# An exercise in legal realism
## Un ejercicio de realismo jurídico

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**Abstract**
This paper is an exercise in legal realism, regarding in particular: (1) legal realism and legal positivism; (2) validity; (3) legal interpretation; (4) the ontology of law; (5) legal cognition; (6) the rule of recognition; (7) the concept of obligation.

**Keywords**
Legal Realism, Legal Positivism, Validity, Interpretation, Ontology of Law, Legal Cognition, Rule of Recognition, Obligation.

**Resumen**
Este artículo, desde el punto de vista del realismo jurídico, versa sobre los temas siguientes: (1) realismo y positivismo; (2) validez; (3) interpretación jurídica; (4) ontología del Derecho; (5) conocimiento jurídico; (6) regla de reconocimiento; (7) el concepto de obligación.

**Palabras clave**
Realismo jurídico, Positivismo jurídico, Validez, Interpretación jurídica, Ontología del derecho, Conocimiento jurídico, Regla de reconocimiento, Obligación.



### 1. Legal Positivism

I shall begin by discussing a mostly "domestic" issue[2], related to Italian literature. Beyond its domestic character, it gives me the opportunity to clarify some basic features of legal realism (and legal positivism too).

In Italian legal-philosophical literature, legal realism is often distinguished from and contrasted to legal positivism[3]. This view can be explained only by an odd and narrow concept of legal positivism, identified more or less with the doctrines of XIX century continental legal scholars —who were used to identify the law in force with the set of normative sentences (especially: codes) enacted by the law-giving authorities, assumed such set of sentences to be complete (gapless) and consistent, and moreover conceived legal interpretation and adjudication as a merely cognitive enterprise (Bobbio, 1961, p. 2)—.

Nowadays, however, this picture is by and large considered as a misleading account of legal positivism (Ross 1963; Bulygin 2007). Rather, legal positivism is generally regarded

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[2] Not only domestic, however: see Leiter (2007, pp. 59-ff).

[3] See e.g. Bobbio (1961a, p. 141-ff); Pattaro (1971; Jori 1987). See also Barrère Unzueta (1990, ch. 3).



***Recibido:*** 04/02/2020 – ***Aceptado:*** 06/05/2020
*Iuris Dictio* Nº 25 / Junio 2020 / pp. 37-47
e-ISSN 2528-7834 / DOI: http://dx.doi.org/10.18272/iu.v25i25.1630

as a methodological attitude toward the law, while all "classical" positivistic views —as to the very nature of law, the structure of legal systems, and legal interpretation— are by now mostly dismissed. The main theses of contemporary legal positivism are the following.

(i) First, legal positivism, properly understood, amounts to deny the existence of so-called natural law (however conceived), since according to legal positivism law is a human artefact. This is true for whatever form of legal positivism. There are no norms in the very nature of "things" or human relationships —no norm exists without a human act of normative creation—. As Kelsen (echoing W. Dubislav) rightly says: "Kein Imperativ ohne Imperator", that is, no command without anyone commanding (Kelsen, 1965, p. 237)[4].

In other words, as stated by Hume, no norms can (logically) flow from facts or knowledge of facts, no normative sentence may be logically derived from a set of purely cognitive premises, such as propositions describing the nature (or any other kind of facts whatsoever). Norms can only stem from those human acts that enact —"posit"— them by uttering normative sentences[5].

Besides, this formulation of the no-natural-law thesis is *not* equivalent to the so-called "social sources thesis". To be sure, law is (or stems from) some kind of social fact — from the standpoint of legal positivism, this is a matter of course. But the "social sources thesis" is a quite unhappy way to state this point.

This is so for at least two reasons. On the one hand, such a thesis suggests (or seems to suggest) law to be a set of "social rules" (in Hart's parlance), that is, customary rules —on the contrary, with the exception of international law, modern (state) law is essentially a set of "posited" rules, issued by some sort of "sovereign" authority—. On the other hand, the "social sources" thesis looks compatible with a form of the natural law doctrine, namely, the doctrine of the so-called "variable natural law", according to which law does not stems (only) from voluntary human acts, but (also) flows spontaneously from "society", "social relationships", "social conscience", "Volksgeist", or the like, and changes accordingly over time.

(ii) Second, the core of legal positivism, since Bentham and Austin, is the distinction between expository and censorial jurisprudence —that is, between the law as it actually is and the law as it ought to be (according to some standard of evaluation)[6]—. Describing the existing law and evaluating it are two different and independent intellectual enterprises[7].

Remark that it is precisely this feature of legal positivism that is currently refused by non-positivist (as well as "soft positivist") legal scholars —they claim that law cannot even be identified without some kind of moral evaluation—.

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[4] According to legal positivism, the so-called "natural law", is not law properly understood, but a critical morality. According to Bobbio, however, natural law, after all, is no specific critical morality or normative ethics, but a peculiar meta-ethics — a second order discourse about ethics, namely a cognitivist, objectivist, meta-ethics (Bobbio 1963, p. 67). Namely, a "normative" meta-ethics concerning the proper way of justifying substantive ethical theses (whatever ethical thesis indeed), assuming "nature" — a completely indeterminate concept — as a source of norms. This is the only common element of a great deal of competing critical moralities (one claiming natural equality among men, another one maintaining inequality; one claiming private property to be a natural state of affairs, another one maintaining common property to be the natural condition of mankind; one requiring obedience to political power, another one justifying the right to resistance; and so forth).

[5] This does not imply —contrary to Kelsen (1965)— that a norm cannot be logically entailed by other norms. This is simply meant to underline that deducing is not deciding; thus, an entailed norm comes to "legal existence", that is, acquires membership in a legal system, only when it is actually "posited" by a law-creating agency (see Alchourrón and Bulygin, 1989).

[6] Bentham 1870, 293 f.; Austin 1979, I, 220. See Chiassoni (2016, chs. 1 and 2).

[7] Besides, it is precisely this feature of legal positivism that is currently refused by non-positivist legal scholars. See e.g. Atienza and Ruiz Manero (2009).

(iii) Third, as a consequence, no "objective" obligation to obey the law can exist —the knowledge of legal norms does not involve any obligation to obey them—. Sure, obedience is what lawmakers demand, but (contrary to Kelsen's view) no binding force, no obligation to obey, is conceptually entailed by the very existence or legal validity of a norm. Obedience presupposes not only cognition, or "recognition", but also axiological acceptance by the addressees[8].

All such three features of legal positivism (properly understood) are shared by legal realism. Legal realism is an openly positivistic view about the law. Not all positivist legal scholars are realist, but all realists are positivists.

## 2. Validity

The third feature of legal positivism introduced in the preceding section deserves some development.

A widely accepted unrealistic view —that can be traced back to Kelsen (Kelsen 1934 and 1960)— is that any valid norm is *thereby* binding, obligatory for its addressees. Since validity is nothing else but binding force. If a rule R states, for example,

> (R) Income taxes ought to be paid,
> the validity judgment about this rule will be
> (VJ1) The rule R is valid.
>
> But, since validity is conceptually equivalent to bindingness, (VJ1) is equivalent, in turn, to a sentence stating that the same rule is obligatory:
> (VJ2) The rule R ought to be obeyed.

This view —sharply criticized by Ross (1961)— is somehow astonishing. The content of the obligation imposed by (VJ2) is clearly nothing else but obedience to (R), that is, the very same behaviour commanded by (R). Hence, the difference between (R) and (VJ2), if any, does not lie in the behaviour requested —it can only lie in the nature of the obligation at hand—. If the *legal* obligation stated by (R) is paying income taxes, this further obligation stated by (VJ2) cannot be anything other than a *non-legal* obligation, hence a moral or political one.

A different argument to state the same point is the following. If every legal norm is obligatory, binding, then the law as a whole is binding —there is an obligation to obey the law in general, *the law as such*—. Now, the sentence "The law ought to be obeyed" is a meta-linguistic sentence, whose object-language is the law. Hence, the obligation to obey the law cannot be —for purely logical reasons —a *legal* obligation: it is necessarily a *meta-legal* obligation, an obligation with respect to the law. In other words, it must be some sort of moral or political obligation (Guastini, 2016)—.

The thesis according to which there is a moral obligation to obey the law, however, is distinctive of the so-called "ideological" or "ethical" legal positivism —a moral (or political) doctrine very close to natural law —that has nothing to do with legal positivism properly understood, especially in its realistic version (Bobbio 1961a, ch. 7; Ross 1961).

Moreover, the sentence (VJ2) does not seem to allow for any descriptive interpretation —it is a manifestly prescriptive sentence, since it imposes an obligation—. Hence, it has no truth-value. Being prescriptive —neither true nor false— it has no place

[8] "According to the non-cognitive view, acceptance is constitutive" of binding force (Ross, 1968, p. 61).

within "expository jurisprudence", that is, a scientific (descriptive) discourse about the law. Admitting prescriptive sentences in legal-scientific discourse is incompatible with the scientific program of legal positivism, especially in its realistic version.

## 3. Interpretation

Nowadays —after Hart's *Concept of Law*— the predominant view as to legal interpretation runs more or less like this[9].

Legal texts are framed in natural languages. In natural languages meaning is determined by actual linguistic conventions. Therefore, each legal text has an objective meaning so determined[10]. However, legal texts are formulated by means of "general classifying terms" (that is, predicates in the logical sense: terms that denote classes), and such terms are fatally vague or open textured. As a consequence, given any rule whatsoever, there are cases that surely fall under its scope, as well as cases that do not. But, side by side with such "easy" cases, there are also "hard", marginal, cases to which the application of the rule is dubious and disputable. In easy cases judges have no interpretive discretion. Hence in such cases one can distinguish between legally correct and incorrect interpretations. In hard cases, on the contrary, the chosen interpretation is the result of a discretionary decision about the extension or reference of the concepts expressed by general terms, in such a way that there is no room for judgments of correctness or incorrectness.

To fully appreciate this theory, one must pay attention most of all to what it *does not* say.

First, this theory has no definite view as to juristic (legal scholars') interpretation —it is focused only on judicial interpretation—. This is a serious shortcoming, for two main reasons. On the one hand, juristic and judicial interpretations deserve separate accounts since they are not necessarily identical from the point of view of logical analysis: for example, legal scholars' interpretation does not involve the solution of any particular case, while judicial interpretation necessarily does; judges must solve the ambiguity and vagueness of legal texts, they cannot confine themselves to detecting them impartially, while academic jurists can (and often do); etc. On the other hand, it is legal scholars who equip judges with concepts, doctrines, interpretive tools, and forms of reasoning —as a matter of fact, the interpretive and dogmatic practice of legal scholarship conditions the very *forma mentis* of judges—. Judicial interpretation is biased by legal dogmatics and cannot be understood without reference to it[11].

Second, and more important, the theory at hand is focused on the issue whether a (previously identified) rule applies to a particular situation or not. This way, the theory completely overlooks the previous identification of the rule as such, hence the central features of judicial and, most of all, juristic job, that is (a) text-oriented interpretation ("in abstracto", that is, with no reference to particular cases) and (b) the construction of unexpressed, unformulated, rules in order to fill gaps, specify principles, and so on (Guastini, 2013).

(i) *Text-oriented interpretation*. Before asking whether a given rule is, or is not, applicable to a particular case, one has to identify the rule at stake. The identification of the rule (or rules) expressed by a legal text is no matter of subsumption of a specified case under the extension of a concept —it is a matter of deciding the meaning of a complete normative

[9] See e.g. Hart (1961, ch, 7); Carrió (1994, pp. 49-ff).; Bulygin 1995. Some criticism in Guastini 2011.

[10] This view has a tacit prescriptive implication: legal texts ought to be interpreted according to the dictionary and syntax of the natural language in which they are formulated. But why should not one interpret, for example, according to the (supposed) intention of the law-giving authorities? And, moreover, what should not one use the whole panoply of interpretive arguments, such as *a contrariis*, *a simili*, systemic coherence, and so on, that lead far away from ordinary meaning?

[11] Tarello (1968).

sentence—. In most cases, one and the same normative sentence is liable to different and competing meaning-ascriptions —depending on the interpretive technique to which it is submitted, on the competing juristic doctrines on the matter, on the different moral feelings of interpreters— in such a way that different rules can be derived from it. From a logical (not psychological) point of view, subsumption presupposes a decision "in abstracto" about the meaning-content of legal texts.

Just an example. Article 13.1 of the French Constitution (1958) states: "The President of the Republic shall sign the ordinances and decrees deliberated upon in the Council of Ministers". Does that mean that the President has the power to sign those ordinances and decrees, or that he/she has the obligation to sign? There is no problem of open texture, no problem of subsumption, here: in such circumstances, interpreters are faced with a completely different issue — not the application of a rule to a definite case, but the very identification of the rule itself (Troper, 1994, p.275).

But even the silly example usually put forward by the followers of the mentioned theory can be used to depict the difference between interpreting a text "in abstracto" and subsuming a case under a (previously identified) rule. "No vehicle in the park", said the law-giver. All right: cars and trucks are certainly included in the scope of the rule. But what about ambulances? If the sentence is understood literally, then the rule prohibits the entering of "vehicles" with no further specification —ambulances are not admitted. But the same sentence may be interpreted (with the aid of a counterfactual sentence pointing at the supposed intention of the lawgiver) as expressing a different rule, referring to "vehicles except ambulances"— in such a way that ambulances are admitted in the park. The problem is not subsuming or not ambulances under the concept of "vehicle", since no one could deny that they are vehicles. The problem is identifying the very content of the rule to be applied.

(ii) *Construction of unexpressed rules*. By the way, the most (and primary) part of juristic and judicial job consists in a great deal of inferential operations by means of which new rules, that the lawgivers never formulated, are added to the legal system. Such unexpressed rules are usually labelled as "implicit", but they are not implicit in the strict (that is, logical) sense since they are derived from explicit rules by means of non-deductive arguments.

Just one simple example, in view of clarifying what I mean by "unexpressed rule". According to Justice Marshall of the Supreme Court of the U.S.A. (Marbury *vs. Madison,* 1803):

> […] 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.

Justice Marshall 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 have no counterpart in the constitutional text and that the Supreme Court is adding to the Constitution (Troper, 2011, p. 139).

Thus, the dominant view as to legal interpretation is completely blind about the very core of legal interpretation (and reasoning). It assumes interpreting, ascribing meaning to legal texts, to be a cognitive (or mainly cognitive) activity, that depends on accepted linguistic conventions — the only room for interpretive discretion stems from the vagueness

(the open texture) of predicates. This is a quite unrealistic view (Tarello, 1980). And as matter of fact it is unsound.

The realistic view about legal interpretation is that the law, understood as a set of rules, is the result of juristic and judicial interpretation and construction of legal texts.

## 4. Ontology

According to an unrealistic view, widespread especially among legal philosophers, law is a set of abstract entities such as rules (or norms) or even a set of enigmatic deontic (or Hohfeldian) entities such as obligations and rights.

Thus, accounting for the law in force would consist precisely in describing the content of rules, and the proper way to do this would be by means of deontic sentences, that is, sentences iterating like an echo the rules they refer to and/or describing the deontic properties of actions: "It is obligatory that *p*", "It is prohibited that *q*", etc.

From a realistic —empiricist— point of view, on the contrary, law is but a set of (quite peculiar) facts, namely linguistic utterances and interpretive practices: the linguistic utterances of the law-giving authorities and the interpretive practices of legal scholars and judges.

Accordingly, accounting for the law in force may consist either in cognitive interpretation or in descriptive meta-jurisprudence.

> (a) Cognitive interpretation is the uncommitted analysis of the normative sentences enacted by the lawgivers, with a view to detecting their plausible meanings in the light of existing linguistic conventions, interpretive methods, juristic theories, and past judicial decisions (if any). As well as, no need to say, the practical consequences connected with each one of the competing meanings.
>
> (b) Descriptive meta-jurisprudence, in turn, consists in analysing and accounting for doctrinal trends and, most of all, past judicial decisions.

Both cognitive interpretation and descriptive meta-jurisprudence are meant to predicting (or, better, attempting to predict) future judicial decisions.

From this standpoint, the so-called "normative propositions" —the propositions by which jurists describe[12] the law in force— are not (they cannot be) deontic sentences about the normative qualification of behaviour ("It is obligatory that p" or the like). They are true or false *propositions* (in the logical sense): "normative" because of their object, not because of their normative inferential capacity —they do not admit any normative or practical inference (Bulygin, 1981 and 1982)—.

Normative propositions —according to their (either manifest or concealed) logical form— are existential propositions about rules or norms, in the sense that they state the existence of rules *within* a given legal system, their membership in the system. For example: "The rule 'It is obligatory that p' exists (is in force) in the legal system S". In such a proposition, the rule is not stated or iterated ("echoed"), but mentioned in inverted commas. From such a proposition alone, no one can validly infer that p ought to be done.

The truth condition of such propositions is the prevailing interpretive practice of jurists and applying practice of judges (Ross 1958). In other words, normative propositions are but pieces of descriptive meta-jurisprudence.

[12] Sometimes they do, although this is not the core of legal scholarship —in most cases jurists do not describe the law, but contribute to frame it—.

 *Iuris Dictio* Nº25 / Junio, 2020 / pp.37-47. e-ISSN 2528-7834. DOI: http://dx.doi.org/10.18272/iu.v25i25.1630

## 5. Legal Cognition

According to a quite unrealistic view, no significant cognition of law is possible from the so-called "external" point of view, that is from the standpoint of those uncommitted people (either jurists or laymen) who do not "participate" to the legal game and limit themselves to observing the actual behaviour (the linguistic behaviour included) of "participants". No genuine cognition, no sound description, of law is possible unless one assumes the "internal" point of view. Such a point of view, however, presupposes the acceptance of the law itself: at least, the acceptance of the ultimate "rule of recognition" by which the valid rules of the legal system at stake are identified. Acceptance is conceived as a necessary requisite for taking cognizance of the law (Hart, 1961; Scarpelli, 1965).

No need to say that "validity" in this context —as in Kelsen's pure theory of law— entails (or amounts to) binding force: a valid rule is a rule that ought to be obeyed. Hence it is not surprising at all that the supporters of the internal point view maintain that the so-called "internal statements" are committed sentences by which people approve and/or criticize behaviours by reference to the rules of the system, make claims justified by such rules, and so forth. This amounts to say that the internal point of view is the standpoint not of "expository jurisprudence" (in Bentham's parlance), but of lawyers and judges.

So, it is quite evident that internal statements do not "bear upon" rules, do not describe them: *apply* rules. They are normative in character and, therefore, have no truth-values (Bulygin, 1981; 1982). Hence, they have no place in a "scientific", axiologically neutral, description of the law in force. Apparently, the supporters of the internal-point-of-view thesis are unable to distinguish between genuine expository jurisprudence —"legal science" in Continental parlance— and legal dogmatics, the latter being a practice "internal" to the law, quite different from its detached description.

Besides, the view at stake has a troubling natural-law shade, since it tacitly assumes the intrinsic bindingness of law as such —the so-called "normativity of law"—. As I already said, such an assumption is the core of "ethical" or "ideological" positivism. But, at the same time, this assumption is shared by natural law doctrine too: *lex iniusta non est lex* —positive law incompatible with natural law is no law at all, which means that it does not deserve obedience, while "genuine" law is, by definition, just, and that means that it demands obedience—.

The realistic view on the matter is that the only genuine uncommitted cognition of the law is purely "external". Cognitive or "expository" jurisprudence can only be a set of detached statements of facts (Ross, 1962). Once more: legal science is a set of normative propositions, whose truth-conditions are the prevailing interpretive practice of jurists and applying practice of judges.

It seems that the supporters of the internal-point-of-view thesis do not even conceive the very possibility of an uncommitted account of the law in force. This is proven, among other things, by their treatment of the concept of obligation, too, as we shall see in a moment.

## 6. Rule of Recognition

Legal cognition, the topic discussed in the preceding section, suggests a look at Hart's rule of recognition. Well, what kind of rule is this? It is no surprise that two competing views exist in legal-theoretical literature on the issue —a realistic view and an unrealistic one—.

The unrealistic thesis —another feature of the internal-point-of-view theory— is that such a rule is a genuine rule, that is, a rule of behaviour, namely, a (void, incomplete) meta-rule that does not state directly what is to be done, but commands people to obey the (further) rules that will be issued by the "sovereign" (Raz 1971, p. 93; Hacker, 1977, p. 23; MacCormick, 1981; Ruiz Manero, 1990, p.135).

As a consequence, the acceptance of such a (meta-)rule is definitely axiological and involves the disposition to comply with the sovereign's commands. This is why the point of view "internal" to the rule of recognition is normatively committed —the commands issued by the sovereign are valid law and they ought to be obeyed as the rule of recognition commands—.

The realistic view, on the contrary, is that the rule of recognition is but a criterion of identification of the valid rules of the system —a conceptual rule, not a rule of behaviour (Bulygin, 1976; 1991)—.

Accordingly, the "acceptance" of the rule of recognition is a cognitive, epistemic, not axiological, move (Guastini, 1998; 2019). It has no normative import. Its only purpose, as its name suggests, is "recognizing", that is, identifying valid law with the aim of describing it.

Once more: the knowledge of the existing law does not involve any obligation to obey.

## 7. Obligation

The unrealistic trend about the concept of legal obligation appears in the form of refusal and criticism of Bentham's "strongly positivist conception" (Hart, 1966, p. 143) on the topic.

According to Bentham, obligation is a "fictitious entity", in the sense that the word "obligation" (as well as other related words: "right", for example) is devoid of any semantic reference. So, the only way to clarify its meaning is what is (nowadays) usually called a "definition in use", which amounts to translate a complete sentence where the word to be defined (the *definiendum*) does appear into a different complete sentence, provided with the same meaning, where the same word does not appear. A deontic sentence such as "The subject S has the obligation to do the action A" —according to its (concealed) logical, not linguistic for — can be translated without loss of meaning into a sentence predicting that the subject S will probably be punished if he/she will not do A (Bentham, 1780).

The supporters of the unrealistic view (namely Hart, 1961, p.79; 1966) object that, in the common usage of lawyers and judges (as well as laymen), this is not at all the actual *normative* meaning of deontic sentences. According to the ordinary usage of such sentences, it is not contradictory to say that a subject has an obligation although he/she probably will not be punished in case of disobedience; moreover, it is not redundant to say that a subject has an obligation and moreover he/she is likely to incur in a sanction for disobedience. Most of all, when a judge states that someone has an obligation, it is a matter of course that he/she is not predicting his/her own decision —judicial deontic sentences are meant not to predict, but to *justify* decisions—. Punishment is not the actual consequence of disobedience —rather, disobedience is the *reason* for punishment—.

Accordingly, stating the existence of an obligation presupposes reference to some previously accepted rule or norm and amounts to either accounting for its content or "iterating" it like an echo (Hart, 1963; Scarpelli 1967).

*Prima facie*, the unrealistic view looks right: it is a matter of course that the "normal" use of deontic language is normative, prescriptive. And it is surely the case when judicial (as well as legislative) language is at stake. Nonetheless, the unrealistic view is wrong.

To be sure, from the *internal* point of view one can assert that, if a rule (an accepted rule) exists, then —for that reason alone— an obligation exists ("The subject S *ought* to do A"), since such an obligation is but the "content" of that rule. From the *external* point of view, however, can one seriously assert the same?

The conceptual issue ("What does *obligation* mean?") hides an epistemic problem related to legal cognition: what are the truth conditions of a sentence asserting the existence of an obligation, that is the existence in the legal system of a rule imposing an obligation? Can

 *Iuris Dictio* Nº25 / Junio, 2020 / pp.37-47. e-ISSN 2528-7834. DOI: http://dx.doi.org/10.18272/iu.v25i25.1630

expository jurisprudence seriously assert the existence of an obligation if non-compliance is devoid of any practical consequence?[13]

Unrealistic scholars clearly misunderstand the object and point of Bentham's "predictive theory". Bentham did not refer in any way to judicial language —when analyzing the concept of obligation, he was interested in *expository* jurisprudence: in legal cognition, not in legal practice and the application of law[14]—. The deontic sentences he had in mind are not sentences uttered by some legal authority —they are sentences by which an uncommitted legal scholar purports to describe the law in force—.

Moreover, unrealistic scholars seem to think that judicial deontic sentences are descriptive, hence true or false, sentences. "Internal" statements, although — admittedly — normative, are supposed to *describe* the content of (previously accepted) rules. Is it the case? It seems that such statements do not describe at all, but *iterate* or *apply* the rules they presuppose (and tacitly refer to). So, the unrealistic tenet is contradictory: no sentence can be at the same time both normative and descriptive (Bulygin, 1982). Moreover, a descriptive sentence about norms (a "normative *proposition*") cannot justify any prescriptive conclusion, such as a judicial decision. A prescriptive conclusion can be drawn only from normative premises.

Once more, unrealistic people seem unable to even conceive the very possibility of a neutral account of the law in force, which is the scientific program of legal realism.

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[13] Besides, without any reference to sanction in case of disobedience, it becomes impossible to distinguish law from morality (Schauer, 2015), commands from advices (Bobbio, 1961b).

[14] The same holds for Holmes' view about the law as a prophecy of what courts will probably do. It is a matter of course that Holmes did not refer (literally) to "the law", in the sense of law-givers' and judges' language, but to "legal doctrine", understood as uncommitted description of the law in force.

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