CHAPTER

1

Dimensions of Objectivity

1.1. Brief Preliminary Remarks

No satisfactory account of the relationships between objectivity and the rule of law can begin with the assumption that the nature of objectivity and the nature of the rule of law are transparent and that the only things to be clarified are the relationships between them. What will become apparent in my opening two chapters is that both objectivity and the rule of law are complicatedly multifaceted. To ponder rewardingly how each of them bears on the other, we need to explore the distinct varieties of each of them.

This first chapter will disentangle multiple aspects or dimensions of objectivity, and the next chapter will then differentiate between the rule of law as a morally neutral mode of governance and the Rule of Law as a moral ideal. The final chapter will mull over some of the relationships between the sundry aspects of objectivity and the moral authority of law. (All three chapters will broach numerous relationships between

objectivity and the rule of law or the Rule of Law.) My discussions will aim to provide a general overview, rather than an exhaustive account, of some major issues that have preoccupied legal and moral and political philosophers. Though such an overview will inevitably prescind from countless complexities that would receive attention in any comprehensive treatment of the topic, it should suffice to highlight the most important distinctions by reference to which those complexities are to be fathomed.

1.2. Types of Objectivity

Both in ordinary discourse and in philosophical disputation, people tend to invoke the notion of objectivity in a number of diverse forms. To furnish a map of the terrain, this chapter will recount six chief conceptions of objectivity along with a few ancillary conceptions. Although most of the principal facets of objectivity overlap, and although each of them is fully compatible with the others, none of them is completely reducible to any of the others. Three of them are ontological in their orientation, two are epistemic, and one is semantic. That is, three of them bear on the nature and existence of things; two of them bear on the ways in which rational agents form beliefs about those things; and one of them bears on the relationships between those things and the statements that express the agents' beliefs. An adequate explication of the notion of objectivity has to take account of these differences, and likewise has to take account of crucial divisions within some of the distinct aspects of objectivity.

Types of Objectivity

Genus of Objectivity	*Species of Objectivity*
Ontological	Mind-Independence Determinate Correctness Uniform Applicability
Epistemic	Transindividual Discernibility Impartiality
Semantic	Truth-Aptitude

The several dimensions of objectivity to be expounded here are of great importance well beyond the domain of law. Some of them, indeed,

have been investigated much more searchingly in other areas of philosophy than in the philosophy of law, and a couple of the ancillary dimensions (shunted toward the end of the chapter) are only of extremely limited applicability to the substance of legal norms. Nevertheless, each of the six cardinal aspects of objectivity is not only central to many areas of intellectual endeavor but is also of particular prominence in legal thought and discourse. While we shall be considering a wide range of ways in which any field or enquiry or judgment or requirement might be objective, we shall be doing so precisely in order to ascertain the ways in which law is objective. Moreover, we need to discover the respects in which law does not partake of objectivity as well as the respects in which it does.

1.2.1. Objectivity qua Mind-Independence

Every variety of objectivity is opposed to a corresponding variety of subjectivity. Nowhere is that opposition more evident than in connection with objectivity as mind-independence. This first conception of objectivity is perhaps more commonly invoked than any other, both in everyday discourse and in philosophical argumentation. When this conception informs somebody's remarks, a proclamation of the objectivity of some phenomenon is an assertion that the existence and character of that phenomenon are independent of what anyone might think. Within a domain to which such a proclamation applies generally, the facts concerning any particular entity or occurrence do not hinge on anybody's beliefs or perceptions.

For a proper grasp of this first type of objectivity, we need to take note of some salient distinctions. One such distinction lies between (i) the views of separate individuals and (ii) the shared views of individuals who collaborate in a community or in some other sort of collective enterprise.[1] Sometimes when theorists affirm the mind-independence of certain matters, they are simply indicating that the facts of those matters transcend the beliefs or attitudes of any given individual. They mean to

[1] Of course, the shared views to which I refer will often not be merely shared. Frequently, a key reason for the holding of those views by each participant is his knowledge that virtually every other participant holds them and expects him to hold them. That complicated interlocking of outlooks among the participants in a collaborative endeavor is not something on which this chapter needs to dwell.

allow that those facts are derivative of the beliefs and attitudes shared by individuals who interact as a group (such as the judges and other legal officials who together conduct the operations of a legal system). These theorists contend that, although no one individual's views are decisive in ordaining what is actually the case about the matters in question, the understandings which individuals share in their interactions as a group are indeed so decisive. Let us designate as "weak mind-independence" the type of objectivity on which these theorists insist when they ascribe a dispositive fact-constituting role to collectivities while denying any such role to separate individuals. That mild species of objectivity is obviously to be contrasted with *strong* mind-independence, which obtains whenever the existence or nature of some phenomenon is ordained neither by the views of any separate individual(s) nor by the common views and convictions that unite individuals as a group. Insofar as strong mind-independence prevails within a domain, a consensus on the bearings of any particular state of affairs in that domain is neither necessary nor sufficient for the actual bearings of the specified state of affairs. How things are is independent of how they are thought to be.

Before we turn to a second major division between types of mind-independence, a brief clarificatory comment is advisable. When some phenomenon is weakly mind-independent, its existence or nature is ordained by the beliefs and attitudes (and resultant patterns of conduct) that are shared among the members of a group. However, the beliefs and attitudes need not be shared among *all* the members of a group. In any large-scale association or community, very few beliefs and convictions will be shared by absolutely everyone. What is typically present in a state of weak mind-independence – a state that is equally well characterized as "weak mind-dependence" – is not some chimerical situation of unanimity, but instead a situation of convergence among *most* of a group's members. Consider, for example, the loosely knit group of competent users of the English language in Canada. If most of those users regard the employment of "ain't" as improper in any formal speaking or writing (except when the term is deliberately wielded for comical effect), and if most of them accordingly eschew the employment of that slang term in formal contexts, then Canadian English includes a weakly mind-independent rule proscribing the employment of "ain't" in formal discourse. Probably, some competent users of the English language

in Canada do not eschew "ain't" in formal contexts. Such a fact, if it is a fact, is perfectly compatible with the existence of the aforementioned rule. Indeed, the exact difference between the status of some entity *X* as a weakly mind-independent phenomenon and the status of some entity *Y* as a strongly mind-*dependent* phenomenon is that the existence or nature of *X* (unlike the existence or nature of *Y*) is not ordained by the outlook of any particular individual. Instead, it is ordained by outlooks and conduct that prevail among most of the members of some group. Typically, convergence among a preponderance of a group's members – which falls short of convergence among all those members – will be sufficient to ground the existence or to establish the nature of some weakly mind-independent phenomenon. Note furthermore that, when there is very little convergence among a group's members on some particular issue, and when the lack of convergence precludes the existence of some weakly mind-independent entity *X* (such as a linguistic norm that proscribes "ain't" in formal contexts), the weakly mind-independent character of *X* is evidenced by the very inexistence of such an entity. Precisely because *X* is weakly mind-independent rather than strongly mind-independent, the meagerness of the convergence among the outlooks of the group's members is something that matters to *X*'s existence.

Now, before we can come to grips with the question whether legal requirements are strongly mind-independent or weakly mind-independent (or neither), we need to attend to another major dichotomy: the dichotomy between existential mind-independence and observational mind-independence.[2] Something is existentially mind-independent if and only if its occurrence or continued existence does not presuppose the existence of some mind(s) and the occurrence of mental activity. Not only are all natural objects mind-independent in this sense, but so too are countless artefacts such as pens and houses. Although those artefacts would never have materialized as such in the absence of minds and mental activity – that is, although in their origins they were existentially mind-dependent – their continued existence does not similarly presuppose the presence of minds and the occurrence of mental activity. A house would persist for a certain time as the material object that it is,

[2] For some good, crisp statements of this distinction – which has been drawn in various terms by many writers – see Moore 1992, 2443–44; Svavarsdóttir 2001, 162.

even if every being with a mind were somehow straightaway whisked out of existence.

Something is observationally mind-independent if and only if its nature (comprising its form and substance and its very existence) does not depend on how any observer takes that nature to be. Whereas everything that is existentially mind-independent is also observationally mind-independent, not everything that is observationally mind-independent is existentially mind-independent. Consider, for example, an intentional action. The occurrence of any such action presupposes the existence of a mind in which there arises the intention that animates the occurrence, yet the nature of the action does not hinge on what any observer(s) – including the person who has performed the action – might believe it to be. Even if every observer thinks that the action is of some type *X*, it may in fact be of some contrary type *Y*.

Types of Mind-Independence

	Existential	*Observational*
Weak	The occurrence or continued existence of something is not dependent on the mental activity of any particular individual.	The nature of something is not dependent on what it is taken to be by any particular individual.
Strong	The occurrence or continued existence of something is not dependent on the mental functioning of any members of any group individually or collectively.	The nature of something is not dependent on what it is taken to be by the members of any group individually or collectively.

When pondering the mind-independence of laws, then, we should be attuned to both the strong/weak distinction and the existential/observational distinction. A bit of reflection on the matter should reveal that, if the *existential* status of laws is our focus, some laws (most general legal norms) are weakly mind-independent while some other laws (most individualized directives) are not even weakly mind-independent. That most general legal norms are at least weakly mind-independent is quite evident. The existence of those norms does not stand or fall on the basis of each individual's mental activity; it is not the case that

multitudinous different sets of general legal norms emerge and vanish as multitudinous different individuals undergo birth and death, or that no legal norms at all exist for anyone who does not give them any thought. Whereas someone's beliefs and fantasies and attitudes and convictions are existentially dependent on the mind of the particular individual who harbors them, the existence of any general legal norm differs in not being radically subjective. (There can be exceptions in rather unusual circumstances. In a monarchical regime, the officials might adhere to a practice whereby some general laws go out of existence whenever the reigning king's mental activity permanently ceases. Such an arrangement would be peculiar, but it would plainly be possible. Still, in a legal system that is to endure beyond a single person's lifetime, the incidence of any such strongly mind-dependent general laws would have to be highly circumscribed.)

When we move away from general laws and concentrate on individualized directives, we seldom find any existential mind-independence. Typically if not always, an order addressed to a particular person – by a judge or some other legal official – will not remain in effect as such if its addressee's mental activity permanently ceases. Any result sought through the issuance of the individualized order will typically have to be achieved through some other means (perhaps through the issuance of a directive to some alternative individual or set of individuals who will act in lieu of the original addressee). To the utmost, then, an individually addressed legal requirement is existentially mind-dependent; its continued existence as a legal requirement presupposes the occurrence of mental activity in a particular person's mind.

By contrast, the continuation of the sway of general legal norms will almost always transcend the mental functioning of any given individual. Even so, the existential mind-independence of such norms is weak rather than strong. They cannot persist in the absence of all minds and mental activity. They abide as legal norms only so long as certain people (most notably, judges and other legal officials) collectively maintain certain attitudes and beliefs concerning them. Unless legal officials converge in being disposed to treat the prevailing laws as authoritative standards by reference to which the juridical consequences of people's conduct can be gauged, those laws will cease to exist. To be sure, some of the general mandates within a legal system – such as ordinances that prohibit

jaywalking – can continue to exist as laws even though they are invariably unenforced. The requirements imposed by such mandates are inoperative practically, but they remain legal obligations. However, the very reason why inoperative legal duties continue to exist as legal duties is that myriad other legal obligations are quite regularly given effect through the activities of legal officials, who converge in being disposed to treat those obligations as binding requirements. Only because those manifold other legal requirements are regularly given effect does a legal regime exist as a functional system. In the absence of the regularized effectuation of most mandates and other norms within a system of law, the system and its sundry norms will have gone by the wayside. In sum, the continued existence of laws (including inoperative laws) as laws will depend on the decisions and endeavors of legal officials. Yet, because those decisions and endeavors inevitably involve the beliefs and attitudes and dispositions of conscious agents, the continued existence of laws as laws is not strongly mind-independent. The existential mind-independence of general legal norms is only weak.

In what manner are legal norms observationally mind-independent? Are they strongly so or only weakly so? We can know straightaway, in regard to their observational status, that general legal norms are at least weakly mind-independent. After all, as has already been remarked, everything that is existentially mind-independent is also observationally mind-independent. The mental states and events presupposed by the existence of a legal system are those shared by many officials interacting with one another. What those mental states and events are is manifestly independent of what any particular individual thinks that they are. Matters become more intricate, however, when we turn from inquiring whether legal norms are observationally mind-independent to inquiring whether their observational mind-independence is strong or weak. A number of legal philosophers, such as Andrei Marmor, have had no doubt that the observational mind-independence of laws is merely weak. Marmor first notes that, when a concept pertains to something that is strongly mind-independent, "it should be possible to envisage a *whole community of speakers* misidentifying [the concept's] real reference, or extension." He then declares: "With respect to concepts constituted by conventional practices [such as the operations of a legal system], however, such comprehensive mistakes about their reference is implausible. If a given concept is

constituted by social conventions, it is impossible for the pertinent community to misidentify its reference." He emphatically proclaims: "There is nothing more we can discover about the content of the [norms of our social practices] than what we already know."[3] Actually, however, things are more complicated than Marmor suggests. His comments are not completely wrong, but they are simplistic. (In the following discussion of the strong observational mind-independence of laws, incidentally, there is no need for me to distinguish between general norms and individualized directives. In each case, the observational mind-independence is always strong.)

On any particular point of law, the whole community of legal officials in some jurisdiction can indeed be mistaken. Legal officials can collectively be in error about the attitudes and beliefs (concerning some point of law) which they themselves share. They can collectively be in error about the substance and implications of those shared beliefs and attitudes, and can therefore collectively be in error about the nature of some legal norm which those beliefs and attitudes sustain. To assume otherwise is to fail to differentiate between (i) their harboring of the first-order attitudes and beliefs and (ii) their second-order understanding of the contents of those first-order mental states. The fact that the officials share certain attitudes and beliefs in regard to the existence and content of some legal norm is what establishes the existence and fixes the content of that norm; but the fact that they share those attitudes and beliefs does not exclude the possibility that they themselves will collectively misunderstand what has been established and fixed by that fact. A gap of misapprehension is always possible between people's first-order beliefs and their second-order beliefs about those beliefs.

Indeed, Marmor's elision of the first-order/second-order distinction will land his analysis in incoherence when it is applied to many credible situations. Suppose that the courts in some jurisdiction declare that their previous interpretation of a particular law was incorrect. They now maintain that that law should have been understood and applied (and will henceforth be understood and applied) in some alternative way. If the members of the judiciary are collectively infallible at the current

[3] Marmor 2001 , 138, emphasis in original. A complicated variant of Marmor's position underlies the famous discussion in Locke 1975 [1689], book IV, chapter IV. Quite close to Marmor's position, but somewhat milder, is the brief discussion in Greenawalt 1992, 48.

juncture when they pronounce on this matter of legal interpretation, then we have to conclude that they were fallible at the earlier juncture when they espoused the now-disowned reading of the particular law. Conversely, if they were collectively infallible at that earlier juncture, then they are currently mistaken when they deem themselves to have been in error. However Marmor might try to analyze such a situation, he will be led to the conclusion that legal officials have collectively erred about a matter of legal interpretation. His insistence on the officials' collective infallibility will have undermined itself.

The observational mind-independence of legal norms is therefore strong rather than weak. Nevertheless, Marmor is not flatly incorrect. If the legal officials in a jurisdiction do collectively err in their understanding of the substance and implications of some legal norm(s) which their own shared beliefs and attitudes have brought into being, and if they do not correct their misunderstanding, that misunderstanding will thenceforth be determinative of the particular point(s) of law to which it pertains. It will in effect have replaced the erstwhile legal norm(s) with some new legal norm(s). Such an upshot will be especially plain in any areas of a jurisdiction's law covered by Anglo-American doctrines of precedent, but it will ensue in other areas of the law as well. The new legal norm(s) might be only slightly different from the previous one(s) – the differences might lie solely in a few narrow implications of the norm(s) – but there will indeed be some differences, brought about by the legal officials' mistaken construal of the substance and implications of the superseded norm(s). Subsequent judgments by the officials in accordance with the new legal standard(s) will not themselves be erroneous, since they will tally with the law as it exists in the aftermath of the officials' collective misstep. The officials go astray in perceiving the new standard(s) as identical to the former standard(s), but, once their error has brought the new standard(s) into being, they do not thereafter go astray by treating the new standard(s) as binding. (There can be limited exceptions to this general point. If the officials in some legal system adhere to a norm requiring them to undo any mistaken judgment whenever they come to recognize their mistake within a certain period of time, and if they comply with that norm in most circumstances to which it is applicable, then their nonconformity with it in some such set of circumstances would temporarily vitiate the new legal standard that has been engendered by their original misstep.