Geregeld recht: een rechtspositivistische analyse van de rechtsstaat
Bos, A.M.

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Summary

LAW BOUND BY LAW
A legal positivist analysis
of the rule of law

This book explores the question 'what is the rule of law?' The introductory chapter draws the outlines of the problems raised by this question. 'Rule of law' is an evaluative concept that is important in the assessment of the legitimacy of state action. The constituent values of the rule of law are highly controversial. Yet authors on the rule of law present their own favourite list of 'essential features' of the rule of law, with a strong suggestion of self-evidence, and without paying much attention to the different lists of others. But a sound debate on the rule of law asks for precision of argumentation. There is a lot at stake here: a justified claim of legitimacy of state action indicates a moral duty of obedience of the state's subjects.

One may submit that there is no point in trying to settle the political disagreement about the values of the rule of law. Yet this needs not be the last word. Apart from value problems there are conceptual problems in the debate on the rule of law. A legal positivist approach to such problems is preferred, because it will prevent the mixing of analytical and evaluative questions.

In the introductory chapter it is suggested that the concept of rule of law has an invariable core element: state action is bound by the law. This fixed core element gives rise to more specific questions, which are elaborated in parts II to IV. Which characteristics does the law have, that authorities may be bound by it? How may this binding to the law contribute to the legitimacy of their action? How is to be assessed whether an actual state stands the test of this binding? In the preceding part I the preliminary objection is discussed that 'rule of law' cannot have a fixed core, because it is a so-called 'essentially contested concept'. Besides, the legitimacy problem of the rule of law is defined by tracing it back — in writings of historians — to the acceptance of the law-creating capacity of the emerging modern states. If the state has the original capacity to create law, then the binding of the state to the law must be a binding to law created by the state itself. It must be a self-binding.

The conclusion of this book is as follows. A claim that state action in general or in particular instances is legitimate under the rule of law is justifiable only insofar as it is proven that the action actually conforms to
existing restrictive legal rules. The justifiability of the claim of legitimacy further depends on whether the state’s subjects endorse the potential values of a rule-based legal practice, which face the competition of other values, for example those that are connected to a desire that state action is flexible to accommodate the particularities of individual cases in a rapidly changing world.

The following will give an account of the main points of the argument in parts I to IV.

1. Endless disagreement

The view that there is a fixed core element in the concept of ‘rule of law’ is not incompatible with the conviction that it is an ‘essentially contested concept’. Thanks to its fixed core ‘rule of law’ is a shared concept in the sense that opponents at least do recognize each other’s statements as concerning the same evaluative subject. Without this fixed core the use of the term ‘rule of law’ would just lead to a total confusion of tongues. In other words, it is part of the conventional meaning of ‘rule of law’ that by using the term a positive value judgement is made about a legitimizing binding of the state to the law.

But the question is: bound to which law, bound in what way? Standards must be used in the value judgement. The concept of ‘rule of law’ itself, however, does not determine which standards are to be used. On the contrary, it is also a part of the conventional meaning of ‘rule of law’ that people may disagree on the evaluation criteria. The fact that the evaluation standard is variable, is the reason that the concept is contestable. This gives rise to the endless disputes about the proper use of the concept. The disagreement is so far-reaching that different usage of the concept leads to what is called ‘rival conceptions’ of rule of law.

Some authors state that historical research may provide a way to solve the dispute about the ‘real meaning of rule of law’. But also among historians rival conceptions of rule of law are quite common. Still, their writings enable a choice for a particular historical demarcation of the legitimacy problem of the rule of law, that defines this problem in the sharpest possible way. The problem of the rule of law is in a class of its own when it is consistently accepted that the emerging modern state possesses an original, autonomous capacity to create law, not in itself bound by God, reason or tradition. Thus the legitimizing binding of the state to the law acquires a puzzling aspect. The rule of law is about the legitimacy of state action. The legitimacy is expected to come from a binding to the law. But the state itself creates the law. Apparently it is expected that somehow the legal rule of men in the modern state may be governed by the rule of law. How may one
conceive of a legitimizing rule of law without detracting from the acceptance of the state’s original, ex ante unbound law-creating capacity?

II. Antagonism between ‘political’ and ‘material’ law: Franz Neumann

This sharply defined legitimacy question is Franz Neumann’s point of departure for his theory of the rule of law. According to Neumann a combination of two antagonistic legal spheres makes for the legitimate modern state. On the one hand there is the sphere of so-called ‘political law’, on the other hand there is the sphere of so-called ‘material law’.

In the sphere of political law the law’s authority is purely based on the fact that its agents do have the authority to make law, regardless of the contents of the law they create. Here the acceptance of law as ‘the work of men’ becomes apparent. There is no such thing as pre-existing, ‘higher’ law to bind initial law-creation in the state. This sphere of political law is the sphere of de jure unbound law, the sphere of full legal discretion of state officials.

The sphere of material law is the sphere of general legal norms — legal rules — whose contents meet moral requirements. The rules restrict legal authorities’ action and here the law’s authority is based on the fact that authorities’ action conforms to the rules.

Both legal spheres contribute to a legitimate state under the rule of law. Attempts at a theoretical reconciliation of the two spheres are common, but according to Neumann doomed to fail. Either of the two spheres will vanish in the process. The antagonism between the spheres is conceptually irresolvable: highest might and highest right cannot be conceived to be realized at one and the same time in one common sphere. The antagonism can only be resolved in legal practice. In practice legal authorities may bind themselves to legal rules created by themselves. Neumann’s theory of the rule of law is a theory of self-binding. Legitimate state action under the rule of law depends on authorities’ successful legal self-binding.

How can the binding of legal practice to legal rules have a legitimizing effect? According to Neumann this depends on whether such a rule-based legal practice meets the needs and wants of people. In other words, whether people attach value to this binding. The rules themselves do not and cannot hold the clue to this question, as they are only the tools used to structure a particular process of decision making.

III. Law internally bound to law: Hans Kelsen

It hardly needs argumentation that the conformity to restrictive legal rules contributes to the legitimacy of legal practice. But how does political law
contribute to such a legitimacy, it being the sphere of de jure unrestricted law? Hans Kelsen's theory of law offers valuable insight into this question.

Like Neumann, Kelsen rejects any view in which the validity of some kind of law prior to the positive law is defended. But whereas Neumann aims at a theory of the morally legitimizing rule of law, moral considerations are irrelevant for Kelsen's descriptive theory of the positive law in its normative aspect, i.e. in its existence as valid norms. Kelsen's theory of law is a theory of what Neumann called the sphere of political law.

Kelsen points out that in order to be able to determine the legal status of individual acts one needs a legal norm as an interpretation scheme. This also holds true for the acts involved in the law-making process, from the creation of the historically first constitution of a state right through to the judicial decision in a particular case. Legal systems usually have norms of positive law for the interpretation of law-making acts. But what if an act is performed to which no positive legal norm is applicable? When creating the historically first constitution this must be the case, but there may be other instances as well. If such acts are nevertheless considered to be valid law-making, evidently a non-positive legal norm is used as an interpretation scheme.

The norm used to assess the legal validity of such initial law-creating acts must be a legal norm, otherwise it has no bearing on the legal status of the acts under consideration. But it is by definition not a norm of the existing positive law. It is a purely thought norm, i.e. a fictitious legal norm, a so-called 'basic norm'.

Only the use of a dynamic basic norm fits the consistent acceptance of law as the work of men. As opposed to a static basic norm, a dynamic basic norm contains in itself no conditions for the validity of law-making acts. It acquires its content at the moment that acts are considered to be valid law-making notwithstanding the fact that no positive legal norms apply to them. The use of this basic norm is not a detached activity. It amounts to the authorization of initial law-making. Without authorization the acts would just be the acts of ordinary women or men who are not capable of making law.

As a consequence of the need for a legal norm to determine the legal status of actual acts, every act considered to be valid law-making by definition conforms to a legal norm. In other words, the legality of a valid law-making act is by definition assured, even if it is an initial law-making act that only conforms to the non-positive legal basic norm.

The legality of a law-making act also indicates its legitimacy, within the context of the law. Legality and legitimacy are just two sides of the same coin, as it is always possible to describe every law that authorizes law-making acts by saying that it imposes a duty to obey the laws made by the
authority. An initial law-making act is not only legalized by the application of a dynamic basic norm, but is also legitimized by it, within the context of the law. This is the Kelsenian answer to the question, raised by Neumann's theory, of how the sphere of political law, of legally unbound law, contributes to a legitimate legal practice under the rule of law.

IV. Rule of law test

Whether a state can rightfully claim to be governed by the morally legitimizing rule of law can only be established by examining the legal practice of its officials. The morally legitimizing rule of law requires the dominance of restrictive legal rules over the state's use of its basically unbound capacity to create law. A rule-based legal practice is characterized by an allocation of decision-making powers to different authorities, separated in time. Two temporal positions in the process of legal decision-making are important in bringing about the practical dominance of the sphere of material law.

'Earlier' authorities in the law-making process have the responsibility to create rules imposing conditions for future valid law-making and to provide for correction of error. If such determining rules are absent, 'later' authorities cannot effectuate any (morally relevant) binding to the law. Rules that are weakly determining, make for a correspondingly weak binding, and for a correspondingly weak potential legitimacy of future law making. For instance: the highest legislative acts in a state encounter only few and weakly binding rules laid down by 'earlier' authorities. Consequently, state legislation at this level can only be weakly legitimized by the rule of law. For a major part of his acts the legislator cannot but take refuge to other grounds for his claim to legitimacy than the rule of law.

'Later' authorities in the law-making process have the responsibility to exercise their law-making powers with a rule-following attitude. This means among other things that they will have to accept that the rules they encounter have a fixed meaning, i.e. the meaning attributed to the rules by the earlier authorities who decided on the enactment of the rules. The 'later' authorities abandon a rule-following attitude when they take the stand that the meaning of once enacted rules may be changed at will to suit the issues in which they now have to decide, or when they assume that the meaning of the rules may be constructed by referring to justifying background ideas on the law. In these cases they do not practise a binding to existing legal rules, but activate their always present discretionary powers of the sphere of political law.

The willingness to follow rules posed by others is not a commonly cheered attitude nowadays. Moreover, citizens often want legal authorities
to do justice to all particularities of their own cases, which is not compatible with the application of general rules. Yet the view that the values of the rule of law are completely outdated is an exaggeration. Practised binding of the state to self-imposed restrictive law remains an up-to-date ground for the legitimacy of authorities' legal practice.