# The Politics of Legal Interpretation


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**Abstract** Is legal interpretation a kind of scientific enterprise? Can there be such a thing as a 'scientific interpretation' in the law? And why do such questions matter? Are they even worth asking? My aim in this essay is to look into questions of this sort, in order to show, ultimately, that legal interpretation belongs less to the realm of science than to the realm of politics: legal interpretation, I will argue, is an intensely evaluative and decisional activity rather than a descriptive, objective and value-neutral one (as science is normally supposed to be). And, as a consequence, defining legal interpretation, or at least some of its varieties, in terms of a scientific activity carries the risk of distorting some central features—indeed the very 'essence'—of the practice known as 'legal interpretation'.

**Keywords** Interpretation · Legal scholarship · Value choices in law

Is legal interpretation a kind of science? Can there be such a thing as a 'scientific interpretation' in the law? And why do such questions matter? Are they even worth asking? My aim on the present occasion is to look into questions of this variety, in order to show, ultimately, that legal interpretation belongs less to the realm of science than to the realm of politics: legal interpretation, I will argue, is an intensely evaluative and decisional activity rather than a descriptive, objective and value-neutral one (as science is normally supposed to be). And, as a consequence, defining legal interpretation, or at least some of its varieties, in terms of a scientific activity carries the risk of distorting some central features—indeed the very 'essence'—of the practice known as 'legal interpretation'. Or so I will argue.

In order to prove my point, or at least to make it less obscure, I will first try to clarify what kind of question it is we are dealing with (Sect. 1); then I will briefly point to the reasons why it may be important, or it has been thought to be important, that legal interpretation resemble something like a 'scientific' activity (Sect. 2); and,

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finally, I will try to show why it is not appropriate to resort to science talk in the domain of legal interpretation, whereas 'politics' is a much more appropriate notion to resort to (Sects. 3 and 4).

## 1 Understanding the Question

In order to understand the kind of questions we are dealing with ('Is legal interpretation a kind of science?' and the like), some preliminary clarifications are in order.

The first point to discuss is the following: what kind of problem is at issue when we query about the scientific character of legal interpretation? Is it a descriptive question, or is it a normative question? In the first case (descriptive question), of course, we are asking if legal interpretation *is in actual fact*—i.e. as it is normally practised—a kind of science, whereas in the second case (normative question) we are asking what is necessary in order to make of legal interpretation a scientific activity, what kind of epistemological requirements would be needed in order to produce a scientific legal interpretation. Quite obviously, these two questions are different in character; the remarks that I will try to put forward in this paper, however, will address both of them.

The second point concerns the kind of activity whose scientific status is under consideration. Here we find two main possibilities. The first possibility is that *legal scholarship at large* might be considered as a 'science'—wherein 'legal scholarship' refers to all the intellectual activities normally performed in the context of the doctrinal study of law, as opposed to the judicial application of law, on the one hand, and to the more abstract, theoretical/philosophical approach of 'jurisprudence' or 'legal theory', on the other.[1] The second possibility is that *some specific instance* of intellectual activity performed by jurists and judges might be considered as 'scientific' in character. Again, these two possibilities are different in character, but the remarks that I will try to put forward in this paper will separately address both of them.

Lastly, is the question of the scientific character of legal interpretation just some sort of thought experiment, as it were? In other words, in critically—or even polemically—addressing the possibility of a 'scientific interpretation', am I just targeting a strawman, an entirely abstract idea that is not actually endorsed by anyone around? Well, the answer is a resounding 'No'. Indeed, on the one hand, there is a long-standing tradition, especially in continental Europe (and by derivation also in Latin America), of using the term 'legal science' to refer to legal scholarship. There are many reasons for this usage, which is almost entirely absent in the

[1] In continental Europe, 'legal scholarship' is sometimes also called 'legal doctrine' or 'legal dogmatics'. See Bulygin (2015), Peczenik (2005), and Aarnio (2011).

common law tradition,[2] and they will be briefly addressed shortly (§ 2). And on the other hand, in the contemporary jurisprudential debate on legal interpretation, there is at least one influential proposal according to which it is possible to devise a kind of legal interpretation that is 'scientific' in character (§ 3). So it seems that a second look to this question is still warranted.

## 2 Why (Some) Lawyers Claim That Legal Interpretation Is a Science

Once the nature of the question of the purported scientific character of legal interpretation has been clarified, we can ask why we are even asking such a question. Why, in other words, would it matter at all if legal scholarship, or some specific kind of legal interpretation, may be dubbed as a 'scientific' enterprise? Indeed, many different reasons may account for this.

The first reason is that jurists need to present their conclusions about the content of the law as grounded in the existing law—i.e. as interpretations of a pre-existing body of positive law.[3] In other words, legal interpretation—if it deserves to be called 'interpretation' proper and not just a sheer policy argument, a proposal *de lege ferenda* or merely a lawyer's hunch—always includes a 'knowledge' component, which consists in recognising, acknowledging something that in some sense is already there, in the law.[4] So it is true that legal interpretation includes a 'descriptive' part: legal interpretation must be an interpretation of the law, not a free act of creation of new law—or at least it must be presented in this way.[5] And here is where the concept of science kicks in, of course. Science is the paradigm case of objective knowledge—it is the kind of knowledge that can produce objective outcomes, that can produce true statements.

So here we have a second reason why the idea of science has been so frequently associated with the study of law: science is a 'thick concept'[6]. Science normally attracts considerable social consensus: an activity that is 'scientific' in character normally enjoys social legitimacy and high credibility. Science is endowed with social prestige; it is an activity that purportedly strives for objective knowledge—for the truth—and that is not compromised with value choices and axiological stances towards its object. Science is knowledge for knowledge's sake. If the jurists are able

[2]For some rather isolated exceptions, see Harris (1979); Samuel (2003: esp. chs 1 and 2). Interestingly, when the American comparative lawyer John Henry Merryman had to use 'legal science' in an essay on Italian legal scholarship, he felt the need to explain why he was using such a phrase. See Merryman (1965, p. 45 ff).

[3]Lyons (1999, pp. 301–303).

[4]Ferrajoli (1989, ch 1); Redondo (2009, esp. 33–34).

[5]See Raz (2009, p. 299): 'some interpretations are so bad as to be interpretations no longer'.

[6]On thick concepts, see Williams (1985, pp. 129–131, 140–145).

to wear the hat of the scientist, then their social prestige and credibility is augmented.[7] At the same time, 'science' carries with it not only legitimacy but also insulation, as it were: if jurists are perceived as scientists, their field of expertise becomes a highly technical, specialised field of inquiry, with its own epistemological rules and a technical language that is different from the language used in other disciplines (scientific and non-scientific alike), and is virtually inaccessible to the profane.[8]

Third, the emphasis on the possibility of a scientific, and thus 'objective', knowledge of the law is tightly linked, at least *prima facie*, to highly cherished political values such as separation of powers, democracy, legal certainty and the rule of law. These values make the idea of a scientific approach to the law quite appealing and at the same time produce a virtually apolitical image of the jurist—the jurist is presented as engaged in an objective description of the law; he is not part of the law-making process (broadly understood). The jurist acts as a neutral transmission belt between law-making institutions (normally endowed with democratic legitimacy) and law-applying institutions.[9]

Finally, a fourth possible reason for science talk in law is linked to the influence of logical empiricism on some important European legal philosophers in the twentieth century. Indeed, the history of European legal positivism in the second half of the twentieth century is largely the history of the search for a scientifically credible 'knowledge of law'—the possible ways of turning legal knowledge into a really scientific knowledge.[10] This approach, however, proved to be a rather exigent one: it is not content with just labelling as 'science' what the jurists normally do in their study of the law; rather, it commands a reform, or even a radical transformation, of the juristic study of the law. Under this approach, in other words, if the knowledge of the law has to become a scientific enterprise, it must abide by the methodological rules of science properly so called—i.e. of natural sciences. So, for instance, according to Alf Ross, the juristic study of the law can become a science if it deals only with observable facts (namely, past judicial decisions) and formulates predictions of future events accordingly (namely, predictions of which norms are likely to be applied in future cases).[11] According to Norberto Bobbio, in turn, the juristic study of the law may become scientific if it adopts a 'rigorous language'—i.e. if it defines clearly its terms and the rules of formation and transformation of its propositions.[12] And many other examples could be added to this list.

I will not discuss here if the idea of 'science' that lurks in the background of these discussions is actually a reliable one. Here I just want to point out that, as we have

[7]On the 'inferiority complex' of the jurist in front of other scientists see Bobbio (1997).

[8]Posner (1987).

[9]Jori (1990, pp. 232–233) ('if we are unable to scientifically *describe* the law, then the notion of *applying* it is senseless', at 233, emphasis in the original).

[10]For detailed reconstructions of this cultural environment, Villa (1984), Pino (2014) and Priel (2012).

[11]Ross (1958).

[12]Bobbio (1997).

seen, the emphasis on science depends on the tight relation between science, on the one hand, and such things as knowledge, objectivity and truth,[13] on the other. But it is possible that this point tends to be overstated. First, not all knowledge is scientific knowledge—science does not cover all possible kinds of knowledge; there may be respectable forms of knowledge that would not necessarily qualify as instances of science. As a consequence, it may be perfectly possible to talk of legal knowledge without necessarily deploying the concept of science.[14] And, second, it might even be possible to talk about *truth* in legal knowledge and in legal interpretation without automatically involving the idea of science[15]—a possibility I do not endorse, by the way.[16]

Be that as it may, in the following sections I will discuss in turn two different ways of bringing together 'science' and 'legal interpretation'—namely, the idea that there is a specific way of performing legal interpretation which may qualify as 'scientific', on the one hand, and the idea that the juristic study of the law may be a kind of 'science', on the other.[17]

## 3 Why Legal Interpretation Is No Science (I): 'Scientific' Interpretation?

The first idea I want to discuss concerns the possibility of producing a kind of legal interpretation that is purely cognitive, and hence purportedly scientific, in character. Appearances notwithstanding, this idea has not been proposed in the wake of some form of interpretive formalism, or legal cognitivism. Quite the contrary, the idea of cognitive or scientific interpretation has been proposed, among others, by such torchbearers of interpretive scepticism as Hans Kelsen and Riccardo Guastini.[18] In

[13]This relation has sometimes been taken to the point of claiming that, since jurists are able to produce true statements, this very fact warrants the scientific character of their job: Aarnio (1981).

[14]Miguel (2002, p. 5673); Comanducci (2014).

[15]Ferrajoli (1989, ch 1); Pintore (1998); Redondo (2009).

[16]For my part, I think that 'truth' may apply to empirical statements, but not to meaning-ascription statements—such as interpretive statements, whose basic formal structure is 'Text T means M'. In the domain of interpretation, I think that the appropriate word, here, is not 'true', but rather something in the province of 'reasonable', 'correct', appropriate', and alike. For critical assessments of the use of 'truth' in the context of legal interpretation, see Diciotti (1999) and Chiassoni (2016). More generally, see Patterson (1996).

[17]Of course, in the present context I am totally discarding the problem of legal interpretation involving scientific concepts, i.e. concepts elaborated by some natural science such as physics, biology, genetics, etc. This problem raises very important epistemological and legitimacy issues, but it is an entirely different problem from the one I am dealing with in the present occasion. See Canale (2015).

[18]See Kelsen (1960, ch VIII); Guastini (2011a, b, c, pp. 141–142); Id. (2012). But see also Peczenik (1989, pp. 33, 36); Chiassoni (2015); Id. (2016: see esp. 99, fn 8).

fact, the idea of cognitive interpretation is not only compatible with interpretive scepticism—it is an integral part of it, particularly in its 'moderate' varieties.[19]

In a nutshell, the idea of cognitive interpretation runs as follows. The label 'legal interpretation' is ambiguous: it may be attached to at least three very different activities—as well as to the product of such activities, of course. Firstly, 'legal interpretation' may refer to the activity of listing, in a purely cognitive way, the several possible meanings—i.e., the several possible norms—which may be expressed by a given source of law,[20] using the interpretive methods that are available in a given legal culture and without picking out any one of those meanings as the preferred one (cognitive interpretation). Cognitive interpretation, accordingly, boils down to a statement of this sort: 'the source of law SL may be interpreted to express, alternatively, the following norms: $N_1$, $N_2$, $N_3$ ... Nn'.[21] Secondly, 'legal interpretation' may refer to the activity of choosing *one* meaning, among the several possible ones that can possibily be inferred from a given legal text (adjudicative interpretation). Adjudicative interpretation, accordingly, boils down to a statement of this sort: 'the correct meaning of source of law SL is $N_1$ (according to the *interpretive* methodology $IM_1$)'. Thirdly, 'legal interpretation' may refer to the activity of 'crafting' a norm which is actually not included among the several possible meanings of a given source of law (creative interpretation). Creative interpretation, accordingly, boils down to a statement of this sort: 'even if the norm $N_1$ does not appear, *prima facie*, to be expressed by the source of law SL, it may nevertheless be inferred from it (according to the *integrative* methodology $IM_1$)'.

The different nature of the three kinds of interpretation should be readily apparent. Cognitive interpretation is presenyed as just a matter of knowledge. Adjudicative interpretation, on the other hand, is not a matter of knowledge but a matter of decision: namely, the decision to choose one among the several possible alternative meanings that can be expressed by the source of law. Creative interpretation, in turn, is also a matter of decision, but not among alternative meanings that are conveyed by the legal text: rather, it is innovative vis-à-vis existing law; it is a matter of integration of the law.

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[19]For the difference between 'radical' and 'moderate' interpretive scepticism, see Guastini (2011a, b, c). Radical interpretive scepticism claims that there is no meaning before interpretation—meaning is *created* by interpretation. Moderate interpretive scepticism, by contrast, claims that before interpretation there always are multiple (but not infinite) possible meanings, and interpretation consists in choosing among them.

[20]For simplicity's sake, in the following I will use 'source of law' to refer not only to a legally valid document (a 'legal text', such as a statute), but also to *a portion* of a legal text, selected in virtue of its syntactic unity (a 'sentence', in linguistic terms)—e.g., an article, or a portion of an article, of a statute. This is normally considered as the basic item of legal interpretation.

[21]See for instance Kelsen (1960, p. 355): 'jurisprudential interpretation is purely cognitive ascertainment of the meaning of legal norms. [...] Jurisprudential interpretation can do no more than exhibit all possible meanings of a legal norm. Jurisprudence as cognition of law cannot decide between the possibilities exhibited by it, but must leave the decision to the legal organ [...]'.

Another way of putting this involves the well-known metaphor of the 'frame': the output of cognitive interpretation is the frame (i.e. the sum total) of all the possible interpretations of a given source of law; adjudicative interpretation consists in choosing one meaning among those that are included in the frame; and creative interpretation, finally, consists in stepping outside the frame of the possible meanings of a source of law and stipulating a brand new one.

It would seem that this picture carries some flavour of paradox with it. On the one hand, cognitive interpretation enjoys a sort of conceptual or logical priority over the two other forms of interpretation. Indeed, it is exactly because there is a frame of possible meanings, established by means of cognitive interpretation, that we can distinguish between adjudicative interpretation, on the one hand, and creative interpretation, on the other—the former being ordinary and legitimate business for the jurist, and especially for judges, while the latter is an (often covert) operation of juristic and judicial law making. On the other hand, it seems that jurists and judges alike, in their ordinary activities, quite seldom engage in cognitive interpretation: designing the frame of possible meanings does not appear to be of particular interest for the average jurist. *This* paradox is easily overcome, though, because it could simply be the case that jurists, in their interpretive activities, use or tacitly assume a frame of possible meanings without declaring it or even without conceptualising it, and as a consequence—far from being a mysterious or paradoxical object—cognitive interpretation could even be an essential tool in order to openly and fully articulate the interpretive activities of the jurists and to 'measure' their legitimacy.

Now I think that the idea of cognitive interpretation, while having some grain of truth in it, is basically flawed. I am not referring here to the already mentioned, and quite usual, criticism that the notion of cognitive interpretation does not reflect in the least the usual way in which jurists actually perform their job.[22] This objection, indeed, would be easily rebuffed by the proponents of the idea of scientific interpretation: the fact that legal scholars do not engage in cognitive interpretation, they may very well argue, is actually proof that legal doctrine, as it is normally practised, is no science at all. On the contrary, I think that the main flaw lies in the very claim of 'scientificity' that is expressly conveyed by cognitive interpretation.[23] The idea, here, is that cognitive interpretation is a matter of pure, value-free description of the possible meanings attached to a source of law. The jurist that performs cognitive interpretation acts like a scientist (he thus *is*, or *becomes*, a scientist) because he is engaged in a purely descriptive activity without the exercise of value choices or decisions.

[22]For this kind of criticism, see Gianformaggio [1988, p. 466 (on Kelsen)]; Villa [2012, p. 183 (on Guastini)]. Even Guastini, by the way, admits that cognitive interpretation is only rarely to be found in legal scholarship: see Guastini (2004, p. 86).

[23]Cognitive interpretation is expressly qualified as scientific knowledge by Hans Kelsen and Riccardo Guastini (supra, fn 18). See for instance Guastini (2012, p. 152) ('Cognitive interpretation is a purely scientific operation devoid of any practical effect – it belongs to the real of legal science properly understood'). See also Peczenik (1989, p. 33): 'law-describing propositions [...] report "value-freely" the content of statutes and other sources of law. When a lawyer utters a law-descriptive proposition, he certainly acts in a way similar to that of a scientist'.

This is exactly the point I want to attack. I want to argue, in particular, that (*1*) drawing a 'complete' frame of meanings of a source of law is an impossible activity—or, if it is possible, it is utterly useless; and (*2*) that in order to be useful—or even possible—drawing the frame requires decisions and value judgments, in a way that is not *qualitatively* different from ordinary, adjudicative interpretation.

The first point is quite simple. What would be needed in order to draw the complete frame of meanings of a source of law in a purely scientific, descriptive, value-free way? In order to *fully* perform this activity, i.e. in order to state *exhaustively* all the possible meanings of a source of law, for one thing one would have to put to work *all* the available methods or 'canons' of legal interpretation, and it is a well-known feature of contemporary legal cultures that a vast array of such methods is usually made available (linguistic arguments, systemic arguments, psychological arguments, teleological arguments, historical arguments, conceptual arguments, naturalistic arguments, etc.).[24] But this is not enough, of course: in fact, each of the normally available methods of legal interpretation is usually open to multiple different applications. For instance, linguistic arguments may refer to linguistic usages of different sorts (the linguistic usage in place at the time of the enactment of the relevant piece of legislation, or at the time in which some facts have occurred, or at the time in which the interpreter interprets; or it may be the linguistic usage of the population at large, or of some sector of the population, or the technical linguistic usage shared by some professionals, and so on); systemic arguments may involve different ways to carve out the relevant 'system' (the whole legal order, some part of it, or the intersection between the national legal order and some supra-national order. . .); teleological arguments may refer to different objectives and policies and so on. And finally, the picture becomes even more complicated if one includes in the 'frame' of possible meanings also the interpretations that have previously been rendered by other jurists, or even the prediction of the interpretations that may be rendered by some jurists.

The consequence of all this should be readily apparent: the 'frame' of possible meanings of a source of law is either impossible to draw, or it is utterly useless, since it would include such a massive amount of information that would result in very little guidance for the interpreters—a sort of gigantic map of all the interpretive possibilities that are potentially open according to all the possible interpretive conventions that may be registered in some social setting. Think, in particular, about the requirement of including in the frame also *all* the previous interpretations of that text: how is one supposed to find all this information? And what exactly should count, here, as a 'previous interpretation'? Would the interpretation rendered by a layman at the proverbial bus stop count? And what about the interpretations that have not received any attention whatsoever from the relevant legal community? Or think about the linguistic argument: is one supposed to register all the possible linguistic usages of

[24]For some inventories of such methods or canons of legal interpretation, see Alexy (2010); Tarello (1980, ch 8); MacCormick (2005, ch 7).

the words included in the legal text, even the usages performed by not (linguistically) competent speakers—babies, for instance, or foreign people? Or think about the 'psychological' argument (the argument from legislative intention): which intentions should count here? Should the 'cognitive' interpreter strive to include in the frame all the actual or possible intentions that have been expressed by the members of the legislative body regarding the relevant piece of legislation, however they are formulated (even in newspaper interviews, personal correspondence, private memoirs, etc.)? Or, finally, think about the teleological argument: should the cognitive interpreter search for all the possible objectives of a piece of legislation, even the most convoluted ones? A frame adjusted in order to take into account all such possible factors would be even more complicated—and less useful—than the infamous 1:1 ratio map of the Empire generated by the fantasy of Jorge Luis Borges.

The second point somehow derives from the first. If the frame is to be designed in a useful way—arguably, if it is to be possible at all—its content has to be 'reasonably' selected[25]: not every possible linguistic usage, not every conceivable policy objective, not every past interpretive decision, not every legislative intention should be included in the frame, only those candidates that pass some kind of reasonableness test should. But here's the wrinkle. As soon as this kind of reasonableness requirements steps in, it becomes hard indeed to stick to the idea that cognitive interpretation is a purely descriptive, and hence 'scientific', enterprise. To the contrary, cognitive interpretation becomes just another kind of adjudicative interpretation, in the sense that it requires choices, decisions, and a selection of available data, and since we are dealing with that morally and politically imbued subject matter that is the law, it is not credible that such choices, decisions and selections will be guided by purely epistemological criteria, as opposed to more substantial ones (such as assumptions on the different weight, legitimacy and credibility of various kinds of interpreters or institutional actors, etc.).

In sum, then, 'cognitive' interpretation—establishing a frame of possible meanings of a source of law—is not really a purely descriptive enterprise; rather, it calls for choices guided by reasonableness assumptions and value judgments, and as a consequence the frame is the outcome of a decision (actually, of several decisions) and not merely of a scientific description.

Additional support for my argument comes from the acknowledgment, made by some proponents of the idea of cognitive interpretation, that the frame is normally indeterminate, fluid even.[26] Think of the difficulty—or, more probably, the impossibility—of establishing the dividing line between analogical reasoning, on the one hand, and a merely 'extensive' interpretation, on the other hand. In theory, analogical reasoning is meant to apply a norm to cases that fall outside its scope,[27] whereas

[25]This 'reasonableness' qualification is *sometimes* present in Guastini (see for instance 2011a, b, c, p. 60); see also Chiassoni (2017a, b, p. 105).

[26]See particularly Guastini (2011a, b, c, p. 36).

[27]MacCormick (1978, p. 155): 'the whole point of argument by analogy in law is that a rule can contribute to a decision on facts to which it is not directly applicable'.

'extensive' interpretation consists in forcing the 'linguistic borders' of the relevant norm, in order to apply it to unclear cases. Extensive interpretation forces the frame, whereas analogical reasoning reaches outside the frame. But more often than not, we will find that it is not easy to tell if a case falls completely outside the frame or if it is just an 'unclear' case. (Needless to say, the job of the 'frame' is to establish exactly this kind of distinctions, namely the distinction between interpretation proper and integration of the law.) I think that this point may be generalised. In many cases, it is impossible to state conclusively that one interpretation is inside or outside the frame, i.e. to state that what the interpreter is doing is interpretation proper or rather integration of the law.[28] One reason for this is that many interpretive arguments or canons may work also as 'integrative' devices.[29] For instance, the *a simili* argument may support both a full-blown analogical reasoning and an extensive interpretation. And another reason is exactly the fact that the frame, far from being a purely scientific tool that distinguishes interpretation proper from 'creative' interpretation, is itself an interpretation-dependent concept: the frame itself is the outcome of an act of (adjudicative) interpretation. As such, different jurists may come up with different—but equally reasonable—frames.

Cognitive interpretation, then, is not different *in kind* from adjudicative interpretation, but just *in degree*: whereas adjudicative interpretation points to just one (purportedly correct) meaning, cognitive interpretation points to many possible, acceptable meanings; but in both cases the enterprise is guided by value-laden choices. This conclusion, I think, has devastating implications for those who rely on a 'frame model' of legal interpretation.[30] But an extensive discussion of this last point will have to wait for another occasion.

## 4 Why Legal Interpretation Is No Science (II): Legal Scholarship

The second idea I want to discuss is the idea that the juristic 'knowledge' of the law is a kind of science. Here the focus is not just on legal interpretation strictly understood, but on the doctrinal study of the law in general—including such things as systematisation of the law, elaboration of abstract doctrinal concepts and the like.[31] As I have anticipated earlier, a fair share of twentieth-century legal positivism, at least in Continental Europe, has conceived itself exactly as a theory of legal science, i.e. as a theory of the conditions under which the study of law may qualify as

[28]This is acknowledged also by Guastini (1992, p. 135). See also Bobbio (2012), § 3. I have provided various examples to this effect in Pino (2013).

[29]This point is well stressed by Diciotti (2013); but see already Tarello (1980, p. 392).

[30]This model has been recently articulated in detail, and defended, by Chiassoni (2015).

[31]See Guastini (2012).

a scientific enterprise.[32] In addition, it is very common for continental jurists to portray themselves as engaged in a scientific activity and to call themselves 'scientists'.[33]

It is easy to see that when 'science' is summoned in this context, implicit reference is made to 'natural' or 'hard' sciences—those sciences that are supposed to deal with a description of facts, through a methodology that at bottom involves description of phenomena, analysis of data, and prediction of future occurrences of like phenomena. Of course, it is far from obvious that this idea of science is really reliable. It is entirely possible that the image of science that lurks in the background in many discourses on the scientific character of legal interpretation and legal scholarship is naïve, and under-theorised. Anyway, I will not engage here—not even remotely—in an excursus in the philosophy of science. Suffice it to say that the concept of science is complex, and even contested.[34] For present purposes, I think it is safe to rely on the following cautious generalisation on what may count as 'science'. I assume that science is a cognitive enterprise, i.e. an enterprise devoted to producing knowledge on some field of inquiry and is normally directed at empirical facts; such facts are in some sense independent from their scientific study—they exist independently from their scientific study, and their study normally does not affect their existence. Scientific knowledge, moreover, is produced through the application of some method that is recognised as rigorous and reliable, at least within the relevant scientific community (the scientific 'paradigm' or 'research program'[35]). Finally, such a cognitive enterprise is not necessarily value free: it may include reference to values, provided that they are 'epistemological' values (simplicity, coherence, explanatory value. . .), as opposed to 'substantive', moral and political ones.[36]

No essentialism about the concept of science is intended by the preceding observations. And it is entirely possible that the concept of science is affected by 'combinatory vagueness', i.e. that no single definitional criteria should be expected to be found in all the instances of science.[37] But I think that the criteria that I have listed above are generic enough to cover many if not all the central cases of science. Moreover, something in the neighbourhood of this definition of science seems to be exactly what is presupposed by jurists when they qualify their own job as a kind of science: in fact, when jurists appeal to science, they seem to convey the message that their job is endowed with the same kind of descriptive, objective, value-free, purely 'technical' and knowledge-oriented character that is supposed to be featured in

[32]Bobbio (1950), Villa (1984), and Nino (1993).

[33]For a recent example, Rescigno (2003).

[34]On this problem, see Laudan (1983) and Hansson (2017).

[35]Kuhn (1962) and Lakatos (1970).

[36]According to Riccardo Guastini, 'science' properly understood (including 'legal science') is a pure description, value-free, axiologically neutral: (2011a, b, c, pp. 439, 441 fn 7).

[37]Something in this direction is suggested, for instance, by Bunge (1982, p. 372); Laudan (1983); Dupré (1995, p. 242).

science proper. And this should secure the jurists that kind of 'legitimacy surplus' that is normally associated with science (*supra*, § 2).[38] Moreover, if legal knowledge is a science, it can present its own theses as genuine instances of knowledge (i.e., knowledge of the existing law) rather than as policy proposals about how the law should be applied or developed according to some underlying moral or political ideal.

Now, if this scenario is reliable, I think that there are many reasons that point towards the conclusion that legal scholarship is not a science, however 'liberal' or post-positivistic the criteria of membership in the 'science club' are taken to be. The most relevant points here, I think, are the following.

First, legal scholarship is (at least partly) constitutive of its own object. (I am here referring, of course, to legal scholarship *en masse*, not to the contribution that can be made by any single jurist to this effect.) While natural facts (earthquakes, the movement of planets, the structure of a tree...) exist independently from their study, the law as a social phenomenon is partly constituted by the fact that that social phenomenon is recognised as law.[39] Something in the same spirit can be said also about art, for instance: what constitutes art, however indeterminate this concept may be, depends on a complex practice of social recognition, in which many subjects play a role—artists, experts, public institutions, the audience, society at large. The practice of social recognition that makes a certain social phenomenon into law is very complex and involves in different ways the society at large.[40] And legal scholarship, for sure, is a distinctive part of this social practice of recognition.[41] To be sure, I am not claiming here that an object whose existence is constituted by social practices of recognition is not amenable scientific knowledge. Far from it. What I am trying to say is that legal scholarship, as it is usually performed, is actually a part of that very social practice of recognition, and *as such* it creates its own object.

Second, legal scholarship does not just describe its object—rather, it changes its own object, or tries to change it: at least in the sense that it does not merely 'describe' it, but rather it strives to systematise it, to make it coherent, and more generally because it proposes interpretations that are meant to overcome the intrinsic indeterminacy of positive law.[42] Of course, legal scholarship does not affect positive law

[38]See Laudan (1983, p. 120): "the labelling of a certain activity as 'scientific' or 'unscientific' has social and political ramifications which go well beyond the taxonomic task of sorting beliefs into two piles".

[39]See Kramer (2007, pp. 6–8) (on the 'existentially weak mind-independence' of the law).

[40]This is the main point of Jori (2010). But of course this point is already present in Hart (1961) (on the social practice surrounding the rule of recognition).

[41]On the 'performative role' played by legal science on its object, see Ferrajoli (2012, pp. 244–245); Id. (2016, pp. 208–209) (according to Ferrajoli, this performative role is normally overlooked, exactly in order to preserve the 'scientific' status of legal scholarship). This may be considered as just another way of making sense of Kelsen's *Grundnorm* as a presuppostition of legal science.

[42]Poggi (2008, p. 397). For an excellent overview of various juristic operations to this effect, see Ratti (2015). It is interesting to note that even Bobbio claimed that legal scholarship is a science insofar as it makes legislative language 'rigorous' [Bobbio (1997)].

*directly*—as, say, the passing of a piece of legislation would. Rather, legal scholarship affects the law in several *indirect* ways: through the proposal of specific interpretations of the existing law, or of systematisations and integrations of the law, or through the elaboration of interpretive methodologies and doctrinal constructs. And all these proposals are 'successful' if they are eventually incorporated in the decision-making activities of law-applying institutions. Another way of stating this point is the following. A 'law' that is studied by jurists and applied by courts is normally a law that has already been interpreted and reinterpreted by other jurists. This is possible, in particular, in virtue the fact that both legal knowledge and its subject belong to the same ontological field, i.e. language. The law is conspicuously a language entity, and the study of the law by jurists is expressed in language. As a consequence, the language of the law and the meta-language of legal scholarship tend to become indistinguishable one from the other.[43] (It is perfectly possible to become acquainted with a certain legal issue, or even to get a law degree, without reading even one single line of 'officially produced' law.)

Third, the job of legal scholarship is intensely value-laden. It is value-laden not just in the sense that it is guided by the epistemological values that can be found also in 'hard' sciences. Rather, the values that figure prominently in legal scholarship are moral and political in character: it is inevitable that legal knowledge is guided by the legal ideology of the interpreter,[44] by the ideas of the interpreter on the legitimacy of the legal system, by the fundamental political values that the interpreter decides to read into the legal system (democracy, rule of law, economic efficiency, social justice, etc.).

Fourth, legal scholars do not seem to share a common method for their juristic work. What they do share, normally, is the reference to a common object of inquiry—legal scholars, in other words, normally converge on some set of legal materials, some shared sources of law. But in fact, once such materials have been identified (according to widely shared criteria), legal scholars usually diverge as to how properly interpret them— exactly because they do not share a single interpretive methodology.[45] Normally, a plurality of interpretive methods are available to the jurists, and this methodological pluralism is not even captured by the traditional formalism/anti-formalism divide; in fact, formalism and anti-formalism are not just two alternative interpretive methods but rather two populous families of methods (there are plenty of different formalistic interpretive methods, as well as plenty of different anti-formalistic interpretive methods). Also, it is even possible that many

[43]Guastini (1987, pp. 183–184, 192); Id. (2012, p. 159).

[44]On the inevitable ideological component in the work of the jurist, see Nino (1993, chs I, IV); Ferrajoli (2016, p. 208); Chiassoni (2017a, b, p. 271). I use 'legal ideology', here, in roughly the same sense as Alf Ross does (1958). Elsewhere, I have tried to use a concept of this sort to revisit and make sense of the Hartian 'rule of recognition': see Pino (2011); Id. (2015).

[45]Chiassoni (2017a, b) and Dolcetti and Ratti (2013).

jurists do not consistently follow any method at all, but rather do their job on a result-oriented basis.[46]

So it seems that there are some (good) reasons to rule out the possibility that legal knowledge qualifies as a science, at least in the standard meaning of the word. Legal scholarship is not pure knowledge of its object; rather, it changes its object of study, also in the light of value choices of moral and political nature. Is this a fact that calls for a revision of the methodology of legal knowledge, in order to make it more like a 'real' science—i.e. a purely descriptive task? Well, for one thing, I do not know if that would even be possible. But I also doubt that it would be desirable. Of course it would definitely be a good thing if legal scholars strived to import some scientific values into their job, such as rigour, clarity, etc. But my point here is that the most important and socially relevant part of legal scholarship is exactly its 'nomopoietic' enterprise—the systematisation and interpretation of positive law, the transformation of scattered legal data into an intelligible whole.[47] And this part of their job—far from being a usurpation of political power—may very well be in the service of rule of law values, such as public knowledge of the law and legal certainty.

## 5 Conclusions: The Politics of Legal Interpretation

The underlying jurisprudential assumption in this paper has been that legal interpretation is an activity fraught with value judgments—an intensely decisional activity, an activity that calls for the exercise of judgment and choices by whomever performs it. Of course this activity also includes a 'knowledge' part (it is interpretation *of something*): the two components of interpretation—knowledge and decision—are always present, both in judicial and in juristic interpretation, and probably it is exactly this double feature that makes interpretation such a puzzling and fascinating jurisprudential topic.

Now since the subject matter of legal interpretation is the law, i.e. a prominent part of the political and social structure of the relevant community, the choices, decisions, and judgments that are called for in the course of legal interpretation (again, judicial and juristic alike) are necessarily of a moral and political nature.[48] Legal interpretation is guided—voluntarily or not, consciously or not—by value options on the role of law in society, on the role of jurists and judges in society, in short by a legal ideology. The fact that such value options are often disguised in the technicalities of legal reasoning does not detract in the least from the way they affect the outcomes of legal interpretation. Legal interpretation is not a science. Legal scholarship is not just knowledge of the law: they are a form of social

[46]Diciotti (2006); Id. (2007).

[47]Miguel (2002); Comanducci (2008, p. 427); Id. (2014, p. 290); Poggi (2008).

[48]On various senses of 'political' that may be relevant in the context of judicial decision, see Waldron (1990, pp. 120–122).

power. Unearthing the value choices of moral and political nature that they involve is a way to control the use of this power.

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