Oakeshott on the Rule of Law: A Defense

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Abstract: Oakeshott's essay on the rule of law has had no impact on the literature on the rule of law. But it deserves more serious consideration. Oakeshott provides an account of the modern legal order that parallels the two tier models of Hans Kelsen and H. L. A. Hart, as well as Max Weber, Georg Jellinek, whom Oakeshott cites as a source, was Kelsen's teacher and Weber's colleague. What Kelsen and Weber have in common is the ideal of the law as a neutral object, as distinct from an instrument of policy, a notion that Oakeshott adopts and expands on.

Keywords: Michael Oakeshott, Hans Kelsen, Rule of Law, Max Weber, Legal Positivism, Freedom

The concept of the rule of law has been a topic under continuous discussion since at least the 1830s, when the liberal concept of the *Rechtsstaat* was developed by Rudolph Gneist to characterize what Germans understood to be the type of legal order found in Britain. Since then it has been routinely invoked as a Conservative Liberal[1]doctrine, for example by Friedrich Hayek, and in more recent years as a sign and index of national development. Indexes are used to rate the extent to which the rule of law prevails in different countries, and the promotion of the rule of law thus understood was a policy goal of the World Bank. The rule of law was linked in various studies to development, that is to say modernity.

There are, however, serious conceptual problems with the concept of the rule of law, which appear not only in these indices but in the tradition of legal theory itself. One of these can be seen in Hayek's attempts to formulate the concept. Hayek made a point of tracing concepts such as equal treatment before the law to their Greek root in isonomy, but made the bugaboo of *Rechtsstaat* thinkers, official and judicial discretion, central to his concept of the rule of law: the rule of law was identified as the elimination of official discretion. The difficulty, as Hayek himself acknowledged, was that discretion in application of the law was ineliminable and in many cases desirable. Equal treatment was another problem: failing to give equal treatment under the law would be a violation of the law or failure to enforce the law in the first place, not some additional fact about the law or its role. Similar issues arise for the long lists of rule of law criteria that appear in indices, some of which seem to confuse the notion of the rule of law with extensive dependence on the state, leading to the placement of the Scandinavian countries, which lack any rule of law tradition in the usual sense, on the top of the indices.

The fundamental problem is this: obeying the law, obedience to the law by officials, and the effective application of the law by the state, seem together to be the meaning of the rule of law as it appears in these indices. The various specific criteria that appear on the relevant lists include protections or means of assuring that the law will be obeyed, especially by officials, but in the end obedience and effective enforcement and administration is what counts. This undermines the notion that the rule of law is somehow a fundamental or

even distinctively liberal idea, and leaves hanging our intuition that the rule of law is a distinctive and desirable state. In Hayek, indeed, it turns into a kind of mysticism, suggested or intimated by the notions of isonomy and limiting discretion, but lying tantalizingly beyond them.

It is striking that the two least mystical of continental legal thinkers, Hans Kelsen and Max Weber, avoided the concept of the rule of law. Kelsen denounced it as ideological and excluded it from his pure theory of law. Weber replaced the ideologically loaded concept of the *Rechtsstaat* with the de-ideologized sociological concept of rational-legal legitimate authority, which he treated as an ideal-type. The concept of the ideal-type was taken from Georg Jellinek, though for Jellinek the sense of "ideal" was normative and good, whereas for Weber it meant an idealization without normative implications. The notion of ideal-type, as we will see, becomes relevant to Oakeshott's own account.

Oakeshott's essay on the rule of law (1983) has had no impact on the literature on the rule of law. But I will argue that it deserves more serious consideration as an account of the phenomenon that Gneist was trying to capture, which the indices and Hayek do not. Oakeshott provides a rich account of the modern legal order. It parallels the two tier models of Kelsen and H. L. A. Hart. But the difference in Oakeshott's approach is that it is not focused on obedience and effectiveness, as Kelsen was, but on something external to the law itself. Like Weber, who was concerned with legitimacy, Oakeshott was concerned with the understanding and nature of commitment to the law, and thus with understanding the law as an unusual object of commitment or subscription. Like Weber, he was concerned with understanding it as something both distinctively Western and modern.

Oakeshott was sparing with sources, and his German sources remain somewhat mysterious. The textual basis of this discussion is the similarities and differences in the arguments, but there is a specific and for Oakeshott unusual comment that reveals his appreciation for this body of thought. In the middle of his paper "The Rule of Law," Oakeshott makes an apparently odd comment, to the effect that the idea of the rule of law "appears in a slimmed-down version in the writings of the jurist Georg Jellinek. It hovers over the reflections of many so-called 'positivist' modern jurists" (1983, p. 162). This is an important clue to Oakeshott's own thinking, which diverges radically from the conventional literature on the rule of law and also from what has been called the rule of law industry. Weber and Kelsen are relevant comparisons because it is their immediate predecessors, notably Jellinek, who was Kelsen's teacher and Weber's colleague, whom Oakeshott mentions specifically as posing the issues. When Oakeshott refers to positivism, it is less likely that he means the obscure legal positivists who preceded Kelsen than Kelsen himself, who became the representative and most famous by far of all positivists and defined the category in the twentieth century. What Kelsen and Weber have in common is the idea of the law as a neutral object, as distinct from an instrument of policy. This is what supports freedom, for Oakeshott, and distinguishes rule of law countries from others, in contrast to the bias toward state-dependent regimes in the indices.

The mention of legal positivism is somewhat startling, however, for a simple reason, and one that relates to freedom itself. Hans Kelsen in particular made an argument that seems completely contrary to the notion of the rule of law as traditionally understood when he rejected the idea that the law of dictatorships was not law. To many of his critics, the whole point of having a concept of law was to distinguish genuinely legal regimes from pseudo-legality. A theory of law that failed to do so amounted to a kind of endorsement of evil regimes and a legitimation of their law. Natural Law theorists in particular were opposed to Kelsen and "positivism," and indeed Kelsen was opposed to them. But it was difficult to produce an account of the rule of law that made the relevant distinctions without appealing to some sort of notion of Natural Law, or to appeal to claims which had the same logical structure, and therefore the same flaws. Behind any discussion of Oakeshott is this issue: is the rule of law a differentiating standard, or is it coterminous with legal order itself, and if it is a standard, what does its authority come from?

Oakeshott, making a comment on Hobbes, uses Kelsen's language of the *Grundnorm*, when he mentions "the entrenched Basic Law of a *Rechtsstaat*" (1983, p. 158). This at least raises the question of how Oakeshott's own argument relates to these thinkers. It turns out that the relation is close. Kelsen says explicitly that idea of the *Rechtsstaat*, the German language version of the rule of law is ideological.[2] The project of Kelsen's 'pure theory of the law' is one of refining law of extraneous or extra-legal ideological elements. Oakeshott is also concerned with the problem of ideology, and the relation of ideology to law, which he addresses, as we will see, in a slightly different but closely related way, in terms of the typically Kelsenian problem of the relation between justice and law.

Although Kelsen approached the problem in a radically different way, the results, and even the central thesis, turn out to be very similar, though in the end there is a striking

difference with obscure implications. For Kelsen, such notions as the *Rechtsstaat* were historical half-truths, only partially emancipated from their origins in religiously-tinged Natural Law thinking, with misleading affective associations that had developed in the *longue durée* of political and philosophical contestation, which sufficed neither as sociological nor legal ideas—nor indeed as adequate factual descriptions in any *wissenschaftliche* or disinterested scholarly setting.[3] Having intuitions about such things or their essences was of no interest to him: his goal was to strip them of their ideological content to get to their factual core. Kelsen's 'pure theory of the law' was an attempt to retain some concept of legal validity in a theory of the law that was otherwise purged of ideological, valuative, and non-legal elements.

Oakeshott also wants to think of the rule of law in a purified way. He does this in terms of the notion of authenticity.

> The sole terms of this relationship are the recognition of the authority or authenticity of the laws. Thus, the first condition of this mode of association [i.e., the rule of law] is for the associates to know what the laws are and to have a procedure, as little speculative as may be, for ascertaining their authenticity and that of the obligations they prescribe (1983, pp. 137-38).

On the surface this formulation seems lapidary and innocuous. Oakeshott adds in a footnote "That 'law regulates its own creation' is not a paradox but a truism" (1983, p. 139 n5). But Kelsen formulated this issue in terms of validity, and claimed that the sole criteria for the validity of a law was that it had been enacted in accordance with law, by persons authorized by law to do so. Oakeshott makes the same claim, in terms of offices.

> And this [condition of the rule of law] is satisfied only where laws have been deliberately enacted or appropriated and may be deliberately altered or repealed by persons in respect of their occupation of an exclusively legislative office and following a recognized procedure; where the sole recognition of the authenticity of a law is that expressed in an acknowledgment that it has been properly enacted; where this acknowledgment does not entail approval of what the law prescribes; and where there is no other independent office authorized to declare a law inauthentic on account of what it prescribes. In short, the first condition of the rule of law is a "sovereign" legislative office (1983, p. 138)

This sounds different than Kelsen: sovereignty vs. legality or the *Grundnorm* as the first condition of law. But

> … since this authority cannot be identified with any natural quality (virtue, prudence, wisdom, charisma and so on) possessed by or attributed to its contingent occupants, or inferred from any such quality, it must be an endowment of the office itself; that since it is an authority to create obligations…; and that since it is an antecedent authorization to make law, it cannot be identified with approval of what the law prescribes (Oakeshott, 1983, p. 139).[4]

Authorization is a matter of law, not justice. So the result is the same as for Kelsen: "the expression 'the rule of law' denotes a self-sustained, notionally self-consistent, mode of human association in terms of the recognition of the authority or authenticity of enacted laws and the obligations they prescribe in which the considerations in terms of which the authenticity of a law may be confirmed or rebutted are themselves enacted law; in which the jurisdiction of the law is itself a matter of law" (*ibid*). This last phrase is at the core of Kelsen's conception of both the state and law, and leads directly to his notion of the *Grundnorm*:

> Law regulates its own creation inasmuch as one legal norm determines the way in which another norm is created, and also, to some extent, the contents of that norm. Since a legal norm is valid because it is created in a way determined by another legal norm, the latter is the reason of validity of the former. The relation between the norm regulating the creation of another norm and this other norm may be presented as a relationship of super- and sub-ordination, which is a spatial figure of speech. The norm determining the creation of another norm is the superior, the norm created according to this regulation, the inferior norm. The legal order, especially the legal order the personification of which is the State, is therefore not a system of norms coordinated to each other, standing, so to speak, side by side on the same level, but a hierarchy of different levels of norms. The unity of these norms is constituted by the fact that the creation of one norm—the lower one—is determined by another—the higher—the creation of which is determined by a still higher norm, and that this *regressus* is terminated by a highest, the basic norm which, being the supreme reason of validity of the whole legal order, constitutes its unity (Kelsen, [1925] 2006, p. 124).

This, again, might seem innocuous, as might Oakeshott's comments on the authenticity of law being governed exclusively by considerations that are themselves a matter of law. But in both cases it is directed against the dominant Western tradition. Oakeshott recognizes this when he comments:

> In the writings of many of its early exponents and for a large part of its history, a state ruled exclusively by law been represented as a state ruled by *jus*; not merely the *jus* inherent in *lex* (which nevertheless received appropriate recognition), but *jus* in the extended sense of a "natural," "rational" or "higher" law, recognized and declared (but not made) in legislative utterances and correspondence (or absence of conflict) with which endows them with the quality of *jus* (1983, p. 155).

This is the doctrine of Natural Law. Oakeshott spends much of his discussion of the rule of law on showing that this will not work: that *jus* and *lex* have a relation, but not this one. Kelsen spent much of his career attacking Natural Law and its vestiges in legal philosophy. In the end, they have a very specific disagreement on the relation of *jus* and *lex*, but it is a difference that is intelligible only in terms of their agreement on the nature of *lex*.

STATE-LAW IDENTITY, AUTHENTICITY, AND SUBSCRIPTION

Oakeshott uses the language of "subscription" to understand the relation of the individual to "authentic law" and the state understood as an association between subscribers.

> … the vision of a state in terms of the rule of law should, then, be that of an association of *personae* indistinguishably and exclusively related in respect of the obligation to subscribe adequately to the non-instrumental conditions which authentic law imposes upon their self-chosen conduct (1983, p. 161).

Kelsen's language is different, but the point is parallel. For Kelsen, at least in this early text, there is notion of real validity implied by the notion of belief in validity—or as Kelsen puts it "the individuals living within the State have an idea of law in their minds, and this idea is—as a matter of fact—the idea of a body of valid norms" (Kelsen, [1925] 2006, p.177).

> The Pure Theory of Law, as a specifically legal science, directs its attention not to legal norms as the data of consciousness, and not to the intending or imagining of legal norms either, but rather to legal norms qua (intended or imagined) meaning. And the Pure Theory encompasses material facts only where these facts are the content of legal norms, that is, are governed by legal norms. The problem of the Pure Theory of Law is the specific autonomy of a realm of meaning (i.e., the meaning of positive laws). (Kelsen, [1934] 2002, pp.12-13).

The content of legal norms is Oughts, or in Oakeshott's terms "the non-instrumental conditions which authentic law imposes upon their self-chosen conduct" (1983, p. 160).

Where does this leave us with the state? For Kelsen, the core idea is that the law consists in the production of norms in accordance with norms, that legality is a matter of action in accordance with legal norms, norms which in turn are produced in accordance with other norms. Oakeshott reiterates this: For Kelsen, state action is the action of individuals or bodies that are authorized by norms to produce norms according to norms. The acts of the state are no more than these norm-governed or authorized acts. The 'state' and state power, accordingly, are not the source of law, the law is the source of the state and state power: Kelsen's famous thesis of the identity of the law and the state is precisely this: there is nothing more to the state than is given in the law. Kelsen's distinctive contribution to the philosophy of law is his relentless insistence on the idea that law is norms created in accordance with norms, and the key implication of this idea, the hierarchical structure of the normative order itself, the *Stauffenbautheorie*.

Oakeshott's account of sovereignty under the rule of law is a version of the identity thesis. He rejects any grounding of the state in the will of the people or natural law: the grounding is and can be only in law itself, which authorizes personae as occupants of offices.

> … the rule of law does not itself specify any particular constitution or procedure in respect of this legislative office. It does not itself stipulate who shall occupy it, the rules in terms of which it may properly be occupied, or the procedure to be followed in enacting law. It requires only that these should themselves be matters of law. And it attributes a *persona* to the occupant or occupants of this office which reflects the engagement of enacting authentic rules: a *persona* without inter-

> ests of its own and not representative of the interests of others. That is, a *persona* which is the counterpart of the persona of those related in terms of the rule of law (1983, p. 138).

This is Kelsen's identity thesis *in nuce*. But there is a difference in the scope of application. For Kelsen this is a general theory of law and state, as the title of one of his major works puts it ([1925] 2006). His theory, as another work puts it, *Pure Theory of Law* ([1960] 1967), is a theory of positive law, meaning of all actual law, not merely that which is deemed to be genuine law according to some theory, such as one of the endless list of neo-Kantian theories of law or the theory of Natural Law.[5]

THE 'NOTHING MORE' QUESTION: DIFFERENT ANSWERS?

Kelsen's point in the *Pure Theory of Law*, and in other texts, is that not only is the *Grundnorm* or Basic Law the normative ground of a dynamic legal system, it is the sole and sufficient normative ground. Kelsen pursued this argument by systematically re-analyzing traditional legal notions in order to show that the implications for legal and political thought that had been read into them by previous theorists did not follow from what was logically required to account for the law. Kelsen's claim was that the complete legal meaning of the concepts could be adequately analyzed in terms of the idea that norms are produced by norms. This was the core of his project of de-ideologization. Oakeshott's reference to the rule of law as an ideological slogan, and his statement that he is confining himself to what it might mean apart from its ideological meaning, signals a parallel but different aim. And this difference is connected to the difference between Kelsen's attempt to construct a general theory of state and law and a theory of positive law, meaning of all law. The obvious implication of this difference is that Oakeshott is not committed to claims about the legality of dictatorships. But there is much more at stake.

Kelsen was a straightforward relativist. His account of the problem of values can be captured in a passage from Joseph Schumpeter quoted by Kelsen but more famously by Isaiah Berlin: "to realize the relative validity of ones convictions, and yet stand for them unflinchingly is what distinguishes a civilized man from a barbarian." Berlin comments that "To demand more than this is perhaps a deep and incurable metaphysical need; but to allow it to determine one's practice is a symptom of an equally deep, and more dangerous moral and political immaturity" (Berlin, 1958, p. 57; cf. Hardy, 2010, pp. 89-90). These were also Kelsen's views with respect to value questions, as he reiterated in many places (1957; [1929] 2000). But Kelsen was a normativist with respect to the law itself. This places him in a unique position, and its uniqueness is central to understanding how he differed from his peers. For Kelsen, justice was a value, and a highly contested one. It was not part of a normative science of the law: the normativity of the law consisted in and was exhausted by the *regressus* to the *Grundnorm*. Justice is a valuative question. Legality, in contrast, is a factual issue, though one in the realm of normative fact, the system of law itself: was the supposed law created in accordance with law? This is why, for Kelsen, *jus* and *lex* are separate.

Oakeshott is asking the different but parallel question "What exactly is the notion of *jus* postulated in the rule of law?" For Kelsen, the answer is that there is none, though it is consistent with his account to say that there is no notion of justice in law other than that which is contained in the law itself. The structure of the argument, however, is the same for both: like Kelsen, Oakeshott is asking whether there is anything more here than the consideration that the law has been created in accordance with law. He puts this in very similar language:

> In the rule of law, the constitution of the legislative office is neither more nor less than that which endows law with authenticity, consequently the *jus* or *injus* of what is enacted cannot be inferred from such a constitution or procedure. Thus, to favor a so-called "democratically elected" legislature is to express a belief that its authority to enact laws will be more confidently acknowledgeable than that of a legislature assembled and constituted in any other manner; it forecasts nothing whatever about the *jus* or *injus* of its enactments. For that we must look elsewhere (1983, p. 140).

The belief in democracy is thus irrelevant both to legality and to the question of what the *jus* in law is. So the question is whether there is any *jus* in *lex* beyond issues of the authenticity of a law. Oakeshott adds something:

> There are some considerations that are often and understandably identified as considerations of *jus* but are in fact inherent in the notion, not of a just law, but of law itself. They are conditions which distinguish a legal order and in default of which whatever purports to be a legal order is not what it purports to be: rules

> not secret or retrospective, no obligations save those imposed by law, all associates equally and without exception subject to the obligations imposed by law, no outlawry, and so on. It is only in respect of these considerations and their like that it may perhaps be said that *lex injusta non est lex*. And there are also similar considerations concerned with adjudicating cases (for example, *audire alteram partem*), which we shall come to later (1983, p. 140).

This is a line of argument that resembles the lists of the rule of law industry, and indeed includes Hayek's notion of equality before the law as a condition of the rule of law. But Kelsen would accept all these considerations as well: they are conditions that he would place under the heading of law made according to law, and the effectiveness of a legal order. He appeals to the international law notion of *lex imperfecta*. When Kelsen discusses such things as the technical inadequacy of the law of the League of Nations, he is primarily concerned to exclude ideological elements with no legal meaning (Kelsen, 1939). But his positive proposals for legal structures making ineffective treaties like the Briand-Kellogg pact effective conforms to Weber's usage: the pact was technically inadequate because it lacked a court with compulsory jurisdiction—this was error of construction (Kelsen, 1942, p. 45).

Is this all there is for Oakeshott as well? It appears that the answer is "no." He cites "considerations" distinct from questions of authenticity:

> Beyond this, the *jus* or *injus* of a law is composed of considerations in terms of which a law may be recognized, not merely as properly enacted, but as proper or not improper to be or to have been enacted; beliefs and opinions invoked in considering the propriety of the conditions prescribed in a particular law. *Jus* or *injus*, here, is an attribute neither of the mode of association, nor of the totality of the rules which may constitute the current conditions of such an association, nor of the performance of a legislator, but only of what a particular law prescribes (1983, p. 141).

This is to say that these considerations do not apply to a legal order, or to the mode of rule of law association itself, but rather to specific laws.

But what sort of considerations are these? Are they the unchanging universal principles of Natural Law? Or are they value-choices, which in Kelsen's terms at least would imply that they are ungroundable and ultimately arbitrary. Can they be the kinds of considerations that would exclude dictatorial regimes? Or is there some other way, consistent with this account, that this exclusion could be made?

Oakeshott's comments are, up to point, Kelsenian. He rejects the relevance of Natural Law. But he puts the point negatively, in terms of the problems:

> But whether or not such certainty and universality are attainable in this or any other manner, it may be said that association in terms of the rule of law has no need of them. First, it postulates a distinction between *jus* and the procedural considerations in respect of which to determine the authenticity of a law. Secondly, it recognizes the formal principles of a legal order which may be said to be themselves principles of "justice." And beyond this it may float upon the acknowledgment that the considerations in terms of which the *jus* of *lex* may be discerned are neither arbitrary, nor unchanging, nor uncontentious, and that they are the product of a moral experience which is never without tensions and internal discrepancies (1983, p. 143).

This is a somewhat opaque formulation, even in the larger context of the argument, but the point is clear: the rule of law recognizes the legal procedural distinctions that authenticate law, and distinguishes between these and *jus*. But there is something more: something non-arbitrary, changing, and contentious that is the product of a moral experience that itself has internal tensions and discrepancies.

Moreover, this extra thing, this meta-discussion of the law, is part of the rule of law as a mode, even though it is not part of the law itself. As Oakeshott explains,

> What this mode of association requires for determining the *jus* of a law is not a set of abstract criteria but an appropriately argumentative form of discourse in which to deliberate the matter; that is, a form of moral discourse, not concerned generally with right and wrong in human conduct, but focused narrowly upon the kind of conditional obligations a law may impose, undistracted by prudential and consequential considerations, and insulated from the spurious claims of conscientious objection, of minorities for exceptional treatment and, so far as may be, from current moral idiocies. And what it has no room for is either a so-called Bill of Rights (that is, alleged unconditional principles of *jus* masquerading as themselves law),

> or an independent office and apparatus charged with considering the *jus* of a law and authorized to declare a law to be inauthentic if it were found to be "unjust." Such considerations and institutions may perhaps have an appropriate place where association is in terms of interests and "*jus*" is no more than an equitable accommodation of interests to one another, but they have no place whatever in association in terms of the rule of law (1983, p. 144).

The rule of law has no place, in short, for courts applying the principles of Natural Law to determine whether a law is just, or conforms with the will of God, or even one concerned with what one would now call "social justice." But it *requires* something more than authentication: an appropriate form of discourse which is akin to moral discourse.

This is still largely negative. And it raises for Kelsen the question that his Natural Law critics repeatedly pressed against positivism: what about dictatorial regimes? One could imagine a highly aggressive and intrusive legal regime that conformed to this core notion of the rule of law that afforded little protection for the individual against the state: a well-oiled police state. Beyond this crude riposte, there is a more subtle question: whether, without going very far beyond the positivist conception of law, we can capture the more elusive and ambiguous sense that writers on the rule of law appeal to but struggle to define. Kelsen's question would be this: can there be any politically neutral notion of the rule of law which respects the fact-value distinction, or captures the elusive sense—or whether the concept of the rule of law is inevitably ideological or valuative, or a concealed political preference. Oakeshott needs to be answering a different question, and it hinges on what I am calling the elusive sense of the rule of law.

Oakeshott does not, as Kelsen does, think that his problem is to provide a general account of positive law. Not all legal orders are rule of law associations. So he is in a position to answer the police state objection. His answer is subsumed in a more general one:

> What we are seeking is an alleged mode of association in which the associates are expressly and exclusively related in terms of the recognition of rules of conduct of a certain kind, namely "laws." And what we have here is associates related expressly and exclusively in terms of seeking to satisfy substantive wants (1983, p. 125).

It is evident, and becomes more evident in *On Human Conduct* (1975), that there are no, and perhaps cannot be, states in which relations are "exclusively" in these terms. The two "exclusively" clauses above are polar. Oakeshott puts this in terms of a question:

> The rule of law may be recognized as one among the ideal modes of human relationship, but is it a possible practical engagement? Could it be made actually to occur? And further, what place, if any, does it occupy as a practical engagement in the history of human hopes, ambitions, expectations or achievements in respect of association? (1983, p. 149).

The answer is that this construction is an instance of what Jellinek and later Weber called an ideal type. It is a conceptual construction or idealization that may never be fully realized in the actual world of politics, but which nevertheless, by virtue of its conceptual clarity, enables us to make clear something about what is in the real world, by comparing the idealization to the actual. But it is also, as Oakeshott points out at length, an idealization of a deep and variously articulated impulse in European history to live under the rule of law and to create states that operate under it.

The dictatorship question that motivated so much criticism of Kelsen can be disposed of quickly. As Oakeshott has defined the mode of association of the rule of law it excludes purposive organizations. The usurper or tyrant is paradigmatically purposive:

> A usurper and a tyrant are alike without authority, but for different reasons. A usurper may have the disinterested persona required of a legislator but he cannot make authentic law because he does not properly occupy the legislative office. A tyrant may properly occupy the office but he uses his occupation to promote interests, chiefly his own, and therefore does not make genuine law (1983, p. 139 n4).

The ursurper fails the test of authenticity. The dictator by definition supplants the legislative office rather than occupying it. The tyrant fails the test of making law governed by a certain class of considerations. So what is this class, rooted in a moral-like discourse?

INTERNAL LEGAL VALUES

The philosophical dilemma posed by the concept of the rule of law, if we appreciate the positivist critique, is this: either the rule of law just means obedience to the law and no more, or it refers to some standard of law outside the positive, actual law, such as Natural Law or one or another political ideology. The former does not distinguish dictatorships and a police state from the rule of law; Natural Law is a dead inheritance from theology which can ground nothing and about which there is incessant dispute, and ideology is or should be irrelevant to the concept of the rule of law. But we still have some elusive sense of what the rule of law is apart from these alternatives. And this sense seems equally difficult to banish. We have an especially strange sense that some states approximate the rule of law and others do not. This is a sense Oakeshott is at pains not to deny. As he puts it in the opening of the discussion,

> "The rule of law" is a common expression. It is often used, somewhat capriciously, to describe the character of a modern European state or to distinguish some states from others. More often it appears as a description of what a state might perhaps become, or what some people would prefer it to be. But, as with all such shorthand expressions, it is ambiguous and obscure. Let me try to take it to pieces and see what is hidden in it. And I want to begin as near to the bottom as I can and confine myself to what it must mean, leaving out of account the desirability or otherwise of the condition it describes and neglecting what it may or may not be made to mean when used as an ideological slogan (1983, p. 119).

So what is left when we try to construct an ideologically sanitized notion of this elusive thing that makes the relevant distinctions between rule of law states and other states?

Hayek and his followers exemplify the elusive and ambiguous sense, and it is in Hayek that one ought to find a formulation of the elusive sense that allows us to make a sharp distinction between what Kelsen describes and the genuine rule of law. Hayek's account runs into trouble, but it also is, as we shall see, partially correct. An influential tradition stemming from Hayek is concerned with administrative discretion (Hayek, [1960] 1978, pp. 212-15, 225) and the idea that the central feature of the rule of law is the limitation of administrative discretion: this is the practical form or modern meaning of the idea of the rule of law not men. There is a variant of this tradition concerned with the increasing role of administrative law and administrative courts for the supervision of administration (Dicey, [1914] 1962). This tradition has its roots in the experience of the *Obrigkeitstaat* or magistrate state, where there was a wide range of discretionary power and consequently arbitrariness of legal process and state action. Weber contrasts this more traditional form with the modern bureaucracy, whose hallmark is predictability, and with modern rational-legal authority, which also achieves the maximum degree of predictability ([1968] 1978, pp. 1394-95). This comes very close to Hayek's concerns.

What is the difference between predictability and restricted discretion? One could of course have predictable outcomes which result from the biases of the decision-making process or the decision-makers, and these could be distinguishable from the predictability that results from the rule of law, which in turn could be affirmed by appeals courts. But a significant theme of the literature is this: that some discretion is unavoidable, and that even the courts regularly acknowledge this and defer to administrators. This concession means that if the limitation of administrative discretion is the stand-in for the elusive sense, the concept of the rule of law remains as elusive as the elimination of discretion itself. The same can be said for much of what appears in the lists made by the rule of law industry, lists which typically include legal institutions, such as courts of appeal, which exist to assure that the law is being followed, in this case by judges in lower courts. One could treat the independent judiciary as a technical improvement in legal institutions that assures predictability.

With this in mind, we can see Oakeshott's point more clearly. Predictability (or certainty, or the elimination of discretion) is a legal value that competes with other legal values. To place it above all other values in characterizing the rule of law or to turn it into a criterion absolutizes it in a problematic way. Gustav Radbruch, Weber's intellectual ally and a Kelsen critic, argued that the realm of law was bounded by three antinomic legal values: certainty, expedience, and justice. This comes very close to Oakeshott's point. In evaluating laws, or even the norm-giving decisions of a judge, authentication is not enough. Just as in a regime oriented exclusively to purposes the law would be discussed exclusively in terms of the purposes it serves, in an exclusively rule of law regime the discussion would be exclusively in terms of legal values such as certainty, expedience, and justice. And this discussion would acknowledge conflicts between these values, and that they are contestable and always, so to speak, alive and

relevant. It is in this respect that a form of discourse in terms of these considerations resembles moral discourse, with its antinomies and contestables.

When courts make decisions and deliberate, they are governed by a procedure. Oakeshott notes that "The oath of an English judge to render justice 'according to the law' reflects the notion of the rule of law" (1983, p. 147 n8).

> The procedure and these considerations identify the business of the court to be neither more nor less than that of declaring the meaning of a law in respect of a contingent occurrence. Of course, the rules of this procedure cannot themselves announce such conclusion, any more than a law can itself declare its meaning in respect of a contingent occurrence, but they distinguish the casuistical engagement of a court of law from the exercise of what has been called "a sovereign prerogative of arbitrary choice" (1983, p. 147).

It is the trammeling of arbitrary choice by demanding casuistical engagement that is critical to distinguishing the operation of courts operating in terms of the rule of law from those that operate simply in terms of authenticity.

CONCLUSION

I have subtitled this essay "A Defense," but I have engaged instead in explication and some historical contextualization. What I have explained, however, is the arguments of Kelsen that refute the standard approaches to the problem of the rule of law, and how this adds what is missing in Kelsen's account: a distinction between the rule of law and obedience to law. Kelsen would insist, and Oakeshott would agree, that this could not be a legal distinction of the kind that authenticates law, and should not be an ideological one. The mere existence of a distinctive form of discussion that appeals to legal values, and which applies both to legislation and to judicial decision-making may seem like a poor answer to this question.

But it is neither ideological nor authenticating. And the regimes in which this kind of discussion play a role do, to the extent that they do so, approximate the ideal type of the mode of association called the rule of law. That many present regimes fall short of this ideal should be evident, as it was evident to Oakeshott. But for there to be a way of saying how they fall short other than by invoking an ideological conception of the rule of law one needs an answer like this—one that does not take the side of one value or another. And by describing "a procedure composed of rules, conventions, uses, presumptions and so on," as distinct from a *volontè particuliere*, we do get an answer.

NOTES

1 There is a saying, repeated to me by Edward Shils, that the only serious politics are those of conservative liberals and liberal conservatives. Hayek would be a case of the former, Oakeshott of the latter.

2 The differences between the two concepts have been widely discussed: see Loammi Blaau 1990, Pietro Costa and Danilo Zolo 2007, Paul Craig 1997, Gottfried Dietze 1973, 1985, Richard A. Fallon 1997, Gustave Gozzi 2007, Michel Rosenfeld 2000. Despite the discussion, there is little agreement. Both concepts imply some sort of intuited normative content beyond the statutes that make up the written law: something that tells us what law is in accord with the rule of law. Both can be construed as constraints on the state. Both are afflicted with the paradox that the only way in which the law can regulate the state is through the state itself: stated in this way, the question of which does the regulating can only end in either a circle or a regress.

3 Nor was this surprising. Leonard Kreiger's T*he German Idea of Freedom* (1957) documents the endless confusions surrounding the concept of the Rechtsstaat in the writings of nineteenth century thinkers, especially in connection with its use to obscure the issue of the conflict between state power and individual freedom.

4 Oakeshott explains why:

> there has been one unavoidable contingent circumstance of modern Europe for which the rule of law cannot itself provide, namely, the care for the interests of a state in relation to other states, the protection of these interests in defensive war or in attempts to recover notional irredenta, and the pursuit of larger ambitions to extend its jurisdiction. And this is not on account of the complete absence of rules (although most of so-called international law is composed of instrumental rules for the accommodation of divergent interests), but because "policy" here, as elsewhere, entails a command over the resources of the members of a state categorically different from that required to maintain the apparatus of the rule of law, and may even entail the complete mobilization of all those resources (1983, p. 163).

5 There are a number of other Kelsenian touches in Oakeshott's essay, which I will not discuss here. One important one is his view of the separation of powers, which, like Kelsen, he says "properly speaking is a distinction of authorities" (1983, pp. 144-45 n6) and his comment that the rule of law "provides, not so much for the enforcement of the law (which is a nearly meaningless expression), as for the punishment of those convicted of failure to observe their obligations and perhaps something by way of remedy for the substantive damage attributable to delinquency" (1983, p. 147). This is Kelsen's view that the law shows itself in the sanctions it imposes. Oakeshott says that "penalties are, in general, authorized by law, to submit to them is not to subscribe to the non-instrumental conditions imposed by law upon self-chosen action and utterances; they come as the commands of a court addressed to assignable persons to perform substantive actions or to suffer substantive deprivations, and they invoke obedience" (1983, p. 148). This is a version of Kelsen's idea that judges issue individual norms when they pass a sentence, as distinct from the idea that judges apply the law.

REFERENCES

Berlin, I. (1958). *Two Concepts of Liberty*. Oxford: Clarendon Press.

Blaau, L. (1990). "The *Rechsstaat* Idea compared with the rule of law as a paradigm for protecting rights." *New Contrast* 107: 76-96.

Bobbio, N. (1981). "Max Weber e Hans Kelsen." *Sociologia del Diritto* 8 (1): 135-54.

Costa, P. and Zolo, D. (Eds.) (2007). *The Rule of Law: History, Theory, and Criticism*. Dordrecht: Springer.

Craig, P. (1997). "Formal and substantive conceptions of the rule of law," *Public Law* (Autumn): 467-87.

Dicey, A. V. ([1914] 1962). *Law & Public Opinion in England: During the Nineteenth Century* 2nd edn. London: Macmillan and Company.

Dietze, G. (1985). *Liberalism Proper and Proper Liberalism*. Baltimore: Johns Hopkins University Press.

Dietze, G. (1973). *Two Concepts of the Rule of Law*. Indianapolis: Liberty Fund.

Fallon, R. A. (1997). "'The Rule of Law' as a concept in constitutional discourse." Columbia Law Review 97 (1): 1-56.

Gozzi, G. (2007). *Rechsstaat* and Individual Rights in German Constitutional History. In: Costa, P. and Zolo, D. (Eds.) *The Rule of Law: History, Theory, and Criticism*. Dordrecht: Springer, pp. 237-59.

Hardy, H. (2010). "Skeptical Isaiah Berlin," Letter to the Editor, *The New York Review of Books* LVII (6) April 8: 89-90.

Hayek, F. A. ([1960] 1978). *Constitution of Liberty*. Chicago: The University of Chicago Press.

Kelsen, H. ([1925] 2006). *General Theory of Law and State*, trans. Anders Wedberg. New Brunswick: Transaction Publishers.

Kelsen, H. ([1929] 2000). On the Essence and Value of Democracy. In: Jacobson, A. J. and Schlink, B. (Eds.), *Weimar: A Jurisprudence of Crisis*. Berkeley: University of California Press, pp. 84-109.

Kelsen, H. ([1934] 2002). *Introduction to the Problems of Legal Theory* (*Reine Rechtslehre* 1st edn), trans. B. Paulson and S. Paulson. Oxford: Clarendon Press.

Kelsen, H. (1939). *Legal Technique in International Law: A Textual Critique of the League Covenant*. Geneva: Geneva Research Centre.

Kelsen, H. (1942). *Law and Peace in International Relations; the Oliver Wendell Holmes lectures, 1940-41*. Cambridge, MA: Harvard University Press.

Kelsen, H. (1957*). What Is Justice?: Justice, Law, and Politics in the Mirror of Science*: *Collected Essays*. Berkeley: University of California Press.

Kelsen, H. ([1960] 1967). *Pure Theory of Law* (*Reine Rechtslehre* 2nd edn), trans. Max Knight. Berkeley: University of California Press.

Kreiger, L. (1957). *The German Idea of Freedom*. Boston: Beacon Press.

Oakeshott, M. (1975). *On Human Conduct*. Oxford: Clarendon Press.

Rosenfeld, M. (2000). "Rule of Law versus *Rechsstaat," Menschenrechte und Bürgerrechte in einer vielgestaltigen* Welt 21 (24): 49-71.

Weber, M. ([1968] 1978). *Economy and Society: An Outline of Interpretive Sociology*, G. Roth and C. Wittich eds. Berkeley and Los Angeles: University of California Press.