
Oakeshott on Modernity and the Crisis of Political Legitimacy in Contemporary Western Liberal Democracy

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Bio-sketch: Noël O'Sullivan is Research Professor of Political Philosophy at the University of Hull. The most recent of the thirteen books he has authored or co-authored are *The Concept of the Public Realm* (2010, Routledge) and *European Political Thought since 1945* (2004, Palgrave Macmillan). His work has been translated into Chinese, Czech, Dutch, Italian, Persian, Polish and Spanish.

Abstract: In his late essay on 'The Tower of Babel' Oakeshott gave graphic expression to his fear that modern liberal democracies have fallen so deeply under the influence of acquisitive and utilitarian modes of thought devoted primarily to policy issues that they have become almost completely indifferent to the constitutional issue he regarded as the essence of political legitimacy (Oakeshott, 1983). Echoing de Tocqueville, Oakeshott maintained that the external signs of stability and prosperity displayed by the democracies should not obscure the fact that their loss of concern about legitimacy means that they are in effect on the road to serfdom, having almost abandoned the ideal of civil association upon which the survival of individual freedom depends. In this essay I will begin by considering more closely the reasons which led Oakeshott to his pessimistic vision of the future of liberal democracy. I will then suggest that his pessimism was exaggerated, due to problematic features of his model of civil association which I will try to identify. Finally, I will very briefly and tentatively explore several ways of revising Oakeshott's model of civil association that might make possible a less dire assessment of the place of political legitimacy in the contemporary liberal democratic world.

Keywords: Authority; civil association; constitutionalism; ius?; legitimacy; nationalism; patriotism; pluralism; power; rule of law.

Until the advent of utilitarianism in the nineteenth century, liberal and democratic political thinkers from Hobbes, through Locke and Rousseau to Hegel regarded the principal political concern posed by Western modernity as the problem of political legitimacy: the problem, that is, of finding a moral basis for state power in a post-cosmological age of individualism, egalitarianism and moral pluralism. This moral basis they identified as civil association, despite disagreement about what kind of political order that entailed. With utilitarianism, however, emphasis shifted decisively away from the issue of legitimacy and civil association to

the problem of implementing the greatest happiness of the greatest number and eventually, after the Second World War, to the related themes of welfare and social justice. The issue of political legitimacy, however, remained central for Oakeshott, who shares with his early modern predecessors the conviction that the only satisfactory solution to that problem is a constitutional state understood in terms of the ideal of civil association. Oakeshott's interpretation of constitutionalism, however, differs in at least one crucial, highly counterintuitive respect from that of his predecessors. This is his complete rejection of their tendency to think of a consti-

tution as what Oakeshott terms a ‘piece of political machinery’ (Oakeshott, 1975, p. 192).

Since his rejection of ‘mechanical’ approaches to constitutionalism as incompatible with the moral conditions for legitimacy eventually led Oakeshott to profound pessimism about the future of civil association in modern Western democracies, I want to consider whether it is possible to modify his theory of legitimacy in a way which permits a less pessimistic view, on the one hand, whilst retaining the substance of his model of civil association, on the other. Before going further, however, it is necessary to consider more fully Oakeshott’s reasons for dissatisfaction with his predecessors’ interpretation of the constitutional conditions for political legitimacy in the modern Western world.

OAKESHOTT’S CRITIQUE OF MODERN CONSTITUTIONAL THEORY AND PRACTICE

In Oakeshott’s own words, ‘Most constitution makers and constitutional reformers in modern times have not been disposed to think of a constitution as that in terms of which a government may be acknowledged to have authority: they have [instead] confused it with the apparatus of governing and have recognized it merely as a piece of machinery for doing with the least opposition and delay whatever they thought proper to be done’ (*ibid*, italics added).

It should be emphasized that Oakeshott did not reject the instrumental perspective in its entirety, since constitutions inevitably have an instrumental aspect: what he objected to was the tendency to make the instrumental perspective an *exclusive* one. This tendency, Oakeshott maintains, lies at the very heart of modern Western political philosophy since Hobbes, who regarded constitutional government as a device for protecting citizens against violent death and facilitating the ‘commodious living’ he believed peace and freedom make possible. Locke, likewise, regarded constitutions as political devices, this time for protecting in particular the right to private property. For Kant, in similar vein, constitutions are devices for promoting the development of mankind to moral maturity. For Hegel, constitutions are devices for promoting what is perhaps the most ambitious aim of all, which is to enable modern citizens to feel at home in the world. For Bentham, they are devices for promoting the greatest happiness of the greatest number. More recently, Hayek has identified constitutions as devices for protecting the free market, while Habermas has treated them as a vital means for promoting the ideal speech situation which he regards as the key to a non-exploitative political relationship.

Why, it must be asked, does Oakeshott reject the instrumental approach to constitutionalism characteristic of his predecessors? The reason he gives is that the instrumental view judges everything ‘from the point of view of the desirability of its outcome in policies and performances,’ and therefore tends ‘to discount legitimacy’ (*ibid*, italics added). It is this indifference to legitimacy, he believes, that has created a crisis for contemporary liberal democracies by leaving them unprotected against arbitrary power, since insensitivity to legitimacy entails insensitivity to the crucial distinction between power and authority. As Oakeshott explained in *On Human Conduct*:

Governments have become inclined to commend themselves to their subjects merely in terms of their *power* and their *incidental achievements*, and their subjects have become inclined to look only for this recommendation. Indeed, it is long since *this rejection of the idea of authority began to infect our thoughts about the constitutions of governments* (*ibid*, italics added).

For Oakeshott, in short, the contemporary failure to distinguish between authority and power created by indifference to legitimacy is the road to serfdom. The only way to avoid that fate is a renewed commitment to civil association which Oakeshott maintains, however, is unlikely to be made by modern constitutional democracies due to a spiritual malaise from which they suffer. In his late writings, he regarded this crisis as so profound that it led him to share the experience of wholesale alienation from the modern world found in thinkers like Nietzsche and Heidegger on the right, and members of the Frankfurt School like Adorno and Horkheimer on the left (Podoksik, 2003).¹ More precisely, Oakeshott identified this malaise as an all-pervasive instrumental mentality wholly incompatible with the sense of play on which he believed a commitment to constitutionalism ultimately depends (Oakeshott, 2004).² A culture without a sense of play has no secure foundation for the non-instrumental rules upon which civil association relies.

Five problematic aspects of Oakeshott’s model of civil association as a response to the modern Western problem of political legitimacy

I now want to ask whether the contemporary problem of legitimacy is really quite as dire as Oakeshott takes it to be. The answer, it will be suggested, is that it appears considerably less acute if five problematic assumptions underlying

his concept of civil association are called into question. Since all the assumptions are familiar from the critical literature, my concern here is only to draw them together and highlight briefly the difficulties they create for Oakeshott's model.

The first problem concerns what John Charvet has described as Oakeshott's 'extreme version of a society of autonomous selves' (Charvet, 2005). The problem, to be precise, is that Oakeshott claims that political legitimacy can exist only when civil association is structured to accommodate a society composed entirely of autonomous selves. In response, critics like Bhikhu Parekh have claimed that Oakeshott's concept of legitimacy rests on a concealed ideological commitment rather than on philosophical analysis (Parekh, 1979, p. 503). This concealed commitment takes the form of his claim that individuality is a logically constitutive aspect of human conduct as such. In reality, Parekh maintains, Oakeshott's concept of individuality is a commitment to a very specific view of life as an adventure in choosing, self-disclosure and self-enactment. Such an image, Parekh remarks, cannot avoid arbitrarily devaluing the life of those, for example, like an Indian peasant 'hidebound by centuries-old practices and [with] little interest in action as an adventure and a medium of self-disclosure and self-enactment' (*ibid*). Oakeshott's concept of the autonomous self, in short, is not a logical presupposition of the conditions for legitimacy in modern democracy but a personal commitment to a specific concept of selfhood.

The second problem presented by Oakeshott's model of civil association is his distinction between civil and enterprise association. There are two difficulties here, of which the first is the vital distinction between the formal and substantive aspects of action upon which Oakeshott depends in order to differentiate between the two kinds of association. The difficulty of distinguishing between what is formal and what is substantive was in fact illustrated by Oakeshott himself in the course of an early formulation of it in which he used the terms 'regulative' and 'substantive'. If a censor 'removes only some words of a work that has already been written', he wrote, 'the censor's activity is regulatory rather than substantive' (Oakeshott, 2008, p. 99). It is hard not to see, however, that whether or not the censor's act is purely 'regulatory' depends on the precise words he removes, since these may completely change the meaning of a text. The distinction between what is formal or regulative, then, and what is substantive, falls into the class of what have been termed 'essentially contestable' concepts.

The other difficulty presented by Oakeshott's distinction between civil and enterprise (or purposive) association

arises from his rejection of enterprise association as a model for civil association on the ground that it involves a substantive purpose incompatible with the formal nature of civil association. This effectively confines moral legitimacy to civil association. If we look beyond the confines of civil association to the state, however, of which civil association is only an aspect, then it is not clear that a state which promotes an enterprise such as securing the minimal conditions of human flourishing necessarily forfeits all ethical status, even if it flouts the moral requirements of formal or procedural freedom.

The third problem concerns Oakeshott's interpretation of the rule of law. Law in civil association, he maintains, is only authentic if it is formal. The difficulty, however, is that Oakeshott insists that law is only authentically formal when what he terms '*jus*' is intrinsic to it (Oakeshott, 1983, p. 159). At first sight, this requirement does not seem to jeopardize the formal nature of law since by it, Oakeshott writes, he means only that law must observe such formal principles as 'non-instrumentality, indifference to persons and interests, the exclusion of *prive-lege* [i.e. exemption from legal obligation] and outlawry, and so on' (*ibid*). The problematic nature of *jus* emerges, however, when Oakeshott writes that 'to deliberate the *jus* of *lex* is to invoke a particular kind of moral consideration' which can only be discerned by a 'prevailing educated moral sensibility capable of distinguishing between the conditions of virtue, the conditions of moral association ('good conduct') and those which are of such a kind that they should be imposed by law ('justice')' (Oakeshott, 1983, p. 160). But who possesses the 'educated' moral sensitivity' which, Oakeshott adds, is able to distinguish between *jus* and 'whatever moral idiocies there may be around?' (*ibid*). And how is 'moral idiocy' to be eradicated? Even if it is eradicated, Oakeshott writes that *jus* still 'cannot be expected to be without ambiguity or internal tension' (Oakeshott, 1983, pp. 160-161). Oakeshott's reliance on the consensus of an enlightened moral elite is especially problematic in view of the moral diversity of modern Western societies which not only makes it difficult for such an elite to exist, but also for it to be regarded as authoritative, were one to be identified.

The fourth problem presented by Oakeshott's concept of civil association concerns his failure to explain how a sense of identity is to be created between citizens, on the one hand, and the legislative and executive institutions of civil association, on the other. Oakeshott's neglect of this issue in his late work is puzzling in view of his insistence in 1955, two decades before *On Human Conduct*, that the central principle of modern European politics is that a government 'should

be formed and set up in such a way that its subjects would identify with it, not as an alien power, but as their own government' (Oakeshott, 2008, p. 96). Only when this sense of identity is achieved is it possible to satisfy the most fundamental requirement of legitimacy as ordinarily understood in modern European politics, which is that 'the appropriate constitution of government has to be such that the governed may feel satisfactorily governed by themselves. This', Oakeshott adds, 'is the conviction at which contemporary European practice and thinking has arrived; and it is maintained with such confidence that the enjoyment of that position and ability to exercise it is by everyone understood as political maturity' (Oakeshott, 2008, p. 97). Although Oakeshott observed that 'we do not agree on how best to satisfy this condition', he acknowledged the crucial importance of nationalism for the sense of identity of governors and governed (Oakeshott, 2008, p. 96). In yet earlier writings, when the shadow of Bernard Bosanquet still fell over his thought, he had attached even greater importance to patriotism, which he described as not only 'the basis of all morality' but as 'the greatest emotion and intellectual effort of which we are capable' (Oakeshott, 1993). Despite these acknowledgements of the emotional basis of political legitimacy, however, Oakeshott's subsequent mature formulation of the model of civil association ignored this issue.

It is not only nationalism and patriotism, however, which were neglected in Oakeshott's mature political thought. No less striking is his neglect of the role of intermediate institutions in fostering the shared sense of identity between governors and governed required by the predominant modern European concept of legitimacy. Indeed, the simplicity of his portrait of modern liberal democracy as a struggle between individualists and anti-individualists offers an atomized vision which makes it almost impossible to see how such an overarching sense of identity could ever be achieved.

Finally, Oakeshott's conception of civil freedom as merely 'the exercise of arbitrary will' has been unfavourably compared to Hegel's Aristotelian view of the state as the embodiment of freedom. Oakeshott's commitment to negative freedom, Paul Franco maintains, effectively deprives the state of any moral dignity, despite Oakeshott's claim that civil association is moral association (Franco, 1993, p. 131). Hegel, by contrast, is much closer to our 'deepest intuitions about freedom' when he maintains that freedom is not a purely formal ideal emptied of all content, as Oakeshott assumes, but is, rather, a substantive ideal involving 'self-mastery, cultivation of capacities and fulfillment of significant purposes.' As

a result, Franco observes, Hegel's state is able to 'generate the sort of allegiance and identification . . . necessary to sustain it', whereas Oakeshott's ideal, being formal and without content, is devoid of emotional appeal for all but a few (*ibid.*).

In Oakeshott's defence it may be argued that what he actually defends is in fact an ideal freedom which shares Hegel's ideal of self-mastery, embodied in Oakeshott's case in sympathy for a somewhat bohemian version of the English ideal of the gentleman—an ideal whose implications were explored in particular by Shirley Letwin (to whom Oakeshott dedicated *On Human Conduct*) in her study of *Trollope's Gentleman* (Letwin, 1982). Despite the need to qualify Franco's critique, however, it remains true that the absence of an explicitly substantive dimension in Oakeshott's political thought makes it in practice an unsatisfactory response to the problem of political legitimacy.

This brief sketch of the main problems created by Oakeshott's model of civil association is not intended to subvert it but only to suggest that, if it is to have continuing relevance for contemporary liberal democracy, it needs to be recast on a broader basis, less narrowly committed to a purely formal ideal of freedom and law, and to the existence of an elite whose grasp of *jus* can ensure the moral legitimacy on law. It also needs to take account of the emotional basis of legitimacy. I now want to consider three possible ways of constructing a revised, broader foundation for the civil ideal.

Towards a revised model of civil association.

The first way of reformulating the conditions for legitimacy in civil association is suggested by the sociological approach of Ernest Gellner, which is completely non-moralistic. The key to this approach, which Gellner termed 'sociological realism', is recognition that man's essence in the twentieth century is 'not that he is a rational, or a political, or a sinful, or a thinking animal, but that he is an industrial animal' (Gellner, 1964, p. 35). What now defines man, in other words, is not his moral or intellectual or aesthetic or civil attributes, but 'his capacity to contribute to, and to profit from, industrial society' (*ibid.*). The trouble with this standpoint is that it becomes impossible to criticize the legitimacy of a totalitarian regime, for example, in so far as it pursues industrialization. More generally, any concern for such features of civil association as the rule of law is rendered precarious by Gellner's seemingly uncritical conviction that 'power rightly belongs to the possessors of the new [industrial] wisdom . . . [that is, to] those who have acquired diplomas from the schools of the societies which are themselves already . . . industrialized'

(Gellner, 1964, p. 39). Although Gellner's sociological realism, then, detached civil association from a restrictive moral foundation like Oakeshott's, it risked destroying the civil ideal itself in the process by relative indifference to modern constitutional thought. In particular, Gellner risked replacing all regard for rules and procedures as the conditions for freedom by a dangerous trust in the managerial structures of industry.

The second way of revising Oakeshott's model of civil association aims to relocate it in a more explicitly political framework. Shortly before the publication of *On Human Conduct*, Hannah Pitkin accused Oakeshott of developing 'a theory essentially unpolitical' because it systematically omits 'the very stuff of political life', which is 'power, interest, collective action [and] conflict' (Pitkin, 1973, pp. 284-285). In the last analysis, Pitkin maintained, Oakeshott is 'one of those political theorists, like Plato, who are so deeply concerned about the dangers of power interest [and] conflict that they develop a theory in which those problems are eliminated rather than solved.' As Luke O'Sullivan has argued, however, this is in fact a misrepresentation: what Oakeshott thought of himself as doing is not leaving politics out but putting it in its proper place by making clear its dependence on the existence of a legal and constitutional order. Politics, to be precise, consists in the activity of debating the desirability of the specific features of that order (O'Sullivan, 2008, pp. 34-35). A further defence of Oakeshott against Pitkin's charge is offered by Chantal Mouffe, who has suggested a way of making explicit a political dimension to Oakeshott's model of civil association which eliminates its dependence on the moral consensus of an enlightened elite. Mouffe's aim, more precisely, is to adapt Oakeshott's model to the complex challenges of moral and social pluralism by resituating it within a radical democratic theory indebted to a modified version of Carl Schmitt's political thought.

This seems at first sight unpromising, since the essence of Schmitt's thought is a rejection of rule-based models of politics like Oakeshott's ideal of civil association on the ground that they ignore the core of the political relationship, which is a decision about who the political foe is. Only the identification of a foe, Schmitt maintains, can unite a populace by creating an overriding sense of friendship among its members. Mouffe, however, manages to revise Schmitt's concept of the political in a way which she believes renders his thought compatible with Oakeshott's.

As Mouffe acknowledges, the problem with Schmitt's concept of the political is that it identifies politics with war by making political unity dependent on an existential threat.

His mistake, Mouffe maintains, was to interpret this dependence in a way that identifies all conflict as essentially antagonistic. By doing so, Schmitt ignores the possibility of an 'agonal' concept of the political in which conflict is embraced as the sphere of affirmation, rather than the destruction, of otherness. When Schmitt is revised in this 'agonal' way, Mouffe maintains, his concept of the political paves the way for the relocation of Oakeshott's ideal of civil association in a radical conception of democracy that enables it to accommodate greater diversity.

In this way, Mouffe suggests, the dependence of Oakeshott's model on what may prove to be a minority consensus about forms and procedures might be overcome. Mouffe fails to explain, however, why the agonistic conflict she wishes to encourage would ultimately contribute to political unity rather than to irresolvable conflict (Mouffe, 1993, pp. 66-69). She relies, in other words, on an extremely optimistic view of the ability of conflictual politics to produce a rainbow coalition consensus. A somewhat similar revision of Oakeshott's model of civil association, it may be added, has been proposed by David Boucher, who has suggested that the seeming dependence of Oakeshott's civil association on a minority consensus might be overcome by exploring his sympathy for Roman republican sentiment. Even if Boucher's interpretation of the 'Roman' aspect of Oakeshott's political thought is accepted, however, the trouble is that republicanism of every kind presupposes a degree of civic virtue which is lacking in modern democratic states (Boucher, 2005, pp. 81-96).

The final attempt to increase the contemporary relevance of Oakeshott's ideal of civil association by detaching it from his relatively narrow moral foundation is suggested by Douglas Den Uyl's interpretation of Spinoza, to whose political philosophy Oakeshott gave surprisingly superficial attention (Den Uyl, 1993, pp. 62-116).³ This neglect may be partially explained by the fact that Spinoza began his *Political Treatise* by specifying three main foundations for a theory of civil association which all placed him at odds with Oakeshott. The first is Spinoza's claim—in effect—that the kind of individuality Oakeshott esteems cannot be the foundation of a political order because it is an altogether exceptional achievement by those few who manage the difficult transition from passive to active self-consciousness, this being the condition that constitutes the human good for Spinoza.

It is not only the exceptional nature of this achievement which leads Spinoza to dismiss it as politically irrelevant, however; it is, more fundamentally, the fact that the

moral freedom which characterizes the rare achievement of individuality is wholly irrelevant politically, since the main purpose of politics is shaped entirely by the predominant characteristic of human nature. This, Spinoza writes, is the fact that reason plays little part in the life of most men, who are of necessity

liable to passions, and so constituted as to pity those who are ill, and envy those who are well off: and to be prone to vengeance more than to mercy: and moreover, that every individual wishes the rest to live after his own mind, and to approve what he approves, and reject what he rejects. And so it comes to pass, that, as all are equally eager to be first, they fall to strife, and do their utmost mutually to oppress one another . . . (Elwes, 1955, p. 289).

Confronted by this predicament, all that matters is to ensure the permanence of the social order by countering the universal dominance of the passions in a way which does not depend on trusting to any man's good faith or honesty (ibid). The important thing, from this point of view, is simply that public affairs 'should be so ordered, that those who administer them, whether guided by reason or passion, cannot be led to act treacherously or basely. Nor does it matter to the security of a dominion', Spinoza adds, 'in what spirit men are led to rightly administer its affairs. For liberality of spirit, or courage, is a private virtue; but the virtue of a state is its security' (Elwes, 1955, pp. 289-290). For Spinoza, then, the concept of civil association does not involve privileging a particular concept of individuality.

The second observation Spinoza makes is that entry into civil society does not entail any change in moral identity. It is not, in particular, a movement from an amoral state of nature to a morally superior condition of freedom, since morality and freedom are intrinsically private and personal matters for which the political order is merely a framework, rather than an embodiment of morality (Elwes, 1955, p. 287).

Spinoza's third observation is that the contrast drawn by thinkers like Hobbes between the state of nature and civil association is untenable because civil society in some form always exists. Consequently, there can be no movement from a state of nature into civil society, or from a non-moral to a moral condition. In Spinoza's own words,

inasmuch as all men, whether barbarous or civilized, everywhere frame customs, and form some kind of civil state, we must not, therefore, look to proofs of

reason for the causes and natural bases of dominion, but derive them from the general nature or position of mankind . . . (Elwes, 1955, p. 290).

For Spinoza, then, civil association is conceived of as a rational rather than a moral response to the human predicament. As such, he seeks to provide it with a more hybrid foundation than Oakeshott by refusing to restrict the conditions for legitimacy to the purely formal moral demands of individuality. It is true, of course, that Oakeshott's own thought seems to point in this hybrid direction when he acknowledges that it is impossible to give a full account of the modern state in terms of civil association. What is problematic, however, is that he nevertheless makes the legitimacy of the modern state depend upon the extent to which it is satisfied the ethical requirements of civil association.

CONCLUSION

I began by questioning whether Oakeshott was right to believe that a concern for political legitimacy is disappearing from contemporary liberal democracies. Although I have not denied Oakeshott's claim that issues of policy increasingly dominate over constitutional issues, I have suggested that his pessimism about the future of the legitimacy issue is open to the charge of exaggeration, largely because he conferred a monopoly of the claim to moral legitimacy on civil association.

My conclusion is not that Oakeshott's model of civil association should be abandoned, but only that it would benefit from a revised, less moralistic foundation. The aim of the paper, more precisely, was to find a way of defending Oakeshott from the charge of exaggeration by exploring what this less moralistic foundation might involve. Its main characteristic, I suggested, is that it would offer a more hybrid, less purely moral theory of legitimacy that incorporated an acknowledgement of what Oakeshott himself identifies as the principal character of the modern European state, which is its ambivalent attempt to combine purposive and non-instrumental perspectives.

This hybrid theory of legitimacy would acknowledge, above all, that what constitutes legitimacy at any particular time can be determined only by an essentially political debate about the relative weight to be attached to different, and potentially conflicting, aspects of the state. Oakeshott's exclusively formal or procedural conception of the conditions for legitimacy, in other words, is incorporated into a more comprehensive one which includes political debate about the

substantive purposes associated with the modern state, as well as about the constitutional issues that civil association presents.

In the quest for such a foundation I turned in particular to Spinoza, who is unusual in the modern Western tradition for grounding civil association on a naturalistic, non-moral foundation which is the antithesis of Oakeshott's own position. Whether such a revised foundation for Oakeshott's model of civil association is possible, or would simply serve to threaten its coherence, are issues which I do not pretend to have resolved but continue to ponder.⁴

NOTES

- 1 I do not share Efraim Podoksik's (2003) interpretation of Oakeshott's philosophy as fundamentally affirmative of Western modernity. Although Oakeshott is indeed affirmative when identifying the different forms of autonomous discourse which he termed 'modes of experience' he believes have been inadequately identified and disitnguished in the past, this affirmation does not extend to what he considers to be the dominant moral and political tendencies of the age.
- 2 For the influence on Oakeshott of J. Huizinga's thesis in *Homo Ludens*, see Oakeshott's 2004.
- 3 Den Uyl considers the possible reasons for this neglect in his illuminating essay.
- 4 I am indebted to Luke O'Sullivan for commenting on a draft of this paper.

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