3

LEGAL SCIENCE AND *JURISTENRECHT:* THE RELEVANCY OF LANGUAGE AND DISCOURSE FOR THE CONCEPTUAL DISTINCTION

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0. Introduction

0.1. This paper corresponds to the written version — with some additional references and more sophisticated form — of the talk I gave at the University of Coimbra Law School within the *1st Luso-Polish Conference on Legal Theory and Methodology* on the subject of «*Jurist's Law (Juristenrecht) as a dimension of European identity: institutional, methodological and legal-philosophical problems*». I am indebted to Professor Aroso Linhares for the kind invitation and warm reception to his extraordinary *Alma Mater*.

0.2. My claim was very simple at the time. I intended to highlight the distinction between *legal science* and *Juristenrecht.* My primary focus was conceptual. I mainly aimed at clarifying — along the lines of Riccardo Guastini — that *legal science* is a second-order language whilst *Juristenrecht* is a first-order language. Nevertheless, I found the task of distinguishing the scientific statements of *legal science* from dogmatic statements of *Juristenrecht* of great social value. As mentioned below, the *scientific label* is a powerful vehicle for credibility. Many political projects — in law and other fields — have taken great efficacy in convincing a certain relevant audience that the underlying adopted method is scientific (sometimes this even goes without saying if such project is carried out by academics) or, in what concerns law, that a particular ideology is being endorsed through the performance of *legal science.*

0.3. *Scientific statements* and *ideological statements* must be kept apart. By accepting the basic Popperian assumptions, it should be understood that if purely ideological statements are made as regards legal problems, then such statements cannot be falsifiable; if they are not falsifiable, then they cannot be scientific; if they are not scientific — which is entirely legitimate —, then they ought not to be made under the guise of scientific statements. I find this ever more relevant in a legal system as the Portuguese, one that is depicted by Anglo-Saxons as *Law of the Professors (Professorenrecht).*

0.4. In view of the above, my presentation was predominantly expository in the sense that I tried to present the basic premises for my conclusion: that *Juristenrecht* is not legal science rather is *the object of legal science* (as it aspires — and sometimes rightfully succeeds — at becoming *law* which is accessible to the human mind). I tried to be faithful to that endeavor in the pages that follow. This suffices to justify the fact that this paper is structured as a chain of premises sustaining — more or less in sound fashion, I hope — the conclusions.

0.5. I do not expect this explanation to justify the obvious fact that my paper lacks in depth and dialectics. Neither do I wish it to be read as a set of statements which are self-justified *pieces of truth* uttered by someone who is definitively and irrevocably convinced of the ideas he conveys. Rather, I hope it serves the purpose of exposing myself to academic criticism through a very simple method: if one of the premises below is proven wrong then it may very well be the case that the conclusions do not last. As Frederick Schauer once said: "in a genuine academic conversation, everything we do is tentative"[1].

[1] See Bo Zhao, "Everything we do is tentative. An interview with Prof. Frederick Schauer", *Rechtsfilosofie & Rechtstheorie* 39/1 (2010) 79.

1. The meaning of legal science

1.1. The basic tenets of the theoretical positivistic account of law state *grosso modo* that:

1.1.1. law is *man-made* and an act of human will: all *universals* are man-made; law is a system of universals; *ergo* law is man-made[2];

1.1.2. the content of law is contingent, *i.e.,* it is not materially bound by any *a priori* standard. Therefore, what counts as law in any particular society is fundamentally a matter of social fact or convention ("the social thesis")[3];

1.1.3. ethical cognitivism is scientifically untenable as value judgments are not objective rather subjective (*positivist ethical subjectivism*) — value judgments are dependent upon the subject that performs them[4];

1.1.4. morals are not necessarily correlated with the identification of law *(inclusive positivism)* or morals are necessarily uncorrelated with the identification of law *(exclusive positivism)*[5].

1.2. Positivism, however, can also be understood methodologically, *i.e.,* as methodological positivism. In this sense, legal positivism is usually identified as the legal theory that best suits

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[2] «Laws are commands of human beings». See Herbert L.A. Hart, "Positivism and the Separation of Law and Morals", *Harvard Law Review* 71/4 (Feb., 1958) 601, Note 25 and p. 602-606. On the topic of *universals as man-made,* see İlham Dilman, *Are there Universals?* in *Quine on Ontology, Necessity and Experience*, London: Palgrave Macmillan, 1984, 42-71.

[3] See, for instance, Alf Ross, "Validity and the Conflict between Legal Positivism and Natural Law", in Stanley Paulson / Bonnie Paulson, ed., *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, Oxford: Oxford University Press, 1998, 147 f.

[4] On the subject of the emotive conception of ethics and its cognitive implications, see Charles Stevenson, *Facts and Values — Studies in Ethical Analysis,* New Haven / London: Yale University Press, 55 f. On the issue of *subjectivism*, see John Mackie, *Inventing Right and Wrong,* Middlesex: Penguin Books, 1977, 17 f. See also Hans Kelsen, *Reine Rechtslehre,* Wien, 1960 — trad. portuguesa: *Teoria Pura do Direito,* de João Baptista Machado, 7.ª ed., Coimbra: Almedina, 2008, 73 f. A good summary of this positivistic stance may be seen in Mauro Barberis, *Introduzione allo Studio del Diritto*, Torino: Giappichelli, 2014, 18-19.

[5] See Wilfrid Waluchow, *Legal Positivism, Inclusive versus Exclusive,* in E. Craig, ed., *Routledge Encyclopedia of Philosophy,* London: Routledge. Retrieved September 18, 2008, from <*http://www.rep.routledge.com.libaccess.lib.mcmaster.ca/article/T064*>.

the purpose of performing *legal science*[6]. Legal positivism arises from the effort to transform the study of law into a tru*e adequate science* — *i.e.,* objective knowledge — that with the same characteristics of physics, mathematics and natural sciences[7].

1.2.1. Traditional jurisprudence has long been divided into two major subcategories: normative and descriptive. This division was made famous by John Austin, the nineteenth–century positivist who aimed at "determining the province of jurisprudence"[8].

1.2.2. Legal positivists endorse a shared view with all other philosophers self-labeled as positivists (in philosophy of science, epistemology, and elsewhere) a commitment to the idea that the phenomena comprising a given field of knowledge (*e.g.*, law, science) is accessible to the human mind[9].

1.2.3. In Austinian terms, the proper domain of jurisprudence is the descriptive analysis of the positive law, its basic concepts and relations[10]. Normative analysis of law, stated Austin, was the proper domain of legislation, not jurisprudence, and the two should not be

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[6] Dividing positivism into *(i)* ideological positivism, *(ii)* theoretical positivism and *(iii)* methodological positivism, see Norberto Bobbio, *Il Positivismo Giuridico — Lezioni di Filosofia del Diritto* — trad. portuguesa: *O Positivismo Jurídico,* de Márcio Pugliesi / Edson Bini / Carlos Rodrigues, São Paulo: Ícone Editora*,* 1999, 233 f. On methodological positivism, see also see Carlos Santiago Nino, *Introducción al Análisis del Derecho*, 2nd ed. / 12.th reimp., Buenos Aires: Ariel Derecho, 2003, 165 f.; Mauro Barberis, *Introduzione alle Studio del Diritto,* Torino: Giappichelli, 2014, 23 f.; and Juliano Maranhão, *Positivismo Lógico-Inclusivo,* Madrid: Marcial Pons, 2012, 33 f.

[7] Stating that «with a few exceptions, modern analytic approaches to law focus on the tradition of legal positivism and its critics», Dennis Patterson, *Introduction,* in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory,* 2nd ed., Oxford: Wiley-Blackwell, 2010, 2.

[8] See John Austin, *The Province of Jurisprudence Determined,* Cambridge: Cambridge University Press, 1995, reprint 2001, 18 f.

[9] See Jules Coleman / Brian Leiter, *Legal Positivism,* in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory,* 2nd ed., Oxford, Wiley-Blackwell, 2010, 228.

[10] See John Austin, *The Province of Jurisprudence Determined,* pp. 10ff. As Herbert L. A. Hart puts it, «the analysis (or study of the meaning) of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, «functions,» or otherwise». See Herbert L.A. Hart, "Positivism and the Separation of Law and Morals", 601, Note 25 and p. 608-610.

confused, just as law and morality should not be confused[11].

> a. This positivist account of law the official definition of jurisprudence found in *Black's Law Dictionary*: "that science of law which has for its function to ascertain the principles on which legal rules are based, so as not only to classify those underlain rules in their proper order … but also to settle the manner in which doubtful cases should be brought under the appropriate rules. Jurisprudence is more a formal than a material science. It has no direct concern with questions of moral or political policy, for they fall under the province of ethics and legislation."[12]

1.3. In Bobbian terms, if science is the *evaluative description of reality*, then the positivist method is simply the scientific method and, therefore, one must endorse it if one wishes to perform legal science. Otherwise one will be dabbling into legal philosophy and legal ideology: but not into legal science[13].

1.4. Whether or not the positivist methodology is accepted — and definitely it is not accepted by many —, there seems to be good reasons to accept its view according to which *law is a discourse*[14].

1.4.1. Law is a discourse the performance of which is carried out through the *language of the law-giving or law-creating authorities*, also called the *sources of law* (whichever they are understood to be)[15].

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[11] «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 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. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume.» See John Austin, *The Province of Jurisprudence Determined*, 159.

[12] See Patricia Smith, *Feminist Jurisprudence,* in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory,* 2nd ed., Oxford: Wiley-Blackwell, 2010, 292.

[13] See Norberto Bobbio, *Il Positivismo Giuridico*, p. 135 and 238. See also Riccardo Guastini, "Los Juristas a la Busqueda de la Ciencia", in *Distinguiendo. Estudios de Teoría e Metateoría del Derecho,* Barcelona: Gedisa Editorial, 1999, 263 f.

[14] See, among others, Riccardo Guastini, *Il Diritto come Linguaggio. Lezione*, 2nd ed., Torino: Giappichelli, 2000, 7 f.

[15] See Norberto Bobbio, *Scienza Giuridica,* in Norberto Bobbio, ed., *Contributi ad un dizionario giuridico,* Torino, G. Giappichelli Editore, 1994, pp. 335 ff.

a. The identification of *law-giving authorities* is not consensual[16].
b. Taking into account Searle's illocutionary force of speech acts, the *unidirectional discourse of law* includes the use of *prescriptive speech* and *declarative speech* (with the use of *performatives*)[17]; the latter is relevant, among others, for the understanding of the institutional dimension of law (*law as an institutional fact*) as well as for the correct depiction of norms of competence (*i.e.,* power-conferring norms)[18].
c. The account of law as a unilateral discourse hides many other interesting subjects [*e.g.* the possibility of *pragmatics* in law (conversational implicatures and such) mainly the *pragmatics* of legal silence, as regards the subject matter of legal gaps)[19].

1.5. How the discourse of law is (or should be) addressed is not clear cut.

1.5.1. *Legal science* and *legal dogmatics* (or *legal doctrine*) are different concepts (and different underlying enterprises and endeavors).

a. Sometimes the terms *legal science* and *legal dogmatics* are erroneously used interchangeably; these concepts should be carefully distinguished;
b. Legal science is a powerful tool for credibility: history

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[16] See Riccardo Guastini, "Fragments of a Theory of Legal Sources", *Ratio Juris* 9/4 (1996) 364 f. For a thorough discussion, see António Castanheira Neves, "Fontes do Direito. Contributo para a Revisão do seu Problema", in *Digesta — Escritos acerca do Direito, do Pensamento Jurídico, da sua Metodologia e Outros,* vol. ii, Coimbra: Almedina, 1995, 7-93.

[17] See John Searle, *Speech Acts: An Essay on the Philosophy of Language,* Cambridge: Cambridge at the University Press, 1969, 68 f.; Dick Ruiter, "Legal Powers", in Stanley Paulson / Bonnie Paulson, ed., *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, 2007, Oxford, 471 f.

[18] See Pedro Moniz Lopes, *The Nature of Competence Norms,* Mortimer Sellers / Stefan Kirste, ed., *Encyclopedia of Philosophy of Law and Social Philosophy,* Springer (2017), <https://rd.springer.com/referenceworkentry/10.1007/978-94-007-6730-0_223-1>.

[19] See Arend Soeteman, *On Legal Gaps,* in E. Garzón Valdés/W. Krawietz/G. H. Von Wright/R. Zimmerling, ed., *Normative Systems in Legal and Moral Theory*, Festschrift for Carlos E. Alchourrón and Eugenio Bulygin, Berlin: Duncker & Humblot, 1997, 323-332; Eugenio Bulygin, "Sobre la Equivalencia Pragmática entre Permiso y no Prohibición", *Doxa* 33 (2010) 283-296; Juan Ruiz Manero, *Algunas Concepciones del Derecho y sus Lagunas,* in F. Atria *et al.* ed., *Lagunas en el Derecho*, Madrid: Marcial Pons, 2005, 103-126.

has shown that *political projects* were successfully carried out through the usage of scientific parlance, particularly of so-called *hard science*[20].

c. Many times have scholars and legal practitioners claimed to be performing *legal science* when they are indeed performing *something else* (something entirely legitimate, even something necessary, yet *not legal science*).

1.6. The discourse of science (the *scientific* discourse) is necessarily assertive as it necessarily aims at describing phenomena (*i.e.,* it aims at describing *reality as it really is*)[21].

1.6.1. What is said through a discourse of science is, therefore, *true of false* under a certain account of truth. Under the mainstream theories of truth one may find[22]:

a. *Truth-correspondence*: the truth arising out of the correction between the content of a statement and the empirical reality to which such content refers to. For instance, «snow is white» is true if and only if snow is indeed white[23].

b. *Analytical truth*: the truth that derives from the internal relation between the terms of a proposition; Kant distinguished between statements that are true, roughly by definition, like "magnetic fields attract iron," and statements that are made true by facts about the world, like "magnetic fields are produced by the motion of electric charges." The former he called 'analytic truths,' and the latter, 'synthetic truths.' For obtaining knowledge of the truth of analytic statements all we

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[20] For instance, it is claimed that Milton Friedman's account of economics was a (liberal) political project conveyed with the usage of *hard sciences* (such as physics and mathematics). See Raquel Franco, *Teoria Económica da Decisão — Percurso Evolutivo e Aplicações Jurídico-Normativas,* tese de mestrado apresentada na Faculdade de Direito da Universidade de Lisboa, inédito, 2013, p. 21 and 123. See also Lawrence Boland, *The Foundations of Economic Method — A Popperian Perspective*, 2nd ed., New York: Routledge, 187.

[21] See Hans Kelsen, *General Theory of Law and State*, Cambridge - Mass.: Harvard University Press, 1945, xiv.

[22] See Ralph Walker, *Theories of Truth* in *A Companion to the Philosophy of Language,* Oxford: Blackwell, 1998, 309 f.; and, among us, David Duarte, *A Norma de Legalidade Procedimental Administrativa — a Teoria da Norma e a Criação de Normas de Decisão na Discricionariedade Instrutória,* Coimbra: Almedina, 2006, 39 f.

[23] See Alfred Tarski, "The Semantic Conception of Truth and the Foundations of Semantics", in *The Philosophy of Language,* New York, 2001, 70.

need to know is the meaning of the words involved to establish their truth — *magnets are by definition iron attractors* or *bachelors are unmarried men*[24].

c. *Consensual truth*: the truth that relates to a convention on the material correctness in which the property of truth arises out of the agreement among a certain relevant community that something is something — *politicians in power primarily wish to perpetuate their power*[25].

1.6.2. For instance, the discourse of the *science of physics* is roughly a discourse over the *behavior of the physical bodies*. It asserts certain *laws* (which are true or false) but these are not *prescriptive laws*, rather propositions or *laws of nature (e.g., it is true that it is the case that body x behaves in manner y if z happens).*

1.6.3. Many other conditions for science may be pointed out, although there is no complete consensus — *e.g.* Popper's account of *scientificity as falsifiability*, addressed at framing certain ideological non falsifiable theories as *pseudo-science*[26].

1.7. In view of the above, one can therefore say that *legal science* is *ex definitione* a meta-discourse: *a discourse over a discourse*[27].

1.7.1. The main epistemological question of legal positivism is «why do we know what we know about law?». If we are certain that we know something, then there must be some *legal knowledge* which means that there should be possible to identify the objective criteria of truth or falsehood of propositions about the law.

1.7.2. Legal science is *scientific* if (among other requirements) its discourse is *assertive* and it aims to *describe law as it really is* (*i.e.,* it is an enterprise of *legal cognition*).

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[24] See Alex Rosenberg, *Philosophy of Science — a Contemporary Introduction,* 3rd ed., New York: Routledge, 11 f.

[25] See Anna Pintore, "Consenso y Verdade en la Jurisprudencia", *Doxa* 20 (1997) 281 f.; Robert Alexy, *Theorie der Juristischen Argumentation,* Frankfurt, 1978 — trad. portuguesa: *Teoria da Argumentação Jurídica. A Teoria do Discurso Racional como Teoria da Justificação Jurídica,* de Z. Schild Silva, São Paulo, 2001, 112 f.

[26] See Karl Popper, *Conjectures and Refutations. The Growth of Scientific Knowledge*, reimpr., New York: Basic Books, 2002, 37. Stating that «[s]cience progresses by subjecting a hypothesis to increasingly stringent tests, until the hypothesis is falsified, so that it may be corrected, improved, or give way to a better hypothesis. Science's increasing approximation to the truth relies crucially on falsifying tests and scientists' responses to them», see Alex Rosenberg, *Philosophy of Science*, 202.

[27] See Norberto Bobbio, "Essere e Dover Essere nella Scienza Giuridica", in *Studi per una Teoria Generale del Diritto,* T. Greco, ed., Torino: Giappichelli, 2012, 119 f.

1.7.3. Legal science is *legal* because such enterprise of scientific cognition and descriptive discourse *falls over* a discourse which in turn is mainly prescriptive [albeit sometimes declarative (*e.g.*, the constitutive dimension of legal concepts and norms of competence)].

1.8. Since, on the one hand, the discourse of science (the *scientific* discourse) is necessarily assertive and, on the other, law is a discourse that is predominantly prescriptive, then legal science is a *descriptive meta-discourse over a predominantly prescriptive discourse*[28].

1.8.1. One thing is the *discourse of law* (a *level*$_1$ *discourse* or *object-language*);

1.8.2. another is the *discourse over law* or the *discourse of jurists* (a *level*$_2$ *discourse* or *second-order language*)[29];

1.8.3. it is still imperative to discern Bentham's concept of *expository jurisprudence* (…):

a. aiming at the *value-free,* neutral description of the law;

1.8.4. (…) from the concept of *censorial jurisprudence*:

a. aiming at the moral or political criticism of the law or;

b. the conception of *lege ferenda* addressed at the normative authorities[30].

1.9. *Censorial jurisprudence*, albeit also a meta-discourse, does not abide by scientific standards as it simply does not relate to any endeavor of *cognition* (neither scientific cognition, nor any other type of cognition), neither is censorial jurisprudence carried out under a descriptive scientific discourse.

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[28] See Ricardo Guastini, *Los Juristas a la Busqueda de la Ciencia*, 267; Pedro Moniz Lopes, *Derrotabilidade Normativa e Normas Administrativas,* Tese de Doutoramento defendida na Faculdade de Direito da Universidade de Lisboa, 2016, inédito, 20 f.

[29] On the difference between language and metalanguage, see Wilfrid Sellars, "Some Reflections on Language Games", in *Science, Perception and Reality,* New York: Humanities Press, 1963, 321 f.

[30] Originally, Jeremy Bentham, "*Deontology Together with a Table of the Springs of Action and the Article on Utilitarianism",* Amnon Goldworth, ed., Oxford: Clarendon Press, 1983, 9. Bentham claims that «[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» (see Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, J. H. Burns / Herbert L. A. Hart, ed., Oxford: Clarendon Press, 1996, 293 f.

1.10. The distinction between *expository jurisprudence* and *censorial jurisprudence* means "crossing a theoretically significant dividing line: between the legal positivist's insistence on doing theory in a morally neutral way and the Natural Law theorist's assertion that moral evaluation is an integral part of proper description and analysis" [31].

1.11. One cannot perform *science qua tale* if through one's discourse one *affects (or intends to affect) the object* which one is describing in the first place. Therefore:

1.11.1. one cannot *prescribe* over law if one intends to perform legal science and;

1.11.2. one cannot *evaluate* law if one intends to perform legal science…

a. …though *one may scientifically describe evaluative judgments*, which is an entirely different business[32].

1.12. One may, however, perform legal science though a kind of *epistemological constructivism* (Kelsen).

1.12.1. In this sense, legal science may *recreate* its own object (law) through the attempt to understand the law as a unified whole *(sinnvolles Ganzes);*

1.12.2. much like natural sciences transform, through cognitive systematization, the chaos of sensorial experiences into a cosmos *(i.e., the scientific account of nature as a unified system),* so does legal science through cognition and description transform the multitude of norms created by law-creating authorities (the *datum*) into a unified normative system[33].

1.13. The so-called *systematized character* of law is, therefore, a

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[31] See Brian Bix, "Natural Law Theory", in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory,* Oxford, Wiley-Blackwell, 2010, 218. «[to prescribe as it should be or should not be from the point of view of some specific value judgments] (…) 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». See Hans Kelsen, *General Theory of Law and State*, xiv.

[32] One can however describe an evaluation. See Herbert L.A. Hart, *The Concept of Law*, 2nd ed., Oxford: Clarendon Press,1994, 271.

[33] See Hans Kelsen, *Reine Rechtslehre,* 81 f. See also Andrzej Grabowski, *Juristic Concept of the Validity of Statutory Law: A Critique of Contemporary Legal Nonpositivism,* New York: Springer, 2013, 282. As it is well known, Hans Kelsen claimed that legal science should turn law into a contradiction-free system. However, that is not the case. Many conflicts arise within a systematized account of law — some of which are not solvable within the legal system *per se.* Law is man-made, therefore subject to human error.

product of legal science, not an *a priori* datum (*i.e., law is not science* as commonly it is stated: it is the *object of legal science*).

1.14. In this dogmatic dimension, legal science feeds off the continuous *back and forth* between its own meta-language (*meta-language* or *scientific legal discourse*) and the object-language (law's language or the law-creating authorities' language).

1.14.1. Drawing from this *back and forth*, legal science produces its own scientific jargon (*i.e.,* this entails the creation of *normative concepts*)[34];

1.14.2. With the latter, legal science aims at subordinating its object to the descriptive constancy of phenomena.

a. For instance, a proposition according to which $norm_1$ is a principle and not a norm of competence aims at universality;
b. conversely *all norms of the like* should be deemed principles and not norms of competence[35].

1.15. In view of the above, it is said that legal science must abide by these relevant standards:

1.15.1. It should isolate and describe its own object (*law*)[36];

1.15.2. It should be neutral *(wertfrei)*[37];

1.15.3. It should be endowed with an explanatory purpose[38];

1.15.4. It should aim at systematization of operative concepts[39];

1.15.5. It should aim at obtaining universal propositions which are either true or false (under some endorsed criteria for truth)[40];

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[34] On the concept of legal concepts, see Carlos Santiago Nino, *Introducción al Análisis del Derecho*, 165 f.

[35] On this topic, see Pedro Moniz Lopes, "The Syntax of Principles: Genericity as a Logical Distinction between Rules and Principles", *Ratio Juris* 30/4 (2017) 471-490.

[36] «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.» See Hans Kelsen, *General Theory of Law and State*, xiv.

[37] For instance, Hans Kelsen, *Reine Rechtslehre,* 1 f.

[38] See Bartosz Brożek, "Explanation and Understanding", in Idem / Michael Heller / Mateusz Hohol, *The Concept of Explanation,* Kraków: Copernicus Center Press, 2016, 18 f.

[39] Among other, see Hans Kelsen, *Allgemeinen Theorie der Normen,* Wien, 1979 — trad. francesa: *Théorie Générale des Normes,* de O. Beaudi / F. Malkani, Paris, 1996, 53; David Duarte, *A Norma de Legalidade Procedimental Administrativa — a Teoria da Norma e a Criação de Normas de Decisão na Discricionariedade Instrutória,* Coimbra: Almedina, 2006, 37 f. and 43 f.

[40] Among others, see Guillermo Lariguet, "La Aplicabilidad del Programa Fal-

1.16. Legal scholarship or legal dogmatics, on the other hand, may include many other types of academic investigations and endeavors *over* the discourse arising out of the official sources of law. These include:

1.16.1. the moral or political criticism of the law or;

1.16.2. the conception of *lege ferenda* addressed at the normative authorities.

2. «Descriptive» interpretation and «creative» interpretation

2.1. *Interpretation* is a key concept in both legal science and legal dogmatics.

2.2. At the level of legal science, interpretation is an enterprise that *describes* the possible meanings of words *(semantic approach)* and the theoretical background contexts for the *use* of such words *(pragmatic approach)* which can be *ascribed* to a normative text[41].

2.2.1. A scientific approach to legal interpretation states that *sentence a* has *possible meanings* a_1, a_2, a_3(to a_n).

2.2.2. A scientific approach to legal interpretation relates to the following archetypes: interpretation as *describing the «norm-framework»* (Kelsen) or *cognitive interpretation* (Guastini)[42].

2.2.3. A scientific approach to legal interpretation is two-fold:

a. It may be stated that *sentence a* has, abstractly speaking, *possible meanings* a_1, a_2 or a_3;
b. It may be stated that *sentence a* has, within the context of legal system$_1$ (its enacted interpretative norms and, or, *doctrinal approaches*), *possible meanings* a_1, a_2 or a_3.

2.2.4. Under a scientific approach to legal interpretation, there is no real *cognitivist* approach to the *correct meaning* of a sentence (*i.e.,* there is no *true interpretation,* no *interpretative discovery* and, therefore, there is no *a priori «right answer»* for a case)[43].

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sacionista de Popper a la Ciencia Jurídica", *Iso* 17 (2002) 183 f.

[41] See, among others, Riccardo Guastini, "A Realistic View on Law and Legal Cognition", *Revus* 27 (2015) 45-54; Pierluigi Chiassoni, *Tecnica dell'Interpretazione Giuridica,* Bologna: Il Mulino 2007, 50 f.

[42] See Hans Kelsen, *Reine Rechtslehre,* 382 f.; Riccardo Guastini, *Il Diritto come Linguaggio. Lezione*, 146 f.

[43] See Enrico Diciotti, *L'Ambigua Alternativa tra Cognitivismo e Scepticismo Interpretativo,* Siena: Università degli Studi di Siena 2003, 18 f.; Riccardo Guastini, "Una Teoria Cognoscitiva de la Interpretación", *Iso* (2008) 16 f.; Aulis Aarnio,

2.3. At the level of legal dogmatics (and legal scholarship) or legal practice (*e.g., law* as interpretation performed by courts and administrative agencies), interpretation is an activity that entails *ascribing* meanings to normative sentences.

2.3.1. At the level of legal dogmatics and legal practice, interpretation is not a scientific approach to law, rather a creative and political one («political» *lato sensu,* that is)[44].

2.3.2. Interpretation as it is commonly performed by courts and administrative agencies is, therefore, an *act that shapes law*, not one that describes it[45].

2.3.3. Interpretation may settle, *vis-à-vis* a legal case, one of the possible meanings within the framework that arises out of cognitive interpretation and discard the others *(adjudicative interpretation)*[46];

2.3.4. Adjudicative interpretation is therefore an *interpretative decision* (albeit governed by interpretative legal norms);

a. It may be said that a statement of adjudicative interpretation is a statement of the type «sentence a has meaning a_1»;
b. However, as there is no cognitive approach and *no single right meaning*, a statement of adjudicative interpretation is not a statement of fact rather a normative statement (*ought to,* a *decision*), that is: a statement of adjudicative interpretation not «*sentence a* has *meaning* a_1» but «*sentence a* shall have *meaning* a_1»;
c. The interpretation of an interpretative adjudicative statement is a *norm* (*e.g.,* norm *qua* the outcome of interpretation of normative sentences).

2.4. Interpretation may also *ascribe* a whole new meaning which cannot be drawn from the normative text through shared rules of semantic and syntax *(creative interpretation)*[47];

"Sobre la Ambigüedad Semantica en la Interpretación Jurídica", *Doxa* (1987) 109 f.

[44] See Pierluigi Chiassoni, "Statutory Interpretation and Other Puzzles, 57", *Materiali per una Storia della Cultura Giuridica* 1 (2017) 259.

[45] See Riccardo Guastini, "*Juristenrecht*. Inventando Derechos, Obligaciones y Poderes", in Jordi Ferrer Beltrán / José Juan Moreso / Diego Papayannis, ed., *Neutralidad y Teoria del Derecho,* Madrid: Marcial Pons, 2012, 212-213.

[46] See Pierluigi Chiassoni, *Tecnica dell'Interpretazione Giuridica,* 143 f.; Riccardo Guastini, *Juristenrecht. Inventando Derechos, Obligaciones y Poderes*, 211.

[47] See Pierluigi Chiassoni, *Tecnica dell'Interpretazione Giuridica*, 133 f.; José Oliveira Ascensão, *O Direito — Introdução e Teoria Geral*, 13.ª ed. ref., Coimbra, 2008, 425 f.

2.4.1. A statement of creative interpretation (sometimes referred to as «corrective» interpretation) is also a normative statement: «*sentence a* shall have *meaning* b_1».

a. note that «b_1» is not comprised within the specter of possible meanings that arise out of the cognitive interpretation, *e.g.* a_1, a_2, a_3(to a_n);
b. the one who utters statement «*sentence a* shall have *meaning* b_1» is attempting at making it so that «*sentence a* has *meaning* b_1».

2.4.2. A statement of creative interpretation may also *fill the gaps* arising out of ambiguous concepts used in the *discourse of law* (this is what Guastini calls «interstitial lawmaking»[48]);

2.4.3. An interpretative creative statement is a *norm,* although it does without the norm-sentence (*i.e.,* the *meaning* ascribed has no support in the norm-sentence within applicable rules of language);

2.4.4. Statements of creative interpretation are frequently prohibited under certain legal systems but *that does not mean that they do not exist*.

2.5. Both adjudicative and creative interpretation have a certain *creative* dimension:

2.5.1. «choosing» between one of the possible meanings is *creative* to the extent that it *reduces* the specter of possible meanings);

2.5.2. there seems to be a *distinction of degree* between adjudicative and creative interpretation rather than a *qualitative difference*;

2.5.3. in order to derive meaning from normative sentences that encompass such concepts, legal theorists (and sometimes legal practitioners) *create* or *adhere* to pre-existing theories. These include:

a. *legal theories* (*e.g.,* ethical theories on validity, functionalist civil liability theories or political theories over systems of government);
b. *moral theories* (*e.g.,* objective metaethics, Kantian morals);
c. *economic theories* (*e.g.,* neoclassical economics, public choice);
d. *general philosophical theories* (*e.g.,* emotivism, relativism)
e. *others*[49].

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[48] See Riccardo Guastini, *Juristenrecht. Inventando Derechos, Obligaciones y Poderes*, 213.

[49] See Vittorio Villa, "Deep Interpretative Disagreements and Theory of Legal

2.5.4. In view of the above, the aforementioned *background theories* are taken as assumptions *at the moment of interpretation* in order to:

a. ascribe a certain *meaning* to a given normative sentence out of the possible meanings arising out of cognitive interpretation: *e.g. the constitutional concept of human life includes such life as of the conception*.
b. ascribe a certain *meaning* to a given normative sentence, though that meaning (or even that theory) cannot be drawn from the frame of meanings arising out of cognitive interpretation: *e.g. human dignity is a property bestowed upon us by God which cannot be waived.*

3. Limits of legal science and the requirements for legal construction *(Juristenrecht)*

3.1. Legal science has no practical impact *per se*.

3.1.1. The *use* of legal science does not correlate to *practical reason*[50];

3.1.2. Legal science does not solve legal cases;

3.2. Legal construction *(Juristenrecht)* is necessary on a number of cases and for a number of reasons on several moments of the *law-applying process*. Just to name a few:

3.2.1. *At the interpretation («prima facie» applicable norm-selection) stage of «sense»*:

a. Most words used in the *discourse of law* are ambiguous (*e.g.,* polyssemic or open-textured) as to their *meaning*[51];
b. Adjudicative interpretation must therefore be performed in order to decide *what the word means* on account of the *non liquet* prohibition encompassed in most contemporary legal systems.

Interpretation", in A. Capone / F. Poggi, ed., *Pragmatics and Law — Philosophical Perspectives*, New York: Springer, 2016, 95 f.

[50] On the difference between practical reason and theoretical reason, see Aulis Aarnio, *On Legal Reasoning as Practical Reasoning*, in *Separata Facticia de la Revista Theoria* (October 1987 — September 1988) 102 f.

[51] See Timothy Endicott, "Linguistic Indeterminacy", *OJLS* 16/4 (1996) 667 f.; Idem, *Vagueness in Law*, Oxford, 2000 — trad. espanhola: *La Vaguedad en el Derecho*, J. A. del Real Alcalá / J. V. Gómez, Madrid: 2006, 65 f.

3.2.2. *At the interpretation («prima facie» applicable norm-selection) stage of «reference»*:

a. Words used in the *discourse of law* may also be ambiguous (*e.g.,* vague to a certain quantitative or qualitative extent) as to *what they refer to*[52];
b. Adjudicative interpretation must therefore be performed in order to decide *which entities of the world the words «cover»* on account of the *non liquet* prohibition encompassed in most contemporary legal systems.

3.2.3. *At the conflict solving (post-interpretative) stage*:

a. Several norms of a legal system conflict with each other leading to either *invalidity of norms* or (gradual or definitive) *inapplicability of norms* (principles compete and rules conflict in total-total, total-partial or partial-partial schemes[53]);
b. *Adjudicative balancing* must also be performed on account of the *non liquet* prohibition encompassed in most contemporary legal systems;
c. For instance, Alexy's famous *weight formula* is a piece of legal construction (*Juristenrecht*) as it frames the method for *adjudicative balancing*[54]:

$$W_{i,j} = \frac{I_i \cdot W_i \cdot R_i}{I_j \cdot W_j \cdot R_j}$$

i. The formula sets forth that the concrete weight of principle *Pi* in relation with colliding principle *Pj* under certain cases derives from the quotient between, on the one hand, the product of the importance of principle *Pi*, its

[52] See Timothy Endicott, *Vagueness in Law*, 2006, 65 f.

[53] On the taxonomy of normative conflicts, see Alf Ross, *On Law and Justice,* London, 1958 — trad. portuguesa: *Direito e Justiça,* E. Pini, São Paulo: Eudeba, 2000, 158 f.; see also C. Santiago Nino, *Introducción al Análisis del Derecho*, 2003, 274. On the collision of principles, see Robert Alexy, "On the Structure of Legal Principles", *Ratio Juris* 13/3 (2000) 297 f.; David Martinez-Zorrilla, *Conflictos Constitucionales, Ponderación y Indeterminación Normativa,* Madrid: Marcial Pons, 2007, 133.

[54] Cfr. R. Alexy, „Die Gewichtsformel", in J. Jickeli *et al.,* ed., *Gedächtnisschrift für Jürgen Sonnenschein,* Berlin, 2003, 771 f.

abstract weight and the reliability of its empirical suppositions as regards its importance and, on the other, the product of the importance of principle *Pj*, its abstract weight and the reliability of its empirical considerations as regards its importance.

ii. Therefore, $W_{i,j}$ means the concrete weight of *Pi* in relation with the colliding principle *Pj*. The weight formula defines this concrete weight as the quotient of three factors in each side of the balancing: I_i represents the intensity of the interference in *Pi*; I_j represents the importance of fulfilling *Pj*; W_i and W_j represent the abstract weight of principles *Pi* and *Pj*; lastly, R_i and R_j represent the reliability of the empirical and normative suppositions (*epistemic factor*), which relate to the issue of how intense is the interference in *Pi* and how intense the interference in *Pj* would be if the interference in *Pi* was omitted.

iii. Alexy sustains — again, as a piece of legal construction (*Juristenrecht*) — that it is possible to assign, in metaphorical fashion, a numeric value to the variables of the importance of the abstract weight of principles, through a triadic scale: *light* 2^0, that is, 1; *medium* 2^{-1}, that is, 2; and *serious* 2^{-2}, that is, 4. The quantitative expression of the reliability of the empirical suppositions takes the following form: *certain* 2^0, that is, 1; *plausible* 2^{-1}, that is, 1/2; and *not evidently false* 2^{-2}, that is,1/4.

3.3. As seen above, legal construction (*Juristenrecht*) takes place in several steps of the *law-applying process*; however, it is at the stage of interpretation that it becomes more evident.

3.3.1. It becomes clear that some concepts *per se* require a

theoretical background on which they can rely upon on in order *(i)* to be significantly understood and *(ii)* the norms arising out of such normative sentences be applied.

a. It may be the case that this happens with all concepts under a skeptic view of *meaning* (at least one that requires a *contextual* reference point);
b. My claim is simply to state that, for them to be *significantly understood*, some concepts require such *theoretical background* more than others. For instance:
    i. Contrast «court» with «dignity»;
    ii. Contrast «legal agreement» with «justice»;

3.4. Sometimes these concepts are used in such an ambiguous manner that disagreements arise *beyond* the level of interpretation *stricto sensu*[55]. The *discourse of law* gives place to many other disagreements. For instance:

3.4.1. The speech act underlying ambiguous legal sentences (*e.g.* assertive statements with illocutionary *directive force*): *e.g.,* «human life is sacred»;

3.4.2. The ambiguity of deontic modalities (*e.g.* permissive or obligatory norms): *e.g.*, «all citizens are endowed with human dignity »;

3.4.3. The normative structure of legal sentences (*e.g.,* rules or principles): *e.g.*, «all citizens have the right to free speech»;

3.4.4. The theories over pragmatic equivalence between non obligatory and permitted actions: *e.g.*, «if action a is not forbidden under legal system z then action a is permitted under legal system z».

3.5. Frequently, the formulation or adhesion to *theoretical backgrounds* (certain legal, moral, philosophical or economic theories) are a *vehicle* for the creation of *ought sentences* (obligations, prohibitions and permissions) which simply do not pertain to the legal system (*i.e.,* they are a vehicle for the *pure creation* of norms)[56].

3.5.1. This too has to do with *theoretical background assumptions*, *e.g.*:

a. a certain theory of legal sources (*e.g.*, legal positivism

[55] See Vittorio Villa, *Deep Interpretative Disagreements and Theory of Legal Interpretation*, 110 f.; P. Varonesi, "La Dignidad Humana: una Idea aparentemente Clara", in Ricardo Chueca, ed., *Dignidad Humana y Derecho Fundamental*, Madrid: Centro de Estudios Politicos y Constitucionales, 140 f.

[56] See Riccardo Guastini, *Juristenrecht. Inventando Derechos, Obligaciones y Poderes*, 213. For instance, suppose that an academic sustains that the *only* possible constitutional concept of human life in the Portuguese legal system is that of life as of the conception. This is a statement linked with the untenable account of objective metaethics of the type "only one is right and the others are mistaken".

versus «law as integrity»);
b. a certain theory of interpretation (*e.g., originalism, textualism, purposivism*, *etc.*);
c. a certain theory on graduability and expansibility of legal principles (*e.g.,* Alexy's *Optimierungsgebote* or Sieckmann's *reiterated mandates of validity*);
d. *etc.*;

3.6. *Theoretical background assumptions* provide for the implicit creation of legal norms:

3.6.1. Some implicit legal norms are derived from the *conjunction* of the discourse of law together with a *theoretical background assumption*: *e.g., boni mores*; hierarchical superiority of EU Law;

3.6.2. Other implicit legal norms are derived *purely* from *theoretical background assumptions*: *e.g.*, arguments from «Natur der Sache», parliamentary government, human personalism, the principle of *favor laboratoris*;

3.7. These *implicit norms*, necessary as sometimes they may be, are *not a product of legal science*

4. Example: take the concept of *human dignity*

4.1. "Human dignity" is a concept that gives place to a *deep interpretative disagreement* (DID)[57].

4.1.1. DID are *prima facie* genuine disagreements:
a. Within certain *comprehensive reasonable conceptions,* there is a degree of consensus and paradigms that instantiate the concept (*e.g.,* the disagreements arise upon a previous necessary consensus);

4.1.2. DID are *prima facie* deprived of any interpretative errors (*i.e.,* the disagreements are «faultless»):
a. Frequently, adjudicative interpretations diverge but they are *equally legitimate*, *i.e.,* they transcend the semantic and cultural tolerability;

4.1.3. DID are *prima facie* unsolvable:
a. It is impossible (*i.e.,* outside objectivist metaethics and other objectivist theories which are untenable) to come up with an

[57] See Vittorio VILLA, *Deep Interpretative Disagreements and Theory of Legal Interpretation*, 89 f.

a priori right interpretation deprived of a certain contextual reference point;

b. The contextual reference point is a *matter of fact* and not a *product of reason*[58];

4.2. Several *travaux préparatoires* show that, after World War II, constitution-makers *agreed not to agree* on the description of the concept of "human dignity"[59].

4.2.1. These constitution-makers could not agree neither to the *libertarian* account nor to the *communitarian* account of "human dignity" and sometimes they could not agree neither to the secular account nor to the non-secular account of "human dignity")[60];

4.2.2. Such was the price to pay in order to include the concept of "human dignity" in several constitutions;

4.3. The disagreements over the concept of "human dignity" transcend the purely interpretative disagreements[61].

4.3.1. Human dignity may, among others, be envisaged as *(i)* a *background idea* (or a *narrative formula*)[62] *(ii)* a constitutional principle (a state obligation)[63] or *(iii)* a fundamental legal position[64];

a. Human dignity as a *background idea* may further divide into:

i. Human dignity *qua* autonomy, further divided into:

1. Autonomy within the Kantian

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[58] On these properties of DID, see Vittorio VILLA, *Deep Interpretative Disagreements and Theory of Legal Interpretation*, 99 f.

[59] On this, see Ricardo CHUECA, *La Marginalidad Jurídica de la Dignidad Humana* in Ricardo CHUECA, ed., *Dignidad Humana y Derecho Fundamental,* Madrid, 2015, 29 f.

[60] On the differences between the libertarian and communitarian account of human dignity, see Pedro Moniz Lopes, "(…) the appellant's mind and her forceful clarity «is all that Marie has left»". Sobre a dignidade, a autonomia e a moral, a propósito do caso Fleming v Ireland", in Jorge Reis NOVAIS / Tiago Fidalgo de FREITAS, coord., *A Dignidade da Pessoa Humana na Justiça Constitucional,* Coimbra: Almedina, 2018, 319 f. On the differences between the secular and non-secular account of human dignity, see Luís Pereira COUTINHO, *Human Dignity as Background Idea* in Stefan KIRSTE, ed., *Human Dignity and the Foundation of Law,* Stuttgart, 2013, 108 f.

[61] See Cass SUNSTEIN, *Legal Reasoning and Political Conflict,* Oxford: Oxford University Press, 1998, 58-59.

[62] See Luís Pereira COUTINHO, *Human Dignity as Background Idea,* 108 f.

[63] See the Portuguese Constitutional Court decision no. 509/2002.

[64] See Pedro Moniz LOPES, "(…) the appellant's mind and her forceful clarity «is all that Marie has left», p. 300 f. and p. 307 f. See also Jorge REIS NOVAIS, *A Dignidade da Pessoa Humana,* I, — *Dignidade e Direitos Fundamentais,* Coimbra, 2015, 114 f.

account of morality as a system of categorical imperatives[65];

2. *Autonomy* within the account of morality as a system of hypothetical imperatives (Philippa Foot) [66];
3. *Autonomy* as a dispositional property (Joseph Raz)[67];
4. *etc.*

ii. Human dignity *qua* a property of humanity (humans *as such* as beings with dignity)[68];

b. Human dignity as a *constitutional principle* may further divide into:

i. The *duty* impending upon the State to assure certain conditions of dignity for individuals[69];

ii. The *duty* impending upon the State to protect the autonomous dignity of individuals[70];

iii. The *duty* to protect the *holders* or *bearers* of dignity from themselves[71];

c. Human dignity as a *fundamental legal position* may further divide into:

i. Human dignity as the content of a *permissive norm*:

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[65] See Immanuel Kant, *Groundwork for the Metaphysics of Morals,* ed. and transl. by A. W. Wood, Contributors: J. Schneewind / M. Baron / S. Kagan / A. W. Wood, New Haven: Yale University Press, 2002, 4: 429.

[66] See Philippa Foot, "Morality as a System of Hypothetical Imperatives", in *The Philosophical Review,* 81/3 (Jul. 1972) 308 f.

[67] See Joseph Raz, *The Morality of Freedom,* Oxford: Clarendon Paperbacks, 1986, 371.

[68] See Luís Pereira Coutinho, *Human Dignity as a Background Idea*, 111.

[69] See Jorge Reis Novais, *A Dignidade da Pessoa Humana,* i, 186 f.

[70] See Fleming v Ireland [2013], iesc 19, para. 109; Antje Pedain, "The Human Rights Dimension of the Diane Pretty Case", in *The Cambridge Law Journal* 62/1 (2003) 181-206.

[71] Justice Scalia once stated, as regards the *Nancy Cruzan* case, that «the intrinsic value of human life does not depend on any assumption about a patient's rights or interests; states have the power (…) to prevent the suicide of competent people who rightly think they would be better off dead, a power that plainly is not derived from any concern about their rights and interests.» Critically, Ronald Dworkin, *Life's Dominion — an Argument about Abortion, Euthanasia and Individual Freedom,* New York: Alfred A. Knopf, 1993, 13.

1. A liberty to exercise a fundamental legal position *in the manner one wishes to*[72];

ii. Human dignity as a content of an *obligatory norm*:

1. Obligation to exercise a fundamental legal position *in the manner others wish one to*[73];

iii. Human dignity as a content of an *encumbrance*:

1. Liberty to exercise fundamental legal positions *insofar one exercises them in the manner others wish one to*[74];

4.3.2. "Human dignity" is a concept that is frequently used on *both sides* of an argument[75].

a. For instance, in *case law*:

i. The *Fleming v. Ireland* case:

1. Marie Fleming invoked "constitutional values of autonomy, self-determination and dignity" in support of her claim that no constitutional duty existed towards not assisting others in committing suicide[76];
2. The Supreme Court of Ireland decided that "it cannot properly be

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[72] See Pedro Moniz Lopes, *(…) the appellant's mind and her forceful clarity «is all that Marie has left»"*, 323 f.

[73] In this maximized vision of passive dignity, the *right to dignity* is not granted by the State nor created by its holder, rather it "exists", "independently of sex, race and nationality as well as way of life. Each human being was endowed (ausgestattet) with it… Dignity is linked with human subsistency (Mensch-Sein)… even unborn mortally ill life, in the womb of the mother, is endowed with this natural and unavoidable Dignity". H. P. Richter, *Juristische Grundkurse,* Band 20, 2007, *apud* Alfonsas Vaišvila, "Human Dignity and the right to Dignity in terms of Legal Personalism (from Conception of Static Dignity to Conception of Dynamic Dignity", *Jurisprudencija,* 3/117 (2009) 112.

[74] See Jorge Reis Novais, *A Dignidade da Pessoa Humana,* i, 130 f.; Pedro Moniz Lopes, *(…) the appellant's mind and her forceful clarity «is all that Marie has left»*, 325 f.

[75] On this, see See Pedro Moniz Lopes, *(…) the appellant's mind and her forceful clarity «is all that Marie has left»"*, p. 313, Note 70.

[76] Fleming v Ireland [2013], iesc 19, para. 110.

> said that such an extensive right or rights [to committing suicide *and* to assist to such end] is fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution" and that "as there is no right to commit suicide so issues, such as discrimination, do not arise; nor do values such as dignity, equality, or any other principle under the Constitution, apply to the situation and application of the appellant, as discussed above"[77].

ii. The «dwarf-tossing» case;

1. Manuel Wackenheim claimed that banning him from working as a *tossed dwarf* represented an affront to his dignity as it violated his right to freedom, employment, respect for private life and an adequate standard of living, and right to non-discrimination[78].
2. The *Conseil d'État* decided that an administrative authority could legally prohibit dwarf-tossing on grounds that the activity did not respect human dignity and was thus contrary to public order.

4.3.3. The norm of human dignity is therefore *shaped* through either *(i)* adjudicative interpretation of normative sentences, *(ii)* presupposed background theoretical assumptions or *(iii)* the conjunction of both.

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[77] Fleming v Ireland [2013], IESC 19, para. 138.

[78] See CE, Ass., 27 Octobre 1995, p. 372 Case Commune de Morsang-sur-Orge in which an appeal was lodged in order to to annul the judgment of 25 February 1992 whereby the Versailles Administrative Tribunal, at the suit of the Fun Production Company and Mr. Wackenheim, had on the one hand annulled the Order of 25 October 1991 whereby its mayor banned the dwarf-tossing show planned for the 25 October 1991 at the Embassy Club discotheque, and on the other hand ordered the mayor to pay the said Company and Mr. Wackenheim the sum of 10,000 francs compensation for the loss caused by the said Order.

5. Conclusions: *Juristenrecht* not as legal science but as the *object of legal science*

5.1. *Legal scholarship* «lato sensu» includes:

5.1.1. descriptive scientific statements over the discourse of law (in force);

5.1.2. adjudicative interpretations ascribing one out of possible meanings to normative sentences;

5.1.3. creative interpretations ascribing unsupported meanings to normative sentences and notably;

5.1.4. adoption of *background theoretical assumptions* that normatively frame the law-applying process.

5.2. *5.1.2., 5.1.3.* and *5.1.4* are, according to the criteria set forth above, *Juristenrecht.*

5.3. It is said that there is a *back and forth* between scientific meta-language and the object language (the law-creating authorities' language) (Kelsen). But this is a matter of *appropriation* of the former by the latter. This is not the case with *Juristenrecht.*

5.4. *Juristenrecht* enriches its own field of study because the second-order language of jurists *descends* to the object language of law (*i.e.,* it *creates* obligations, permissions and prohibitions, be it *ex nihilo,* be it *interstitially*).

5.4.1. It may be so that *Juristenrecht* is formally (officially) accepted in the discourse of law with *membership to the legal system* (*e.g.,* the *bona fides* principle in Portuguese administrative law was primarily — before official recognition in the Portuguese Constitution in 1996 — a product of *Juristenrecht*);

5.4.2. It may be so that *Juristenrecht* is formally (but unofficially) accepted in the discourse of law with *membership to the legal system* (*e.g.,* it becomes customary law);

5.4.3. But it is certainly also so that *Juristenrecht* is purely *presupposed* in the law-applying proceedings in everyday life (*e.g.,* courts and administrative agencies) as a background premise under seldom enthymematic legal conclusions.

5.5. *Juristenrecht* is therefore *in force.*

5.6. An accurate (scientific) description of law must take into account both *(i)* the language of law and *(ii)* the language of *Juristenrecht*[79].

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[79] Paradigmatically, see Riccardo Guastini, *Juristenrecht. Inventando Derechos, Obligaciones y Poderes*, 221.