

The Rule of Law Deflated: Weber and Kelsen

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Max Weber and Hans Kelsen may seem unexpected sources for a discussion of the normative concept of the rule of law. Neither addresses the issue directly, despite being contemporaries of people like Albert Venn Dicey who made it a central concern¹. Despite the fact that Weber avoided the term “*Rechtsstaat*” and referred instead to rational-legal *Herrschaft*, and that Kelsen said that the term *Rechtsstaat* was ideological, both Weber and Kelsen haunt this literature. The distinctive language they used in discussing the law reappears with regularity in the literature, usually without mentioning them by name². So do their distinctive concerns³. Both, moreover, were engaged in projects that bear directly on the concept of the *Rechtsstaat*, the German language variant of the concept of the rule of law⁴. So why did they decline to embrace

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¹ A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, 3rd ed., London-New York, Macmillan, [1885] 1959.

² P. CRAIG, for example, discusses *Formal and Substantive Conceptions of the Rule of Law*, in *Public Law*, Autumn, 1997, 467-487; the distinction is central to Weber’s sociology of law.

³ In *Rule of Law versus Rechtsstaat*, in P. HÄBERLE, J.P. MÜLLER (eds.), *Menschenrechte und Bürgerrechte in einer vielgestaltigen Welt*, Basel-Genf-München, Helbig&Lichtenhahn, 2000, 49-71, M. ROSENFELD considers the problem of the irrationality of the common law, one of Weber’s themes. Cfr. E. MELISSARIS, *Is Common Law Irrational?: The Weberian ‘England Problem’ Revisited*, in *Northern Ireland Legal Quarterly* 55, n. 4, 2004, 378-395.

⁴ The relations and differences between the two concepts has been widely discussed, but a traditional view was that the *Rechtsstaat* represented the German conception of the

what has become a standard topic in discussions not only of the nature of legal order but of social and political orders as well?

The Kelsen-Weber response, as I will reconstruct it here, is this: to divide legal orders into “rule of law” and non-rule of law legal orders is not to make a legal distinction; it is a matter of imposing a non-legal distinction, a distinction that is, from the point of view of purely legal considerations, arbitrary. The distinction as formulated by “rule of law” theorists is typically rooted in ideological considerations masquerading as legal distinctions. Defenders of the rule of law conception claim otherwise: they think they are making legal distinctions between legal orders, distinctions that can be based on philosophical considerations rather than ideological preferences for particular types of political orders. Dworkin, for example, argues that what are treated as ideological and non-legal concepts are in fact required by adjudication, and that a proper understanding of the nature of adjudication and of legal interpretation will show that these concepts and considerations play an ineliminable role⁵. For these thinkers, as for Kelsen, for the concept of the rule of law to be reduced to a mere political preference is a failure. They thus agree on the terms of the dispute: the concept has to be derived from legal considerations solely. They disagree on what is entailed by legal considerations. This, however, is not the only approach to the topic. A long tradition has been concerned to argue that there is a need (presumably a moral or political need) to distinguish legal orders from oppressive orders, and that there are characteristics of legal systems that allow one to make these distinctions. The large number of lists of criteria for evaluating the degree to which a country is a rule of law regime reflect this basic idea: the criteria are themselves based on features of the legal systems of the countries, but it is not clear that the preference for these features is or can be grounded in legal considerations alone. To the extent that they reflect political or moral preferences for particular kinds of legal systems, the distinction is no longer a legal one.

English legal system, especially as depicted by R. VON GNEIST, *History of the English Constitution*, New York, G.P. Putnam & Sons, [1882] 1886; IDEM, *The English Parliament in its Transformations through a Thousand Years*, Boston, Little Brown, 1886; see also L. BLAAU, *The Rechtsstaat. Idea Compared with the Rule of Law as a Paradigm for Protecting Rights*, in *New Contrast*, 107, 1990, 76-96; P. COSTA, D. ZOLO (eds.), *The Rule of Law: History, Theory, and Criticism*, Dordrecht, Springer, 2007; P. CRAIG, *Formal and Substantive Conceptions of the Rule of Law*, cit., 467-487; G. DIETZE, *Liberalism Proper and Proper Liberalism*, Baltimore, Johns Hopkins University Press, 1985; G. DIETZE, *Two Concepts of the Rule of Law*, Indianapolis, Liberty Fund, 1973; R.A. FALLON, ‘The Rule of Law’ as a Concept in Constitutional Discourse, in *Columbia Law Review*, 97, n. 1, 1997, 1-56; G. GOZZI, *Rechtsstaat and Individual Rights in German Constitutional History*, in P. COSTA, D. ZOLO (eds.), *The Rule of Law: History, Theory, and Criticism*, cit., 237-259; M. ROSENFELD, *Rule of Law versus Rechtsstaat*, in *Menschenrechte und Bürgerrechte in einer vielgestaltigen Welt*, 21, n. 24, 2000, 49-71.

⁵ R. DWORKIN, *Law’s Empire*, Harvard, Harvard University Press, 1988.

§ 1. – Deflationary Arguments

The argument Weber and Kelsen present has several elements, but the core is this: they are deflationary arguments. In each case, they articulate an account of the relevant facts and logical implications in a particular domain which is designed to be substituted for a “metaphysical” version of the same conception – such as “sovereignty” – which shows that there is nothing more to sovereignty than that which is included in the substituted conception. Kelsen’s argument is indirect. It shows that the general considerations that determine what counts as a legal regime also are sufficient to account for the legal aspects of the supposedly distinct phenomenon of a “rule of law” legal regime. The supposed distinction on which the “exclusive” notion of the rule of law depends, in short, is a distinction without a difference. This assertion appears in connection with the identity thesis:

There cannot therefore be any State not bound by its own order, free in relation to it, insofar the idea of a State bound by its order, free from hypostatization, has a meaning, because the State is this order itself, cannot be anything but order, and the idea of State liberated from ‘its’ order is a contradiction in terms. Since this order can be only the legal order, no State is conceivable other than the *Rechtsstaat*, and the *Rechtsstaat* is a pleonasm. (Kelsen⁶, translated in La Torre⁷).

The last sentence has a striking, and intended, implication for the discussion of the rule of law. It amounts to a rejection of “exclusive” concepts of the rule of law as adding nothing. What is of interest, however, is why it is the case that legal orders are necessarily rule of law orders.

Kelsen’s argument, and what I will show to be Weber’s variant of this argument, are not merely “inclusive” conceptions of the rule of law. Nor do they depend on a metaphilosophy of law such as legal positivism. They are deflationary analyses of the concept that show that the concept adds nothing of explanatory value, and is merely ideological. Both Kelsen and Weber used deflationary arguments in the context of law, but they were of different kinds.

Weber’s deflationary definitions were “empirical” in the sense that they asserted that there was no empirical difference between the implications of the definitions he gave and the definitions given by other, essentialist or metaphysical theories of the same thing. Weber’s

⁶ H. KELSEN, *Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht*, 2nd ed., Tübingen, J.C.B. Mohr, [1922] 1928, 187.

⁷ M. LA TORRE, *Law as Institution*, Dordrecht, Springer, 2010, 30, on http://link.springer.com/chapter/10.1007/978-1-4020-6607-8_2/fulltext.html.

famous definition of the state as monopoly of legitimate violence in a geographical territory is a classic example of deflation: nothing of the metaphysical view of the state is left, but the definition enables one to describe the empirical facts about statehood with no empirical remainder. Kelsen did something similar with sovereignty, but in Kelsen's usages the examples are legal rather than empirical differences, and involved the claim that there were no legal implications of supposed differences, for example between sovereign units of a federal system and units with specified authorizations under a legal order. The rest of the theory of sovereignty was, for him, mystical leftovers from the metaphysical theory of monarchy.

For them, such notions as the *Rechtsstaat* were ideologically encrusted, 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. Their goal was to strip them of their ideological content to get down to their factual core. They went about doing this in different, but parallel, ways.

§ 2. – *Kelsen and Weber: Core Concepts*

For Weber, the answer to the question of why he did not employ the concept of the *Rechtsstaat* is straightforward: he discusses it under a different heading. As part of his typology of forms of legitimate rule, he included "rational-legal authority", which is a formulation of the main features of the *Rechtsstaat* with the valuative overtones removed. His account of rational-legal authority placed "calculability," which appears as "predictability" in standard lists of characteristics of the rule of law, in a central position, and his historical writings treat the separation of office and person as one of the defining features that distinguish Occidental political and legal orders from those found elsewhere⁸: this is the distinction between the rule of law and the rule of men as it can be grounded in the history of law and administration.

A sociological "ideal-type" is an abstraction designed to provide an interpretive entry point for analysis, in this case of a distinctive form of legitimating belief. He contrasts it to two other conceptually purified forms, charismatic and traditional domination. Kelsen has a parallel list, adding religious, customary, and statutory law.⁹ Weber

⁸ M. WEBER, *Economy and Society: An Outline of Interpretive Sociology*, edited by G. Roth and C. Wittich, Berkeley-Los Angeles, University of California Press, [1968] 1978, 957-958.

⁹ H. KELSEN, *General Theory of Law and State*, cit., 110-116.

treats these as ideal-types, rarely or never found in reality in their pure forms, and regards actual present legal orders as mixtures; Kelsen, similarly, describes modern constitutions as mixtures of customary and statutory law, and he also uses the language of ideal-type¹⁰. Rational-legal authority, according to Weber, rests on the acceptance of the validity of the following (three) mutually dependent ideas:

1. That any given legal norm may be established by agreement or by imposition, on grounds of expediency or value-rationality or both, with a claim to obedience at least on the part of the members of the organization. This is, however, usually extended to include all persons within the sphere of power in question – which in the case of territorial bodies is the territorial area – who stand in certain social relationships or carry out forms of social action which in the order governing the organization have been declared to be relevant.

2. That every body of law consists essentially in a consistent system of abstract rules which have normally been intentionally established. Furthermore, administration of law is held to consist in the application of these rules to particular cases; the administrative process is the rational pursuit of the interests which are specified in the order governing the organization within the limits laid down by legal precepts and following principles which are capable of generalized formulation, and are approved in the order governing the group, or at least not disapproved in it.

3. That the typical person in authority, the “superior”, is thus himself (still) subject to an impersonal order by orienting his actions to it (this order) in his own dispositions and commands. (This is true not only of persons exercising legal authority who are in the usual sense “officials,” but, for instance the elected president of a state)¹¹.

Kelsen puts the same issues in a very slightly different way, reflecting his different purposes, and the difference between a sociological de-ideologization and one based on normative minimalism.

The first item concerns “sovereignty,” and extends Weber’s famous definition of a state: “A Compulsory political association will be called a state insofar as its administrative staff successfully upholds the claim to the monopoly of the legitimate use of force”¹². This is a “sociologized” restatement of the concept of sovereignty, and one that radically demystifies it. “Legitimacy” for Weber is no more than the belief by at least some of the affected population, namely the mem-

¹⁰ The term comes from Georg JELLINEK, whose lectures Kelsen attended in Heidelberg, who used it to represent a valuative ideal. Weber uses the term non-valuatively, as a value-neutral means of interpretation and aid to conceptually clear description. This is also how Kelsen uses the term; H. KELSEN, *General Theory of Law and State*, cit., 284, 288, 441-444.

¹¹ M. WEBER, *Economy and Society*, cit., 217.

¹² M. WEBER, *Economy and Society*, cit., 54.

bers of the ruling organization themselves, in the right of the rulers to rule. Elsewhere Weber speaks of legitimacy in terms of the combination of this belief and the probability that the rules in question will be obeyed¹³.

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. 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. 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*, which was already part of his Vienna background:

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 unity¹⁴.

The two definitions are closely related. For Weber, the characteristic of rational legal authority is the existence of a body of laws that constitutes a consistent, abstract, impersonal order. Officials are governed by or “oriented” to this order, and this includes the officials and political authorities who exercise the authority of administration, but also elected officials, such as Presidents and legislators. Kelsen makes

¹³ M. WEBER, *Economy and Society*, cit., 37, 53-54; M. WEBER, *Some Categories of Interpretive Sociology*, cit., 175-179.

¹⁴ H. KELSEN, *General Theory of Law and State*, cit., 124.

the same points: that the law is a consistent normative order, that it is a system of norms, rather than one of personal authority. Weber does not say precisely that law is norms produced in accordance with norms, but the third item in his list implies something very close to it. Officials, including elected ones, are oriented in their actions to an impersonal order, a “consistent system of abstract rules which have normally been intentionally established”¹⁵, to which they are subject. This system of rules is the law: the legitimating principle which characterizes the orientation to the law that gives these rules a specifically “legal” meaning is the belief in the validity and authority of the impersonal order itself, and not merely a belief in its contents.

Whether a “belief” in this impersonal order as such is different from a belief in Kelsen’s *Grundnorm* is a question which can be asked in two ways: sociologically, there seems to be no difference; legally, from the point of view of Kelsen’s own account of the problem of international recognition of legal authority, there seems to be no difference either, because Kelsen’s account of the recognition of legal authority under international law requires only effective authority, a version of Weber’s first item, and the existence of the *Grundnorm* can be inferred back via regression from any functioning legal authority¹⁶. The difference comes down to the difference in disciplinary purposes: the sociologist explains without justifying; the jurisprudential thinker seeks the ultimate ground of justification. For Weber the principle of rational-legal legitimacy must be accepted as a value: it is not possible to ground it on anything deeper. Similarly for Kelsen, with this difference: for Kelsen the ground of the law cannot be outside of the law, but must be itself a legal norm. So the legitimating principle must be a law itself, a law presupposed by the law as a normative system of positive laws, without which the law would not be normative.

§ 3. – The “Nothing More” Question

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.

¹⁵ M. WEBER, *Economy and Society*, cit., 217.

¹⁶ This problematic is discussed at length in S. TURNER, *Explaining the Normative*, Cambridge, Cambridge: Polity Press, 2010, 74-77.

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. The project in this sense resembles, though in a different sphere and by means of different kinds of arguments, Weber's own procedure of systematically stripping traditional terminology for teleological thinking about human action and society of any teleological content.

So where does the rule of law fit into their picture? As has been already noted, many of the properties of legal orders that the label "rule of law" has been applied to appear in their accounts already. Both of them emphasize the subordination of officials to the law. This consideration alone accounts for much of the traditional notion of the rule of law: a state in which the laws are largely obeyed, in which official power is circumscribed by the law, and that authorizes the use of the coercive power of the state only within limits. Writers like Lon Fuller add to the rule of law such notions as the idea that the laws should not be contradictory¹⁷, a consideration explicitly addressed both in Weber's definition and *inter alia* by Kelsen. The idea of legal rationality and the idea of non-contradiction seem inseparable. Both also add the consideration of effectiveness: whether the legal order actually commands obedience. If we limit ourselves to these three very simple considerations, we have the following: the rule of law is the effective operation of a state under an impersonal rationally organized order that is accepted as valid by a significant number of people, especially officials, and that has a reasonably high level of compliance, especially by officials. Deviations from the rule of law are illegal acts, and the abrogation of the rule of law would consist in the commission of acts not authorized by the law or forbidden by it, especially by officials, in significant numbers.

§ 4. – *Extending the Deflationary Argument*

We can take these anodyne definitions of legal orders or in the case of Weber the specifically modern legal order as the basic answer to the question "what is the rule of law"? The question to be asked is this: what of the elements of a "rule of law" regime that are at the core of most conceptions of the rule of law are accounted for by the Weber-Kelsen account of law? What is covered, and what is left over? Here the differences between Weber and Kelsen with respect to their different purposes, constructing an ideal-type to understand empirical reality in the case of Weber, understanding a normative order in the case

¹⁷ L. FULLER, *The Morality of Law*, New Haven, CT: Yale University Press, 1964.

of Kelsen, lead them in somewhat different directions. Both are relevant to the notion of the rule of law, which is ambiguous between two aspects: typically lists of properties defining the rule of law focus on both facts, such as the extent of corruption, and properties of the legal system itself. Weber's approach deals with the factual side; Kelsen's with the properties of the legal system. But some of the criticisms of Kelsen are more appropriately directed to the empirical side, and Weber points to a dark side of the rule of law, a side which Kelsen himself acknowledges.

The notion of an effective impersonal order in which officials act and generate norms according to norms accounts for much, if not most, of what is normally referred to as the rule of law. In the developing world, much of what is meant by a lack of the rule of law is a matter of ineffectiveness in enforcing the law, and especially ineffectiveness in enforcing the laws relating to official conduct, which for Kelsen would include the improper generation of norms, for example by judges or bureaucrats acting in unauthorized ways. Weber discusses these issues under the heading of predictability, which is an empirical feature of legal systems. The normative and empirical aspects are of course entangled. There are some typical legal institutions, such as an appellate court system, that serve the purpose of enforcing judicial consistency, for example, and the existence and legal properties of these institutions are often included in lists of criteria evaluating the rule of law.

§ 5. – *Discretion and the Rule of Law*

How do their accounts of an effective norm-governed regime relate to the traditional claims for the rule of law? The issues can be broken into parts, but the parts are intertwined in complex ways. The four issues that seem most important are these: the issue of legal oppression; the problem of the role of discretion, administrative and judicial; the problem of judicial independence; and the problem of the role of legal interpretation, especially in connection with Dworkin's claim that adjudication requires or implies a commitment to a large set of interrelated political values and moral *desiderata*. Discretion is at the heart of this issue and most of the other issues as well.

An influential tradition in the rule of law literature outside of law is associated with Hayek, and is concerned with administrative and judicial discretion¹⁸ and the idea that the central feature of the rule of law

¹⁸ F.A. HAYEK, *Constitution of Liberty*, Chicago, The University of Chicago Press, [1960] 1978, 212-215, 225.

is the limitation of discretion, especially administrative discretion: this is the modern meaning of the idea of the rule of law not men. This tradition has its roots in the experience of the *Obrigkeitsstaat* or magistrate state, where there was a wide range of discretionary power and consequently arbitrariness of legal process and state action. Weber in particular contrasts this more traditional form with the modern bureaucracy, a machine made of men whose hallmark is predictability, and with modern rational-legal authority, which also achieves the maximum degree of predictability¹⁹. The maximum conformity with the ideal-type of rational-legal authority would eliminate arbitrary authority: it would not be arbitrary because it would be impersonal and part of an order; the fact that it maximizes predictability means that it is not arbitrary. So this kind of regime, if it is oppressive, must be oppressive in another way. We will return to the notion of oppressive law after dealing with oppressive discretion.

As Hayek himself was forced to acknowledge, however, some discretion is ineliminable. Even the courts regularly acknowledge this and defer to administrators²⁰. Thus there can be no sharp line between a rule of law regime and one involving discretion: it is a quantitative rather than a qualitative distinction. But although judges have discretionary power, this power is limited. And this poses a number of interesting conundrums for any rule of law account. If we grant that some discretion is ineliminable, how are we to understand discretion and its limitation? For now, it will suffice to say that it erases this way of making a legal distinction between the *Obrigkeitsstaat* and the *Rechtsstaat*: both involve discretion. The difference, as Weber puts it, is that they while each is a form of legitimate rule, that is to say a legal order, they rest on different legitimating beliefs, the latter a form of what Weber calls traditional authority and Kelsen calls customary law.

In the case of jurisprudence proper, the issue of the limits of discretion is bound up, in the Anglo-American literature, especially since Dworkin's *Law's Empire*²¹, with the problem of legal interpretation. Kelsen, notoriously, rejected theories of legal interpretation. But Kelsen avoided many of the problems associated with the language of interpretation and what Dworkin attacked as the false dichotomy between inventing and finding law by his argument that the judge, in passing a sentence, was enacting a norm, an individual norm in most cases, and that this is what the judge is authorized to do. The judge is thus a law giver just as the legislator or the executive giving a directive is.

¹⁹ M. WEBER, *Economy and Society*, cit., 1394-1395.

²⁰ Hayek himself makes this concession: F.A. HAYEK, *Constitution of Liberty*, cit., 213.

²¹ R. DWORKIN, *Law's Empire*, cit.

This reflects a fundamental difference in the understanding of what judges do, especially when they justify their decisions. What is the purpose of justifying a decision if it is not to supply a justification of it that is at the same time an interpretation of the law? Begin with two core facts: that judges have discretion, and that it is limited discretion, with the limits enforced legally by courts of appeal. Part of the point of justifying a decision reflects the limits on discretion. To provide an adequate reason is at the same time to immunize the decision from the claim that discretion had been abused. What is an abuse of discretion? A large part of it is spelled out in the judicial oath. Here is an American example:

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: «I [...] do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [...] under the Constitution and laws of the United States. So help me God»²².

The content of the oath makes clear what an abuse of discretion would consist of: a failure to be unbiased first, and to perform the duties specified in the law second. The latter would be a failure to apply the law; the former a failure to use the discretion implied in the oath itself in an unbiased manner. It would follow that the justifications given by the judge of their decisions are attempts to fulfill these commitments: these are the controlling commitments, and failures with respect to them would be and are the subject of discipline and even removal. Appeals courts respect the reality of discretion and do not simply give their own opinions of an appealed case. They apply both commitments and adhere to them as judges, with the expectation that they will be potentially be judged in the same way. These constraints also assure the claimant of a degree of predictability, both with respect to the initial decision and the appellate decisions. This account is entirely consistent with Kelsen's picture of adjudication as norm-giving. Theories of legal interpretation of the sort Kelsen disparaged are more readily construed as guides to the construction of justifications. But the underlying purpose of the justification is contained, explicitly, in the two elements of the oath. And as Kelsen would have noted, these are norms with sanctions attached to them, and in this sense real law, unlike any norms of "interpretation" such as those found in Dworkin. Dworkin is correct, however in one limited respect: appeals to democratic princi-

²² U.S. Code, Title 28, Part I, Chapter 21, § 453, on www.law.cornell.edu/uscode/text.

ples are one potential way of justifying a claim that the decision was unbiased and thus within the realm of acceptable discretion. But it should be added that there are many other ways to justify this claim, including, for example, a law and economics analysis.

There is a variant of the “discretion” tradition in the discussion of the rule of law, which is more straightforwardly “legal” rather than political. It is exemplified in Dicey’s concern with the increasing role of administrative law and administrative courts for the supervision of administration²³. This comes very close to Hayek’s concerns. But it raises the question of whether this concern is accounted for by predictability. What is the difference between predictability and effectively restricted discretion? An independent judiciary is often included in lists of elements of the rule of law. But the function of an independent judiciary is to serve as a means of controlling the actions of state officials – it is they who the judiciary is independent of. Independence also protects the judiciary from the influence of private persons. So the role of “independence” in relation to the rule of law, is to assure consistency and predictability in the application of the law. This Independence is not an end in itself, or a new criteria, but a means to the end of predictability, among perhaps other ends, such as protection against bureaucrats’ misuse of their discretion.

The legal issue here, as Dicey understood it, had to do with the independence of the common courts, and the less than independent character of administrative courts. This seems like a clear conflict with Kelsen, who argued that the notion of the independence of the judiciary in the English tradition resulted from a particular historical experience, but was an illusion: English judges are appointed by the state and are part of it, and therefore not independent. Kelsen acknowledges the historical role of the judiciary in restraining royal power in England, but suggests that these events created an illusion of independence: in fact the selection of judges and their control by the administration was a matter governed by law just as other executive functions were. In each case, the decision makers were producing norms in accordance with norms, including norms that authorize them to take particular kinds of actions. It is, and should be, a technical issue as to the distribution of executive powers of this kind, but it should not be pretended that the courts are outside of politics. The notion of “powers” and thus the idea of the independent power of the judiciary is a mystification: there are no “powers” here other than the ones produced under

²³ Cfr. A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, cit., 213-267.

norms: the same body of norms that authorizes legislatures and executives to produce norms²⁴.

One can turn the idea of separation of powers into a political ideology – and indeed the use of the extra-legal metaphysical language of “powers” facilitates its absorption into a political theory or ideology. But the phrasing has no legal meaning beyond the sense of legal authorization. But there is another issue here which undermines the idea of judicial independence as an absolute value standing on its own, rather than understanding it as an instrumental value. Too much judicial discretion has the potential for undermining predictability, not to mention democratic values. Kelsen’s own constitution writing reflected his recognition of this²⁵. One can say the same for the rights associated with the legal process, the demand for due process itself, and for other elements of the legal order that have been associated with the rule of law. These are not stand-alone legal values but instrumental legal values, a point made by Raz²⁶. And such values as transparency may also be understood as instrumental.

Instrumental values, more generally, have two sides: they may serve the primary value, or they may undermine it. Thus transparency, another criteria found in lists of elements of the rule of law, under some circumstances, will make it more likely that the law will be followed, and also that it will be accepted as legitimate and thus that the legal regime will be effective. But whether this is true in a given situation is a contingent, empirical fact. Weber points to the universal phenomenon of bureaucratic secrecy²⁷, and it must be said that secrecy may also, in some circumstances, promote legitimacy and effectiveness: instrumentality cuts both ways, here as elsewhere.

§ 6. – *The Oppressive Regime*

Law itself is instrumental, from the point of view of politics. And this exposes a division in Weber’s own thinking about the law. From 1914 on, he takes the view that the law is a coherent system, an intellectual object, to be understood as such on the model of mathematics. In this form it is not instrumental or directed by values. His earlier writ-

²⁴ H. KELSEN, *General Theory of Law and State*, cit., 255.

²⁵ The Austrian Constitution (the *Bundes-Verfassungsgesetz [B-VG]*) was based on a draft by Hans Kelsen and first enacted on October 1, 1920. Cfr. H. KELSEN, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, in *The Journal of Politics*, 4, n. 2, 1942, 183-2000.

²⁶ J. RAZ, *The Authority of Law: Essays on Law and Morality*, Oxford, Clarendon Press, 1979, 225-226.

²⁷ M. WEBER, *Economy and Society*, cit., 992-993.

ing is perhaps closer to his friend Gustav Radbruch, who had a “values” account of law of a kind Kelsen was intensely critical of. These perspectives are not entirely inconsistent: legal order, understood in terms of the valuative language Weber (and Radbruch) employed was not an “ultimate” value, or at least not a meaningful one, but rather an intermediate value, a value that needed to be accepted by people with different ultimate values as instrumental for the achievement of these ultimate values, by providing the order that made achievement of ultimate values possible²⁸. This way of thinking meant that Weber could see the legal order from, so to speak, the outside. Kelsen, in his writings on democracy, did so as well, a point to which we will return, for it is important to answering a common criticism of both Kelsen and Weber: Kelsen for failing to call distasteful regimes non-legal, Weber for failing to distinguish genuine “rational” legitimacy from *de facto* legitimacy²⁹.

One can imagine, though empirical cases are lacking, a highly aggressive and intrusive legal regime that conformed to the predictability aspect of the rule of law that nevertheless afforded little protection for the individual against the state: a well-oiled police state with a long list of enforced unfreedoms. Weber’s hostility to the inexorable rise of a bureaucratic order based on rational-legal authority and his sense that the last vestiges of human freedom had to be protected from it, indicate that he agreed with this concern. However, it is also true that a large part of what is terrifying about the police state has to do not with the laws themselves, but with the discretion granted to those who enforce it and to their unpredictability: the situation Kafka describes, in which the charges, violations, and processes are a mystery rather than predictable. Yet these officials might very well have their unpredictable actions authorized by law³⁰. The problem posed by the critics of Kelsen and the proponents of an exclusive account of the rule of law is this. Is there a response to either of these concerns within the Kelsen-Weber view of law? Or does the deflationary approach to the rule of law amount to the acceptance of this kind of regime as examples of the rule of law?

²⁸ S. TURNER, R. FACTOR, *Decisionism and Politics: Weber as Constitutional Theorist*, in S. LASH, S. WHIMSTER (ed.), *Max Weber, Rationality and Modernity*, London, Allen and Unwin, 1987, 334-354.

²⁹ C.J. FRIEDRICH, *Authority, Reason, and Discretion*, in IDEM (ed.), *Authority*, Cambridge, MA Harvard University Press, 1958, 28-48; see also B. WHITE, *Is There a Place for Morality in Law?*, in *Queensland University of Technology Law Journal*, 12, 1996, 229-242, on <https://lr.law.qut.edu.au/issue/view/36>.

³⁰ Though it must be said that empirical regimes of this sort seem to involve issues with discretion, often punished by other people will discretionary power, thus collapsing into a system of terror. Thus even a high Soviet official under Stalin would not be sure of what discretionary powers, or even duties, he had.

If we grant that the issue of discretionary power is a quantitative rather than a qualitative difference, the problem of “oppression” can be clarified. One form of “oppression” is the sheer existence of arbitrary power – an argument made in political philosophy by Phillip Pettit³¹, who calls this “domination.” He has in mind primarily the private use of arbitrary power, for example, the power to deny a person needed services for no reason, or to order a person to do something for no reason. This formulation is designed to permit an activist, but still limited, state, which is permitted to interfere for good reasons. His account points to a problem with the concepts of arbitrariness and oppression themselves.

There is a peculiar problem with the relationship between “objective” and “subjective” aspects of oppression. If one thinks that there are objective standards of oppression that apply even when the people involved do not regard the relevant acts as oppression, one is obliged to provide a source for these standards. Philosophical intuitions do not help: they would not be the intuitions of the people to whom the standards are being applied. If they merely reflect local political ideologies, they are not objective standards. If there is a generic notion of oppression that is not relative to a community, it must derive from some other sort of theory – such as a Marxian theory of history – not from the idea of the rule of law. Pettit avoids these problems by arguing that what counts as arbitrary is a matter neither of natural law nor positive law but rather of common knowledge within a community, and therefore “objective” in a factual sense but at the same time relative to the community. If the community regards committing a person to drug treatment as non-arbitrary, it is; if this is not part of the community ethos, it is arbitrary. This redefinition gives a source for the relevant notions or arbitrariness and has for him the virtue of justifying state intervention that restricts a person’s freedom, and solves the problem of what is or is not oppressive. It solves it, however, in a way that reveals the problem with the concept. If a given legal regime allowing discretion conforms to community standards, it is not oppressive, however oppressive it might seem to outsiders. Indeed, any legal order using discretion would be non-oppressive if it conformed to community standards of non-arbitrariness, on Pettit’s account.

There is of course a question of whether there is such common knowledge. Pettit has difficulties with the possibility of minorities with different community standards, and there is also the problem of individuals asserting freedoms that the community rejects. Why should

³¹ P. PETTIT, *Republicanism: A Theory of Freedom and Government*, Oxford, Oxford University Press, 1997; IDEM, *On the People’s Terms: A Republican Theory and Model of Democracy*, Cambridge, Cambridge University Press, 2012.

we be bound to the judgments of the community? These are questions that are ordinarily resolved politically: indeed, the point of political procedures is precisely to produce decisions in the face of disagreement. Moreover, the idea that the law should conform to public opinion is a particular political ideal rather than a legal principle. As Dicey pointed out, it was only in the late 18th century that the idea that law should comport with public opinion took hold. From the perspective of the deflationary argument, this means that the concept of the rule of law is logically independent of the normative political idea that legal structures should match community notions of arbitrariness.

The problem of oppression and freedom from oppression has a logical structure that parallels the logical structure of the problem of discretion, and with similar consequences: it does not serve to distinguish between different rule of law regimes. Even the most oppressive regime, to the extent that it is law governed, does not forbid everything, and therefore permits something: thus all legal regimes allow freedom of some sort. There is no qualitative distinction between an oppressive and a free order, only a quantitative one. What counts as permitted or forbidden under the law is a political matter. For Kelsen, this was an argument in favor of democracy: majority rule implied that the majority could not oppress itself. For Weber, the protection of the last vestiges of genuine human freedom, which he thought were threatened by bureaucratization, was also political: the constitutional regime he designed preserved the possibility of political leadership and the political control of bureaucracy. In this respect they both rejected the traditional view of German liberalism that the best protection of freedom was the law and the courts, rather than the people.

§ 7. – *Conclusion*

Why would it matter that one could construct a deflationary argument for the rule of law, an alternative which strips it of its ideological elements? One superficial reason is obvious, and would have been obvious to Weber and Kelsen. The ideas of the rule of law and the *Rechtsstaat* both present themselves as something other than political programs, ideologies, or personal value-choices. The terms purport to refer to something broader – a way of life, a spirit animating the legal life of a society, and a means of protecting other important values, of basic equity and fairness, rights, and so forth. The contrast to tyranny and the rule of men and the frequent claim that the rule of law is under threat testify to the emotive power of these notions. Yet the promise is illusory.

The rule of law, because of its historical associations, is a concept that promises a great deal. But if we ask what the rule of law actually consists of, within a sociological reality, we get a less alluring answer. There is nothing in the subordination of officials to an abstract order that guarantees the achievement of values of freedom or protection from state power. States which operate under the strict observance of an abstract order are machines that can be turned to many purposes. The preservation of the values that we ordinarily group under the notion of the rule of law must come from someplace other than the notion of law itself. Kelsen was relentless in separating the legally meaningless ideological provisions of treaties and constitutions from those which had actual legal force³². He regarded the flowery but empty promises of such constitutions as a kind of fraud. The rule of law is a concept with similar properties. It is usually treated as an unalloyed good, seen through the haze of associations with English freedom, the rise of democratic constitutionalism, liberal rights, and the achievement of a decent society in which everyone is accorded the equal respect of the law. But the legal meaning of the rule of law is simply that the law is obeyed and effective. Weber and Kelsen allow us to cut through the haze to see that the law is a coercive order, that the rule of law is consistent with a wide range of values, and intrinsically connected to few of the political ideas and values with which it is normally associated. The associations are decorative and historical. With Kelsen and Weber, we have something startling: an impeccably liberal *Ideologiekritik* of a liberal shibboleth.

Abstract

Weber and Kelsen avoided the traditional doctrine of the *Rechtsstaat* and did not participate in the contemporary discussion of the Rule of Law, but they each painstakingly constructed alternative descriptions of the kind of legal order that these terms have been used to describe. The alternatives were deflationary. Kelsen attempted to show that there was no legal distinction between rule of law regimes and other legal regimes; Weber that there was no empirical distinction to be found in a plausible ideal-typification of the modern legal order. Their motives were similar: they sought a demystified and de-ideologized language. Weber's category of rational-legal authority was defined by the belief in an impersonal legal order to which officials submit; this was

³² This is especially visible in his discussion of the treaties creating the League of Nations: H. KELSEN, *Legal Technique in International Law: A Textual Critique of the League Covenant*, Geneva, Geneva Research Centre, 1939.

also Kelsen's concept of the *Grundnorm*. Parallel to Weber, Kelsen used a strategy of de-ideologization to critique elements of the idea of "the rule of law," such as the separation of powers. Their redescription are intentionally subversive. They show that there is nothing more to the "rule of law," either in the realm of fact or the realm of legally meaningful norms, than conformity to the law itself. It is shown that thinkers like Hayek and Dworkin do not escape these deflationary arguments, and the reasons they do not are revealing about the general problems faced by "rule of law" conceptions: "discretion" is ineliminable; "oppression" is a matter for political decision. Neither can be the source of a relevant legal distinction.