuvenating the ‘spirit of Bellagio’

We think that a collection like this, with such skilful contributors dealing with such hotly debated topics, needs no further justification than its index and contents. However, to the stimulating and self-evident qualities of the contributions, we would like to add a ‘strategic’ reason which has been at the heart of our editing work. This collection is also an occasion for trying to bridge the communication gap between two great traditions of legal thinking, namely the Anglo-Saxon analytical legal philosophy, stemming mainly from the works of Jeremy Bentham, John Austin, and H.L.A. Hart, and the Continental General Theory of Law, whose founding fathers were Hans Kelsen, Alf Ross, Norberto Bobbio, and Genaro Carrió. Defeasibility has been a passionately discussed topic in both worlds, and, despite several widely known differences, one may find in both cultures and the corresponding legal orders that the treatment of legal defeasibility has shown more than one point of convergence, especially regarding certainty and flexibility in decision making based upon rules. This appeared to us to be an opportunity to rejuvenate what we may call the ‘spirit of Bellagio’, an opportunity which could not be passed by. Let us elaborate.

In 1960 a conference on legal positivism was held in Bellagio, a wonderful town on Lake Como, under the auspices of the Rockefeller Foundation.¹² It was the first time that Anglo-American and Continental jurists came together ‘to work towards the clarification of a subject of common interest in the field of jurisprudence’. This happened just two years after the publication of Hart’s manifesto *Positivism and the*

¹⁰ B. Chapman, ‘Defeasible Rules and Interpersonal Accountability’, in this volume, ch. 22.

¹¹ *Ibid.*

¹² See the report of this conference in R.A. Falk and S.I. Shuman, ‘The Bellagio Conference on Legal Positivism’, *Journal of Legal Education*, 14 (1961–2), 213–28.

Separation of Law and Morals and the English version of Alf Ross's masterpiece *On Law and Justice*. In the following years, as an incarnation of 'the spirit of Bellagio', some of the all-time best achievements of legal positivism were published, including Hart's *The Concept of Law*, Bobbio's *Sul Positivismo Giuridico* (On Legal Positivism), Alf Ross's *Validity and the Conflict between Legal Positivism and Natural Law*, Scarpelli's *Cos'è il positivismo giuridico* (What is Legal Positivism), among many others.

This experience, though extremely stimulating and tremendously fruitful, was not repeated for many years and during the years in which the spirit of Bellagio grew dim, Anglo-American and Continental jurists became confined again to their respective domains. So, at the end of the seventies, Genaro Carrió, one of the most prominent members of the 'Analytical School of Buenos Aires' and translator into Spanish of *The Concept of Law*, observed: 'It is dismaying to see that Dworkin's detailed objections to legal positivism, as well as the rich literature that has ensued, have not yet gone beyond the cultural boundaries of English-speaking countries.'¹³ As anybody who is even vaguely familiar with present Continental jurisprudence knows, this is no longer the case. Dworkin's works have been widely commented upon and studied, as well as the literature that has stemmed from his evocative remarks. If this has happened, it is also owing to Carrió's challenging words. That said, however, it is worth noticing that many opportunities for common debate have been missed during recent years, and the two legal cultures have for the most part returned to their original separateness.

Whatever the reason for the cyclical separateness between Continental and Anglo-American jurisprudence, it is hard not to note that nowadays an important fracture (mostly of communication) exists between jurists from the two traditions.

The main outcome of this separateness seems to be, in addition to the lack of stimulating projects such as Bellagio's,¹⁴ that many important and original analyses of common topics, which are being studied in both legal cultures, are not considered (or not sufficiently considered) outside the world where they have been elaborated. This volume is an attempt to break this state of affairs, by collecting together some previously unpublished essays all dealing with an issue which is now being debated in both cultures, and by exchanging the main results of such investigations.

The Bellagio conference, of course, was held in the pre-computerized era, when meeting each other face-to-face was almost imperative if one wanted to exchange ideas prior to carrying out purportedly converging enquiries. In the age of e-mail this is no longer an imperative, and this book is primarily the product of a debate carried out by technological means. Fortunately, however, computers have not yet succeeded in superseding the pleasure and thrill of a 'live' discussion; this book is also the product of a conference on defeasibilism held in Oxford in March 2008, and jointly organized by Professor Richard Tur and the editors of this book, where a collection of works to appear in the present volume were presented and thoroughly analysed in the purest 'Bellagio spirit'.

¹³ G.R. Carrió, 'Professor Dworkin's views on Legal Positivism', *Indiana Law Journal*, 55 (1980), 211.

¹⁴ A successful attempt to change this state of affairs was the organization of the 'Neutrality and Legal Theory' Conference at the University of Girona (20–22 May 2010), whose speakers were Robert Alexy, Juan Carlos Bayón, Brian Bix, Eugenio Bulygin, Bruno Celano, Jules Coleman, Riccardo Guastini, Brian Leiter, Jorge Rodríguez, Fred Schauer, Scott Shapiro, and Wilfrid Waluchow.