# Truth and Objectivity in Law and Morals II

Proceedings of the Second Special Workshop held at the 27th World Congress of the International Association for Philosophy of Law and Social Philosophy in Washington D.C., 2015

Edited by André Ferreira Leite de Paula / Andrés Santacoloma Santacoloma / Gonzalo Villa Rosas

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**Part IV – Objectivity and Truth in Morals**

# Introduction

Due to the positive response to the First Special Workshop "Truth and Objectivity in Law and Morals," which took place at the 26th IVR World Congress in Belo Horizonte, Brazil, and the publication of an ARSP-Supplement, a book made up of a compilation of selected papers, Andrés Santacoloma Santacoloma and Gonzalo Villa Rosas have continued working on this project. The goal of this effort was to constitute a standing discussion group, i. e. a common place for those interested in the topics of objectivity and truth within the law and morals, to exchange ideas and perspectives, and to debate on these subject matters.

The aim of the first workshop was to open a discussion concerning the convergence of beliefs and the acceptance of some kind of realism as necessary conditions for objectivity in practical reasoning, as well as the possibility of truth in law and morality. The perspectives presented at this Special Workshop put forward different but correlated topics. Some of them were the applicability of Bayesian models in order to make objective legal decisions; the search for truth in and through legal argumentation; the intelligible character of rules inside theories of interpretation, which guarantee the coherence and the integrity of law; the role of semiotic analysis in the construction of the objectivity of law; the procedural and contextual aspects of objectivity in legal reasoning; the role of objectivity in the distinction between the context of justification and the context of discovery; the truth problem of normative propositions and legal statements; and the incompatibility of non-factualism with the traditional account of validity and legality, as well as hermeneutics and the possibility of seeking truth in law.

In order to have a new version of the workshop and to seek new perspectives in its direction, Santacoloma and Villa Rosas decided to invite André Ferreira Leite de Paula to work as co-chair. The Second Special Workshop was held at the Campus of the Georgetown University in Washington D. C., USA on July 27th and 28th 2015. Fourteen lecturers from around the world participated in it. This current compilation contains a selection of papers presented there, and it has been divided into four parts, which are organized according to a criterion of decreasing generally of treatment of the respective topic.

The first part consists of contributions about objectivity and truth in law written by Matti Ilmari Niemi, Triantafyllos Gkouvas, Andrés Santacoloma Santacoloma, and Samuele Chivoli. Arguing that the objectivity of legal knowledge is a way to outline the relationship between the sentences of legal dogmatics and reality, and the nature of legal reasoning, Matti Ilmari Niemi discusses in his paper, "What is the Foundation of Objectivity in the Field of Law?," a fundamental question: "is it possible to combine the perspective of a particular person in the world with an objective view of the same world?" From the very different conceptions of objectivity, Niemi considers three conceptions introduced by Marmor and a fourth conception presented by Rawls. The first and strongest conception can be called a metaphysical or ontological one: "objectivity means correspondence between a statement and its object in the discernible world." The second and weaker conception can be called the semantic conception of objectivity: "a statement is objective if it is a statement about an object and it is subjective if it is about the subject making the statement." The

third conception can be called the logical conception of objectivity: "a statement is objective if it has a determinate truth-value." According to this conception, truth refers to the justification of statements in the cognitive and external sense. An objective legal statement provides information about a society, that is, about the legal order of a society as a fact-based institution. Since all three conceptions that Marmor puts forth presuppose a very strong concept of truth, Niemi abandons them altogether. The fourth and weakest conception, which Niemi calls "the constructive conception of objectivity," focuses on the criteria of objective reasoning, instead of presumed entities, objects or truth conditions. On these grounds, he argues that this conception is the only one consistent with the nature of legal reasoning.

Triantafyllos Gkouvas analyzes in his paper, "Legal Truth Without Legal Facts: A Metaontological Argument," the problem underlying the following question: "do legal utterances expressing true legal propositions necessitate the existence of legal facts as their truthmakers?" This problem, he believes, is not peculiar of law, but a local manifestation of a broader problem arising at the intersection of ontology and the truthmaker theory. Gkouvas' aim is to provide a negative answer to the legal version of the question in the hope that the strategy can lend some support to those who are wary of inflationary approaches to the ontology of social artifacts, like law. Roughly, the idea is that whereas the preservation of the veridicality of discourse about ontologically superfluous entities remains a venerable task, it also has no implications for what a correct account of the truthmakers of claims featuring these entities should be like. This way of disassociating one's ontological from one's truthmaker commitments helps him to explain why quantificational claims in metaphysics are not "ipso facto" translatable into assertions of candidate truthmakers. For his purpose, Triantafyllos employs Ross Cameron's version of the truthmaker theory of ontological commitment to defend the hypothesis that legal propositions can be made true by non-legal truthmakers, namely by facts that do not qualify as legal facts in any informative sense. In his account, the dispositional facts about what is enforceable in a given political community can assume the task of making assertions about the truth of the legal content. The latter facts do not make any essential reference to legal entities of any kind (objects, properties or relations). This enterprise allows him to cast in a better light the legal relevance of metaontological concerns raised by philosophers like John Heil and Heather Dyke concerning the methodological pitfalls of doing ontology via studying language.

In "Semantical Rules and the Theory of the Limit of the Wording: Seeking for Objectivity in Law," Andrés Santacoloma Santacoloma faces the problem of objectivity in law and morals on the path of the philosophy of language. The possibility of the objective meaning of legal concepts raises crucial questions for law, such as the dependence of the meaning of a concept from the community and/or individuals and the possibility of an entire community being wrong in applying a concept. Further, on the one hand, there is tension that exists between the historical and social changeability of concepts, and, on the other hand, the possibility of meaning being fixed, and, therefore, objectively recognized. In the first part, the numerous questions that arise in this field are analyzed with regard to Matthias Klatt's theory concerning the limitations of wording, as discussed in his book, *Making the Law Explicit: The Normativity of Legal Argumentation* (*Theorie der Wortlautgrenze*), which is based on Brandom's theory of meaning. The possibility of separating semantic and

legal interpretation settles one of the central disputes of the German debate between Matthias Klatt and Ulfrid Neumann: a debate that raises questions of viscosity and the risk of hypostatization of semantic problems in normative legal argumentation. After assessing Klatt's roots in Brandom and Neumann's objections against Klatt's position, Andrés Santacoloma Santacoloma makes a compatibilization between viscosity and realism and argues for a return to a pragmaticist theory of meaning based on Peirce's pragmatic maxim.

Following the well-known notion of a conversational implicature introduced and elaborated by Paul Grice, Samuele Chivoli's discusses in his paper, "The Speaker Dilemma in Legal Implicatures, Responses and Comparisons," the notion of a legal implicature, i.e. a conversationally implicated proposition of law, and presents a speaker dilemma regarding legal implicatures. The dilemma concerns how the intentions of the members of a group of jointly acting agents should be aggregated if the group is to collectively communicate a given content and, at the same time, eliminate indeterminacy, since Law-making bodies, which are usually made up by more than one person, are not per se recognizable as having an intention by saying what they say. Putting them to work in different scenarios, which lead to conflicts of intentions, Chivoli introduces the voters (V-) and the supporters (S-) principles, in order to explain the functioning of collective intentions. His enterprise concerning the speaker dilemma is twofold. On the one hand, he outlines the differences and similarities that the speaker dilemma bears to the discursive dilemma famously generalized by List and Pettit, and, on the other hand, he evaluates three ways of responding to the puzzle by dissolving it and arguing that the dilemma resists all of these criticisms.

The second part, with contributions from Bruce Anderson and Michael Shute, and André Ferreira Leite de Paula is dedicated to objectivity and its relation to legal reasoning. André Ferreira Leite de Paula's main concern in "Revisiting Discovery and Justification in Legal Theory" is the clarification of the manifold possible versions that the distinction between discovery and justification can assume and their relations to one another in legal theory. The "standard version" of the distinction means, according to him, a gap between the empirical factors that influence legal decision-making and the final presentation of the judicial decision. This standard version is what he recognizes as the "epistemic dichotomy" between discovery and justification. After reconstructing the debate in the branch of the philosophy of science, De Paula argues that the "epistemic dichotomy" between discovery and justification is both cognitively necessary and normatively desirable. Since this is a dichotomy between effective and presented reasons, he recognizes this dichotomy between discovery and justification as a "normative" one, distinguishing two levels of criticism: a level of particular cases and the level of the legal system as a whole. Considering a distinction between, on the one hand, empirical factors that influence the emergence of legal claims ("discovery"), and, on the other hand, normative standards of decision and truth ("justification"), he stresses the necessity of maintaining a "dualism between genesis and validity," especially with regard to allegedly "realist" research attitudes that engage in explanations of the emergence and of effects of legal claims by reference to pre-intentional, post-intentional and non-rational factors.

In their paper entitled "The Need for a Better Understanding of Legal Reasoning and Feelings," Bruce Anderson and Michael Shute focus on aspects of legal decision-making that have been typically neglected by traditional approaches of legal justification, namely the process of discovery. Legal decision-making is an intelligent and, at the same time, an emotional performance. In order to analyze the complex relationship between the psychological way of reaching decisions in actual judgment performances, the authors consider in their paper the functions and operations that feelings such as empathy, wonder, curiosity, anger, and mercy normally play in real cases. As their analysis reveals, feelings are indicators of values. Feelings play a central role in the dynamic of insights and judgments, in the processes of testing solutions in judgments of fact, and of reaching coherence in legal decision-making. After briefly reconstructing Amalia Amaya's approach on coherence and emotions, Anderson and Shute provide an alternative account on coherence in legal reasoning. They do so by adding the necessity of reflective insights to be considered in the framework of a self-attentive analysis of decision-makers. The purpose of which is to understand their own mental process of decision-making by reaching self-awareness of the conditions of the possibility of adequate judging that go beyond rationality.

Two contributions of this volume deal with objectivity in relation to Kelsen's theory of law. Jing Zhao and Monika Zalewska wrote these contributions, and they constitute the third part of this volume. In the paper entitled "The Justification Problem in Hans Kelsen's Theory of Legal Validity," Jing Zhao addresses the question of whether Kelsen's basic norm is really able to justify both the validity of a legal order and its practical normative force. The question arises precisely because of Kelsen's selective attitude toward the reception of Kant's philosophy. On the one hand, he has adopted Kant's doctrine of "schematism" at the epistemological level as a condition for objective legal knowledge. This has enabled him to say that the basic norm really exists in the juridical consciousness as a result of simple analysis of actual juridical statements. On the other hand, Kelsen has not embraced Kant's practical philosophy at the same degree as evidenced by his statement: "The doctrine of the unity of the will and other practical commitments were not adopted." Kant himself has needed practical commitments in order to justify the normativity of the practical "ought" that is implied in the legal order. On the contrary, Kelsen's basic norm assumes, at the same time, theoretical and practical justificatory functions. Jing Zhao argues against the possibility of making a claim of practical justification of "what should I do" on a merely epistemological basis and that this procedure leads unavoidably to a loss of the aspired scientific purity.

In "Objectivity and Hans Kelsen's Concept of Imputation," Monika Zalewska is concerned with the complex correlation between objectivity and imputation. Imputation is a category that lies precisely in the field between cognition and construction, since it has a subject-dependent existence and, at the same time, it provides the condition of the possibility of objective knowledge. Imputation has, naturally, a history of development in legal theory, which can be analyzed in regard to the many phases of Hans Kelsen's work. Here is where Zalewska's analysis are focused: she informs us of the evolution of the concept of imputation in the constructivist, classical and skeptical phases of Kelsen's thought and shows us how its meaning and function has changed by passing through the notions of central imputation (Ver-

schreibung) and peripheral imputation (Zurechnung), and varying between implication and a form of the transcendental argument and between law and morals.

Last but not least we have two contributions from Michele Saporiti and Gonzalo Villa Rosas. These two papers are gathered in the last chapter of our volume, which deals with issues concerning objectivity and truth in morals. In "Quid est veritas?: On Conscientious Objection and Truth", Michele Saporiti aims at analyzing the relationship between conscientious objection and truth. The first approach to the problem is a dialectical reconstruction of the truth-based approach to conscientious objection. By means of this reconstruction, Saporiti explains the nature of conscientious objection as opposed to other instruments of resistance and, following Scarpelli, he argues for a metaphysical-axiological model in which the universalistic reference to truth is the key-element within this model of justification, where the maxim "Veritas non auctoritas facit ius," through which he explains that the conscientious objector becomes a militant of "ius" against "lex," seems to play a central role. He also considers a positive law-based version of the conscientious objection, which is held as an instrument to the realization of the plurality of our contemporary democracies. The two perspectives have important implications and moral premises in terms of theories of conscience, as he also explains while scrutinizing the two "logics" of conscientious objection from the legal viewpoint. In the end, he provides some hints concerning the goals of the truth-based and the positive law-based approaches to conscientious objection, and their effects on contemporary democratic societies. Even taking into account the differences on perspective and the possible consequences, Saporiti concludes and stresses in his paper that "a disobedient conscience still represents a useful chance for our constitutional legal systems to take moral conflicts seriously."

In his paper, Gonzalo Villa Rosas approaches our volume's topic with a detailed assessment of the pertinency of Harman's and B. Wong's theories in order to raise a general criticism against moral relativism. According to the author, numerous criticisms raised against these theories reveal a structural feature of relativism, which makes it unsuitable to be a moral theory. If relativism can be characterized as the theory, which defends a relational conception of truth and which takes seriously the premise that for a given domain there can be faultless disagreements within that domain, then a consistent relativist account must always involve an observer's perspective. However, it seems unquestionable that morality is a normative practice, and that the moral theory ought to take seriously and try to make sense of our moral practices. In this vein, we cannot attain a suitable understanding of morality without taking into account the perspective of those who regard it as a normative body that gives them reason for action.

The editors would like to express their gratitude to the authors of this volume and the participants in the workshop for their helpful feedback and the wonderful discussions, which are now available as an ARSP-Supplement.

André Ferreira Leite de Paula
Andrés Santacoloma Santacoloma
Gonzalo Villa Rosas

# Part I – Objectivity and Truth in Law

Matti Ilmari Niemi

# What is the Foundation of Objectivity in the Field of Law?

## Introduction

Objectivity is a virtue of legal reasoning. We are used to demanding objectivity as a quality of acceptable legal knowledge. This is the case in legal dogmatics, in the work of judges as well as in other situations. Concepts of objectivity and subjectivity are normally used in a normative sense. Acceptable and accurate legal judgements are objective, while judgements accounted as subjective are not.[1]

Objectivity is a necessary condition of acceptable legal knowledge. On the other hand, objectivity is not a sufficient condition. Other virtues are required, too. Acceptable knowledge is logical, rational, coherent and adequate. In addition, truthfulness is often mentioned. I will, however, repudiate the applicability of the concept of truthfulness in the frames of legal knowledge. Instead, a qualified legal judgement is well justified.

Here, the focus is on legal knowledge and reasoning. It is possible to talk about objectivity of law as well. It seems to be a different point of view. As a matter of fact, the cognitive dimension often constitutes the essential or, at least, one dimension of this viewpoint as well.[2] Accordingly, both viewpoints can be included in the same discussion.

There are many kinds of conceptions of the concept of objectivity. They are different in strength in the philosophical sense.[3] For instance, according to a simple and strong conception, a judgement is objective if, and only if, it describes its object. If a judgement does not tell us about an object, it tells us about the writer or the speaker. In this case the judgement is subjective.

Legal positivism is also committed to a strong conception of objectivity. I promote an anti-positivistic understanding of law, and therefore, my conception of objectivity differs from the positivistic one. I support a weak conception of objectivity.

1 In the frames ow my own approach, I use the term "judgement" instead of, for example, "statement" or "proposition" because of the nature of legal reasoning and knowledge adopted. More closely, see Chapter 5. In the frames of the positivistic approach, the use of the term "statement" is justified for the same reason. These terms are interchangeable but they have different senses depending on the understanding of the nature of knowledge.

2 In the cases of Kramer (Matthew H. Kramer, *Objectivity and the Rule of Law* (Cambridge: Cambridge UP, 2007)) and Stavropoulos (Nicos Stavropoulos, *Objectivity in Law* (Oxford: Clarendon Press, 1996)) the cognitive point of view seems to the essential dimension. In the case of Greenawalt (Kent Greenawalt, *Law and Objectivity* (New York and Oxford: Oxford UP, 1992)) a cognitive viewpoint creates a dimension of the study.

3 See Andrei Marmor, 'Three Concepts of Objectivity', in *Law and Interpretation. Essays in Legal Philosophy,* ed. Andrei Marmor (Oxford: Clarendon Press, 1995), 177–201 and Matti Ilmari Niemi, 'Objective Legal Reasoning – Objectivity without Objects', in *Objectivity in Law and Legal Reasoning* (Oxford and Portland, Oregon: Hart Publishing, 2013) ed. Jaakko Husa and Mark van Hoecke, 69–84, at 73.

As far as objectivity of legal knowledge is concerned, the foundation of objectivity refers to the understanding the nature of legal knowledge. The difference on the level of objectivity is caused by and can be traced back to the differences in understanding the nature of law and legal knowledge. Therefore, I will analyze and criticize both the positivistic conception of legal knowledge and objectivity. With the help of this analysis and criticism I will introduce and defend the weak conception of objectivity.

## Part One: The Positivistic Approach

Legal positivism is committed to a fact-based understanding of law. More precisely, law is treated as social facts. Legal rules exist in the form of social facts. Because legal rules are social facts, they differ from moral evaluations. They are different in quality.

According to *Kelsen*, a legal rule comes into existence in a legislative act.[4] For him, a legal rule as an ought-prescription is the meaning of a rule-issuing fact.[5] On the other hand, legal reality furnished with the help of legal rules is an independent part of reality. It cannot be reduced to other parts of reality. Accordingly, legal knowledge cannot be reduced to psychology, sociology or ethics. In addition, there is a sharp distinction between legal knowledge and nature, that is, between legal dogmatics and natural sciences.[6] Kelsen's positivism is a non-naturalistic version of legal positivism.[7]

*Hart* treated law as a fact-based phenomenon as well. For him, law is a part of social reality.[8] On the other hand, not all legal rules have a similar ontological status. Rather, there is a necessary social foundation of each legal system. This foundation appears in the form of the rule of recognition of each legal system. A rule of recognition is, on the one hand, a normative and legal rule, and on the other hand, a part of social reality.

The rule of recognition has both epistemological and ontological dimensions. First, it is the criteria of valid law. Second, it shows the nature and essence of law. It is possible to indicate and know all the valid rules of a legal system by means of the rule of recognition. At the same time, the rule of recognition appears as the factual foundation of law, that is, a legal system and the separation criterion distinguishing law from morality. The rule of recognition manifests itself in the way in which judges and other officials identify valid law as discernible factual behaviour. It is a matter of factual behaviour of officials, not moral evaluations. In this sense, the rule of recognition is both a rule and a fact (an existing rule).[9]

4 Hans Kelsen, *Pure Theory of Law* (first publ. 1960), trans. from the second edition Max Knight (Berkeley: University of California Press, 1970), at 193.

5 Ibid, at 5.

6 Ibid, at. 1 and 79.

7 Stanley L. Paulson, 'The Very Idea of Legal Positivism', *Revista Brasileira de Estudos politicos* 2011, 139–65, http://www.pos.direito.ufmg.br/rbep/102139166.pdf, at. 155.

8 See H. L. A. Hart, *The Concept of Law*, second edition, ed. Penelope A. Bullock and Joseph Raz, (Oxford: Clarendon Press, 1994), at. vi and 201.

9 Ibid, at. 50, 104, 109, 116 and 239.

There is a naturalistic dimension in Hart's theory. Legal validity is reduced to a rule of recognition, and the rule of recognition as factual behaviour and beliefs by officials is a part of discernible social reality.[10]

## Part Two: A Positivistic Conception of Objectivity

Hart's theory of law is the point of departure of his followers. Hart's theory creates the foundation of the positivistic concept of objectivity as well. *Kramer* introduces a positivistic and Hartian analysis and conception of objectivity.

According to Kramer, the existence of law will depend on the decision and endeavours of legal officials. They contain the beliefs and attitudes and dispositions of conscious agents, and the continued existence of laws is mind-independent in the weak sense. On the one hand, the continued existence of laws is not dependent on the mental activity of everyone but on the mental activity of certain persons, judges and other legal officials. On the other hand, the continued existence of laws is not independent of the mental activity of any one.[11] The crucial point seems to be that the law is independent of citizens' beliefs and attitudes. In the frames of a legal system, the content of law depends on the beliefs and performance of judges and other legal officials, but it appears to be a given matter from the viewpoint of citizens. This is the foundation of the objective social existence of both legal rules and a legal system.

The crucial point seems to be that the law appears independent of citizens' beliefs and attitudes. This is the foundation of the objective social existence of both legal rules and legal system.

Mind-independence seems to be the main element of the ontological dimension of objectivity. The two other dimensions are epistemic and semantic dimensions.[12]

The social existence of legal rules is the ultimate foundation of objectivity, and hence, the ontological dimension is the crucial dimension of objectivity in Kramer's approach. For that reason, it is possible to talk about correct answers to legal questions. This is the second element of the ontological dimension of objectivity. Correct answers are objective answers. Correctness and objectivity depend on the leeway left to legal officials. The more determined decisions by officials, the more objective they are.[13] The third element is uniform applicability of legal rules, that is, they are applied in the same way to everyone in a legal system.[14]

Transindividual discernibility and impartiality creates the epistemic dimension of objectivity.[15] This dimension is not, however, important or interesting here.

10 See *Joseph Raz*, Two Views of the Nature of the Theory of Law. A Partial Comparison, in *Hart's Postscript*, ed. Jules Coleman (Oxford: Oxford UP, 2001), at. 5.
11 Kramer, *Objectivity and the Rule of Law* (n. 2), at. 6–8.
12 Ibid, at. 2.
13 Ibid., at. 14.
14 Ibid, at. 38.
15 Ibid, at. 46 and 53.

Truth-aptitude creates the semantic dimension of objectivity.[16] Statements of law have truth-values, that is, they are true or untrue.[17] This is natural because Kramer presupposes the existence of legal rules as social facts. A true legal statement describes a valid legal rule, that is, an existent fact. Basically, a true legal statement describes the behaviour and beliefs of judges and other legal officials. If there are many legal statements equipped with truth-value semantical objectivity reigns in a legal system.

The connection between conventional legal statements and the behaviour and beliefs of judges and other officials is, however, not direct. The social reality is met with the help of the rule of recognition as a mediating factor. The validity and existence of other kinds of legal rules cannot be equated with the behaviour of beliefs. Other rules supervene the rule of recognition and, at the same time, the specific branch of social reality.[18]

Accordingly, legal validity and social reality cannot be equated in a straightforward way as legal realists do. The truthfulness of legal sentences depends on and is basically determined by social reality (the external reality), but does not entail a straight correspondence relation with the discernible social reality, that is, with the behaviour and beliefs of officials. The existence of conventional legal rules carries a special type of social reality basically dependent on discernible facts.

Therefore, knowledge of legal facts cannot be equated with knowledge of any discernible facts or those acquired with the help of empirical means. Rather, positivistic legal method contains the means to describe and understand the objects of factual recognition, that is, the recognized and official sources of law in a specific legal sense (in the internal sense). Legal rules are defined as a part of social reality but without any specific ontological definition. The "legal reality" seems to be a specific normative dimension of a certain social practice, that is, the practice of judges and other officers. The existence of rules is explained by the membership of a legal system as an official system in this sense.

This approach does not entail correspondence relation between statements and their objects in strong or conventional sense. Nevertheless, some kind of correspondence has to be presumed.

## Part Three: The Nature of the Positivistic Conception of Objectivity

The Hartian positivistic notion of objectivity is not the strongest one.[19] According to the strongest and simple conception, objectivity means congruence between a statement and its perceivable object. A statement is objective if, and only if, it describes its object as a part of the discernible world. If a statement does not tell us about a discernible object, it tells us about the writer or the speaker. In this case, the

16 Ibid, at. 68 and 73.

17 Kramer uses the term "statement" because of his understanding of the nature of legal knowledge. Legal knowledge appears in the propositional sense. Hence, the term "proposition" could be used as well.

18 Jules Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis', *Legal Theory*, 4 (1998), 381–425, at. 397.

19 See Niemi, Objective Legal Reasoning – Objectivity without Objects (n. 3), at. 73.

statement is subjective. The strongest conception presumes philosophical realism and the correspondence theory of truth in the strong and conventional sense.

The Hartian conception of objectivity is a representative of a weaker version of objectivity. According to this, a statement is objective if and only if it is a statement about an object. The crucial matter is the grammatical sense of a statement. In order to be objective, a statement has to give information about a defined object in a world other than that in the speaker's mind. On the other hand, no specific definition of ontology or truth is needed.

However, even the weaker positivistic notion of objectivity proves to be too strong. The reason for this is the following. All positivistic approaches are founded on the fact-based conception of law. The law as a whole, as well as its parts, that is, legal rules, is defined as social facts. Therefore, knowledge of the valid law has to be understood in the sense of a correspondence relation between statements and their objects in the reality, that is, social facts in one sense or another.

My claim is that no reality or any kinds of facts need to be presumed as the objects of legal knowledge. Moreover, those kinds of objects should not be presumed because they lead to a misleading understanding of knowledge.

## Part Four: Criticism of the Positivistic Ontology

It is natural to presume that defined objects of knowledge exist. In this way, knowledge is presumed to be information about something, about reality, that is, about the world. If I talk about something I presume the existence of the thing I am talking about, and if I know something, there must be something which I know about. Hence, it seems to be reasonable to presume defined objects of knowledge.[20] This is the foundation of philosophical realism. This seems to be the motivation of legal positivism, as well.

According to positivistic understanding, legal rules as social facts come into existence by means of certain official rule-establishing procedures. These factual procedures are the formal criteria of validity recognized by the rule of recognition. Valid rules are identified with the help of certain forms of rule-creation. Rules exist or they do not exist because rule-creating facts exist or do not exist, and the statements describing them are true or untrue, but there are no other options available. The logic of facts and truthfulness is binary, and hence, the logic of validity is binary.

According to *Hart*, legal rules are used as reasons in legal reasoning and interpretation.[21] In the frames of Hartian approach, these rules are the contents of the sources of law identified with the help of the rule of recognition. I call them formal reasons, because they are identified with the help of formal criteria, that is, the procedures in which the rules are created.

Here, I will exploit the famous and powerful critique of positivism by *Dworkin*. I will, however, apply it in a different way. According to Dworkin, the positivistic

20 Plato, *Parmenides (On Ideas)*. English edition, e. g. The Perseus Catalog, Parmenides, 132 b–c. http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0174%3Atext%3DParm.

21 Hart, *The Concept of Law* (n. 8), at. 84, 90 and 104.

conception of law cannot be durable, because it does not recognize principles.[22] Principles of justice with or without any connection to legal procedures, that is, formal criteria, are indeed employed in the practices of courts. As a matter of fact, they are used in all legal reasoning. They are substantial reasons.

The employment of substantial reasons is necessary because legislation and precedents are imperfect, incomplete and insufficient means of regulation. Often, substantial reasons are embodiments of principles of justice and values, but there are other kinds of substantial reasons as well. Therefore, legal reasoning is the union and co-operation of formal and substantial reasons. Certain legal norms are applied, on the one hand, because they are products of certain rule-creating procedures and, on the other hand, because they lead to just, fair and reasonable decisions or outcomes of interpretation. It is even possible to deviate from formally valid rules with the help of substantial reasons. An exception to an applicable section of a statute is possible, for instance, in the case of unreasonableness.

The effect of justice and values as well as the use of substantial reasons renders questionable the status of legal rules as social facts. Here we meet two crucial questions.

First, are there two different kinds of law, one as formally valid legal rules and social facts and another in the form of evaluative substantial reasons? If the answer is positive, the law cannot be defined as social facts. In addition, there would be two kinds of law with two different ontological qualities. This is a problematic ontology.

Second, how can principles or other substantial reasons affect and modify the content of law if the law is defined as social facts? If a legal rule is an existing social fact, as a part of existing reality, how is it possible to shake up its existence and modify it on the grounds of values? Valuing an existing fact cannot change it. Evaluation is a human mental outlook occurring outside of the facts and outside of the "world". The facts can be treated as good or bad but they remain as they are. Legal rules cannot be seen as social facts or as parts of existing reality in a durable way if they can be modified, bypassed or ignored in the form of exceptions.

Accordingly, the law cannot be defined as social or other kinds of facts if the facts are not sufficient constituents of law. This seems to be the case. If the law is not defined as facts, there is no use for the notion of truthfulness either. There is no relation between facts and judgements as the foundation of truthfulness. Therefore, the truthfulness of the judgements is not determined by the facts.

Even if legal rules are treated as social facts, the usefulness of the concept of truth proves to be problematic. The ideas of fact and truth are founded on the presumption that truthfulness of statements is determined by the states of affairs in reality. The truthfulness of statements is verified with the help of observation of reality. If there is no discernible legal reality, we cannot determine the truthfulness of statements with the help of verification. On the contrary, the statements determine the presumed existence of the states of affairs. However, in this case, the presumed legal facts are redundant. Moreover, the whole understanding of legal knowledge proves to be misleading.

22 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977), at. 46.

It is easy to acknowledge that the aspiration of conventional legal judgements is not to describe anything "out there", in reality, or in any other sense. They do not state or assert in the proper sense. Instead, the sense of legal judgements is to justify conclusions with the help of formal and substantial reasons. They are judgements in the true sense.

In the case of legal knowledge, the resulting judgements are conclusions arrived at by means of justification. Justification refers to formal and substantial reasons as premises of concluding and reasoning. Instead of verification, the correctness of the conclusions is checked and proved to be right by the adequacy and power of different legal premises. They contain both formal and substantial reasons. These reasons have the same quality and the same way of effect but they have different force and amount of effect in different situations. No legal facts or any kind of legal reality is needed. A legal judgement, more broadly, legal knowledge, is not any kind of description of facts or "legal reality". The uniform ontological status makes it possible to master the whole field of legal arguments and the relations between the arguments in a uniform way.

Accordingly, there is no need or room for the concepts of facts or truth in legal reasoning. As a matter of fact, neither of them is employed or mentioned in conventional legal reasoning. Instead, concepts of justification and validity are used. This is not a coincidence. Justification and validity do not refer to descriptions of facts or truthfulness as a relation between statements and facts but to correct and justified legal reasoning and interpretation as discourse.

Qualified and correct legal reasoning is objective legal reasoning. Therefore, objectivity in the field of law is a quality of legal reasoning, that is, a quality of advanced discourse.

## Part Five: The Weak Conception of Objectivity Adopted

In conclusion, a well-functioning conception of objectivity in the field of law has to be weaker than the positivistic conception. According to this, objectivity is a quality of legal discourse and reasoning.

I find the constructive conception of objectivity introduced by *Rawls* fruitful here.[23] Rawls' conception focuses our attention on the criteria of objective reasoning, on arguments and conclusions and on their justification instead of on facts or other objects of knowledge. Here, the conception of objectivity without objects is adopted.

Objectivity is not an either/or matter. Reasoning and judgements can be more or less objective and more or less subjective. There are different degrees of objectivity and subjectivity. Reasoning and judgements can be more or less successful and more or less convincing and credible.

Why do we need and why do we demand objectivity? Objectivity is a way to secure producing trustworthy and correct information of law. Only objective judgements can provide reliable information on valid law. We cannot check the correctness of legal information with the help of any kind of verification methods. We can

23 John Rawls, *Political Liberalism* (New York: Columbia UP, 1993), at. 110 and 115.