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DIGNITAS

Revija za človekove pravice

Slovenian journal of human rights

ISSN 1408-9653

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Article information:

To cite this document:

Strahovnik, V. (2018). Defeasibility of Moral and Legal Norms, Dignitas, št. 53/54, str. 101-115.

Permanent link to this document:

<https://doi.org/10.31601/dgnt/53/54-7>

Created on: 07. 12. 2018

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Defeasibility of Moral and Legal Norms

Vojko Strahovnik

1. Introduction

In this paper I want to address the notion of defeasibility in moral and legal reasoning. The central focus is on defeasible principles or defeasible norms.¹ I first start with a brief analysis of different models of defeasible moral principles recently proposed within the scope of the discussion on moral particularism, namely the recently proposed models of: (a) ‘that’s it’ moral principles; (b) default moral principles; (c) hedged moral principles; and (d) defeasible moral principles.² The debate then shifts to the field of legal norms and locates similarities and differences between both domains. I look at some understandings and interpretations of defeasibility in legal reasoning, especially those that try to propose a wider understanding of legal defeasibility as covering the whole field of normativity.³ At the end of the paper, I discern several general features of defeasibility models for normativity-related domains and point to central features of defeasibility that they share.

¹ Defeasibility can be regarded as a feature of norms, principles, rules, standards, reasoning, argumentation, concepts, and conclusions. In this paper, (unless indicated otherwise) I regard it as a feature of norms both moral and legal.

² Holton, *Particularism and Moral Theory: Principles and Particularism*, *Proceedings of the Aristotelian Society*, 2002, pp. 191–209; McKeever and Ridge, *Principled Ethics: Generalism as a Regulative Ideal*, New York, 2006; Väyrynen, *A Theory of Hedged Moral Principles*, in: Shafer-Landau (ed.) *Oxford Studies in Metaethics*, 2009, pp. 91–132; Lance and Little, *From Particularism to Defeasibility in Ethics*, in: Lance, Potrč and Strahovnik (eds), *Challenging Moral Particularism*, 2008, pp. 54–74.

³ Tur, *Defeasibilism*, *Oxford Journal of Legal Studies*, 2001, pp. 355–368; Celano, *True Exceptions: Defeasibility and Particularism*, in Ferrer Beltrán and Ratti (eds), *Essays on Legal Defeasibility*, forthcoming; Guastini, *Uklonljivost, vrednostne praznine in razlaganje* [Defeasibility, Axiological Gaps, and Interpretation], *Revus*, 2010, pp. 41–56.

2. Model of Defeasibility and Defeasible Principles in Moral Theory

Models of the defeasibility of moral principles were most recently developed within the debate on moral particularism that appeared with the work of John McDowell⁴ and especially Jonathan Dancy⁵, which questions the existence of moral principles, proposing instead an understanding our moral reasoning as essentially connected with our discernment of moral reasons in each particular situation and forming a judgment based on that. The current state of affairs in the debate on particularism is such that some opinions of the proponents and opponents seem to converge in the recognition that we must accept some sort of moral generalities, although there are differences about the nature of such generalities.⁶

Initially the basic argument behind particularism was the idea of the holism of reasons or context-sensitivity of reasons, i.e. that the moral import of a given feature of action depends on the context in such a way that we cannot predict its functioning from one situation to another.⁷ This precludes the formulation of exceptionless moral principles linking features of our actions with their moral import or status. One of the important shifting points in the debate was the recognition that this context-sensitivity (holism) of reasons does not necessarily imply the impossibility of general moral principles and that the two questions, namely (i) the structure and functioning of reasons, and (ii) the possibility of general principles, rules and norms must be separated.⁸

The debate therefore takes place on both levels, one being the level of moral reasons and the other the level of moral generali-

⁴ McDowell, *Mind, Value, and Reality*, Cambridge, MA, 1998.

⁵ Dancy, *Ethical Particularism and Morally Relevant Properties*, *Mind*, 1983, pp. 530–47; Dancy, *Moral Reasons*, Oxford, 1993; Dancy, *Ethics without Principles*, Oxford, 2004.

⁶ See Strahovnik, Introduction: Challenging Moral Particularism, in: Lance, Potrč and Strahovnik (eds) *Challenging Moral Particularism*, New York, 2008, pp. 1–11; Strahovnik, Raz on Reasons, *Principles and Guiding*, *Dignitas*, 2011, pp. 118–131.

⁷ Dancy, 1993; Dancy 2004.

⁸ See Holton 2002 and McKeever and Ridge 2006. Sensitivity to context could be captured in a set of general moral principles that would track exactly this sensitivity. If one wants to argue for particularism from holism an additional thesis must be introduced in the argument, namely that the context-sensitivity of reasons is 'uncodifiable', which is what particularism still wishes to establish. This really gives us particularism, but the burden of proof is now shifted towards arguing for this additional thesis. (Some particularists do not base their argument for particularism on holism or reasons, e.g. Thomas (2011) argues from the non-monotonicity of practical reasoning to moral particularism.)

ties (moral norms, principles, rightness, obligation). What we are therefore left with are four distinctive views.

| | | |
|-------------|--------------------------|---------------|
| NORMS/RULES | Particularism | Generalism |
| REASONS | Variabilism ⁹ | Invariabilism |

The first two views pertain to the level of moral principles and the latter two to the functioning of moral reasons from situation to situation. Moral particularism can be characterised by a negative attitude to moral principles and generalism on the other hand as seeing principles as basic for moral reasoning and morality as such. Variabilism can be defined as a view that the moral import of a given feature of action (reason) can vary from case to case; invariabilism thus claims that a feature has the same moral relevance whenever it is instantiated.

This separation into two domains, namely that of norms and of reasons, now also allows for the construction of ‘mixed’ theories, namely: (i) variabilistic generalism; and (ii) invariabilistic particularism.

| | | |
|---------------|--------------------------------|-----------------------------|
| | GENERALISM | PARTICULARISM |
| INVARIABILISM | traditional moral theories | ‘non-monotonicity’ theories |
| VARIABILISM | theories of ‘defeasible norms’ | moral particularism |

One of the main motivations behind attempts to argue against traditional moral particularism was the worry about the flattened moral landscape that was raised in a similar manner by several authors¹⁰ and can be summarised in the following way. Given the

⁹ 1 Instead of talking about the holism of moral reasons, I focus here on the variability of those reasons. Holism is a broader view that can encompass different claims, namely: (i) the context-sensitivity of moral relevance (a feature is a reason in one case, but not in another); (ii) the variability of moral polarity (a feature is a reason for an action in one case and a reason against in another); (iii) the variability of the strength of reason (the strength of a reason varies from case to case); (iv) organicity (reasons (for and against an action) do not add up in a simple, additive way); and (v) that the set of morally relevant features of actions is open. Further, holism must delimit the scope of its claims (do all reasons vary with context or just some?) and strength (e.g. a strong holism would claim that any change in the context necessarily affects the functioning of a reason). Dancy (2004) also distinguishes between variability that pertains to the nature of a reason and variability that pertains to the content of a reason; he argues that despite the variability of reasons some reasons are such that are invariable (e.g. killing an innocent human being against his/her will), but thus is due to their content and not due to their nature as (invariable) reasons.

¹⁰ McNaughton and Rawling, *Unprincipled Ethics*, in: Hooker in Little (eds), *Moral Particularism*, Oxford, 2000, pp. 256–75; Crisp, *Particularizing Particularism*, in: Hooker in Little (eds), *Moral Parti-*

holism of reasons the set of morally relevant features of actions is open; therefore any feature can be morally relevant and can stand as a reason for or against an action. Further – given the particularistic thesis – this set of features cannot be ordered by general principles, since the moral relevance varies from case to case. But why does morality on the other hand seem to be ordered in this manner? Why do we so often think that the morally central features have to do e.g. with causing pain and suffering, sincerity, honesty, the keeping of promises, benevolence, dignity of persons etc.? In more general terms, we can specify this concern in a way that one must find a middle way between the traditional model of exceptionless principles and a pure discernment theory that sees moral judgments as similar to the perception of the moral status of acts in each particular situation. These alternative approaches employ the notion of defeasibility.

The bulk of the more recent debate has thus dealt with a way to combine the variability of reasons with some kind of ethical generalities, precisely to avoid a flattening of the moral landscape and to preserve an initially appealing intuition that morality has to do with principles, while at the same time accommodating the variability of reasons that could represent an exception to moral principles. It seems that the overall dialectics is thus the following. Variabilism does not imply or even support moral particularism. Variabilism is nonetheless an appealing position that moral particularism pointed out. One should then find a way to capture this variability of moral reasons by a set of moral principles that can accommodate this context-sensitivity of reasons and explain all the examples of variance that particularism exposed.

3. Soft or Defeasible Moral Principles

A number of approaches have been put forward recently to resolve the issue of the flat moral landscape, many of them sharing the characteristics of offering a type of moral generalities that would be sufficient to explain the basic concern behind it and at the same time allowing for the variability of moral reasons.

cularism, Oxford, 2000, pp. 23–47; Bakhurst, *Ethical Particularism in Context*, Hooker and Little (eds), *Moral Particularism*, Oxford, 2000, pp. 157–77; McKeever and Ridge, *What Does Holism Have to Do with Moral Particularism?*, *Ratio*, 2005, pp. 93–103.

In what follows I deal with four such attempts to provide holism-friendly (or variabilism-friendly) moral principles (also labelled soft principles or defeasible principles), namely the model of: (a) *‘that’s it’* moral principles; (b) *default* moral principles; (c) *hedged* moral principles; and (d) *defeasible* moral principles as *soft laws*.

| | |
|-------------------------------|---|
| <i>‘That’s it’</i> principles | For all actions x: if x is A & that’s it, then x is wrong/you should not do x. |
| <i>Default</i> principles | For all actions x: if (i) x is A; and (ii) no other feature of the situation explains why x being A is not a moral reason not to perform the action; and (iii) any reasons (considered collectively) to x do not outweigh the fact that x is A, then x is wrong by virtue of being A. |
| <i>Hedged</i> principles | For all action x: if x is A, then x is W (morally wrong) by virtue of being A, provided that x instantiates the designated relation R for A and W. |
| <i>Defeasible</i> principles | Defeasibly, for all actions x: if x is A, then x is wrong/you should not do x. In privileged conditions, for all actions x: if x is A, then x is wrong/you should not do x. |

(a) *‘That’s it’ moral principles*: *That’s it* moral principles are part of principled particularism, a suggestion put forward by Richard Holton (2002). These *that’s it* moral principles escape what Holton calls the supersession argument, that is the argument that we can always provide an exception to a given moral rule/norm by pointing to some further possible feature of an action that would overturn our original judgment about a case.¹¹ For example, killing somebody is wrong, but not if it is done in justifiable self-defence. Therefore, we can devise moral principles that would explicitly exclude any further feature of actions that might provide such exceptions. Instead of *For all actions x: if x is a killing of a person* ® *you should not do x*, we can devise a modified principle *For all actions x: if (x is a killing of a person & That’s it)* ® *you should not do x*, where the *that’s it* functions so as to exclude any other relevant moral considerations, including that no other moral principles apply in the given case.¹² Further, when we find an exception that

¹¹ “[G]iven any action whose features are described in non-moral terms, and a principle that says that an action having those features will be good, we can always think of some further feature which is such that, were the action to have that feature too, it would become a bad action. So the principle is inadequate as it stands. It must be modified, or a further principle must be given outlining the exception. But once we have done that an exception to the amended principle(s) will be found, and we will be forced to amend again. And so on” (Holton, 2002, p. 4).

¹² Holton specifies the *that’s it* premise in the following way: “There are no further relevant moral prin-

would otherwise overturn the original, unmodified principle, we can construct another moral principle that applies in all similar cases, e.g. *For all actions x: if (x is a killing of a person & it is a case of self-defence & That's it) ® you are permitted to do x*. What we end up with a view according to which there is always a finite set of moral principles that entails and justifies a given moral verdict.¹³

(b) *Default moral principles*: Default moral principles figure in an attempt by McKeever and Ridge to formulate an intermediate position labelled generalism as a regulative ideal. McKeever and Ridge argue that the possibility of moral knowledge in a particular case presupposes the availability of a certain kind of moral principles – default principles. These principles emerge out of recognition of a reason for action, i.e., a descriptive feature of a situation that favours or disfavors a certain action; together with a presupposition that there are no further morally relevant features present in a situation this yields a moral judgment. All this invites the possibility that this structure supporting reasons can be captured by a default principle. Such principles have the following general form:

*For all actions x: if (i) x is A; and (ii) no other feature of the situation explains why x being A is not a moral reason not to perform the action; and (iii) any reasons (considered collectively) to x do not outweigh the fact that x is A, then x is wrong by virtue of being A.*¹⁴

We can rehearse a similar example as the one above. If an action is a killing of an innocent human being and no other feature of this action explains why this fact is not a moral reason not to perform the action and any reasons for this action do not (taken collectively) outweigh the fact that it is a killing of an innocent human being, then this action is wrong by virtue of being a killing of an innocent human being. (Instead of rightness and wrongness

ciples and non-moral facts; i.e. there is no true moral principle and set of true non-moral sentences which supersede those which appear in this argument" (Holton, 2002, p. 6).

¹³ Cf. Holton, 2002.

¹⁴ McKeever and Ridge, 2006, p. 118. And here is the principle that considers the moral rightness of an action: For all actions x: if (i) x is B; and (ii) no other feature of the situation explains why x being B is not a moral reason to perform the action; and (iii) any reasons (considered collectively) to x do not outweigh the fact that x is B, then x is right by virtue of being B.

one could bring into play any other thin verdictive moral predicates like obligatory. We can also formulate a model of default moral principles for ‘being a reason’, e.g.: *For all actions (x) and facts (F): If F is a fact to the effect that x would be pleasant and no other feature of the situation explains why F is not a reason to x, then F is a reason to x*¹⁵).

We can see that default principles follow the idea already present in the *that’s it* principles since they delimit the scope of morally relevant considerations in situations in which the principle applies, thereby eliminating the possibility of any exceptions to them by putting them outside the scope of principles. (What is different from the *that’s it* principles approach is that the default principles more closely follow the structure of moral relevance defended by Dancy in terms of the difference between reasons (favourers) and enablers¹⁶, since we can see e.g. that the absence of specific disablers is ensured by condition (ii) and the presence of a general enabler in (iii).) Both models are similar in that they devise moral generalities that are compatible with the context-sensitivity of the moral import of features of acts by ‘disciplining’ it and breaking the moral import of considerations into several invariable pieces.

The following two approaches are somewhat different in this respect since they do not explicitly exclude variability from the principles by referring the enablers and disablers of reasons.

(c) *Hedged moral principles*: Hedged moral principles include the “normative bases” of reasons inside moral principles.¹⁷ An example of a hedged moral principle is: *For any action x, if x is F, then x is M by virtue of being F, provided that x instantiates the designated relation R for F and M* (where F stands for a reason

¹⁵ Such default principles emerging out of judgments about particular cases are the basis for McKeever and Ridge’s defence of moral generalism. After they defend them against various objections, they take a step forward to unhedged principles. In order to defend generalism against particularist claims, they must show that the set of morally relevant features is limited. The starting point of these arguments is practical wisdom – a practically wise person, according to McKeever and Ridge, is someone who has successfully internalised a finite and manageable set of unhedged moral principles that codify morality. Given a plausible assumption that moral thought and judgment presuppose the possibility of practical wisdom, a defender of generalism now has an argument against (anti-transcendental) particularism.

¹⁶ A favourer is a feature that favours a given action, while the enabler (or enabling condition) enables the favourer to favour an action and stand as a reason for the action. E.g. the fact that I made a promise to do A favours this action, while further facts that my promise was not given under duress and that I am able to do A function as enablers (Dancy 2004: 38–45).

¹⁷ Väyrynen, *Moral Generalism: Enjoy in Moderation*, Ethics, 2006, pp. 707–41; Väyrynen, *Usable Moral principles*, in: Lance, Potrč and Strahovnik (eds) *Challenging Moral Particularism*, New York, 2008, pp. 75–106; Väyrynen, 2009.

(e.g. stand for causing pain), M for moral evaluation (e.g. wrongness) and R for the relation specifying the normative base of the reason (e.g. failing to exhibit the kind of concern or respect which persons merit¹⁸). Väyrynen claims that just what relation R is a substantive moral question and we can even avoid the specific reference to it if we formulate a hedged principle as follows: *For any action x, if x is F, then x is M by virtue of being F, provided that x instantiates the designated relation for F and M*; e.g. Any act of causing pain is *pro tanto* wrong by virtue of its causing pain, provided that the act instantiates the designated relation for *causing pain* and *being pro tanto wrong*. We can reformulate this proposal in terms of suitable conditions. F is a reason for action A when the conditions are suitable (when the presence of both overrides and underminers is ruled out), which means that conditions are suitable for F with respect to being M if and only if the relation responsible for F's having the normative force it does (if any) is the designated relation for F and M.¹⁹

The following model that will be presented also employs a similar notion of privileged conditions in which the reason 'behaves normally', as opposed to the conditions that are not privileged and where it can vary its moral relevance.

(d) *Defeasible moral principles as soft laws*: A model of defeasible principles is defended in a series of articles by Maggie Little and Mark Lance.²⁰ Their model is clearly committed to variabilism since it incorporates what they call *deep moral contextualism*: right- or wrong-making, and good- or bad-making features of actions vary with context in ways that preclude codification by exceptionless principles. Lance and Little argue that the full-fledged recognition of exceptions to moral generalisations does not mean that one must accept a picture of morality as being entirely free from any important kind of generalities. The sharp divide between generalism and particularism is a consequence of too strict and narrow views about the nature of explanation. According to these views,

¹⁸ In the case of a killing of an innocent man this basis could be the following thought. "I propose, as first approximation, that one's judgment is guided by one's conception of the basis for the wrongness of killing. Suppose I believe that what is fundamentally wrong about killing a person, when it is wrong, is that it frustrates the victim's prudential interests in particular, her interest in continuing to live" (Väyrynen, 2009).

¹⁹ Väyrynen, 2009.

²⁰ Lance and Little, "Particularism & Anti-Theory", in Copp (ed.) *The Oxford Handbook of Ethical Theory*, 2005, pp. 567–9; Lance and Little, "Defending Moral Particularism", in: Dreier (ed.) *Contemporary Debates in Moral Theory*, 2006, pp. 305–21; Lance and Little, "Where the Laws Are", in: Shafer-Landau (ed.) *Oxford Studies in Metaethics*, Vol. II, 2007, pp. 149–171; Lance and Little, 2008.

genuine explanatory reasons must be governed by universal exceptionless principles. An alternative model of explanation figuring exceptions is offered, a model that covers non-moral ground as well. Features of such acts as promise-keeping, lying, inflicting pain or being kind are building blocks of everyday morality that entertain an intimate connection with their moral import (as core moral reasons that can unflatten the moral landscape). Those are genuinely explanatory features for the moral status of acts and may be captured within defeasible generalisations. Defeasible principles (e.g. *Defeasibly, lying is wrong*; or *Defeasibly, causing pain is wrong*) are introduced through the notion of privileged conditions. If we want to single out a connection between a particular descriptive feature of such act as “causing pain” and between the negative moral import of this feature that is neither necessarily universal nor pervasive or usual, we can do this by saying that defeasibly, causing pain is wrong-making. When a defeasible generalisation faces an exception something has gone off course – the context has relevantly changed in respect to privileged conditions and our moral understanding must track this.

Those are the four most recent attempts to capture the notion of defeasibility as it pertains to moral principles and rules. We can see that all models tend to accommodate the alleged exceptions to the moral norms and thus in principle allow that the moral import of a given feature of action varies from case to case. We can also see that one of the differences between the mentioned models is that the latter two kinds of soft principles differ from the first two in a sense that they do not exclude ‘exceptions’ to the principles in advance. These are sorted out later, when we e.g. must make a judgment on whether the case in hand really instantiates the relevant normative basis or if the privileged conditions are in force. Defeasibility allows for variability of moral reasons.

4. Defeasibility in Law and Defeasible Legal Norms

In legal theory and legal philosophy the debate on defeasibility became prominent with H. L. A. Hart’s introduction of “open texture” concepts and the defeasible character of at least some legal rules. It seems that Hart’s argument represented a serious blow to the traditional pure deductive model that considered a legal system “*as a complete normative system containing a multitude of*

legal rules and standards plus some fundamental legal principles and doctrines” within which it was possible “*to logically deduce the correct or sound legal decisions in any given case*”.²¹ Since one of the presuppositions of this model is that in principle it is always possible to formulate clear necessary and sufficient conditions for the application of a given legal rule, the ‘open textured’ nature of them now has put this under question since Hart meant with it not only a simple claim that at least some legal norms have exceptions, but that it is “*theoretically impossible to enumerate all the exceptions and state all the sufficient conditions for the rule’s application*”.²² Thus one can summarise the basic foundation of defeasibility as an “*idea that law, or its components, are liable to implicit exceptions, which cannot be specified ex ante (viz. before the law’s application to particular cases)*”.²³

For example, regarding these exceptions in relation to the legal concept of contract Hart claims that “*no adequate characterization ... could be made without reference to these extremely heterogeneous defences in the manner in which they defeat or weaken claims in contract. The concept is irreducibly defeasible in character and to ignore this is to misrepresent it*”.²⁴ This in principle possibility of always discovering new exceptions²⁵ to the rule precludes the final delimitation of necessary and sufficient conditions, but at the same time the concept remains the same; the newly discovered exception “*is capable of being absorbed as an exception to the rule without affecting the basic meaning of the rule*”.²⁶ As a consequence, an exception does not represent a

²¹ Boonin, *Concerning the Defeasibility of Legal Rules*, *Philosophy and Phenomenology Research*, 1966, p. 371. Bix (forthcoming) on the other hand argues that open-textured nature of legal concepts/norms and defeasibility are two independent phenomena and “only broadly analogous, in that both create circumstances in which judges have discretion to create new law or exceptions to existing law”.

²² Boonin, 1966, p. 372.

²³ Beltrán and Ratti, “Legal Defeasibility: An Introduction”, in: Beltrán and Ratti (eds) *Essays on Legal Defeasibility*. Oxford University Press, forthcoming.

²⁴ Hart, “The Ascription of Responsibility and Rights”, in: Flew (ed.) *Logic and Language*, Oxford, 1955, p. 150.

²⁵ Cf. the conclusions of Holton: “Principled particularism provides us with just the resources we need to bring the two theses together. We can think of legal decisions as always containing implicit That’s it clauses. When a distinction is made in a subsequent judgement, it is typically that clause that is denied. Indeed what better way of understanding the legal maxim, mentioned above in a non legal context, *Exceptio probat regulam in casibus non exceptis*: the exception proves the rule in the case not excepted? When we explicitly identify a case as an exception to a rule, we invoke That’s it. But by treating it as an exception, rather than using it to show that the rule is wrong, we thereby implicitly reaffirm the rule for the cases in which That’s it is not triggered” (Holton, 2002, p. 209).

²⁶ Boonin, 1966, p. 375. Cf. Helm, *Defeasibility and Open Texture*, *Analysis*, 1968, pp. 173-175.

radical change in the concept or in the rule itself. Or as Celano²⁷ puts it: *“Being defeasible, the norm somehow survives the impact such recalcitrant cases. Though somehow revised, amended, qualified, the norm, it is assumed, remains in place: it is still the same norm”*.

In what follows I briefly present the understanding of deferability and defeasible legal norms as formulated by Celano²⁸, Tur²⁹ and Guastini³⁰.

Celano closely relates defeasibility with the so-called “identity assumption”, that is the assumption that the exceptional case leaves the norm intact. One of the most obvious and straightforward options to address the relationship between norms and exceptions is the specificationist approach. Every time different legal norms conflict and it seems that we will have to make an exception, the proper way to proceed is to conclude that all *“we have to do is specify (that is, suitably restrict the domain of application of) at least one of the norms, or the relevant norm, so that, thanks to the inclusion of further conditions within its antecedent ... the conflict – or the unsatisfactory verdict – eventually vanishes”*.³¹ Specification reveals itself as the middle and most reasoned way between the pure subsumption model on one hand and the intuitive balancing of each particular case on the other. But the problem of this approach lies in the in-principle possibility of never being able to specify all the exceptions and thus also the claim that we are merely amending the same norm seems hollow according to Celano: *“Achieving a fully specified ‘all things considered’ norm, thereby ruling out the possibility of further, unspecified exceptions (apart from those already built into the norm itself) would require us to be in a position to draw a list of all potentially relevant properties of the kind mentioned. And this, we have seen, is misconceived”*.³²

He instead proposes to look at the alternative approach to defeasibility which regards exceptions as already implicitly included or provided for by the norm. A specified norm is thus just a sort of shorthand for the more complex norm that lies in the background.

²⁷ Celano, forthcoming.

²⁸ Ibid.

²⁹ Tur, 2001

³⁰ Guastini, 2010

³¹ Celano, forthcoming

³² Ibid.

But this approach fails for the same reasons since it understands exceptions not as real exceptions – not as real holes in the norm – but as some sort of *prima facie* exceptions that allow for the filling in of the holes. He then proposes that one must accept some sort of particularism in order to do proper justice to the (possibility of) genuine exceptions. (This will not be our interest here further since the central issue is the notion of defeasibility of the norms). In short, he proposes understanding “*norms as defeasible conditionals liable to true exceptions, i.e., conditionals such that the consequence follows, when the antecedent is satisfied, under normal circumstances only*”.³³ This notion of normalcy (normal circumstances) is very close to the notion of privileged conditions for a norm as developed by Lance and Little.

Similarly, Tur starts with the recognition that the open-textured nature of moral concepts and norms does not merely mean that those norms have exceptions but that defeasibility claim goes beyond that, e.g. claiming that the set of possible exceptions is open. He distinguishes between three different versions of the rule-like formulae. The first is the “*canonical form of the Kelsenian norm*”³⁴: *If A, then B ought to be*, which is clearly defeasible and allows for no exceptions. The second form seemingly allows for them since we can state it as: *If A, then B ought to be, unless x, y, z, ...* that is supposed to be complemented by a list of exceptional cases. But in fact this type of norm can easily be transformed into the first type since we can include all the exceptions in the antecedent.³⁵ This brings Tur to the third form of legal rules that are genuinely open-ended: *If A, then B ought to be, unless there is an overriding reason to the contrary*.³⁶ What could be the source of these reasons? Tur understands the considerations that could defeat or override the norm as arising out of the basic evaluative reasons or grounds such as “*mercy, justice, equity, purpose, or rights*”.³⁷ What we see here is that Tur is not so much building on the notion of the exception to the rule/norm, but on the case that moral rules are capable of being overridden. At the end, he specifies the general formula as follows:

³³ Ibid.

³⁴ Tur, 2001, p. 357

³⁵ Ibid., p. 359

³⁶ E.g. “If $a + b + c$ exists and neither x , y or z is present, then a contract ought to be recognized to exist, unless it would be unconscionable (or otherwise intolerably unjust) to do so” (Ibid., p. 362)

³⁷ Ibid., p. 359

If A (legally defined facts) is, then B (legally determined consequences) ought to be, *unless* there is EITHER (1) an operative exception, being (a) a known or established exception or (ii) an exception yet to be established; OR (2) an overriding consideration, including (iii) equity and/or justice, (iv) policy, (v) mercy, (vi) purpose, (vii) rights, or (viii) a residual category of ‘damn good reason’ or ‘compelling objection’.³⁸

The third model of defeasibility of legal norms is that of Guastini.³⁹ Guastini relates defeasibility with notions of axiological gaps and interpretation. The starting point is the understanding of a defeasible norm as a norm that is susceptible to implicit exceptions, which cannot be explicitly stated in advance, which in turn means that it is impossible to delimit circumstances that would represent genuine sufficient conditions for its use⁴⁰ (Guastini 2010: 43). Next, Guastini understands defeasibility and axiological gaps as phenomena related to the level of interpretation and not of normative systems. When some norm as defeasible allows for an exception, this creates an axiological gap (that some state of affairs is excluded from the norm and not regulated by some other norm). What emerges is an axiological gap and not a genuine normative gap since we are not dealing with the absence of the normative regulation of a given field, but with a gap that appeared as a consequence of our interpretation of the norm. Most often a defeasibility and axiological gap appears due to the well-known phenomena of the restrictive interpretation of a norm that is an argumentative technique of distinguishing between different subsets of different kinds of states of affairs supposedly governed by the same norm. For Guastini, defeasibility and axiological gaps are related to the axiological judgments of the interpreters of norms. Further, defeasibility is not a special characteristic of the legal principles; it is not an objective property of those norms that is already there before we start to interpret them. Axiological judgments employed within the interpretation are thus not the consequence of the defeasibility and a gap, but their origin or a cause. Defeasibility is a consequence of the act of interpretation.

³⁸Ibid., p. 368

³⁹Guastini, 2010

⁴⁰Ibid., p. 43

5. Conclusion

We can summarise the main lessons from the analysis of the proposed defeasibility models in the following way. Two features that are central for defeasibility and defeasible norms (i.e. the interesting kind of defeasibility that goes beyond the specificationist approach to norms) are: (a) a genuine exception condition; and (b) an identity condition. A defeasible norm must allow for genuine exceptions that can be made in the light of e.g. the specificity of the case in hand. And a defeasible norm must survive beyond this case of making an exception still remaining the same norm as before. One of the ways in which the notion of defeasibility would be able to accommodate both of these conditions and requirements is an account that includes an appeal to a wider set of evaluative, axiological or normative backgrounds of basic moral and legal considerations. We saw that the Lance and Little model of defeasibility is an attractive model, but it has to be understood against a background of basic reasons that we appeal to in our interpretation of a moral norm. Their suggestion is close to what Tur suggests, but has an advantage of presenting some more tools for our understanding of defeasibility (Lance and Little employ models of paradigm/riff, justificatory dependence and idealisation/approximation and similar). In either case, it seems that defeasible norms must appeal to some wider set of basic moral or legal considerations that lie in the background and are at the same time such that they cannot be fully specifiable. This brings us back to the debate on particularism as closely related to the uncodifiable nature of normativity.

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