Chapter 7
Juristenrecht: Inventing Rights, Obligations, and Powers

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Scientific neutrality is […] a habit of life, […] our way of taking part in political struggle

Norberto Bobbio

7.1 Expository Versus Censorial Jurisprudence

The very beginning of every discussion about neutrality, meant as "Wertfreiheit", in the legal domain—it seems to me—is Jeremy Bentham's distinction between expository and censorial jurisprudence: "A book of jurisprudence can have but one or the other of two objects: (1) to ascertain what the law is; (2) to ascertain what it ought to be. In the former case it may be styled a book of *expository* jurisprudence; in the latter, a book of *censorial* jurisprudence: or, in other words, a book on the *art of legislation*".[1]

Bentham's distinction is echoed by John Austin in the following way: "The existence of law is one thing, its merit or demerit is another, whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a

"La neutralità scientifica è […] un abito di vita, […] il nostro modo di partecipare alla lotta politica": N. Bobbio, "Lettera a Nicola Matteucci" (1963), a cura di C. Margiotta, in *Materiali per una storia della cultura giuridica*, XXX, n. 2, 2000, p. 418.

[1] J. Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. by J.H. Burns and H.L.A. Hart, Clarendon Press, Oxford, 1996, pp. 293 f.

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different enquiry. A law, which actually exists, is a law though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation".[2]

The same attitude is shared by Hans Kelsen too: his "pure theory of law" purportedly responds to "the required separation of legal science from politics"[3]; the pure theory "is being kept free from all the elements foreign to the specific method of a science whose only purpose is the cognition of law […]. A science has to describe its object as it actually is, not to prescribe as it should be or should not be from the point of view of some specific value judgments. The latter is a problem of politics, and, as such, concerns the art of government, an activity directed at values, not an object of science, directed at reality".[4]

Both Bentham and Austin, as well as Kelsen, aimed at distinguishing the value-free knowledge of the law from (a) the moral or political criticism and/or approval (or justification) of the existing law as well as (b) legal policy (viz., directives *de lege ferenda* addressed to the legislature).

Notice that if law is conceived of as a language—the language of law-giving authorities[5]—then both expository and censorial jurisprudence are second-order languages whose object-language is the law itself. Both concepts (expository and censorial jurisprudence) suppose a sharp logical distinction between the language of the law and the language of lawyers.

Nonetheless, Bentham's, Austin's, and Kelsen's characterization of expository jurisprudence as pure cognition of the law as it *is*—hence a purely cognitive, value-free, enterprise—cannot be taken as a satisfactory description of the actual practice of academic lawyers—i.e., in French juristic language, "la doctrine". Rather, it should be understood as a normative model of "legal science", since almost every book or essay usually claiming to be and actually considered as a piece of legal cognition ("expository jurisprudence", knowledge of the law in force) cannot be reduced to a merely cognitive enterprise.[6]

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[2] J. Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law*, 4th ed. by R. Campbell, John Murray, London, 1879, I, p. 220. Cf. also at pp. 33 and 176 f.: "General jurisprudence […] is concerned with law as it necessarily *is*, rather than with law as it *ought* to be; with law as it must be, *be it good or bad*, rather than with law as it must be, *if it be good*"; "The *science of jurisprudence* […] is concerned with positive laws […] as considered without regard to their goodness or badness".

[3] H. Kelsen, *Introduction to the Problems of Legal Theory* (1934), ed. by B. Litschewski Paulson and S.L. Paulson, Clarendon Press, Oxford, 1992, p. 3.

[4] H. Kelsen, *General Theory of Law and State*, Harvard U.P., 1945, Cambridge (Mass.), p. XIV.

[5] N. Bobbio, "Scienza del diritto e analisi del linguaggio" (1950), in U. Scarpelli (ed.), *Diritto e analisi del linguaggio*, Comunità, Milano, 1976.

[6] I refer to legal writings such as textbooks, monographs, commentaries, etc., with a special look to continental legal scholarship.

7.2 The Issue Restated: Legal Science Versus Legal Scholarship

In the common usage of continental jurisprudence the ordinary juristic work is frequently labelled as "legal science",[7] "legal doctrine",[8] or "legal dogmatics".[9] Nonetheless, all such phrases can be understood as pointing to (at least) two quite different intellectual enterprises which ought to be distinguished:

1. On the one hand, *legal science* properly so called—the "science of law" (Kelsen), the "science of jurisprudence" (Austin)—i.e., the scientific (neutral, value-free) description of the law in force [10];
2. On the other hand, what I shall call *legal scholarship*,[11] i.e., the usual academic investigation into the law, especially into those normative texts which are regarded as the official sources of law.

What should the science of law exactly amount to, can be questioned, e.g., it may be questioned whether it should confine itself to describing the so-called "law in books" (this is often the case in continental jurisprudential style) or it should take

[7]German "Rechtswissenschaft", Italian "scienza giuridica", French "science juridique", Spanish "ciencia jurídica", etc.

[8]Cf., e.g., A. Peczenik, *Scientia Juris. Legal Doctrine as Knowledge of Law and as a Source of Law*, vol. 4 of E. Pattaro (ed.), *A Treatise of Legal Philosophy and General Jurisprudence*, Springer, Dordrecht, 2005, Chap. 1. See also A. Ross, *On Law and Justice*, Stevens & Sons, London, 1958, *passim* (in particular pp. 9, 19, 46), about what he calls the "doctrinal study of law".

[9]German "Rechtsdogmatik", Italian "dogmatica giuridica", French "dogmatique juridique", Spanish "dogmática jurídica", etc. The phrase "legal dogmatics" is not familiar to Anglo-American jurisprudence, but is commonly used in continental juristic parlance. Cf. e.g. A. Aarnio, *On Legal Reasoning*, Turun Yliopisto, Turku, 1977, pp. 266 ff.; R. Alexy, *A Theory of Legal Argumentation* (1978), trans. by R. Adler and N. MacCormick, Clarendon Press, Oxford, 1989; E. Bulygin, "Legal Dogmatics and the Systematization of Law", in T. Eckhoff, L.M. Friedman, J. Uusitalo (eds.), *Vernunft und Erfahrung im Rechtsdenken der Gegenwart*, Duncker & Humblot, Berlin, 1986 (*Rechtstheorie*, Beiheft 10), pp. 193–210; A. Aarnio, *The Rational as Reasonable*, Reidel, Dordrecht, 1987, Chap. 3; A. Peczenik, *Scientia Juris. Legal Doctrine as Knowledge of Law and as a Source of Law*, cit., esp. Chap. 1.

[10]D.M. Walker, *The Oxford Companion to Law*, Clarendon Press, Oxford, 1980, p. 754: "*Legal science*. Systematized and organized knowledge […] of and about law. […] The term 'legal science' may also be limited to systematic thinking and writing about law, as distinct from law making and application of law to practical problems, what might be better described as legal scholarship".

[11]D.M. Walker, *The Oxford Companion to Law*, cit., p. 750: "*Legal scholarship*. Systematic research into and thinking and writing about any division or subdivision of legal science. It is mainly the function of the legal scholar or jurist. […] Its purpose may be highly theoretical or severely practical, to elucidate some abstract matter or to reduce to order and make understandable and usable the prescriptions of a particular statute. This activity is sometimes called 'legal science', though that phrase seems more appropriate for the total body of knowledge, understanding of which is advanced by legal scholarship".

into account judicial decisions (case-law) as the very core of "law in action". The first line of inquiry is (at least apparently) suggested, e.g., by Hans Kelsen; the second one is recommended namely by American Realists as well as the Scandinavian realist scholar Alf Ross. But this issue is immaterial in the present context.[12]

Legal science (strictly understood) and legal scholarship are different matters. The main difference between them, however, is not the same as between describing and evaluating and/or prescribing. Sure, from time to time academic lawyers do evaluate—criticize or approve (or justify)—the law in force; sometimes they also make statements *de lege ferenda*, i.e. directives belonging to the realm of the "art of legislation" (in Bentham's terms) or "art of government" (in Kelsen's language). In such circumstances, however, they do not usually claim to act as genuine "scientists". The non-neutral character of legal scholarship lies elsewhere and is the specific subject of this paper.

7.3 The Main Components of Legal Scholarship

In common juristic usage, the legal academic work as a whole is often labelled as "interpretation" without any further specification. However, such a use of the term "interpretation" is definitely too large. Its main fault is overshadowing the variety of intellectual operations actually accomplished by legal scholars. Since interpreting, properly understood, is but a part—and not the most important, I dare say—of actual juristic work. Side by side with interpretation, jurists accomplish a great deal of other operations too. I propose to label them "juristic construction".

1. Interpretation *stricto sensu* consists in ascribing meaning to normative texts (such as statutes, the constitution, etc.). The standard form of an interpretive sentence, I assume, is: "T means M" (where T stands for the interpreted text and M for the ascribed meaning).
2. Juristic construction, in the sense I am going to use the phrase, mainly consists in shaping unexpressed rules, i.e. rules that no normative authority ever formulated—rules that cannot be ascribed to any definite enacted text as its meaning-content or direct (logical) implication.

In most cases the grounds of such rules are juristic "theories" or "doctrines",[13] such as the theory of parliamentary government, the theory of written constitutions, the theory of the relationships between European Community law and the domestic legal systems of the member states, the doctrine of incorporation of rules of international

[12] Cf., however, the concluding remark of this paper.

[13] D.M. Walker, *The Oxford Companion to Law*, Clarendon Press, Oxford, 1980, p. 371: "*Doctrines of Law*. Systematic formulations of legal principles, rules, conceptions, and standards with respect to […] fields of the legal order, in logically interdependent schemes, whereby reasoning may proceed on the basis of the scheme and its logical implications".

law in municipal legal systems, the opposite doctrine of transformation (according to which international rules only form part of municipal law if accepted by statutes), the competing theories of civil liability, the different conceptions of equality, and so on.

Such theories are, on the one hand, products of juristic construction and, on the other hand, powerful tools for further construction. In particular, they are used as arguments for asserting the existence or validity of unexpressed rules. Generally speaking, the framing of unexpressed rules is aimed at filling (real or supposed) gaps in the law.

But, of course, both interpretation and construction need some further analysis.

7.4 Interpretation

In common usage, "interpretation" refers sometimes to an act of knowledge, sometimes to an act of decision, sometimes to a genuine act of rule-creation. Therefore we should distinguish between "cognitive", "adjudicative", and "creative" interpretation.[14]

1. Cognitive interpretation consists in identifying the ("frame" of) various possible meanings of a legal text—the meanings admissible on the basis of shared linguistic (syntactic and semantic) rules, accepted methods of interpretation, and existing juristic theories—without choosing anyone of them.
2. Adjudicative interpretation consists in settling one definite meaning, chosen among the meanings identified (or identifiable) by means of cognitive interpretation, and discarding the others.
3. Creative interpretation consists in ascribing the text a "new" meaning not included in the frame of meanings identified (or identifiable) by means of cognitive interpretation.

Suppose a legal provision P is ambiguous or otherwise indeterminate in such a way that it could be interpreted as expressing either the rule R1 or the rule R2. Well, cognitive interpretation will take the form of a sentence stating "P can mean either

[14]The ground of the following distinction is the simple statement of fact that (almost) every "legal norm has two or more meanings", and "there is no juristic reason to prefer one of the various meanings to another. […] The view […] that the verbal expression of a legal norm has only one, 'true', meaning which can be discovered by correct interpretation is a fiction, adopted to maintain the illusion of legal security, to make the law-seeking public believe that there is only one possible answer to the question of law in a concrete case. […] The view that it is the function of interpretation to find the 'true' meaning of the law, is based on an erroneous concept of interpretation. […] The choice of interpretations […] is determined by political motives. Authentic interpretation [i.e., interpretation performed by law-applying authorities] may even attribute to a legal norm a meaning which non-authentic interpretation could never dare to maintain. That is to say, by authentic interpretation a legal norm may be replaced by another norm of totally different content" (H. Kelsen, "On Interpretation", Preface to H. Kelsen, *The Law of the United Nations. A Critical analysis of Its Fundamental Problems*, Stevens & Sons, London, 1950, pp. XIII ff).

R1 or R2"; adjudicative interpretation, in turn, will be expressed by a sentence stating either "P means R1" or "P means R2"; creative interpretation, in turn, will consist in saying, e.g., "P means R3" (notice that, by hypothesis, R3 is not one of the admissible meanings of P, as identified by cognitive interpretation).

Take this very simple example. Article 40 of the Italian constitution states: "The right to strike will be exercised in compliance with the statutes which regulate it". Now, suppose that no statute actually exists regulating the exercise of such a right. Well, cognitive interpretation of this constitutional provision could run, more or less, like this: article 40 of the constitution can be ascribed three different meanings—(a) the right to strike may not be exercised until some statute does regulate its exercise; (b) lacking any statutory regulation, the right to strike may be exercised with no limits at all; (c) even in absence of any statute regulating the issue, the right to strike may be exercised although within limits, viz., its "natural" limits deriving from the balance of it with other fundamental rights and constitutional values.[15] Adjudicative interpretation, in turn, would consist in choosing one of such competing meanings.

As a good example of creative interpretation, I shall mention the following. Article 72 of the Italian constitution requires a certain legislative procedure for the enactment of any "statute on constitutional matters". No need to say that "constitutional matters" is an open-textured concept, which allows for a great deal of interpretive discretion. The phrase "statute on constitutional matters", however, is not ambiguous—in ordinary juristic language, it univocally denotes *ordinary* (i.e. non-constitutional) statutes bearing upon issues of constitutional significance (paradigmatic example: statutes concerning the electoral system of the Chambers). Nevertheless, according to the Constitutional Court's opinion, it should be interpreted as meaning the same as "constitutional statutes", i.e., statutes adopted by the special procedure required for constitutional amendments. Such a meaning of the phrase clearly falls outside the range of meanings—in the present case the one and only meaning, in fact—identifiable by cognitive interpretation.[16]

Cognitive interpretation is a purely scientific operation devoid of any practical effect—it belongs to the realm of legal science properly understood. Adjudicative and creative interpretations, in turn, are "political" operations—they do not point at ascertaining the existing law; rather, they point at shaping it.

However, as far as I can see, creative interpretation, as defined above, is somewhat unusual. In most cases creative interpretation takes a slightly different form—it consists in deriving from a legal text some unexpressed ("implicit", in a large, non-logical, sense) rules either by means of a great variety of non-deductive arguments (e.g., *a contrariis*, *a simili*, etc.) or on the basis of some *a priori* juristic theory.[17] Well, deriving ("constructing" or framing) unexpressed rules, strictly speaking, is

[15]The three interpretations listed above were actually maintained in recent Italian constitutional history.

[16]Corte costituzionale, decision 168/1963.

[17]Jurists treat such rules as "implicit" in view of hiding the creative import of their constructions.

not an "interpretive" act—it is a genuine form of so-called "interstitial legislation" by interpreters. And this last remark leads us to juristic construction.

7.5 Juristic Construction

Legal scholars' books and papers are crowded by theoretical assumptions, previous to the interpretation of any particular legal provision—assumptions that have no direct relationship with normative texts.[18] Such assumptions:

1. First, inevitably condition interpretation, either orienting it in a definite direction or excluding certain interpretive decisions otherwise possible;
2. Second, most of all, are grounds for deriving a great deal of unexpressed rules.

Let me provide some examples.

(a) According to the European Court of Justice,[19] "the European Economic Community constitutes a new legal order of international law […] which comprises not only member states but also their nationals. Independently of the legislation of member states, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also because of the obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Community. […] According to the spirit, the general scheme and the wording of the EEC Treaty, article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect".

In other words, the Court assumes the European Community Treaty to be neither an ordinary international act (governing relationships among states) nor a constitutional act (governing relationships between citizens and the state), but an entirely new kind of legal act with a mixed nature, half international, half constitutional. This "theoretical" assumption leads the Court to interpret several provisions of the Treaty as creating rights and obligations not only in the relationships among states but even in the relationships between each state and its citizens.

(b) According to Alexander Hamilton,[20] "a limited constitution" is a constitution "which contains certain specified exceptions to the legislative authority", i.e.,

[18] As far as I know, this is especially true for continental legal scholarship.

[19] European Court of Justice, February 5, 1963, Case 26/62, *Van Gend & Loos*. According to the Court of Justice, April 8, 1976, Case 43/75, *Defrenne*, the mandatory articles of the Treaty apply not only to the action of public authorities but also to independent agreements concluded privately or in the sphere of industrial relations, such as individual contracts and collective labour agreements.

[20] *Federalist Papers*, n. 78.

a constitution limiting the competence of the legislature, and "limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all the acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing".

Hamilton's reasoning—a piece of "art of legislation" in Bentham's terms—is quite simple: the Constitution states a number of limits to the legislative power; the only way to make such limits effective is declaring any legislative act contrary to the constitution void; such a declaration cannot be entrusted but to the courts. No need to say that such a power of the courts goes far beyond the explicit provisions of the Federal Constitution of the U.S.A.

Hamilton's theory of limited constitutions, however, is echoed and expanded by Justice Marshall, in *Marbury* (1803)[21]: "a legislative act contrary to the constitution is not law […]. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of such government must be that an act of the legislature, repugnant to the constitution, is void. […] So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. […] If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such an ordinary act, must govern the case to which they both apply".

Justice Marshall, in other words, assumes that, according to the intention of the framers, the Constitution is superior to (more valued than) legislative acts, and derives from such a "theoretical" assumption two outstanding normative consequences—first, any legislative act contrary to the constitution is void; second, the Court is entitled to declare such an act void. Both consequences are but unexpressed rules, that the Supreme court is adding to the Constitution.

(c) The Italian Constitution of 1948 has framed a "parliamentary government", since the Executive is subject to the confidence of the Chambers and, in case of a vote of censure, is (supposedly) under the obligation to resign. Now, Italian constitutional lawyers (more or less unanimous on this point) maintain that, under the supposed "general theory" of parliamentary government, the President of the Republic is not the "head" of the Executive: he or she is rather a "neutral" power—something like Benjamin Constant's *pouvoir neutre*—whose function is just "guaranteeing" the constitution, i.e. assuring the normal functioning of the ordinary political-constitutional process.

Such a "theoretical" assumption has a great normative import. For example: the President is granted a veto-power over legislative acts; however, he or she may not exercise such a power on political grounds, since the function of the

[21] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60.

veto-power is allowing the President to exercise an *a priori* control over the constitutionality of statutes (quite different from the *a posteriori* control assured by the Constitutional Court); in particular, the President may use his/her veto-power (only) against statutes whose unconstitutionality is self-evident. Another example: the acts of the Executive, although settled by the Council of Ministers, are enacted by the President, i.e. they are, properly speaking, presidential (not governmental) acts; the President, however, may not refuse his/her signature except when facing acts clearly unconstitutional. And so on. In other words, the "general theory" of parliamentary government allows legal scholars to add a great deal of rules—limiting presidential powers—to those expressly stated by the Constitution.

(d) The Italian Constitutional Court assumes—without providing any argument—that the constitution contains (or implies) a number of "supreme principles", which are allegedly superior to the remaining constitutional provisions, and concludes that such principles may not be suppressed, derogated, or changed in any way—not even by means of the procedure of constitutional amendment. As a consequence, the Court empowers itself to declare null and void any constitutional amendment purporting to subvert the supreme principles.[22] Notice that in no way does the existing constitutional text allow for such theses.

7.6 Unexpressed Rules

An unexpressed rule is a rule that no normative authority ever formulated—a rule which cannot be ascribed to any legal text as its meaning-content.

Every unexpressed rule is the result of an argument, in which (usually) some expressed rule is one of the premises and the unexpressed one is the conclusion. But it has to be stressed that in most cases such arguments, first, are not logically valid and, second (most of all), include premises which are not expressed rules, but arbitrary juristic conceptual constructs and theories. At least three different kinds of reasoning and three different corresponding classes of unexpressed rules can be distinguished.

1. Some unexpressed rules are derived from explicit rules by means of a logically valid argument, in which all the premises are but explicit rules.

   For example, a first explicit rule states "All citizens have the right to vote"; a second explicit rule, in turn, states "Everyone procreated by citizen-parents is a citizen". From such premises one can deductively infer the implicit rule: "Everyone procreated by citizen-parents has the right to vote".

   Unexpressed rules of this kind, however, are of no interest in the present context, since, although not formulated by normative authorities, they are logically

[22] Corte costituzionale, decision 1146/1988.

entailed by explicit rules (without adding any further premises). Their juristic formulation is the result of a merely cognitive operation.

2. Other unexpressed rules are derived from explicit rules by means of logically invalid arguments—e.g., *argumentum a simili*, *argumentum a contrariis*, etc.

   For example, a constitutional provision grants all "citizens" the right to vote; arguing *a contrariis*, one could maintain that such a provision implies the unexpressed rule according to which non-citizens are positively (although implicitly) excluded from the exercise of such a right (in such a way that a statute granting them the same right would be unconstitutional). Another example: a statutory provision grants "big corporations" a tax-break; arguing *a simili*, one could maintain that, in the light of a supposed *ratio legis* (e.g., economic development during a financial crisis), big corporations are essentially "similar" to medium-size companies and, therefore, the provision at hand implies the further rule to the effect that the same tax-break is to be applied to such companies too. In both cases (*a contrariis*, *a simili*), a new unexpressed rule is added to the legal system.

3. Moreover, a lot of unexpressed rules are derived—deductively or not, this is not really important—either from explicit rules plus some theoretical assumption, or directly from a theoretical assumption alone.

I already gave some examples of it in the preceding section. Consider however some examples more.

(a) According to the "classical" constitutional theory of the Enlightenment, the function of every constitution is limiting political power[23]; this view implies that constitutional rules are addressed (only) to the supreme state organs and in no way subject to judicial application. Nowadays, on the contrary, most constitutional lawyers think that the function of the constitution is (also or even essentially) moulding social relationships among citizens[24]; from this view they draw the conclusion that constitutional rules should be directly applied by any judge in any controversy (what is called "Drittwirkung" in German jurisprudence).[25]

(b) Article 139 of the Italian Constitution prohibits whatever revision (even by means of constitutional amendment) of the "republican form" of the state. Most constitutional lawyers, however, assume that a republican state is, by definition, a democratic one, and conclude that no revision of the democratic form of the state is allowed. No need to say that this conclusion, whose only ground is a

[23] See article 16 of the *Déclaration des droits de l'homme et du citoyen*: "Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution".

[24] G. Bognetti, "Teorie della costituzione e diritti giurisprudenziali", in Associazione italiana dei costituzionalisti, Annuario 2002, *Diritto costituzionale e diritto giurisprudenziale*, Padova 2004.

[25] See, e.g., G. Zagrebelsky, *Il diritto mite*. *Legge*, *diritti*, *giustizia*, Einaudi, Torino 1992.

disputable juristic concept of "republic", has the outstanding effect of excluding from constitutional amendment nearly the whole constitutional text.

(c) The Court of Justice of the European Community assumes, on the one hand, that the European Community law and the law of the member states form a unified legal system and, on the other hand, that European law is superior to state law, and draws the conclusion that state legislation is invalid (or, at any rate, non-applicable) when incompatible with Community law.[26] No need to say that both assumptions have no textual counterparts in the EEC Treaty.

(d) The Italian Constitutional court assumes, on the contrary, that the European Community law and the law of the member states are independent legal systems, and draws the conclusion that Community law cannot derogate or invalidate incompatible state legislation.[27] This assumption too has no textual basis in the Treaty.

Generally speaking, formulating unexpressed rules is often aimed at concretising principles. The concretisation of principles, in turn, is often a means to fill up real or supposed gaps in the law.[28]

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[26] European Court of Justice, July 15, 1964, Case 6/64, *Costa*: "By contrast with ordinary international Treaties, the EEC Treaty has created its own legal system which […] became an integral part of the legal systems of the member states and which their courts are bound to apply. […] The integration into the laws of each member state of provisions which derive from the Community and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The Law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The Transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights". Cf. also European Court of Justice, March 9, 1978, Case 106/77, *Simmenthal*.

[27] Corte costituzionale 170/1984.

[28] *Supposed* gaps, in most cases. Take the following example. Article 87 of the Italian constitution states (among many other things) that the President of the Republic enacts (certain) governmental acts. Most constitutional lawyers, however, are not satisfied with such a simple provision. They wonder about the limits of this presidential power—in particular, they ask in what circumstances the President is authorized to refuse the enactment and, since the constitution gives no answer to such a question, they conclude for the existence of a gap in the constitutional text and try to fill it (see, e.g., M Luciani, "L'emanazione presidenziale dei decreti-legge. (Spunti a partire dal caso E.)", *Politica del diritto*, 3, 2009). They do not even suspect that since the constitution states no limits hence no *constitutional* limits exist. Should we really consider as a gap any case that the constitution simply does not take into account? The supposed gap does not depend on the fact that the constitution fails to regulate the case although taking it into account—it depends on the juristic assumption that the constitution *ought to* regulate the case. In other words, the gap in question is an "axiological" one.

7.7 Concretising Principles

Framing unexpressed rules amounts to "apocryphal" legislation by interpreters. And, as a matter of fact, it constitutes the main and most significant part of legal scholars' work. This is especially true as far as constitutional interpretation—or, rather, constitutional "construction"—is concerned.

It is a well known feature of most European constitutions of the twentieth century that they include a great deal of "principles", i.e. provisions affected by a high degree of indeterminacy (open circumstances of application, defeasibility, etc.)—provisions, in particular, that because of their indeterminacy cannot be applied without previous "concretisation".

On the one hand, principles, because of their peculiar form of indeterminacy, cannot be used as direct justifications of judicial decisions of individual cases. For example, the principle "Defence is an inviolable right at every stage and instance of legal proceedings" (article 24 of Italian Constitution) says nothing about the presence or absence of the advocate to the police interrogation of the accused person; to decide whether the advocate ought to be present or not, the principle must be "transformed" into a (relatively) precise rule.[29] The principle "National sovereignty belongs to the people" (article 3 of French Constitution) says nothing about the right to vote of immigrants from inside the European Union in the elections of city councils; to decide whether such immigrants are entitled to vote or not, one has to derive, from the principle, a definite rule.[30]

On the other hand, in most cases the judicial review of legislation requires comparing (not two rules, but) a rule and a principle.[31] Rules and principles, however, are logically heterogeneous sentences. As a consequence, such a comparison is simply impossible without previous concretisation of the principle at stake. How to compare a statutory rule which does not provide the presence of the advocate to the police interrogation with the constitutional principle of the defence as an inviolable right? How to compare the principle of national sovereignty with a statute or a treaty entitling European immigrants to vote in the elections of city councils? Once more, principles need concretisation.

Concretising a principle means "extracting" from it one or more unexpressed rules. Such a concretisation amounts to an argument where the premises are the principle at hand coupled with one or more arbitrary "theoretical" assumptions. For example: "Defence is an inviolable right at every stage and instance of legal proceedings"; the police interrogation of the accused person is a part of the legal proceedings; hence the advocate ought to be present.[32]

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[29] See Corte costituzionale, decision 190/1970.

[30] See Conseil constitutionnel, decision 92–308 DC.

[31] G. Zagrebelsky, *La giustizia costituzionale*, 2nd ed., Il Mulino, Bologna 1988, pp. 125 ff.

[32] The example shows a logically valid argument, but in most cases juristic reasoning is not deductive.

7.8 Production of Rules by Means of Rules

Generally speaking, legal scholarship amounts to shaping the legal system in two connected ways[33]:

1. First, determining by means of adjudicative interpretation the meaning-contents of the enacted texts;
2. Second, producing (new) rules by means of (pre-existing) rules, i.e.—echoing a happy formula by J. L. Mackie—"inventing right and wrong"[34]: more precisely, inventing rights, powers, obligations, and other "jural relations".

In Bentham's, Austin's, and Kelsen's view, law is a language—the set of sentences enacted by the lawgiving authorities—and "expository jurisprudence" is depicted as a *second-order descriptive* language whose object-language is the normative language of the law.[35] This view of the "science of law" is a normative model on which one can easily agree. But it cannot be considered as a reliable description of actual legal scholars' practice.

In actual legal scholars' language, at least three kinds of sentences can be distinguished:

(a) "Normative propositions" ("Rechtssätze", "propositions of law", etc.), i.e. true or false sentences describing the law in force;
(b) Adjudicative interpretive statements, which are not propositions at all, since they do not describe, but ascribe meaning;
(c) Normative formulations, which do not describe anything at all, but settle new (unexpressed) rules.

There is no possible confusion between the revolving of the earth around the sun and the astronomical science which describes it, since the moving of planets is no language-entity (while astronomical science obviously is). As far as the relationship between legal scholarship and the law is concerned, on the contrary, such a confusion is possible and actually obtains. This is so since both law and legal scholarship are but languages. In other words, no clear-cut distinction can be established between the language of law and the language of lawyers—they are subject to a continuous osmotic process. Lawyers' language does not "bear upon" the language of the law—rather, legal scholars do mould and continuously enrich their subject-matter of study.

This amounts to say that interpretation and juristic construction are not the "legal science"—as academic lawyers usually claim—but a part of the law itself and therefore a part of the subject-matter of legal science. In other words, describing the law in force requires taking into account legal scholarship as a significant part of it.[36]

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[33] The formula of the title obviously echoes Piero Sraffa's *Production of Commodities by Means of Commodities. Prelude to a Critique to Economic Theory*, Cambridge U. P., Cambridge 1960.

[34] J. L. Mackie, *Ethics. Inventing Right and Wrong* (1977), Penguin Books, Harmondsworth, 1978.

[35] By the way, criticism and approval of existing law, too—i.e., "censorial jurisprudence"—amount to a second-order (evaluative) language about the law.

[36] Provided, as a matter of course, that the rules framed by legal scholarship come into force through the decisions of law-applying organs.