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Hart's Internal Perspective: Not a Matter of Endorsement? Comments on Alexander Somek's Review of *The Concept of Liberal Democratic Law*

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On the whole, Somek's recent review of my book *The Concept of Liberal Democratic Law* is strikingly incongruous and self-contradictory. Considered in detail, it is grossly inaccurate and contains flagrant mistakes about elementary legal theory. Its tone and style, moreover, are unscholarly and un-collegial. In the comments that follow, I believe I make it abundantly clear that my book is not at all what Somek presents it to be.

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I. Introduction

There is something fundamentally incongruous about Alexander Somek's 15-page review of my book *The Concept of Liberal Democratic Law* (*CLDL*) in the March 2021 issue of the *Modern Law Review.* Why does one write a 15-page review for a prestigious law journal if the aim of the review is basically to present the book as not worthy of being read? I always tell my doctoral students as a rule of thumb: never discuss at length a book that you consider bad if your only purpose is to show how bad it is. Nothing good can come from that kind of scholarship. What, one must ask, is academically interesting about the kind of book that Somek portrays in his review that warrants reading it to the end and writing a long review article about it?

There is also something deeply contradictory about the whole review that magnifies the question raised above. How did Somek manage, on the strength of the incompetence that he imputes to 10 out of 11 chapters of the book, to arrive at an assessment of the key thoughts in my book as 'amazing and powerful.' Somek's express suggestion is that readers should skip chapters 1 to 10 and go straight to

chapter 11 for it is only there that, at long last, one finds some 'amazing and powerful thoughts.' (at 395–96). This is quite astounding when one considers the fact that the 'amazing and powerful thoughts' developed in chapter 11, consist of nothing but a concise recapitulation of the thoughts developed in chapters 1 to 10. In other words, one is left with the perplexing question of how the upshot of 10 bungling chapters can so instantly morph into a set of 'amazing and powerful thoughts' in the eleventh.

There is one last introductory point that I wish to make. In the grip of his remarkable wish to put the scholarly standard of my book in doubt, he did not shy away from committing what in my opinion must count as one of the most glaringly obvious mistakes about basic legal theory that one can imagine. I am referring to his understanding of the internal perspective to rules that Hart develops in *The Concept of Law.* I point this out in section III, point 13, below. The title above also refers to it.

In what follows, I first provide a short description of the central aim pursued in *CLDL* (section II). I then respond to 13 of Somek's misgivings regarding my book (section III). In one of these 13 misgivings, Somek makes one small point — no less pernicious in tone and style than the other 12 — that I am prepared to concede, and I indeed do so below (section III, point 8). I deal with 10 of the 13 misgivings very briefly. The first and the last two receive more extensive attention. Thereafter, I turn to the substantive argument that Somek raises in response to *CLDL* and briefly respond to it (section IV). After this I move on to a short concluding observation (section V).

II. What is *CLDL* about?

CLDL develops an historical concept of liberal democratic law through readings of pivotal twentieth century legal theoretical positions articulated in the work of Herbert Hart, Ronald Dworkin, Duncan Kennedy, Hans Kelsen, Carl Schmitt and Rudolf Smend. It assesses the essential jurisprudential positions of these theorists against the background of a long history of European metaphysics from which the modern concept of liberal democracy eventually emerged. More specifically, *CLDL* asks this question: to what extent did these theorists basically take over the language that Aristotle bequeathed to Western legal and political thought, and to what extent did they resist this language? The more they resisted this language, argues *CLDL* in response, the more they prepared the way for the rigorous conception of liberal democratic law that modern societies — pluralist and socially divided as they are — require.

III. Are Somek's misgivings about *CLDL* well-founded and pertinent?

1. CLDL 'offers quite a bit of second-hand history of philosophy. For example, the few pages on medieval nominalism and voluntarism appear to have been taken right out of Villey' — Somek at 396.

It is not surprising that the history of nominalism and voluntarism in chapter 1 would strike Somek as 'taken right out of Villey.' It is surprising, however, that he finds this peculiar, considering that the aim of the chapter is to expound the Villey thesis. The title of the chapter spells out this aim in capital letters: NOMOS AND NOMINALISM — THE VILLEY THESIS. It makes perfect sense that an exposition of the Villey thesis would mostly be taken out of, well, Villey. Villey considers modern positivist conceptions of law and subjective rights a direct result of the nominalist revolution in medieval scholasticism. This development is an important point of departure for the argument about liberal democratic law in *CLDL*. Unlike Villey, who laments this development, *CLDL* considers it a crucial step towards a liberal democratic conception

of law and legal rights. *CLDL* considers the nominalist revolution in medieval scholasticism a first important step away from Aristotelian metaphysics in Western philosophy and therefore a first important step towards the non-metaphysical concept of law required in liberal democracies.

For the record, there are two other pieces of history in *CLDL* that one can indeed consider 'second-hand.' The first concerns 11 pages on medieval history in chapter 5 (*CLDL* at 85–96). The second concerns 10 pages on 19th century history in chapter 6 (*CLDL* at 112–115, 119–124). Both are taken from impeccable sources and there was no need for me to try and re-invent the wheel with regard to either of them. Both played an important role in the narrative that I wanted to develop.

The 11 pages of medieval history are taken mostly out of Joseph Canning's exquisite (and most well-received among historians) *A History of Medieval Thought 300–1450* (Routledge, 1996). I used key aspects of Canning's book to set the field for playing off Villey's and Schmitt's completely opposite assessments of medieval politics. Schmitt stresses several times in *Der Nomos der Erde* that it is a widespread error to speak of the anarchy of the Middle Ages — *[E]s ist eine weitverbreitete Irrtum, von der Anarchie des Mittelalters zu sprechen*' (see *CLDL* at 94). Villey, on the other hand, considers the nominalist and voluntarist revolution in late medieval thinking a consequence of the crude structures of government that medieval powers built on the ruins of the Roman empire — *sur les ruines de l'État romain ils ont grossièrement reconstruit un régime social fait des maîtrises individuelles* (see *CLDL* at 99).

These very different assessments of medieval law and politics by two leading legal theorists of the 20th century offer a refreshing angle to the teaching of medieval legal thought, but I also consider them intellectually intriguing as a legal theorist. Canning's exposition of key moments in the history of medieval political thought — the Eusebian conception of the historical significance of the emperor Constantine's reign; the Roman law conception of emperorship; the struggles between secular and religious power that developed in the Western Empire after the fall of Rome and lasted till the 14th century — ultimately appear to favour Villey's rather than Schmitt's assessment of medieval politics. But it also provides an important background that underlines the historical significance of Bodin's and Hobbes' 16th and 17th century conceptions of undivided sovereignty and the idea of unitary popular consciousness that arose in France towards the end of the 18th century.

The second bit of 'second-hand history' mentioned above is taken from Pierre Rosanvallon's *Le people introuvable* (Gallimard, 1998). It shows how soon the experiment with unitary popular consciousness unraveled in the years of the French Revolution. I return to this bit of history under point 4 below. Suffice it only to note here that all these historical developments — along with the 17th century religious conflicts with which *CLDL* also engages with reference to the so-called 'Böckenförde dictum'[1] — underline the sheer fragility of political order in Europe throughout this long history. A clear regard for this history of institutional fragility is crucial for the concept of liberal democratic law that *CLDL* puts forward. In view of the overarching argument in *CLDL*, its brief reliance on a select number of reliable sources to bring bits of relatively well-known history into play does not strike me as questionable scholarship.

2. The discussion of Protagoras' homo mensura *statement, Sophocles'* Antigone *and Aristotle's potentiality–actuality distinction is 'unconnected.' Why they are discussed together 'remains a mystery' — Somek at 396.*

There is, I would suggest, a very strong narrative connection between Protagoras, Sophocles and Aristotle in *CLDL*. Protagoras' *homo mensura* statement and Sophocles' *Antigone* are presented as registers of a deep crisis in Greek or Athenian consciousness. Aristotle's potentiality–actuality distinction is presented as an endeavour to resolve this crisis. I make these connections very firmly and perhaps rather adventurously so (see *CLDL* at 55–69). Towards the end of chapter 3, *CLDL* puts forward this assessment of Aristotle's position: 'Perhaps Aristotle just did not have the nerve to walk the tightrope between the political and the poetic that Protagoras and the great tragic poets had drawn tight for him' (*CLDL* at 69). And it then moves on to suggest in chapter 4 that Aristotle's potentiality–actuality distinction was his way of avoiding this tightrope. Scholars who specialise in Greek philosophy and poetry may well be reluctant to make these points as firmly and confidently as I do. But there is no way that any reader of these parts of *CLDL* can credibly allege that they see no connections here. One has to be wilfully obtuse not to see them.

3. The main argument suffers from a 'puzzling' contradiction. 'Readers cannot but scratch their heads when they realise that, while the collapse of the distinction between actuality and potentiality is apparently to be welcomed, the uniting of auctoritas *and* potestas *in one hand necessarily leads to murderous regimes.' — Somek at 396.*

Of concern here is the link that political theorists recognise between Aristotle's potentiality–actuality distinction and the *auctoritas–potestas* distinction drawn in Roman law and politics. The potentiality–actuality distinction is pivotal to Aristotle's teleological metaphysical scheme in terms of which all things move from a state of mere potentiality to fully actualised existence. In Roman political and legal institutions, this distinction was reconceived in terms of the senate's authority or *auctoritas* to recognise the essential but still only 'potential' political order that the governmental powers or *potestas* of the Roman magistrates had to 'actualise.' Giorgio Agamben discusses this link between the potentiality-actuality and the auctoritas-potestas distinctions at length in his book *State of Exception*.[2]

Now, there is absolutely no suggestion in *CLDL* that the collapse of the potentially-actuality distinction should be welcomed. The argument is at all times that the distinction, as articulated by Aristotle, tends to collapse by itself, and that Jewish-Christian messianism that Agamben explores with reference to St. Paul[3] is a very plausible and forceful way of avoiding this collapse. This argument goes to the heart of the thoughts in chapter 11 that Somek calls 'amazing and powerful.' It is key to the 'distilled' concept of liberal democratic law put forward at the end of chapter 11.

4. The author never gives demos 'a chance' of being regarded as more than an ominous fiction — Somek at 396.

It is history that never gave demos a chance, not me. *CLDL* indeed observes that the *demos* — or anything that one might broadly associate with unitary popular sovereignty — did not have much of an innings in European history before the French Revolution. This is surely not a controversial claim. Whatever popular uprisings occurred before this time were all too quickly suppressed by monarchies and attendant hereditary nobilities. The French Revolution is considered the epochal event that it was because it was the first significant 'moment of the people' in the history of Europe, as was the American Revolution in America. *CLDL* also observes that this moment did not last in Europe. This is also surely not a controversial claim. I also do not think any historian

would consider it controversial to claim that the revolutionary unity of the people was also rather short-lived in the United States.

CLDL does not go into American history, but it does go to the trouble of showing, and in considerable detail, how the universalist claims of the French revolutionaries very soon turned into the sectoral claims of the propertied bourgeoisie from which citizens without property — the emerging working class — soon dissociated themselves. Anyone who is still inclined to invoke the notion of a unitary demos so easily in this splintered age that is ours should take a good look at the 19th century *effritement* (shredding) of the revolutionary demos that Pierre Rosanvallon traces with such depth in his book *Le peuple introuvable.* Chapter 6 of *CLDL* engages extensively with Rosanvallon's thesis. In this regard, I believe it offers a helpful starting point for anyone interested in the historical background of the social divisions that John Rawls identified as the key concern of liberal political theory. And this reality of social division — elaborated further in *CLDL* with reference to especially Hart and Kelsen — is the essence of the massive historical challenge that the ideal of liberal democratic law still faces today.

5. The incoherent and 'accidental' lumping together of Bentham, Mill, Savigny, Hegel, the Freirecht movement, Sociological School and American Realism in chapter 7 leaves the reader 'bewildered' — Somek at 396.

Chapter 7 of *CLDL* deals with 19th century and early 20th century political, legal and social theory, all as part of a general description of the search for universally shared political interests and concerns that ensued soon after the French Revolution, and surely not only in France. As already pointed out above with reference to Rosanvallon, the revolutionary conception of universal concerns that would unite all members of all political communities already fell apart very quickly in the years after the French Revolution. Chapter 7 of *CLDL* presents all the 19th and early 20th century theoretical developments mentioned above as different strands of the search for the uniting 'universals' that were lost in the wake of the French Revolution. The chapter subheadings already tell the story: 1) the utilitarian and economic unity of the people; 2) the historico-spiritual and conceptual unity of the people; 3) the social unity of the people.

How can it be perplexing to a professor of legal philosophy, no less, that Bentham, Mill, Hegel and Savigny — the great contemporaries of the age — would take centre-stage in the discussion of the major theoretical developments of this time? And can it really be such a stretch for any legal theorist to see how this discussion must eventually lead to a discussion of the revolt against Savigny's Pandectist formalism (and American formalism on the other side of the Atlantic) in the *Freirecht*-movement, the Sociological School, and the American realists? Yes, the law and economics movement came later, but now, is it really so difficult to see the point of discussing the law and economics movement as a market-theoretical and legal theoretical specification of the utilitarian theories of Bentham, and Mill?

6. The argument in chapter 7 is disturbingly superficial. It presents the Freirecht movement as 'though it paved the way for jurisprudence of National Socialism' — Somek at 396–97.

CLDL does *not* present the Free Law Movement as though it 'paved the way for the jurisprudence of national socialism.' It stresses the completely different moral

universes to which Free Law and National Socialist jurisprudence belonged and expressly endorses its sobering revolt against the toxic formalism of 19th century legal science (*CLDL* at 165–67). How could a reviewer of my book have come to such a wrong-headed idea? Chapter 7 does point out a problematic aspect of Free Law jurisprudence that National Socialist jurisprudence jumped upon and used without reserve for its own purposes. I rely on the work of serious and thorough German scholars — Ingeborg Mauss and Okko Behrends — for my arguments (see *CLDL* at 166). Somek dismisses the work of these scholars as 'one sided' and 'secondary' without offering substantiation for doing so. The unscholarly (and perhaps I could even go so far as to say un-collegial) nature of this dismissal speaks for itself.

7. 'The more the checkered history unfolds, however, the more the superficiality becomes apparent. The German public law scholar Rudolf Smend is squarely put into the 'Aristotelian' camp. This is as nuanced and fine-grained as it can get if it does not occur to you that the relevance of 'life' in Smend's geisteswissenschaftlicher Methode *may reflect the influence of Wilhelm Dilthey, Theodor Litt and other varieties of the philosophy of life (*Lebensphilosophie*)' — Somek at 397.*

The discussion of Smend's work in chapter 9 of *CLDL* engages expressly with Smend's view that the Aristotelian or ancient conception of natural political unity is no longer feasible in the modern age (*CLDL* at 210). I refer expressly and with emphasis to Smend's *geisteswissenschaftliche Methode* (*CLDL* at 205). I deal extensively with Smend's resort to Hegelian dialectics for purposes of articulating an historical conception of political unity for which Greek naturalist thinking no longer allowed, according to him. I argue expressly and extensively that Smend got his Hegelianism not only directly from Hegel, but also from Litt, whose thinking was also consciously and expressly Hegelian (*CLDL* at 208). I indeed do not refer to Dilthey, references to whom are sparse and rather 'in passing' in Smend's work. Had they been more prominent, I surely would have highlighted them, because it is indeed the *Lebensphilosophie* in Smend's thinking that I consider problematic and irreconcilable with the concept of liberal democratic law. Yes, in the end I bring all of this back to Aristotle, but I offer arguments for doing so of which Somek does not appear to have taken any notice.

*8. 'It pains the reader' to see Schmitt's '*konkretes Ordnungsdenken*' presented as '*Ortungsdenken*' — Somek at 397.*

Granted, the reference to Schmitt's '*Ortungsdenken*' is a stylistic slip. It is, however, not a substantive or interpretive mistake to refer to Schmitt's *konkretes Ordnungsdenken* as *Ortungsdenken*, for that is exactly how the mature statement of this *konkretes Ordnungsdenken* in *Der Nomos der Erde* presents it. The whole first section of *Der Nomos der Erde* describes the law as '*Einheit von Ordnung und Ortung*' (unity of order and 'placing'). It is nevertheless a stylistic mistake to impute this term in its compound form to Schmitt himself, and I fear my text does this on the pages that Somek indicates (*CLDL* at 38, 148, 226). I thank him for pointing that out. I hope a future edition of my book will allow me to correct this.

9. The most awkward misreading, however, concerns another one of the author's intellectual heroes, namely Giorgio Agamben. The author lets Agamben say (in quotation marks that remarkably also contain parentheses) that Saint Paul '[wrote in

Greek, but thought in Yiddish]'. This is, in spite of the use of quotation marks, not a quote from Agamben who on the pages cited by the author refers to Jakob Taubes who replied to Emil Staiger's comparison of Paul's Greek to the German of medieval Ashkenazi Jews, called 'Yiddish' — Somek at 399.

There is no misrepresentation of Agamben in *CLDL*. My quotation of Agamben's reference to the 'Yiddish Saint Paul' does not attribute the origin of this reference to him, as Somek suggests. The fact that these words originally come from an exchange between Staiger and Taubes and not from Agamben himself, as Somek observes correctly, is also of absolutely zero importance for the point that I wish to make with the invocation of the 'Yiddish Saint Paul.' Agamben tells this story about Taubes and Staiger in the course of his presentation of Saint Paul as a typical Jewish-Messianic, as opposed to a Greek thinker, despite the fact that Saint Paul wrote in Greek. And that is all that my invocation of the 'Yiddish Saint Paul' aims to reflect. There is no slippage of meaning in my quotation of Agamben (*CLDL* at 80) that bends his argument in a direction that it did not intend to go. The 'parentheses' to which Somek refers are also not parentheses but square brackets that most scholars will read as a clear indication that the quote adapts the text and does not reproduce it precisely. And frankly, I do not understand why Somek considers the long story about Taubes and Staiger so important. He makes no point at all from his side about its relevance for the way in which *CLDL* relies on Agamben's text.

10. 'The message of the book takes its shape through a concatenation of 'likings' or 'dislikings' of certain ideas' — Somek at 400.

Somek imputes an emotivist mode of reasoning to *CLDL*. According to him I simply proceed by postulating, for example, that natural law is bad, nominalism and sovereignty are good, and so forth. *CLDL* does nothing of the kind. It draws a series of conceptual distinctions taken from the history of metaphysics and political theory and arranges them according to their compatibility with the concept of liberal democratic law. This concept, like all others, has a specific conceptual profile. Some things are reconcilable with it; others aren't. That's all.

11. 'None' of the elements of the definition of liberal democratic law proposed at the end of CLDL are 'reminiscent of Locke or Mill, let alone Milton Friedman' — Somek at 395.

This seems an excellent reason for reading the book. It would appear there is something refreshingly original afoot in it.

12. The argument in CLDL is 'awfully long' and 'protracted' …

This is the first of two last points with which I would like to deal in more detail. For this I purpose I will also quote Somek more extensively:

> It takes the author awfully long to arrive at his concept of liberal democratic law. After having gone through the whole text one wants to caution readers not to spend too much time on anything beyond the introduction and the final chapter (for a similar, less forthright advice by the author himself, see xii) … The other chapters, by contrast, offer relatively protracted, amazingly unconnected, occasionally superficial and at certain points somewhat embarrassing interpretations of the works of others. (Somek at 396).

The reference to my advice to the reader (see *CLDL* at xii) that Somek invokes here, concerns my own acknowledgment in the preface to the book of the structural problem that results from its twofold ambition. On the one hand, the book aims to be useful as a textbook for students (it developed out of class notes for first year students and I am now using it as a text book for them). On the other hand, it aims to put forward an argument about the essence of liberal democratic law that I consider a pertinent contribution to contemporary legal theory. The former aim necessarily requires that one covers quite a wide range of themes and topics. It is standard to want to introduce first year law students to the key thoughts of ancient Greek, medieval and modern philosophers, as well as to key developments in legal theory from 19th century formalism, the Sociological School, the *Freirechtschule*, the American realists, Kelsen, Hart, Dworkin, and key exponents of the Critical Legal Studies movement. It is also quite standard for legal theory textbooks to do this quite in a fragmented way, by treating all these developments as islands or pockets of thought without integrating them in a compelling and interesting historical and/or conceptual narrative.

CLDL complies with the first standard and deliberately breaks with the second. It provides newcomers to legal theory with enough information about all the legal theoretical developments listed above on which they can be examined at the end of the semester. But it also provides intellectually curious students — those who are typically bored to death with studying legal theory as an ensemble of unrelated thoughts — with an historical and conceptual narrative and framework on the basis of which they can engage with the pressing questions that legal theory faces today. This makes the book, at least in my experience as a teacher, a valuable prescribed text (also in advanced courses). At the same time, however, it also aims to contribute a probing argument about key questions regarding liberal democratic law with which scholars in this field of research can engage. The former aim may render the book somewhat protracted as far as the latter aim is concerned, and I alert readers to this possibility and invite them to read on faster through parts of the text that may strike them as somewhat too familiar territory. There is, however, no suggestion in the book (not even a 'less forthright' one) to anyone to skip chapters 1 to 10 and go right to chapter 11, as Somek suggests. I am convinced that every chapter of *CLDL* contains enough original thinking on each of the legal theoretical developments listed above to engage not only students, but also advanced scholars in the field of legal theory.

Two of the other allegations or accusations piled up in the quote above — unconnected chapters and superficiality — have already received enough attention above. Only the matter of 'embarrassing interpretations' — still demands attention. And this brings us to the most startling aspect of Somek's review of *CLDL*.

13. 'Embarrassing interpretations'

Somek's invocation of 'embarrassing interpretations' pertains to my interpretation of Hart and Kelsen. He writes:

> Matters become worse when the author mistakes Hart's internal aspect of rules for an attitude of acceptance or endorsement. As is well known, Hart referred to the internal aspect of — or viewpoint on — rules in order to explain that people obtain guidance by using them as critical standards. Being guided by rules does not in and of itself amount to their substantive acceptance. One can obtain guidance by adopting the internal perspective even if one is substantially detached from the relevant normative standard. One can, for example, point out to adherents of a religion that their understanding of their professed faith is misguided by speaking from what they regard to be their relevant point of view. One can accept what their religion teaches as the relevant standard for

> their conduct without thereby accepting this standard for oneself. The author's conflation of guidance and substantive acceptance plays a central role for his outlandish claim that Kelsen and Hart, possibly along with Kant, are major trailblazers of the liberal concept of law simply because they accommodate the coexistence of the internal and the external perspectives on law. (Somek at 397–98).

To begin with Hart: Somek's understanding of Hart's internal aspect is, I suggest, simply wrong. His didactic example is, on top it, completely miscued. It attributes an internal perspective to someone who obviously does not have one.[4] The intrinsic element of endorsement or acceptance in Hart's concept of internal aspect is the heart of Hart's critique of the 'gunman model' of law. His whole distinction between 'having an obligation' and 'being obliged' turns on this point. You give your money to the gunman because you want to avoid the negative consequences of not doing so. You give your money to the receiver of revenue or an official who collects payment of fines because you accept there is a good enough reason for doing so.[5] If you do not accept that there is good reason for doing so — in other words, if you reject the rule that demands that you do so (as many members of a society indeed do with regard to many rules) — you basically have an external perspective on that rule. Hart relates the distinction between internal and external perspectives in the clearest of terms to the opposition between the voluntary acceptance and the rejection of legal rules.[6]

As for the 'outlandish claim that Kelsen and Hart, possibly along with Kant, are major trailblazers of the liberal concept of law … simply because they accommodate the coexistence of the internal and the external perspectives on law', that is indeed my claim and I do not see why anyone would consider it 'outlandish'. In the case of Hart, the Hart–Devlin debate speaks volumes in this regard, as Nicola Lacey notes well in her biography of Hart (cited in *CLDL*).[7] As for Kelsen, he expressly defines liberal democracy in terms of the sustenance of majority–minority relations (relations between those with internal and those with external perspectives regarding a divisive rule, in Hart's terms).[8] Does the holder of the Chair for Legal Philosophy in Vienna, of all places, really wish to deny or doubt this?

IV. Irrationalism and 'factual beliefs'

When Somek finally turns to comment on the substance of the argument in *CLDL*, he ascribes to me a 'deflation of reason into a means to evoke attitudes' that 'comes perilously close to embracing some form of irrationalism.' (at 395). He concludes that I would have done better had I taken on board '[m]ore Hegel [and] less Hart.' (at 407). He does so on the basis of an expressly Hegelian argument about a historical externalization of reason that overcomes the alienation of this externalization through the intervention of a certain facticity that throws us into factual states of belief.

The point that Somek makes here strikes me as potentially highly interesting. I share his interest in Hegel and respect his ability to engage with the old philosopher in a refreshing way. It is a real pity that he simply ignored the prominent engagement with (and obvious reverence for) Hegel in *CLDL*, not just in chapter 7, but also towards the end of the book. The whole theme of 'divided life' that I take into my final definition of liberal democratic law comes straight out of Hegel. I guess it was just my particular bad luck that a legal theorist truly capable of engaging incisively with this part of my argument had a grand opportunity to do so, but preferred (for whatever reason) to let it pass. It would not have been necessary to end up seeing eye to eye in this regard. He probably would in any case have opted for his '[m]ore Hegel [and] less Hart' in the

end, and I suspect I would have stuck to my 'more Hart and less Hegel.' But we could have had a really good discussion.

As things stand, however, his 'Hegelian point' is simply left hanging rather pointlessly. It leaves one wondering what 'something factual … that throw[s] us into states of belief' (at 407) offers in response to the problem of irrationalism that Somek raises. And it also leaves one wondering why anyone would consider this a remotely insightful response to a long and careful argument that takes factual states of belief — and the divisions to which they give rise — as its critical point of departure. This is the argument that *CLDL* develops from the beginning to the end. This is the critical question to which it responds. It has nothing to do with irrationalism and does not end up close to it. It takes the reality of the political as its point of departure and explores the most rational way of dealing with it.

V. Just a case of *his* perceptions of *CLDL* against *mine*?

This is the first time that Somek and I have engaged in scholarly exchange. There is no previous record of conflict or ill-will between us. I have never commented on his work before, either in writing or orally. I have not read his work extensively, but what I have read has always struck me as interesting and of a high standard. It surely left me with enough reason to consider him a distinguished scholar and colleague. Why our first academic encounter should have come to pass in this way is inexplicable to me.

Perhaps one should therefore simply accept that all of this points to a simple case of a reviewer and an author having very different perceptions of a book, the one negative and the other predictably positive. Unfortunately, the style in which the review was written and the patent inaccuracies in it pointed out above prevent me from doing so. My replies to Somek do not suggest that we simply have two different views of *CLDL*. They make it abundantly clear that, in my opinion, he had — from the start to the end — no real interest in a close reading of *CLDL*. There is absolutely nothing in his review that attests to any real engagement with anything I wrote in the book. Having reflected carefully on the substance of his various assertions, my opinion is that he must have rushed through it, not noticing connections that are plainly there and making connections of his own that are plainly not there. He seems to have done so solely for the sake of hastily writing what has turned out to be (whether by accident or design) a pernicious review. He did not even pause afterwards to check whether he got his basics right. His misreading of an essential aspect of Hart's rule theory of law is the tell-tale sign of that. And then one must add to this the disconcerting suggestion that Kelsen's emphatic regard for the social divisions (again, the internal and external perspectives) that condition modern law, does not make him 'a trailblazer of liberal democratic law.' One must ask again: Will the holder of the chair in legal philosophy in Vienna really want to stand by this claim in future? Or will he at least here, on this point, soon enough realise that it was his review, and not *CLDL*, that put forward interpretations that should perhaps not be mentioned again.

References

[1] Ernst-Wolfgang Böckenförde*, Staat, Gesellschaft, Freiheit* (Suhrkamp, 2016 [1976]) 60.

[2] Giorgio Agamben, *State of Exception* (Kevin Attell trans, University of Chicago Press, 2005)

[3] See Giorgio Agamben, *The Time that Remains: A Commentary on the Letter to the Romans* (Patricia Daley trans, Stanford University Press, 2005).

[4] HLA Hart, *The Concept of Law* (3rd ed, Oxford University Press, 2012 [1961]) 89.

[5] Hart, *Concept of Law*, 84–85.

[6] Hart, *Concept of Law*, 90–91.

[7] Nicola Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2006).

[8] Hans Kelsen, *Vom Wesen und Wert der Demokratie* (2nd ed, Scientia Verlag, 1963 [1929]) 53–68.

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