

Introduction as both prescriptive and evaluative. this conception

[Government](#)



Introduction The rule of law is a contested concept. There are reams of academic literature about what the rule of law is; whether it is formal or substantive - thin or thick. The thick concept is one that explains the rule of law as both prescriptive and evaluative.

This conception discourages the separation between the rule of law and 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, on the other hand, defines the rule of law as only prescriptive. It looks to the presence or absence of specific, observable objective criteria of the law or the legal system.

1 In this essay I argue that understanding the rule of law as two clearly distinguishable conceptions is unhelpful. The basis for my argument is two-pronged: first, at its element the rule of law is about constraining the exercise of arbitrary power. Thus the thin understanding of the rule of law does not effectively achieve this if it allows for actions that result in the abuse of fundamental rights. Second, the understanding of the rule of law is both as a principle of governance and as a theory of law or a principle of law.

Therefore, the rule of law requires a combination of thin (principles of governance - the making of laws) and thick features (principle - the nature of the laws) of law. Both conceptions are necessary for a good legal system. In its prevention of arbitrariness, the rule of law is not primarily concerned with government as an institution as such but of the laws and legal institutions; whether they 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 law should 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 to what something must be like to be regarded as law. The first relates to governance. Theories of the rule of law Tamanaha outlines the the rule of law theories on a continuum with formal and substantive theories on opposite ends of the spectrum. 3At the thin end of the spectrum requires government or citizen action to be sanctioned by law and is not concerned at all with the nature of the action the law sanctions.

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

This is conception of the rule of law as a principle of law. In sum, the rule of law as a formal legality concerns itself with the manner, form and procedures of law. And includes principles of natural justice (procedural fairness), right to

an open and fair hearing and absence of bias on the arbitrator. This is more substantive in character than Raz is willing to acknowledge.

As has been argued the determination of the extent procedural fairness is achieved is context-specific. ⁷Another thicker formal conception of the rule of law is the conception of the rule of law as requiring legality and democracy. ⁸The only difference between the more substantive theories and Raz's theory is over the type of rights or the content used to evaluate the law not whether or not it should be evaluated. The conceptions regarded as placing on the substantive end of the continuum include aspects of the formal theories mentioned above, but add emphasis on content requirements for law.

⁹They add more criteria for the evaluation of the law. These theories require legality, democracy and laws that are just. Most basically, they require that laws protect individual rights. Furthest to the substantive end of the continuum is the idea that the rule of law requires the realisation of justice through the commitment to the right to dignity. At the end of the continuum is the realisation of socio-economic welfare in addition to formal legality, individual rights and democracy. The theories are complementary: Principle of law and principle of governance. The thickness of the rule of law, in my judgment, is affected by socio-economic transformation. The Magna Carta 1215 for example, which is regarded as a fundamental milestone for the rule of law enshrined the protection of the individual rights of "free man".

¹⁰ This meant that laws governing slavery may be said to have both procedurally and substantively sound; thus that system was understood to be

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compliant with the rule of law. Additionally, the rights of the slaves were therefore not protected and this differentiation was reasonable in the legal society of that time. That legal system was both in substance and form compliant with the rule of law as the virtue of the society at the time. Another example is the governance through monarchies versus the democratically elected government where the former is regarded as unreasonably limiting citizen's right to elect their government. 11 Thus the limitations of a purely substantive conception is that people's rights are not universal; systems of governance - democracy, monarchy do not guarantee the realisation of justice.

Property rights, to people that were historically disposed, may be more valuable and fundamental than rights to secrecy. Thus imposing the rule of law as a rigid universally common concept at its element risks instances of certain dominant parts of society dictating to other societies what is good and what is not. 12 I also argue that since the rule of law is an ideal, 13 it is untenable why there is a need for rigid conceptions of its content. Requiring the thickest form of the rule of law as a minimum standard makes the rule of law illusive - with its definition and effectiveness redundant if no society can ever achieve it.

Conclusion I conclude that the conception of the rule of law should not be either thick or thin. It should aim to have both elements. It does have both elements.

This way the rule of law becomes an effective and neutral device that guarantees formal integrity of the processes of law, politics and

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governance. It maintains a level of independence from political theories and in its function by not being overly descriptive in relation to what makes a good law. The two conceptions should be regarded as complimentary. The form exists to ensure that the substance regardless of its benefits is passed or made in line with the process. And the substance exists to ensure that notwithstanding its correct form the law is of the nature that is capable of guiding behaviour in a particular socio-economic environment. 1 2

Raz 1979, p214)3

Tamanaha 2001, pp 104 -1064

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Raz The rule of law and its virtue (1977) 93 Law Quarterly Review 195–

p211 “The rule of law is a political ideal which a legal system may lack or may possess to a greater or a lesser degree. .

. . It is also to be insisted that the rule of law is just one of the virtues which a 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 or respect for persons or dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious prosecution may . . . conform to the requirement of the rule of law” 6 Raz p203. 7 Jowell

The rule of law today 17. 8 Tamanaha Rule of Law 91, 99-100. 9 102. 10

Insert chapter 39 for example. 11 Thomas Paine The Rights of Man 12

Hijab discussion between Arab and Western feminists. 13

Raz, and

others – the rule of law is a political ideal.