

A Realistic View on Law and Legal Cognition

Riccardo Guastini

Legal realism – or, at least, one form of legal realism – can be characterized as the conjunction of three strictly connected theses: ontological, methodological, and epistemological.

The ontological thesis is about the law itself – it answers the question “What kind of entity is the law?”.

The methodological thesis is about legal interpretation – it answers the question “What kind of activity is interpreting legal texts?”.

The epistemological thesis is about legal knowledge (or “legal science”, as it is usually labelled in continental jurisprudence) – it answers the question “What the scientific knowledge of law does consist in?”.

I shall begin by the methodological thesis since it conditions all the others.

1. Methodological Realism

A preliminary distinction is necessary ¹. In the legal domain, “interpretation” is the name of (at least) two different activities, i.e.,

(a) “cognitive” interpretation, which amounts to the analysis of a text in view of clarifying its possible (plausible) meanings, and

(b) “adjudicative” interpretation which consists in ascribing a definite meaning to a text (rejecting the others).

¹ The following distinction echoes Kelsen’s distinction between interpretation understood as an act of cognition and an act of will, respectively. See Kelsen 1992, 82 f.; Kelsen 1950, Preface.

Well, methodological realism is but a sceptical theory of adjudicative interpretation. Ascribing meaning to normative texts is a non-cognitive activity – not a matter of cognition, but rather a matter of decision ².

This holds for judicial interpretation (the usual, limited, subject of current theories of interpretation ³) as well as for “dogmatic” interpretation, i.e., the interpretation put forward by legal scholars.

However, a further distinction is in order.

(i) *Interpretation strictly so called*. Legal texts are affected by a double form of indeterminacy.

On the one hand, normative formulations are often ambiguous. Therefore they admit different competing “in abstracto” (or text-oriented) interpretations: the normative sentence S can be interpreted as expressing either the norm N1 or the norm N2.

On the other hand, each norm is vague. Therefore it admits different competing “in concreto” (or fact-oriented) interpretations: given a norm whatsoever, is the individual case C included or excluded from its scope ⁴?

This is why interpretive sentences – “in abstracto” (“The normative sentence S expresses the norm N1”) as well as “in concreto” (“The case C falls within the scope of the norm N1”) – are not cognitive or descriptive, but *ascriptive* sentences. Just like stipulative definitions, they are decisions about meaning ⁵. Therefore, they have no truth-value.

By the way, it is a matter of course that interpretive decisions of jurists, lawyers, and judges are conditioned by their practical (e.g., political, economic, professional, etc.) interests and ideas of justice, as well as – last not least – the conceptual constructions of legal dogmatics. Moreover, jurists, lawyers, and judges often are the very source of the indeterminacy of legal texts, in the sense that they do “put” indeterminacy in texts that would not raise any problem of interpretation at all in ordinary conversation.

(ii) *Legal construction*. In juristic common parlance the term “interpretation” usually applies to the bulk of the intellectual operations accomplished by interpreters (judges, lawyers, jurists, etc.).

² Guastini 2011b. This view is indebted to Tarello’s theory of interpretation. See Tarello 1974 and 1980.

³ Kelsen’s and Tarello’s theories are two remarkable exceptions.

⁴ No need to say that further (and maybe even more important) forms of indeterminacy depend on legal gaps and normative conflicts. Gaps and conflicts, however, do not forerun interpretation – they follow it. In most cases legal texts disclose a gap and/or a conflict in the light of a certain interpretation, while a different interpretation would make disappear the gap and/or the conflict.

⁵ Guastini 1997.

Nevertheless, it is quite easy to realize that interpreters – and above all legal scholars – do not confine themselves to decide the meaning of normative texts. Furthermore, and most important, they do make what I propose to call “legal construction”. By this phrase I mean a set of intellectual operations which includes (*inter alia*):

- (a) the creation of normative and axiological gaps;
- (b) the creation of axiological hierarchies among norms;
- (c) the specification of principles;
- (d) the balancing of conflicting principles;
- (e) and, most of all, the construction of unexpressed (so-called “implicit”) norms ⁶.

Various connections exist among such different operations. E.g., the construction of unexpressed norms is meant at filling gaps and specifying principles. Axiological hierarchies are meant at balancing conflicting principles. And so forth.

Now, if interpretation properly understood is no cognitive activity, *a fortiori* legal construction is the output not of cognition, but decision. In fact, legal construction amounts to genuine juristic and/or judicial law-creation: “interstitial legislation”, as one may call it ⁷.

2. *Ontological Realism*

Realism endorses an empiricist ontology of law. Law is not a set of abstract entities (such as norms, values, rights and obligations, or the like ⁸). Rather, it is but a set of facts. What kind of facts, however? This question requires an articulate answer.

(i) *Law as a set of normative texts*. At a first glance (a surface level of analysis) the word “law” simply refers to the normative texts enacted by law-giving agencies: such normative authorities as the legislators, the framers of the constitution, etc. In other words, “law” denotes a

⁶ All such concepts are fully analyzed in Guastini 2011a. Anyway, a short characterization runs as follows: (a) a normative gap is the lack of any legal regulation of a case; (b) an axiological gap is the lack of a satisfactory regulation (and the presence of an unsatisfactory one); (c) an axiological hierarchy between two norms is a value-relationship created by interpreters by means of a comparative value-judgement; (d) specifying a principle amounts at deriving from it an unexpressed rule; (e) balancing conflicting principles consists in establishing an axiological hierarchy between them; (f) an unexpressed norm is a norm which lacks any official formulation in the sources of law, being not a plausible meaning of any particular normative sentence.

⁷ See Guastini 2013.

⁸ By the way, according to a distinctive realistic thesis, deontic concepts (such as obligation, prohibition, etc.) as well as so-called “fundamental legal concepts” (such as right, power, etc.) are deprived of any semantic reference. See, e.g., Ross 1957 and 1958b, Olivecrona 1971.

set of normative (prescriptive, directive) formulations or sentences, hence facts of a certain kind – namely, language-entities.

Such a concept of law is somewhat unsophisticated, but it is useful in view of clarifying both the basic ontology and the very genesis of legal norms, since:

- (a) first, norms are but language-entities;
- (b) second, norms can only come into the world by means of acts of “legislation” (in the generic, material, sense of “legislating”) – «No imperative without an imperator, no command without a commander»⁹.

Nonetheless, normative texts obviously require interpretation. Normative formulations must not be confused with norms properly understood, i.e. their meaning contents. If the normative sentence S can be interpreted as expressing either the N1 or the norm N2, what is the law? N1 or N2?

Thus we are obliged to say that legal texts are not “the law”: after all, they are but sources of law¹⁰. Law is not a set of normative sentences, but the set of normative meanings (i.e., norms) which are actually ascribed legal texts by interpreters, either by interpretation in the strict sense or by legal construction¹¹.

(ii) *Law as a set of norms*. This is why, at a deeper level of analysis, we have to use the term “law” to denote not normative texts, but rather normative meanings: the set of norms which interpreters actually “extract” or “construe” from normative formulations.

Such a set includes both the class of expressed norms (i.e., the norms which are plausible meanings of the existing normative formulations) and the class of unexpressed norms (i.e., the norms construed by interpreters).

From this standpoint, law depends on the combination of two different activities: (a) the formulation of normative texts, and (b) the interpretation and construction of such texts. There is no law without

⁹See Kelsen 1973, 237, and 1991, 3 (echoing a thesis of Walter Dubislav’s).

¹⁰ «After all, it is only words that the legislature utters; it is for the courts to say what these words mean; that is it is for them to interpret legislative acts. [...] And this is the reason why legislative acts, statutes, are to be dealt with as sources of Law, and not as a part of the Law itself. [...] The courts put life into the dead words of the statute»; «It may be urged that if the Law of a society be the body of rules applied by its courts, then statutes should be considered as being part of the Law itself, and not merely as being a source of the Law; that they are rules to be applied by the courts directly, and should not be regarded as fountains from which the courts derive their own rules. [...] And if statutes interpreted themselves, this would be true; but statutes do not interpret themselves; their meaning is declared by the courts, and it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as Law» (Gray 1948, 124 s, 170).

¹¹ As to the ontology of meanings, I shall confine myself to say that the meaning of a sentence is but another sentence assumedly synonymous of the first one. From this point of view, meanings too are language entities.

texts to be interpreted (first ontological thesis), but moreover there is no law without interpretation (second ontological thesis). Law is a set of interpretive practices.

However, legal scholars and judges – at least diachronically – often disagree: many normative formulations are subject to competing interpretations; the existence (in the legal system) of any unexpressed norm is intrinsically controversial, since such a norm lacks any official formulation. Different interpretations and constructions bring forward different sets of norms, hence (partially) different legal systems.

E.g., according to a certain jurisprudential trend, the legal system includes, say, the expressed norms N1 and N2, N3, and the unexpressed norms N4, N5. Whereas, according to a different jurisprudential trend, the same system includes the expressed norms N1, N2 (not N3), and the unexpressed norms N4, N5, and moreover N6. Thus, we are facing to two distinct legal systems: {N1, N2, N3, N4, N5}, {N1, N2, N4, N5, N6}.

Therefore we should ask: what is the law in such circumstances? Which of these two systems is the law? To answer such a question one must climb down to the deepest level of analysis, corresponding to a third concept of law.

Nonetheless, this second concept of law – although still unsatisfactory – has the merit of accounting for the fact that the law is not produced by “legislators” only. In legal practice, side by side with law-giving authorities, one finds interpreters too, and the law in a sense arises from the interaction of legislators and interpreters. One cannot even imagine the law without interpreters (viz., jurists) as well as one cannot imagine a religion without priests.

(iii) *Law as a set of norms in force.* At the third, deepest, level of analysis, the term “law” refers to the set of norms in force, i.e., the norms actually applied (i.e., used in deciding cases) in the past and predictably applied in the future by law-applying agencies – judges, administrative agencies, as well as supreme constitutional organs (as far as constitutional norms are concerned)¹².

In other words, notwithstanding the existing different interpretations and constructions, one can always find a number of synchronically leading interpretations and constructions generally accepted – the “law in action”.

Let us go back to the preceding (fictitious) example. According to the first jurisprudential trend the content of the legal system is {N1, N2, N3, N4, N5}; according to the second it is {N1, N2, N4, N5, N6}. To identify the law we have to ascertain which of such norms is in force. And it is quite possible that the empirical analysis of the

¹² The obvious reference is to Ross 1958a. See however Bulygin 1991.

leading jurisprudential trends shows, e.g., that N1, N2, N4, N5 as well as N7 are in force, while N3 and N6 are not.

Summing up, by the word “law” one can understand three different things:

- (i) the set of the normative *texts* enacted by the lawgiving authorities;
 - (ii) the set of (expressed and unexpressed) *norms* formulated by interpreters;
 - (iii) the set of (expressed and unexpressed) norms actually *in force*.
- This leads us to the epistemological thesis.

3. *Epistemological Realism*

A previous distinction is in order.

In the common usage of continental jurisprudence the ordinary juristic work is frequently labelled as “legal science”, “legal doctrine”, or “legal dogmatics”. Nonetheless, all such phrases can be understood as pointing to (at least) two quite different intellectual enterprises which ought to be distinguished:

- (i) on the one hand, *legal science* properly so called – the “science of jurisprudence” (Austin¹³), the “science of law” (Kelsen¹⁴) – i.e., the scientific (neutral, value-free) cognition of the law in force;
- (ii) on the other hand, what I shall call *legal scholarship*, i.e., the usual academic investigation into the law, namely into those normative texts which are regarded as the official sources of law.

For this reason epistemological realism includes two distinct theses – the first one being a descriptive thesis concerning legal scholarship, while the second one is a prescriptive thesis bearing upon the scientific knowledge of the law.

(1) *Legal scholarship*. As a matter of course, the actual practice of jurists cannot be considered as a genuine scientific enterprise, since – as I said – juristic sentences (or the most part of them) are non-cognitive and hence neither true nor false. Interpretive sentences are not descriptive, but ascriptive; the sentences which formulate unexpressed norms are secretly prescriptive)¹⁵. Legal scholars do not describe the law – they (contribute to) make it.

According to a classical view of analytic legal philosophy, legal scholarship is a meta-language whose object-language is the

¹³ Austin 1995, 14, 112 s.

¹⁴ Kelsen 1992, 7, and 1966, ch. III.

¹⁵ “Secretly”, since they usually claim to be existential sentences about norms – “The unexpressed norm N belongs to the legal system S” – although they are genuine normative formulations.

language of the lawgivers¹⁶. Unfortunately, such a picture of legal scholarship is, although seductive, somehow misleading. The language of lawgivers and the language of interpreters are actually subject to a continuous osmotic process. Juristic language does not simply “bear upon” lawgivers’ language – rather, jurists shape and enrich the object of their study, like a violinist interpolating apocryphal keys in the composition he or she is executing.

Interpretation and construction are not legal cognition – rather, they are pieces of legal policy¹⁷. In fact, they are part (an essential part) of the very object of legal cognition.

Nevertheless, jurists do contribute to the cognition of law, too, in the ways we are going to see.

(2) *Legal science*. From the standpoint of legal realism, legal science can in no case consist in describing such abstract entities as obligations or rights and/or in sentences about the normative qualifications of behaviour (“It is obligatory that *p*”, “It is prohibited that *q*”), and the like. And, as a consequence, its sentences cannot be deontic sentences repeating – iterating, like an echo – the norms they refer to¹⁸.

Legal science properly understood can acquire three different forms, corresponding to the three concepts of law that I have been developing in the previous section.

(i) *Cognitive interpretation*. Talking about interpretation, I dealt with “adjudicative” interpretation – the ascription of a definite meaning to a given legal text. And adjudicative interpretation is the usual and most important job of legal scholars. Nonetheless, they also accomplish a different job, viz., “cognitive” interpretation which consists in identifying the various possible meanings of a normative text – the meanings admissible on the basis of shared linguistic (syntactic, semantic, and pragmatic) rules, accepted methods of legal interpretation, and existing juristic theories – without choosing anyone of them (“The text *T* can be interpreted in the senses *S1* or *S2*”).

Cognitive interpretation contributes to the knowledge of law understood as a set of normative texts, since it enlightens the ambiguity of normative formulations and the vagueness of norms.

By the way, cognitive interpretive sentences can be understood: either as predictions of future interpretive decisions of law-applying agencies; or as interpretive directives aiming at orienting such future decisions, viz., circumscribing the range of admissible meanings of the text concerned.

¹⁶ Bobbio 2011.

¹⁷ See Kelsen 1992, 82; Ross 1958, 46.

¹⁸ Contrary to Kelsen’s view. See e.g. Bulygin 1982.

(ii) *Reconstruction of jurisprudential trends*. Understanding the law (not as a set of normative formulations, but) as a set of expressed and unexpressed norms, it is an obvious contribution to the knowledge of law the analysis, reconstruction, and description of the interpretive and constructive trends of judges and jurists.

This, too, is a common practice among legal scholars. And it does amount to a contribution to legal knowledge since it is a preliminary move for ascertaining the prevailing trends, which, in turn, is preliminary to identifying the law in force.

(iii) *Description of the law in force*. Understanding the law as a set of norms in force, the cognition and description of the law requires the identification of the norms actually applied by judges and other law-applying agencies. (Where no definite norm regarding a certain matter is in force, legal science can only take note of the existing jurisprudential conflicts.)

One may agree with the prevailing view according to which legal science consists in a set of “normative propositions”, i.e. true or false sentences concerning norms. However, two clarifications are in order: the first one pertains to the logical form of normative propositions; the second one to their conditions of truth.

(a) As I already said, normative propositions are not deontic sentences about the normative qualification of behaviour. Rather, they are existential sentences about norms (in force). The “legal” existence of a norm is but its membership to a definite legal system. Hence, normative propositions, whatever their actual syntactic form may be, are sentences which state the membership of norms (in force) to a definite legal system: “The norm N belongs to the legal system S».

(b) A normative proposition is true if, and only if, the norm which it refers to will be predictably applied in future decisions. Therefore, normative propositions can be understood as propositions on contingent futures: predictions concerning the future application of the norms they refer to.

References

Austin J. (1995). *The Province of Jurisprudence Determined* (1832), ed. by W.E. Rumble, Cambridge, Cambridge U.P.

Bobbio N. (2011). “Scienza del diritto e analisi del linguaggio” (1950), in N. Bobbio, *Saggi sulla scienza giuridica*, Torino, Giappichelli, 1.

Bulygin E. (1982). "Norms, Normative Propositions and Legal Statements", in G. Fløistad (ed.), *Contemporary Philosophy. A New Survey*, vol. 3, Dordrecht, Kluwer.

Bulygin E. (1991). "El concepto de vigencia en Alf Ross" (1963), in C.E. Alchourrón, E. Bulygin, *Análisis lógico y derecho*, Madrid, Centro de Estudios Constitucionales, 339.

Gray J.C. (1948), *The Nature and Sources of the Law*, Second edition from the author's notes, by R. Gray, New York, Columbia U.P.

Guastini R (1997). "Interpretive Statements", in E. Garzón Valdés et al. (eds.), *Normative Systems in Legal and Moral Theory. Festschrift for Carlos E. Alchourrón and Eugenio Bulygin*, Berlin, Duncker & Humblot, 279.

Guastini R. (2011a). *Interpretare e argomentare*, Milano, Giuffré.

Guastini R. (2011b). Rule-Scepticism Restated, in L. Green, B. Leiter (eds.), *Oxford Studies in Philosophy of Law*, vol. 1, Oxford, Oxford U.P., 2011, 138.

Guastini R. (2013). "Juristenrecht. Inventing Rights, Obligations, and Powers", in J. Ferrer Beltrán et al. (eds.), *Neutrality and Theory of Law*, Dordrecht, Springer, 147.

Kelsen H. (1950). *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems*, London, Stevens & Sons.

Kelsen H. (1967). *Pure theory of Law* (1960), trans. M. Knight, Berkeley, University of California Press.

Kelsen H. (1973). "Law and Logic" (1965), in *Essays in Legal and Moral Philosophy*, ed. by O. Weinberger, trans. P. Heath.

Kelsen H. (1991). *General Theory of Norms* (1979), trans. M. Hartney, Oxford, Clarendon.

Kelsen H. (1992). *Introduction to the Problems of Legal Theory* (1934), trans. B. Litschewski Paulson and S.L. Paulson, Clarendon, Oxford.

Olivecrona K. (1971). *Law as Fact*, second ed., London, Stevens & Sons.

Ross A. (1957). "Tû-Tû", in *Harvard Law Review*, vol. 70, no. 5, 812.

Ross A. (1958a). *On Law and Justice* (1953), London, Stevens & Sons.

Ross A. (1958b). "Definition in Legal Language", in *Logique et analyse*, no. 3-4, 139.

Tarello G. (1974). *Diritto, enunciati, usi. Studi di teoria e metateoria del diritto*, Bologna, Il Mulino.

Tarello G. (1980). *L'interpretazione della legge*, Milano, Giuffré.