The Neo-liberal State

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OXFORD
UNIVERSITY PRESS

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The Nature of the Neo-liberal State and the Rule of Law

The idea of the rule of law lies at the heart of the neo-liberal view of the nature and role of the state. More than this, however, it is the deep fault line that divides neo-liberalism and social democracy and, for that matter, more radical forms of socialism. On the neo-liberal view social democracy and socialism are outside the rule of law. On the face of it, this might seem to be rather an arcane point. Nevertheless, I hope to show in this book that the issue of the rule of law and its ramifications goes to the heart of modern debates about the nature of the state, social justice, the nature of freedom, the scope of rights, the relationship between governments and markets, and civil society and the voluntary sector. This is not all. Deep issues about human motivation and the extent to which it can be understood in 'rational economic man' or utility maximizing terms, the scope of altruistic behaviour, and the relationship between altruism and institutions are all engaged by the nature and scope of the rule of law. So, I shall argue, it is a theme central to the coherence of neo-liberalism and to social democracy and in pursuing this topic in a systematic way we shall be involved in considering the deeper questions in political, legal, and constitutional thought and the relationship of those to the economic life of modern society.

In this chapter and the next I want to do two things. The first is to characterize the nature of the rule of law in neo-liberal thought; the second is to look at the various justifications within neo-liberal thought for this conception of the rule of law. In so far as the second point is concerned, as we shall see, there are rather different and not wholly compatible approaches to be found in neo-liberal thought.

So, first of all we need to look at the character of the rule of law from a neo-liberal perspective and why it is to be seen as *a*, if not *the* central virtue of institutions – to echo John Rawls' famous claim that justice is the first virtue of institutions.[1] On the neo-liberal view an understanding of the nature of justice has to take its place within the more comprehensive and governing idea of the rule of law.

I believe that the best way to begin to elucidate the nature of the rule of law as understood by neo-liberals is to start with the work of Michael Oakeshott who is *not* a neo-liberal. Nevertheless, his thought is, in many ways, close to that of neo-liberal thinkers – his distance from it lies in the fact that he distrusts all general theories of politics and at least in some forms (in the work of Hayek for example) the articulation and defence of neo-liberalism assumes the shape of a general theory.

In the second volume of *Law, Legislation and Liberty: The Mirage of Social Justice*[2] Hayek points out that in his lectures at the London School of Economics Michael Oakeshott drew a distinction between a *telocratic* order of society or a *telocracy* (an order devoted to the pursuit of some overall end, goal, or purpose) and a *nomocracy* (a rule governed order not devoted to the attainment of particular ends). Hayek regards this distinction as being of basic importance and corresponding to similar distinctions made in his own works. However, we shall look at Oakeshott first because the distinction between telocracy and nomocracy is very well drawn in his work and it is grounded in a good deal of historical detail so it appears to be less of an abstract philosophical distinction than otherwise might be the case. As we shall see the distinction is of fundamental importance to neo-liberal thinking about the rule of law.

In his writings Oakeshott draws a sharp and influential distinction between *nomocratic* and *telocratic* politics. He also draws the distinction in a very clear manner which makes the exploration of these ideas a good basis for considering neo-liberal ideas in the same topic. Nomocratic politics focuses on the idea of political institutions as providing a framework of general rules which facilitate the pursuit of private ends, however divergent such ends may be. It is not the function of political institutions to realize some common goal, good, or purpose and to galvanize society around the achievement of such a purpose. Rather, nomocratic politics is indifferent to common ends and has an interest in private ends only in so far as they may collide: when X's pursuit of his goal *A* may prevent Y from pursuing his goal *B*. Such collision may be avoided by adherence to rules and not by government preferring one private end over another. So, given nomocratic politics, the rule of law is about the essential features of the general rules which govern the terms of political association. The rule of law in this view is not therefore *subordinate* to another value. There can be no justification for avoiding or suspending the rule of law because of the claimed importance of some other common or collective values. Neither Oakeshott nor neo-liberals are much given to using terms like 'the common good', but if there is meaning to such a term then for Oakeshott and the neo-liberals it means the framework of rules facilitating the achievement of private ends; it does not lie in some substantive, collectively endorsed moral goal or purpose in society.

One can see why, on this nomocratic approach to policies which is endorsed by neo-liberals, the rule of law has such a central place as the overriding virtue of institutions. Other values such as freedom, justice, and rights have to be compatible with the rule of law, understood (for the moment) as a framework of general rules for the achievement of private ends. All of this will be subject to full exploration in later chapters but, for the moment, we might cite as illustrations of the general thesis outlined earlier the claim that freedom has to be understood as the absence of coercion and coercion has to be understood in relation to the rule of law; social justice is incompatible with the rule of law because its demands cannot be embodied in general and impartial rules; and rights have to be the rights to non-interference rather than understood in terms of claims to resources because rules against interference can be understood in general terms whereas

rights to resources cannot. There is no such thing as a substantive common good for the state to pursue and for the law to embody and thus the political pursuit of something like social justice or a greater sense of solidarity and community lies outside the rule of law.

In a nomocratic state, then, the rule of law is central but, according to Oakeshott, this is not so in the telocratic state:

> [W]hile in a telocracy, rule of law is not forbidden, it is never something valued on its own account: the only thing valued on its own account is the pursuit and achievement of the chosen end which is a substantive condition of things.[3]

and

> [T]elocracy does not necessarily mean the absence of law. It means only that what may roughly be called 'the rule of law' is recognised to have no independent virtue, but to be valuable only in relation to the pursuit of the chosen end.[4]

A telocracy implies the organization of the state and its institutions in pursuit of a single overriding goal or a comprehensive goal within which other values will be given a subordinate place. A telocratic state may be and frequently has been a religious telocracy in which obedience to what is discerned to be the will of God is the dominant end – Oakeshott gives the example of Calvin's Geneva. It may, however, be a secular telocracy and for Oakeshott German National Socialism, Italian Fascism, and Soviet Communism would all be telocracies. However, there can be other much more seemingly benign forms of telocratic government, one of the main examples of which for Oakeshott and the neo-liberals would be post Second World War welfare and social democratic states. These states also embody an overriding goal and, as we shall see, for the neo-liberal are equally incompatible with the idea of the rule of law both in the sense that the rule of law will be seen as subordinate to the overriding end and thus not as a principle with independent value or, more subtlety but, for the neo-liberal, more insidiously, social democratic legislation cannot be reconciled to the demands of the rule of law even if social democrats profess respect for the principle.[5]

Oakeshott's argument about the rule of law in his *Lectures in the History of Political Thought* parallels the distinction he draws in *On Human Conduct* between enterprise and civil associations. A telocratic state is an enterprise association galvanizing and mobilizing resources in the pursuit of a dominant end; a nomocratic state is a civil association.

The telocratic state or enterprise state has laws which specify what is to be achieved by the state for its citizens; the state as a civil association (a nomocracy) has laws which do not define the 'what' of politics – the specific goals to be collectively attained – but rather the 'how' of politics – defining the terms and conditions of civil association and the rights and duties which will enable individuals to pursue their multifarious goals.[6]

The telocracy–nomocracy distinction implies for Oakeshott as it does for the neo-liberals a sharp distinction between *government* and *policy*. In a nomocracy, the government (*a*) is recognized as having sovereign authority to make and

promulgate the law but the law is not to be seen as a means of attaining common or collective goods or outcomes; (*b*) is 'the guardian of a system of prescriptive conditions to be subscribed to in making choices'[7]; and (*c*) is concerned with the maintenance and improvement, where necessary, of the set of rules constituting civil relationships between individuals who entertain different views about their wants, goals, needs, and purposes. The law in a nomocracy is, in Oakeshott's view, both neutral and impartial in respect of those circumstances. Politics in a nomocracy is concerned with the business of 'considering authoritative prescriptions from the standpoint of their worth and of reconsidering subtractions, additions, or amendments' to such prescriptions. Politics is concerned with improving the framework within which we engage in 'self chosen actions'. In a nomocracy, government is more like a governor in a complex engine. It is not part of what directly makes the 'engine go', but rather regulates the speed at which the various parts move.[8] The ensemble of rules and prescriptions, independent of ends, goals, and purposes, authoritatively determined by government following political consideration of amendments and improvement to this framework of prescription constitutes the rule of law in society.

In a telocracy, in Oakeshott's view, issues of policy displace the concern with the rule of law. After all, a telocracy is based upon the idea of the achievement of a common or collective end or purpose and the rule of government and politics is to galvanize the members of society and their resources in the pursuit of this common goal – 'energising and directing a substantive purpose'.[9] The character and scope of law is made subordinate to the achievement of the common purpose as has been said and, as such, policy may be said to be more important than law and indeed, as we shall see when we look at Hayek's criticisms, such policies cannot be made subject to the rule of law. On this view of things, as Oakeshott says: '[N]othing but the chosen end is valuable in itself'. It is in the different view of the nature and scope of state, law, policies, and the rule of law that the major fault line between neo-liberalism on the one hand and social democracy on the other lies. The state, idealized as a nomocracy, is a *Rechtsstaat*, a law-based state. One based on telocratic principles – a set of goals or purposes may be seen as a welfare state in the very broad sense that secures goods to satisfy individuals' wants, whatever they may be. So a welfare state of the social democratic sort or fascist or national socialist state may all in their different ways be types of *Wohlfahrtsstaat.* The difference between nomocracy and telocracy in Oakeshott's view also leads to a fundamental difference in relation to the law in these different sorts of states: the fundamental differences between *adjudication* and *arbitration.*

Whether in a nomocracy or a telocracy laws and rules will always be general and they will need to be interpreted and specified in particular contingent circumstances. Nevertheless, Oakeshott wants to argue that this process of relating the generality of law to specific circumstances differs in quite a fundamental way between nomocracy and telocracy.[10] In a nomocracy the laws are rules and prescriptions providing a framework for self-chosen actions and

because these rules may be broken or because their import may, in particular circumstances, be unclear then adjudication

> is to be recognised as a procedure in which the meaning of *lex* is significantly, justifiably, appropriately and durably amplified: significantly, because such a conclusion is not given in the *lex*; justifiably, because the authority of the amplification must be its relation to *lex*; appropriately, because the conclusion must resolve a specific contingent uncertainty or dispute about the meaning of *lex*; and durably because it must be capable of entering the system of *lex* and becoming available not only to 'judges' to be used in resolving future uncertainties or disputes, but also to *cives* to be used in choosing what they shall do.[11]

So adjudication in this nomocratic sense is central to the rule of law and its maintenance. All law is general – indeed that is one of its central virtues for the neo-liberal – but in relating the general to the particular through adjudication in all the aspects just distinguished, adjudication is central to the rule of law, its maintenance, and its durability. It has to be distinguished clearly from the exercise of discretion which is the other main alternative in linking the general and the particular.

This is the major contrast with a telocracy or the state being seen as an enterprise. As we have already seen from a nomocratic point of view this is a fundamental defect of the state as an enterprise because it subordinates the rule of law to the enterprise. In an enterprise state, however, alternatives to adjudication reinforce the distance between an enterprise state and the rule of law. This actually follows from the earlier claim that in an enterprise state questions of policy will dominate – the policy for achieving the aims of the enterprise. Because the enterprise cannot be captured in terms of law and rules but its pursuit involves responding to changing circumstances, there is a need for a decision about the direction of policy to be made. In an enterprise state this is going to be a *managerial* decision and is also going to involve a very high degree of discretion. Because the enterprise will be much more vulnerable to contingency compared with a set of rules governing the framework of individual choice, managerial decisions will be less durable than adjudicative ones within the rule of law.[12]

Unlike a *Rechtsstaat*, governed by the rule of law, a *Wohlfahrtsstaat* cannot build a durable body of decisions or conclusion because the governmental and rule governed management of the enterprise will be subject to constant change just because government is attempting to manage constantly changing circumstances, for example, in health or education.

Similar considerations apply in respect of reasoning and discretion. In a nomocracy adjudication is not to be seen as a discretionary or subjective exercise of will on the part of the judge. There is a *text* first of all – the law whose relation to the particular case is under judgement and there is a process of reasoning (although not deductive reasoning) which yields the conclusion. This reasoning is open and transparent. It is public and when emanating from a lower court can be subject to challenge and revision. This is not so with the decision-making of the manager of the enterprise state or an arbiter of a dispute about what is produced by the enterprise – the goods of the enterprise. There is no text or body of law for

the process of decision-making to be based upon – only previous managerial decisions. In the absence of a text and precedents reasons will run out and the decision will embody a discretionary and subjective act of will. Nor is there a requirement or even an expectation that a similar decision would be taken in other similar circumstances. Managerial decisions of this sort do not create anything comparable to a corpus of law and a jurisprudence.

The same is true of *arbitration*. In a situation in which an arbitrator is needed there will be different interests at stake linked to the subjective goods secured, allocated, and distributed by the enterprise state. So disputes might be about, for example, whether X has got his fair share of health care, education, or whatever. Arbitrators making determinations in such cases are bound to act in subjective and discretionary ways partly because there will be no corpus of law to which appeal can be made in such cases for reasons already given and because the interests to be arbitrated will always be changing and shifting in a much more radical way than an interest in maintaining the nomocratic framework within which individuals make their own choices.

This is a point made by Oakeshott in his *Lectures in the History of Political Thought*. Arbitration is essentially a compromise between groups with different interests with varying weights and, as such, these will vary a good deal from case to case. He argues that this is quite different to adjudication in the law.

- The law as the current system of rights and duties provides the answer to disputes not the weight of the interests or the power of the parties.
- The law becomes a third party in a two-party dispute and provides independent grounds for resolution rather than a compromise between the interests of the two parties.
- Such a solution does not relate to one particular occasion but applies in a more general manner and becomes a more established determination than an arbitrated solution.
- The law applies across the whole of the society whereas arbitration is confined to two parties.
- The law is known in advance and parties guide, moderate, and constrain their actions according to the law.[13]

The managerialism and the central place for discretion in a telological state again put such a state outside the rule of law on this sort of analysis. Politics is essentially a matter of arbitration and bargaining and discretion is at its heart. These baneful features are central, so neo-liberals argue, to the socialist and social democratic state.

These distinctions are also to be found in Hayek's *Law, Legislation and Liberty, Vol. 1: Rules and Order*. He is absolutely clear that the role of a state in a nomocratic order is quite different from the role of the head or the manager of an organization with dominant goals and purposes. In this he follows Fuller who criticises the idea of law as a system of power and command rather than as a set of rules of conduct. Hayek emphasizes, as Oakeshott does, the importance of the

judge in 'maintaining an ongoing order of action'.[14] In other respects however, his arguments are rather different from those of Oakeshott. He argues that people have legitimate expectations in respect of the law: that is 'expectations on which generally his actions in that society have been based'. The role of the law is to facilitate the framework to secure the satisfaction of legitimate expectations. Thus the role of the judge can become that of adjusting the law and expectations so that they match as far as possible. 'Legitimate expectations', however, seem quite close to what Oakeshott calls interests and which for the latter fall within the scope of arbitration rather than adjudication, legality, and judgement. At the same time, however, while they may differ somewhat about the boundaries between judgement and arbitration, they both agree that the judge's judgement is not arbitrary and discretionary but must be embedded within the existing corpus of law and jurisprudence whether this is statute law or common law. It is a matter of the judge discerning the law embedded in practices and expectations rather than inventing or creating law. The guiding thread of this discernment must be for Hayek that the law should work in such a way as to match and render mutually compatible peoples' divergent legitimate expectations. As we shall see throughout the book this leads him to the view that these divergent expectations can best be rendered mutually compatible by a legal framework which essentially protects negative freedom – freedom *from* rather than positive freedom *to*; negative rights – rights to non-interference rather than positive social and economic rights; and procedural rather than social justice. These become central to the fundamental jurisprudence of the nomocratic order.[15] This thought is quite fundamental to Hayek and has wide ramifications for his social, political, and legal theory.

But surely, it might be argued, a nomocratic state and its laws have to acknowledge some set of goals. It cannot be impartial or indifferent to all goals. Law cannot be pointless. It cannot be totally non-instrumental. It has to facilitate the achievement of some goals. If this is recognized, it might be argued, it will modify the sharpness of the distinction between a nomocratic and telocratic state, between a civil association and an enterprise association.

Oakeshott clearly recognizes in his *Lectures in the History of Political Thought* that there is a goal or set of goals central to a nomocratic account of the state. He refers to Aristotle in this context and argues following him that members of such a state will have in common a number of what Aristotle called 'admitted goods' and equally a number of admitted or agreed evils. He goes on to say (and this is all he does say):

> Among the most cherished of these 'admitted goods' is the freedom to make choices for themselves; and among their strongest antipathies is interference with this freedom.[16]

There are two points to be made here. The first has to do with a central issue in Oakeshott's argument about the non-instrumental nature of the rule of law but on which he has rather little to say. He accepts that it is central to his case for a distinctive mode of organization called a civil association or nomocracy that it does indeed embody the pursuit of certain aspects of social life and he mentions freedom, peace, and security in this context. So, on the face of it the critic might

say that a nomocracy is not to be distinguished from a telocracy in the light of its purposelessness since there are nomocratic purposes namely freedom, security, and peace. However, in his essay on 'The Rule of Law' Oakeshott argues that these are not substantial or particular ends of the sort pursued in telocracy. Rather, freedom, peace, and security are not consequences of civil association, nomocracy, or goals to be realized. They are, he argues, inherent in its character.[17] The rules of laws of a nomocratic state do not prescribe ends to be pursued, rather freedom, peace, and security 'characterize this mode of association but not as consequences'. Thus, in his view, the adverbial character of the rule of law is preserved while at the same time endorsing certain human goals as inherent in the adverbial process. These goods – freedom, peace, and security – are part of the framework necessary within which individuals can then pursue their own chosen goods and goals. This is also very much Hayek's point in *Law, Legislation and Liberty, Vol. 1: Rules and Order*. The goal of nomocracy is not a particular kind of good like social justice, welfare, or greater social solidarity as might be the case in socialism or social democracy, or more sinister goods such as racial purity and national ethnic identity of the *Volksgemeinschaft*, but rather in Hayek's view consists of abstract goods – for example the good of negative freedom which is a condition for anyone to use his or her limited knowledge in highly specific circumstances to meet one's needs. It is not itself a substantive goal. It is a condition, as it is for Oakeshott of being able to pursue substantive and divergent goals in society. This is a point to which I shall return in the later critique.

The second point, Oakeshott's reference to Aristotle might be misleading here in that his view of goals in relation to ethics and politics did turn not just upon agreement, but was also rooted in an account of the human nature and the human *ergon* – its characteristic function. If freedom of choice and the conditions and rules for exercising it are understood in this context, then it might be thought that underlying the idea of a nomocratic state is a universalistic and almost certainly metaphysical theory of human nature. Whether acknowledged or not, there is no doubt that some defenders of a nomocratic and neo-liberal or libertarian state, as we shall see, do indeed develop ideas about such a state on the basis of a metaphysical theory.

In Oakeshott's case, however, his citation of Aristotle in this context is rather misleading because it is not his intention to provide a metaphysical case for a nomocratic order rooted in and deduced from some kind of philosophical anthropology with human freedom at its heart. Rather, as he makes clear in *On Human Conduct*, ideas about individual liberty and the broader individualism within which liberty is set have their basis in a complex set of historical circumstances which have developed in Europe since the thirteenth century and became more prevalent in the sixteenth century. Individualism and liberty are not just subjectively endorsed 'bright ideas', nor are they metaphysically grounded. Rather, they are complex ideas with equally complex historical roots and very different forms of expression: religious, philosophical, ethical, political, and aesthetic. Equally, ideas about the nomocratic political order to accommodate such a set of values are also a historical development rather than a philosophically grounded

theory for Oakeshott. Part of *On Human Conduct* shows the concurrent development of ideas about individualism and political order in Western European history and in the political thought of Europe since the sixteenth century and the emergence of two types of political organization: nomocracy and telocracy.

The same points hold true for telocratic ideas too. The goals which telocratic governments seek to secure for people whether the welfare goals of health, education, and social security and goals of a darker hue such as racial, ethnic, national, cultural, or religious purity equally have their roots deep in European history. They are not arbitrary sorts of goals, nor does their appeal rest on metaphysical considerations.

What Oakeshott points out is that those historical circumstances make these different ideas of government and the goals which they can achieve *intelligible*. He argues that neither nomocracy nor telocracy are arbitrary and unaccountable 'dispositions of thought in modern Europe'. Each has a 'context of circumstances' which makes it intelligible.[18] It is important to have a very general grasp of those intelligibility factors for both 'dispositions of thought' about the modern state. Oakeshott has a clear preference for the nomocratic approach, but it is important to recognize that this preference (for him) arises out of an understanding of Western European history and is not predicated upon some general or metaphysical theory of the good and human nature. Others, who also from a more distinctively neo-liberal perspective, prefer the nomocratic order take a rather different view of the justification of the nomocratic state, or the *Rechtsstaat* – the state that embodies the rule of law. Typically they appeal to a rather idealized version of evolution as in Hayek, natural law as in Rothbard, or contractual theory as in Buchanan, or a rights-based theory such as that propounded by Nozick.

So let us consider briefly the conditions which in Oakeshott's view make the *Rechtsstaat* and the enterprise state opposing, but nevertheless wholly intelligible states or dispositions of thought about politics and law in the light of European history.

In Oakeshott's view, the following characteristic aspects of Western European history make a telocratic approach to government appear plausible:

- The fact that every emergent European state was 'born in diversity' – there was therefore a need to create a sense of solidarity as the basis of the state and the pursuit of the goods that would make for such solidarity is a telocratic/goal-directed enterprise.
- The civil rules of modern states inherited a lot of the power of medieval kings and much of the authority of the Church. This combination of power and moral activity often led in a telocratic direction.
- There is a relationship between telocracy and power. There is no point in positing an end to be pursued without the power to do it. A telocracy requires the mobilization of the capacity of government to meet its posited aims. In Oakeshott's view the modern European state has now amassed the power to pursue such goals and thus 'telocratic government seems more rational

now than it did in early modern times . . . because power has made it more possible'.[19]

- War has also given a major impulse to telocratic states. The resources of society are managed by the government to meet its overriding aim of victory in war. Total war in the twentieth century has no doubt enhanced this impetus. Indeed it is arguable that the case for planning post Second World War in Britain was greatly strengthened by the fact that the state had been able to mobilize resources in a national way to meet an overriding goal. What could be done in war time could also be done in peace time.
- The process of colonization also increased the emphasis on telocratic forms of governance. Colonies were to be managed rather than just ruled and managed in the interests of an overall end – namely the interests of the 'mother' country. Oakeshott also believed that the techniques of telocratic governance were also much developed by the process of colonization.
- The belief in telocracy is likely to be predominant in a society in which there appears to be some overriding problem to be solved. The obvious case is war but there are other examples too where it has been thought that there is an overriding problem which could undermine the stability of society. The obvious problem in peace time is poverty and unemployment. To overcome the problem has required a massive mobilization of resources and a very high level of bureaucratic organization by government.
- As he makes clear in the closing pages of *On Human Conduct* there has been an abiding human desire for a sense of community, of solidarity, with others. This desire is of great significance in accounting for the salience of telocracy. While freedom for Oakeshott has been one of the major motivating forces behind nomocratic politics, nevertheless for many freedom has been seen as a burden to be escaped not a condition to be embraced. This escape can be provided by telocratic forms of politics.

These conditions, which are set out rather skeletally in Oakeshott's *Lectures in the History of Political Thought* are explored in more detail and with more emphasis on political and legal thought about these things in *On Human Conduct*. As Oakeshott wryly observes in his essay on the rule of law in *On History* the Germans always had a word for it – *it* being the state as a kind of enterprise association.[20] Indeed they did, and the bewildering range of terms used over the centuries in Germany just shows the diversity of the understanding of the state as an enterprise and of the theoretical embodiment of such understanding: *Verbändestaat* (interest group state), *Gewerkschaftsstaat* (trade union state), *Beamtenstaat* (administrative state), *Bildungstaat* (the state with an educative and spiritual ideal), *Führerstaat* (state based on the will of its leader), *Machtstaat* (power state), *Fürstenstaat* (model state), *Hausstaat* (dynastic state), *Kulturstaat* (state as the embodiment of the cultural life of the nation), *Obrigkeitsstaat* (the authoritarian state standing above politics), S*ozialstaat* (social state), *Volkstaat* (the state of the racial people), and *Wohlfahrtsstaat* (welfare state). These terms denote complex and to a very

large extent mutually exclusive conceptions of the state. Each of these conceptions has its own complex theoretical elaboration, but what they all have in common is the idea of the state as a telocracy, as an enterprise and with its fundamental aim the management of society in pursuit of overall goals and aims.[21]

Equally for Oakeshott there are complex historical circumstances which render the alternative political disposition – the pursuit of nomocracy – intelligible. These factors include the following:

- While as we have seen, one of the pressures for a nomocratic view of the sate was the diversity of the communities and groups of which it was composed. A telocracy provided a galvanizing goal to integrate such diversity. Equally, however, as Oakeshott points out the impact of diversity on the development of a state could underpin a nomocratic approach – that integration could come via law and via civil associations as much as by the pursuit of common ends.
- As a matter of fact modern states began and developed in the context of a legal order – a set of rights and duties defining relationships and obligations between subjects and their government.
- The early law making of modern states was a process of emancipating subjects from feudal and corporate subjections. Feudal lordship and the corporate nature of feudal life particularly in work and religion, had a very strongly telocratic approach, then emancipation from these features encourages the nomocratic disposition of both thought and practice.
- The emergence of a money economy also played its part in establishing nomocratic ideas in the sense that as money grew in importance the state was seen to be the custodian of the stability of the currency and not the director of how national income should be disposed. This is a parallel to the nomocratic role of the state outside the economic sphere – maintaining the stability of general laws, leaving individuals to pursue their own ends within those laws.
- The growth of nomocratic beliefs was also the result of a reaction against telocracy on the part of those subjects of modern states with a growing sense of individuality and personal freedom. For subjects such as these 'in so far as they were able to impress themselves upon governments, ruling was turned in a *nomocratic* direction'.
- Experience of contending telocratic beliefs within and between states – for example different religious denominations – what Oakeshott calls the 'civil war of telocracies', led to a positive view of nomocracy 'whose office was to maintain peace and the more elementary "admitted goods" by means of a substantially neutral legal order'.[22]
- In Oakeshott's view religion too, often seen as one of the most powerful telocratic motives, played a significant part in the growth of nomocracy. The reason for this is that while God might be thought to have some overall purpose for mankind he has also endorsed men with free will and thus man [*sic*] had the opportunity to conform to or diverge from this purpose. If God rules man nomocratically what is the justification for the state to rule telocratically?

Oakeshott regards nomocracy as having a number of defenders among political philosophers including, despite their many differences: Hobbes, Locke, Halifax, Hume, Burke, Kant, Adam Smith, Tom Paine, the authors of the Federalist papers, Benjamin Franklin, J. S. Mill, Proudhon, von Humboldt, Tocqueville, Acton, T. H. Green, Hegel, and Bodin. They provided a theoretical understanding of a disposition of thought and action which is much less varied than telocratic conceptions. The latter are now multifarious because the valued goals of the enterprise state have in history been more varied. A nomocratic form of government is more limited in scope and does not have overall purposes. There will be differences between theorists about the justification of this form of government and less about its essential character. So reverting back to the German examples, we might cite the *Rechtsstaat* (the state governed by law) as a fundamental form of nomocracy along with *Justizstaat* (the state as the defender of the rights of individuals) and the *Nachtwächterstaat* (the nightwatchman state).

Within the nomocratic context there could be important differences about the size and scope of a nomocratic state because it is important to recognize that for Oakeshott, at least, the contrast between nomocratic and telocratic government is about the character of each mode of government not its *size*. It is also about the contrasting scope of government and law: law as subordinate to governmental purpose in a telocratic state; law as non-instrumental and adverbial in a nomocratic state. It may, of course, be very likely that a nomocratic state will, in fact, be smaller than a telocratic state but it is not part of its essential nature that it should be.

So, there is a close relationship between a nomocratic state and the rule of law – indeed, the rule of law is constitutive of the nomocratic state but so far, apart from the insistence that law should be general and should not serve particular purposes. I have not focused upon the detailed characterization of the formal features of the rule of law. Oakeshott himself does this in his essay 'The Rule of Law' and in doing so, without citing him, specifically seems to follow the ideas of Lon Fuller in *The Morality of Law*.[23] Oakeshott argues that these formal characteristics of the rule of law would include the following features:

- Rules have to be public and non-secret.
- Rules should not be retrospective.
- No strict obligations save those imposed by law.
- All associates equally and without exception should be subject to the obligations imposed by law.
- No outlawry.
- *Audire alteram partem* (listen to both sides in a legal dispute).

For Fuller, these criteria, which Oakeshott cites, and his other criteria such as the need for the law to be clear, to be mutually non-contradictory, not to require the impossible, to be constant through time, and that official action be congruent with the law constitute the 'inner morality of law'. Oakeshott seems to be ambivalent on this point. On the one hand he seems to agree with critics of Fuller who have argued that his criteria are not in fact moral criteria at all but

rather the conditions that law must satisfy if it is to be law at all. They are *efficiency* rather than *moral* criteria. Oakeshott agrees with the critique when he says that these 'considerations' as he calls them are 'inherent in the notion, not of just law, but law itself'.[24] However, immediately afterwards he seems to reinstate them if only minimally as moral criteria when he says that it is 'only in respect of these considerations and their like that it may perhaps be said that: *lex injusta non est lex*' (unjust law is not law).

There are two big issues raised by these ideas. The first is that if Fuller's characteristics are thought to be efficiency criteria, which any system of law must embody to some degree if it is to be effective as law, then they could be regarded as being capable of being embodied in any set of laws however immoral the purposes to which those laws were devoted or indeed whatever the content of the law – moral or immoral. If the law is just seen as a tool which can be used for good or bad purposes, then Fuller's criteria are about the efficiency of the tool rather than about the morality of the law even though he regards them as constituting the inner morality of law. On the efficiency view of Fuller the criteria which he adumbrates are not part of laws's moral ideal, they are rather part of the efficiency conditions for any legal system. This leads us quite close to the idea that any legal system and any state in fact is a *Rechtsstaat* just because to be effective that legal system will embody Fuller's criteria to a greater or lesser extent.

The second point is that there is quite a large question which we shall take up later in the chapter as to the extent to which Fuller's criteria for the rule of law are compatible with received views about the common law. Hayek, for example, wants to preserve a central role for the common law in a *Rechtsstaat*, but there must be a question as to how far common law can in fact embody to the extent that statute law can some of these criteria.

Both Oakeshott and, as we shall see, Hayek are critics of legal positivism. Positivism defines law by its sources and rejects the idea that moral considerations have to be invoked to identify law – such that, for example, unjust law is not law. The positivist insists that whatever is correctly authorized by the legal sovereign is law; the question of whether it is good or just law is a separate question. For a positivist what counts in respect of the rule of law is that it is duly authorized and a positivist might be able to accept Fuller's criteria for the rule of law as efficiency conditions without which it might be impossible for law to operate. Nevertheless, for law to be law it does not have to meet a moral standard. Oakeshott, however, wants to argue that there are genuine questions to be asked about the justice of law, or as he puts the point frequently the *jus* of *lex*. On the face of it this is a difficult question for Oakeshott to address because law in a nomocracy is not to be understood as serving particular goals; it is non-instrumental – even freedom, security, and peace, recall, were not to be regarded as part of laws's *telos* as opposed to conditions of a legal nomocratic order. So, given this, what can make for the justice of law or of individual laws? This latter distinction is perhaps the point. The rule of law overall is to be non-instrumental and constitutive of a nomocracy but individual laws can be regarded against that background as just or unjust.[25] So what would be the basis for that judgement for

Oakeshott? Individual laws in a nomocracy would be unjust if they sought substantial and particular benefits to individuals. Individual laws would be unjust if they were concerned with any of the following:

- the merits of different interests
- satisfying substantive wants
- the promotion of prosperity
- the elimination of want
- the equal or differential distribution of reputed benefits or opportunities
- with arbitrating competing claims to advantages or satisfactions
- the promotion of a condition of things recognized as the common good.

The law can prescribe the rules under which these goods are sought but must not be concerned with securing them to individuals or groups through legal rules or rights. So, while welfare conferring laws may satisfy the positivist's account of legitimacy as law duly authorized they are not *just* laws in a nomocratic understanding of the nature and purpose of law.

Beyond this Oakeshott argues the justice of law is not to be determined by its accordance or discordance with some conception of natural law or universal values however naturalistic. Rather what will be determined as just or unjust particular laws in an 'appropriately argumentative discourse to deliberate the matter'.[26] There is scope for such deliberation – indeed for Oakeshott this is what politics is about – but within a general recognition in a nomocracy that the overall rule of law is non-instrumental, prescribing adverbial conditions.[27] It is not to be determined by considering abstract or universal values. All of this adds further to the case that a social democratic state must lie outside the rule of law because its laws in securing goods and services to individuals as part of a concern with social justice must fall outside the terms of a nomocratic understanding of the rule of law.

However, Oakeshott acknowledges in *On Human Conduct* particularly that both telocracies and nomocracies have been central to the development of Western European political history. The modern European state and the rule of law for Oakeshott are equivocal and ambiguous. Modern European states through many centuries have embodied each of these properties. At various times one has come to dominate the other but they are paired together as Oakeshott says as 'sweet enemies'[28] and they certainly engage different but fundamental aspects of the human psyche, a sense of freedom and individualism on the one side, a desire for belonging and community on the other – these are the twin and opposing roots of nomocracy and telocracy. While Oakeshott himself, clearly preferring nomocracy, leaves the struggle and the resolution of the struggle to history, this is not the case with neo-liberal thinkers such as Hayek, Buchanan, and Rothbard – who seek to provide a strong theoretical or philosophical defence of the neo-liberal version of the nomocratic state and the rule of law.

This still leaves to be explored the relationship between the liberal conception of *Rechtsstaat* and the rule of law on the one hand and legal positivism on the

other. Hayek is also a strong critic of legal positivism and his arguments against that position are both more diverse and more elaborate than those of Oakeshott. It is very important at the outset to see how important this issue is for Hayek's position. His social, political, and legal philosophy is a defence of a conception of the *Rechtsstaat* – of a state as embodying and constrained by the rule of law. If, however, the rule of law is identical with a set of non-moral criteria which any mature legal system embodies irrespective of the goals of that system, then the idea of a distinctive form of state – the *Rechtsstaat* – disappears. Hayek is quite clear about this as is shown by his remarks about Kelsen. He says that on Kelsen's view argued, for example, in *Hauptprobleme der Staatsrechtslehre* and in *Der Sociologische und die Juristische Staatsbegriff,* every state with a legal system (and how could it be a state without one) is a *Rechtsstaat* and that the rule of law prevails, of necessity, in every state just because the rule of law has no moral content. It refers only to a procedural process by which law is derived in logical ways from a basic norm (*Grundnorm*). Alternatively, in the view of critics of Fuller, it is law posited by a legitimate source together with the idea that such law embodies – as a set of efficiency criteria only – Fuller's general principles of the rule of law.

So what is the basis of Hayek's critique of the positivist position?

There are several aspects to it. The first, linking back to Oakeshott, is the idea that positivism presupposes that society in which law is embedded is to be seen on the model of an organization or an enterprise rather than as a spontaneous order arising from the unplanned and unpredictable ways over time that innumerable people make use of the limited knowledge and the limited resources that they possess. On Hayek's view the legal positivist tries to obliterate the distinction between rules of just conduct (nomocracy) and the rules of organization (telocracy) and the reason for this is that positivists construe the law as the command of a sovereign which, as it were, determines the nature of the organization over which the sovereign presides.[29] On Hayek's view the positivist posits a central role for power in the legal system as the source of both law and of sanction. This is a point that many positivists would embrace.[30] Positivists sometimes argue that the law and the state constitute a system of power. Hayek argues that this position embodies the constructivist fallacy. Law emerges in many ways, some certainly by legislative action by a sovereign body but very often, and in Hayek's view, the greater part of the time the law emerges through an unintended process as the results of millions of acts of reciprocal activity each of which may have been intended but from which emerges a set of rules which we know as common law. This is not at all the same as saying that law emanates from a locus of power. Hayek allows that the positivist might reply that what makes the common law authoritative is because it is endorsed by whoever or whatever is the sovereign. In Hayek's view this is still a very long way from saying that the content of the common law is in detail sanctioned by sovereign power. It might well be that the sovereign has just said that the common law should be enforced and obeyed without at all determining the content of that law.[31] In Hayek's view the positivist is motivated by the idea that all law must have the same character and that is

defined by positivism. Hayek rejects this in favour of a more pluralistic view in which private law and common law which have been closely linked with the emergence of spontaneous orders have their own character and legitimacy.

The positivist mistakenly collapses all order into organization or nomocracy into telocracy. And this collapsing of the distinction is exacerbated because of the positivists' emphasis on public law. In Hayek's view, public lawyers always tend to think of any kind of order as an organizational order – one with a conscious purpose, which is the role of the law to facilitate. On Hayek's view, the contrary is true. Once we understand the importance of spontaneous order then we can see that the idea of the law as the command of the sovereign is defective. It cannot account for the interlinking of private and the common law. An organization and an enterprise need a guiding purpose and a guiding intelligence; spontaneous order does not. As he says:

> What distinguishes the rules which will govern actions within an organisation is that they must be rules for the performance of assigned tasks. They presuppose that there is a place for each individual in a fixed structure determined by command and that the rules each individual must obey depends on the place that he has been assigned and on the particular ends which have been indicated for him by the commanding authority. The rules will thus regulate merely the detail of the action of appointed functionaries or agencies of government.[32]

In Hayek's view many legal positivists look forward to the day when private law, which is largely about the rules to facilitate the spontaneous order of a free market, will in fact become only a kind of limited zone within a more embracing conception of public law – if indeed private law survives at all. He quotes Radbruch on this point[33] when he argues that private law is a 'temporarily reserved and constantly diminishing sphere of free initiative within the all encompassing public law'.[34]

Because socialism and social democracy increase the reach of government into the spontaneous order of society with policies for social justice, social and economic rights, social or positive freedom, and solidarity – they inevitably transform society into an organization and this development displaces private law and the common law by various forms of public law which makes the claims made about the nature of law by legal positivists seem more plausible. Thus, for Hayek the positivist position assumes that society is like an organization with a power centre and from which law emanates in statutes. For Hayek this is a fundamental mistake about the nature of society about which more will be said later.

So in Hayek's view, socialism and social democracy have played a baleful role in transforming order into organization, displacing private law by public law, and replacing common law (which is a species of spontaneous order) by statute law, a process which fits the model of law deployed by legal positivists.

One of the drivers of legal positivism in Hayek's view rests upon a correct insight which positivists have then distorted. If (as positivists deny) the law is law

only, and if it is a just law, and if there are no agreed or objective criteria of justice, then the judgement whether *X* is a law or not will turn upon subjective assessments as to whether *X* is just or not. This would make for a kind of legal and moral anarchy. Hence, for the positivists, identification of the law as law has to be separated from justice and indeed any other substantive moral conception. In this context Hayek cites G. Radbruch as saying in his *Rechtsphilosophie*: 'If nobody can ascertain what is just, somebody must determine what is legal'. This, however, has to be done without invoking morality. Hayek agrees with the claim made by positivists that there are no agreed positive criteria for what is just or unjust but there can, in his view, be agreed negative criteria: infringing negative freedom, infringing property, lack of universality in law, etc., and satisfying these negative criteria will be at least partly constitutive of a *Rechtsstaat*. Positivists, in suggesting that moral values are subjective and cannot be used in terms of identifying the law as law, throw out the baby with the bathwater because in his view, as we shall see later in the book, there are compelling negative criteria which law has to fulfil to be law and these do have a moral salience. These issues are complex and important and will be looked at in more detail in subsequent chapters but the important point for the moment is that it is in Hayek's view false to think that law can be literally demoralized so that any state with a legal system is a law-based state or a *Rechtsstaat*. It is a grave defect of socialism and social democracy to assimilate order to organization – a false assumption which favours the account of the law and legal sovereignty given by positivists.

There are two other aspects of Hayek's position which are well worth noting. Firstly the role of common law and secondly the methods to be used to allow the ideals of a *Rechtsstaat* to be realized and the linking of legal positivism to what he regards as the fallacies of constructivism and rationalism in social, political, and legal thought.

To begin with the final point since it follows most clearly from Hayek's contrast between spontaneous order and organization and the nature of the rules appropriate to each. In Hayek's view the legal positivist is guilty of what he regards as the intentionalist fallacy, of seeing all types of order as the product of conscious design and thus requiring a consciously and intentionally constructed legal system to constitute, guide, and develop it. Once this false move has been made, then the way is open for the positivist to argue that what makes the law the law is the exercise of the conscious will of the sovereign appropriate to whatever order it is in positing the law. What makes the law the law is that it is derived from such an authoritative source, and not its content or its purposes. In Hayek's view this is a false sort of constructivism. It is false to what we know about the evolution of human society, the order of which evolved over long tracts of time without law, sovereignty, and legislation as the positivist understands these things.[35] It is also false for epistemological reasons as we shall see in detail later. It is false also for the reasons already given of displacing a spontaneous order more and more by a consciously designed one which, when combined with the deep epistemological problems it faces, poses threats to values such as individual liberty and the conditions necessary for relatively autonomous

individuals to utilize their fragmented knowledge in ways that will not only be to their own benefit but indirectly to the benefit of all.

All of these points relate closely to Hayek's view of the importance of the role of the common law in the United Kingdom and more generically to what he calls 'grown law' which has a necessary place in all societies and of which there are many theorists to whom Hayek pays tribute: Coke, Hale, Hume, Burke, Savigny, and Maine, etc. As social groups evolve over history and become more complex and larger, their habits and expectations also develop and these become rules for the group – they become normative for the group not just habits of behaviour. These rules are not invented by a guiding intelligence but are the result of multifarious types of interaction within which individuals use their fragmented and practical knowledge – knowing *how* rather than knowing that – to solve the problems that face them in so far as they can. Out of these interactions habits, norms, and rules develop and expectations are created. These developments are certainly the products of human action, indeed in the individual case intentional action, but the outcomes of these individual intentional actions produce a spontaneous order which is not a matter of design. This is the way the common law or grown law has developed. Such forms of law make more and more explicit what is implicit in the practices of a society as these develop. The common law develops alongside the development of the spontaneous order. At the same time there will be disputes about the law and how the law relates to expectations. These disputes have to be resolved by judges. Judges in such circumstances do not act in arbitrary and discretionary ways. Rather they take the existing state of the common law and also the *rationes decidiendi* from previous cases and adjust them to deal with conflicts in expectations. In doing so Hayek argues that the judges find the law or discern the law implicit in the common practices and ways of life of the particular societies in which they exercise their office.[36] In doing so the judge will seek to make clearer and more coherent a set of grown rules which in some respects may have become inchoate and to develop the corpus of common law and to adapt it to new circumstances and to enable it to accommodate new expectations. In a sense, as Hayek points out, the judge acts and operates with principles – but these principles are derived not from some independent moral standpoint like natural law but rather from an understanding of the deepest ideas in the common or grown law, which in turn have made explicit the ideas that are embedded in the habits, norms, and actions of an existing society. Again for Hayek there is a clear contrast between his understanding of the role of a judge in the common law seeking conscientiously to interpret a corpus of law so that while retaining its identity and integrity it is made relevant to changing circumstances and expectations, and the role of the head of an organization concerned with the arbitration and conciliation of interest, and guided by the overall purpose or dominant aim of the organization. In the case of the common law judges, as Hayek argues, they have no overall aim in view beyond the adjudication in the particular case, utilizing both the law as a *quasi* text and previous decisions. He/she acts in a way that is completely unlike the manager of an organization who conducts himself or herself according to the dominant aim of the organization. Nevertheless

Hayek's approach to the common law and grown law more generally is to argue that its aggregate effect – to which the decisions of judges contribute – is to produce an abstract order of rules of just conduct which will in fact allow individuals the freedom to utilize their fragmentary knowledge more effectively.

Now this is quite a large additional claim. It is one thing to value the common law as an organic product of action rather than design, quite another to argue that it does or can be seen to serve the interests of the growth of a *Rechtsstaat*.[37] Indeed, such a claim might appear at first sight to be rather paradoxical in that the idea of a *Rechtsstaat* as developed by continental liberal thinkers had a very large element of rationalism and constructivism at its heart. It did have an overall aim, albeit an abstract rather than substantive one, namely the legal framework for the operation of a predominantly market society and economy and a free civil society. How does this ambition sit with Hayek's emphasis of the common law as an essential element of the *Rechtsstaat*?

There are various dimensions to Hayek's answer to this question. First of all, he accepts that we cannot just assume that because common law is a spontaneous order all common law will actually lead to the creation or support for a *Rechtsstaat* type of framework without considerable development and adaptation by judges. This point was well made by Carl Menger, a leading neo-liberal thinker and a considerable influence on Hayek in his *Investigations into the Methods of the Social Sciences with Special Reference to Economics*.[38] He points out in commenting on the historical school of law, particularly the work of Savigny, that while the members of the historical school had correctly understood the common law as an organic development – a product of action rather than design – and that it has great value because of this, he also points out that 'Common law has also proved harmful to the common good often enough' and has had to be corrected by legislation. Given this point, he argues that the historical school has made us 'understand the previous uncomprehended advantages of common law' but he goes on to argue that 'never may science dispense with testing for their suitability those constitutions that have come about organically'. He finishes this point rather dramatically by saying that 'No era can renounce this calling.' So Menger's position seems to be that we may well start with the common law which is valuable because of its organic and spontaneous development; nevertheless to attain the legal framework of a free society and a free economy such law may well have to be modified and adapted and this may well require government and legislation. Hayek's mature position, despite a bit of zigzagging during his career, was broadly similar. He argues in *Law, Legislation and Liberty, Vol. 1: Rules and Order*, 'the fact that law that has evolved in this way has certain desirable properties does not prove that it will always be good law or even that some of its rules may be very bad. It does not mean therefore that we can altogether dispense with legislation.'[39] Also, he argues at the same point in the book that the evolution of the common law, gradual as it is, may not be adaptable quickly enough to changes in circumstances.

All of this means that the common law does have to be modified at times so that it works in favour of the *Rechtsstaat*, and this in turn means that the values to

do with the rule of law are at the heart of the *Rechtsstaat* ideal and those of the free society and the free economy have to be clear and compelling if they are to serve as the basis for the correction of the negative but still 'grown' features of common law. Not only that but also the moral basis of the *Rechtsstaat* has to have some kind of principled objectivity if it is indeed to be invoked to enable us to modify and modulate through legislation the spontaneous order to be found in common law. In Chapter 2 we shall turn to the different, and not wholly compatible, accounts of this moral basis, scope, and character of the *Rechtsstaat* and the rule of law as a moral and legal ideal. In Hayek's own view as we shall see most aspects of this ideal will be negative: to do with claims about the falseness of certain types of political claims in terms of rights, freedom, justice, community, solidarity, and the like but also negative in the sense that he, unlike some other neo-liberals, does not think that it is possible to develop objective and positive moral conceptions.

Before moving into these arguments, however, I want to address one further issue in Hayek's approach to common law. In his social and legal philosophy Hayek places a great deal of emphasis on the law providing at any one time a framework of certainty and predictability. This is not for him some kind of abstract moral demand but rather is central to the role of the law in addressing the basic circumstances of human life. Given that, as we shall see, for Hayek our knowledge is fragmentary and we need space within which each person can utilize whatever knowledge is available to meet his or her needs and expectations as best he or she can and this exercise, if it to be successful, requires a stable, free, secure, known, transparent, and predictable environment which only the law can provide. However, there is a big question about whether or not the common law can in fact meet these requirements. Hegel's critique of Savigny's hostility to codification is relevant here since, as we have seen, Hayek rather approves of Savigny. Hegel's view is that transparency and universality are not and cannot be features of the common law in that how a judge at common law will approach a case and how different parties will be treated is far from being clear and predictable. Hegel argues in paragraph 211 in *The Philosophy of Right*[40] that the law has to have the character of 'determinate universality', that is to say it has to be clear and transparent and to apply in a universal way to all of those who fall under the law: property owners, traders, bankers, and citizens in general – whatever the class of those to whom a particular law applies. This knowledge of determinate and universal law is central to the rule of law. In the additional remarks to paragraph 211, he goes on to argue that '[l]aw must be known by thought, it must be a system in itself and only as such can it be recognized in a civilized country', and then in a direct criticism of Savigny, his colleague at the University of Berlin, he goes on to argue that '[t]he recent denial [by Savigny] that nations have a vocation to codify their laws is not only an insult; it also implies the absurdity of supposing that not a single individual has been endowed with skill enough to bring into a single system the endless mass of existing laws'.

The systematization and codification of the law was, in Hegel's view, central to its determinate universality as he makes clear in this paragraph. Only then will it be able to provide the clear and predictable framework within which individuals

can act with confidence. This cannot be attained by the common law if it is left uncodified and unsystematized. In some ways Hayek's mature view is not all that different from that of Hegel. In the *Kodifikationsstreit* in Germany to which Hegel contributed and which was provoked by Thibaut – Hegel's mentor in all of this – in his book *Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland*,[41] published in Heidelberg in 1814, and Savigny in his *Vom Beruf unsrer zeit für Gesetzgebung und Rechtswissenschaft*,[42] published in the same year, the latter argued against codification because he valued the organic growth of the common law – as did Hayek. He did however make an important distinction which is of fundamental importance for the rule of law. He argues that initially law exists in the habits and the consciousness of the community, but as society develops it comes to embody two further aspects. The first aspect is the continuation of the law as part of the habits and practices of the society – what he calls the 'political' aspects of the law; the second aspect is the technical aspect embodied in the science of jurisprudence. The problem with all of this, as Thibaut argued, is that this latter aspect means that in a common law context the understanding of the law – just because it is unsystematized and codified – becomes more complex and the understanding of it has to be in the hands of professional students of jurisprudence and this removes it almost completely from the consciousness of ordinary people. It becomes part of an esoteric science and an esoteric language. The difficulty then comes particularly with the idea of *Rechtsstaat* and the rule of law if an understanding of the rule of law, in a common law jurisdiction the compilation of cases and precedents is removed from the common knowledge of the people. Citizens will not be able to act according to the rules of just conduct if the knowledge of such rules has become esoteric knowledge. At the same time, Thibaut's and Hegel's point was that while systematization is desirable in terms of what we would now call the rule of law, the creation of law with determinate universality does not take place *de novo*, nor is it a case of turning into systematic positive law some general moral framework of law such as natural law might be thought to provide but rather should be a systematization of the common law. Savigny is right to value the common law but wrong to object to its systematization.[43] In some respects, depending on how far Hayek wanted to allow his argument to go we might say that Hayek is more on the side of Thibaut and Hegel here. We start with the common law because that is embedded in the consciousness of the people but we should make that consciousness clear, determinate, and universal and only then can it meet the requirements of the *Rechtsstaat* and the rule of law which in turn facilitate through clarity and universality the conditions necessary for individuals to cope with their limited knowledge and an indifferent natural world.

As I argued earlier for the neo-liberals the rule of law is a moral ideal and, as we have seen, is closely related to ideas about the spontaneous order, the private law, the common law, the negative liberty, the market order, the fragmented and dispersed nature of knowledge, etc. together with the claim that both common law and legislation should be guided more in the direction of the rule of law than has been the case under socialist and social democratic regimes. In Chapter 2

I will discuss some of the fundamental ways in which a liberal account of the rule of law have been argued.

NOTES

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3. Oakeshott, M. J. (2006). *Lectures in the History of Political Thought*, ed. T. Nardin and L. O'Sullivan. Exeter: Imprint Academic, p. 484.
4. Oakeshott, M. J. *Lectures in the History of Political Thought*, p. 472.
5. Oakeshott, M. J. *Lectures in the History of Political Though*, p. 472.
6. Oakeshott, M. J. *Lectures in the History of Political Thought*, pp. 472, 488.
7. Oakeshott, M. J. (1975). *On Human Conduct*. Oxford: The Clarendon Press, p. 232.
8. Oakeshott, M. J. *On Human Conduct*, p. 233.
9. Oakeshott, M. J. *On Human Conduct*.
10. Oakeshott, M. J. *On Human Conduct*, p. 131.
11. Oakeshott, M. J. *On Human Conduct*, p. 138.
12. Oakeshott, M. J. *On Human Conduct*, p. 138.
13. Oakeshott, M. J. *Lectures in the History of Political Thought*, p. 487.
14. Hayek, F. A. (1973). *Law, Legislation and Liberty, Vol. 1: Rules and Order*, London, Routledge and Kegan Paul, p. 98.
15. Hayek, F. A. *Law, Legislation and Liberty, Vol. 1: Rules and Order*, p. 106.
16. Oakeshott, M. J. *Lectures in the History of Political Thought*, p. 485.
17. Oakeshott, M. J. (1983).'The Rule of Law', in *On History*. Oxford: Blackwell.
18. Oakeshott, M. J. *Lectures in the History of Political Thought*, p. 489.
19. Oakeshott, M. J. *Lectures in the History of Political Thought*, p. 474.
20. Oakeshott, M. J. *On History*, p. 167.
21. For further discussion see K. Dyson (1980). *The State Tradition in Western Europe*. Oxford: Martin Robertson.
22. Oakeshott, M. J. *Lectures in the History of Political Thought*, p. 490.
23. Fuller, L. (1962). *The Morality of Law*. New Haven: Yale University Press.
24. Oakeshott, M. J. *The Rule of Law*, p. 152.
25. Oakeshott, M. J. *The Rule of Law*, p. 153.
26. Oakeshott, M. J. *The Rule of Law*, p. 156.
27. Oakeshott, M. J. *The Rule of Law*.
28. Oakeshott, M. J. *On Human Conduct*, p. 326.
29. Hayek, F. A. *Law, Legislation and Liberty, Vol. 2: The Mirage of Social Justice*.
30. Kelsen, H. (1957). 'What is Justice?', in *What is Justice? Justice Law and Politics in the Mirror of Science*. Berkeley, CA: Berkeley University Press. For the relationship between his idea of a *Rechtsstaat* and legal positivism, see 'Rechtsstaat und Staatsrecht', in H. Klecatsky, R. Marcic, and H. Schambeck *Die Wiener Rechtstheoretische Schule, Vol. 2*. Vienna (1968). For the full force of Hayek's critique of Kelsen from the point of view of the rule of law and *Rechtsstaat*, see Hayek, *Law, Legislation and Liberty, Vol. 2: The Mirage of Social Justice*, pp. 44–61.
31. Hayek, F. A. *Law, Legislation and Liberty, Vol. 2: The Mirage of Social Justice*, p. 46.
32. Hayek, F. A. *Law, Legislation and Liberty, Vol. 1: Rules and Order*, p. 49.

33. Hayek, F. A. *Law, Legislation and Liberty, Vol. 2: The Mirage of Social Justice*, p. 47.
34. Hayek, F. A. *Law, Legislation and Liberty, Vol. 1: Rules and Order*, p. 91.
35. Hayek, F. A. *Law, Legislation and Liberty, Vol. 1: Rules and Order*, p. 119.
36. Hayek, F. A. *Law, Legislation and Liberty, Vol. 1: Rules and Order*, p. 119.
37. See Shearmur, J. (1996). *Hayek and After*. London: Routledge and Kegan Paul, p. 89.
38. Menger, C. (1985). *Investigations into the Method of the Social Sciences with Special Reference to Economics*. New York: New York University Press, p. 233; and Shearmur, J. *Hayek and After*, p. 44. Overall Shearmur's book is one of the most acute studies of Hayek and I am indebted to him for seeing this aspect of Menger's work.
39. Hayek, F. A. *Law, Legislation and Liberty, Vol. 1: Rules and Order*, p. 88.
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43. There are interesting insights into these debates and their background to be found in J. Q. Whitman (1990). *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change*. Princeton, NJ: Princeton University Press.