DIGNITAS
Revija za človekove pravice
Slovenian journal of human rights
ISSN 1408-9653

Legal Positivism and the Defeasibility of Legal Norms
Vojko Strahovnik

Article information:
To cite this document:
Strahovnik, V. (2018). Legal Positivism and the Defeasibility of Legal Norms, Dignitas, št. 59/60, str. 219-234.

Permanent link to this doument:
https://doi.org/ 10.31601/dgnt/59/60-16

Created on: 07. 12. 2018
To copy this document: publishing@nova-uni.si

Legal Positivism and the Defeasibility of Legal Norms

Vojko Strahovnik[1]

ABSTRACT

The paper discusses the relationship between the defeasibility of legal norms and legal positivism. It begins by introducing the concept of defeasibility. By using defeasibility in the legal domain one usually aims to stress either the defeasible nature of law (legal norms) itself as the admitting of exceptions that cannot be fully spelled out and specified in advance (a norm-based account of legal defeasibility) or defeasibility in legal reasoning as a consequence of the interpretation of legal provisions or concepts (an interpretation-based account of legal defeasibility). Several different models or interpretations of defeasibility are discussed in order to get a better grip on the issue. What they have in common is that they presuppose a value-laden background of defeasible norms that can lead towards making an exception to the norm. This raises an interesting issue about whether such defeasibility of a legal norm is compatible with legal positivism. After presenting several distinct understandings of legal positivism, the paper argues that the existence of such presupposed values and defeasibility of legal norms is not compatible with strong and exclusive legal positivism.

Key words: legal positivism, legal norms, defeasibility, values, ethics.

[1] Faculty of Government and European Studies, Kranj, Faculty of Theology, University of Ljubljana.

Pravni pozitivizem in uklonljivost pravnih norm

POVZETEK

Članek se ukvarja z odnosom med uklonljivostjo pravnih norm in pravnim pozitivizmom. Na začetku je predstavljen sam pojem uklonljivosti. Na področju prava z uklonljivostjo običajno merimo na uklonljivo naravo prava oziroma pravnih norm kot takšnih, ki dopuščajo izjeme, in sicer na način, da jih ne moremo v celoti vnaprej opredeliti in določiti (razumevanje uklonljivosti kot uklonljivosti norm samih) ali pa uklonljivost razumemo kot posledico interpretacije pravnih določil ali pojmov (razumevanje uklonljivosti kot izvirajoče iz interpretacije norm). Da bi se lažje približali jedru razprave, je predstavljenih več različnih modelov in interpretacij uklonljivosti,. Kar imajo ti modeli in interpretacije skupnega, je predpostavka vrednostno utemeljenega ozadja, ki nam omogoča, da normi določimo izjemo. To vzpostavlja zanimivo vprašanje, ali je takšno razumevanje uklonljivosti združljivo s pravnim pozitivizmom. Po razlikovanju med več vrstami pozitivizma zagovarjamo prepričanje, da je predpostavka omenjenega vrednostnega ozadja nezdružljiva s strogim oziroma izključujočim pravnim pozitivizmom.

Ključne besede: pravni pozitivizem, pravne norme, uklonljivost, vrednote, pravo

Introduction to defeasibility

The concept of defeasibility is a multi-faceted concept that is used in different senses and is related to various subjects. What do we in fact mean when we say that e.g. a certain norm, rule, reasoning or concept is defeasible? The simplest idea that can initially assist us is that defeasibility is closely linked to the presence of exceptions, i.e. cases that on one hand fall under a certain norm, rule or concept, but at the same time have unbefitting normative consequences given which we tend to exclude them from falling under these norms, rules or concepts.

There are several open questions or dimensions in relation to defeasibility. First, there are a number of candidates for being de-

feasible, e.g. concepts, norms, rules, standards, principles, reasoning, facts, opinions, statements, decisions, regulations etc.[2] Next, there are open questions about the origins, nature and scope of defeasibility. Finally, there is a debate about the consequences defeasibility holds (or would hold) for legal theory as well as practice.

In what follows I focus on the defeasibility of norms. A norm is defeasible if it allows for exceptions, meaning there is a case that the norm should supposedly cover, but it proves otherwise. We must add at least two more characteristics. First, a defeasible norm remains the same and retains its normative power even where we are able to find an exception to it; is this sense, it 'survives' this exception and can hold for all further, non-exceptional cases. Second, a defeasible norm remains in the 'normative space' even in the case of an exception and can e.g. indirectly influence the final normative solution.

The conceptual space around defeasibility is usually inhabited by a cluster of related concepts, including that of indeterminacy, vagueness, normalcy, and open-texture. Let us try to clear the air around these a little.

Defeasibility is often associated with indeterminacy in the sense that a given norm or set of norms does not provide a definite 'normative solution' for all cases. Defeasible norms are supposedly vague, either as a whole or regarding particular phrases or formulations they contain. Next, a common approach to the defeasibility of norms is that they are characterised as holding only in normal, ordinary or paradigmatic cases and circumstances.

Based on these characterisations, it is clear that the use or application of such defeasible norms in individual cases requires a good judgment and refined interpretation. In this vein, the defeasibility of norms is not merely due to their incorrect or vague formulation that could in principle be resolved or more clearly spelled out. Defeasible norms are also not some kind of 'rules of thumb' we can use most of the time, but which we are also able, if necessary, to specify and turn into an exceptionless norm; to understand the defeasibility of norms in this way would mean not taking them seriously enough.

Sometimes, the term defeasibility is linked to the famous Harti-

[2] P. Chiassioni, Defeasibility and Legal Indeterminacy. In: J. Ferrer Beltrán and G. B. Ratti, eds. The Logic of Legal Requirements. Essays on Legal Defeasibility, Oxford 2003, 162.

an concept of "open texture"[3], in the sense that it is impossible to clearly specify all the necessary and sufficient conditions for the use of a given concept or a given norm. Along these lines, Hart e.g. in relation to the concept of a contract claimed that we cannot put forward an "adequate characterisation of the legal concept of a contract [...] without reference to these extremely heterogeneous defences [facts, which may lead to invalidation or cancellation of the contract, e.g. the concealment of facts, coercion, immorality etc.: n. VS], and the manner in which they respectively serve to defeat or weaken claims in contract. The concept is irreducibly defeasible in character and to ignore this is to misrepresent it".[4] The defeasibility of norms is sometimes also associated with the presence of explicit or implicit conditions which we can add to the norm, e.g. in the form of a clause "unless a, b, c, ...", or with which we can limit the norm to a given set of cases in advance.

The defeasibility of legal norms and models of defeasibility

The debate on the relationship between general legal norms and particular cases from our daily lives has been present in philosophy nearly since its beginnings. In Plato's dialogue *Statesman,* we can follow the debate between Socrates and a young stranger from Elea on what defines a good statesman who would regulate public affairs justly, and the conversation then moves to the question of whether it is possible to rule and govern without laws. The stranger, while trying to defend the affirmative answer to this question, proposes the idea that it is better that a "royal man" governs instead of laws, since "[l]aw can never issue an injunction binding on all which really embodies what is best for each: it cannot prescribe with perfect accuracy what is good and right for each member of the community at any one time. The differences of human personality, the variety of men's activities and the inevitable unsettlement attending all human experience make it impossible for any art whatsoever to issue unqualified rules holding good on all questions at all times".[5] He continues by saying that

[3] H.L.A. Hart, The Concept of Law, Oxford, 1961, 120–132.
[4] H.L.A. Hart, The Ascription of Responsibility and Rights, Proceedings of the Aristotelian Society, 49 (1949), 176.
[5] Plato, Statesman, 294a–b (transl. J.B. Skemp, Bristol, 1952), quoted in F. Schauer, 2012, 78.

the one who governs will probably be unable to avoid any general law being put forward, and so one "will lay down laws in general form for the majority, roughly meeting the cases of individuals . . . under average circumstances", but nonetheless both Socrates and the stranger agree that if exceptions to those general norms were to emerge it would be unwise, unjust or even ridiculous not to correct those cases.[6]

Similar considerations can be found in Aristotle's *Nicomachean Ethics*. "The reason [i.e. that justice and equity are not quite the same thing, and that equity can be seen as a correction of legal justice; n. VS] is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of the practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission – to say what the legislator himself would have said had he been present and would have put his law if he had known."[7]

Such discussions focus on the relationship between general norms on one hand and particularities, peculiarities and exceptions on the other, but often such understanding of these exceptions is not radical enough since they are understood as a sheer consequence of underspecified or incomplete general norms. Among others, Dworkin maintains such an optimistic view: "Of course a rule may have exceptions. ... However, an accurate statement of the rule would take [these exceptions] into account, and any that did not would be incomplete. If the list of exceptions is very large, it would be too clumsy to repeat them each time the rule is cited; there is, however, no reason in theory why they should not all be added on, and the more there are, the more accurate is the statement of the rule".[8] Genuine defeasibility understood as

[6] Cf. F. Schauer, Is Defeasibility an Essential Property of Law? In: J. Ferrer Beltrán and G. B. Ratti, eds. The Logic of Legal Requirements. Essays on Legal Defeasibility, Oxford 2012, 78.
[7] Aristotle, Nicomechean Ethics, 1137a-b (transl. W.D. Ross).
[8] R. Dworkin, Taking Rights Seriously, London 1977, 24–25.

"the hard problem" goes beyond and includes genuine exceptions which are not such that they would already be properly included in a general norm and correctly specified.[9]

Within the field of legal theory and legal philosophy the debate on the defeasibility of legal norms intensified with Hart's notion of open-textured concepts and the supposedly resulting defeasibility of norms. With these ideas, Hart opposed a strictly deductive model of law "as a complete normative system containing a multitude of legal rules and standards plus some fundamental legal principles and doctrine" and within which it is possible to "logically deduce the correct or sound legal decision in any given case".[10] Since one of the key presuppositions of such a model is that it is at least in principle possible to identify and highlight the necessary and sufficient conditions for the application of legal norms, the open-texture nature of legal concepts brings troubles for it. With this, Hart aimed precisely at this presupposition, not merely highlighting that some legal norms may have exceptions, but a much stronger one "that it is theoretically impossible to enumerate all the exceptions and state all the sufficient conditions for the rule's application".[11] It is exactly in this vein that we can at the outset define the defeasibility of law as "the 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)".[12] This in principle possibility that one can always stumble upon a novel exception prevents the listing of all necessary and sufficient conditions, but the original concept and the related norm remain the same; each new exception "is capable of being absorbed as an exception to the rule without affecting the basic meaning of the rule".[13] Exceptions therefore do not lead to any radical changes or permutations of legal concepts or norms. As Celano highlights, "[b]eing defeasible, the norm somehow survives the impact of such recalcitrant cases. Though somehow revised, amended, qualified, the norm, it is assumed, remains in place: it is

[9] B. Chapman, Law Games: Defeasible Rules and Revisable Rationality, Law and Philosophy, 1998, 4, 448.
[10] L. G. Boonin, Concerning the Defeasibility of Legal Rules, Philosophy and Phenomenology Research, 1966, 3, 371.
[11] Ibid., 372.
[12] J. Ferrer Beltrán and G. B. Ratti, Legal Defeasibility: An Introduction. In: J. Ferrer Beltrán and G. B. Ratti, eds. The Logic of Legal Requirements. Essays on Legal Defeasibility, Oxford 2012, 1.
[13] L. G. Boonin, Concerning the Defeasibility of Legal Rules, Philosophy and Phenomenology Research, 1996, 3, 375; cf. P. Helm, Defeasibility and Open Texture, Analysis, 1968, 5, 173–175.

still the same norm".[14]

I now briefly turn to three models of the defeasibility of legal norms (Celano, Tur, Guastini). Bruno Celano[15] closely relates defeasibility with the so-called "identity assumption", namely the assumption that the exceptional case leaves the norm intact. One of the most obvious and straightforward possibilities to address the relationship between norms and exceptions is the specificationist approach. Each time different legal norms conflict and it seems that we will have to make an exception, this model suggests that 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".[16] 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".[17]

He instead proposes looking 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. 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. Thus one must accept some sort of particularism in order to do proper justice to the (possibility of)

[14] B. Celano, True Exceptions: Defeasibility and Particularism. In: J. Ferrer Beltrán and G. B. Ratti, eds. The Logic of Legal Requirements. Essays on Legal Defeasibility, Oxford 2012, 268.
[15] B. Celano, True Exceptions: Defeasibility and Particularism. In: J. Ferrer Beltrán and G. B. Ratti, eds. The Logic of Legal Requirements. Essays on Legal Defeasibility, Oxford 2012, 268–287.
[16] Ibid., 270
[17] Ibid., 276

genuine exceptions. This model of exceptions is complex and will not occupy our interest here further since the central issue is the notion of the defeasibility of norms. In short, Celano proposes an understanding of "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".[18]

Similarly, Richard Tur[19] 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 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"[20]: "If A, then B ought to be", which is clearly not 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.[21] 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".[22] What could be the source of these reasons? Tur understands them as considerations that could defeat or override the norm and which arise out of basic evaluative reasons or grounds such as "mercy, justice, equity, purpose, or rights".[23] What one can 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 of a defeasible norm as follows:

> If A (legally defined facts) is, then B (legally determined consequences) ought to be, unless there is EITHER (1) an operative exception, being (i) a known or established exception or (ii) an exception yet to be established; OR (2) an overriding

[18] Ibid., 285
[19] R. H. S. Tur, Defeasiblism, Oxford Journal of Legal Studies, 2001, 2, 355–368.
[20] Ibid., 357
[21] Ibid., p. 359
[22] 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
[23] Ibid., p. 359

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'.[24]

The third model of the defeasibility of legal norms is that of Riccardo Guastini.[25] Guastini relates defeasibility with notions of axiological gaps and interpretation. The starting point is an 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 use. 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). "Axiological gaps and defeasibility often look like two faces of the same coin. By defeating a rule one excludes from its scope certain fact situations (which on the contrary, according to a different interpretation, would actually be regulated by that rule). Sometimes, such fact situations appear to be regulated by other rules in the legal system, but in other circumstances this is not the case – those fact situations are not regulated by any rule at all. In such a case, there is a gap in the system. Therefore, by defeating a rule, a gap has been produced".[26]

What emerges is an axiological gap and not a genuine normative gap since we are not dealing with the absence of normative regulation of a given field, but with a gap that has appeared as a consequence of our interpretation of the norm. Most often a defeasibility and axiological gap appears due to the well-known phenomenon of the restrictive interpretation of a norm that is an argumentative technique for 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.

[24] Ibid., p. 368
[25] R. Guastini, Defeasibility, Axiological Gaps, and Interpretation. In: J. Ferrer Beltrán and G. B. Ratti, eds. The Logic of Legal Requirements. Essays on Legal Defeasibility, Oxford 2012, 182–192.
[26] Ibid., 187

Defeasibility is not a special characteristic of 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 some objective defeasibility of the rule itself or a genuine, interpretation-independent normative gap, but the origin or a cause of interpretative defeasibility. For Guastini, a literal interpretation is still an interpretation so there cannot be any neutral or value-free interpretation. Not only principles, but also rules can be defeated and therefore we cannot understand the presence of principles in the legal system as an origin of defeasibility. "Defeasibility and axiological gaps simply depend on interpreters' evaluations, and such evaluations often take the form of juristic 'theories' – 'dogmatic' theses framed by jurists in a moment logically previous to interpretation of any particular normative sentence and independently of interpretation. [...] Defeasibility does not pre-exist interpretation – on the contrary, it is one of its possible results. And interpreters' evaluations are precisely a cause, not an effect, of rules defeasibility, *we introduce exceptions to the rules when their 'strict' application would give rise to consequences that appear unjust* [this last italicised part appears only in the Italian original of Guastini's paper and in its Slovenian translation; n. VS]".[27] The open-texture or vagueness of concepts therefore cannot be seen as special sources of defeasibility; they are merely ineliminable characteristics of natural languages. "Rules [...] are inert, they do nothing: they let themselves be defeated, but do not defeat themselves. As beauty is in the eye of the beholder, in the very same way defeasibility is not in rules, but in the attitudes of interpreters".[28] Guastini concludes with an argument that, if we accept such a view of defeasibility, then it becomes clear that defeasibility cannot be used as an argument against legal positivism since the latter merely includes the thesis that law can be identified without an appeal to moral evaluation, and not that moral evaluation cannot figure in the interpretation of law and as such interpretation is not the identification of law but a part of the law itself. While Guastini is exceptionally clear in his arguments and examples, he seems to operate with a relatively narrow understanding of defeasibility at least from the aspect that the platitudes related to defeasibility

[27] Ibid., 189
[28] Ibid., 190

point out that an 'exception' to the rule is somehow informed by the rule itself and that the rule fully 'survives' this point of meeting an exception. Within his picture nothing similar takes place; the interpretation is narrowed and the gap filled by a negative rule or condition.

Legal positivism and defeasibility

Does accepting the defeasibility of legal norms also mean at the same time a rejection of (strict, exclusive) legal positivism, especially if we follow the latter two presented models of defeasibility, which both explicitly employ some sort of background moral reasons and axiological gaps? The answers and positions of authors differ on this issue. There are arguments that try to convince us that proper defeasibility of a legal norm is incompatible with legal positivism; others argue to the contrary, namely that both theses are unrelated and that the falsity of legal positivism in no way follows from defeasibility. And there are still others who argue that we can even use defeasibility to reconcile the divide between strong and weak positivism; that positivism can accommodate both epistemic and logical defeasibility, and that actually both strong and weak positivism have pointed out several facets of defeasibility that are important for legal practice and our understanding of law.

The answer, of course, depends on the way we understand both legal positivism and defeasibility. As we already highlighted above, two of the central characteristics of defeasible legal norms are that such a norm must allow for genuine exceptions and these norms remain unchanged in the sense that when we run into an exception we cannot fully specify the norm in such a way to preclude any other possible exceptions that would be able to defease or defeat them.

Further, many defeasibility models suggest that defeasibility presupposes (or is a consequence) of a certain axiological background which consists of basic principles, values or basic reasons. It is this axiological background that enables us to identify the genuine exceptions to the norms in the first place and then go on to properly normatively define or solve such cases. This is one characteristic that models of moral and legal defeasibility have in common. If we understand such an axiological background as

comprising basic moral reasons (e.g. justice, benevolence, non-maleficence, sincerity, fidelity etc.), then we can choose a middle ground between the generalist and particularist views in normativity. In this case, defeasible norms represent some sort of middle axioms at the middle level at which we formulate them – primarily due to practical concerns – but being fully aware that there are the mentioned basic moral reasons or morally relevant properties in their background.[29]

As stated previously, the relationship between defeasibility and legal positivism depends upon our understanding of both. In relation to defeasibility, it is crucial whether we understand it as internal to legal normativity or law itself or we see it only as a consequence of legal interpretation.

Several authors argue that issues of the defeasibility of legal norms and rejection of legal positivism are independent of each other. If on one hand we understand the defeasibility of norms not as a special property of norms, but as a result of interpretation and "interpreters' evaluations"[30] and, on the other hand, legal positivism as a position which mainly concerns the question of whether you can recognise something as a law or legal norm without reference to morality (and thus not as the view that a moral evaluation cannot be part of the interpretation of legal rules and principles), then the two positions are indeed compatible since the interpretation of legal norms is strictly not part of the recognition or identification of law, but at most part of the law in the most general sense.

Legal positivism also allows for different interpretations. Usually we connect it closely with the thesis of the social origins of law in the sense that the existence and content of the law depend on social facts. What is law depends on what a particular community recognises as the law, as posited (commanded, decided, adopted) law, and all of this regardless of whether or not it satisfies (moral) ideals of justice, fairness, equity and the rule of law.[31] Based on of such considerations, we can deduce one of the central theses of positivism, i.e. that the determination or identification of law is independent of moral criteria and arguments.[32]

[29] V. Strahovnik, Defeasibility of Moral and Legal Norms, Dignitas, 2012, 53-54, 101–115.
[30] R. Guastini, Defeasibility, Axiological Gaps, and Interpretation. In: J. Ferrer Beltrán and G. B. Ratti, eds. The Logic of Legal Requirements. Essays on Legal Defeasibility, Oxford 2012, 189.
[31] L. Green, Legal Positivism. In: E. N. Zalta, ed., The Stanford Encyclopedia of Philosophy.
[32] J. J. Moreso, Legal Defeasibility and the Connection between Law and Morality. In: J. Ferrer Beltrán

However, this thesis itself allows for many different interpretations. It can represent a starting point of so-called exclusive legal positivism in the case we understand it as the thesis that the determination of law (legal norms) cannot be dependent on morality (or that it is always independent of morality). Inclusive legal positivism understands it more loosely, namely as a thesis that it is not necessary for such determination of law to depend on morality. Further, we can understand legal positivism as a normative thesis that the determination of law should not depend on morality.[33]

We can delineate these three mentioned positions in the following way. From the social sources thesis of legal positivism we can more specifically define the following thesis:

Law identification thesis (LIT): The determination of what law is does not depend on moral criteria or arguments.

But this thesis can be read in at least three distinct ways:

LIT1: The determination of what law is *cannot* depend on moral criteria or arguments.

LIT2: The determination of what law is *need not* depend on moral criteria or arguments.

LIT3: The determination of what law is *should not* depend on moral criteria or arguments.[34]

In this way, we arrive at the previously mentioned version of positivism: exclusive, inclusive and normative.

We now return to the initial question and look at how these different understandings (especially the first two) of legal positivism fare in relation to defeasibility linked to background axiological considerations. It is important to emphasise that none of the conceptions of legal positivism completely excludes any role of morality in the sphere of law. Even exclusive legal positivism can allow for that fact, namely that not every legal reasoning or decision of a judge is strictly formalistic and employ moral considerations if these are relevant for the legal norm (therefore we can refer to morality within the domain of law, while at the same time not being the law itself). Morality is excluded from the determination of law and not in the use of law. Inclusive legal positivism goes even further; legal norms may include moral

and G. B. Ratti, eds. The Logic of Legal Requirements. Essays on Legal Defeasibility, Oxford 2012, 226.

[33] Ibid., 226–227

[34] Ibid

norms and, in this case, also the recognition of law must make reference to morality. As for normative legal positivism; it insists on the theses that the determination of law should not include appeals to morality, namely mostly because of the fact that moral disagreement, moral relativism and scepticism or our other cognitive limitations with regard to moral truths represent a threat to the respect of the autonomy of persons and the provision of a determinate and stable legal order which is predictable and unambiguous. These are the main reasons for normative legal positivism prohibiting moral considerations from entering the field of the determination of law – but that is another debate and I will not enter it here.

How can one now answer the question about the relationship between the defeasibility of legal norms and legal positivism? If defeasibility is understood as a genuine feature of these norms or a normative system which allows for exceptions on the basis of background moral reasons, then it is incompatible with both exclusive legal positivism and normative legal positivism. Similarly, Manuel Atienza and Juan Ruiz Manero argue that the level of fundamental values and aims can defease the surface level of legal rules.[35] However, such an understanding of the defeasibility of legal norms remains compatible with inclusive positivism (which probably dominates among advocates of positivism). If, on the other hand, we are inclined to understand the defeasibility of legal norms as a result of their interpretation, then such a view is also compatible with legal positivism although, on the other hand, even in this case one has to acknowledge that morality plays an ineliminable role in law.

Conclusion

Basic values as an axiological background establish the framework for the functioning of individuals and societies alike, whether these frameworks are delineated by morality or by law. In more general terms, we can distinguish two fundamentally different views of the 'codification' of such a background; on one hand, there is generalism which combines the possibility of codification and a deductive model of normative thought

[35] M. Atienza and J. R. Manero, Rules, Principles and Defeasibility. In: J. Ferrer Beltrán and G. B. Ratti, eds. The Logic of Legal Requirements. Essays on Legal Defeasibility, Oxford 2012, 242–243.

and, on the other hand, particularism which rejects the possibility of the (complete) codification of the field of normativity. The approach which builds upon the notion of the defeasibility of norms sits between the two approaches mentioned above. The defeasibility of at least some moral and legal norms can be interpreted as a consequence of normative pluralism, the possibility of a conflict between the fundamental moral considerations and the richness of the axiological background. The defeasible nature of legal norms is thus not compatible with strict and exclusive legal positivism, which in turn means that it therefore presumes a close relationship between morality and law in such a way that it sees the former as the foundation of the latter.

REFERENCES

Aristotle. *Nicomachean Ethics* (trans. W.D. Ross).

Atienza, Manuel & Manero, Juan Ruiz. 2012. Rules, Principles and Defeasibility. In: J. Ferrer Beltrán & G. B. Ratti, eds. *The Logic of Legal Requirements. Essays on Legal Defeasibility,* Oxford: Oxford University Press, pp. 238–253.

Bix, Brian H. 2012. Defeasibility and Open Texture. In: J. Ferrer Beltrán & G. B. Ratti, eds. *The Logic of Legal Requirements. Essays on Legal Defeasibility,* Oxford: Oxford University Press, pp. 193–201.

Boonin, Leonard G. 1966. Concerning the Defeasibility of Legal Rules. *Philosophy and Phenomenology Research* 26(3): 371–378.

Celano, Bruno. 2012. True Exceptions: Defeasibility and Particularism. In: J. Ferrer Beltrán & G. B. Ratti, eds. *The Logic of Legal Requirements. Essays on Legal Defeasibility,* Oxford: Oxford University Press, pp. 268–287.

Chapman, Bruce. 1998. Law Games: Defeasible Rules and Revisable Rationality. *Law and Philosophy* 17(4), 443–480.

Chiassioni, Pierluigi. 2012. Defeasibility and Legal Indeterminacy. In: J. Ferrer Beltrán & G. B. Ratti, eds. *Essays on Legal Defeasibility.* Oxford: Oxford University Press, pp. 151–181.

Dworkin, Ronald. 1977. *Taking Rights Seriously*. London: Duckworth.

Ferrer Beltrán, Jordi & Ratti, Giovanni Battista 2012. Legal Defeasibility: An Introduction. In: J. Ferrer Beltrán & G. B. Ratti, eds. *The Logic of Legal Requirements. Essays on Legal Defeasibility.* Oxford: Oxford University Press, pp. 1–7.

Green, Leslie. 2009. Legal Positivism. In: Edward N. Zalta, ed. *The Stanford Encyclopedia of Philosophy,* Http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/ (accessed 10. 12. 2012).

Guastini, Riccardo. 2012. Defeasibility, Axiological Gaps, and Interpretation. In: J. Ferrer Beltrán and G. B. Ratti, eds. *The Logic of Legal Requirements. Essays on Legal Defeasibility.* Oxford: Oxford University Press, pp. 182-192; Slovenian translation: Guastini, Riccardo. 2010. Uklonljivost, vrednostne praznine in razlaganje, *Revus* 14, 41–56.

Hart, Herbert L. A. 1949. The Ascription of Responsibility and Rights. *Proceedings of the Aristotelian Society* 49: 171–194.

Hart, Herbert L. A. 1961. *The Concept of Law.* Oxford: Oxford University Press.

Helm, Paul. 1968. Defeasibility and Open Texture. *Analysis* 28(5): 173–175.

Moreso, José Juan 2012. Legal Defeasibility and the Connection between Law and Morality. In: J. Ferrer Beltrán & G. B. Ratti, eds. *The Logic of Legal Requirements. Essays on Legal Defeasibility*, Oxford: Oxford University Press, pp. 225–237.

Schauer, Frederick. 2011. Is Defeasibility an Essential Property of Law? In: J. Ferrer Beltrán & G. B. Ratti, eds. *The Logic of Legal Requirements. Essays on Legal Defeasibility*, Oxford: Oxford University Press, pp. 77–88.

Strahovnik, Vojko. 2012. Defeasibility of Moral and Legal Norms. *Dignitas* 53/54: 101–115.

Strahovnik, Vojko. 2013. O odnosu med etiko in pravom glede na vidik uklonljivosti pravnih norm. In: M. Špelič, ed. *Lex victrix in caritate: zbornik ob sedemdesetletnici p. Viktorja Papeža OFM*. Ljubljana: Brat Frančišek, pp. 24-36.

Tur, Richard H. S. 2001. Defeasibilism. *Oxford Journal of Legal Studies* 21(2): 355–368.

Waluchow, Wilfrid J. 2012. Defeasibility and Legal Positivism. In: J. Ferrer Beltrán & G. B. Ratti, eds. *The Logic of Legal Requirements. Essays on Legal Defeasibility*, Oxford: Oxford University Press, pp. 254–267.