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Objectivity

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1. Objectivity: reality and thought

Philosophers usually discuss objectivity by reference to domains, to which objects or facts or properties or notions belong. They may say that the relative merit of ice cream flavors and other matters of culinary taste are subjective or that physics is objective if anything is, and they are split regarding morality. Some philosophers go further: they say that different domains can be objective in different ways, so that we cannot usefully explain in a general way what makes a domain objective. In this chapter we shall discuss objectivity in law and shall leave open the question whether the account of objectivity in law can be generalized to other domains. Even so, we shall initially look at what philosophers say regarding objectivity elsewhere (or indeed objectivity in general) in order to get a better sense of our subject and to deal with some threshold issues.

Is there objectivity in law? It is often thought that sensitive political issues such as the legitimacy of adjudication turn on this question. But it is not clear what the question comes to, i.e. what it would take for law to be objective. We need a sharper formulation of the conditions that law must fulfil if it is to come out objective, which may help us decide the issue whether law is indeed objective.

2. Two approaches

In a classic approach, a domain is objective in case the existence and character of the objects that populate the domain is independent of the mind, i.e. of thoughts, beliefs, desires, and other aspects of the mental. This approach puts the emphasis on the world, and treats the standing of our thoughts or beliefs as derivative. It says that our thoughts or beliefs about these objects are capable of being objective in virtue of the fact that reality contains the objects that it does, and does so independently of minds. It is however notoriously difficult to pin down what the required independence amounts to— precisely what must be independent of what—and so to design a test of objectivity. Among other difficulties, this approach to objectivity would quickly raise too many

fundamental issues in the neighbourhood, such as the character of reality, the individuation of objects, and the nature of reference (cf. Raz 2001, 196). Besides, a test of objectivity should be such that thought itself and other aspects of the nature and functions of the mind are not without more ruled out. The test therefore cannot be that something should not be constituted by the mind. Moreover, our test should be subtle enough to allow not only for constitution by the mind but also for causal or historical dependence upon it. Consider domains populated by things which would not exist at all were it not for human minds and the thoughts, beliefs, or desires that they entertain. It would be unhelpful to devise a test that things such as stars and rocks and chemical compounds would satisfy, but things such as trains and currency exchange rates would not. There seems to be a difference relevant to the nature of objectivity between questions such as whether travel by rail is romantic or whether speculating on forex is scary, on the one hand, and questions such as how best to design trains that satisfy certain design conditions (e.g. regarding speed, capacity, cost, or pollutants) or how currency volatility affects economic growth, on the other. Unlike the first, the second kind of question seems to belong to a domain where a great deal of objectivity is possible, so we need a more fine-grained test to capture the crucial distinction. A more promising test requires that *truths* in that domain be independent of thoughts or beliefs or desires. Specifically, if *p* is an objective truth, it holds independently of people's thoughts or beliefs or desires that *p* (Nozick 2001, 76).

An alternative approach places the emphasis not on the world but on thinking subjects: instead of reality and its character, it focuses on the way we understand it and the intellectual norms that govern thought about it (cf. Nagel 1986; Raz, 2001). For example, Thomas Nagel says that objectivity is a method of understanding. In Nagel's view, objectivity is primarily a process or state of detachment, which is achieved by stepping back from an initial view formed from an individual or even generally human perspective, and by coming to occupy instead a perspective that encompasses the initial view and its relation to the world. The new perspective allows us to consider the initial view as an appearance which can be assessed and corrected by reference to the detached perspective. The detachment, to the extent that it is achieved, makes the new perspective that much less dependent upon individual or generally human contingencies. Although Nagel concedes merit to the view that the existence of a larger reality underlies objectivity—the possibility of detachment, which for Nagel is distinctive of the objective perspective, presupposes that humans and

how things appear to them are part of a larger reality—he argues that the connection is derivative and often misleading: less detached (and therefore less objective, in Nagel's sense) perspectives and how things appear from them may themselves be part of reality: objective reality is incomplete (Nagel 1986, 4-7; 25-7).

3. Error

In spite of such differences, the two approaches have much in common. In this chapter we shall rely on a mark of objectivity that captures a key theme common to both approaches and shall leave open the question which approach focuses on the primary and which on the derivative sense of objectivity. We shall focus on the relation between how things are in the world and how subjects think of and understand it, and we shall try to test for objectivity by investigating whether the relevant domain is such that there is space for *error*. We should expect that for a domain to be objective there should be some logical space between how we understand or judge or perceive or believe things to be and what discriminations we make among different objects or properties in the domain, on the one hand, and what the case is, on the other. Availability of such space should be part at least of the domain's independence from the mind, on which the first approach focuses, and would suggest that in that domain there may be truths which are independent of our judgment. It would further make it possible to adopt the kind of perspective on which the second approach focuses, i.e. one which is detached from and critical with respect to individual judgment, in order to pursue such truths, if any exist. We could then position a domain along a spectrum ranging from those where there is no such space at all—individual judgment and case necessarily coincide, so there is no genuine standard governing the former—on to domains where there is a standard by reference to which individual judgment may turn out to be mistaken, through to domains where even collective judgment or shared understanding can turn out to be mistaken. The precise position of a domain would of course depend on a great deal of refinement. For example, we may think that only unreflective judgment (individual or otherwise) or only judgment under certain other epistemic conditions may turn out to be mistaken in a certain domain, or we may think that even collective reflective judgment or fully articulated shared understanding could turn out to be wrong.

It should go without saying that the question what standard, if any, governs judgment in a certain domain is not to be referred back to the judgments made in the domain in question. This clarification is meant to allay any fears of making objectivity too easy, in the sense of allowing those who make the judgments to invent bogus 'internal' standards which, instead of opening up any genuine space for criticism and correction, ensure that judgments in the domain are necessarily vindicated. First, to say that standards that make error possible are available in a domain is not merely to say that judgments in a domain are formulated in the cognitive idiom and purport to be about how things are in the world (cf. Raz 2001). Second, the boundaries of the domain and hence the character of the relevant standard are matters open to critical evaluation. If astrologists or witchcraft specialists e.g. say that this is going to be one of these days because the stars are out of line or because a certain witch has cast a spell, their claims plausibly compete with ordinary scientific explanations, which involve causal relations governed by laws of nature. The claims, therefore, plausibly are to be assessed by reference to the usual scientific standard, and, we should hope, turn out false, and indeed objectively so.

4. Legal objectivity

This no doubt at best a partial conception of objectivity, but it should be helpful enough for the purpose of exploring the territory in respect of objectivity in law. We can formulate our problem as follows: are there objective legal facts? That is, is there an objective fact about what the law requires? We shall treat this question as roughly equivalent to the question whether the nature of law is such that our thoughts or beliefs or discriminations or judgments about what the law requires are subject to a (distinctively legal) standard by reference to which they can be corrected. For a standard to be capable of playing that role, it must be set at least in part by something external to that which it is meant to govern. This would require that the nature of law be such that there is space between lawyers' judgments, beliefs, and so on regarding what the law requires, on the one hand, and what it in fact requires, on the other, so that the larger the space, the stronger the objectivity that law can have.

Lawyers and judges seem to speak about the law in terms that presuppose a strongly objective standard. They often argue that received settled doctrines misrepresent the law, and may not treat the absence of a settled view regarding what the law requires as being in tension with their own view that it requires

what they think it does. They seem, in short, to assume that some considerable distance exists between legal judgment and case. The fact that they often seem to make this assumption is not of course dispositive. Perhaps lawyers do not in fact make the assumption—it is possible that what they say is best explained otherwise—and they could certainly be wrong in making it even of they did—the law's objective or otherwise standing may after all be a purely philosophical, not a legal question. We need therefore to scrutinize the apparent assumption by looking more closely at the character of the standard that governs judgment regarding what the law requires.

5. Determinacy

Our question ties objectivity with the possibility that lawyers mistake what the law requires. Some legal philosophers identify our question with another (see among others Brink 2002; Leiter 2001; Leiter 2002): they ask, is the law determinate? This question is often put differently. Is there a fact of the matter regarding what the law requires? Are there right answers to questions of law? Or, more narrowly, are there right answers in hard cases?

These questions ask whether the law has determinate requirements at all, or whether it has determinate requirements in certain cases. Those who deny that it does may say that there is no fact of the matter regarding what the law requires, at least in some cases, or that there is no right answer to at least some questions of law. This approach has some appeal. After all, for lawyers to get legal requirements wrong there must be determinate requirements in the first place. Moreover, there is something important at stake when a certain sub-class of lawyers, namely judges, rely or at least claim to rely on judgments about what the law requires in the resolution of disputes. Things would seem to be seriously amiss if there are no determinate legal requirements when they do so.

It would be wrong however to identify objectivity with determinacy. The fact that one has an experience of chocolate may have a determinate and subjective character at the same time: something may taste decidedly chocolatey to me, and I could not be wrong that it does. Judgments of color can also be determinate and subjective if certain explanations of the nature of color are right. If there is nothing more to something's being red than its being disposed to cause the occurrence of a certain qualitative experience in ordinary healthy subjects under normal conditions, it can be a determinate subjective fact that an object is red.

Conversely, on a certain understanding, vagueness in predicates such as 'bald' is not merely a consequence of our ignorance or failure to discriminate finely enough but rather a consequence of a feature of the world. On this view, it could be indeterminate whether Fred is bald. But if whether or not he is is determined by the actual number of strands of hair on his head, it can be an objective fact that it is neither true nor false that he is bald. Vague domains may include areas that are both indeterminate and objective. Determinacy is not necessarily tied to or even indicative of objectivity in law either, nor is indeterminacy so tied to or indicative of subjectivity. Suppose for a moment that what the law requires is fully determined by what individual judges decide regarding which party should win in a dispute. It would follow that the law could have determinate, albeit subjective requirements. If a judge decided that plaintiff wins, it would be right to say that the law required that plaintiff win, and it could not turn out that the judge made a mistake about law's requirements. Conversely, if law's nature is such that we are all individually and collectively fallible about what it requires—if even our shared understanding of what it requires can turn out to include mistake—it can be an objective fact that the law is indeterminate on some question (compare Dworkin 1996, 134, regarding the question whether Picasso was a greater genius than Beethoven).

As we will see in a moment, philosophers who discuss the question of legal objectivity in terms of legal determinacy seem to rely on or at least to set aside further premises regarding the nature of law. By contrast, we have so far been addressing the question of objectivity with minimal or no reliance on controversial doctrines about the nature of law. We now need to consider how alternative such doctrines affect the issue. In this way, our investigation of objectivity may serve as a check of the plausibility of the doctrines. The question we then need to pose is not whether there are determinate legal requirements. Rather, we need to ask whether what determines what the law requires, and thereby defines the standard that governs judgments regarding what the law requires, is such that the relevant judgments can be mistaken and, if so, what precisely is the scope for error. We shall briefly survey some prominent substantive theories of the nature of law to see whether or not they imply that the law can be objective.

6. Conventions

H. L. A. Hart famously denied that judges are infallible, as some of the sceptics of his time suggested. On his and other legal positivists' view the nature of law and hence of the standard that governs judgment about the law is social in character, and consists of two components, one to do with *legality* and the other with *impact*. The first involves correct identification of the set of individual legal norms (or rules or laws), which stand in a systematic relation to each other and govern people's conduct in a community—the set of valid norms in the system. The second involves the conditions of correct application of the norms identified in the first stage to the facts of the cases in actual of hypothetical litigation. In classical positivism, both components are social, in the sense that both the identity of the set of valid norms and their correct application is determined by a social practice, conceived in terms of certain descriptive aspects of the collective behavior of a community. Different positivists explain the components differently and therefore each account entails a different precise sense in which the two components are social.

In Hart's original explanation, the set of valid norms is determined by a conventional practice of officials: it is the set of rules that officials apply in the resolution of disputes, as a matter of settled practice with which they consider it their duty to conform (Hart 1994, 100-23; Hart 1982, 153-61). In that version of Hart's theory, the relevant officials identify these rules by origin: they are the rules which have either been expressly created by a person whose law-making authority is accepted by the officials by virtue of their practice, or are simply recognized by the officials as having the status of law.

The second component of the standard that governs judgment about the law consists in the part that governs how the rules are to be applied. This part, according to Hart, is also set by settled practice, albeit in respect of questions of classification. Correct application of the rules identified by the first component (which include rules about the construction of other rules) is determined by correct application of the words in which the rules are formulated; and the latter is determined by judgments of classification actually made by lawyers or the community at large. Specifically, correct application is determined by general agreement in classificatory judgments. These include judgments that something is a paradigmatic instance of a term, or that it is (or is not) relevantly similar to the paradigms. Conversely, where 'no firm convention or general agreement dictates [the word's] use or […] its rejection by the person concerned to classify', there is no fact of the matter regarding the question whether or not a term applies (Hart 1994, 126-7).

In Hart's variant of positivism, the distance between legal requirement and legal judgment, in respect of both validity and impact, is small: whilst there is space between what the law requires and individual judgment about it, there is no space between what the law requires and settled collective judgment. Individual judges who decide that the law includes a rule R may make a mistake as long as R is not in fact treated as such in judges' settled practice. But it would be incoherent to say that judges collectively made a similar mistake: the rules which judges have a settled disposition to consider legal just are—necessarily are—legal. And an individual judge who classifies Fs as Gs, where G is a term that figures in the formulation of a rule, may make a legal mistake by virtue of the fact that the settled practice of the community treats Fs as not-G. However it would make no sense to say that the community's settled practice of classification may incorporate mistake. What counts as G is determined by what we collectively classify as such (cf. Stavropoulos 2001).

In cases where there is no settled classificatory practice—some are disposed to classify Fs as G whereas others are disposed to classify Fs as not-G, the law becomes indeterminate for Hart. In such hard cases, judges must decide not in line with what the law requires—there is no determinate requirement for them to conform with—but rather by acting as legislators, extending the law in the hitherto indeterminate area. The choice they must make is unconstrained in a narrow sense: though of course it ought to be fair and just and possibly to cohere with other parts of the law, it is a free choice insofar as, by hypothesis, the law as it stands does not dictate how they ought to choose.

Other variants of positivism may conceive differently of the components. For example, other accounts of legality may not accept that, conceived as purely conventional, the judicial practice of treating rules as legal suffices to determine the valid norms. For example, it may be necessary that the judiciary hold those who make norms to possess legitimate authority, in the sense that judges must either believe that they do possess it or at least merely adopt the perspective of someone who does believe they do (cf. Raz 1990, 170-7).

Further complications arise in respect of the question whether any moral conditions could ever be among law's determinants, granted that, if they are, this can only be in virtue of the contingent social fact that they are treated as such in judicial practice (which remains the ultimate, and itself purely social, foundation

of law). This possibility is actually embraced by the so-called inclusive positivist view to which Hart eventually subscribed (Hart 1992, 238-76; Coleman, 2002). Drawing on a philosophical analysis of the concept of authority and cognate concepts, Joseph Raz suggests that this cannot be so. He argues that law's role in practical reason requires that norms that belong to a legal system must satisfy, among other conditions, the condition that they be created by someone who at least claims or is held to have legitimate authority over the norm's purported subjects. He argues that it would be inconsistent with the norms' role if their existence and content were not identifiable by reference to facts alone (see Raz 1995, 230).

Positivists may further conceive of the second component, which governs correct application of valid norms, in a way that is not dependent on strict linguistic conventions governing correct application of words in formulations of rules. For example, a positivist may accept that more than correct application of words in rules' formulations determines correct application of the rules; yet draw on an account of vagueness that is more sophisticated than Hart's to conclude, with him, that correct application of the rules is ultimately determined by similarity of putative instances to paradigms (cf. Endicott 2002). Like Hart's, such a view would limit the possibility of mistake in our classificatory practice, at least in this respect: what we treat as a paradigmatic instance of a term could not turn out to be not a genuine instance at all.

7. Law and its Application

In spite of differences among them, positivist theories of the nature of law seem to share two important implications in respect of the question of legal objectivity. First, by virtue of splitting the question what determines legal requirements in two—one about validity and another about application—they split the question of objectivity in two, relatively independent components.

Some of those who find the combined positivist explanation of the nature of law implausible may be tempted not to question the first part, thinking that it is only the second part that generates the implausibility. Grant for the sake of the argument that 'the law' stands for a set or system of norms whose legality is distinct and prior to the question what the law requires: it follows that identifying law's requirements consists in applying the norms, which may necessitate interpretation, in the weak sense of a method for subsuming the facts

of a case under the norms. The premise that we just granted then implies that the question of objectivity is equivalent to the question whether the law so conceived determines a uniquely correct outcome in disputes. If we are tempted by this line of thought, our discussion of objectivity should be accordingly focused on consideration of alternatives regarding the nature not of law but of legal interpretation (cf. Brink 2001; Leiter 2001a; Leiter 2002).

Even if we accept, either categorically or *arguendo*, the first part of the positivist explanation of the nature of law, we need not accept the second. For example, some skeptics grant the positivist that the law consists in a system of rules. They may then argue that since anything can be interpreted to accord with the rules (possibly because they agree with Hart and others that only settled practice could conceivably determine correct application of the rules, but think that anything could be made to accord with *that*), the law does not impose any determinate requirements. This view may be elaborated in different ways, which cannot be considered in this chapter.

Alternatively, one may argue both that legal interpretation includes more than the application of the words in the formulation of rules and that the further resources are not conventional or otherwise social in character. Moreover, one may argue that correct application of words is not (or not fully) determined by conventions or judgments of similarity practitioners are disposed to make, or generally by individual or social practice (cf. Moore 1985; Brink 2001; Stavropoulos 1996). In this way the law could come out that much more determinate and objective than Hart's model implies.

8. Social Practices

The second implication of positivist explanations of the nature of law flows from the thesis that social practices constitute both aspects of the standard which, according to this view, determines what the law requires. This has important consequences in respect of objectivity, since social standards restrict the scope of mistake. We already saw that Hart's theory only allows for a restricted kind of objectivity, limited by the understandings, judgments, and discriminations that judges collectively make as a matter of their settled practice. It is harder to assess conceptions of positivism that rely on more sophisticated conceptions of social standards. For example, Raz's explanation of such standards attempts to make more room for mistake, drawing on the notion of incomplete understanding.

According to Raz, a standard which governs social practices is constituted by the shared understanding of the practice, and provides the links among different judgments of practitioners by virtue of fact that the judgments include implicit commitment to the shared understanding. However, although practitioners implicitly try to conform to the shared understanding, everyone may be mistaken about what that is—no one need fully understand what the shared understanding and hence the practice comes to, so everyone's judgment is subject to correction by reference to the standard, properly specified, to which they are all implicitly committed (compare Raz 2001; Raz 2002; Raz 2003). This account implies that, in spite of its social character, a standard can have critical bite in respect of each and every individual understanding and judgment, or even in respect of an amalgamation of all such understandings and judgments. Such an account may avoid crude reductions of social standards to statistical compilations of individual understanding and behavior, even supplemented by devices such as surveys of intuitions regarding hypothetical cases. In this way, it may serve to allow for considerable room for error and thereby objectivity in law: all judges may mistake what the standard they try to conform to requires in respect either of validity or correct application of norms.

It may still be argued that, since on this view the shared understanding of a practice constitutes the standard that governs it, law's objectivity is correspondingly limited. It would be incoherent on this view to say that the law has a certain requirement, even though a full and accurate specification of the shared understanding of the practice regarding conditions of validity and application (and of any other conditions that figure in the determination of law's requirement) in fact entails that it does not have it.

9. Values

Things may be otherwise if we accept that values are among law's determinants. On one version of such a view, what the law requires is determined by the principles that best justify certain political practices including the practices of lawyers and judges (Dworkin 1986). On this view, judges and other lawyers share a commitment, not to their shared understanding of their practice, but rather to the values or principles, if any, which in fact justify their practice. This means that they keep an open mind about which values or principles, if any, do so, and it is this tacit commitment that provides the link among the

understandings and judgments of individual lawyers. This view introduces a determinant that is external to lawyers' shared understanding of legal practice (cf. Stavropoulos 2003). Now if we assume that something similar holds in respect of *evaluative* practices—that the domain of value is strongly objective in the sense that our shared understanding of values could be at least partly mistaken—law would have at least one determinant that lies at some considerable distance from the judgments, beliefs, and shared understandings of lawyers. This view then opens up the possibility not only of each judge or lawyer but of all judges and lawyers taken together, including any conception of their shared understanding, being mistaken about what the law requires.

Finally, the availability of such a strongly objectivist conception of value implies that inclusive positivists, who accept that values can figure among the conditions of legality, may run the risk of introducing instability to their view. For if what the law requires may turn, not on what lawyers and judges take it to require as a matter of their shared understanding of what it does, but rather on the correct understanding of some value, which may not match their understanding—if their shared understanding may turn out to be wrong—it is unclear how the character of law can still be conceived as fundamentally social (cf. Dworkin 2002, 1655-65).

Inclusive positivists such as Coleman acknowledge the apparent tension and introduce a distinction between the identity or content of rules and their application in order to eliminate it. They argue that values, to the extent that they figure in the determination of legal requirements, are pertinent only to application: the identity or content of the standard to which lawyers are committed can be on this view social and indeed conventional in character, even where its application turns on evaluative matters that go beyond any convention (Coleman 2001). This implies that an evaluative fact, for example that a certain contract is in fact unfair, may in part make it the case that the law requires that the contract not be enforced, whether or not there exists a convention regarding what makes a contract unfair. But it can still be a conventional fact that the law requires non-enforcement of the contract, in virtue of the fact that there exists a convention of treating fairness, whatever it comes to, as a condition of enforceability.

The difficulty with this argument is that, on the usual understanding of convention, a standard is conventional just in case a certain kind of reason

applies to those who are governed by it: the fact, itself, that there exists a certain settled behavior or judgment itself constitutes a reason for conforming to it. But given that by hypothesis settled behavior or judgment may fail to track what the law requires, or none may exist, no such reason for doing as the law requires need be available. Since it need not be the case that other lawyers treat contracts such as the one in our example as unfair, a lawyer's reasons for considering it unfair need not include the reason that it is so treated by others.

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