After Legal Positivism

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Alexander Somek, **The Legal Relation: Legal Theory After Legal Positivism** (2017).

Legal positivism—or one style of doing positivist legal theory—is dead. Of course, there are different types of legal positivists in the world. For example, some legal positivists take a page out of the book of their opposite number, natural law theorists. But natural law theory[1] —belief in a single right moral answer to legal questions—is going nowhere. To believe otherwise is to evince embarrassingly bad aesthetic judgment. Better to revive/reframe legal positivism. The way to do that is to return to the work of the master, Hans Kelsen, for it is only through a rethinking of Kelsen that legal positivism can be saved from its most ardent supporters in Oxbridge and North America.

This is the opening gambit to one of the most intriguing books in legal theory in recent memory. Alexander Somek—who has written two brilliant books on EU law[2] and an equally impressive book on global constitutionalism[3] —has produced a book every Anglophone legal theorist should read. To be sure, Somek writes in a style most Anglophone legal philosophers will find off-putting. While references to Hegel and Fichte abound, I have never read anyone who has a comparable command of the secondary literature in Analytic Legal Theory. Somek has read everything (in legal theory, analytic philosophy, German philosophy and more) and his analysis of the work of contemporary analytic legal theorists is itself ample reward for the time needed to consider his arguments.

The book is composed of six chapters, each of which contains small subsections denominated by themes (many expressed in one or two words). Like his Anglo-American contemporaries, Somek wants to elucidate the nature of law. Eschewing social facts (Hartian and Razian positivism) and constructive interpretation (Dworkin), Somek maintains that "[l]aw is first and foremost a relation among people." (P. 20.) Somek defends this claim with accounts of legal knowledge and sources of law that can broadly be described as "Kelsenian" in inspiration, if not style.

"Knowing the law is a business." (P. 1.) Thus begins Somek's account of the nature of law. Of course, money and power surround law. But law can be free of their undue or corrupt influence. The vehicle for this, Somek avers, is truth: "[o]nly by virtue of truth can legal knowledge emancipate itself from the undue influence of money and power." (P. 2.) In addition to truth, there is a fact of the matter about what the law "*really* is." (Id.) Thus, objectivity about law is possible but this is attained only if we understand what the law really is about.

Somek believes sources are an important dimension of the nature of law. But his conception of the role of sources in generating a concept of law is rather different from what one usually finds in the literature. Sources of law connect people through creation of a legal relation (e.g., buyer and seller). It is through these relations that agents mediate their presence with the world. Knowledge of the law is subjective (in the sense of individual agency): all sources of law (precedents, statutes, professional commentary) "give rise to law while drawing on other sources." (P. 7.) While knowledge of the law is law's knowledge of itself, "[i]ts point is to attain clarity in singular cases." (Id.) Finally, when we invoke the law we do so through legal relations the categories of which mediate our relationship to others.

Somek describes his approach to legal theory as "constructivist" about law's objectivity. He wants to convince us that modern Anglophone positivism errs when it conceives of objectivity as a correct understanding of existing legal materials (think of Raz's account of law's authority). Knowledge is knowledge "*of* the law *by* the law, that is, of a prior source by a later source." (P. 80.) This view of sources is misleading, for sources are just "devices that permit us to know what the law is." (Id.) Recall Dworkin: law (principles) is a matter of "a sense of appropriateness developed in the profession and the public over time." (P. 4, citing and quoting *Ronald Dworkin, Taking Rights Seriously* (1978).)

Nevertheless, a science of law is possible. A claim to legal knowledge "bearing the stamp of approval by the law necessarily flows from sources of law." (P. 89.) But legal sources alone are not law, any more than law is the union of primary and secondary rules (according to Hart). Law is more than rules: for one thing, sources require elaboration. Systematic elaboration is as much law as its sources. Elaborations, like cases, require endorsement, specifically the assent of players in the practice: "[j]oined practice is the warrant for the shared belief that is a social fact."[4] (P. 95.) Not surprisingly, Somek sees the common law not as a system of legal knowledge, but "a system of endorsements." (P. 104.)

The most intriguing chapter of this interesting book is the fourth one, on *The Legal Relation*. Somek's goal in this chapter is to rethink the relationship between morality and law. Through a synthesis of Hegel and John Mackie—together with a clever hypothetical involving proper behavior at classical music concerts—Somek makes some insightful comments on the nature of reasons for action and how best to understand the role of authority in law. In contrast to Raz, whose widely-endorsed "service conception" of authority sees substantive reasons for actions displaced by law's authority, Somek argues that the authority of law "that emerges from the legal relation is an authority of rights." (P. 125.) I cannot police the poor conduct of fellow concertgoers because the law prohibits such an intervention. As such, law requires that I yield to another's reasons for action even as I disdain the perspective which gives rise to it. As Darwall (who is cited and quoted) puts it, second-personal authority is authority to have wants respected. Authority, it turns out, is much more complex (morally and politically) than a technocratic (Somek's word) account of the concept might indicate.

In the space of such a short review, it is difficult to convey the depth of argument in this engaging book. Somek's sustained treatment of the secondary literature in contemporary analytic legal theory (*Late Legal Positivism*) is not to be missed. Somek is a hard-core positivist: there is a fact of the matter about what the law is. As always, his commitment to truth about law sits uneasily with his nod to the work of people like Stanley Fish[5] and his embrace of a skeptical reading of Wittgenstein on rule-following.[6] But these are minor blemishes on an otherwise compelling and engaging work.[7]

1. Somek identifies Dworkin as the natural law theorist he has in mind: "Natural law is an extension of moral claims to the domain where we have to decide over questions of coercion." (P. 4, citing Ronald Dworkin, **Law's Empire** (1986).) Of course, there is much more to "natural law theory" than the Dworkinian view. Somek recognizes this and has a long and interesting footnote on the matter. See Somek at p. 3, fn. 6 ("Admittedly, the contours of 'natural law theory' as a position in legal philosophy are far from clear."). [?]
2. Alexander Somek, **Individualism: An Essay on the Authority of the European Union** (2008) and Alexander Somek, **Engineering Equality: An Essay on European Anti-discrimination Law** (2011). [?]
3. Alexander Somek, **The Cosmopolitan Constitution** (2014). [?]
4. Obviously, this sounds a lot like Hart. [?]
5. Stanley Fish, **Doing What Comes Naturally: Change, Rhetoric, and Theory in the Practice of Theory in Literary and Legal Studies** (1989). [?]
6. I am identified as a member of the "Wittgensteinian Right." P. 39, note 85. As Somek conceives of this group, he is correct in locating me there. [?]
7. My thanks to Bosko Tripkovic for comments on a draft of this Jot. [?]

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