

# A Companion to Philosophy of Law and Legal Theory

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## The Ideal of the Rule of Law

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A remarkable consensus prevails in the literature about what the rule of law actually requires. It is widely agreed that the rule of law requires that laws be publicly promulgated, be reasonably clear and not self-contradictory, and have general and prospective application; that the application of laws be administered by impartial and independent courts which are reasonably accessible to all; that people ought to be given adequate opportunities to comply with the law; that laws are not changed too frequently; and other, similar principles.<sup>1</sup> From a philosophical perspective, however, the ideal of the rule of law is a complicated one, and discussions of it are often confusing. Of course, we share the view that the rule of law requires the kind of principles listed above. But on what grounds? And what is it that unites these ideas and brings them together under the umbrella that we call “the ideal of the rule of law”?

The fact that we tend to refer to the rule of law as *an ideal* suggests that the rule of law is a general normative principle, and one that can be attained, in practice, to various degrees; legal systems can meet the normative requirement of this ideal to a greater or lesser extent. Presumably, the better the law meets these standards, the better law is, at least in some respect.<sup>2</sup> However, as soon as we begin to think about the rule of law as an overall normative ideal, some dangers lurk in the background. One obvious danger is to confuse the ideal of the rule of law with an ideal of the rule of *good* law. Many commentators associate the rule of law with the kind of legal regime that respects, for example, personal freedom and human dignity. Others go even farther and maintain that a legal regime that violates human and civil rights is one that fails to comply with the rule of law. Undoubtedly, these are noble ideals but their connection to the rule of law is questionable. The ideal of the rule of law must capture something that is essential to legalism, *per se*; if there is something good about the rule of law, it has to be a kind of good that derives from certain features that law, as such, possesses. To assume that the rule of law instantiates values that derive from certain views about what would be a good legal regime, like law that respects freedom, dignity, and human rights, amounts to the circular thesis that it is good to be ruled by good law.<sup>3</sup> If the rule of law is to have some distinctive import, it must avoid this obvious circularity.

Nevertheless, there is a beginning of an insight here. The ideal of the rule of law is basically the moral-political ideal that it is *good to be ruled by law*. The general idea is

that whatever else is the case, including, crucially, whatever the content of the law is, it is always better to be governed by a system of laws than by some other system of governance or social control. But why is that? How can we say that a certain form of governance is better than its alternatives, regardless of its particular content, that is, without knowing what the actual governance prescribes. The answer that I will consider here consists of a twofold claim: first, that it is in the nature of regulation of human conduct by law that whatever purports to be law must meet certain conditions, conditions that enable it to be law. Second, that a form of governance that complies with those conditions achieves something good in itself, promotes certain values that we cherish.

If I am right that this is the main answer on offer, two problematic issues arise: first, if we maintain that the ideal of the rule of law is premised on the basic assumption that it is good to be governed by law, the obvious question arises: law as opposed to what? How else can a population be governed if not by law? Can there be any sustained form of *de facto* governance which would not be legal? Here the difficulty arises from some of the familiar theories about the nature of law. According to one tradition that emanates from Hobbes, and more specifically, from early nineteenth-century legal positivism, basically any form of governance that is *actually sustained* over a population is, *ipso facto*, legal. When we have a certain population that is governed by a political sovereign, we have law.<sup>4</sup> But now the idea that if we are to be governed, we should be governed by law, amounts to the tautology that if it is good to be governed it is good to be governed. According to the opposing view about the nature of law, however, generally associated with the natural law tradition, not every form of *de facto* governance is legal; only forms of governance that comply with certain minimal moral constraints are properly characterized as legal. Thus, on this account of the nature of law, the conception of legality is such that it already incorporates a moral component. Only minimally good law is law, as it were. If it is really the case that only forms of governance that comply with some moral constraints are legal, then the idea that it is good to be governed by law amounts to the claim that it is good (in some respect) if we are governed by law because only that which is good (in some respect) is really law. But on this conception, there would seem to be nothing special about the rule of law; what makes rule by law good, on this natural law conception, is that the *content* of law is necessarily good (at least to some extent). Furthermore, if this version of natural law turns out to be wrong, and some norms can be legally valid even if their content is evil, then there would seem to be nothing necessarily good about being governed by law.

We can generalize the problem here: it would seem that any attempt to explain what the rule of law ideal really is, must await a philosophical explication of the nature of law. In order to have a view about whether it is really good to be governed by law, one must first have a pretty good sense of what *law is* and what makes it a distinctive form of social control. It would seem that a theory about the rule of law is methodologically parasitic on a theory about the nature of law. If you want to claim that it is good to be governed by law, you must first tell us what law is, and what makes a form of governance legal to begin with.

Many commentators resist this methodological conclusion,<sup>5</sup> and to some extent, they are right. We do not need a fully articulated theory about the nature of law in

order to substantiate the normative ideal that it is good to be governed by law. What we need is only to understand that there are certain necessary features that any form of governance has to meet in order to be legal. The key idea here is that governance by law is regulation of human conduct by general norms. As long as we can agree that at least one distinctive feature of governance by law consists in this normative form of regulation, namely, that it is essential to law that it purports to regulate human conduct by general norms, we may have all that we need to ground the ideal of the rule of law. Why is that? Because it is in the nature of regulation of human conduct by general norms that such regulation has to meet certain functional conditions, and it is those functional conditions that constitute the various components of what we call the rule of law. In other words, once we understand what conditions law has to meet in order to *function as law*, we will be able to judge whether meeting those conditions is in any sense good or not.<sup>6</sup>

But here we meet the second main controversy about the rule of law ideal: if the conditions that constitute the rule of law are essentially functional, would it not follow that any value in complying with the conditions of the rule of law is only functional in nature? Some prominent legal philosophers have taken this line, and maintain that the values we associate with the rule of law are not moral values; they do not make the law good in any moral-political sense, but only functionally good.<sup>7</sup> Consider this familiar analogy: we can assume that the main function of a knife is to cut, and let us assume that in order to cut, a knife has to be sharp; the sharper the knife, the better it cuts. In this case, sharpness is a functional value. It is functionally valuable for knives to be sharp; sharpness is what enables knives to fulfill their putative function of cutting things. But this, of course, does not make sharpness valuable in any other sense; it certainly does not make sharpness somehow morally or normatively valuable. A sharp knife is a good knife, but good only in the sense that it makes the knife cut better. Similarly, it seems quite plausible to maintain that to the extent that there are certain features which are functionally necessary for law to guide human conduct, such features make the law good – that is, good in guiding human conduct. But this is a purely functional sense of good.

The problem with this functional conception of the rule of law is that it would seem to miss a great deal of what makes the rule of law worthy of our appreciation. It would leave unexplained the general association of the rule of law with a well-ordered society. More specifically, it would seem that a purely functional conception of the conditions of the rule of law would fail to support the first and most important component of the ideal of the rule of law, namely, the normative thesis that it is good to be governed by law.

What I am trying to suggest here is that there is an inherent problem in any attempt to articulate the ideal of the rule of law in a way that would be free of circularity. On the one hand, the ideal of the rule of law is meant to capture the normative judgment that it is good to be governed by law. But this idea, as we have seen, immediately calls into question: governed by law as opposed to what? Do we first need to have a theory about the nature of law in order to come to any conclusions about the question of whether governance by law is good in any sense? A negative answer to this question seems possible, if we focus on the functional aspects of governance by law: perhaps there are certain conditions that the law has to meet in order to be able to guide human

conduct; and then we could say that by meeting these conditions, the law achieves something good. However, as we noted, such a line of thought would naturally conclude with “good” in a purely functional sense. And then it becomes very doubtful that such a functional sense of “good” is capable of grounding the conclusion that it is generally good to be governed by law.

Is there a way out of this circularity? I believe that there is, and I do not think that we first need to have a fully articulated theory about the nature of law in order to show why it is good, morally speaking, to be governed by law. Suppose we agree that whatever else the law might be, it is basically a form of regulation of human conduct by general norms. Suppose we also agree with the functionalists that in order to be able to regulate human conduct by general norms, such regulation must meet certain conditions; it must take a certain shape, as it were, which is functionally necessary for guiding human conduct by norms. Now, suppose it also turns out that the features that law must have in order to function as law are such that they also tend to promote certain things that we value; suppose these conditions are such that, other things being equal, it is good to have them, because they manifest respect for human dignity, promote freedom, and so forth. If this is the case, then we would have shown that it is good to be governed by law. Let me try to present this in the form of a structured argument:

- 1 Whatever else the law is, at the very least, and necessarily so, law purports to guide human conduct by generally prescribed norms.
- 2 Generally prescribed norms can only guide human conduct if they meet certain conditions. Call these: the conditions of the rule of law. Thus, the conditions of the rule of law are functionally necessary for law to guide human conduct.
- 3 Therefore, wherever there is law (that is, some legal system in force), the conditions of the rule of law are actually met, at least to some minimal extent.
- 4 Any form of governance that meets the conditions of the rule of law necessarily promotes certain things that we morally value; that is, by actually complying with these conditions the law attains something morally good.
- 5 It follows that just by having law, we have attained something good; we have attained a form of governance that is good in some moral sense. Therefore, it is good to be governed by law.

I will assume here that premise 1 is basically correct and generally not controversial. Perhaps it requires one clarification: the idea that law aims to guide conduct by generally prescribed norms does not have to entail that just about every legal norm, as such, must have general application. Exceptions are possible and not very infrequent.<sup>8</sup> The claim is that governance by general norms is a characteristic and essential feature of law; for our present purposes, we do not need to specify what kind of norms are legally possible. Similarly, premise 2 is widely agreed by everyone who has written on this subject; in fact, as I have mentioned from at outset, there is a pretty wide consensus on what the conditions of the rule or law are. For example, it is widely recognized that norms can only guide conduct if they are made public, that is, promulgated to the population whose conduct the norm purports to guide; or that norms can only guide conduct if they are prospective (you cannot guide conduct retroactively); and prescribe

conduct that the relevant population can actually comply with (you would fail to guide conduct if it is actually impossible to comply with your guidance); or that norms can only guide conduct if people can understand what is the conduct that is required of them. And so on and so forth. Needless to say, the details are controversial. For example, although it seems pretty clear that one cannot actually guide conduct retroactively, it is not entirely clear that any violation of this condition is necessarily unjustified, or even that it is necessarily a violation of the conditions of rule of law. There may well be exceptional cases in which a retroactive law makes perfect sense. And such exceptions are possible with respect to all of the conditions of the rule of law. These exceptions, and countless borderline cases, are made possible by two considerations that apply here: The first consideration to bear in mind is that guiding conduct, though essential to what the law does, is not exhaustive of the functions of law. The law may need to achieve other objectives as well, besides guiding conduct. Second, even within the sphere of conduct guidance, the law's objectives may be in some internal conflict. The law may need to guide the conduct of different subsets of the population differently, or it may need to guide their conduct in certain ways that are not necessarily in harmony with some other objectives the law may need to achieve.<sup>9</sup> Thus, the fact that it is generally clear what the conditions of the rule of law are, does not entail that these conditions are simple, or that there is no room for controversy about their precise application. Complications notwithstanding, I will largely assume here that premise 2 is not particularly controversial.

I take it that if premises 1 and 2 are correct, then premise 3 follows as a matter of logic.<sup>10</sup> Premise 4 is, of course, the problematic one, and we will have to show that it is true. Finally, it is possible to cast some doubt on the legitimacy of the move from 4 to 5, and I will address that doubt as well.

According to the functionalist conception of the rule of law, the conditions of the rule of law are essentially functional in nature. If a legal norm purports to guide conduct, it must have certain features that enable it to fulfill this function. Now, what the functionalists claim is, that though there is a sense in which it is good if the law meets these conditions, this good is purely functional in nature. As we mentioned earlier, a sharp knife is a good knife, but only in the sense that it make the knife cut better; it does not make the knife good in any other sense. In other respects, it may be bad that the knife is sharp (e.g., it makes it more dangerous or easier to use for malicious purposes). Similarly, the claim is that if the law meets the conditions of the rule of law, it is better law in the sense that it is better equipped to guide human conduct. But again, the good here is purely functional. Now, this, in itself, is quite right. However, it is arguable that the conditions of the rule of law, though essentially functional in nature, promote other goods that we value independently of, or in addition to, the functions they serve in enabling the law to guide human conduct. Let us explore this possibility.

Consider, for example, the requirement of promulgation. The need to make laws public and knowable to the population whose conduct the law purports to guide is, indeed, first and foremost functionally good; it enables the law to guide conduct. However, the publicity of law is good in many other respects as well. Making laws public renders them politically transparent and open for public scrutiny and criticism. It enables the law's subjects to form opinions about the content of the law, and about

those who enact the laws. Publicity of law is, generally speaking, an essential ingredient of political accountability. Therefore, whatever functional values promulgation of laws have, it also has moral-political value that is conducive to the maintenance of a well-ordered democratic regime.

To take another example, consider some of the requirements of the rule of law with respect to the application of law. It is widely acknowledged that in order to guide conduct, it is not sufficient for the law to make its prescriptions public, prospective, and so forth; successful application of the law to particular cases is also functionally essential. This is a very complicated condition of the rule of law: it requires the law to maintain a considerable amount of congruence between the rules it promulgates and their actual application to specific cases. And this general requirement entails a whole range of practices and institutions. Generally speaking, it requires that the various agencies dealing with the enforcement and application of the law to specific cases apply those rules that are promulgated by the law. In practice, given the conditions of the societies in which we live, this aspect of the rule of law may require such important things as an independent, impartial, and professional judiciary; unfettered access to litigation; generally reliable and noncorrupt enforcement agencies, and so forth. Now again, although the need for such institutions and practices is basically a functional one, the values they serve go well beyond their functional merit. A professional, independent judiciary, for example, is also very conducive to the flourishing of a well-ordered democratic regime, it serves to balance the power of other law making and law applying agencies, and generally, it contributes to a culture of public order and respect for the law that is essential to a well ordered political culture. Similar considerations apply to the existence of well functioning and noncorrupt enforcement agencies, like a police force, tax collecting agencies, and so forth. Without them, law cannot function properly. But their value goes much beyond this functional aspect. A corrupt police force, for example, is bad not only because it undermines the functioning of the legal system, as it does, but it is bad also because it creates a culture of corruption and dishonesty that makes life in society generally unpleasant. A reliable and honest police force enables the law to function well, but it also enables us to live in a fair and agreeable society, free of unnecessary anxieties and corruption.

The conclusion that there is something morally good about meeting the conditions of the rule of law needs to be qualified, and in two respects. First, it should be admitted that compliance with the conditions of the rule of law does not necessarily *guarantee* that the relevant legal regime is otherwise an agreeable one. Many evils can be committed by a legal regime that fully complies with the rule of law.<sup>11</sup> Second, I think that it is quite possible that there are legal regimes which are so profoundly evil that it may actually be morally better if they also fail to comply with the conditions of the rule of law. If the law is, overall, profoundly corrupt, it might be better, all things considered, if it also failed to guide conduct. So perhaps in some exceptional cases, violations of the rule of law would do more good than harm.<sup>12</sup> In any case, none of these qualifications undermine the essential point of premise 4. The good that is achieved by compliance with the rule of law conditions does not consist in the fact that it would guarantee, by itself, a good legal regime. There are many elements that make the law good and worthy of our appreciation. The fact that it meets the rule of law conditions is morally

good, in some respects, but it is not the only good, and often not even the most important one.

Even if we grant that premise 4 is true, and compliance with the conditions of the rule of law are not only functionally but also morally and politically valuable, it may still be argued that we have not quite established the conclusion in premise 5. In other words, even if it is the case that the rule of law virtues are partly moral in content, it is arguable that these values do not prove that there is necessarily some moral value in being governed by law, as such. In fact, Joseph Raz has made this argument a long time ago. The values we associate with the rule of law, he claimed, are only negative values: "The rule of law is a negative virtue in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself" (Raz, 1979, p. 224).

Let us take a closer look at the two prongs of this argument. Many moral values consist in the avoidance of evil rather than the direct promotion of a good. Raz is right to claim that not every instance of avoiding evil justifies moral credit to the agent; as he rightly notes, the person who cannot poison another due to his ignorance or inability does not deserve credit for it. Moral agents normally deserve credit for avoiding evil when they would have had both the *opportunity* and the *temptation* to commit the wrong, and they have resisted it. But we should not confuse a theory of moral agency and ethical virtue with the question of what is a good. Suppose, for example, that we discover a world in which people, who are otherwise similar to us, cannot possibly kill each other. Thus they would not deserve any credit for the avoidance of murder. But we would still be able to say that it is a good world in that respect. The fact that those creatures cannot kill each other is good, in itself, even if it is not a personal accomplishment that they deserve credit for. Similarly, the fact that a properly functioning legal system cannot sanction certain forms of arbitrary force or violation of human freedom and dignity is simply good, even if it is true that the law does not deserve moral credit for it.

Furthermore, I doubt it that all the values which are promoted by compliance with the rule of law conditions are negative values in the sense Raz has in mind here. Many of them are, but not all. To the extent that there is something positively good about a culture of open, public deliberation about the common goals of society, and to the extent that compliance with some of the rule of law conditions is at least conducive to such a culture, there may well be something positively good, not just avoidance of evil, that is promoted by compliance with the rule of law.

Now consider the second prong of Raz's argument: The kinds of evil which the rule of law conditions avoid, Raz claims, are only those which could have been created by the law itself. No evil is avoided by, say, the publicity of law or its prospective aspect, unless there is law, first, which could violate these conditions (to some extent). In other words, the rule of law virtues only mitigate possible evils that the law could create to begin with. If there is no law, then there are no such evils that need to be avoided. Raz's analogy with the wrong of deceit is revealing: there is no way in which I can lie to you unless I communicate with you. It is only because I can talk to you and tell you a lie that my honesty, in the limited sense of avoiding deceit, is a virtue. Honesty, in this limited sense, Raz claims, "does not include the good of communication between people, for honesty is consistent with a refusal to communicate" (Raz, 1979, p. 224). But what



if I have a positive duty to tell you the truth? Surely, the unfaithful husband who cheated on his wife does not manifest honesty by simply keeping quiet about it. If there is a justified background expectation to communicate the truth, an avoidance of communication might be deceitful. Similarly, we can claim that if there are good reasons to have a form of governance in society, the lack of legal governance is a moral deficiency. We have law and legal systems because there are good reasons to have them. Thus, Raz is right to insist that if there is anything which makes the law good, it is not simply the fact that the conditions of the rule of law, by themselves, actually create certain goods. We must first assume that there is some good in having law to begin with. (Similarly, unless we assume that the institution of monogamous marriage is good, there might not be anything wrong with the silence of the deceitful husband.) In this respect, the argument we presented above is incomplete. But it can be completed by adding the necessary assumption (which, in fact, Raz has never denied): the necessary assumption is that we have good reasons to have law in the first place. If we add this background assumption, then it seems to me that the conclusion of the argument does follow.

It is, admittedly, a very limited conclusion, and for two main reasons. First, we must bear in mind that the conditions of the rule of law, though functionally necessary for law to be able to guide conduct, can be violated to a very considerable extent without rendering the legal regime inoperable. Many legal systems function with gross violations of the rule of law. Second, I think that there is something true about Raz's basic insight that most of the rule of law virtues are essentially negative values. There is a sense in which law itself is more like a necessary evil, not positively a good in itself. Imagine a world which does not require law and legal systems, a world in which there are no reasons to have law at all: presumably it would be a much better world than ours.<sup>13</sup>

### Notes

- 1 Most of these features of the rule of law were articulated by Lon Fuller (1964, ch. 2). Many others basically endorsed Fuller's list (e.g., Finnis, 1980, pp. 270–6; MacCormick, 1992; Raz, 1979, ch. 11).
- 2 This is actually not quite accurate. In my essay (Marmor, 2007, ch. 1), I have argued at some length that compliance with the rule of law can sometimes be excessive; it is not necessarily the case that the more, the better.
- 3 Hayek (1944, ch. 6), for example, was quite aware of this danger, but I doubt it that he managed to avoid this circularity. Much of his praise for the rule of law derives from his conviction that the rule of law is good because it is conducive to freedom; and then he articulates the requirements of the rule of law as those which would make the legal regime conducive to freedom. This, I think, implicates his argument with the circularity I mentioned above.
- 4 This view is most famously associated with John Austin (1954).
- 5 Jeremy Waldron, for instance, in a recent article (yet unpublished) "The Concept and the Rule of Law," makes this methodological claim the main target of his critique.
- 6 This is basically the line of thought presented by Fuller (1964).
- 7 Most prominently, H. L. A. Hart (1983, pp. 349–50) and Joseph Raz (1979, p. 226).

- 8 I have elaborated on these exceptions and complications in my essay on the rule of law (see Marmor, 2007, ch 1).
- 9 For a very convincing argument showing how the law needs to convey a different message to different subsets of the population, see Meir Dan-Cohen (2002, p. 37).
- 10 Basically, the argument has this form:  $[(L \rightarrow P) \ \& \ (P \rightarrow Q)] \rightarrow (L \rightarrow Q)$ . Actually, it is a little more complicated since premise 3 introduced an existential quantifier, but the general structure is the same.
- 11 South African Apartheid, for example, was quite legalistic. The evils of the Apartheid regime can hardly be attributed to violations of the rule of law.
- 12 It is very difficult to generalize about this. Sometimes, even if the legal system is profoundly evil, the fact that it fails to comply with the rule of law might be an additional iniquity over and beyond the law's substantive injustice.
- 13 I am indebted to Scott Altman, Elizabeth Garrett, and Joseph Raz for helpful comments on a draft of this chapter.

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