

Alexander Somek, at the height of his powers, has already enjoyed a long and distinguished career. He is, unlike most of us, altogether at home in both worlds – the Anglophone world with its myopia and the Continental European world with its vast perspectives but, all too often, with analysis that falls short of the mark. Alexander Somek brings the best of both worlds together, and his manuscript is a welcome effort to redress the balance in favor of, as he puts it, a post-legal positivist theory of law.

Stanley L. Paulson, Washington University in St. Louis

A mature masterpiece equaling Hart's Concept of Law or Dworkin's Law's Empire in jurisprudential ambition, originality, and sophistication, *The Legal Relation* is the most important continental European contribution to jurisprudence in the new millennium.

Mattias Kumm, Inge Rennert Professor of Law at the
New York University School of Law and Professor of Global
Public Law in the Berlin Social Science Center

With this bold and provocative book, Somek brilliantly reimagines legal positivism. Every legal philosopher must read this book. The argument is imaginative, penetrating, and ultimately convincing.

Dennis Patterson, Board of Governors Professor of Law,
Rutgers Law School, Camden, New Jersey

THE LEGAL RELATION

What is law? The usual answer is that the law is a system of norms. But this answer gives us at best half of the story. The law is a way of relating to one another. We do not do this as lovers or friends and not as people who are interested in obtaining guidance from moral insight. In a legal context, we are cast as “character masks” (Marx), for example, as “buyer” and “seller” or “landlord” and “tenant.” We expect to have our claims respected simply because the law has given us rights. We do not want to give any other reason for our behavior than the fact that we have a legal right. Backing rights up with coercive threats indicates that we are willing to accept legal obligations unwillingly. This book offers a conceptual reconstruction of the legal relation on the basis of a critique of legal positivism.

Alexander Somek is Professor of Legal Philosophy at the University of Vienna and Global Affiliated Professor of Law at the University of Iowa, where he previously held the position of the Charles E. Floete Chair in Law. He has been a Fellow of the Institute for Advanced Study in Berlin, a LAPA fellow, and visiting professor at Princeton University and at the London School of Economics. He is the author of eleven books.

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The Legal Relation

LEGAL THEORY AFTER LEGAL POSITIVISM

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Preface

In the face of the eventual demise of legal positivism, *The Legal Relation* offers an attempt to rebuild legal theory. The work of reconstruction is informed by viewing law as a morally significant relation among people.

In the intellectual format in which legal positivism persists in the Anglo-American world, it no longer possesses any critical edge; oddly enough, some of its proponents have even made it their intellectual game to incorporate elements of its sworn opponent, natural law theory, into it.

A return to natural law theory, however, is not in the cards. The belief in one morally right answer to legal questions not only reveals embarrassingly bad aesthetic judgment, it also ignores the fact that law is designed to address a predicament of morality.

A new beginning is needed. But where would one go when both legal positivism and natural law theory drop out of the picture? *The Legal Relation* proposes to return to the broader theoretical perspective from which modern legal positivism originated in the early work of Hans Kelsen, namely, constructivism.

Legal constructivism has a negative and a positive dimension. Negatively, constructivism is about stripping the law of unnecessary idealizations. Its view of the law is not intended to be morally uplifting. Positively, constructivism construes the law from the type of relation that the law constitutes among people. Roughly stated, the emphasis shifts from law as a norm to law as a relation. This relation gives rise to sources of law. From these sources, then, “flow” various legal norms.

Constructivism, like legal positivism, accords to sources of law a central role. In contrast to positivism, however, sources are not just constitutive rules designed to capture law-creating social facts. Each source lends to the law a new appearance. The legal process involves sources talking to sources. Indeed, legal knowledge itself must be regarded as a source of law.

Both constructivism and natural law theory recognize the relevance of morality to the resolution of legal questions. The former insists, however, that, within a legal context, morality changes its mood. Within the context of the legal relation, morality can no longer be dead serious. Consequently, a major theme of *The Legal Relation* is the relation between legality and irony.

While the first half of *The Legal Relation* speaks to contemporary legal positivism, it also returns to a way of thinking about law that we associate with nineteenth-century German legal philosophy. While the book aspires to be faithful to this legacy, it does not adopt any particular thinker (*e.g.*, Fichte, Hegel, Savigny, or Puchta) as its revered master.

Owing to its focus on the legal relation, the book rediscovers, in the exploration of alienation, an element of the Marxist critique of law. *The Legal Relation* is based upon a certain view of the purpose of jurisprudence. Legal theory does not invest future lawyers with supreme abilities to resolve hard cases, nor is it about enhancing our technical understanding of the structure of the legal system. Rather, legal theory ought to explain why and how the law matters to our lives.

Living our life we carve out a presence for ourselves in this social world. The inescapable means thereto is agency. Constructivism, ultimately, approaches the law from the conditions of autonomous agency.

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Work on this book commenced, unwittingly, during my time as a visiting professor in the Philosophy Department of the University of Vienna in 2014. I would like to thank Herlinde Pauer-Studer for having been such a gracious and generous host.

The largest debt of gratitude, however, I owe to my favorite American law school. Most of the work on the book was done while I was still a regular faculty member in the College of Law of the University of Iowa. It is with immense gratefulness and fondness that I recount its uniquely congenial atmosphere. I, for one, do not know of any other place where shared academic ambition and mutual benevolence create such a perfect environment for unimpeded scholarly growth. If I have accomplished anything of significance in my life, it is the result of the good fortune I have had as a part of an intellectual culture of friends.