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The Relational Approach to Law

The project reintroduces an understanding of law that views it primarily as a manner in which human beings relate to one another.

To this end, the relational approach reformulates ideas of classical German legal philosophy (*e.g.,* Kant, Hegel) in a vocabulary that is amenable to political liberalism (Rawls). The core of this effort is a reconstruction of freedom of choice (*Willkür*) from the perspective of reasonable disagreement.

The relational approach also seeks to demonstrate that law is the critique of practical reason. Such a critique is a matter of human practice. Not by accident, philosophy of law and philosophy of history are internally connected.

Introduction

This project seeks to work out the approach outlined in *The Legal Relation* (Somek 2017). One of the project's major themes is the constitution of choosing and deciding in an interpersonal context.

Choosing and deciding do not amount to the same. The social face of choices abstracts from reasons for action. Decisions, by contrast, create new reasons by rising above those. Choices may look like decisions, whereas decisions do not do what choices ordinarily do, namely, articulate preferences (see below pp. 10-13).

Evidently, the relational approach takes up themes that have been the shibboleth of those aligning themselves with what Germans call "decisionism". It is a school of political thought that emphasizes the inevitability of resolute and decisive action vis-à-vis long-winding debates and moral justifications (*e.g.,* Schmitt 1934, Lübbe 1975; for a famous critique Habermas 1980; Conrad 2007). In contrast to card-carrying "decisionists" the relational approach does not oppose *ratio* and *voluntas* (on the legal significance of the distinction, see Tuori 2011). Rather, it embeds choices and decisions into practical reason without, however, assimilating them to acts of inferring.

The project aims at nothing short of a systematic exposition of legal philosophy. This explains its large ambition. It tries to break away from the duality of legal positivism and natural law theory and seeks

to explore the meaning of law with an eye to other spheres of human experience, such as art and religion.

The following pages present the major themes relevant to this approach. Some of the transitions may not be fully obvious, and many ideas still remain sketchy. Hopefully, however, it can be seen that the project *almost* amounts to a philosophy of law. Certain topics are absent, such as crime and punishment and, more generally, the question of responsibility. The relational approach offers a certain perspective on law. Short of elaborating a full-blown "system" of legal philosophy it is moderately comprehensive in its scope.

The self-critique of practical reason

There is an idea underlying *The Legal Relation* that remained, however, latent and implicit in this work. Only subsequent expositions of the approach in German have brought it to the fore (Somek 2018a, 2018b). It is the idea that law *is* the critique of practical reason or, more precisely, the critique of practical moral judgment. In the sense with which Kant used the term "critique" for the purpose of his transcendental project this implies the *self-critique of practical reason*.

As I have argued before (Somek 2017, 2018a), the legal relation emerges from according the social dimension of moral judgment priority over its substantive counterpart. This entails, subject to the condition of reciprocity, yielding to the judgment of others in the face of disagreement. Such yielding is expressive of the moral ideals of freedom and equality. We sustain disagreement on the merits, but concede others qua equally free judging persons authority either over themselves or over others, such as ourselves. The legal relation that emerges from such yielding and granting is the historical manifestation of the critique of practical reason and judgment. In mutually granting each other rights we respect that people conduct themselves or others according their own lights, regardless of what these may be.

This view implies that the critique of reason is not confined to thinking, let alone to a philosophical analysis. Rather, it is *immanent* in social practice. This is, concededly, not a Kantian but rather a Hegelian point. Law is historical, and there is a not at all contingent rela-

tion between the philosophy of law and the philosophy of history (Schelling 1800).

Law is a practice of raising and disputing claims and, ultimately, of using force in order to garner respect. The existence of law demonstrates how practical reason comes to realize itself by distinguishing *within itself* between law and morality.

Universalization

Like the *Legal Relation* before, the projected work would like to offer a reconstruction of choice and decision from the perspective of universalization (Somek 2017).

Strictly speaking, universalization means that morally appropriate reasons for action need to be such that they could be the reasons of any person finding him- or herself in the same or a like situation (Hare 1981). The condition is fulfilled as long as nobody accords priority to his or her interests by making an exception for him- or herself. This implies also that nobody must have reason to reject an action were he or she in the position of a person adversely affected by it. As long as a burden imposed on others is considered to be fair, equitable, unavoidable or in any other respect worth taking, the reason for action can stand morally vindicated.

Universalization is an elementary feature of reason that precedes normative claims, narrowly understood. According to Brandom (1994), any asserter is entitled to assert another person's assertion with deference to the authority of that other. What is true of assertions is also true of actions. Real moral universalization occurs by considering oneself entitled to an action in virtue of another person having done the same. To a large extent, indeed, the fabric of social life is woven out of derivative entitlements that are scarcely ever subjected to scrutiny. The claim of reason is in both cases the same, nevertheless. What I consider true or right must appear to be true or right from the perspective of anyone.

Particularity

In the moral domain, however, it is the case that universalizations tend to diverge. This is owing to the influence of different evaluative

outlooks with which people arrive at the same issue. These outlooks determine that weight which universalizers attribute to competing values. Different people weigh them differently.

This demonstrates, above all, that we are particulars. We all universalize, but on the ground of particular evaluative outlooks. Some are more risk-averse than others, some value associative ties more than others, some believe in the overarching importance of wealth over tradition. Cast in the language of the communitarian critique of political liberalism, this means that we invariably determine the right on the ground of what we consider to be good (Sandel 1982, 1996). What communitarians, however, failed to explore more thoroughly is what explains what sways us into one or the other direction or makes us shift loyalties. Arguably, aesthetic appeal plays an enormous role (Liesmann 2008), as is evident in the presentation of styles that wish to pass as cool or zesty.

Disagreement and reasonableness

Particularity, though, is not a deficiency. It allows us, individually and collectively, to be more reasonable than we would be if our moral reasoning took place merely in the echo chamber of likeminded fellow believers. According to John Stuart Mill (1859), the encounter with differences of opinion requires from us to put even deeply held convictions to a test. In his view, this exercises a salutary effect, for it prevents them from becoming idle. Hence, we have opportunity to appreciate their merit even more.

The fact of dissent as such does not imply that there cannot be a right answer (Waldron 1999). But we cannot and should not expect dissent to disappear. In fact, we would be morally and intellectually impoverished if it did. Paradoxically, a position that appears to be supported by unanimous agreement must be suspect of being a result of social pressure and of lacking in substance.

Hence, the first step of the critique of practical reason that is law consists in embracing disagreement. Morally, such an endorsement is possible only by *universalizing particularity*. Its result is the constitution of the legal relation. It eliminates substantive disagreement by rendering different judgments as mere choices. It removes dissent by

casting judgments as something else that is susceptible to universalization. The transformation of judgment into choice—of "There is reason to do x" into "I choose to do x"—represents the self-correction of practical reason that occurs within the legal relation.

This does not mean that the disagreement about the concrete content of a particular legal relation is thereby also absorbed. The elimination on the inside does not extend to the outside. Disagreements over the rules governing legal relations persist. If they are consistently resolved by granting someone authority to lay down the law the critique of practical reason that is law needs to embrace constitutionalism as the only alternative to natural law.

We do not need to dwell on this here.

Similarities to the Kantian approach

It is important to note in which respect the relational approach is similar to, and different from, theories taking their cue from the political philosophy of Immanuel Kant.

The relational approach to law is similar to Kant's perspective in conceiving of the legal relation as external. Not only does it arise in a sphere in which human beings interact with one another and therefore potentially *interfere* with the freedom of others; more importantly, the relation is external inasmuch as within the mutually conceded space of free choice the reasons for choosing remain immaterial. What matters is *that* someone has chosen something. Whatever a rightholder decides to put his or her mind to constitutes an exclusionary reason for action for the person that is thereby obligated (Raz 1991).

The relation is also external in the sense that the obligated persons cannot be expected to comply out of a sense of duty qua belief in the correctness of what they are required to do. This follows from the elimination of the substantive perspective. The respect for choices does not have to be grounded in the recognition of their reasonableness. This explains why "legality", as understood by Kant, is essential for law. It does not matter for law whether the motivation for compliance is merely avoiding sanctions or any other motive, such as a desire to fit in or to pass as a good boy or girl.

Legality needs to be taken into account in how one conceives of the "bindingness" of the legal system. Kantian political philosophers, such as Christoph Horn (2014), speak of "non-ideal normativity" and mean by it the type of obligation that is supported by empirical incentives. People are moved to act owing to the threat of sanctions and yield to sufficient counter-pressure only if they find themselves incapable of exercising greater pressure themselves. The bindingness of law is mediated by mechanisms. This is a matter that rendered Kant's legal philosophy puzzling and ambivalent. We shall return to this point below (p. 18).

Differences to the Kantian approach

At the same time, the relational approach is different from Kant's legal philosophy. Kantians—at any rate, according to the highly plausible reading of Kant defended by Arthur Ripstein (2009)—take the freedom of each person to use his or her own powers for granted. The powers of personal agency and the command over resources are a given and the core question becomes then whether others use these with the person's consent or not. Implicitly, then, the Kantian approach becomes complicit with libertarian ideas concerning self-ownership. Indeed, external freedom becomes assimilated to self-ownership (Cohen 1995).

By contrast, nothing of this kind is implied by the relational approach, for it does not *ab ovo* conflate choice with the choice over the use of personal resources. Rather, the relational approach is in principle amenable to an understanding of freedom that prefers legal relations in which the choices of one person enhance the freedom of another (see below pp. 20-21). Kantians also do not explore how choices as second-personal phenomena (Darwall 2006) or the "externalness" of relations are brought about in the first place. They therefore also fail to appreciate why the law, *qua* social institution, is the historically existing critique of practical reason.

The relational approach is in many respects closer to both Hegel (1821) and political liberalism (Rawls 1991). The proximity to the latter is evident in the focus on the limits of judgment and how these ought to be addressed (Waldron 1999). We do not—at any rate not in the

normal case—mutually concede to one another a right to command other adults what they ought to do, for it is generally assumed that this could never do justice to what is relevant to them from their point of view. Their rights result from the critical correction of the claims of our practical reason. Rights to choose exist as a consequence of the limits of our moral judgment. Moreover, the relational approach follows Hegel in viewing "abstract right"—that is, how we appear to one another within the legal relation—as a construct that gives us an important aspect, but not the fully elaborated picture of the moral world.

Hegel's legal philosophy also has a strong emphasis on "choice", as is not least evident in his characterization of the will as the faculty to decide against the backdrop of an indeterminate range of options. The will embraces this indeterminacy in choosing something on no determinate grounds. The will is the "unity" of indeterminacy and determinateness. The indeterminacy is preserved in the determinate. This is a theme that will recur at later stages of the project (see below pp. 10-14).

From external to internal freedom

The legal relation is made up of correlative rights and obligations and may include mere permissions. Rights leave it to the right-holder to enforce a right. The world of rights is a world where there is always a fork in the road.

The function of rights needs to be seen from the angle of the normative principle that is at the heart of the legal relation itself, namely freedom. The legal relation is about freedom, even though this freedom is subject to the conditions of equality and reciprocity.

At the outset, it must appear that the freedom constituted by according the social dimension of judgment priority over its substantive counterpart (see above pp. 4-5) must essentially amount to wantonness (Frankfurt 1988). After all, legally constituted freedom of choice permits bounded random choices. The freedom guaranteed by the legal relation would thus amount to a licence to choose whimsically, which it arguably does in the external sphere.

But arbitrariness is not what we are looking for if we are concerned about agency *qua* medium to create and to sustain our presence in this world. Unprincipled choices leave no intelligible pattern, in particular, they do not lend shape to a person's practical identity (Korsgaard 1996). Hence, from the internal perspective of agency the whole point of freedom of choice needs to be recast from authorizing wantonness to a means mitigating the pressures of moral conformity (Honneth 2011). Only if the forces of conventions can be pushed into the background or cast aside people can live free lives in which they are capable of being a law unto themselves.

It is at this juncture that the relational approach crosses the line dividing external and internal freedom. So far freedom has been manifest in the absence of interferences with freedom of choice (no coercion, no threats, no bullying; possibly also no removal of options, of which we have said nothing so far), but now we have to examine the value of choice from within a person wishing to sustain a presence in this world. Thus understood, the approach follows Hegel and has the analysis of abstract right followed by an exploration of "morality".

Self-legislation and authenticity

The idea of being a law to oneself gives rise to the well-known paradox of autonomy (Pinkard 2002; Pippin 2008; Khurana 2019; Brandom 2019). If freedom means autonomy and autonomy means to be subject to self-given laws, then the question must arise whether one is also free when one is self-legislating. If one were subject to external forces, any purportedly self-given law would actually bear the mark of heteronomy. If one were randomly picking and choosing laws one would never move beyond wantonness.

The paradox of autonomy forces us to revise our understanding of autonomy *qua* self-legislation (Menke 2018). The revision suggests that we are free inasmuch as we *are* a law to ourselves. Such a conception of autonomy implies, however, that autonomy can be based on discovering an authentic self (Taylor 1991). The idea of self-discovery, however, is defensible only by granting that the relevant process involves the active construction of one's own biography (see, generally, on *Vernunft* Brandom 2009). The construction, however, must be *in-*

tended as a discovery in order to pass as self-determination. Only when this condition is met one determines oneself to be determined by one's self. Choices are an essential element of self-discovery. A significant dialectical relationship obtains between unearthing practical identity and allowing oneself to be challenged by new opportunities (Somek 2017).

Such a modified understanding of autonomy is necessary, even if not sufficient, in order to determine the rights we ought to have. Their root is revealed with an eye to the equal capacity to become who we are by embarking on some project of self-discovery.

The external freedom guaranteed within the legal relation would be morally quite insignificant and merely confirm that which is nature within us if it were not reflective of this internal dimension (see Menke 2015).

Equality and rights

In order to understand the link between internal freedom and the external freedom that is guaranteed by rights the legal relation needs to be brought into focus.

The rights and obligations comprising a specific legal relation have to be laid down by some law-giver. The authority is political in the sense that it permits the resolution of problems in the face of persistent disagreements. All law is positive law.

No progress could be made in the political realm if decisions had to be reached unanimously. Hence, the default voting rule is the majority. The underlying rationale is the rejection of elitism (Somek 2001). No one and no group can claim to possess greater insight than others, at any rate, as long as no issues are concerned that have been recognised to require greater expertise. The opinion of each counts for one. What remains to be done is to aggregate votes. Majority rule is the rule that empowers equals. It lays the foundation of their collective agency.

The principle of equality is inherent in the legal relation. Paying respect to the judgment of others in the social dimension is its first manifestation (see above p. 4). Equality also demands that majority

rule be used as the default standard collective decision-making. At the same time, it limits the use of this rule.
The majority rule must not be used in a manner that is contrary to its egalitarian spirit. This is, however, the case in cases of discrimination.

Discrimination

The first limit that political authority encounters is the prohibition of discrimination. The concept of discrimination, however, needs to be elaborated with an eye to the political context of law-making (Somek 2001). Any unequal treatment of persons is supposed to serve some legitimate public purpose. Political authority is supposed to have the power to choose its laws, and once authority has chosen, the people on the ground are expected to adapt. This means that to a certain extent it is given into their hands to avoid any disadvantages that could affect them in the course of the application of these laws.

Viewed against this background, then, the injustice of discrimination is derivative of the demeaning nature of efforts that people would have to engage in order to avoid disadvantage. History, alas, provides us with abundant examples for debasing practices: Jews had to convert to Catholicism in order to be fully recognized members of society, women had to pass as men, gays as straight. The relevant dismal conditions can be identified with an eye to the space that people lack in order to live self-authenticated lives. Any legal regime that encourages people into self-denial—such as religious favouritism or discrimination on the grounds of gender roles—is contrary to the equality principle.

The relevant grounds of discrimination, however, also point to the liberties that people ought to enjoy, such as religious freedom or the freedom to pursue any professional career. The principle of equality is, then, the point of departure from which constitutional limits on government action can be abducted.

From choice to deciding

Law is the realm of constrained choices that are in principle expressions of practical reason, even if, in the face of disagreements, this reason appears to be person-relative. The limited person-relativity of

practical reason is an outcome of its self-critique. Treating person-relative practical reason as a choice is a way of removing the taint of relativity. It re-enters the sphere of that which is reasonable—person-neutrally and proper, as it were.

At the same time, there is great deal of equivocation underneath the type "choice" (Greenfield 2011).

Immaterial choosings, such as instances of "picking" one item rather than another on a shelf in a supermarket (Morgenbesser & Ullmann-Margalit in Ullmann-Margalit 2017) need to be distinguished from the choice between investing in stocks or bonds. Some choices are made available to people by businesses and governments in order to engage their responsibility even though the people concerned do not understand the issue; or in order to make them select reasonable conduct in the belief that they could have also decided against it (Sunstein 2015). "Nudging" is the well-known version of such a soft paternalism (SunThaler & Sunstein 2009).

Most intriguing, however, is the difference, adumbrated above in the instruction (see above p. 1), between what German permits to distinguish as mere *Willkür* from an *Entscheidung*. According to the relational approach, freedom of choice (*Willkür*) is a second-personal phenomenon. Whether there are good reasons or not does not matter in the interpersonal relation. Resolutions are presented as though they originated from nowhere. They are social facts.

If this experience is mirrored into the first-personal perspective it invites conceiving oneself as a chooser, that is, as someone taking pleasure from yielding to sudden impulses. Arguably, doing so on occasion is integral to being true to oneself, for it permits one to escape from the strictures of social conventions and traditional roles (Mead 1934). Nevertheless, even the integration of the second-personal perspective into the first-personal does not yet reach up to the level at which a choice becomes the mere appearance of a decision. Any choice can be rendered explicable, after all, by giving reason from a first-personal perspective.

Decisions, by contrast, actually sever themselves from reasons for the second-order reason that reasons remain either inconclusive or irrelevant owing to other overriding considerations. Borrowing Joseph

Raz's (1990) analytical matrix, the difference between the first and the second scenario can be elucidated by highlighting the function of the reason that demands that other reasons not be taken into account (the "exclusionary reason"). What Kierkegaard (1843) famously termed the "teleological suspension of the ethical" epitomizes the second scenario. The first is manifest when reasoning about perfect or imperfect or incommensurable (Raz 1986) alternatives is experienced as paralysing and results in the incapability to adopt a course of action. In overcoming this situation, reason-responsiveness is actually moving beyond itself. Whereas in the case of Kierkegaard's suspension the first-order reason to submit oneself to a higher authority is protected by a second-order reason that excludes any considerations of morality, something different happens when reason-responsiveness throws off the shackles of first-order reasons. The second-order exclusionary reason does not protect a first order reason, but emancipates the agent from all responsiveness to reasons, even if in a reason-responsive way. The second-order reason creates a space of indeterminacy where the agent is vindicated in following something that is neither something nor nothing (a feeling, a sense, a hunch, an intuition). In Hegelian language this means, that the will chooses something determinate on the ground of its own indeterminateness.

Since a decision emancipates the agent from pondering inconclusive alternatives, it becomes imperative, then, to abide by the chosen course of action. A decision would not be worth making if one did not stick to it *decisively* (with *Entschlossenheit* in Heidegger's parlance; Heidegger 1927).

Remarkably, the critique of practical reason reaches therewith the point at which no longer first-order reasons are generative of choice, but where the relation becomes reversed. The choice gives birth to the reason to stick to a once chosen path.

Evidently, a great deal of existentialist philosophy is relevant to the exploration of these issues. Much requires clarification here, in particular the question whether decisions aren't after all merely bounded pockets of choice within a tightly knit web of second-order reasons.

Schelling's abyss

It may seem as though a decision is merely the more rare and possibly also more heroic sibling of ordinary choices. The moment of decision is, however, always present outside and inside the legal relation.

The moment of decision is present *outside* of the legal relation for it lurks behind any political allocation of rights and obligations. It resides in any act that overcomes reasonable disagreement.

First, any rule governing a legal relation may not appear to be reasonable for the parties concerned. They will be able—from their own perspective—to view it as a decision that had to be made in order to overcome the stalemate of competing reasons.

Second, however, there is a moment of decision inherent in any legal rule also from the perspective of political legitimacy. Any authoritative resolution of a reasonable disagreement must stay within the ambit of the reasonable. The bounds of reasonableness are usually indicated in the norms of constitutional law. The commitments that they express (such as to the "rule of law") require further elaboration. Conceivably, then, one encounters also reasonable disagreement over how the lines between the reasonable and the unreasonable ought to be drawn. This suggests that this line will be drawn from within the domain of reasonable disagreements. The relevant infuses, however, the bounds of the reasonable with the factual element of decisions. Apparently, reason is historically self-determining on grounds that cannot be fully accounted for. There is something ineradicably factual about what we appeal to as "reason".

Within the legal relation decisions are significant in the context of efforts to live an authentic life. As mentioned above, while—in order to be self-determining—the chooser needs to intend to discover an authentic self, this self is actually construed by examining past experiences in light of a possible future. The question must recur, therefore, from whence such a construction originates. Borrowing Schelling's (1809) parlance, this site is the "ground" of this particular chooser's historical existence. Whatever this site may be it is different from the identity that is construed in the process of discovery. It is not something, but also not nothing. Possibly, it is nothing short of an eternal

"no" said in reply to any determinate existence, but also the longing to exist. The *Grund* is *Abgrund*. The ground is an abyss, the abyss against which practical reason is constructed.

The topic will recur in the final section (see p. 22).

From choices to sources

Within a legal relation the choice of one person is often, but not exclusively, rendered as the ground of an obligation for another. If my landlord terminates my lease I have to move out of my place. If she chooses, I have to act.

Choices—acts of will, in Kelsenian parlance—are a ground of obligations, also for us collectively considered. Choices are contingent social facts. They are neither necessary nor impossible. They can be manifest in speech acts, in human conduct or in routinely practiced modes of reasoning about legal issues. In any event, all social facts that are normatively relevant within the legal relation are sources of law. *Broadly* understood, even an accident is one. Of course, these facts have to be seen in juxtaposition with norms attaching to them a certain normative significance.

Narrowly understood, however, we speak of sources with regard to practices and utterances that give rise to general norms. The chief cases are custom and legislation. Much more contested, but also exceedingly intriguing, is the idea of legal scholarship qua source of law. The discipline is habitually in denial, but this does not alter that scholarship indeed is a source of law.

Sources as forms of knowing the law

Interestingly, sources are not merely facts that are generative of law. Above all, they are modes of knowing the law and, hence, a manifestation of law's subjectivity (Somek 2018b). As a consequence of their subjective nature, each source lends the law a different appearance.

The subjective side of sources becomes intelligible by taking into account what a source aspires to bring about, namely, a clarification of the law. Every source means to tell us what the law is in every single case. The significance of this claim can be understood by juxtaposing the application of a general norm with an appeal to the social fact

from which the norm originated. From the perspective of customary law some behaviour counts as prohibited because the community believes it to be wrong and has manifested this belief on countless occasions in the past. Customary law is a mode of knowing the law. It is the manner of knowing the law that appeals to a shared belief the existence of which is shown in routine practice. Likewise, adopting the viewpoint of legislation it can be said that something is ruled out because we, the legislature, have explicitly said so before. The source refers to a social fact that accounts for the authority of law. It thereby reveals its very own *mode* of knowing what the law is. This mode accounts for the gestalt shifts of the law that occur as the process of knowing the law moves from one source to the next. While an appeal to customary law speaks from within an intellectual space that is supposedly marked by "common understandings" and therefore invariably bound to remain elusive, legislation occupies the commanding heights of those who have authority to say what the law is: "This ought to be so because we have said so". In this context, wishy-washy appeals to shared sentiments are out of place. What must matter, rather, for the purpose of interpretive construction, is the intent of the law-makers.

The special role of legal scholarship

It was the major shortcoming of early versions of legal positivism—the type of positivism that German historians of legal ideas refer to as *Gesetzespositivismus* (Wieacker 1996)—to suppose that the law is complete once it has appeared in the form of legislation. This shortcoming is, however, not really an error or a mistake, for it merely demonstrates loyalty to the legislative perspective on the law. Any source, in order to live up to its claim to articulate and, hence, to know what the law is, has to posit that it is fully capable of clarifying what the law is. Should a piece of legislation appear to be not clear with an eye to a certain set of facts then methods of interpretation should help to elucidate the issue.

Contrary to what the critical legal movements of the twentieth century—such as American Legal Realism, the Free Law Movement, the Pure Theory of Law and Critical Legal Studies—maintained, the

shortcoming of such statutory positivism (*Gesetzespositivismus)* was not merely to ascribe to legislation a level of determinacy that it cannot possess; more fundamentally, our knowledge of the law cannot be complete at the level of legislation because statutes do not apply themselves to situations. They cannot say which of the existing rules it is *appropriate* to apply. This is the task of legal scholarship. In order to link adequately elements of factual situations with elements of legal norms a mode of knowing must intervene that constructs an elaborate system of classifications in order to facilitate the application of norms. Not only is the law thereby given a different shape, it also attains a new form. It exists in the form of contestable claims that, again, have to find acceptance in decisions, which are another source of law that, not unlike legislation, claims that something ought to be done because someone has said so.

Recognition and reconciliation

One does not understand the process of knowing the law that unfolds within the legal relation adequately unless one pays heed to the fact that the law possesses self-consciousness (Somek 2018b). The sources are not merely ways of knowing the law, they are also ways of asserting that whatever is apprehended is also known truly or correctly.

Self-consciousness assures consciousness that that which it is aware of is indeed known by it and locates the authority of such knowledge within itself. The prevalence of reflective conformation explains the tug of war between different styles of legal reasoning. It is a manifestation of a struggle of recognition among sources. It makes a difference, that is, whether legal knowledge aligns itself with legislation or custom. Accordingly, appeals to legislative history or common understandings are of different valence depending on the source on behalf of which they are made. Of course, legislation cannot speak for itself. It has to be given a voice by scholars adopting the perspective of those saying that something ought to happen because "we" (or "they") have said so in the past. The same is true of the sensibilities of customary law. The knowledge claims that are inherent in sources collide on the level of scholarship and remain difficult to reconcile.

Owing to the decisional element of sources the specimens of reason to be encountered in their format are *prima facie* foreign to whoever seeks to obtain guidance from them. More profoundly, practical reason, in embodying traces of choices—historical contingencies—turns out to be alienated from itself. The critique of practical reason that is law has to conclude, therefore, in that the task of legal interpretation necessarily involves the hermeneutic challenge to overcome the irritating "otherness" of reason. Legal scholarship is the hermeneutics of law. The sources of law contain traces of practical reason that may not at all match the practical reason of the interpreter. Nevertheless, legal scholarship has to attempt to make sense of law as a coherent whole, which explains why reasonableness must be attributed to that which emerges from the sources of law.

If understanding what seems to defy our order or intelligibility is the mission of hermeneutics, its task is to reconcile scholarship with sources. Since, however, the interpretive construction of law is not located "outside" of the law but an element of the legal relation the distance to the subject matter is to be preserved. This explains why legal scholarship is—provided it arrives at an enlightened understanding of itself—infused with irony. Legal arguments are never as serious as moral arguments, for they are never expressive of real beliefs. This irony is often ill-conceived by legal positivists as a commitment to "objectivity". They mistakenly cast their task as one of "describing" the legal system.

Compromise and construction

The interpretive construction of law is a social process and, hence, objective in the sense in which the speaking of a language is a socially observable fact. This practice is essentially amenable to making the law ancillary to the pursuit of any objective. Hence, it is perfectly consistent with legality to arrive at interpretive constructions that work to one's favour. Any relevant effort will be crowned with success as long as others do not put obstacles into the path of the interpreter's ambition.

This implies that legal interpretation is plainly and simply a "political" affair. At any rate, it must be supported by political compro-

mises indicating red lines the crossing of which parties will not tolerate. Nevertheless, constructions of law have to be *presented* as interpretations of legal materials in order to pass as expositions of law. This explains why both legal practice and legal scholarship have a dual face. Compromises are clad in the language of interpretation, and constructions can beget sweet harmony of agreement.

The choice to observe the law

Legality of observance, that is, the mere "external" or "outward" compliance with norms, is what we legitimately may ask of one another inasmuch as we participate in the legal relation. This rather modest demand invites, of course, the "bad man's" perspective on the law (Holmes 1897), which is exactly the perspective from which following the law presents itself as a choice. Is it worth it?

Unavoidably, the legal relation constitutes choice from a second-personal perspective in a manner that extends to the question whether one has to be committed to the law. Given that coercive sanctions are legitimate means to motivate the observance of legal demands, the legality of law falls prey to a perspective that expects an "incentive" for compliance. The authority of law is therefore invariably susceptible to reconstruction from the perspective of the "science of choice", namely the economic analysis of human conduct (Becker 1976). Laws are costs.

Law and economics is the single most important revolution of legal scholarship to have taken place in the twentieth century. Its radicalism lies in its reductionism. The hermeneutic orientation is abandoned and replaced with the task of reconstructing the authority of legal rules from the perspective of neoclassical welfare economics. The result is, however, strikingly inconsistent with the legal relation. First, in lieu of carefully processing reasonable disagreement within a morally neutralized space, economic analysis posits one fundamental moral principle, namely that of wealth maximization. The normative Chicago strand offers natural law theory with particularly unappealing distributive results. Second, since neoclassical economics embraces a model of rational choice that is based upon utility functions, it actually eliminates judgment and choice.

The invasion of legal scholarship by economic analysis thus replaces the law with *its very own antithesis*, that is, an antithesis that is fully consistent with its operation.

Imperium and *dominium*

The legal relation gives rise to two forms of authority: The *de jure* authority of those in whom it vests legal powers, narrowly conceived, and the derivative *de facto* authority of those who by exercising rights create a fait accompli for others. The social power that is a consequence of the latter is intimately connected with the right to private property. Since the nineteenth century, Western societies have experienced a tug of war between decentralized economic orderings and politics: or, alternatively put, between property (*dominium*) and sovereignty (*imperium*). The distinction is Carl Schmitt's and Wilhelm Röpke's (Schmitt 1950; Slobodian 2018).

Under democratic conditions, *imperium* is the sphere of political authority. It is earned in the face of disagreement and subject to well-known constitutional constraints. This sphere is, as Martin Loughlin (2003, 2017) rightly underscores, in principle independent from the economy.

The scope of dominion is quite extensive. It not only covers a great variety of private dealings, but also the regulatory strategies with which market actors seek to gather information (e.g., rating agencies) and to sustain trust (e.g., standard setting). The private sphere is remarkably independent from its political counterpart and extraordinarily capable of regulating itself and of managing dispute resolution. It seems as though the state is needed only in order to sustain a monopoly of force. Not by accident, Hegel viewed the "external state"—the "state of necessity"—as part of civil society (Somek 2014).

The political element of *imperium* is manifest in the ambition of people to emancipate themselves from the necessities that arise as unintended consequences of the spontaneous orderings in the private sphere. The most appealing vision of what a political ordering of society is able to accomplish is a mode of realising legal relations that would finally reintroduce the relational component into a context that has so far been dominated by the respect for choices.

Emancipation and social freedom

Keen interpreters of Hegel's social philosophy such as Frederick Neuhouser (2000) and Axel Honneth (2011, 2015) have most recently reinvigorated the theory of social freedom. This freedom is, essentially, not *only* about having a choice but *also* about being present in activities and goods that one cares about. Simply put, it concerns not the possibility ("choice"), but the *actuality* of freedom. Indeed, social freedom is the condition for living fully authentic lives (see above p. 8).

Arguably, the social presence of persons in their *own* doings depends on two conditions.

The first condition has made Hegel's philosophy of law perennially controversial even though Hegel began with a relatively uncontroversial premise. One is not really free—or: one is only *formally* free while substantially alienated from oneself—if one's status or action is experienced as resigning oneself to a foreign force or will. People can through their own choices relinquish themselves to fate. This is not terribly controversial. Hegel's views become divisive when we are told that individuals can overcome a state in which they are detached or alienated from their own lives if they reconcile themselves with traditional social roles. The explanation for this proposition, which must smack of conformism, is that individual freedom can be "actual" only if it fits into an already existing social world.

The second condition of social freedom says that the participants in such an institutional setting recognise their mutual dependence and embrace it either affectionately or in a spirit of loyalty and solidarity. Their relationship would be altered profoundly if it became asymmetrical and one person took advantage of the weakness and vulnerability of others.

Social freedom is realised in relations that may be facilitated in exchanges even if their internal logic is different from merely catering to preferences. It may be essential, rather, that preferences and tastes are formed within them. This explains why aspects of a culture of social freedom can be spelled out in terms of Michael Walzer's "art of separation" (2017). It suggests that spheres of relatively spontaneous inter-

action may have to be relatively immune from the influence of other spheres, in particular the circulation of money. Other than the spheres themselves, these walls are not a result of spontaneous orderings. Building and sustaining their integrity requires joint political action.

Social freedom is not confined to dyadic relationships of reciprocity. It can be manifest in society-wide support of others for the reason of seeing one' own life enriched by the lives of others; "enriched" not in the sense of having someone work for you for your own satisfaction, but enriched in the sense of being part of something greater with whom one identifies. An instructive example is public support of classical music. Only a very small number of people actually benefit from subsidies by attending performances. A large number is not interested in these events. However, their support expresses their will to live in a world where classical music can exist. The reciprocity lies in being part of the totality that is thus sustained.

Apparently, the realization of social freedom requires strong political authority. And there is, as is well known, a problem.

Externalities and federalism

The struggle, however, of political democracy to assert itself vis-à-vis the economic sphere is compounded by a problem of vision that has beset democratic thought since the rise of neo-liberalism.

According to what I have earlier called "the darling dogma of bourgeois Europeanists" democracies are inherently undemocratic because they possess boundaries. Owing to their boundedness democratic political processes exclude outsiders who are not or only inadequately represented. It seems to follow that democracies ought to be stripped of boundaries. But doing so would, at best, transform them into one unbounded deliberative sphere that is incapable of engaging in any collective action. While bounded democracy is internally deficient, unbounded democracy is without power. The first must not, the second cannot rule.

The way out of this predicament is federalism.

Generally, there are three reasons for federalism that require careful exposition: First, the desire to stay small while having greater impact on issues of interdependence in order to sustain the smaller scale;

second, the desire of a political unit to grow beyond itself and to merge peacefully into something larger; third, to avail of a justification for the power exercised within bounded political units. It is this third justification that addresses the perplexity inherent in the darling dogma.

Inscrutable and ultimate decisions

The perspective on federalism concludes the critique of practical reason that is law. Concededly, the final stage of the project appears to be remarkably Kantian.

Nevertheless, the exploration of decisions is thereby not exhausted. It needs to be complemented by adding at least two perspectives on the ultimate free decider, *i.e.* the God of Western European philosophy.

The most important decision that affects human beings for better or worse is God's choice to save some and not all. This decision is not made on the merits. Ever since Augustinus (397) has introduced this idea it has bewildered theologians and philosophers. As is well known, it has left a strong imprint on Calvinist theology. Is omnipotence on the part of the decider a sufficient condition for finding it acceptable? Or do we have to believe in some wisdom that must forever elude mortal creatures? It is with respect to God's inscrutable decision that their legitimacy can be analyzed from the ground up.

The most perplexing decision that can be imagined marks one of the enigmas animating Schelling's (1833) late philosophy. In Schelling's view, the ontological proof for the existence of God is an insult to God, for it necessitates God's existence. It does not leave God any choice not to exist. But, if anyone, God is free, and therefore God has to be free to decide himself into existence. This raises the question of what God can be imagined to have been before he decided to exist.

Schelling explored this question from various angles, including the idea that God contracted himself before creating the world that is coextensive with him. The distinction between ground and existence and the ground preceding existence is also of relevance here, with ground standing for a perennial negation of order and reason.

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