

Legal Objectivity

Towards a material and embodied approach

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I. Introduction

This paper is concerned with the connection between being, knowing and the law, in short: the “onto-epistemology” (*Barad* 2007) of the law. This is the dilemma of the law. It presupposes that it exists, that it can be known and that it is vested with legitimacy. The last presupposition makes the first two even more controversial. If law creates a legitimate ought, knowledge about its existence needs to be possible, or as Alexander Somek puts it “the existence of law is mediated by knowledge that claims to know what the law is” (*Somek* 2017: 1).

The relationship between the is, the known and the ought in legal discourse is mediated – either openly or tacitly – by the paradigm of legal objectivity. Objectivity as an ideal guides the process of knowing according to its demands. Legal objectivity insinuates that law creates a legitimate ought and can thereby be differentiated from mere power, i.e. that law is not exercised arbitrarily but guided by its own reasons¹

How we conceptualise and make sense of legal objectivity as an ideal therefore is vital for how we obtain legal knowledge and what kind of legal knowledge we can obtain. The prerequisites that are necessary in order to obtain legal objectivity become methodological guidelines that shape academic discourse, legal training, the convincing power of legal application, as well as the self-image of jurists.²

¹ The paradigm of objectivity thereby underlies legal discourse independently of whether it explicitly presupposes legal objectivity or not because it at least implicitly has to do so: “The problem is straightforward. Legal knowledge, in order to make the law possible, necessarily has to lay claim to objectivity. At the same time, as a social fact, it is likely to be caused by less auspicious forces than the quest for truth” (*Somek* 2017: 2). Objectivity as an epistemological ideal is the basis for various legal principles. Equal treatment and the principle of legal certainty for example could only be attainable if objectivity was attainable. To assess the attainability and desirability of objectivity as an ideal, one has to reflect on whether it effectively manages to meet its expectations. Does striving for objectivity really makes us impartial and law certain? Is it possible that the epistemological ideal of objectivity hinders us to live up to our ideals of a democratic and constitutional state? (*Zilberszac* 2018: 38–48, *Klappstein* 2005: 111–131).

² At the root of the question whether and in which form objectivity exists and can be attained or at least appropriated lie the age old controversies of the (non-)relation of the material and the discursive, the body and the mind, the subject and the object and thereby of epistemology and ontology. Any consideration on this metalevel of framing and seeing reality and its entanglement with knowledge sheds a completely different light on what it means to exist within that reality and how to cope with it and the responsibilities that would arise from it.