What Rules the Rule of Law?

A Comparison between Michael Oakeshott and Hans Kelsen

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1. Oakeshott and the »So-called «Positivist« Modern Jurists«

In a series of seminal publications\(^1\), Michael Oakeshott has investigated what the Rule of Law constitutes as a special community of citizens or »civil association«.\(^2\) He tries to understand the phenomenon of the Rule of Law in its capacity of »ideal character«, that is, not as an ideal but as an idea or collection of ideas. He is not so much interested in how the Rule of Law functions in reality, or how it should function according to some ethical or political opinion, as in the conditions that, from a theoretical point of view, must be fulfilled in order to be able to speak of a community which is governed by the Rule of Law. As Oakeshott indicates, his conception of the Rule of Law is inspired by the works of Bodin, Hobbes, Hegel and Jellinek, and is closely connected to »the reflections of many so-called «positivist« modern jurists«.\(^4\)

What makes a comparison between Oakeshott and Kelsen especially worthwhile, is that both authors have developed very similar conceptions of the Rule of Law – as appears, for instance, from their characterization of the positivity, authority and validity of law –, but differ in other important respects. In particular, Oakeshott’s conception of the Rule of Law has a normative significance, whereas Kelsen aims at providing a description of the Rechtsstaat in a purely scientific and neutral way. According to Oakeshott’s normative understanding, only an association of »ives can be considered to be governed by the Rule of Law. Certain exceptional conditions have to be met which, in our contemporary world, not many states would be able to do, if

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\(^1\) We focus in particular on Oakeshott 1975b and 1999.
any. However, in Kelsen's view, any state that, in exercising its power, uses law — irrespective of whether it is good or bad law — can be considered a Rechtsstaat. Since every modern state is ruled by law in this sense, in one way or the other (at least if one is willing to take the legal perspective6), the addition of Recht to Staat has become superfluous. As Kelsen writes: «If the state is comprehended as a legal order, then every state is a state governed by law (Rechtsstaat), and this term becomes a pleonasm.»7 For Oakeshott, on the contrary, the Rule of Law is a mark of distinction that can be attributed to a state only under very specific circumstances.

In this chapter we will first give an outline of Oakeshott’s conception of the Rule of Law (section 2). Second, Kelsen’s view on the Rechtsstaat, as developed in his Pure Theory of Law, will be sketched (section 3). Third, the two conceptions will be compared (section 4). A selection of the most significant similarities and differences will be discussed. Finally, some advantages and disadvantages of both conceptions will be evaluated (section 5). In what respects can they be considered to supplement or correct each other?

2. Oakeshott: The Rule of Law as Civil Association

Michael Oakeshott conceives of the Rule of Law as a moral association based on the authority of non-instrumental rules that impose on its associates the obligation to respect the conditions which are prescribed in the law. These conditions are adverbial qualifications of the actions performed by the associates. In other words, the law does not prescribe concrete actions but qualifies only how a self-chosen action has to be carried out. In principle, everything is allowed if it is done in a lawful manner. Every citizen is, for instance, free to drive around in his car as long as he respects the traffic rules and does not cause harm or danger to other road users. According to Oakeshott8, in penal law there is even no general prohibition on killing: it is only not allowed to kill «murderously»! The conditions prescribed in the law do not serve to promote or hinder a «substantive interest».9 In this sense, the laws belonging to the Rule of Law are non-instrumental: they do not aim at achieving a common goal or a collective satisfaction. For example, traffic

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5 See further section 4.
6 See section 3.
7 Kelsen 1967, p. 313.
8 Oakeshott 1975b, p. 58 n.
9 Oakeshott 1999, p. 149.
law does not determine where road users should go to, but only the way in which they have to reach their self-chosen destination. Moreover, the conditions prescribed in the law do not have to meet the requirements of correctness, justice or reasonableness. The sole terms of this relationship are the recognition of the authenticity of the laws. According to Oakeshott, the Rule of Law also referred to as nomocracy, civitas peregrine or societas — is based on three conditions. The first condition is that the associates know what the laws are and how they are created. For that purpose, a legislative power has to be established. Seen from the perspective of the Rule of Law, it does not matter to whom this power is attributed: to a king (in a monarchy), to a selected group of people (in an aristocracy), or to the people as a whole (in a democracy). What is essential is that there is a sovereign legislative power that has the exclusive and unconditional competence to create, amend or withdraw laws. The laws are not a loose collection of rules, but constitute an autonomous, coherent legal system, which Oakeshott calls lex. After extensive political deliberation, the legislature determines the conditions that are applicable to the associates’ actions. It has to be established on purely moral (non-instrumental or procedural) grounds in what manner citizens are allowed to pursue their own interests; neither individual nor collective interests are taken into account. In creating law, the existing social practices and the way in which they are normally regulated serve as a guiding light. What holds the community together is a shared recognition of a specific way of doing things based on tradition. Tradition is thus an important source of inspiration for the creation of law, though it is itself not changeable. The civil association is part of a living tradition that not only looks backward but also develops

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11 Oakeshott 1999, p. 149.
12 That is, an association, not of pilgrims travelling to a common destination, but of adventurers. Oakeshott 1975b, p. 203.
13 Oakeshott 1975b, resp. pp. 203, 299 and 201.
14 Oakeshott does not favor one system over the other. That does not mean that he is against democracy, though he is critical about how it developed into popular government. Cf. Franco 1990, p. 155.
15 Oakeshott 1975b, p. 129.
16 The term moral does not refer to questions concerning good and evil, but indicates that what is at stake in the political debate is not the satisfaction of a specific need or another wished-for consequence. Cf. Oakeshott 1975b, p. 122, 139.
17 Oakeshott 1991b, p. 56, conceives of politics as the activity of attending to the general arrangements of a collection of people who, in respect of their common recognition of a manner of attending to its arrangements, compose a single community. See for his conception of politics also Oakeshott 1975b, pp. 159–177.
itself by means of deliberation. There is no collective ultimate objective: 'In political activity [...] men sail a boundless and bottomless sea.'

The conditions prescribed in the law inevitably have an indeterminate character. For this reason, the second condition is that a court be installed that is competent enough to determine whether an action in an individual case meets the conditions that are specified in the law. The judge does not assess the desirability of these conditions (that is up to the legislator), but only their correct application in individual cases. The general norms of the law are never directly applicable to a concrete case; there are no easy cases in which the application of the law is self-evident. The relation between the judge's conclusion and the law is contingent, that is, the law may be applied in various ways. With every application the meaning of the law is amplified. For his choice of a certain application the judge gives reasons which are derived from the system of law. These reasons cannot be considered right or wrong, but they may be persuasive to a greater or lesser extent. In interpreting the law the judge engages in a type of deliberation that Oakeshott characterizes as 'retrospective casuistry': from previous cases a rule is abstracted on the basis of which it has to be established whether the law has been violated in the case at hand or not. To the violation of the law the judge attaches a certain consequence; he may, for instance, impose a sanction (such as a fine or imprisonment). The judge is not an arbitrator in a conflict of interests, but the custodian of the unity of the legal system. The judge's verdicts are commands that have to be followed by the associates.

The third and final condition for an association based on the Rule of Law is power: there has to be an executive branch that takes care of implementing the commands of the court. To this apparatus of rules also belong the so-called custodians of peace who are responsible for investigating, prosecuting and preventing violations of the law.

An association that meets these three requirements does not, as said before, aim at reaching a common goal in the sense of a final objective pursued by all members. The association is itself not a common interest or a greatest

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19 Oakeshott 1991b, p. 60.
20 Oakeshott 1999, p. 158.
21 This type of reasoning Oakeshott 1975b, p. 136 calls 'analogical', but he adds that this involves more than a case-by-case comparison: 'The reasoning is analogical; it is not concerned with the similarities of cases but with what can be abstracted from a judicial conclusion, namely the amplification of the meaning of lex.'
22 Oakeshott 1975b, p. 143.
23 Oakeshott 1975b, p. 143.
good, except when its survival is at stake due to an external threat, such as war. Neither do inalienable and unconditional rights preceding the legal order (for instance, individual rights or human rights) belong to it. The civil association is based solely on legality. What binds the associates is the collective acceptance of the authority of the law. They have committed themselves to respect the moral conditions specified in the law which apply to them all equally. It does not matter whether the associates have chosen or accepted these conditions themselves; they have to recognize the legal system as a whole and respect it, in terms of Hegel, as a «product of reflective intelligences». Law's authority consists in the recognition of the validity of the conditions specified in the law, irrespective of whether they are just or not. The justice of the legal system, referred to as jus, does not follow from its adherence to higher values – such as human perfection or self-realization – but from the formal principles that are imbedded in the law: «The only justice the rule of law can accommodate is faithfulness to the formal principles inherent in the character of lex: non-instrumentality, indifference to persons and interests, the exclusion of privilege and outlawry»\textsuperscript{26}, and so on.\textsuperscript{27}

In Oakeshott's view, the Rule of Law is a strictly non-teleological and non-instrumental project. Under the Rule of Law the law rules for its own sake, as a way of loi pour loi one could say, because the law has value in itself as a form. A shared orientation is lacking; the only thing that matters is to maintain a civil and civilized form of living together: «[Civil laws] do not specify a public interest (there is none), but a public concern with the manners in which private interests are pursued».\textsuperscript{28} In this respect, it distinguishes itself from other associations in society, such as an enterprise or a club. Usually, a company aims at maximizing profit. For that purpose, managers give their subordinates commands in order to increase production. A club may serve several goals, for instance, promoting the sportive achievements of its members, the maintenance of some cultural or natural heritage, or simply social activity for its own sake. The members work together to reach the goal that they have chosen themselves. In a state governed by the Rule of Law there is no such higher aim. Everyone is free, within the limits set by the law, to choose for himself which interest he wants to pursue. The legislator does not give orders to the associates, but determines only in which

\textsuperscript{25} Cited and explained in Oakeshott 1975b, p. 256.
\textsuperscript{26} On the meaning of outlawry, see Friedman 2005, p. 179.
\textsuperscript{27} Oakeshott 1999, p. 173. Oakeshott 1975b, p. 153 n. also speaks about the inner morality of a legal system, recalling Lon L. Fuller's concept of the internal morality of law.
\textsuperscript{28} Oakeshott 1975b, p. 254.
manner the self-chosen actions have to be carried out. The commands of the
court have to secure that the law is obeyed, if necessary by means of force.

As the Rule of Law does not constitute a greatest good, values such as
freedom, safety, peace and order cannot be considered to be goals of the
civil association. According to Oakeshott, these values are inherent in the
civil association, but they are not realized by it:

[A]ll this may be said to denote a certain kind of freedom which excludes only the
freedom to choose one's obligations. But this freedom does not follow as a consequence
of this mode of association; it is inherent in its character. And this is the case also with
other common suggestions: that the virtue of this mode of association is consequential
peace (Hobbes) or order. A certain kind of peace and order may, perhaps, be said to
characterize this mode of association, but not as a consequence.\(^\text{29}\)

In other words, civil association does not conceive of safety, peace and order
as material needs that can be fulfilled by a collective effort, but as formal
conditions that enable citizens to fulfil their own needs and pursue their
own goals. The same counts for freedom (and other values, such as happiness
or perfection).\(^\text{30}\) As soon as the realization of a certain value is declared to be
the collective goal of the association, the Rule of Law ceases to exist. The
state is no longer governed by the Rule of Law, but turns into its opposite:
the state as cooperation or enterprise. The antonym of the Rule of Law is the
technological conception of the state, developed by Bacon amongst others,
in which the state is an enterprise in the service of a higher goal. In history,
this higher goal has to be defined in different terms, such as the harmoniza-
tion of cultural and religious opinions, or the growth and division of wealth.
In the state as enterprise – also referred to as teleocracy, civitas cupiditatis\(^\text{31}\) or universitas\(^\text{32}\) – the members do not associate in their capacity as
legal subjects (or personae) but as natural persons who have a shared interest
or a common need. The government is a manager who gives orders to his
subordinates in order to promote this higher goal. Oakeshott characterizes
the political style connected to this mode of government as rationalistic\(^\text{33}\):
human conduct is subjected to a uniform standard of perfection.\(^\text{34}\) A govern-

\(^{29}\) Oakeshott 1999, p. 175.
\(^{30}\) See also Franco 1990, pp. 223–224.
\(^{31}\) That is, a corporate productive enterprise, centred upon the exploitation of the
material and human resources of an estate (Oakeshott 1975b, p. 290).
\(^{33}\) Oakeshott 1991a, pp. 9–10.
\(^{34}\) Another qualification is ideological (Oakeshott 1991b, p. 54). Elsewhere, he speaks
about the spolitics of faiths as a political style that aims at achieving human perfection as
the greatest good, which he distinguishes from the spolitics of scepticism rooted in the
radical belief that human perfection is an illusion, or in the less radical belief that we
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ment dedicated to the Rule of Law acts as a »master of ceremoniess35 who enables people to enjoy their own party, whereas a manager in the state as enterprise can be compared to an »arbitr of fashion« who prescribes what people are to wear or not to wear.36 In modernity, the conception of the state as enterprise has gained popularity due to the rise of the so-called »handicapped individuals« (individuel manqués).37 Some people are, either on financial or on psychological grounds, not able to connect to the modern condition and are not capable of handling the freedom that is granted to them. They feel estranged and helpless. Out of guilt for their own failure they become militant anti-individualists who want to get rid of the individual and its moral prestige. As soon as they discover that they are not alone and they associate themselves, the »mass-man« is born.38 The mass-man strives for a state in which everyone is equal and everyone shares the same goal. The Rule of Law is supported by a different type of man, namely by individualists who, on the contrary, want to distinguish themselves and who aim at developing themselves and deciding for themselves. They are no pilgrims who are jointly heading to the same final destination, but adventurers39 who constitute, paradoxically speaking, a »community of Einzelgängere40 who are joined in their subjection to the law. In their view, the state has to secure only that they can live in freedom and in an orderly and civilized way with each other.

In contemporary states both conceptions of governance can be traced, as Oakeshott argues. This ambivalence represents two different tendencies in human nature: on the one side to follow and to subject oneself and, on the other side, to take life in one's own hands. Both conceptions cannot be reconciled with each other or reduced to each other. They are no friends of each other, neither are they foes. Oakeshott characterizes their relationship

know too little about the conditions of human perfection for it to be wise to concentrate our energies in a single direction by associating its pursuit with the activity of governings (Oakeshott 1996, resp. pp. 27 and 31).

37 Oakeshott 1975b, p. 276.
39 The dominant feature of the modern European man is, according to Oakeshott 1975b, p. 251, the wish to be »distinct«.
40 In his phantasy novel »Die 13½ Leben des Käpt'n Blaubars« (Moers 1999, p. 283; our translation), Moers gives a description of a group of nomads named »Gimpels that is very well applicable to the cives in Oakeshott's civitas: »ingrained individualists, […] like a walking paradox, an emergency association of loners«.
as «sweet enemies». There can be no doubt which conception has his sympathy. He considers the state as an enterprise to be a «relic of servility of which it is proper for European peoples to be profoundly ashamed». Moreover, in his view, it is basically an oxymoron: an enterprise is a voluntary association – the members have chosen to associate themselves out of their own free will and they can always decide to leave the enterprise –, whereas the state is an organization based on force from which the associates cannot withdraw themselves so easily. A state that acts as an enterprise forces its members to work together for the common good and, thereby, they lose their freedom and autonomy. For that reason Oakeshott argues that the Rule of Law – despite the fact that nothing can be gained from it (or perhaps exactly because of that) – is the superior conception of governance: «The Rule of Law bakes no bread, it is unable to distribute loaves or fishes (it has none), and it cannot protect itself against external assault, but it remains the most civilized and least burdensome conception of a state yet to be devised».

3. Kelsen: The Identification of Law and State

In his Pure Theory of Law, Kelsen aims at construing a critical-scientific conception of law which is purified from metaphysical and empirical references and also safeguards the autonomy of law. Roughly speaking, he discerns three different phases in the history of human thought (in particular in the fields of social and legal philosophy) which have contributed to the development of the modern positivist conception of law. Initially, in primitive thinking, there was a unity between nature and society. Nature was conceived as animated and, therefore, as a part of society. In primitive society, the main principle that was supposed to govern nature was that of retribution based on reward and punishment. Subsequently, in modern society a dualism between nature and society is established. Supported by the growth of scientific knowledge, differentiations are made between this life and the hereafter, reality and idea, between what is (Sein) and what ought to be (Sollen). The causality principle replaces the earlier principle of retribution: nature is understood as a mechanism that is governed by laws of cause and effect. As a result, society becomes a part of nature. Because it presupposes a

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41 Oakeshott 1975b, p. 326.
42 Oakeshott 1975b, p. 321.
43 Oakeshott 1999, p. 178. Oakeshott 1999, p. 176 does not exclude the possibility that, by complying with the conditions specified in the law, certain needs can be fulfilled by way of «side products».
transcendental order superseding the social order, Kelsen characterizes this kind of dualism as "metaphysical" or "religious". In order to overcome this "harsh" dualism and to restore the original unity between nature and society, the idea of an eternal and just order superior to all man-made law — that is, the idea of natural law — is posited. Finally, a fundamental break with the metaphysical-religious dualism constitutes the critical-scientific worldview of our modern age. It intends to liberate thinking of any metaphysical notions by focusing exclusively on the world as it is, that is, as it can be known through our senses and intellectual faculties. It rejects any statement on an object beyond experience. It does not deny the existence of the transcendental, but considers it to be a "scientifically useless" hypothesis which cannot be proven or falsified. Moreover, it is based on an epistemological dualism between facts and norms. Scientifically speaking, the world can be approached from two different perspectives: an empirical and a normative perspective. Absolute truth is no longer obtainable; truth is always relative to the knowing subject. In the critical-scientific worldview, objectivity is the main goal. "Therefore", as Kelsen argues, "we also find the prevalence of logic and the tendency to relativism", which may even lead to skepticism towards what can be known. These elements taken together constitute the philosophical foundation of the positivist conception of law.

Not only in the superstructure of intellectual thought but also in the base structure of society, there have been developments that, according to Kelsen, have paved the way for a positivist conception of law. In modern society, power has become more and more centralized in the state. As Max Weber argues, the state has obtained the monopoly of the legitimate use of physical force. The state's main instrument for the execution of force is the law. Because positive law lacks the "self-evident rightness" of natural law, it needs the strong arm of the state to be enforced. In modern society, there is a close connection between law and the state. Kelsen goes so far as to claim that, from a legal perspective, they are identical. In the course of modernization, law has gradually emancipated itself from other normative systems, such as morality, religion and custom, and has become autonomous.

Due to these intellectual and social developments, law has become an independent object of scientific research. Kelsen seeks to provide a solid scientific foundation for the science of law in order to secure its position among other sciences, in particular the natural sciences, which threaten to become

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46 Kelsen 1971, p. 199.
the dominant and only acceptable form of *true* science. For that purpose, the questions of what is typical or unique about the way the science of law understands its object, and how it differs from other understandings, have to be answered. Kelsen argues that the phenomenon of law can be studied from two different perspectives: either how it should be (*Sollen*) or how it is (*Sein*). These two perspectives correspond with two different disciplines by means of which law can be studied: these are, respectively, a *normative* science of law that determines deductively which rules are valid, and an *explanatory* sociology of law that establishes inductively a certain regularity for which it tries to find a causal explanation. Thus, in Kelsen’s view, the science of law is a normative and deductive science of value, like ethics and logics, whereas the sociology of law, like other branches of sociology, is a science of reality, and conforms more generally to the methodological practices of the natural sciences. It is equally possible and legitimate to study law from both perspectives, but not at the same time.

According to Kelsen, it is the aim of the science of law to describe the set of valid legal norms in a certain territory at a certain time, irrespective of their ethical value and empirical effects. Taken together, the legal norms of a given legal order build a hierarchical structure (or *Stufenbau*), consisting of different levels of norms and norm applications, starting from the basic norm, moving down to statutes, governmental regulations, court decisions, contracts, and so on, and ending in the factual execution of a legal command (e.g., the imprisonment of a criminal by a police officer). In Kelsen’s view, a norm is a legal norm if, and only if, it can be traced back to a higher legal norm that authorizes the creation of the legal norm at a lower level. Ultimately, the validity of all legal norms depends on the implicit acceptance of the basic norm (or *Grundnorm*) of a legal system. The basic norm is a norm *the validity of which cannot be derived from a superior norm*. It states that the norms of a state’s first constitution constitute law and, by implication, the norms following from the first constitution also constitute law. Kelsen is able to differentiate between law and power, but only under the assumption that a person is prepared to adopt the legal perspective. No one can be forced to take this perspective. What might appear, from an empirical point of view, to be the sheer execution of power, may normatively be considered a rightful application of a legal norm. That is essentially an individual choice. Thus, for Kelsen, law is a matter of perception – not as a social or psychological fact but as a transcendental datum: in order to identify norms as legal, it has to be presupposed that a prior higher norm was accepted that

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validates all other legal norms that are subsequently promulgated. Because
the norms belonging to a given legal order owe their validity ultimately to
the basic norm, the basic norm brings unity to the diversity of existing
norms. This unity makes it possible to describe the legal order at hand as a
coherent set of legal sentences that do not contradict each other.\footnote{Kelsen 1967, pp. 205–208.} The ac-
ceptance of the basic norm is what the normative study of law makes pos-
able: «The basic norm merely states the condition under which the empirical
material can be more closely defined as positive law by juridical science».
\footnote{Kelsen 1973, p. 405.} Moreover, it enables the «transformation of power into law».
\footnote{Kelsen 1973, p. 437.}

Legal norms have to be interpreted before they can be applied to concrete
cases. According to Kelsen, every legal norm belonging to the Stufenbau is,
by necessity, to a greater or lesser extent, open for interpretation and cannot
dictate its own application at a lower level. If we descend the hierarchy of
norms – from the general constitutional provisions to the court’s decisions
in individual cases – the interpretative options will gradually diminish, but
at each level there will remain at least some room for interpretation. Legal
interpretation involves the application, as well as the creation, of a legal
norm, because a general higher-order norm has to be concretized. A legal
norm functions as a «scheme of interpretation» or a «frame» within which the
different possible applications of the norm are given. Scientifically speaking,
these options are equivalent. Therefore, a «one right answer» does not exist:

The interpretation of a statute […] need not necessarily lead to a single decision as the
only correct one, but possibly to several, which are all of equal value, though only one
of them in the action of the law-applying organ (especially the court) becomes positive
law.\footnote{Kelsen 1967, p. 351.}

The different possible applications are equivalent, because a choice between
them is inevitably based on a subjective evaluation which is carried out from
a particular moral or political point of view. In Kelsen’s view, legal inter-
pretation is not a neutral, value-free activity but an activity in which some
values are realized at the expense of others. It is always possible to argue
about the right application of a legal norm in a concrete case, but this debate
cannot be settled from a legal perspective:

From the point of view directed at positive law, there is no criterion by which one pos-
sibility within the frame is preferable to another. There simply is no method (that can be
characterized as a method of positive law), by which only one of several meanings of a norm may gain the distinction of being the only «correct» one.\textsuperscript{53}

Kelsen advocates a clear separation between legal norms and other norms, leading to an identification of law and state. In his words, the state is «the personification of a legal order».\textsuperscript{54} Irrespective of how they are created and by whom they are created, legal norms owe their validity to the state and not to society. Kelsen considers the state to be a «special form of society», «social unity» or a «legal organization», to which all legal norms can be traced back, whether they are produced by state officials or by members of an association. Every individual whose actions are imputed or ascribed to the state can be designated as an «organ» of the state, including a voter or a contract party. By implication, in the creation of law, no principal distinction can be made between «ordinary» people and state officials; everyone who is authorized to issue legal norms is, by definition, part of the state.\textsuperscript{55} Neither can the rights of private law, or «private rights», and the rights of public law, or «political rights», be distinguished fundamentally: «all law [is] state law».\textsuperscript{56} At the same time, Kelsen does not consider every legal order to be a state. A state presupposes at least an administration and courts, and possibly, but not necessarily, a legislature at a later stage of development; that means that there has to be a certain degree of centralization.\textsuperscript{57} Both the legal order of primitive society and the international legal order are fully decentralized coercive orders and therefore not states. However, Kelsen does not rule out the possibility of a «world state» in the future.\textsuperscript{58} Because he acknowledges that there can be law without the state in primitive society, as well as in the international legal order, it is more accurate to say that, in Kelsen's view, all law has to be public law. But as soon as an administration and courts have been installed within a certain legal community, which are responsible for the application of legal norms created either on a centralized or on a decentralized level, all law is by definition state law. In other words, non-state law is only thinkable in contexts where there is no state or no state yet.

\textsuperscript{53} Kelsen 1967, p. 352.
\textsuperscript{54} Kelsen 1973, p. 197.
\textsuperscript{56} Staatsrecht; Kelsen 1962, p. 216; our translation.
\textsuperscript{57} Kelsen's description of the social process of centralization begs the question of whether law and state can be considered as identical. In contrast, Oakeshott does not have this conceptional problem, because he understands law in the context of cultural practices without identifying law and the political order (see the previous section).
\textsuperscript{58} Kelsen 1971, p. 256.
In Kelsen’s view, law is a “specific social technique” or a “specific social means, not an end.⁵⁹ What distinguishes law from other social techniques or means, is its use of force. “Law makes the use of force a monopoly of the community.”⁶⁰ In other words, a legal order is essentially a coercive order: a sanction is imposed in reaction to the violation of a legal norm. Kelsen conceives of a legal norm as a conditional statement that authorizes an individual – that is, a legal authority – to apply the sanction prescribed in the norm in case the specified behavior occurs (e.g., “If a person steals, a judge is authorized to send this person to jail”). Fear of sanctions does not need to be the primary motivational force to obey the law, but the legal order simply has to provide for sanctions if the law is not obeyed. By threatening with force, or actually using it, law is capable of pacifying the community.⁶¹

In his critical variant of legal positivism, Kelsen opposes the natural law doctrine that, in his view, wrongly identifies law (or state) and justice, and misconstrues law as an absolute value, which can be deduced objectively from the unchanging laws of nature.⁶² Instead, he stresses the dynamic character of law creation: law is constantly created and re-created through decisions of individual people authorized to do so. Law is never simply given, waiting to be discovered, but a construction, a product of conscious and subjective choices. As a result, law can only have a relative value. According to Kelsen, the natural law doctrine has, “on the whole, a strictly conservative character.”⁶³ Despite its appeal to norms superior to law, its function is “not […] to weaken, but to strengthen the authority of positive law”. In other words, natural law is nothing more than an ideology: “Natural law as posited by the theory was essentially an ideology which served to support, justify and make an absolute of positive law, or, what is the same thing, of the authority of the state.”⁶⁴ If legal norms are presented as absolute commands, deduced from the laws of nature, they are immunized against criticism and change. If, on the other hand, legal norms are taken for what they are, that is, man-made constructions in which some interests are protected at the expense of others, their fallible and changeable character becomes apparent.

In Kelsen’s conception, law may derive its norms not only from custom or established practices but from any source (morals, politics, religion, decency, and so on) and, therefore, the potential for modifying the existing law is

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⁵⁹ Kelsen 1971, p. 236.
⁶³ Kelsen 1971, p. 150.
much greater than in a natural law approach. What follows from the »nature of things« on a factual level is not necessarily what ought to be done on a normative-legal level. Although, in principle, »any kind of content might be laws«, the norm to be created has to fit into the existing legal order; otherwise it can be annulled on the basis of the higher norm that authorizes the creation of the norm at a lower level. That means a significant limitation of arbitrariness in the exertion of power and offers some prospect of values such as the equality of citizens before the law, legality and legal security, being protected.

According to Kelsen, modern sociology had, in general, replaced the natural law doctrine.\textsuperscript{65} Both disciplines tried to ground their normative conception of law in factual statements about the »nature of things«, either in a supposedly ideal or in a supposedly real world. So Kelsen’s Pure Theory of Law is not – as is sometimes argued\textsuperscript{67} – meant to disguise the political nature of law but, on the contrary, to expose it in order to enable a critical discussion about it, albeit outside the forum of science. Consequently, as a legal scholar, Kelsen does not give preference to one kind of legal order over another; he considers every state to be a Rechtsstaat dedicated to the Rule of Law since it, by definition, exerts its power by means of law.

That does not keep him, however, from embracing democracy on a personal level.\textsuperscript{68} He rejects the raw and direct form of democracy, in which the people’s voice is transmitted without any apparent interference, but opts for the mediating form of parliamentary democracy instead. He considers parliamentary democracy to be both a valuable and inevitable compromise between the democratic requirement of freedom, on the one hand, and the need for a division of labor caused by social-technical progress, on the other. Parliamentary democracy can only be, Kelsen argues, a »democracy of legislation«, that is, a democracy where law is created at the highest level of the state.\textsuperscript{69} A so-called »democracy of administrations«, in which the application of law in the lower ranks of the state would be democratized, would unavoidably undermine democracy at the legislative level. At first glance, legality leads to a limitation of democracy, but it appears to be a necessary ele-

\textsuperscript{65} Kelsen 1967, p. 198. As Kelsen 1967, p. 198 explains: »A legal norm is not valid because it has a certain content, that is, because its content is logically deducible from a presupposed basic norm, but because it is created in a certain way determined by a presupposed basic norm. For this reason alone does the legal norm belong to the legal order whose norms are created according to this basic norm.«

\textsuperscript{66} Kelsen 1962, p. 46.

\textsuperscript{67} See, e.g., Dreier 1990, pp. 19–20.

\textsuperscript{68} See, in particular, Kelsen 1963.

\textsuperscript{69} Kelsen 1963, pp. 72–76.
ment of its maintenance. Through its voting system, democracy attests to a worldview of relativism: in the absence of absolute truths, every opinion and every vote should count equally. Autocracy, on the contrary, is based on political absolutism, which grants no freedom to the ruled and does not treat them as equals.\textsuperscript{70}

Kelsen's defense of democracy, building on the principles of freedom and equality, does not, of course, follow logically from his conception of law but is very well compatible with it. In his view, democracy presupposes a hierarchical structure of norms, the so-called Stufenbau. In order to protect the unity of the legal system, higher norms (created by the legislature) are entitled to overrule norms at a lower level (created by, for example, the government or the court) in case of conflict. Within the confines of his scientific theory, he cannot and does not choose one system of norm creation (e.g., democracy) over the other (e.g., autocracy).

4. Oakeshott and Kelsen: Similarities and Differences

It is obvious that Oakeshott and Kelsen are working from within different academic disciplines and therefore refer to different sources, use different methods, and pursue different scientific goals. Oakeshott is a political philosopher, who was trained originally in British Idealism but later became influenced by Neo-Kantian Idealism\textsuperscript{71} and hermeneutics (as appears, among other things, from his interest in history, historicity and tradition). In the publications discussed above, his main goal is to understand the conditions under which the Rule of Law can be thought of as a normative concept. On what grounds can justifiably be said that a state is governed by the Rule of Law? On the contrary, Kelsen, a lawyer by education and a self-made legal philosopher, aims at purifying the law and the science of law from what he considers to be metaphysical normative notions. Building on a strict is-ought distinction that he adopted from the neo-Kantian epistemology\textsuperscript{72}, he intends to describe the law as it is, without making any claims as to how it ought to be.

Despite these differences, they share a very similar conception of law, in particular in their view of what constitutes law's validity and legality. To begin with, both Oakeshott and Kelsen identify law with positive law, that


\textsuperscript{71} In particular in his rejection of methodological holism, see Podoksik 2004.

\textsuperscript{72} Cf. Dreier 1990, pp. 86–90.
is, law that is created by men. In opposition to the natural law doctrine, they reject any appeal to a higher, non-legal normative standard that would decide on the validity of law. As quoted above, according to Kelsen, «any kind of content might be law». Oakeshott argues, likewise, that law derives its authority from the recognition of the validity of the conditions specified in the law, irrespective of whether they are just or not. As soon as the cives belonging to the civil association have accepted the legal system as a whole, they have to accept individual decisions taken by legal authorities as binding law. Thus, it is not the content of the law that determines whether it is valid law or not, but the way (by whom and how) it has been created. However, Oakeshott does not explain how exactly this procedure could confer validity to the law. He seems to take for granted that norms that are created and applied by legal authorities – in particular the legislature and the court – are valid law. As an empirical precondition he requires that the cives have recognized the legal system as a «product of reflective consciousness». According to Kelsen, the mere recognition of a legal system cannot explain its validity, because that would be an inadmissible jump from «is» (the social fact of recognition) to «ought» (the normative existence of the law, or why it should be recognized as law). 73 In Kelsen’s account, as we have seen, a norm is a legal norm if, and only if, it can be traced back to a higher legal norm that authorizes the creation of the legal norm at a lower level. Ultimately, the validity of all legal norms depends on the implicit acceptance of the basic norm of a legal system. The basic norm is an epistemological presupposition, not a social fact, which legal scholars have to accept in order to be able to describe the law as law. Whether citizens do so or not, is a matter of individual choice.

Secondly, both Oakeshott and Kelsen seem to conceive of the Rule of Law predominantly in terms of formal legality. 74 In this conception, the Rule of Law is composed of procedural ideals such as generality, equality of application, predictability (or even certainty), consistency, and prospectivity. As Oakeshott argues, the justice of the legal system does not follow from its adherence to substantive values but from the formal principles that are imbedded in the law, including non-instrumentality, indifference to persons and interests, the exclusion of privi-lege and outlawry. These formal principles have to secure that the law is applied equally to everyone, so that no-one within the civil association is excluded from the protection of the law or, on

73 In this respect, Kelsen’s account differs fundamentally from H.L.A. Hart’s notion of the rule of recognition, which is based on a common practice among legal officials who accept certain criteria for identifying valid law (Hart 1994, pp. 55–57 and further).

74 Tamanaha 2004, p. 119.
the other hand, receives any special benefits. Kelsen’s notion of the hierarch- 
chical structure of the law (or Stufenbau) expresses the law’s pursuit for pre-
dictability and consistency: because a legal order is based on the principle of 
non-contradiction, any creation or application of a legal norm that violates 
a higher legal norm can and should be annulled by a legal authority. Without 
this principle the law would become arbitrary and unpredictable, since any-
thing would go. Oakeshott considers the judge to be the main guardian of 
the unity of a legal system. Kelsen and Oakeshott both acknowledge that the 
meaning of the law is never entirely clear. In Kelsen’s view, a legal norm 
offers a «frame» or a «scheme of interpretation» which contains different 
possible applications of the norm that, legally speaking, stand on an equal 
footing. Oakeshott agrees that the law may be applied in various ways but, 
contrary to Kelsen, he does not presuppose that the possible applications of 
the law are somehow pre-given in a frame or scheme of interpretation. In-
stead, he builds on the hermeneutic insight that a general norm derives its 
(always temporary) meaning from its application to concrete cases.75 With 
every application the meaning of the law is amplified, so the scope of a legal 
norm is not fixed but may, in principle, be extended endlessly.

Thirdly, Kelsen and Oakeshott seem to share a relativist, if not skeptical, 
view on the objectivity and universality of moral values that informs their 
formalistic, positivist conception of validity and legality. Their position can 
be characterized as meta-ethical moral relativism, which holds that the truth 
or falsity of moral judgments, or their justification, is not objective or abso-
lute but is relative to particular traditions, convictions or practices of groups 
of people.76 According to Kelsen, value judgments are nothing but subjec-
tive preferences. Science cannot determine the truth or falsity of these pref-
ferences but, in public and political debate, it must be established which of 
these preferences will receive legal recognition. Oakeshott also denies that 
there are shared values upon which we could all agree. Accordingly, in his 
view, the Rule of Law should grant people the freedom to live their lives 
according to their own plans, albeit within the formal conditions set by the 
law. In determining which formal conditions have to be imbedded in the 
law, the legislature should orient itself on the traditional way of how to do 
things in particular traditions or practices. That implies, however, that when 
it comes to formal or procedural values, Oakeshott is less relativistic than 
with regard to substantial values: whereas citizens are hopelessly and end-

75 In Gadamer 2006, pp. 305–309, a very similar notion of application can be found.
76 This definition is taken from the Stanford Encyclopedia of Philosophy at http:// 
plato.stanford.edu/entries/moral-relativism/#ForArg.
lessly divided in matters of justice, they may hope to find, through political deliberation, a common *jus* that indicates the way in which they have to deal with these differences of substance.

Although there are many similarities in Oakeshott’s and Kelsen’s conception of law on a descriptive level, their views on the Rule of Law differ fundamentally. The most obvious difference is, to begin with, that Oakeshott endorses a normative conception of the Rule of Law, whereas Kelsen intends to provide a purely scientific and objective description (whether he fully succeeds in purifying his theory of liberal tendencies is open to debate). In Oakeshott’s account, the Rule of Law is an ideal or theoretical concept that may function as a standard against which concrete, empirical states may be measured – and will probably fail to a greater or lesser extent. Only a state that is organized as a civil association is governed by the Rule of Law in Oakeshott’s sense. That means, first and foremost, that the state has to abstain from the pursuit of some general interest, but it must take care instead that the citizens are able to pursue their individual interests in a lawful and civilized way. As soon as the state places itself in the service of achieving some common goal – the people’s enlightenment, welfare, freedom, safety, sustainability, et cetera – it turns into an enterprise and the Rule of Law is lost. According to Oakeshott, most states in Europe nowadays are enterprises.

Kelsen, on the other hand, has a rather comprehensive understanding of the Rule of Law. As we have seen, he calls any state that, in exercising its power, uses law – irrespective of whether it is good or bad law – a *Rechtsstaat*. Since every modern state is ruled by law in this sense (if one is willing to adopt the legal perspective), the concepts of *state* and *Rechtsstaat* have become interchangeable.

Subsequently, with regard to the evaluation of the law, the only thing Kelsen is interested in – in contrast to Oakeshott – is legality. Because he considers value judgments to be subjective preferences, Kelsen deems the question of the law’s legitimacy not to be answerable with scientific means. Therefore, in his Pure Theory of Law no substantive criterion for establishing the quality of the law or the legislative process can be found. Kelsen conceives of law as a «specific social technique» that is distinguished from other social techniques by its use of force. In his view, a legal norm has a hypothetical structure: if an action takes place that contravenes the norm, a legal official is authorized to impose the sanction prescribed by the norm. From this detached, technical point of view, it is indifferent to what end the instrument of law is used. Again, «any kind of content may be law».

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77 With the «possible» exception of Andorra; cf. Oakeshott 1975b, p. 176.
estingly, however, Kelsen does put forward a normative, political argument to demonstrate the superiority of his dynamic, positivist conception of law over a conservative, natural law conception: whereas the natural law doctrine in general has served to justify and maintain the existing legal state of affairs, the Pure Theory of Law makes constant change and amendment of the law possible. The only formal condition an amended or newly created legal norm has to meet, is that it fits the general legal system or, in other words, that it is consistent with all already accepted legal norms.

With Kelsen, Oakeshott recognizes that the civil association is based solely on legality. However, he introduces another formal criterion that law is expected to fulfill under the Rule of Law: legal norms should not prescribe or forbid specific actions (such as: you are ordered (not) to drive on the road), but they may only specify the manner in which a self-chosen action may be carried out (for example, if you drive on the road, you should drive safely). In addition, he requires from the actors involved in the process of law-making to refrain from any appeal to a common good; their only job is to identify the formal conditions that have to be respected in human interaction in order to sustain a civilized way of living together. This second criterion puts serious limits to an instrumental use of law, because it questions fundamentally the means–end logic on which Kelsen’s conception of the Rule of Law is based. Oakeshott challenges us to think about the Rule of Law not as a technique, or as a means to some higher end, but as an end in itself.

Finally, because he deliberately ignores ethical, political, social and other extra-legal conditions under which legislation may have to function, Kelsen is rather liberal (in the sense of permissive) when it comes to the sources of law. According to him, from a legal perspective, any normative consideration may inspire the creation and application of law. Oakeshott, on the other hand, has a clear preference for the continuation of existing traditions and practices. Since the creation of law has to start from somewhere, he recommends beginning with what has already been accepted as shared values and valuable guidelines of action. That does not mean that change is excluded, but it will always be a gradual, piecemeal amendment of already established orderings. In this sense, Oakeshott may be considered conservative, where as Kelsen is more progressive in his emphasis on the dynamic character of law creation in modernity. On methodological (and more or less hidden politi-

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78 In his rehabilitation of tradition, Oakeshott is very close to Gadamer (see in particular his elaboration of the principle of history of effect (Wirkungsgeschichte) in Gadamer 2006, pp. 299–306.

79 For his view on conservatism see Oakeshott 1991d.
cal) grounds he would deny that inferences can be drawn from how things have been regulated until now to how they ought to be regulated in the future. In his later writings, Kelsen expresses his preference for democracy, at least on the legislative level. Oakeshott seems to be less fond of democracy; he puts more trust in considerate deliberation by politicians who do not consider themselves to be representatives of some private or party interest. How these politicians have to be selected remains, however, unclear.

5. Does the Rule of Law Bake no Bread?

When comparing these two eminent thinkers, it appears that they share many ideas, especially with regard to the validity and legality of law. Oakeshott and Kelsen both have a formalistic, positivist understanding of what law is, which is grounded in meta-ethical moral relativism. More interestingly, they differ in some important respects. On the one hand, it may be argued that they complement each other. For instance, Oakeshott does not give any explanation of what exactly constitutes the validity of the law; he seems to assume that law created by legal authorities is by definition valid law (if it fits the general legal system). Kelsen's theory of the hierarchical structure of the law, ending up in the notion of the basic norm, provides such an explanation (whether it is a convincing one, we will not discuss here). Where Kelsen chooses to stick to a purely descriptive conception of the Rechtsstaat, Oakeshott shows how a positivistic conception of law can be combined with a normative approach to the Rule of law. Moreover, Oakeshott gives some basic guidelines for the creation and application of law, which Kelsen deliberately refrains from doing.

On the other hand, a comparison can also point to the weak spots in both theories and may question some of their underlying (methodological, conceptual and/or normative) presumptions. Building on Oakeshott, one can criticize Kelsen's purely technological conception of law as an instrument that can be used for any goal. As Oakeshott argues, in the creation and application of law important empirical and normative considerations have to be taken into account. Implementing legal norms that deviate too much from already accepted norms and the normal ways of doing things will most likely have a devastating effect on the practice at hand, if it has any effect at all.\textsuperscript{80} Instead of banning normative discussions from science altogether, it is

\textsuperscript{80} Oakeshott 1991b, p. 48, formulates it as follows: to try to do something which is inherently impossible is always a corrupting enterprise.
worthwhile to investigate, along the lines indicated by Oakeshott, whether we may find in shared formal principles a common ground for the creation and amendment of the law. Conversely, it can be questioned, from Kelsen's critical perspective, whether Oakeshott's formalistic *loi-pour-loi* approach is fully satisfactory. Is it possible to conceive of the Rule of Law as an end in itself? Why should one sustain a legal system when it is incapable of defending itself and feeding its citizens? Moreover, and more principally, is it possible to determine the formal conditions that have to be applied to human interaction, without taking into account substantive interests? For example, if one requires road users to drive safely on the road, one has implicitly accepted safety as a shared goal that traffic law should promote. Finally, one may ask why, in the process of law-making, priority should be given to tradition. Why should one do what one always has done? How can corrupt regimes be changed from within if they offer themselves no guidelines?

These and several more interesting questions may arise, when one puts together two kindred spirits who agree in many respects so that they can meaningfully disagree in others.

Bibliography


