

## 4E Objectivity

### Reconceptualising legal objectivity according to the concept of embodied, embedded, enacted and extended cognition

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#### 1. Theme and Context

The Ideal of objectivity plays a central and vital role within legal discourse. Judges are expected to apply the law objectively, in order to be impartial. Legal statements should be objective in order for them to be accepted as valid. Whether or not we take a scientific claim seriously, whether we render a judgement acceptable depends on whether we ascribe objectivity to it. Objectivity as an ideal guides the process of knowing according to its demands. How we conceptualise and make sense of objectivity as an ideal therefore is vital for how we obtain knowledge and what kind of knowledge we can obtain. The prerequisites that are said to be necessary in order to obtain legal objectivity become methodological guidelines that shape academic discourse, legal training, the convincing power of legal application, and finally the self-image of jurists.<sup>1</sup>

Concepts of objectivity are diverse. Encyclopaedias of scientific theory and philosophy describe it as the absence of individual perspective, arbitrary value commitments and bias in scientific claims and results. It entails the idea that statements about the world should be free from the viewers particular perspective.<sup>2</sup>

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<sup>1</sup> 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. In order 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 make us more impartial and law more certain? Is it possible that the epistemological ideal of objectivity hinders us to live up to our ideals of a democratic and constitutional state? See for example: *Zilberszac*, *Objektivität in den Rechtswissenschaften, Juridikum* (2018), 38-48; *Klappstein*, *Demokratische Legitimation und Grenzen der Verlagerung von Entscheidungen auf den Rechtsanwender*, in *Bäcker/Baufeld*, *Objektivität und Flexibilität im Recht: Tagungen des Jungen Forums Rechtsphilosophie (JFR) in der Internationalen Vereinigung für Rechts- und Sozialphilosophie (IVR) im September 2004 in Kiel und im April 2005 in Hagen (Archiv für Rechts- und Sozialphilosophie (ARSP) Beiheft (2005), 111- 131*  
<sup>2</sup> "For instance, according to a simple and strong conception, a judgement is objective if, and only if, it describes its object.": Niemi, *What is the foundation of objectivity in the Field of Law*, in *Paula/Santacoloma/Rosas*, *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 DC, 2015 (Archiv für Rechts- und Sozialphilosophie Beiheft (2016)), 15*; *Reiss/Sprenger*, *Scientific Objectivity*, in *Zalta*, *The Stanford Encyclopedia of Philosophy 2017*, <https://plato.stanford.edu/entries/scientific-objectivity>.

Knowledge free from subjectivity could however only be obtained under two conditions: Firstly, if human beings were separated into a rational, analytical mind and an emotional, vulnerable and socially and culturally embedded body. This assumption was most prominently ascribed to the theories of René Descartes<sup>3</sup>, but has its roots in Jewish and Christian theology.<sup>4</sup> The “Cartesian” idea of cognition is ingrained in Western philosophy with its idealisation of rationality and the mind and its devaluation of the body, emotionality and vulnerability. The binary logic of Cartesian thinking thereby correlates with other stereotypical binary matches. For example, white men were associated with the mind and women and people of colour were associated with the body or animals.<sup>5</sup> The Cartesian way of seeing the world found its way into natural law, most evidently into the theories of Thomas Aquinas who described the mind as a receptor for divine and universal reason. The prerequisites for objectivity, within this account, are thought to be within ourselves and we would just have to activate our minds in order to be able to produce universal perceptions and judgments about the reality.<sup>6</sup>

Secondly, if you do not fully trust or believe in the capacity of human beings to separate their minds from their bodies, knowledge free from perspectival distortion would be possible if one could find conditions in the exterior world under which everyone could see an object from the same point of view. Legal formalists design their methodological approaches to meet this condition. By strictly limiting methods and objects of inquiry they believe that the perspectives of the viewers could be approximated and merely subjective views thereby avoided.<sup>7</sup>

Another approach to objectivity suggests that objectivity is not attributed to the product of knowledge but to the process of knowing. In the legal discourse this means that objectivity is described as a quality of legal reasoning. This concept of objectivity emphasizes the importance of representing a diversity of viewpoints and is taken on by some legal realists and

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<sup>3</sup> It is contested to what degree Descartes actually implied that dualism is possible.

<sup>4</sup> Goudriaan, Descartes, Cartesianism, and Early Modern Theology, in Lehner, Muller, Roeber, The Oxford Handbook of Early Modern Theology, 1600-1800 (2016), 533-550.

<sup>5</sup> Bordo, The Cartesian Masculinization of Thought, Signs (1986), 439-456; Grosz, Bodies and Knowledges: Feminism and the Crisis of Reason, in Alcoff/Potter, Feminist Epistemologies (1993), 187-215.

<sup>6</sup> Thomas von Aquin, Naturrecht und Naturgesetz, in Galen/Ockenfels, Sammlung Politea Bd. XXXIV 1996. Viola, Natural Law Theories in the Twentieth Century, in Pattaro/Reversi, Legal Philosophy in the Twentieth Century: The Civil Law World, Vol. 12, 2016.

<sup>7</sup> Rüthers/Fischer/Birk, Rechtstheorie mit juristischer Methodenlehre<sup>9</sup> (2016), 285ff.; Zilberszac, Objektivität (2018), 38-48. Within the formalist paradigm there is free space for learned patterns of gaze, bias and individual sense of justice to influence decisions without having to account for them. At the same time, the image of an objective jurisprudence is preserved externally, since subjective elements are hidden in the presentation of the legal decisions; Böllinger, Die unbewusste Dynamik richterlichen Entscheidens. Ansätze zu einer Theorie strategischen Handelns im Bereich der Rechtsfindung, Betrifft JUSTIZ (2012), 224-237.

post-positivist legal theorists that demand jurists and academics to openly reflect on the diverse reasons guiding legal decision making processes. This implies that jurists should not be limited to interpreting decisions and texts in a positivist style but also reflect on the “extra-legal” concepts and ideas that guide their decisions.<sup>8</sup>

While process-oriented conceptions of objectivity require “the knower” to reflect on their point of view by addressing varied perspectives and arguments, they do not require the knower to reflect on her or his subjectivity as an embodied state of being. As different as the three mentioned conceptions of legal objectivity are, they all focus on knowing, perceiving, analysing and judging as a mental and rational process and do not methodologically reflect on knowing, perceiving, analysing and judging as an embodied and embedded process. Although the formalist and process-oriented approaches to objectivity do not explicitly build on the Cartesian model of cognition, they recreate the dogma that the mind is superior and more valuable to the body and thereby recreate the notion of body and mind as binary oppositions.<sup>9</sup>

This model of cognition however has been increasingly rejected by cognitive science during the last centuries and has already led to an increased discussion within the legal discourse about law and epistemology.<sup>10</sup> It turns out that suppressing, masking or overcoming one’s embodied subjectivity, and thereby the fundamental embodiedness of (legal) knowledge, seems to be neither possible nor desirable. On the contrary, the attempt to ignore desires, emotions, needs and experiences (states of being usually associated with subjectivity within a Cartesian mindset) makes it more likely for “the knower” to be unaware of them, so that bias

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<sup>8</sup> *Niemi*, What is the foundation of objectivity in the Field of Law, in *Paula/Santacoloma/Rosas*, 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 DC, 2015, in *Archiv für Rechts- und Sozialphilosophie Beiheft* (2016), 23; *Zilberszac*, *Objektivität* (2018), 38-48.

<sup>9</sup> *Zilberszac*, *Objektivität* (2018), 38-48. Every concept of objectivity ultimately relies on a certain concept of human cognition. It builds on certain assumptions about the constitution and interplay of the mind and the body and the environment. It also however builds on certain ideas about what kind of knowledge is valuable and whom it should serve. To understand if and how legal objectivity can and should be obtained we have to clarify our epistemological presuppositions. How do and how can we know? What should we know?

<sup>10</sup> *Newen/Bruin/Gallagher*, *The Oxford Handbook of 4E Cognition* 2018; *Shapiro*, *The Routledge Handbook of Embodied Cognition* 2014; *Gallagher/Zahavi*, *The phenomenological mind. An introduction to philosophy of mind and cognitive sciences* 2008; *Thompson*, *Mind in Life. Biology, Phenomenology, and the sciences of mind* 2010. *Antony*, *Embodiment and Epistemology*, in *Moser*, *The Oxford handbook of epistemology* 2011; *Alloa*, *Leiblichkeit: Geschichte und Aktualität eines Konzepts* (UTB 2012); *Jan*, *Mind Invasion: Situated Affectivity and the Corporate Life Hack*, in *Frontiers in Psychology* 2016, 266ff; *Buchholz*, *Embodiment*, *Forum der Psychoanalyse* (2014), 109ff; *Jelić/Tieri/De Matteis/Babiloni/Vecchiato*, *The Enactive Approach to Architectural Experience: A Neurophysiological Perspective on Embodiment, Motivation, and Affordances*, in *Frontiers in Psychology* (2016), 481ff.

could not even be reflected upon, which makes way for mechanisms of projection, idealisation, devaluation and all sorts of unaware evaluative impulses.

Under the keyword "4E Cognition", which stands for "Embodied, embedded, extended and enacted cognition", previously hidden dimensions of perception and cognition are analysed and made visible.<sup>11</sup> The findings of 4E Cognition are fundamentally important for legal epistemology. Legal epistemological and methodological presuppositions have to be evaluated in light of this research. This of course entails the concept of legal objectivity. By not accounting for the "Leiblichkeit" of knowledge, conceptions of legal objectivity do not only fail their mission of providing a theory for the validation of law, but also render the claim that law can be applied objectively, even that it exists objectively impossible. A concept of objectivity that depends on denying the basic conditions of knowledge, cannot and should not serve as a paradigm for legal knowledge.<sup>12</sup>

The aim of my dissertation is to discuss the implications of "4E Cognition" for the conception, prerequisites and effects of legal objectivity. My hypothesis is that jurisprudential objectivity presupposes reflection of subjectivity (in all its dimensions). Based on this hypothesis, I discuss whether and to what extent legal objectivity as a paradigm can and should be reconceptualised and institutionalized in jurisprudence. Taking 4E Cognition seriously demands rethinking the relation and the concept of subject and object, the "interior" and the "exterior" within legal discourse. It demands taking into account the implications of 4E Cognition on the process of finding, interpreting and applying law and ultimately it demands rethinking legal terms, concepts, and methodologies in a non-dualistic way.<sup>13</sup> Of course this is a task on which several books, artworks, performances etc would have to be written or made. My aim therefore is to simply identify where and how we could and should start to adjust our legal thinking in order to be able to pursue legal objectivity.

With the attempt to show hidden or repressed dimensions of perception and knowledge in order to make them conscious and integrate them into jurisprudential theory and practice, I

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<sup>11</sup> See fn 9.

<sup>12</sup> Should we not let go of objectivity altogether then, one could ask. The answer is if we do we let go of the concept that there is anything outside ourselves that could be law. Rather we have to radically start from the point that knowledge and thereby legal knowledge is always inherently embodied. That means legal concepts and methods have to be redesigned according to a nondualistic notion of the human and human cognition.

<sup>13</sup> This requires a collective change of consciousness in terms of how we view ourselves and others. We have to overcome the Cartesian temptation of understanding ourselves as rational and inviolable actors and come to terms with our vulnerable, relational and emotional selves.

am pursuing an inherently feminist concern. Practices and cultures of knowledge are decisive for whose voices are (or can be) heard. Methodological prerequisites for the articulation and classification of knowledge must therefore be examined for their inherent mechanisms of exclusion and inclusion that stabilize power - including the ideal of objectivity.<sup>14</sup>

## 2.State of Research

There are whole libraries filled with reflections on the role and significance of objectivity in law. Different concepts of objectivity are connected to different ideas of law and the process of finding the law, as well as on different assumptions about what can and should be known and perceived and how.<sup>15</sup>

If one however tries to rethink legal objectivity in the scheme of a non-dualistic conception of body and mind, subject and object or rationality and emotionality, then one faces a great challenge. It quickly becomes clear to what a great extent Cartesian dualism (which is already widely contested throughout all scientific disciplines, but nevertheless still remains remarkably powerful), is inherent in the available scientific terms, concepts and methods. Therefore, it does not only require a reformulation of the concept of objectivity itself, but a comprehensive paradigm shift in scientific theory.

The basis (but of course not the full body) for such a fundamental shift in thinking about (legal) knowledge has been laid out in the phenomenological theory of the "Leib" and, finally, in the interdisciplinary research on cognition, which, under the keyword "4E cognition", investigates the corporeality, contextuality and situativity of knowledge.

The theory of "Leiblichkeit" (the embodied self) reintroduced the body into western philosophical thought. When we understand ourselves in the world as embodied beings, our

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<sup>14</sup> *Autor/innenkollektiv*, Einleitung, in *Foljanty/Lembke*, Feministische Rechtswissenschaft. Ein Studienbuch 2006, 22. *Barad*, Naturalizing Objectivity, in *Perspectives on Science* (2008), 285- 306; *Longino*, Science as Social Knowledge: Values and Objectivity in Scientific Inquiry 1990. *Haraway*, Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective, in *Feminist Studies* (1988), 575- 599.

<sup>15</sup> Just to name a few: *Potacs*, Rechtstheorie 2015. *Greenawalt*, Law and Objectivity 1992.; *Bäcker/Baufeld*, Objektivität und Flexibilität im Recht: Tagungen des Jungen Forums Rechtsphilosophie (JFR) in der Internationalen Vereinigung für Rechts- und Sozialphilosophie (IVR) im September 2004 in Kiel und im April 2005 in Hagen, *Archiv für Rechts- und Sozialphilosophie (ARSP) Beiheft* (2005); *Paula/Santacoloma/Rosas*, 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 DC 2015, in *Archiv für Rechts- und Sozialphilosophie Beiheft* (2016).

feelings, sensations, desires, memories as well as our vulnerability and relationality become important and vital components of our cognition. Our interaction with the world can no longer be seen as mechanical but has to be viewed as complex, interdependent and multifactorial. Psychoanalytical theory and research additionally showed the correlation between memories, experiences and desires and human actions and decisions. The concept of “Leiblichkeit” originates from phenomenology. “Leiblichkeit” is the starting point of perception - of experiencing oneself in the world. In contrast to the term body, which understands human materiality as an object, the term “Leiblichkeit” describes the human as a living being, whose experiences necessarily emanate from its body. The body is a symbol for the fact that we exist physically in the world and that as physical beings we are exposed to the world, while at the same time we are shaping and influencing it. The body conveys relationality, vulnerability and affectivity.<sup>16</sup>

From the 1990s onwards, cognitive science, inspired by the insights of phenomenology, was able to develop a new perspective on the process of cognition. The process of cognition and the limits and possibilities of cognition have now been explored in the light of their necessary and fundamental embodiedness. In this sense, cognition cannot be a product generated in the brain like a computer, but merely a lived and embodied, affective and context-dependent process. In addition, knowledge takes place not only within the boundaries of the self<sup>17</sup> but also uses technology and artificial intelligence. Cognition thus came to be thought of as embodied, embedded, enacted and extended.<sup>18</sup>

While phenomenology and 4E cognition can account for how knowledge emanates from an embodied being and its interaction with other beings and the world, it cannot account for what we relate to. It lacks a theory of the material world, of matter but at the same time depends on presupposing a certain subject/object relation. In order to reconceptualise objectivity the material and ontological dimension has to be reflected upon as well. This

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<sup>16</sup> Merleau Ponty, *Phänomenologie der Wahrnehmung*, hrsg. und übersetzt von Rudolf Boehm, 1974; *Waldenfels*, *Das leibliche Selbst. Vorlesungen zur Phänomenologie des Leibes* 2000. *Bidwell- Steiner*, *Das Grenzwesen Mensch. Vormoderne Naturphilosophie und Literatur im Dialog mit Postmoderner Gendertheorie* (2017), 35ff.; *Alloa*, *Leiblichkeit: Geschichte und Aktualität eines Konzepts* (2012), 2ff.; *Plessner*, *Lachen, Weinen. Eine Untersuchung nach den Grenzen des menschlichen Verhaltens* 1941.

<sup>17</sup> The self itself becomes a questionable phenomenon, its boundaries are far from clear cut, but the “self” epistemologically symbolises a place from which knowledge emanates, an artificial centralisation of the process of knowing that mediates responsibility.

<sup>18</sup> See fn 9.

problem has famously been described by Immanuel Kant, who thought that matter exists, but we can not have direct knowledge of it. We indirectly access it through categories that we are given before birth (thereby disembodied) and the a priori categories thereby act as a disembodied mediator within ourselves. New Materialism and object oriented ontology on the other hand don't operate with dualism but rather think of dimensions of matter that we are part of. Law than too becomes a material dimension of the communication and mediation between matter.<sup>19</sup>

The phenomenology of the “Leib”, cognitive sciences and new materialism were subject of a broad discussion in feminist theory, sociology, political science and philosophy, and lead to systematic reflections on one's knowledge claims. New concepts of objectivity have been developed in the course of these reflections, particularly by feminist philosophers<sup>20</sup>. Within the legal discourse the implications of 4E Cognition on legal knowledge and legal objectivity have selectively been taken into account. Under the framework of the Cultural Cognition Project (CCP) at Yale University and the Project of Law and Mind Sciences (PLMS) at Harvard University, research has been undertaken on the influence of different political and cultural backgrounds on the evaluation and collection of evidence, as well as on the adjudication of professional judges and jurors. The PLMS deals more extensively with the embodiedness of legal knowledge by also taking into account “external factors” such as the influence of camera perspectives on the evaluation of video evidence, or the implications of the warmth or the architecture of a room on decision making processes. Particularly Adam Benfornado emphasised the need for more research on embodied cognition within the legal sciences.<sup>21</sup>

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<sup>19</sup>. Kant, Prolegomena zu einer jeden künftigen Metaphysik 1783.

*Sencindiver*, New Materialism, in O'Brien. Oxford Bibliographies: literary and critical theory. Ed. O'Brien. Oxford University Press, 2017; *Morton*, Hyperobjects: Philosophy and Ecology After the End of the World 2013.

<sup>20</sup> *Barad*, Objectivity (2008), 285- 302; *Longino*, Objectivity 1990. *Haraway*, Knowledges (1988), 575 - 599; *Bordo*, The Cartesian Masculinization of Thought, *Signs*, 1986, 439 ff; *Grosz*, Bodies and Knowledges: Feminism and the Crisis of Reason, in *Alcoff/Potter*, Feminist Epistemologies (1993), 15ff

<sup>21</sup> “[...]although this research is still in its early stages, work in embodied cognition has the potential to upend the way we think about our judicial system.[...] In certain ways, embodied cognition research presents a heartier challenge than other insights from the mind sciences introduced in the last few decades, both because it conflicts with our deep-seated intuitions about the relationship between the mind and body, and because it is greatly unsettling to our existing legal structures, potentially undermining the notion of fair and equal justice. These concerns are real and we ought not gloss over them. It is true that exposing these biases built into our system — showing that the emperor is wearing no clothes—may lead to increased skepticism of our laws, courts, and legal actors. But the alternative is to pretend that a system that appears to be biasing outcomes in a patterned way is legitimate. This latter approach is untenable. Willful ignorance is neither feasible in practice, nor justifiable.” *Benfornado*, The Body of the Mind: Embodied Cognition, Law, and Justice, *St. Louis University Law Journal*,

The Westminster Law and Theory Lab has been very active (if not the most active) within this realm and has conducted a wide variety of research (partly very progressive and experimental) on the relationship of law and the senses. It tries to make sense of law within a post-phenomenological framework informed by the embodiedness of legal knowledge and its ontological and material occurrences at the same time.<sup>22</sup>

### 3. Relevancy of research

We cannot simply say that objectivity does not exist or that we do not need it without equating law to power. In order to save the claim that law exists, there needs to be a concept of how it can exist and how we can access it.<sup>23</sup> This concept, as I mentioned above, is incapable of meeting its expectations as long as it denies the basic cognitive conditions for its existence. I therefore want to take on the challenge of rethinking and reconceptualising legal objectivity based on the findings of 4 E Cognition - a challenge that has not been undertaken within the legal discourse yet. My aim is to identify the main concerns that occur when the “Leib” is made conscious within legal discourse and inspire further research into these problems. I also want to motivate a change within legal education and methodology. Redefining the concept of legal objectivity means redefining the prerequisites that have to be met in order to aspire it. Paradigms, methods, and terms designed in order to suppress, mask or overcome subjectivity can no longer be applied under this framework. If knowledge is inherently embodied, one’s embodied process of knowing can only be reflected upon. This raises the question how the reflection on embodied subjectivity can take place within the legal field. The reconceptualization of objectivity thereby necessarily entails rethinking legal methodology

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(2010), 3- 31; see also: *Benfornado*, *Frames of Injustice: The Bias We Overlook*, *Indiana Law Journal* (2010), 1334-1378; *Kahan/Braman*, *Cultural Cognition and Public Policy*, *Yale Law & Policy Review* (2006), 147- 170.

<sup>22</sup> *Pavoni/Mandic/Nirta/Philippopoulos-Mihalopoulos*, *The Westminster Law and the Senses Series*, See 2018; *Pavoni/Mandic/Nirta/Philippopoulos-Mihalopoulos*, *The Westminster Law and the Senses Series*, Taste 2018.

<sup>23</sup> “There would be no legal system if nobody could say what the law is. This is painfully trivial. The existence of law is mediated by knowledge that claims to know what the law is. Somek, *The Legal Relation. Legal Theory After Legal Positivism* (2017), 1.



#### **4. Methods**

The work is based on a hermeneutic consideration of legal theories and positions. In doing so, I take a critical view of power, from which the scientific analysis of theories and concepts always considers their embeddedness within a certain socio-political framework. In addition, I follow an interdisciplinary approach as I try to eliminate blind spots of legal theory in the light of cognitive science. My research is also driven by an effort to overcome Cartesian dualism in understanding and arguing, which is why I prefer to rely on theories and concepts that focus on the embodied dimension of knowledge. In order to think of legal methodology and epistemology in a non-dualistic way, I will not only reflect on the research that I mentioned above, but also on my knowledge and experiences as a visual artist.