

Philip M. Bender (ed.)

# The Law between Objectivity and Power



HART



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This publication was supported by the Max Planck Society.



MAX-PLANCK-GESELLSCHAFT

**The Deutsche Nationalbibliothek** lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN HB (Nomos) 978-3-8487-8334-2  
ePDF (Nomos) 978-3-7489-2721-1

#### **British Library Cataloguing-in-Publication Data**

A catalogue record for this book is available from the British Library.

ISBN HB (Hart) 978-1-5099-6265-5

#### **Library of Congress Cataloging-in-Publication Data**

Bender, Philip M. (München)

The Law between Objectivity and Power

Philip M. Bender (ed.)

477 pp.

Includes bibliographic references.

ISBN 978-1-5099-6265-5 (hardcover Hart)

1st Edition 2022

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Published by

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

[www.nomos.de](http://www.nomos.de)

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

ISBN HB (Nomos) 978-3-8487-8334-2

ISBN ePDF (Nomos) 978-3-7489-2721-1

ISBN HB (Hart) 978-1-5099-6265-5

DOI <https://doi.org/10.5771/9783748927211>



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Onlineversion  
Nomos eLibrary

## Foreword

This book is the result of two complementary projects – one substantive, the other organizational. The *substantive project* is to explore law within the tension field of objectivity and power. It is a topic that has been following me from the very beginning of my studies.<sup>1</sup> The chair of Professor Hans Christoph Grigoleit, for whom I worked as an assistant for over a decade, provided an extremely inspiring environment to further pursue this interest. In a way, the diverging conceptions of what law is – an instrument of power or an objective reality limiting power – always reappeared in very different contexts. In their extreme version they seem to capture only part of the truth but not the whole of it. This book wants to reflect the broad range of the topic and the justification of both ways of looking at the law, depending on the perspective and the specific problem one is about to examine. The *organisational project* is linked to how this book was born: by bringing together young scholars from different areas of interest, disciplines, and countries, with whom I have interacted at different stages of my career. Even though the idea was to create a legal theory dialogue, I wanted to include doctrinal statements on the issue of objectivity as well. This approach reflects the necessity of considering the peculiarities of each legal subbranch. But there is more to it: theoretical, and especially epistemological questions have practical normative implications, which cannot be answered without the mechanisms that normally settle normative disputes, ie constitutional enactments, majority votes or other emanations of a given legal system. I develop this understanding, which I call *Constitutional Pragmatism*, in the introductory chapter in more detail.

The two projects leading to this book would not have been possible without the invaluable support of a variety of institutions and people. First and foremost, I owe my gratitude to the Max Planck Institute for

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1 I want to mention the seminars with Lorenz Schulz on truth in legal reasoning (2010/2011) and with Hans Christoph Grigoleit and Jens Kersten on methodology, objectivity, and ideology (2012), both at the Ludwig Maximilian University of Munich (LMU), the scientific college (*Wissenschaftskolleg*) with Christian Hillgruber and Frank Schorkopf on power and law (2011/2012) organized by the German Academic Scholarship Foundation (*Studienstiftung*), and the class on legitimacy-based law with Tom Tyler at Yale Law School (2019).

Tax Law and Public Finance in Munich for which I worked as a research associate during the past two years: the institute provided the generous funding for both the conference and this book. Especially its director, Professor Wolfgang Schön, unconditionally supported the idea from the very beginning. Not only did he contribute to the conference with his insightful and personal talk on the thinking of Werner Flume. He also helped to overcome each and every of the various organizational hurdles. In this regard, I also want to thank his secretary, Gabriele Auer, whose experience and dedication provided the backbone of this undertaking. I am also particularly grateful to Professor Hans Christoph Grigoleit and Professor Peter M. Huber for immediately accepting my invitation to the conference and for sharing their experienced views and insights with us. Finally, I want to thank all the peer reviewers involved that helped to get the book accepted and financed, as well as Florian Bode, who reported on the conference.<sup>2</sup>

I will end this foreword by briefly sketching out the plan of this collected volume. In the *first part*, which consists of my introductory chapter (§ 1), I present different ways of thinking about objectivity to structure the theoretical discourse and to provide some notional clarification. I also explain why the topic of objectivity and power is relevant and how we should approach it.

The *second part* contains two general contributions regarding legal interpretation. The first one, by Hans Christoph Grigoleit (§ 2), underlines the need of objective teleological interpretation of statutes as a response to the rather fictitious claim of the will of the legislator. The second one, by Franz Bauer (§ 3), points out how the subjective (historical) interpretation of statutes, rightly understood, can avoid many of the pitfalls underlined by its critiques.

Then, the topic of objectivity and power is approached in specific areas of law. In that spirit, the *third part* focuses on constitutional law. It contains an outline of how objectivity is pursued in the reasoning of the German Federal Constitutional Court (*Bundesverfassungsgericht*) by Peter M. Huber (§ 4), who also builds on his experience as its Justice. Daniel Wolff (§ 5) turns to US constitutional law and analyses the (implicit) assumptions of the concept of law and the possibility of objectivity in legal

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2 Florian Bode, 'Tagungsbericht: The Law between Objectivity and Power. Young Scholars Conference am Max-Planck-Institut für Steuerrecht und Öffentliche Finanzen in München am 12. und 13. Oktober 2020' (2021) 76 JZ 411–412.

reasoning that underlie the debate on interpretive methodology between originalists and living constitutionalists.

The *fourth part* takes a closer look at private law. It starts with a contribution by Ben Köhler (§ 6) on remedial discretion – a particular form of institutionalized subjectivity and power. It is followed by the chapter of Victor Jouannaud (§ 7) on the scope of the essential matters doctrine (*Wesentlichkeitsdoktrin*) in private law adjudication. He argues for a limited applicability as long as the particular norms of private law aim at an (objective) balancing of interests. In contrast, for norms of private law that serve (subjective) regulatory goals, the constitutional doctrine applies. The part ends with a look at the international realm: following a comparative approach, Andreas Engel (§ 8) contrasts the power-based understanding of conflict of laws dominant in the United States with the European objective understanding of the system of private international law. However, he also points to the ongoing convergence of both approaches.

The *fifth part* turns to criminal law broadly speaking. Lucia Sommerer (§ 9) dwells on the risks of trying to create presumed objectivity in the field of predictive policing through the use of algorithms. Martín D. Haissiner (§ 10) analyses the presumption of innocence and its relation to (objective) truth as the goal of criminal proceedings.

The *sixth part* is dedicated to international arbitration, an area in which issues of legal theory are particularly present due to the lack of any sovereign to settle disputes authoritatively. Fabio Núñez del Prado (§ 11) starts this part by presenting his vision of arbitration, characterized by a strong belief in the market mechanism. Inspired by Hayekian thought, he entrusts spontaneous orders to create some kind of objectivity beyond the state. Even though Santiago Oñate (§ 12) also aims at an objective arbitral order beyond the nation state, the foundation of his approach does not consist in the market mechanism but rather in the value-judgments of the international community.

The contributions of the *seventh part* take an interdisciplinary approach. Whereas Peter Zickgraf (§ 13) analyses the potentials of the economic analysis of law to objectivize legal reasoning within the methodological positions of the German legal order, Emilia Jocelyn-Jolt (§ 14) explores the topic of this book from the angle of law and literature.

The *final part* is dedicated to what I call *structural objectivity* in my introduction: it is primarily not about the necessary power- or objectivity-based content of a legal decision but rather about the structures within which we think about law and the necessary consequences that come along with the decision for a particular path. In that vein, Jan-Erik Schirmer (§ 15) points out how metaphors pre-structure our legal thinking, and Alvin Padilla-Ba-

*Foreword*

bilonia (§ 16) unveils the duality of citizenship, which functions as both, a source of rights and an imperialist instrument of power. He thereby points to some kind of structural objectivity, because even though a government might be free in deciding whether or not to grant citizenship, it cannot escape the dual consequences that this decision entails.

Philip M. Bender  
Munich, January 2022

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