

# [Introduction as both prescriptive and evaluative. this conception](https://assignbuster.com/introduction-as-both-prescriptive-and-evaluative-this-conception/)

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Introduction Therule of law is a contested concept. There are reams of academic literature aboutwhat the rule of law is; whether it is formal or substantive – thin or thick. Thethick concept is one that explains the rule of law as both prescriptive andevaluative.

This conception discourages the separation between the rule of lawand the substantive values promoted by the law.  It regards certain ideas of freedom, rights, and justice as integral components of the rule of law. The thin conception, onthe other hand, defines the rule of law as only prescriptive. It looks to thepresence or absence of specific, observable objective criteria of the law orthe legal system.

1 Inthis essay I argue that understanding the rule of law as two clearlydistinguishable conceptions is unhelpful. The basis for my argument istwo-pronged: first, at it element the rule of law is about constraining theexercise of arbitrary power.  Thus thethin understanding of the rule of law does not effectively achieve this if itallows for actions that result in the abuse of fundamental rights. Second, theunderstanding of the rule of law is both as a principle of governance and atheory of law or a principle of law.

Therefore, the rule of law requires acombination of thin (principles governance – the making of laws) and thickfeatures (principle – the nature of the laws) of law.  Both conceptions are necessary for a goodlegal system. In its prevention of arbitrariness, the rule of law is not primarilyconcerned with government as an institution as such but of the laws and legal institutions; whetherthey can be relied upon. This is consistent with what Joseph Raz states: the rule of law has two aspects”(1) that people should be ruled by the law and obey it, and (2) that the lawshould be such that people will be able to be guided by it.” 2The second part of Raz’s statement, in my judgment, is evaluative; it speaks towhat something must be like to be regarded as law. The first relates togovernance. Theories of the rule of law Tamanahaoutlines the the rule of law theories on a continuum with formal andsubstantive theories on opposite ends of the spectrum. 3At the thin end of the spectrum requires government or citizen action to besanctioned by law and is not concerned at all with the nature of the action thelaw sanctions.

4 Thisis primarily the rule of law as a principle of governance. As we move to theother end of the spectrum, we consider the conception often associated with JosephRaz: formal legality. 5In this guise, the rule of law requires laws to be public, clear and prospectivein their applications. Compliance with the rule of law is an ideal or a virtuethat a legal system may possess or achieve as a matter of degree. I considerthat this conception of the rule of law has some features that overlap with thesubstantive conception of the rule of law. However, Raz rejects the notion thatthe system of law must be based on justice or morality in order for it to beinline with the rule of law. 6To Raz the rule of law is only a constitutional principle that is part of thelegal order, rather than a political principle that requires adherence todemocratic principles or forms of political ideology.

This is conception of the rule of law as aprinciple of law. Insum, the rule of law as a formal legality concerns itself with the manner, formand procedures of law. And includes principles of natural justice (proceduralfairness), right to an open and fair hearing and absence of bias on thearbiter. This is more substantive in character than Raz is willing toacknowledge.

As has been argued the determination of the extent proceduralfairness is achieved is context-specific. 7Another thicker formal conception of the rule of law is the conception of therule of law as requiring legality and democracy. 8The only difference between the more substantive theories and Raz’s theory isover the type of rights or the content used to evaluate the law not whether ornot it should be evaluated. Theconceptions regarded as placing on the substantive end of the continuum includeaspects of the formal theories mentioned above, but add emphasis on contentrequirements for law.

9They add more criteria for the evaluation of the law. These theories requirelegality, democracy and laws that are just. Most basically, they require thatlaws protect individual rights. Furthest to the substantive end of thecontinuum is the idea that the rule of law requires the realisation of justice throughthe commitment to the right to dignity. At the end of continuum is therealisation of socio-economic welfare in addition to formal legality, individual rights and democracy. The theories arecomplimentary: Principle of law and principle of governance Thethickness the rule of law, in my judgment, is affected by socio-economictransformation. The Magna Carta 1215 for example, which is regarded as fundamentalmilestone for the rule of law enshrined the protection of the individual rightsof “ free man”.

10 Thismeant that laws governing slavery may be said to have both procedurally andsubstantively sound; thus that system was understood to be compliant with therule of law. Additionally, the rights of the slaves were therefore notprotected and this differentiation was reasonable in the legal society of thattime. That legal system was both in substance and form compliant with the ruleof law as the virtue of the society at the time. Another example is thegovernance through monarchies versus the democratically elected governmentwhere the former is regarded as unreasonably limiting citizen’s right to electtheir government. 11 Thusthe limitations of a purely substantive conception is that people’s rights arenot universal; systems of governance – democracy, monarchy do not guarantee therealisation of justice.

Property rights, to people that were historicallydisposed, may be more valuable and fundamental than rights to secrecy.  Thus imposing the rule of law as a rigiduniversally common concept at its element risks instances of certain dominantparts of society dictating to other societies what is good and what is not. 12I also argue that since the rule of law is an ideal, 13it is untenable why there is a need for rigid conceptions of it content. Requiring the thickest form of the rule of law as a minimum standard makes therule of law illusive – with its definition and effectiveness redundant if nosociety can ever achieve it.

Conclusion Iconclude that the conception of the rule of law should not be either thick orthin.  It should aim to have bothelements. It does have both elements.

This way the rule of law becomes an effective and neutral device thatguarantees formal integrity of the processes of law, politics and governance. It maintains a level of independence from political theories and in itsfunction by not being overly descriptive in relation to what makes a good law. Thetwo conceptions should be regarded as complimentary. The form exists to ensurethat the substance regardless of its benefits is passed or made in line withthe process. And the substance exists to ensure that notwithstanding itscorrect form the law is of the nature that is capable of guiding behaviour in aparticular socio-economic environment. 1 2                 Raz 1979, p214)3                 Tamanaha 2001, pp 104 -1064                 5                 Raz The rule of law and its virtue (1977) 93 Law Quarterly Review 195–p211″Therule of law is a political ideal which a legal system may lack or may possessto a greater or a lesser degree.  .

. . It is also to be insisted that the rule of law is just one of the virtues whicha legal system may possess and by which it is to be judged.  It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind orrespect for persons or dignity of man. A non-democratic legal system, based onthe denial of human rights, on extensive poverty, on racial segregation, sexualinequalities, and religious prosecution may . . . conform to the requirement ofthe rule of law” 6 Razp203. 7 Jowell The rule of law today 17. 8 TamanahaRule of Law 91, 99-100. 9 102. 10 Insertchapter 39 for example. 11 ThomasPaine The Rights of Man12 Hijabdiscussion between Arab and Western feminists. 13               Raz, and others – the rule of lawis a political ideal.