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THE RULE OF LAW

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Introduction

The "Rule of Law" is an ideal that features prominently in contemporary political discourse. Departures from the Rule of Law are regarded as flaws or failings in a legal system, or at best regrettable necessities that carry a significant burden of justification. The Rule of Law is often considered to be the distinctive virtue of legal systems, and a prerequisite for the existence of a good or decent system of law. But while all (or almost all) agree that the Rule of Law is an indispensable aspect of a worthwhile legal system, there is less agreement on the content and scope of the ideal. It is normally thought to include such elements as official conformity to the law; the independence of the judiciary; laws being clear, prospective and public; and the ability to challenge the applicability of a law in a fair hearing (see Jowell 2007). Nonetheless, lawyers and theorists debate the merits of "formal" or "thin" accounts of the Rule of Law over "substantive" or "thick" accounts, without agreeing among themselves about the details of these accounts (see Tamanaha 2004, chs. 7–8). Formal and thin accounts of the Rule of Law focus on various formal and procedural features of the law, whereas substantive and thick accounts add some requirements of substantive justice, or human rights, or democratic processes.

In this article I will defend a restricted conception of the Rule of Law that is not limited to formal or procedural features, but does not embrace the general protection of human rights or substantive justice or democracy. So the account is neither thick nor thin, neither substantive nor formal, but something in between. The account is grounded in the fundamental idea that the Rule of Law serves to promote and protect governance by law under non-ideal conditions. I will begin by considering Lon Fuller's and Joseph Raz's highly influential analyses of the Rule of Law, and the limitations of those accounts. I will go on to propose an analysis of the Rule of Law that is broader than theirs and yet still narrower than "thick" or "substantive" accounts. Finally, I will argue that the value of the Rule of Law ultimately depends upon the overall moral merits of a legal system—not because the Rule of Law has only instrumental value, but because it is an inherently mixed-value good.

Fuller and Raz on the Rule of Law

There are two particularly influential philosophical accounts of the Rule of Law: those provided by Fuller (1969) and Raz (2009: 210–29). Both take a narrow view of the Rule of Law whilst regarding it as an important legal ideal. What is distinctive about the two accounts is that they suggest two (very different) ways in which the requirements of the

Rule of Law might be unified. There is a great deal to be learned from both the accounts themselves and from their limitations.

Fuller's account of legality is best known for the claim that it constitutes an "internal morality" (or "inner morality") of law (1969, ch. 2). He points out, plausibly enough, that a legal system could not exist if all of its laws lacked any one of the following eight features (or "desiderata"), which could be described as: (1) generality; (2) publicity; (3) prospectiveness; (4) clarity; (5) non-contradiction with other laws; (6) the possibility of conformity to the law; (7) constancy through time; and, finally, (8) congruence between the announced laws and their administration. These represent the principles of legality that a legal system should aspire to satisfy (1969: 41–44. For two illuminating discussions of the desiderata see Marmor 2007 and Kramer 2007, ch. 2). What makes these principles an "internal morality" is a more elusive matter. Fuller's key thought seems to be that law is the enterprise of subjecting human conduct to the governance of rules (1969: 46, 49, 162). In order to succeed in this enterprise the eight principles must be respected. In particular, principle (8)—faithful application of the existing law—is necessary if there is to be any point in citizens obeying the law (1969: 209–10). In effect the state is undertaking (a) that it will be possible for the citizen to know and obey the law and (b) that if the citizen obeys the law then the state will abide by it too (1969: 39–40). Consequently, it is an affront to the citizen's dignity as a responsible agent to depart from the principles (1969: 162).

On the other hand, Fuller recognizes that the principles have only a *pro tanto* force, i.e., that they can be outweighed by other considerations (including conflicts within the principles themselves, 1969: 45). Thus it can be acceptable to use retroactive legislation to correct a failure of publicity (1969: 53–54). Other illustrations of the *pro tanto* force of the principles might be the permissibility of some laws bestowing a welcome status on named individuals (e.g., the original membership of a newly formed court) and some cases of selective enforcement of the criminal law. It is also widely thought that the objective standard of care in negligence law is acceptable even though it renders some "short-comers" (i.e., those incapable of satisfying the standard) liable (Honoré 1999). So the importance of Fuller's principles of legality lies in the value of (a) being able to conform to the law and (b) knowing the consequences of conformity and nonconformity. One limitation of this analysis lies in the fact that these values are always susceptible to being outweighed by some competing value that can be better achieved by departures from the principles. The Rule of Law, on Fuller's approach, no longer seems to impose quite as strong a normative constraint on the law as it is often thought to do.

The more fundamental limitation of Fuller's account, however, is simply that it omits so much that is central to our ordinary conception of the Rule of Law, such as the independence of the judiciary, the effective ability of citizens to challenge the legality of state actions in the courts and the observance of due process in civil litigation and criminal prosecutions. Fuller's principles are quite simply those that are *necessary* for subjecting human conduct to the governance of rules. But they say nothing about the other conditions that must prevail if the law is to govern a community. (Indeed it may be that Fuller did not envisage his principles of legality as being coextensive with the "Rule of Law," a term he first uses in the "Reply to Critics" in the revised edition of his work (1969: 187–242).)

So let us turn to Raz's alternative analysis of the Rule of Law. Raz rejects the idea that the Rule of Law represents an "inner morality" of law (2009: 223–24). He sees it instead as premised on the assumption that people should obey the law and be ruled by

it (2009: 212). The "basic intuition" of the Rule of Law is that if the law is to be obeyed it must be *capable of guiding* the behavior of those to whom it applies (2009: 214). The Rule of Law itself is constituted by those features of the law that are necessary for it to be capable of guiding behavior. This rationale is applicable to Fuller's desiderata of the Rule of Law, though Raz himself places more emphasis on institutional features that are important for ensuring consistent application of the law and supervising conformity to the Rule of Law itself. He suggests the following (non-exhaustive) list of principles (2009: 214–19):

(1) all laws should be prospective, open and clear;
(2) laws should be relatively stable;
(3) the making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules;
(4) the independence of the judiciary must be guaranteed;
(5) the principles of natural justice must be observed;
(6) the courts should have review powers over the implementation of the other principles;
(7) the courts should be easily accessible; and
(8) the discretion of the crime-preventing agencies should not be allowed to pervert the law.

Raz ultimately sees the Rule of Law as an inherent virtue of the law, because a legal system that better conforms to the Rule of Law is better able to achieve the function of guiding human behavior. He emphasizes, however, that this is not a *moral* virtue, but rather an *instrumental* virtue, i.e., the virtue of efficiency (2009: 226). In his well-known image, the specific function of knives is to cut, and thus the sharpness of a knife is one of its inherent virtues, but a knife can be put to both morally desirable and morally deplorable uses. So too with the uses to which the law can be put. A legal system that conforms to the Rule of Law, is a "good" one, but only in the sense of being well-suited to the specific function of law (2009: 223–26).

On the other hand, Raz does attribute other (moral) value to the Rule of Law, such as (a) reducing the scope for arbitrary power, (b) facilitating individual planning and (c) serving the value of human dignity by reducing uncertainty over the future and reducing frustrated or disappointed expectations (2009: 219–23). But he sees the Rule of Law as a purely *negative* virtue, because its value lies in lowering the risks that are created by the law's existence in the first place. It is like the duty not to deceive in communicating with others. Absent the ability to communicate we could not deceive. But the value of communication does not lie in failing to deceive others—it lies in the positive goods that can be achieved through communication (2009: 224, 228).

Raz's account is forceful, but it has three important limitations. The first concerns the way in which it frames the conception of the Rule of Law in terms of the guidance functions of *the law*. The Rule of Law is normally thought to be particularly relevant to how the *state* acts, directing it to govern through (and be governed by) law. The reason for this is obvious enough: the state has many possible means at its disposal to alter the behavior of its subjects and bring about various ends. The state can "guide" conduct by (a) intentionally bringing about that conduct, or, more specifically, (b) intentionally bringing about that conduct by laying down standards to be followed. The behavior of the general public can be altered in many ways other than by laying down

standards, e.g., by persuasion (health campaigns, propaganda), or by providing services and resources (roads, hospitals, art galleries, public parks), or by changing the circumstances of choice (e.g., by expanding or contracting the money supply, buying and selling assets, deploying more police on the beat). In the case of these sorts of measures, there is no reason to think that they will be more effective in guiding behavior if they are legally authorized than if the state or its officials simply act without authorization.

The Rule of Law, however, *does* require the state to have legal authorization for the use of its resources and personnel. It is not simply that the state and its officials should obey the general law: there should also be legal controls over how it acts *within* the general law. This aspect of the Rule of Law is ignored by Raz because he sees the matter in terms of the relationship of the law to the *government* (2009: 212–13). For Raz, to say that the government should be subject to the law is tautologous, since an action unauthorized by law cannot be an action by the government as a government (2009: 212). The only alternative Raz sees to this "legalistic" conception of government is government in a "political sense," i.e., government in the sense of where "real power" is located in a community (e.g., with big business, or trade unions, etc.). But it is more common to think that the problem of the Rule of Law is a particularly pressing one for the state, and the "state" in the political sense of a system of institutions which have characteristic social functions and which make characteristic claims about the justification for those functions. The state is not necessarily the location of "real power" within a community: it is instead an entity with a special legal and political status within society (and, very often, considerable social power). It would be misleading to think of unauthorized actions of the state as being of no greater significance than the unlawful actions of other social actors. The state is intimately connected to the law, and there is a heightened concern that it be subject to the law.

Secondly, even on its own terms the instrumental view of the Rule of Law contains a significant inherent limitation, as Raz himself recognizes (2009: 225). Even where the legal standards are used to guide behavior, it is not the case that the ends pursued by the state will be more effectively pursued through conformity to the Rule of Law. There is an important reason for this. The state often pursues some end *indirectly* through the law: it makes doing X legally required in order to promote or bring about Y (Raz 2009: 224–25; see also 167–68). So the state may require vehicles to be inspected and registered with a central authority. But ordinarily the aim of such measures will not be inspection or registration for its own sake. Inspection and registration are normally desirable because they promote the goal of road safety by ensuring that more vehicles are roadworthy than they would be without these measures. Now whether that indirect goal will be better served by, e.g., a very clear and precise set of criteria (conforming to the desiderata of clarity), or by an extremely vague standard, seems to be a contingent question. Perhaps more car-users will err on the side of higher quality if the standard is extremely vague, leading to greater road safety. Otherwise they will settle for nothing more than barely passing the precise criteria. Equally, perhaps the most effective way of dealing with the phenomenon of "designer drugs" (where the molecular structure of a chemical is modified to escape the definitional scope of current prohibitions, while preserving the effect of the substance) would be to criminalize and punish them retroactively, thereby deterring others but violating the Rule of Law requirement of prospectiveness. Similarly, the widespread official toleration of certain unlawful methods of evidence-gathering (such as maintaining an unlawful database of people's DNA, or using intrusive surveillance) might be more effective in reducing some types of criminal wrongdoing than the scrupulous use of legal methods.

These examples indicate that it is only the performance of the very conduct specified in the standard that is made easier by conformity to the desiderata of the Rule of Law. The underlying aim of the standard, i.e., the goal that the introduction of the standard was designed to promote, might be better achieved by departures from the Rule of Law. So it is misleading to think that adherence to the Rule of Law is straightforwardly underwritten by considerations of instrumental effectiveness. The use of clear, or prospective, or public, standards is not an inherently superior method of achieving some ends than the use of standards that lack these features, or to the use of some other means altogether. It is only inherently conducive to enabling those to whom the standards are directed to do the very thing that the standard requires: i.e., it is only inherently conducive to enabling the *standard itself* to be followed. So it all depends on the nature of the goal in question whether the most effective method of pursuing it is via a standard that conforms to the Rule of Law.

Finally, Raz extends Fuller's parsimonious list of conditions for the Rule of Law by including a range of institutional arrangements (independence of the judiciary, accessibility of courts, due process) that are designed to help ensure that the law is applied faithfully by the state (2009: 216–19). This takes his account of the Rule of Law closer to a traditional understanding, but has a paradoxical potential. Rather than supporting a very narrow (or "formal"—2009: 214) conception of the Rule of Law, it seems to invite a very broad conception. For it is not only institutional arrangements that help ensure that the law is faithfully followed and applied. A democratic political system, freedom of the press and freedom of association also serve this goal. It is also served by people having access to legal advice, and having a level of education and resources to be able to gain access to the courts easily. If all of the political and social conditions that help to ensure the law is faithfully followed and applied are part and parcel of the Rule of Law, then it is a very extensive ideal. Raz excludes these further conditions by restricting the Rule of Law to actions of the state (2009: 218–19), but: (a) some of the conditions such as legal protection of freedom of the press and democratic accountability *are* actions of the state; (b) the restriction to state actions does not flow from the "basic intuition" that the law must be capable of guiding behavior; and (c) the restriction excludes some conditions (such as an independent legal profession) that are quite plausible candidates for even a narrow conception of the Rule of Law.

The instrumental conception, then, has a number of difficulties in accounting for standard features of the Rule of Law. The focus on what the law must be like to be *capable* of guiding behavior does not explain what must be the case for the law to *succeed* in governing a community.

Governance by Law

The basic idea of the Rule of Law, obviously enough, is that it exists when a community is ruled, or governed, by law. There is a longstanding conception of a law-governed community as one that avoids the alternative evils of tyranny and anarchy (or at least tyranny and what might be called "Hobbesian anarchy," i.e., where chaos and violence prevails). In the case of tyranny, it is an individual or group of individuals who rule a community, irrespective of any requirements of the law, whereas in the case of anarchy there is no effective governance or law at all. By contrast, a law-governed community is one where although there are rulers, both rulers and ruled are subject to law, and the law is effective in governing the community. This points to three fundamental elements of the Rule of Law: (1) that the legal system is effective; (2) that the state is governed by

law and governs through law; and (3) that individual laws can be (severally and jointly) obeyed. Let me consider each one in turn:

1. *The Law Is Effective*

For the Rule of Law to prevail in a community, the law must be effective in guiding its subjects. To be effective, there must, obviously, be a legal system, viz., a set of institutions that are constituted by and apply legal standards and that have whatever other attributes are involved in its being a legal system (on these attributes compare, e.g., Raz 2009, chs. 5–6 with Simmonds 2007, ch. 2, and Waldron 2008). The law must also be followed and applied (to a sufficient degree). The Rule of Law does not obtain when some other powerful societal actor, such as a drug cartel or a group of rebels or insurgents, takes over effective control from the legal system and rules in its place (entirely, or in some region). Nor does the Rule of Law exist in a state where legal institutions are so cowed or corrupt that those with the relevant type of influence can generally succeed in acting contrary to the law. Nor, finally, does it prevail if the law is widely disregarded by the general population (as it is, apparently, in Yap, Micronesia, despite the existence of a functioning legal system. See Tamanaha 1997: 136–37). It is not enough that there is a recognizable legal system in place if the laws of that system do not play a significant role in guiding the behavior of the general population.

The law must also be effective in the sense that it can be used by those to whom it applies. There is no point having various legal rights and remedies if there are no legal avenues through which these can be asserted against those who deny or violate them. Similarly, there is no point having such access if the officials do not conscientiously apply the law according to its terms. So for the law to be effective, there must be sufficient conformity to the law by the general population, and there must also be a set of officials who are available (and able) to apply the law either when called upon or at their own initiative.

2. *The State Is Governed by Law and Governs Through Law*

That the legal system is effective, in the sense of being followed and prevailing over non-state competitors, does not in itself guarantee that the agencies of the state will themselves be subject to the law. A state could reserve the right to act extralegally when it judged it appropriate, whilst allowing many matters to be settled by existing legal regulation. It could also exempt its own internal workings and decision-making from legal regulation. The subjection of the state and its instrumentalities to the law imposes an additional level of legal governance to the community. (This should not be equated with a general requirement for judicial review: a state's processes can be regulated by law even if disputes over those processes are nonjusticiable.)

This element is not a purely formal one, for it requires more than simple conformity to existing law. It would not be satisfied if all state officials enjoyed a clear, prospective and promulgated legal exemption from liability under any law of the system. This is not because such an exemption for some officials could never be justified (as it may be in the analogous case of diplomatic immunity). But *prima facie*, exemptions from laws that would otherwise apply if a person were not an official must be necessary for those officials to carry out their particular functions (inspection, arrest, adjudication, repossession). Blanket exemptions of officials from otherwise applicable laws would mean that the state was not effectively under legal governance.

3. *That Individual Laws Can Be (Jointly and Severally) Obeyed*

To be governed by law, the law must be such that it is possible to obey it, i.e., to conform to it and be guided by it. Whether the law is directed to agencies of the state or members of the community (or both), it can only govern if it can be obeyed. This is the element given great prominence in formal accounts of the Rule of Law, as it points to the desirability of clarity, prospectiveness and non-contradiction of standards. But the other two elements are equally important for the Rule of Law. There is generally no point in obeying the law if it is ineffective. Nor does the ability to obey the law help, unless one's behavior will later be assessed according to the law that one obeyed. In fact, the three elements are mutually supportive: it must be possible to obey the law if it is to be effective (i.e., followed) and if it is to be able to guide the state and its officials.

These three elements account well for Fuller's desiderata, as well as going beyond them, but they still leave out some central features of our ordinary conception of the Rule of Law such as the independence of the judiciary and due process. Why is this? Fuller's list of requirements seeks to identify those conditions that must be satisfied (at least to some extent) for a system of law to exist at all (1969: 55). But the focus of the Rule of Law is not on the *existence* of law (important as that is) but on *governance* by law. The latter requires there to be law, but requires more besides. The three elements above constitute the minimum conditions for the law to govern. But in addition to these, there are other factors that are highly conducive to the maintenance of those conditions. It is into this category that requirements such as judicial independence, access to the courts and the principles of natural justice (due process) fall.

This does not mean, on the other hand, that *every* condition that is conducive to maintaining a law-governed community should be regarded as part of the Rule of Law. As noted above, many factors play an important role in indirectly supporting governance by law. But they are *indirect* factors inasmuch as serving the Rule of Law is not the principal or primary reason for their establishment and maintenance. The core of the Rule of Law—the subjection of the state to law, the formal features of law and laws, the institutional and procedural demands on the legal system—are those conditions that are sought *because* they serve the goal of governance by law. The principal reason for establishing these conditions is that they serve that end. Many other conditions can serve and promote the Rule of Law, but the main rationale for seeking these conditions is not that they serve the Rule of Law: instead, it is that they promote other goods, such as respect for human rights and human dignity or the good of political participation. That they are conducive to the Rule of Law is a further reason in favor of bringing them about, but they would still be worth pursuing in the absence of their service to that good. It is worth maintaining a distinction between factors that are simply conducive to governance by law and those whose principal rationale lies in promoting that end.

So this implies a fourth element of the Rule of Law:

4. *Those Legal and Social Arrangements Whose Primary Rationale Lies in Their Being Highly Conducive to the Existence of Elements 1–3*

This element, for example, supports the existence of an independent legal profession as an aspect of the Rule of Law, since one of the main rationales for such a body is to maintain governance by law. It also supports a degree of arm's-length separation between

administrative agencies and the government. As the example of an independent legal profession illustrates, the fourth element is not necessarily limited to institutional processes and arrangements within the legal system itself. There may well be other social conditions whose main rationale is to serve governance by law, in which case they too are rightly regarded as forming part of the Rule of Law. Indeed, even some of Fuller's original desiderata, such as publicity and stability, are best understood as falling partly under (4) as well as (3). To guide behavior, for instance, it is often unnecessary for anyone, other than those to whom a law applies, to be aware of it (Marmor 2007: 17). Publicity on the other hand—*general* knowledge of the existence of a legal standard—serves to open the law to scrutiny of its compliance with other elements of the Rule of Law, such as congruence of official action to law (Kramer 2007: 153 and Marmor 2007: 18). Similarly, a degree of stability may be necessary for discharging some duties, since it may take time and effort to be in a position to do so. But it also makes it easier for the law to be known if it has a degree of constancy through time, and easier for those seeking to conform to the law to do so.

It would be wrong to think that because the fourth element serves the other three, it is simply "ancillary" or "peripheral," and thus less important to the Rule of Law. The Rule of Law is an ideal for law-governance in an imperfect world, i.e., under non-ideal circumstances where people are fallible (and worse). Conditions such as the independence of the judiciary are just as crucial to governance by law under these circumstances as are the other elements. The same is true of the central procedural requirements of the Rule of Law, such as access to a hearing by an impartial and competent adjudicator, and the opportunity to make submissions over the content of the applicable law. For the law to govern, there must be processes to resolve disputed questions *of law* in a principled way, as well as processes for determining whether the conditions for the application of the law have been satisfied. (On the importance of the procedural dimensions of the Rule of Law, see Waldron 2008 and 2011.)

What can make these further conditions seem less central to the Rule of Law is that the form that some of them take will be dependent upon the particular political and legal culture of each country. How best to secure an independent judiciary—through a career judiciary or through the appointment of experienced lawyers to the bench—may simply depend upon the history of a particular legal culture, and how well its practices have served that goal.

This leads to a further question. Why is upholding the Rule of Law ordinarily regarded as a particular responsibility of the *state*? Why is it that departures from the Rule of Law by the state are especially criticized? One answer, of course, lies in the threat that the state poses to the Rule of Law. The legal system is ultimately part of the state, and the legal system relies upon the willingness of other state instrumentalities to obey its decisions, since it does not have the resources to physically compel compliance. On the other hand, the state is not the only societal actor that can pose a threat to the Rule of Law. Protest movements, political parties, trade unions and large business conglomerates can also threaten the Rule of Law if they have sufficient social power, as can the general population if it fails to be significantly guided by the law. So why single out the state—both in the sense of the government and state officials? Because the degree of control the state enjoys over the legal system and the content and operation of the law means that it is uniquely placed to support and promote (as well as threaten) the Rule of Law. Consequently, a special responsibility falls upon it to scrupulously uphold the ideal, and to set an example by doing so.

The preceding discussion explains the reasons for adopting a restricted conception of the Rule of Law, one which does not extend it to the general protection of human rights, or to democracy, or other human goods. The restricted conception best captures the idea that the point of the Rule of Law is to provide the conditions for the law to govern the community, and that upholding the Rule of Law is a special responsibility of the state. But it also makes sense of the inclination to extend the Rule of Law to all of those other conditions that are conducive to governance by law. In the end, however, it is worth distinguishing those conditions which are justified *because* they serve governance by law from those that are valuable for other important reasons and whose main *raison d'être* is not the maintenance of legal governance. To say that this is a *restricted* conception, on the other hand, is not to say that it is limited to formal or procedural features of law and legal institutions. Some aspects, such as the application of the law to officials, or the independence of the judiciary, are neither. It is simply to indicate that it does not encompass all of those other conditions that are conducive to governance by law.

The Value of the Rule of Law

Why is the Rule of Law normally regarded as both a legal and a moral ideal? What is valuable about the Rule of Law? Two questions need to be separated here: (a) what is the basic rationale or justification for the Rule of Law, and (b) what values are served by the observance of the Rule of Law? While the values that justify the Rule of Law are served by its observance, it does not follow that all of the values served by the Rule of Law are part of its underlying justification. Observance of the Rule of Law requirement on publicity, for instance, may facilitate criticism of the merits of various laws (Fuller 1969: 51; Marmor 2007: 18; Kramer 2007: 151), but the point of publicity is to facilitate conformity to the law and conformity to the Rule of Law itself. It is an additional virtue that it enables the law to be criticized on its merits.

The most common value associated with the Rule of Law is human dignity, in the sense of people's capacity for rational agency and autonomous choice (for a variety of alternatives, see Fuller 1969: 162–67; Raz 2009: 221–23; Finnis 1980: 270–73; MacCormick 1992: 123; Waldron 2008: 26–28). This is based on the fact that the Rule of Law operates to make the application of the law (fairly) predictable and to ensure that those to whom the law applies are able to conform to it. But there are reasons to question the primacy of this rationale for the Rule of Law.

First of all, the value of human dignity and rational agency is clearly not a sufficient rationale for the full scope of the Rule of Law. Much of constitutional law, for instance, deals with the processes of decision-making within the state—which person or body is authorized to take which decision and in what way. Similarly, much of the law regulates how people should be treated *by* officials (e.g., in having their interests considered in making a decision, or in being arrested). In a liberal society this is commonly done in a way that respects people's dignity and agency. But nothing in the Rule of Law requires people to be treated in this way. That the law must be capable of being followed by officials in their roles is not generally understood in terms of serving the rational agency of *officials*. It is instead designed to put processes in place for which officials can be accountable, and to ensure that officials do not misuse their position. Nor does the Rule of Law provide very much in the way of other protections for human dignity and rational agency. The law may infringe upon these values in a wide variety of ways: it may limit people's freedom of movement, their employment, the practice of their religion,

whom (and whether) they can marry, whether they can have (or care for) children, with whom they can associate or communicate. It can regulate their access to reading matter, art and music, their appearance (clothing, hair, use of makeup, head-covering, tattoos, piercings) and their dwellings. None of these encroachments are *per se* incompatible with the Rule of Law.

Second, the Rule of Law does not require (or even create a presumption) that the behavior of non-officials be guided exclusively by the laying down of standards for them to follow. As noted earlier, the law can influence behavior by authorizing other methods to promote desirable ends, such as education campaigns, soup kitchens, mobile libraries, art galleries and public parks. The provision of services and resources can be the best method of promoting some ends. What matters from the perspective of the Rule of Law is not that non-officials always be guided by standards, but that the measures taken to influence behavior are authorized by law, i.e., that the actions of officials are subject to the law.

Finally, while the dimension of the Rule of Law that requires it to be possible to obey the law clearly does serve human dignity and rational agency by enabling people to conform to the law (and know the consequences of their actions), it also serves to ensure governance through law. The point is that the state does not govern through law if it uses standards that are *so* vague that it is simply up to the discretion of officials how these standards apply, or if it changes the standards retrospectively whenever it wants to, or if the standards are unknown to those to whom they apply, or if its officials are inconsistent in how they enforce the law. In all these cases, the state is not really governing through law—instead it is taking advantage of its control over the content and application of the law to act at its own discretion. It is only if the standards that it is going to apply are known, prospective, relatively clear, non-contradictory and applied consistently that the state is subjecting itself to governing through law. Similarly, to demand what is *literally* impossible is simply an abuse of form: it implies that liability to certain official measures is conditional on conformity when in fact it is simply being unconditionally created. It is a desirable consequence of the demands on legal governance that it makes it possible for people to conform to those laws that require them to do something. In many cases this will reduce the risks of falling foul of the law and enable people to take advantage of opportunities created by the law. Legal governance thus *presupposes* that its subjects are rational agents and capable of being guided by standards. But in the end the law's promotion of human dignity and rational agency depends upon the *content* of the laws of a particular legal system, not simply the observance of the Rule of Law.

These three points suggest that while the Rule of Law serves human dignity and rational agency, its underlying justification rests instead on the value of having a law-governed community. What is it that governance by law brings to a community? Clearly it does not guarantee that the law will pursue desirable ends, or that the community will be an admirable one. There have been (and are) many states committed to the Rule of Law in which serious injustices have been (and are) perpetrated and supported by law. On the other hand, it does seem that part of what makes an admirable community admirable is its observance of the Rule of Law. Why is this? For a start, such a community not only has good laws, it has a law-abiding population, where those laws are followed by those to whom they apply. Second, such a community is one in which the state and its officials operate through legal processes and according to legal demands. Why is this so important? Because the power and influence that the state and its officials have over

the content and the application of the law create a standing risk of corrupt and self-interested actions. Whatever worthwhile ends the state may pursue through the law, these will be compromised by a state apparatus that lacks fidelity to the law. Moreover, the greater the departures from fidelity to law, the more that the pursuit of those ends will be compromised. Maintaining the integrity of the state and its processes is indispensable to the pursuit of valuable goals through the law, including the goals of respecting and promoting human dignity and autonomy. Nor is it feasible to have a law-abiding general community in the midst of official corruption. If people do not believe they will be treated according to the existing law, their reasons for obedience are much reduced. So the Rule of Law is a necessary condition for a flourishing community (or, at least, for communities like ours that possess a state). This is not because it is simply a *means* to achieving valuable ends, since the attainment of some ends is made more difficult by adherence to the Rule of Law. Rather, it is because the Rule of Law manages to provide a method of pursuing ends with built-in safeguards against the abuse and misuse of those methods. They are not always the most efficient methods, but they are likely to ensure the integrity of the agents charged with carrying them out.

What light does this throw on the question of whether an "evil" regime—a regime which does not simply perpetrate serious injustices, but is exclusively concerned with its own interests (and the interests of its supporters), at the expense of the interests of the community at large—would have any reason to conform to the Rule of Law (Finnis 1980: 273–76)? An evil regime would clearly have some reasons for conformity, e.g., to guide the population effectively, to provide incentives for conforming to the law, and to coordinate the activities of the state's officials (Kramer 1999: 66–71). And whether or not it would have more reason than a benign regime to depart from the Rule of Law depends upon the circumstances (under normal conditions it arguably would have more reason to depart: Simmonds 2007: 76–99; contrast Kramer 2004). But what distinguishes an evil regime is its attitude to the Rule of Law. A benign regime is committed to pursuing its ends through law, and accepts that this is a constraint on its actions. An evil regime does not. Of course, were conformity to the Rule of Law the most effective means to pursue *any* end, an evil regime could see it as a *rational* requirement on its actions. But as we saw above, all that the Rule of Law necessarily facilitates is conformity to the law itself, not the attainment of any further aim. At times the law, especially laws that comply with the Rule of Law, will not be the most effective means of achieving an aim. So an evil regime will have reasons to conform to the Rule of Law, but it will also have reasons to depart from the Rule of Law whenever there is a more effective method of achieving its aims. Whether it will have more reason to observe the Rule of Law in any particular case will depend on the balance of reasons, including the collateral effects (if any) of departures from the Rule of Law (such as the effects on its reputation for conformity to the Rule of Law). A benign regime, by contrast, will not see the observance of the Rule of Law in this way. It values maintaining governance *by* and *through* law because of the goods that such governance serves, not just as a means to an end. It will only depart from the constraints of the Rule of Law where there is some important good that cannot be achieved at an acceptable cost through conformity. Whether it will depart depends upon the seriousness of the departures and the urgency and importance of the value that would otherwise have to be sacrificed. In short, an evil regime will be unable to *comply* with the Rule of Law, even when it conforms to it, because such a regime does not value governance by law in itself, but simply as a means to its ends.

Finally, is the observance of the Rule of Law *always* morally valuable? To the extent that it serves values such as state integrity and human dignity this must be so. Moreover, as the threats to these values are created by the existence of the state, not simply the existence of the law, their reduction is not simply a negative value (as Raz suggests, 2009: 224). To say that the Rule of Law always has some value is not, of course, to say that every legal system which observes the Rule of Law is, all things considered, worthwhile. That depends, naturally, on the merits of the laws in the system. What is not generally recognized is that the same is true of the Rule of Law itself: it also is not always worthwhile, all things considered. This is because the Rule of Law is (in our imperfect world) a double-edged virtue. The fundamental requirement that the state and its officials scrupulously and consistently apply the law entails that all laws, whatever their merits, be applied. The goods achieved by the Rule of Law depend upon officials consistently applying the law rather than doing so selectively. One of the central components of the Rule of Law is official conformity to the law. In the light of our various moral limitations (such as our fallibility, our susceptibility to self-preference, our weak will), coupled with the great goods that a reliable and stable legal system may bring to community life, there is much to be said for this position. (Or at least, there is much to be said for the idea that officials always have a strong reason to follow the law, though there may be circumstances where officials should not conform.) But it is not an unalloyed good, since it inevitably comes at the moral cost of following and applying even unmeritorious laws. In order to deliver the goods that the Rule of Law can bring, officials must follow and apply laws, including those that are morally unjustified. But where the content of a legal system is sufficiently unmeritorious *overall*, the goods achieved by general conformity to the law may not be worth the price. Ultimately, then, the value of the Rule of Law itself is dependent upon the merits of the legal system as a whole—not because it is simply a means to whatever ends the law pursues, but because it is, inherently, a mixed-value good.

It is this that helps explain our ambivalent attitude towards the Rule of Law in unjust regimes such as apartheid South Africa. The observance of the Rule of Law under apartheid (to the extent that it occurred: Abel 1999) clearly had some value in restricting arbitrary official action and creating some space for actions opposing the regime. But the Rule of Law also involved a body of officials helping to maintain that regime through their consistent use and application of the law. Under these conditions, a wholehearted commitment to the Rule of Law would have been misguided. Instead, the forms of legality had a value in assisting resistance and, ultimately, in assisting the transition to a system of democratic majority rule under law.

Conclusion

The Rule of Law is the ideal of a law-governed community. Many conditions must be satisfied for that ideal to be realized, going well beyond the formal features of laws and official conformity to the law. For the Rule of Law is not simply an ideal of a law-governed community: it is an ideal of a law-governed community in a non-ideal world. It is constituted by those conditions that are highly conducive to, and are justified by, their contribution to governance by law. Other conditions, such as respect for human rights and democratic accountability, can also be conducive to the Rule of Law, just as the Rule of Law itself is an important condition for the effective protection of human rights and democratic processes. But it is worth maintaining a distinction between these different

ideals, despite their mutual supportiveness, in terms of the main rationale for their existence. Hence the idea that this is a restricted conception of the Rule of Law, i.e., one that is neither thick nor thin, neither substantive nor formal, but something in between.

The Rule of Law serves many values, but its fundamental rationale lies in its promotion of state legality, i.e., in the subjection of the state itself to effective legal regulation, and the adherence of the state to governing through law. The Rule of Law is not an ultimate end, since it alone cannot guarantee that the legal system will be a meritorious one. Instead, its value lies in the fact that a meritorious legal system is one that partly consists in, and cannot be achieved without, the Rule of Law.

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References

Abel, R. (1999) "Legality Without a Constitution: South Africa in the 1980s," in D. Dyzenhaus, ed., *Recrafting the Rule of Law: The Limits of Legal Order*, Oxford: Hart Publishing, pp. 66–80.

Finnis, J. (1980) *Natural Law and Natural Rights*, Oxford: Oxford University Press.

Fuller, L. (1969) *The Morality of Law*, revised edition, New Haven: Yale University Press.

Honoré, T. (1999) "Responsibility and Luck: The Moral Basis of Strict Liability," in T. Honoré, *Responsibility and Fault*, Oxford: Hart Publishing, pp. 14–40.

Jowell, J. (2007) "The Rule of Law and Its Underlying Values," in J. Jowell and D. Oliver, eds., *The Changing Constitution*, 6th edition, Oxford: Oxford University Press.

Kramer, M. (1999) *In Defense of Legal Positivism*, Oxford: Oxford University Press.

—— (2004) "On the Moral Status of the Rule of Law," in M. Kramer, *Where Law and Morality Meet*, Oxford: Oxford University Press, pp. 172–222.

—— (2007) *Objectivity and the Rule of Law*, New York: Cambridge University Press.

MacCormick, N. (1992) "Natural Law and the Separation of Law and Morals," in R. George, ed., *Natural Law Theory*, Oxford: Oxford University Press, pp. 105–33.

Marmor, A. (2007) "The Rule of Law and Its Limits," in A. Marmor, *Law in the Age of Pluralism*, New York: Oxford University Press, pp. 3–38.

Raz, J. (2009) *The Authority of Law*, 2nd edition, Oxford: Oxford University Press.

Simmonds, N. (2007) *Law as a Moral Idea*, Oxford: Oxford University Press.

Tamanaha, B. (1997) *Realistic Socio-Legal Theory*, Oxford: Oxford University Press.

—— (2004) *On the Rule of Law: History, Politics, Theory*, Cambridge: Cambridge University Press.

Waldron, J. (2008) "The Concept and the Rule of Law," *Georgia Law Review* 43: 1.

—— (2011) "The Rule of Law and the Importance of Procedure," in J. Fleming, ed., *Getting to the Rule of Law: Nomos L*, New York: New York University Press.

Further Reading

For further reading, see: T. R. S. Allan (2001) *Constitutional Justice: A Liberal Theory of the Rule of Law*, Oxford: Oxford University Press (study of the Rule of Law in the common law from a constitutional perspective); R. M. Dworkin (1985) "Political Judges and the Rule of Law," in *A Matter of Principle*, Oxford: Oxford University Press (classic defense of a substantive account of the Rule of Law); R. M. Dworkin (2006) "Hart's Postscript and the Point of Political Philosophy," in *Justice in Robes*, Cambridge, Mass.: Harvard University Press (arguing that legality is an interpretive concept and fundamental to the nature of law); D. Dyzenhaus, ed. (1999) *Recrafting the Rule of Law: The Limits of Legal Order*, Oxford: Hart Publishing (wide-ranging collection of essays with case studies and analysis of the Rule of Law); and C. Sampford (2006) *Retrospectivity and the Rule of Law*, Oxford: Oxford University Press (a detailed study assessing the Rule of Law arguments against retrospective laws).