Defeasibility in legal theory: What is actually defeasible?[1]

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Defeasibility in legal theory: What is actually defeasible? To what entities can we attribute the property of defeasibility in the domain of legal theory? This paper tries to answer the question by examining whether defeasible are legal concepts, legal rules, legal conclusions or legal institutions. The paper concludes in suggestion that all of the enumerated candidates can be considered to be defeasible.

Keywords: *Application of law, defeasibility, legal concepts, legal pluralism, sequential reasoning, subsumption syllogism*

Hart's conception of defeasibility of legal concepts

A standard test how a law teacher checks out whether her students understand a general term encapsulated in a statute is to ask for the clear instances of the term's application. If a student cannot name such instances, she either does not understand the term, or her understanding is practically useless. Either way, the extrapolation of clear instances is relatively reliable indicator of the student's ability to grasp the meaning of statutory terms. This is the reason why the word "etcetera" in explanation of legal terms is indispensable also for lawyers of civil law countries.[2]

In his first jurisprudential article H. L. A. Hart suggests that there is yet another peculiarity of legal concepts which makes indispensable for lawyers yet another word – "unless". According to Hart, lawyers use "unless" due to "*the distinctive ways in which legal utterances can be challenged*". He elaborates this point in the following words:

"*For the accusations or claims upon which law courts adjudicate can usually be challenged or opposed in two ways. First, by a denial of the facts upon which they are based (technically called a traverse or joinder of issue) and secondly by something quite different, namely, a plea that although all the circumstances are present on which a claim could succeed, yet in the particular case, the claim or accusation should not succeed because other circumstances are present which brings the case under some recognised head of exception, the effect of which is either to defeat the claim or accusation altogether or to "reduce" it, so that only a weaker claim can be sustained.*"[3]

Hart demonstrates his idea of defeasibility on the concept of contract as it is applied in the practice of English courts. In order to claim that there is a contract validly concluded, there needs to be ascertained whether there are two parties, whether an offer was given by

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[2] Cf. HART, H. L. A.: The Ascription of Responsibility and Rights. *Proceedings of the Aristotelian Society*. New Series, Vol. 49, 1948 – 1949, p. 174 and HART, H. L. A.: *The Concept of Law*. 2nd ed. Oxford: Clarendon Press, 1994, p. 127.

[3] HART, H. L. A.: The Ascription of Responsibility and Rights. *Proceedings of the Aristotelian Society*. New Series, Vol. 49, 1948 – 1949, p. 174.

one which was accepted by the other, whether a memorandum in writing was submitted in some cases and whether there was a consideration. This information, however, does not provide students with complete understanding of what the term "contract" means, since they still need to learn "*what can* defeat *a claim that there is a valid contract, even though all these conditions are satisfied*".[4] Hart proceeds to enumerate and classify various standard defences used to defeat a contract (such as fraudulent misrepresentation, duress, lunacy, lapse of time…), but he concludes that they cannot be encompassed in some general formula which could serve as a necessary and sufficient condition for ascertaining the contract's validity. The defences are simply too heterogeneous in their nature as well as in the conditions of their application to be eligible for exhaustive generalization.[5] Moreover, among the distinctive features which make legal concepts defeasible, Hart includes also the peculiarity of judicial process in which the concepts are applied. When a judge establishes whether there is a valid contract, she does it only upon claims which are actually made before her and not upon those which could have been made. Due to a lack of proper legal counselling a party can omit to make a claim which could have established that the contract in question is invalid. Yet, this failure does not make the judge's decision declaring the contract to be valid incorrect: "*it would be a misunderstanding of the judicial process to say of such a case that the parties were merely treated as if there were a contract. There* is *a contract in the timeless sense of 'is' appropriate to judicial decisions.*"[6]

Since Hart first introduced his analysis, the concept of defeasibility has found a firm place in jurisprudential writings.[7] Depending on the level of abstraction when defining it, the concept can be used in various contexts. For example Brian Bix defines defeasibility as a capability of being defeated, referring to "*the ability of a conclusion to be justified by certain criteria being met, yet subject to being "defeated" or rebutted if further criteria are met*".[8] Thus, the concept might be used not only as an analytical device for description of a certain peculiarity of legal concepts, but also as a device for classification of various doctrinal positions regarding the relationship between law and morality.[9] So, should we hesitate to assert that the concept of defeasibility is being overused? The appropriate use of a certain descriptive term is not dependent only on the original ideas of its inventor, but also – and above all – on the adequacy and purpose of the description that the term is to offer. Even Hart himself later disowned the "*main contentions*" of the paper in which he introduced the idea.[10] Therefore, it seems to be pertinent to look critically at the concept by trying to answer these questions:

[4] Ibid, p. 175.

[5] Ibid, pp. 176-182.

[6] Ibid, p. 182.

[7] The concept of defeasibility is used also in other scientific or philosophical disciplines, e.g. epistemology. Cf. KLEIN, P. D.: Knowledge, Causality, and Defeasibility. *The Journal of Philosophy*. Vol. 73, No. 20, 1976, pp. 792-812.

[8] BIX, B. H.: *A Dictionary of Legal Theory*. Oxford: Oxford University Press, 2004.

[9] BELTRÁN, J. F. – RATTI, G. B.: Validity and Defeasibility in the Legal Domain. *Law and Philosophy*. Vol. 29, No. 5, 2010, pp. 619-622.

[10] HART, H. L. A.: *Punishment and Responsibility: Essays in the Philosophy of Law*. 2nd ed. Oxford: Oxford University Press, 2008, p. v.

i) Should the property of defeasibility be attributed to legal concepts, legal rules, legal conclusions or institutions?
ii) Is there any difference between defeasibility and overrideability?
iii) Does the property of defeasibility relate to validity or applicability of the entity it is attributed to?
iv) Does the property belong to the domain of language or morality?

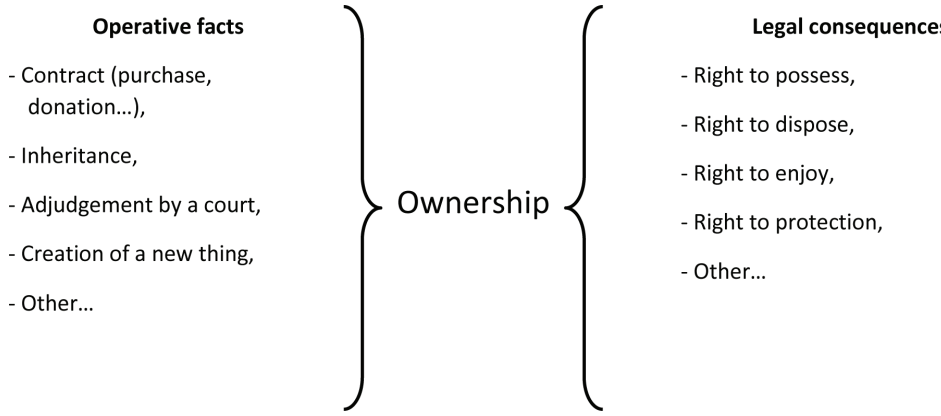
There is no place to answer all these questions thoroughly and therefore I restrict my current interest only to the first one: To what kind of entities should we attribute the property of defeasibility in the domain of legal theory? However, the enumerated questions are intertwined, so while answering the first one I will also pass around the others.

What are we describing when we use the word "defeasible"?

Hart explicitly attributed the property of defeasibility to legal concepts. This position has been criticized. For example Richard Epstein suggests that defeasibility is "*a characteristic of the legal rules of obligation, and not of the definition of a legal concept*". If Hart was right, Epstein argues, then virtually no concept could be defined in terms of necessary and sufficient conditions, since every word of natural language "*can be pressed into the service of the law*" and thus become a device for expressing legal concepts.[11] This objection, however, is not accurate because natural language will not transform into legal terminology merely by its simple incorporation into a text considered to be the official source of law. For example the verb "to be" and its derivatives do not have to express any distinctive legal concept even if they are regularly embedded in the text of statutes or precedents. Natural language terms can gain new meaning when embedded in legal texts, but this in itself does not make them distinctively legal. On the other side, certain words can express legal concepts, even if they are not part of any legal text, e.g. "source of law". This is because what we usually consider to be legal concepts (contract, ownership, right, civil liability…) and what we typically find in legal dictionaries are terms that, in a very compact and simplified form, express legal rules. This characteristic of legal concepts was eloquently illustrated by Alf Ross. In his article Tû-tû[12] Ross observes that a part of our legal terminology consists of terms which link certain operative facts with certain legal consequences and beside that they do not have any other meaning. Thus, they serve as a special technique of presentation which is for lawyers extremely useful because it enables them to express a great mass of legal rules in a simple and understandable form. As a demonstration Ross uses the legal concept of ownership. The following diagram illustrates what rules the concept of ownership represents in civil law countries:

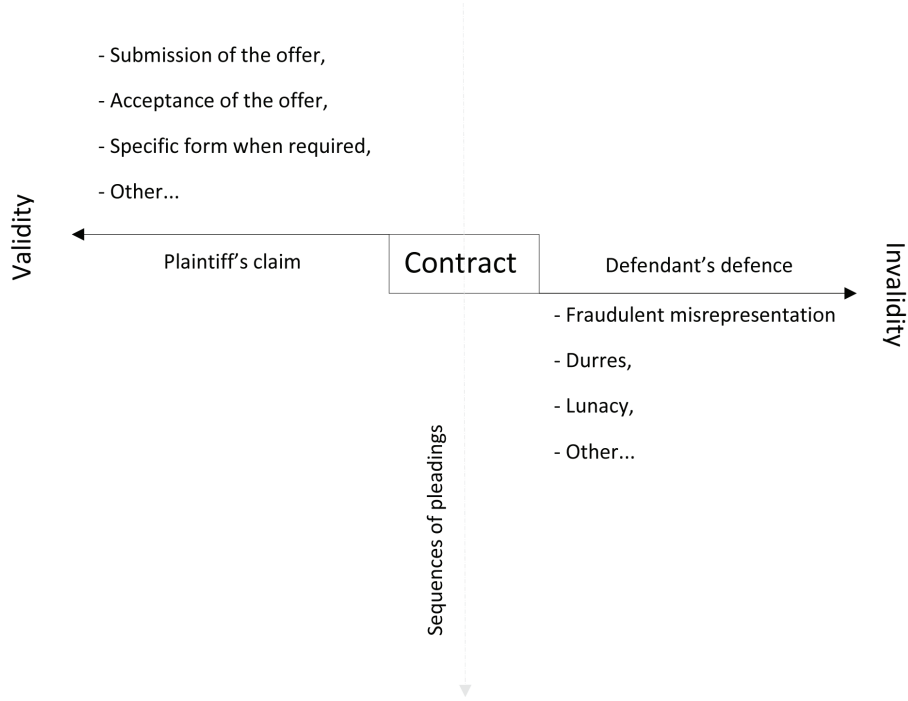
[11] EPSTEIN, R. A.: Pleadings and Presumptions. *University of Chicago Law Review*. Vol. 40, Issue 3, 1973, pp. 559-560.

[12] ROSS, A.: Tû-tû. *Scandinavian Studies in Law*. Vol. 1, 1957, pp. 137-153.



On the left side there is a disjunctive plurality of operative facts from which each one is sufficient to create an "ownership" of a certain thing. On the right side there is a cumulative plurality of legal consequences which the "ownership" is usually accompanied with. So, if our verbal inventory lacked the word "ownership", we would have to use instead an extensive enumeration of rules that would include all possible combination of particular operative facts with particular ownership rights. Nonetheless, not every legal concept has the same structure as the one just exposed. The logical relationship between operative facts does not need to be disjunctive, nor is the relationship between legal consequences always cumulative. If the generality of a legal concept is too low, there may be no plurality of conditions or consequences at all. One way or another, the crucial point is that legal concepts are more or less easily translatable into the form of legal rules. And it is not decisive if there are any legal concepts without this feature because charitable reading of Hart's article (with particular regard to the examples he used - guilt, murder, contract, trespass, will, property) will lead us to the conclusion that when he was speaking about defeasibility of legal concepts, he was at the same time speaking about defeasibility of legal rules.

The concept of contract which is enumerated as one of the operative facts in the diagram above can also be represented as a linking term. However, if we wanted to illustrate its defeasibility, and not its ability to link certain conditions with certain consequences, the diagram would look approximately like this:



One of the differences between "linking-ness" of legal concepts and their defeasibility is that the former quality is static meanwhile the latter is dynamic. The quality of defeasibility is dynamic in two aspects: Firstly, it reflects the contradictory form of judicial process where the victory of one usually means the loss of the other. In this respect, legal concepts are defeasible because they can be subject of contestation between litigants standing against each other. Let us suppose that the subject of the contestation is the validity of a contract. In this case we can depict the dispute as a war of tug where in the middle of the rope there is a physical representation of the contract and the plaintiff tries to pull the rope towards the area marked as "valid", whereas the defendant pulls the rope toward the area marked as "invalid". Secondly, defeasibility reflects the sequential nature of legal reasoning as it is manifested (at least) in today's judicial proceedings. When we look back at the Hart's passage quoted above, we will notice that the defeasibility of legal concepts appears as a consequence of a particular defendant's strategy: she does not deny the allegations presented by the plaintiff, but she asserts that there are other facts of the case which should be taken into account and which should lead to defeat or reduction of the plaintiff's claim. Thus, the plaintiff case is only *prima facie*; it is a presumption which stands only in the absence of good reasons to the contrary. If a defendant introduces these reasons and thus "*brings the case under some recognised head of exception*", then again this defence might be susceptible to be defeated by some

new arguments presented by the plaintiff trying to show that the defendant's appeal to the exception should by subjected to some further exception.[13] Having in mind this peculiarity of legal reasoning Epstein concludes that "*some "unlesses" presuppose not only the prima facie case, but a defence and a reply as well*", and therefore it is "*necessary do develop rules that determine not only who is under a duty to raise a given issue – who bears the burden of allegation, so to speak – but also at what level in the argument it is to be raised.*"[14] Bruce Chapman clarifies this point by showing how the concept of excuse puts into order particular arguments of litigants raised before a court. Excuse "*only becomes an issue in the criminal law action once the defendant already has been shown to be a wrongdoer ... It would be wrong, for example, for the defendant ex ante to invoke our compassion for the preoffense circumstances, claiming that she had a right to engage in the wrongful act and, further, that her victim had a correlative duty to submit to it*".[15] For Chapman, defeasibility as it was explained by Hart, includes "*more than the idea ... that legal norms are not absolute, being subject to other offsetting consideration ... defeasibility is also an essentially sequenced idea, where the different legal norms, with their offsetting effect, are only admitted into the decision-making calculus in a certain order of priority*".[16]

Let us return back to our main question: To what kind of entities should we attribute the property of defeasibility in the domain of legal theory? So far we have come to the conclusion that there is no significant difference if we attribute defeasibility either to legal concepts or to legal rules, since the former usually serve as devices for expression of the latter. Now, we will continue answering the question by noticing that the previous insights on the sequenced nature of defeasibility shed some light on Brian Bix's definition according to which defeasibility is a property attributable to "conclusions" (see above). In fact, what a defendant is trying to defeat when she claims that she signed the contract under duress is not the very concept of contract, nor is it the rule determining the conditions of its validity. It is the conclusions drawn from that rule by the plaintiff. If the judicial proceeding is sequenced into particular performances of litigants, then defeasible are conclusions drawn from the law presented at the end of each sequence. The sequencing of legal arguments transcends the relationship between litigants and applies also to the relationship between courts placed in different layers of judicial hierarchy. This is because a litigant may try to defeat not only the conclusions of the opposing party but also the conclusions of the court if she believes they are wrong and should be quashed by a higher instance court. The last sequence of argumentation is completed when the final decision is made and there is no appeal available to reverse it.

Now, let us put the term "conclusion" into the context of deductive reasoning. A particular sentence is a "conclusion" when it logically stems from certain premises. In

[13] EPSTEIN, R. A.: Pleadings and Presumptions. *University of Chicago Law Review*. Vol. 40, Issue 3, 1973, p. 568.

[14] Ibid, p. 573.

[15] CHAPMAN, B.: Law, Incommensurability, and Conceptually Sequenced Argument. *University of Pennsylvania Law Review*. Vol. 146, No. 5, 1998, p. 1519.

[16] Ibid, pp. 1507-1508.

the domain of application of law, the first premise says what the applicable law is, while the second one represents the facts of the case. Thus, when a litigant tries to defeat a conclusion, she is actually seeking the revision of all parts of the deductive operation (subsumption syllogism). A litigant starts with the revision of the second premise. Her objection does not lie in questioning the truthfulness of the facts as presented by the opposing party, but in questioning their completeness. The completion of the second premise, however, goes hand in hand with the completion of the first one. It is because the litigant asks for the addition of just those facts that are relevant for the court's decision, and the relevance of facts is always substantiated only by their fit to the antecedent of the first premise. Thus, we come to the most controversial point of the idea of defeasibility: How can a litigant justify her claim that the first premise, which indicates the applicable law, needs to be complemented by adding a new condition? How can we ascertain that the exception which the litigant is appealing to is truly "recognized"? If we cannot find satisfactory answers to these questions and, at the same time, if we keep insisting that the idea of defeasibility has its firm place in practice of application of law, then we will virtually give up rule of law in favour of rule of judges.[17] So, how should we complement the first premise without getting accused of acting arbitrarily?

This line of questioning reveals that the first premise itself is a conclusion of some other logical operation. The first premise of subsumption syllogism takes a form:

(1) $p \rightarrow q$

If a litigant tries to defeat the conclusion of the syllogism by claiming that some other facts (r) should be taken into account, then she will succeed only if she proves that the first premise should be completed like this:

(2) $(p \wedge \neg r) \rightarrow q$

If the litigant believes that the establishment of new facts (r) is not enough to defeat the conclusion, but it is enough at least to reduce its severity (s), then according to her the first premise ought to look like this:

(3) $(p \wedge r) \rightarrow s$

In either case, the antecedent of the first premise is presented as a result of a conjunction. At the first glance, it would seem that defeasibility would be a quite trivial matter, if the complemented part of the antecedent merely copied the exact wording of the official sources of law. This might be true, if the particular compounds of the conjunction were drawn from one coherent set of rules. However, legal systems are not, and perhaps never have been, coherent. Law is composed of parts which contradict each other and if it is to fulfil its original purpose – regulate human behaviour – it must contain

[17] Cf. SCHAUER, R.: Exceptions. *The University of Chicago Law Review*. Vol. 58, No. 3, 1991, p. 896ff.

rules prescribing which of the contradicting part should prevail. In some areas of law, like human rights law, these rules gradually evolve in the case-law of judicial authorities which solve collisions between particular rights or between rights and goods. Additionally, today's judges make their decisions in the conditions of legal pluralism, which means that they have to apply rules originating from different legal systems.[18] It is enormously difficult, for instance, to formulate exact wording of rules regulating mutual relationships between national, international and European legal order. Even if we found words which best serve this purpose, their authority would still be strongly dependent upon such contingent factors as mutual respect of the highest court instances, each operating within its own system, and upon the success of elected politicians searching for compromises between centripetal (e.g. euro-friendly) and centrifugal (e.g. euro-sceptical) social forces. Nonetheless, one can assume that amongst the most useful words expressing this balance there will also be the conjunction "unless", like for example in the sentence "European law takes precedence over a domestic law, unless it would interfere with core constitutional values or the constitutional identity of a Member State".[19]

So, defeasibility would not be a trivial subject matter, even if we were able to enumerate in clear wording all possible conditions under which a certain claim can be defeated.[20] Judges are supposed to work with rules coming from various sources institutionalised in various legal systems, so now and then they encounter cases which produce genuine controversy about correct composition of the first premise, even if the words of the laws are clear. Therefore, it seems that the concept of defeasibility is suitable for description of actual law-application practice, even without entering the problem of relationship between law and morality[21] or the problem of a proper fit between words of a rule and its purpose.

However, analysis of these problems brings us an opportunity to introduce the last candidate for the attribution of defeasibility: Is it not the case that instead of concepts, rules or conclusions defeasibility should be attributed rather to institutions? Some authors suggest that defeasibility is not a feature of rules, but a feature of a manner how these rules are applied. For example Frederick Schauer points out that when analysing defeasibility we should take into account difference between the case where a rule gives no answer and the case where it provides a bad answer.[22] In the former instance, defeasibility can be conceived as a function of language, or more precisely: it is caused by the open texture of a rule that does not provide a clear answer to a specific case and

[18] Legal pluralism is, however, not a feature of only today´s condition of application of law. Cf. TAMANAHA, B. Z.: Understanding Legal Pluralism: Past to Present, Local to Global. *Sydney Law Review*. Vol. 29, 2007, p. 377ff.

[19] Cf. MAZÁK, , J. – JÁNOŠÍKOVÁ, M. et al.: *The Charter of Fundamental Rights of the European Union in Proceedings before Courts of the Slovak Republic*. Košice: Pavol Jozef Šafárik University in Košice, 2016, chapter I.B.2.

[20] Cf. ATRIA, F.: *On Law and Legal Reasoning*. Oxford – Portland Oregon: Hart Publishing, 2001, p. 123ff.

[21] Moreover, a great many of conflicts between law and morality can nowadays be translated into the conflict between a certain legal regulation and human rights, i.e. a conflict between two recognized sources of law.

[22] SCHAUER, F.: On the open texture of law. *Social Science Research Network* [online], 2011, p. 15. Available at: http://ssrn.com/abstract=1926855.

therefore it encourages a decision-maker to search for a balance between its wording and its purpose. However, in the latter instance, according to Schauer, there are no compelling reasons to consider a rule defeasible just because it generates undesired outcomes. Here, defeasibility "*must be a moral or policy claim rather than a logical or linguistic one*", so it is rather "*a contingent empirical fact*" than "*an essential feature of legality itself*".[23] For Schauer, the real question is not whether a rule leads to an absurd application, but "*whether and when some class of officials should be empowered to decide which applications are absurd and which are not" ... Defeasibility is thus not a property of rules at all, but rather a characteristic of how some decisions-making system will choose to treat its rules*".[24]

This point is eloquently elaborated by Fernando Atria. Atria invites us to reconsider Lon Fuller's reflection on the appropriate application of the rule "*It shall be a misdemeanour, punishable by fine of five dollars, to sleep in any railway station*" to the case of two men, the first of whom:

"*...is a passenger who was waiting at 3 a.m. for a delayed train. When he was arrested he was sitting upright in an orderly fashion, but was heard by the arresting officer to be gently snoring. The second is a man who had brought a blanket and pillow to the station and had obviously settled himself down for the night. He was arrested, however, before he had a chance to go to sleep."*[25]

According to Fuller, we will have no trouble to perceive the purpose of the prohibition as soon as we recall to our minds "*the picture of a dishevelled tramp, spread out in an ungainly fashion on one of the benches of the station, keeping weary passengers on their feet and filling their ears with raucous and alcoholic snores*".[26] Comparing the two "sleeping" men through the perspective of the prohibition's purpose, the first man should be acquitted, while the second one fined. With the help of this example Fuller wanted to demonstrate that the meaning of words is dependent on the context of their application and that the appropriate context for understanding law is framed by the law's purpose. From that it follows that rules are inherently defeasible, since their wording can always be defeated by their purpose. Rules cannot dictate bad answers; a bad answer is no answer and therefore we need to ask the law again.

Fernando Atria agrees with Fuller when he says that it would be odd for any sensible lawyer to fine the first man and to release the second one just because this conclusion is warranted by the literal meaning of the word "sleep". Yet, Atria insists that this solution is right not because the first man was not "really" sleeping, but because fining him would obviously not serve the rule's purpose. Now, would the conclusion be different if the rule was not a legal one, but it was to regulate a game called "staying awake in railway

[23] Ibid, pp. 16-17.

[24] Ibid, pp. 20-21.

[25] FULLER, L. L.: Positivism and Fidelity to Law: A Reply to Professor Hart. *Harvard Law Review*. Vol. 71, No. 4, 1958, p. 664. Cf. ATRIA, F.: *On Law and Legal Reasoning*. Oxford – Portland Oregon: Hart Publishing, 2001, p. 13.

[26] FULLER, L. L.: Positivism and Fidelity to Law: A Reply to Professor Hart. *Harvard Law Review*. Vol. 71, No. 4, 1958, p. 664.

station" in the sense that if a player does not avoid of falling asleep in the station she will lose five points? Atria thinks that the answer is affirmative because games are different kind of institutions from legal systems.[27]

Atria explicitly casts doubts on the analogy between games and law which is regularly used in legal theory.[28] He suggests that these two should be distinguished, since the former is an autonomous institution, while the latter belongs to regulatory institutions. Atria builds this difference upon John Searle's distinction between constitutive and regulative rules. Accordingly, autonomous institutions "*invent new activities*", while regulatory institutions select "*from a vast array of ways in which things can be done, those which are to be preferred*" and thus they "*establish normative standards for the better way to do something we can do anyway*".[29] Consequently, autonomous institutions are not justified by their regulatory effect; they are "arbitrary" in the Wittgensteinian sense; their rules are completely insulated from other (especially moral) considerations, so their application is indefeasible. On the other hand, regulatory institutions are justified by their regulatory effects; the rules pertaining to them are conceived as universalisations of substantive reasons and these reasons have impact upon their application.[30] This exposition of difference between autonomous and regulatory institutions explains why the application of rules regulating games is *essentially* formalistic or mechanical, whereas the application of legal rules is not. In the domain of law the formalistic approach is only one of more options and it has to be defended as a moral claim:

"*…in the case of games such a formalistic approach is something about the practice that any would-be participant has to understand before actually engaging in it, while in law the correctness of such an approach is a substantive claim to be argued and defended inside the practice … To dispute the complete insulation that characterises games is to show lack of understanding about the practice of them; but to dispute that very same approach to the interpretation and application of rules of law is not to display ignorance regarding the fundamentals of legal practice, but to defend a substantive legal claim and in a particular case to advance moral arguments to ground an interpretation of the law is not to display ignorance or lack of seriousness about that practice.*"[31]

Atria makes his analysis more subtle by asserting that not every legal system which have appeared in human history is necessary a regulative institution. He noticed that archaic legal systems, such as the ancient Roman law or the old Biblical law were in fact autonomous institutions. In archaic legal systems formalities of law were not perceived

[27] ATRIA, F.: *On Law and Legal Reasoning*. Oxford – Portland Oregon: Hart Publishing, 2001, p. 47.

[28] Cf. HART, H. L. A.: *The Concept of Law*. 2nd ed. Oxford: Claredon Press, 1994, p. 40. RAZ, J.: *Practical Reason and Norms*. Oxford: Oxford University Press, 2002, p. 114ff. ROSS, A.: *On Law and Justice*. New Jersey: The Lawbook Exchange, 2004, p. 12ff.

[29] ATRIA, F.: *On Law and Legal Reasoning*. Oxford – Portland Oregon: Hart Publishing, 2001, pp. 48-49. "*The distinction … is not based on the fact that some systems constitute and others regulate, but on the fact that some systems regulate pre-existing forms of behaviour in order to create a new activity, while others create the possibility of new forms of behaviour in order to regulate some pre-existing form of behaviour.*" Ibid, p. 23.

[30] Ibid, p. 30.

[31] Ibid, p. 5.

as an instrument for better regulation of social interactions, but instead as a part of rituals set up and nourished for their own sake. Law was conceived as a "*magical language that was created by the Gods and communicated to humans by priests*".[32] Consequently, *"policy considerations did not have any bearing on the selection of the specific forms required, nor upon the consequences of failing to follow them*".[33] In contrast to it, nowadays the various formalities of law are desirable because they are justified by some substantive reasons (e.g. democratic legislative procedure is substantiated by the principle of equality; the written form of contracts is required to prevent eventual frauds…). Interestingly, according to Atria, Roman law started to undergo transformation from an autonomous to a regulatory institution, when the praetorian law which was supposed to soften the harsh impact of *ius civile*, begun to take its course. He suggests that similar transformation can also be seen in the Bible.[34] Jesus' mission was not to abolish the old law, but to complete it. In Atria's reading the crucial message of this creed was that "*the law was not a ritualistic-formalistic-magical set of rules that had to be fulfilled in detail (autonomous law), but something with a* point*, something that* stood for *something else (regulatory law).*"[35] Needless to say, all modern legal systems are today generally conceived as systems of universalized substantive reasons, i.e. as regulatory institutions.

What conclusions can we draw from Atria's insights? First of all, it should be clear that the meaning of a rule does not entirely determine its own manner of application. The meaning of the rule "Falling asleep in railway stations shall be punished" is the same in all contexts, however when it is conceived as a rule regulating a game, its application is mechanical, indefeasible; whereas when it is taken as a legal rule embedded in a modern legal system, its application is purpose-sensitive, defeasible. So, the mode of the rule's application is not determined only by its meaning, but also by a substantive consideration "*of how formal the application of the rule should be, of how many (and which) substantive issues or reasons are pre-empted by the rule*".[36] This consideration heavily depends on the fact whether the rule is a part of an autonomous or a regulative institution. So, after all, the defeasibility of rules "*is not an interesting fact about the rules, but about the institution they belong to*".[37] Until now, Atria's conclusions have been consistent with Schauer's. Yet, Atria goes further. Although he admits that defeasibility is indeed a contingent feature because legal systems can be both autonomous and regulative institutions, beside that he claims that once it is established, that a legal system is a regulative institution, defeasibility is not its contingent, but a necessary feature. Moreover, it is beyond the reach of the legal rules to transform its own system from

[32] Ibid, p. 52. The thesis according to which archaic Roman law was a magic is traceable back to Axel Hägerström. Cf. MINDUS, P.: *A Real Mind: The Life and Work of Axel Hägerström*. Dordrecht: Springer, 2009, p. 204ff.

[33] ATRIA, F.: *On Law and Legal Reasoning*. Oxford – Portland Oregon: Hart Publishing, 2001, p. 53.

[34] Ibid, p. 54.

[35] Ibid, p. 56 (emphasis added by Atria).

[36] Ibid, p. 109.

[37] Ibid.

a regulative to an autonomous one because this transition is not a function of rules, but a function of how these rules are generally perceived by the legal environment in which they are being applied.[38] This is the reason why for example Napoleon did not succeed in his effort to make Code Civil indefeasible by enacting prohibition of its interpretation.[39] So after all, in/defeasibility of legal rules cannot be implemented as a policy deliberately chosen by policy makers. At least not as an either/or option applicable for all future cases.

Returning back to the problem of a proper composition of the first premise, the previous paragraphs show that the exception which a litigant seeks to apply for her case can be substantiated not only by a reference to the explicit wording of a rule but also by a reference to its implicit purpose.

Conclusion

To what entities should we attribute the property of defeasibility in the domain of legal theory?

If we say, as Hart did, that defeasibility is characteristic of legal concepts, we might mean at the same time that it is characteristic also of legal rules, since (a great many of) legal concepts are translatable into the language of legal rules.

If we say, as Bix did, that defeasibility is characteristic of legal conclusions, we might mean at the same time that it is characteristic also of legal rules, since if a litigant wants to defeat a conclusion, she is actually seeking the revision of all judgement, including the first premise which states what the applicable legal rule is. Similarly, we can attribute defeasibility to legal reasoning.

If we say, as it is common in today's legal theory, that defeasibility is characteristic of legal rules, we use this phrase as a conveniently shortened expression of the idea according to which defeasibility is characteristic of a manner in which legal rules are dealt with, or in Atria's words, defeasibility is characteristic of regulatory institutions in which rules are applied as universalisations of substantive reasons.

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[38] Ibid, p. 116.

[39] Ibid, p. 119.

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