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Indice (Summary)

Tendenze della Teoria del diritto
(Trends in Legal Theory)

La science du droit: pourquoi et pour quoi faire?
(Legal Science: Why? To Which Purpose?)

Un debate sobre las propiedades formales de los sistemas normativos
(A Debate on the Formal Properties of Normative Systems)

Saggi

(Essays)

Substantive Norms and Substantive Questions

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Abstract

In previous work I proposed and defended a proof-based account of legal exceptions, suggesting that no "substantive" representation could be given of the conditions of judicial decisions when exceptions happen to be at play. This paper explores some jurisprudential implications of the proof-based account, seeking to work out its impact on the idea of substantive law. For reasons that I try to make clear, the relevant question to be asked is whether we need to appeal to substantive norms in order to represent those conditions of judicial decisions that bear on the substantive questions that courts are called to decide. The answer, I suggest, is "No".

Keywords: Exceptions. Substantive legal norms. Legal proof.

1. Introduction

First, a bit of scene setting. I have in recent work been concerned with the notion of an exception, and particularly with how exceptions operate in the context of judicial decision-making. The basic puzzle is that exceptions behave in a way that can give rise to conflicting theoretical intuitions. On the one hand, we want to say that exceptions must be absent if certain judicial decisions are to be correctly issued. Think, for example, of the exception of self-defence in a case of murder. If self-defence is present, the judge will not correctly convict the defendant. On the other hand, we want to resist the thought that the absence of an exception is itself a necessary condition of the correctly issued decision. Or at least it seems that simply to say *that* does not allow us to articulate and explain the difference between (a) the necessary absence of exceptions, and (b) the necessary absence of other kinds of circumstance that we certainly do not treat as exceptional. Compare the necessary absence of self-defence in a case of murder with the necessary absence of the victim's consent in a case of rape. Both circumstances have to be absent in order for the corresponding convictions to be properly made. But we do not qualify consent as an exception in rape. So what is the difference?

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The difference, I think, boils down to the fact that absence of consent in rape is a circumstance that has to be ascertained or proved in order for the conviction to count as correctly made. The same is not true of self-defence. Provided that self-defence is not proved, the murder conviction is justified even if the absence of self-defence itself remains unproved. In order to characterise the notion of an exception we need to be able to distinguish between two ways in which any given circumstance *X* may be said to be "absent" in some decision-making context. It may be that the negation of *x* is proved, or it may simply be that *x* is not proved. Contrast (1) and (2):

(1) *X* is not proved.
(2) *Not-X* is proved.

Trivially, (1) does not imply (2). It may be that *X* is not proved and that *not-X* is also not proved. It may be, in other words, that *X* remains uncertain. And while some circumstances, like consent in rape, are such that it is a correctness condition of the corresponding judicial decision that their negation be proved (which means that such circumstances cannot remain uncertain), some other circumstances —exceptions— are such that, although it is a condition that *they* be *not proved*, their negation *may* also not be proved.

The previous paragraphs are a rough summary of a proof-based account of exceptions, some aspects of which I have defended in print elsewhere[1]. The present paper explores some general jurisprudential implications of that account for our understanding of the role of proof in judicial decision-making.

2. Proof in Law: The Received View

The received view seems to be that proof in law is an activity instrumentally directed at the ascertainment of the factual antecedents of what are normally called the "substantive" legal norms. Here is a representative quotation:

> «[W]hat must be proved in court depends on the factual hypotheses to which legal norms associate certain consequences. Thus what must be proved in the legal process is the proposition asserting the occurrence of such facts, so that the corresponding legal consequence can be applied»[2].

This view is widespread in contemporary jurisprudence[3]. Very few authors have ventured to suggest a different account. Kelsen was one of them. He main-

[1] See Duarte d'Almeida (2012) and Duarte d'Almeida (2013). The proof-based account will be expanded at length in (Duarte d'Almeida 2015).

[2] Ferrer 2005: 49 (my translation).

[3] See *e. g.* Wróblewski 1973: 161-162; Wróblewski 1975: 168-174; Jackson 1983: 88; Wróblewski 1992: 131-137; Taruffo 1992: 45-47, 65, 67-70, 74-77, 80-84; Jackson 2004: 124-130; Ferrer Beltrán 2006: 308-309; Ho: 2008, 56, 10-11, 68-69; Roberts and Zuckerman 2010: 108.

tained that the relevant condition in a case of murder, for example, is not the fact of murder itself, but the fact that murder has been *ascertained* in court:

> «If a general legal norm attaches a punishment to murder, then this situation is not correctly described by the statement —[']the fact that an individual has committed murder is the condition of the sanction[']. *Not the fact itself that an individual has committed a murder is the condition stipulated by the legal order*, but the fact that an organ, authorized by the legal order, in a procedure prescribed by the legal order, has ascertained that an individual has committed murder [...] [*T*]*he legal rule does not say: "If a certain individual has committed murder, then a punishment ought to be imposed upon him"*. The legal rule says: "If the authorized court in a procedure determined by the legal order has ascertained, with the force of law, that a certain individual has committed a murder, then the court ought to impose a punishment upon that individual"»[4].

The stock reply to Kelsen is simply to concede that, yes, there may well be *procedural norms* requiring judges to decide on the grounds of what has been proved, but nevertheless to insist that it remains the case that *substantive legal norms* have the actual facts, not their proof, in view. For example, consider Eugenio Bulygin's discussion of Kelsen's claims. It is true, Bulygin grants, that

> «[i]f a jury has decided that the [false] sentence "Dimitri [Karamazov] killed his father" has been proved in court, then the judge is under the obligation to sentence Dimitri to imprisonment, because there is a norm that prescribes that judges ought to sentence to imprisonment those persons who have been found guilty of murder. So the judge has the duty to issue an individual norm sentencing Dimitri»[5].

It remains the case, however, Bulygin says, that "the rule of criminal law —contrary to Kelsen's opinion— stipulates the duty to punish those who have committed murder and not those of whom the judge says that they have committed murder"[6]. It is this substantive rule that "constitutes the standard of correct and incorrect judging"[7]. Indeed, it is only by reference to that rule that we can explain that a judge who convicts Dimitri Karamazov on the grounds of a proved but false proposition of fact has issued a mistaken or "wrong" decision[8].

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[4] Kelsen 1960/67: 239-240 (my italics). See also Kelsen 1944a: 217-218; Kelsen 1944b: 46-47; Kelsen 1945: 135-136; and Kelsen 1979/91: 128-130, 140-141, 243-244, 413-414.

[5] Bulygin 1995: 23. See also Bulygin 2003: 246 («the procedural rules [concerning proof, as opposed to substantive rules] do not merely indicate under which circumstances the judge can convict a suspect, but establish an obligation to punish him»); or Bulygin 1985: 162-163 (affirming that the "law of procedure" —as contrasted with "substantial" penal laws— imposes upon the judge an "obligation" to sentence Karamazov to prison).

[6] Bulygin 1995: 22.

[7] Bulygin 1995: 23.

[8] Bulygin 1995: 21; see also Bulygin 1994: 20.