

Raz's Conception of the Rule of Law through Forty Years – From Law's Ability to Law's Intention

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Abstract: This article reviews two of Joseph Raz's famous articles on the rule of law—"The Rule of Law and Its Virtue" (1977) and "The Law's Own Virtue" (2019). Following the footsteps of this brilliant legal philosopher helps us better understand the concept of the rule of law. In the earlier article, Raz identified law's ability to guide behaviour as the core idea of the rule of law. About forty years later, Raz expanded this core idea to include law's intention to serve the public interest. Building on Raz's work, we argue that these two ideas can be unified into a single core idea: that people truly obey the law. By its very nature, the rule of law is a distinctive moral virtue.

Keywords: Joseph Raz, rule of law, rule of man, public interest

1. The Rule of Law as Law's Ability to Guide behaviours (1977)

1.1 The Old Core Idea: Law's Ability to Guide behaviours

In 'The Rule of Law and Its Virtue (1977)', Raz argued that if the law is to be obeyed it must be capable of guiding the behaviours of its subjects. So, the core idea of the rule of law is: the law must be capable of guiding the behaviours of its subjects.¹ Raz repeated this basic idea again and again in the old article. We can conclude that as law's ability to guide behaviours.

Based on the core idea, Raz provided eight principles of the rule of law:²

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.

8. The discretion of the crime-preventing agencies should not be allowed to pervert the law.

Surely these eight principles are important. Being capable of guiding the behaviours of its subjects is an ability the law should possess. As Raz said, Principles (1) to (3) require that the law should conform to standards designed to enable it effectively to guide action. Principles (4) to (8) are designed to ensure that the legal machinery of enforcing the law should not deprive it of its ability to guide through distorted enforcement and that it shall be capable of supervising conformity to the rule of law and provide effective remedies in cases of deviation from it.³

1.2 A Matter of Degree

Every law has some ability to guide, more or less. Otherwise, it is not law at all. As Raz said, the law to be law must be capable of guiding behaviours, however inefficiently.⁴ The law's ability to guide may be strong or weak. Hence, the rule of law is a matter of degree. With more principles added to the core idea, the law's ability to guide may become stronger. That is why Raz said these eight principles are very incomplete.⁵

The core idea tells us that the rule of law is a matter of degree, but it can't tell us what degree is proper. Since complete conformity to the rule of law is impossible (some vagueness is inescapable) and maximal possible conformity is on the whole undesirable (some controlled administrative discretion is better than none). It is generally agreed that general conformity to the rule of law is to be highly cherished.⁶ But the problem is, how to determine the general conformity. Raz neglected this problem in the old article, the core idea can't answer it.

1.3 A Negative Virtue

Since Raz thought the rule of law means the law has the ability to guide behaviours, the opposite of the rule of law is that the law doesn't have sufficient ability to guide, that is to say, the law is unstable, obscure, retrospective, etc. In other words, the law is inefficient. The inefficiency of law is also a matter of degree, and an inherent bad created by law itself.

Every law has some degree of inefficiency. Logically, it is impossible to eliminate the inefficiency of law unless we eliminate the law. Since the rule of law is designed to minimize the inefficiency of law, it is essentially a negative value. As Raz said, 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.⁷

1.4 A Non-Moral Virtue

Raz is a legal positivist, he denies the necessary connection between law and morality. As we can see in the old article, Raz also tried to deny the necessary connection between rule of law and morality. But Raz's conception of moral virtue is inconsistent. Raz said that conformity to the rule of law is one among many moral virtues which the law should possess.⁸ Raz used the word moral virtue with its broad sense that includes efficiency. As Raz said, of course, conformity to the rule of law also enables the law to serve bad purposes.

That does not show that it is not a virtue, just as the fact that a sharp knife can be used to harm does not show that being sharp is not a good-making characteristic for knives.⁹

But after that, Raz used the word moral virtue with its narrow sense. He admitted that the rule of law is not a moral good. Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put. It is the virtue of efficiency; the virtue of the instrument as an instrument. For the law this virtue is the rule of law. Thus the rule of law is an inherent virtue of the law, but not a moral virtue as such.¹⁰

Since Raz thought the core idea of the rule of law is law's ability to guide, law's intention is not its business. Strictly speaking, the ability itself is only a useful characteristic, not a moral virtue. A good law may be very inefficient and an evil law may be very efficient. In this sense, the rule of law is a non-moral virtue. The rule of law itself does not bring any moral good, and the moral value of the rule of law is dependent on the moral purpose the law is designed to serve. There is no necessary connection between the rule of law and morality.

1.5 Compatible with Arbitrary Power and Other Moral Evils

Raz thought the rule of law is compatible with arbitrary power, and an act which is the exercise of power is arbitrary only if it was done either with indifference as to whether it will serve the purposes which alone can justify use of that power or with belief that it will not serve them.¹¹ In Raz's view, the rule of law is simply about law's ability and nothing about intention, but arbitrary power is exactly about intention. So of course the rule of law is compatible with arbitrary power. As Raz said, a ruler can promote general rules based on whim or self-interest, etc., without offending against the rule of law.¹²

Raz further argued that the rule of law is compatible with other moral evils. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies.¹³

It is a little depressing for proponents of the rule of law. If the rule of law is simply about the ability of law, then the rule of law is just the rule of efficient law. The rule of law does not review the morality of law, it strengthens every law blindly. The rule of law makes the evil law eviler and the good law better. Hence, if the law is evil, there is no reason to pursue the rule of law. That means the rule of law is not a universal value.

At the end of the old article, Raz said that sacrificing too many social goals on the altar of the rule of law may make the law barren and empty.¹⁴ But what is left on Raz's altar of the rule of law is only the efficiency of law. Indeed Raz didn't make the law barren and empty, but he made the rule of law barren and empty.

1.6 Two Aspects of the Rule of Law

To sum up, Raz's conception of the rule of law in the old article focused on law's ability to guide behaviours. Based on this core idea, Raz held four assertions:

1. the rule of law is a matter of degree.

2. the rule of law is a negative virtue.
3. the rule of law is not a moral virtue.
4. the rule of law is compatible with arbitrary power and other moral evils.

If we accept that the rule of law simply means the law has the ability to guide behaviours, then Raz's analysis in the old article is nearly impeccable. But the law has the ability to guide behaviors does not mean the law is truly obeyed. As Raz said, if the law is to be obeyed it must be capable of guiding the behaviours of its subjects. The problem is, logically, the law is capable of guiding behaviors can not guarantee the law is obeyed. Something important is missing here.

In fact, Raz realized the rule of law has two aspects in the old article¹⁵:

1. that people should be ruled by the law and obey it.
2. that the law should be such that people will be able to be guided by it.

For some reason, Raz only analysed the second aspect in the old article and set the first aspect aside until 2019. As we will see below, the first aspect buried a foreshadowing for the new article and the new core idea of the rule of law.

2. The Rule of Law as Law's Intention to Serve Public Interests (2019)

2.1 A Neglected Problem

In the new article 'The Law's Own Virtue (2019)', Raz first attempted to conclude five principles under the rule of law:¹⁶

- (1) reasonably clear,*
- (2) reasonably stable,*
- (3) publicly available,*
- (4) general rules and standards, that are*
- (5) applied prospectively and not retroactively*

Apparently, these five principles still focus on law's ability to guide. As Raz said, what makes these principles one doctrine rather than a hodgepodge of principles is that they are united in stating conditions whose satisfaction is required to make it possible for those subject to the law to find out what it is, and thereby make it possible for the government (which aims to guide people's behaviours) to know how to govern, and for those subject to it to know how they are governed.¹⁷ That is basically a long version of law's ability to guide.

Raz soon realized a serious problem here. These five principles prove again that the rule of law is a matter of degree, like the old article. That, in itself, is no problem. The difficulty is that the rule of law gives no guidance as to the required degree of compliance. The rule of law is a kind of principle that allows degrees of

conformity, but complete compliance is not achieving the highest degree. For the highest degree of the rule of law means to rule out changes in the law and reliance on discretion by legal authorities, which is not what we want.¹⁸ Hence, the question becomes what degree of the rule of law is ideal.

As we mentioned earlier, Raz overlooked this problem in the old article and he admitted that these new five principles can't answer it. As Raz said, we must realise that the rule of law doctrine has been inadequately identified. Perhaps simply only part of it was stated. Without discarding the sensible part of the five principles, we need to further explore and develop our understanding of the doctrine.¹⁹ After that, Raz began to deal the real enemy of the rule of law, the rule of man.

2.2 The New Core Idea: Law's Intention to Serve Public Interest

In the new article, Raz argued the new core idea of the rule of law is the intention to serve public interests.²⁰ So, the opposite of the rule of law is law's private intention. Since the law is not a random machine or a spontaneous order, law's private intention entails the rule of man. Our history has proved that the rule of man is a moral evil, any man who has the ruling position will definitely use the power to pursue private interests. Unlike man, law itself does not have private interest. After thousands of years of suffering from the rule of man, we humans decide to surrender the ruling position and give it to a man-made ruler, the law. We hope that the law will serve public interests and the government will be a custodian of public interests.

We are unlikely to obey a random machine or something like that. So, either the rule of man or the rule of law. If the law pursues someone's private interests, no matter how strong law's ability to guide is, it means the law is already compromised and used as a tool by someone. That is not the rule of law but the very instance of the rule of man. The rule of law requires the law must have the intention to serve public interests. Hence, by its nature, the rule of law is against the rule of man.

In fact, we can deduce the new core idea from the old article, although Raz didn't realize it. Raz said that a person obeys the law only if part of his reason for conforming is his knowledge of the law.²¹ But, logically, his knowledge of the law is just a premise of his obedience. The more important part is that the law serves public interests. If he knows that the law is used as a tool to serve private interests of the lawmaker, we can hardly say he truly obeys the law. He is merely forced by the lawmaker's private intention, even if he did what the law requires. If the law's intention is to serve public interests, he as one of the public will truly obey the law. So to be precise, we truly obey the law only if the law has the ability to guide behaviours as well as the intention to serve public interests.

Based on the new core idea of the rule of law, Raz provided six further principles:

(6) The reasons for which decisions are made should be publicly declared.

(7) The process of reaching the decision should be fair and unbiased.

(8) It should also allow proper opportunities to consider relevant arguments and information.

(9) The decisions should be reasonable, relative to their declared reasons.

(10) Presumptive conventions: the burden of establishing that government actions were undertaken in the belief that they serve the interests of the governed is a heavy one.

(11) The doctrine of the rule of law and its main implications should be part of the public culture, embedded in education and public discourse, and taken as obvious and vital by all.

Raz realized that the strongest enemy of the rule of law is not the inefficiency of law but the rule of man. To be exact, principles (6) to (9) aim to decrease the possibility of the rule of man. Principle (10) and (11) aims to protect the rule of law through conventions and public culture.

2.3 A Matter of Kind

As we mentioned above, Raz argued that the rule of law is a matter of degree in the old article. Since Raz thought the new core idea of the rule of law is the intention to serve public interests, the rule of law is no longer a matter of degree. The law either pursues private interests or pursues public interests, in this sense the rule of law is a matter of kind. Raz changed his mind on this issue. Remember Raz admitted that he could not answer what degree of the rule of law is ideal, he dismissed the question.

As for the legal system, one may still argue that since some laws serve public interests and some serve private interests, the rule of law is a matter of degree'. But that is in another sense. The rule of law clearly requires that all law serve public interests, different legal systems vary in the development and implementation of the rule of law, but that doesn't mean the rule of law is a matter of degree.

2.4 Arbitrary Power

Raz's conception of arbitrary power is inconsistent. In the old article, Raz thought that an act which is the exercise of power is arbitrary only if it was done either with indifference as to whether it will serve the purposes which alone can justify use of that power or with belief that it will not serve them. Arbitrary power is a subjective concept with a hard objective edge. Since it is universally believed that it is wrong to use public powers for private ends any such use is in itself an instance of arbitrary use of power.²²

However, in the new article, Raz denied the hard objective edge. Raz argued that it is not arbitrary use of power for Rex (a sole hereditary ruler) to order the purchase of a very expensive diamond ring for his lover, just because Rex claims that he was entitled to do so because his lover would be very pleased with the gift.²³ This is exactly the instance of arbitrary power Raz held in the old article. Even in the new article, Raz's definition of arbitrary power is inconsistent. Earlier in the new article, Raz considered arbitrary government as indifference to the proper reason. But later, indifference to reason.²⁴

In the old article, Raz thought the rule of law is compatible with arbitrary power. A ruler can promote general rules based on whim or self-interest, etc., without offending against the rule of law.²⁵ In the new article, Raz changed his mind. As Raz said, indifference to reason, arbitrary use of power, is one way in which one can offend against the rule of law.²⁶

Though Raz's conception of arbitrary power is inconsistent, it is not a fatal problem. Whether we consider the use of power with private intention as arbitrary power or not doesn't influence our conception of the rule of

law, as long as we consider it as the enemy of the rule of law. At least we can call it the abused power, as Raz said, the rule of law protects us from arbitrary use of legal power, and from similar abuses of legal power.²⁷

2.5 A Positive Virtue

As we mentioned above, Raz thought the rule of law is a negative virtue. He said 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.²⁸ In the new article, Raz insisted that the rule of law protects us from risks that the existence of the law creates.²⁹ That means Raz insisted that the rule of law is a negative virtue.

But Raz is wrong. Under the old core idea, the opposite of the rule of law is the inefficiency of law, which is created by the existence of law. Hence, it is impossible to eliminate the inefficiency of law unless we eliminate the law. Under the new core idea, the opposite of the rule of law is law's intention to serve private interests, i.e., the rule of man. Logically, we can eliminate law's intention to serve private interests without eliminating the law. As the enemy of the rule of law, the rule of man is not a risk created by the existence of law. In fact, the rule of man is much earlier than the rule of law. We humans didn't have the concept of the rule of law in ancient times. After thousands of years of suffering from the rule of man, we have the concept and value it. Hence the rule of law is not a negative virtue, it can avoid evils caused by the rule of man. This highlights that the rule of law is a positive virtue.

2.6 A Special Moral Virtue

In the old article, Raz emphasized that the rule of law is not a moral virtue but a useful characteristic. But in the new article, Raz admitted that the rule of law requires governments to be faithful to the law, it is a moral doctrine.³⁰ In Raz's view, there is no necessary connection between law and morality, and by its nature the law claims to possess moral legitimacy, but not all legal systems are morally legitimate.³¹ We argue that if the rule of law is a moral doctrine as Raz said, then logically what government should be faithful to, as the rule of law requires, is not the law itself but the law's moral legitimacy claims.

The law may claim many moral virtues, such as democracy, justice, equality and human rights. The rule of law just focuses on one general moral claim that the law should serve public interests. Governments, by their nature are the laws' instrument for their application and development³², should also serve public interests.

In Rex's realm, an order pursuing Rex's private interests may still be a law. But when Rex's government is acting by this law, it violates the rule of law. We can hardly say the government's blind loyalty to Rex is faithful to the law. The law is used as a tool to serve Rex's private interests, it is the very instance of the rule of man. Like Rex, it is human nature to pursue private interests, any man with the ruling position will pursue private interests sooner or later. The rule of law requires the law to serve public interests. Hence, by its nature, the rule of law is against the rule of man. That makes the rule of law a moral virtue, for the rule of man has been proven as a moral evil.

At the same time, the rule of law is a special moral virtue. The rule of law only excludes the intention to serve private interests and requires the intention to serve public interests generally, it does not specify which kind of

public interest should be pursued. As Raz said, saying that the private intention is excluded is not a matter of taking sides on which purposes this or that government should pursue.³³ Determining what ends to pursue in the exercise of discretionary powers, or in the interpretation of the law, is the stuff of ordinary politics, and the rule of law does not review the success of politics.³⁴ What the rule of law does review is that the power should not be used to pursue private interests. As for which kind of public interest should be pursued, is not the business of the rule of law. In this sense, one can say that the rule of law is a negative virtue, but not ‘the inherent negative virtue’ in Raz’s view. Also in this sense, one can say that the rule of law is a formal virtue, but remember that the avoidance of the rule of man is a substantive value.

Since the rule of law excludes the intention to serve private interests, the rule of law is incompatible with arbitrary power or abused power. The rule of law does not specify which kind of public interest should be pursued, if we consider democracy, liberty, equality, etc. as different kinds of public interest, it seems that the rule of law is compatible with non-democracy, non-liberty, inequality, etc., as long as other public interests are pursued and people truly obey the law. We can imagine an equal but illiberal society, in which people truly obey the illiberal law. As Raz said, the law should conform to a variety of moral principles and display a number of distinct moral virtues. The rule of law is one of them, but not the only one. Nor is there any other principle or doctrine conformity to which on its own assures us that the law is just.³⁵

To explain the concept of the rule of law, Raz resorted to the concept of public interest. In Raz’s view, the public interests means the interests of the governed. But the public interest is also a complex concept, Raz did not clarify it. Let’s say public health is a kind of public interest. During the epidemic, if the government locks down the entire country for years by efficient law. Does it violate the rule of law? One may argue that the anti-epidemic measure is excessive, the law is either with private intention or is just stupid. If the law’s intention is to serve some evil private interests, surely it violates the rule of law. But what if the law intends to serve public health?

One plausible explanation is that the calculation of public interests is complex, and the law miscalculates. Public health is a kind of public interest, so is personal freedom. The excessive anti-epidemic measure serves public health but it harms personal freedom, and it violates the public interests on the whole. Hence if we consider only one kind of public interest, law’s miscalculation doesn’t violate the rule of law. It seems Raz’s conception of the rule of law does not require the correct calculation of public interests. As Raz said, governments may act only in the interests of the governed, and honest mistakes about what that is and what it entails are the stuff of ordinary politics, and honest mistakes about this do not violate the rule of law.³⁶

We agree with Raz. After all, the rule of law is not the rule of smart law. The correct calculation of public interests is not the business of the rule of law. That means it may be morally justified to violate the rule of law. As Raz said, sometimes action in breach of the rule of law can in fact serve the interests of the governed well. Sometimes, violation of the rule of law is the only way in which important interests of the people can be protected.³⁷ Here Raz is talking about public interests on the whole. The excessive anti-epidemic law that intends to serve public health is not smart, but it doesn’t violate the rule of law. Disobedience of the excessive anti-epidemic law violates the rule of law, but it is morally justified.

3. Conclusion

The concept of the rule of law is so complex that even the brilliant brain made some mistakes. What we can learn from Raz's legacy is that the rule of law requires the law should have the ability to guide behaviours as well as the intention to serve public interests. Law's ability to guide behaviours is a matter of degree, a negative virtue, a non-moral virtue. Law's intention to serve public interests is a matter of kind, a positive virtue, a special moral virtue.

Both the old core idea and the new core idea are important. If the law has the intention to serve public interests but without the ability to guide behaviours, people can't obey the law. If the law has the ability to guide behaviours but without the intention to serve public interests, the law is just a tool used to serve someone's private interests, and people will not truly obey the law. Finally, standing on Raz's shoulders, we argue that the core idea of the rule of law is that people truly obey the law. People truly obey the law only if the law has the ability to guide behaviours as well as the intention to serve public interests. The rule of law by its nature is against the rule of man. That is the full understanding of the concept of the rule of law.

Competing Interests

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Footnotes

1. Joseph Raz, "The Rule of Law and its Virtue", in Joseph Raz (ed.), *The Authority of Law: Essays on Law and Morality* (Oxford and New York: Oxford University Press, 1979), pp. 214.
2. See the old article 214-218.
3. See the old article 218.
4. See the old article 226.
5. See the old article 218.
6. See the old article 222.
7. See the old article 224.
8. See the old article 225.
9. See the old article 225.
10. See the old article 226.
11. See the old article 219.
12. See the old article 219.
13. See the old article 211.
14. See the old article 228.

15. See the old article 213.
16. Joseph Raz, "The Law's Own Virtue", Oxford Journal of Legal Studies 39 (2019): pp. 3.
17. See the new article 3.
18. See the new article 3-4.
19. See the new article 4-5.
20. See the new article 8.
21. See the old article 214.
22. See the old article 219.
23. See the new article 6-7.
24. See the new article 5-7.
25. See the old article 219.
26. See the new article 7.
27. See the new article 15.
28. See the old article 224.
29. See the new article 15.
30. See the new article 5.
31. See the new article 5.
32. See the new article 5.
33. See the new article 7.
34. See the new article 6.
35. See the new article 9.
36. See the new article 14.
37. See the new article 14.