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Objectivity of Law in the View of Legal Positivism*

Christian Dahlman, the chairman of the workshop on “Law and Objectivity” at the IVR World Congress in Lund 2003, asked me to produce a paper on that topic. He told me that the workshop was intended to address the claims concerning “objectivity” that are raised in legal positivism and specified some possible problems, like the following: Is the positivistic ideal of a “non evaluative legal science” possible? Is there a special kind of “legal ought” or “legal authority” that can be separated from moral ought and moral authority? What difference does it make for legal positivism if morality is objective or subjective?

It certainly does not cost me a great effort to adopt a positivistic view on law and so in what follows I will try to give an answer at least to the first two questions posed by Dahlman. My answer will be in both cases positive. I think that there is room for objectivity in law and so a non-evaluative legal science is perfectly possible. And there is a specific legal ought different from moral ought. As to the third question, as I do not believe in the objectivity of values in general, I do not think that ideal or critical morality is objective. But I will not tackle this problem here.

1. *Legal Positivism*

Legal Positivism can be characterized by two theses: 1) The *Sources Thesis* and 2) the *Separability Thesis*. According to the first, what counts as valid law is a matter of social fact, which can be ascertained without any recourse to moral evaluations. This implies that all law is man-made: it is a human artefact. According to the second thesis, there is no necessary (conceptual or logical) connection between law and morality. A morally justified norm does not necessarily belong to law, and vice versa, a legal norm can be morally unjustified. There is still another contention, which – though it is not shared by all positivists¹ – is important to take into account in this connection. It is what, following Nino, may be called *ethical skepticism*. According to this position moral judgments cannot

* My warmest thanks to Pablo Navarro and Jorge L. Rodríguez, whose critical comments allowed me to avoid several mistakes; the remaining are due only to my stubbornness.

¹ Bentham is a case of clear exception, but not the only one.

be true, either because they are all false (Mackie), or else, because they lack truth values altogether (and so are neither true nor false). I find it a very sound view, but I will not regard it as a definitional note of legal positivism.

2. Objectivity

In what sense can positive law be said to be objective? This is a complex and much debated issue. In order to be able to try to answer this question, several distinctions must be made: which concept or concepts of objectivity are at stake and in regard to which activities related to law is this question pertinent?

Andrei Marmor² distinguishes between three concepts of objectivity: semantic objectivity, metaphysical objectivity and discourse objectivity.

A statement is semantically objective if, and only if, it is a statement about an object and it is semantically subjective if it is about some mental state of the speaker. This concept of objectivity is a matter of meaning and is independent of truth.

Metaphysical objectivity is defined in terms of the relation between a statement and an object existing in the world which is described by that statement: a statement is objective in this sense if, and only if, such object exists and is subjective if there is no such object. This definition of metaphysical objectivity rests on two presuppositions: first, only descriptive statements can be objective in this sense and, secondly, it assumes a correspondence theory of truth. But, as Marmor stresses, metaphysical objectivity should not be confused with realism; realism entails the existence of an objective reality, which is ontologically independent of our knowledge, whereas metaphysical objectivism does not raise such a claim. Statements about social or cultural objects may be regarded as objective in the metaphysical sense, even if they are not ontologically independent from our knowledge.

Whereas metaphysical objectivity limits the scope of objective statements to descriptive statements, discourse objectivity is more liberal in the sense that it only requires that a statement must be true in order to be objective, but it allows for the truth of statements, which are not descriptive.

Brian Leiter³ distinguishes between epistemic and metaphysical objectivity. The first is the demand that our cognitive processes be free of bias or other factors that distort judgement. The second is related to truth: a statement is objective in this sense if, and only if, it represents things as they truly are, independently of our beliefs. I think it is substantially similar to Marmor's metaphysical objectivity.

² A. Marmor, *Positive Law and Objective Values*, Oxford 2001, chapter 6 (pp. 112-134).

³ "Introduction" to B. Leiter (ed.), *Objectivity in Law and Morals*, Cambridge 2001.

In this paper I will concentrate my attention on metaphysical objectivity. Moreover, I will argue that legal statements, or rather the relevant kind of legal statements can be (at least sometimes) both descriptive and true. If this is so, then such statements are metaphysically objective.

3. Norms and Normative Propositions

Law consists mainly, but not exclusively of norms, i.e. of regulations that establish that a certain type of action *p* is obligatory, prohibited or permissible in certain circumstances *q*. Its function is primarily prescriptive. Following the terminology of *Normative Systems*,⁴ I will use the terms “case” for the circumstances and “solution” for the expression that prescribes that a certain action ought to, must not or may be performed. So norms can be defined as expressions correlating cases with solutions.

Now, from a positivistic point of view, norms as prescriptions are neither true nor false. But statements about norms, stating e.g. that such and such norm exists, or is valid or applicable, or is in force in a given society, are true or false. Such statements will be said to express normative propositions. To avoid misunderstandings it is important to emphasize that normative propositions are descriptive and not normative in the usual sense. They are normative only in the sense that they are about norms.⁵

The distinction between norms and normative propositions is of utmost importance for philosophy of law. This distinction is partly blurred by the fact that the same linguistic expressions (like “Smoking forbidden” or “It is obligatory to pay the income tax” or “You may park your car here” can be, and as a matter of fact are, often used to express both norms and normative propositions. But this does not prevent that their meaning, logical structure and function are completely different. Norms can be valid or invalid, efficacious or not, they can be followed or obeyed, but as prescriptions they are neither true nor false. Normative propositions, instead, are true or false, but are neither valid nor efficacious and cannot be followed or obeyed. The facts that make normative propositions true are complex, institutional facts, which presuppose certain social conventions and empirical facts, like practices (customs) or actions of certain persons, as occurs for instance with legislation or judicial decisions. Though there may be practical difficulties in ascertaining such facts in particular

⁴ C.E. Alchourrón and E. Bulygin, *Normative Systems*, Springer, Wien-New York 1971.

⁵ The distinction between norms and norm(ative) propositions was, as far as I know, first introduced by G.H. von Wright in his book *Norm and Action* (London 1963) and subsequently developed by Carlos Alchourrón in his paper “Logic of Norms and Logic of Normative Systems” (*Logique et Analyse*, 12, No. 47, 1969) and in *Normative Systems*. But similar distinctions (though cast in different terminology) can be found in Bentham, Kelsen, Hedenius and Alf Ross.

difficulties in ascertaining such facts in particular cases, in principle there are no insurmountable theoretical obstacles for determining whether a given normative proposition is true or not.

To the extent that legal science can formulate true normative propositions the positivistic ideal of a non evaluative legal science seems to be possible. This allows me to give a positive answer to Dahlman's first question.

4. *Objectivity of Law*

Marmor⁶ considers four questions concerning objectivity of law: 1) Identification of law ("Can we have objectively right and wrong answers to the question what the law is on particular issues?"). 2) Merit of law ("Is the law objectively right or wrong, good or bad?"). 3) The function of law as adjudicator of disputes and conflicts of interests. 4) Objectivity of legal theory. I will be concerned only with the first and the fourth of these questions.

Given the characterization of metaphysical objectivity and the above-mentioned differences between norms and normative propositions, it should be clear that for legal positivism the problem of the objectivity of law can only be raised with reference to normative propositions and not in relation to norms. This means that it is primarily concerned with the first and the fourth Marmor's questions: objectivity in the identification of law and objectivity of legal theory. Both questions receive an affirmative answer.

It can be said that the problem of the objectivity of law is the problem of truth conditions of normative propositions. Law is objective in the sense that it gives true answers to legal questions. Typical legal questions are of the form "Is the action p obligatory (prohibited, permissible) in circumstances q, according to L?" ("L" stands here for a legal system, but not necessarily the whole legal system, like French law; it can also be some subsystem, like French Civil Code or Italian traffic regulations. As has been argued in *Normative Systems*, any set of legal norms can be regarded as a legal system.)

The answers to legal questions are basically of two kinds: *positive* and *negative*. An answer is positive if and only if the law determines the normative status of the action we are interested in, and it is negative if the law does not determine it. A positive answer is "According to L, p is obligatory (= not-p is prohibited) in case q" or "According to L, p is not obligatory (= not-p is permissible) in case q". But an answer can also be negative. Negative answers are of two kinds: (A) "According to L, it is not the case that p is obligatory and it is not the case that not-p is permissible in case q" or (B) "According to L, p is obligatory, but not-p is permissible in case q".

⁶ Marmor, op. cit, chapter 7.

The answer (A) is true if L contains no norm concerning p in q; then p has no normative status according to L, it is neither obligatory, nor prohibited, nor permitted in q. In such cases we say that L has a *normative gap*.

If the answer (B) is true, we say that L is *inconsistent*, because it contains at least two contradictory or conflictive solutions.

The possibility of normative gaps and contradictions in law is disputed by many legal philosophers. This is not particularly astonishing in the case of those authors who either believe in Natural Law or (what amounts to nearly the same) who think that there is a necessary connection between law and morality (Dworkin). But it should be surprising in a legal positivist who maintains the Sources and the Separability Theses. Indeed, at a first look (but only at a first look) it seems reasonable to think that moral principles, as far as critical or ideal morality is concerned, must be complete and consistent. But it would be more than strange to expect such perfection from positive law, which, as already mentioned, is made by man and as all human creation is fallible. There is certainly no guarantee that positive law is always complete and consistent. We must take into account that the contention of completeness and consistency means not only that some particularly wise and careful legislator can produce a legal system that is complete and consistent regarding a certain topic, but that all legal systems (that is, all possible sets of legal norms) are necessarily complete and consistent. This sounds really fantastic. And yet important philosophers of law have maintained this strange thesis. Kelsen has defended this extravagant thesis for many years⁷ and Joseph Raz, though admitting the possibility of inconsistent systems, still believes that there are no normative gaps and hence the law is for logical reasons always complete.⁸

5. True vs. Right Answers

For a positivist who makes a sharp distinction between description of law and its evaluation, it must seem surprising that much of the contemporary discussion on objectivity of law treats this problem in terms of *right answers* instead of *true answers*. Not only Dworkin in his famous papers on the right answer⁹, but also many other authors choose to speak of a right answer and not of a true answer.

⁷ For a detailed analysis of Kelsen's theories on legal gaps see *Normative Systems*, cit., ch. VI.

⁸ J. Raz, "Legal Reasons, Sources, and Gaps", reproduced in *Authority of Law* (Oxford 1979) and my critique in "On Legal Gaps" presented in the Workshop on Logic at this Congress.

⁹ R. Dworkin, "No Right Answer?", in P.M.S. Hacker and J. Raz (eds.), *Law, Morality, and Society*, Oxford 1977, pp. 58-84, and "Is There Really No Right Answer in Hard Cases?" in *A Matter of Principle*, Cambridge MA 1985.

Brian Leiter, for instance, defines objectivity in the following terms: “The law is *metaphysically* objective insofar as there exist right answers as a matter of law”.¹⁰

Which is the difference between a right answer and a true answer? I have the impression that this terminological difference highlights a conflation of descriptive and evaluative issues. A right answer is not a merely true answer, it is a good answer. And it is not difficult to discover when an answer is regarded as good, i.e. as right or correct. In order to be right, an answer must inform us about obligations and rights. A merely negative answer (e.g. “The law says nothing about this situation”), even if true, would not be regarded as right.

As a consequence of this shift from mere description of the law to its evaluation, objectivity is conceived as synonymous with determinacy. David Brink is quite explicit on this point when he speaks of “objectivity or determinacy” of the law¹¹. The law is regarded as objective if and only if it provides positive answers to legal questions. “A conception of law can be understood to be objective insofar as it represents in actual or hypothetical controversies *as determining a uniquely correct outcome*” (the stress is mine). This seems to entail that a legal system that contains normative gaps or inconsistencies could not be regarded as objective. This would be a rather peculiar idea of objectivity.

6. Two Concepts of Determinacy

Here we must distinguish between two different though related questions: one thing is the objectivity of a legal system (i.e. the possibility of true statements about the law) and another thing is the determinacy of the deontic status of an action according to law. A legal system to be objective must determine a true answer, which may be positive or negative, but it need not be a *correct* answer, if by a “correct” answer we understand a positive answer. For a legal system can be objectively incomplete or inconsistent; in such cases we can make objectively true statements *about* the law. Another matter is the determinacy of the “outcome”, i.e. the determinacy of the solution that the law provides for a certain problem. If we are interested in the deontic status of an action *p* in certain circumstances *q*, we need a univocal deontic characterization of *p* in *q*. A negative answer (“*p* is not prohibited in *q* and not-*p* is not permitted in *q*” or “not-*p* is both prohibited and permitted in *q*”) does not determinate the deontic status of *p* in *q*.¹² So it is essential to distinguish between statements *about the law* and

¹⁰ Brian Leiter, *op. cit.*, p. 3.

¹¹ D. O. Brink, “Legal Interpretation, Objectivity, and Morality”, in B. Leitner (ed.), *Objectivity in Law and Morals*, *cit.*, p. 12.

¹² Strictly speaking *p* is not determined only in case of a normative gap; if the system is inconsistent it is overdetermined. But the practical outcome is similar in both cases.

statements about the legal status of an action *according to law*. The indeterminacy of a statement of this last kind does not necessarily entail the indeterminacy of the statement of the first kind: a legal system that does not determine the legal status of an action may very well be objective in the sense that we can make true statements about it. In other words, it may be objectively true that the law is incomplete or inconsistent and hence does not determine the legal status of a certain action. This is perfectly compatible with the objectivity of the law.

7. *Determinacy and Interpretation*

Still another problem is the determinacy of interpretation, a problem that Brink seems to have in mind when he speaks about objectivity: "... debates about law's objectivity can be seen as debates about the extent to which legal interpretation is determinate."¹³

The problem of interpretation is a difficult issue that cannot be treated in full length in this paper. So I will only make some scattered remarks concerning interpretation.

In the first place, we must distinguish between norms and norm formulations: a norm formulation is a purely linguistic entity, a sentence, whereas a norm is an interpreted sentence, i.e. a linguistic entity plus its meaning. To interpret a norm formulation is to assign a definite meaning to it. So interpretation can be seen as the step from a norm formulation to a norm. Now, this step is not always successful: it well may happen that a norm formulation is ambiguous; in that case we cannot assign a definite meaning to it, and so there is not one norm, but several possible norms and it requires a decision of the interpreter which of them is to be regarded as *the* norm corresponding to the norm formulation in question. In many cases there is no objective criteria to guide this decision. If the interpretation is not determinate, then there is no true answer to the question how a certain situation is regulated by the law; therefore in such cases the law is not objective. Sometimes the legislator himself takes this decision (by means of the so-called legal definitions), but in most cases it is the task of judges. Only after the decision of the judge, can we know which norm is expressed by a certain norm formulation. In this sense judicial decisions contribute to the determinacy of law, i.e. to its objectivity.

Some legal philosophers maintain that, as there are no true meanings, the interpretation is always indeterminate and so the law is never objective. This is the main tenet of the so-called "skeptical school of Genoa".¹⁴ I have argued else-

¹³ D. O. Brink, op. cit., p.13.

main tenet of the so-called “skeptical school of Genoa”.¹⁴ I have argued elsewhere¹⁵ that this view is untenable and I will briefly repeat my argument.

The thesis is that all norm formulations cannot be ambiguous, for in that case there would be no norms at all. The proof of this thesis is a kind of *reductio ad absurdum*. Let us assume that all norm formulations are always ambiguous. Suppose the interpreter is confronted with a norm formulation p_1 ; according to the hypothesis p_1 is ambiguous, i.e. it has several meanings and so it expresses several possible norms. After careful examination and evaluation of the different alternatives, the interpreter decides to pick out one of them. But as there is no access to meanings other than through language, he must produce a new norm formulation that purports to depict the meaning (i.e. the norm) he has chosen. Let us call it p_2 . But according to our hypothesis, p_2 is also ambiguous and therefore has several meanings. So the interpreter must choose one of them and this can only be made by means of a third norm formulation, which will also be ambiguous, and so on *ad infinitum*. Thus, if there are no univocal norm formulations, all we will have is a plurality of possible norms, but we will never be in presence of a definite norm. This is not a normative or legal problem: it is a linguistic problem. It is an essential feature of language that at least some of its expressions must be univocal. A language that does not meet this condition is useless as a tool for communication. This does not mean that there must be expressions which are always univocal, but in given context there must be some univocal expressions, in order to be able to grasp the meaning of at least some expressions.

8. Resolution of Controversies

Which is the motivation for the conception of objectivity in terms of right answers instead of true answers? The main problem lies in the fact that a negative answer does not justify the decision of a judge. Judges are under the obligation not only to resolve all the controversies submitted to them, but to justify their decisions by means of the law. Normally a judicial conflict between the plaintiff and the defendant is about an action of the latter. The plaintiff claims that the defendant has the duty to perform a certain action (let us call it p), which the defendant refuses to perform. But legal systems (statutes, customs, precedents) contain only general norms, which refer to types or classes of actions and types or classes of circumstances (generic cases), whereas judges have to resolve individual cases. The judge must decide whether the defendant ought to perform the

¹⁴ Giovanni Tarello, Riccardo Guastini, Paolo Comanducci, Tecla Mazzarese and Pierluigi Chiassoni being their main representatives.

¹⁵ E. Bulygin, “True and False Statements in Normative Discourse”, in R. Egidi (ed.), *In Search of New Humanism*, Kluwer Academic Publishers, Dordrecht-Boston-London 1999, pp. 183-191.

action p. In order to justify his decision he must subsume the individual case under a generic case determined by the legal system. This operation of subsumption is successful if the legal system provides a “uniquely correct outcome”, that is, if the answer is of the form “According to law, p is obligatory in the case q” or “According to law, not-p is permissible in the case q”. But if the system has a normative gap or is inconsistent, then p is not deontically determined in the case q. So the system fails to give a positive answer. In this case the judge cannot justify his decision by means of legal arguments. (The problem of indeterminacy of an individual case can also stem from a third source: the penumbra or vagueness of the relevant concepts that characterize the case: this is what in *Normative System* was called a gap of recognition.)

In such situations there seem to be only two ways out: either we recognize that our legal system can be deficient and so the judge must decide the case not on *legal* grounds, but must choose other (moral or political) criteria. This is what Hart called *judicial discretion*. In such cases the judge must create a new norm: he acts as a legislator, though, of course, such judicial legislation is only interstitial. Or we refuse to admit that a legal system can be indeterminate (as Dworkin does), but then in order to make sure that the law is always complete and consistent, we must inject into the law moral principles, which are supposed to remove all possible deficiencies of positive law, resolving all contradictions and filling all gaps. Quite apart from the fact that this move amounts to give up the positivistic conception of law, there is no guarantee that a system containing both legal and moral rules and principles will be complete and consistent. On the contrary, it seems plausible, as has been argued by Mackie,¹⁶ that resorting to moral norms would introduce more subjectivity into the law. Brian Leiter is quite explicit on this point: “If... one thinks that adjudication is ‘objective’ in the sense that there are objectively right answers to legal disputes, then it might seem a bad idea to make right answers in law depend on moral considerations, as Dworkin does.”¹⁷ As has been convincingly argued by Russ Shafer-Landau,¹⁸ it is by no means clear that ethical theory can be constructed as “a coherent set of rules from which one can infer all determinate moral verdicts.”

¹⁶ J.L. Mackie, “The Third Theory of Law”, in Marshall Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, London 1983.

¹⁷ B. Leiter, “Objectivity, Morality, and Adjudication”, in B. Leiter (ed.), *Objectivity in Law and Morals*, cit.

¹⁸ R. Shafer-Landau, “Moral Rules”, *Ethics*, vol. 107, No. 4 (1997), pp. 584-611.