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THE RULE OF LAW BEYOND THICK AND THIN

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ABSTRACT. In this paper it is argued that different understandings of the requirements of the Rule of Law can to a large extent be explained by the position taken with regard to two interrelated distinctions. On the one hand, the Rule of Law can be regarded as either a principle of law or as a principle of governance. On the other hand, the requirements of the Rule of Law can be regarded as defining either a minimum standard which something has to meet in order to be law or as an aspirational standard identifying what it means to be good law. In combination these two distinctions define a range of perspectives on the nature of the Rule of Law that are complementary rather than mutually exclusive.

I. INTRODUCTION

The Rule of Law is generally acknowledged to be of great importance as a basic principle of governance, despite the fact that its exact meaning is widely contested. The formal essence of the Rule of Law can be stated in Tom Bingham's words as requiring:

> [that] all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered by the courts.[1]

In addition to these formal requirements, many regard the Rule of Law as also implying certain substantive standards. Joseph Raz has warned against the tendency to include 'just about every political ideal which has found support in any part of the globe during the

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[1] Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010), p. 8.

post-war years' within the concept of the Rule of Law,[2] and indeed: the Rule of Law should not be equated with the rule of good law. However, substantive conceptions of the Rule of Law typically contain additional requirements that are regarded as equally essential. For example, the United Nations has adopted the following description of the Rule of Law:

> For the United Nations, the Rule of Law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[3]

In this account, it is recognized that the laws of a legal system that regulates the power relations within a state should not only be enacted, enforced and adjudicated in conformity with the type of formal requirements stated by Bingham, but should also be consistent with the substantive principles of international human rights and fairness as well as the principle that those ruled by the law should also participate in its promulgation. These are regarded as the minimum requirements that any system of authoritative rules, institutions and procedures (which in short will be called an 'authoritative system') should meet in order to qualify as governance by law.

In the debates on the proper conceptualization of the Rule of Law, it is often presented as if we will somehow have to choose between either a formal or a substantive conception of the Rule of Law and either a thick(er) or a thin(ner) account of its requirements.[4] In this paper it is contended that many of the differences between the competing versions of the Rule of Law can be better conceived as different understandings of the same Rule of Law requirements, rather than as disagreements on which requirements are implied in

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[2] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (London: Oxford University Press, 1979), p. 210.

[3] Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, (UN Doc. S/2004/616), p.4.

[4] For an overview of the various alternatives, see Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), pp. 91ff.

the Rule of Law. It is argued that different understandings of the requirements of the Rule of Law can to a large extent be explained by the position taken with regard to two interrelated distinctions. On the one hand, the Rule of Law can be regarded as either a principle of law or as a principle of governance. On the other hand, the very same requirements of the Rule of Law can be regarded as defining either a minimum standard which something has to meet in order to be law or as an aspirational standard identifying what it means to be good law. In combination these two distinctions define a range of perspectives on the nature of the Rule of Law that are complementary rather than mutually exclusive.

II. THE RULE OF LAW AS A PRINCIPLE OF LAW AND AS A PRINCIPLE OF GOVERNANCE

As is clear from its description of the Rule of Law, the United Nations regards the Rule of Law as a principle of governance. As a principle of governance the Rule of Law is a normative, prescriptive principle claiming that all power relations within a society should be regulated in accordance with certain fundamental principles. As such, it must be distinguished from the Rule of Law as a principle of law. As a principle of law, the Rule of Law is an analytical, descriptive principle claiming that in order to qualify as a legal system an authoritative system should be in accordance with certain fundamental principles.[5]

These two perspectives are related in the sense that as a principle of governance, the Rule of Law requires that all power relations should be regulated by law. As a consequence, the fundamental principles that an authoritative system must comply with in order to qualify as law carry over to the requirements of the Rule of Law as a principle of governance. That is, governance by law means governance by rules that fulfill the requirements of the Rule of Law as a principle of law. Thus, for a system of governance, the requirement that its rules fulfill the requirements of the Rule of Law as a principle

[5] Cf. N.W. Barber, who distinguishes between the Rule of Law as part of either legal theory or political theory: 'Conceptions within legal theory are presented as implied by, or flowing from, a full understanding of the nature of law or legal system. Those conceptions that lie within political theory are presented as part of a grander theory of how power should be exerted over individuals' (N.W. Barber, 'Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?', *Ratio Juris*, 17(4) (2004): p. 476).

of law is a necessary (but not necessarily a sufficient) condition for fulfilling the requirements of the Rule of Law as a principle of governance.

However, as part of a principle of governance the requirements for a regulative system to qualify as law are normative, not descriptive requirements. To illustrate this, the U.N. description of the Rule of Law states (in part) that 'the Rule of Law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated'.[6] In this description we can see the requirements of public promulgation, equal enforcement and independent adjudication as part of the analytic description of what it means for a system of rules to qualify as law properly understood. However, as part of a normative principle of governance, these requirements translate into normative requirements of governance claiming that the government should regulate the power relations within a society by rules that are publicly promulgated, equally enforced and independently adjudicated.

However, from the description of the Rule of Law it also appears that, reversely, the Rule of Law as a principle of law equally presupposes that the law is properly administered and adjudicated. For a rule to function as a legal rule, it will have to be properly administered and adjudicated. As a consequence, the requirements of the Rule of Law as a principle of governance will also carry over to the requirements of the Rule of Law as a principle of law.

Thus we see that the requirements of the Rule of Law as a principle of law and as a principle of governance are inextricably intertwined. Just like a photon can be regarded as either a particle or as a wave, depending on the perspective of the observer, so the Rule of Law can be regarded as either a principle of law or as a principle of governance. As a principle of law it will display its descriptive character, and as a principle of governance it will display its normative character.[7]

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[6] Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, *supra* note 3.

[7] As Barber notes, both aspects can also be recognized in Joseph Raz's conception of the virtue of the Rule of Law. When Raz speaks of the 'virtue' of the Rule of Law, he uses this both as signifying the essential qualities of law, and as denoting conformity with the dictates of the Rule of Law (Barber, *supra* note 5, at 476–477).

III. THE RULE OF LAW AS A PRINCIPLE OF LAW: THE REQUIREMENTS OF LEGALITY

In order to know what governance by law requires, we will first have to know what it takes for something to be law. Therefore, an analysis of governance by law will have to start with an analysis of the Rule of Law as a principle of law. We will start our inquiry into the nature of the Rule of Law with an analysis of the function of law and see what this tells us about the requirements of the Rule of Law.

A classic example of this type of analysis is offered by Joseph Raz in 'The Rule of Law and its Virtue'.[8] The general focus of that paper is on the Rule of Law as a 'political ideal'.[9] That is, it regards the Rule of Law as a principle of governance. As such, Raz claims that it 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'.[10] However, as Raz makes clear, he will only be concerned with the second aspect.[11] This aspect concerns the question of what something must be like in order to be law, and therefore only discusses the Rule of Law as a principle of law.[12]

Thus, in discussing Fuller's theory of the Rule of Law, Raz discusses an argument 'which establishes an essential connection between the law and the Rule of Law'.[13] This argument regards the Rule of Law as 'a necessary condition for the law to be serving directly any good purpose at all'.[14] That is, as a principle of law the Rule of Law is regarded as a necessary condition for something serving any purpose (good or bad) *as law*. Raz uses the analogy of a knife:

> Being sharp is an inherent good-making characteristic of knives. A good knife is, among other things, a sharp knife. Similarly, conformity to the Rule of Law is an

[8] Raz, *supra* note 2.

[9] *Ibid*., at 211.

[10] *Ibid*., at 213.

[11] *Ibid*.

[12] The first aspect raises the question of why people should be governed by law and why they have reason to obey the law. Both questions will have to be answered by identifying the function of governance by law. According to Raz people only have reason to obey the law if, by their own standards, they are better off by following its rules rather than the reasons for action they would have in the absence of the law. This is the core of what he calls 'the service conception of authority' (Raz *supra* note 2, at 198). In that sense governance by law must, in Raz's theory, be aiming at serving the general interest.

[13] Raz, *supra* note 2, at 224.

[14] *Ibid*., at 225.

inherent value of laws, indeed it is their most important inherent value. It is of the essence of law to guide behaviour through rules and courts in charge of their application. Therefore, the Rule of Law is the specific excellence of the law.[15]

Raz concludes:

> A knife is not a knife unless it has some ability to cut. The law to be law must be capable of guiding behaviour, however inefficiently. 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 used. 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.[16]

So, in the most general sense, the Rule of Law is regarded as a quality of law considered as a functional concept.[17] The term 'functional concept' refers to a concept which is defined in terms of the purpose or function something is characteristically expected to serve.[18] If a knife is defined as a cutting instrument, this means that cutting is regarded as a knife's essential function. As Raz rightly notes, an essential function of a functional concept defines its standard of excellence. But it is important to see that it does so in a double sense: it defines *a minimum standard* in the sense that something that is not capable of cutting is not a knife, and it defines *an aspirational standard* in the sense that something is a better knife to the extent that it is better able to cut. The property that makes something better perform its essential function is a good-making property. Hence, sharpness can be seen as a good-making property of a knife. The sharper it is, the better a knife can perform its essential function (the aspirational standard), and if it lacks sharpness altogether, it will not be able to cut at all and therefore it will not be a knife (the minimum standard).

Similarly, the Rule of Law can be seen as identifying the good-making properties of a legal system. That is, the Rule of Law identifies the qualities that an authoritative system has to have in order to be able to function as a legal system. This means that a legal system is regarded as having an internal standard which is deter-

[15] *Ibid*., at 225.

[16] *Ibid*., at 226.

[17] Raz calls it an analysis of 'an instrumental conception of law' rather than a functional conception (*Ibid*., at 226).

[18] See Alisdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2nd ed. (London: Duckworth, 1985), p. 58.

mined by the function it is supposed to fulfill. This will also be a double standard in the sense that it defines both a minimum standard that something has to meet in order to be a legal system and an aspirational standard identifying what it means to be a good legal system.

Therefore, rather than distinguishing between thick and thin conceptions of the Rule of Law, we should distinguish between the Rule of Law as a minimum standard for something to be law and as an aspirational standard for being good law. From this it also becomes clear that, although Raz is right in warning not to equate the Rule of Law with the rule of good law, we should not conclude that the Rule of Law only identifies a minimum standard for something to be law. Rather, we should take Raz's warning to mean that we must be careful not to confuse these standards by taking the Rule of Law as an aspirational standard to define the minimum standard something must meet in order to be law. Having the good-making properties of law to some extent is necessary for something to be able to perform law's essential function and thus for something to be law. In this sense the requirements of the Rule of Law identify the existence conditions of law.

Raz regards the Rule of Law as consisting of those qualities that enable law to fulfill its essential function. Raz sees 'guiding behaviour through rules properly applied' as an essential function of law. This would indeed seem to be the most basic function that law must be capable of fulfilling. This basic function implies both a minimum standard and an aspirational standard. As a minimum standard it requires that law is at least *capable* of guiding behavior, and as an aspirational standard it requires that law guides behavior as good as possible. Raz focuses on the minimum standard and so inquires what qualities law must have in order to be capable of guiding behavior through rules properly applied. According to Raz, this capability of guiding behavior implies a number of principles. The three he includes that are relevant here are:[19]

[19] The other principles Raz includes are not concerned with the qualities of rules to be capable of guiding behavior, but with the proper administration of these rules; that is, with the quality of governance by law: they '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' (Raz *supra* note 2, at 218). The Rule of Law as a principle of governance will be discussed in Sect. IV.

1. *All laws should be prospective, open, and clear.*

This is widely regarded as the most basic requirement for a rule to be capable of guiding behavior. If guiding behavior through rules is the basic function of law, then it must be possible for it to guide behavior. And as Raz rightly remarks, one cannot be guided by a retroactive law.[20] Similarly, it is essential that laws are made public: 'If it is to guide people they must be able to find out what it is'.[21] 'For the same reason its meaning must be clear. An ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it'.[22]

2. *Laws should be relatively stable*

The reason why, according to Raz, law has to be relatively stable is that 'people need to know the law not only for short-term decisions (where to park one's car, how much alcohol is allowed duty free, etc.) but also for long-term planning. (…) Stability is essential if people are to be guided by law in their long-term decisions'.[23]

This second principle indicates a further specification of the function of law. Law's function is not merely to guide behavior, but to do so in such a way that it enables people to plan their life, including both their short-term and their long-term decisions. Accordingly, the function of the law has both a formal and a substantive aspect: the formal function of law is that it guides behavior through rules; the substantive function is that it enables people to live their lives in accordance with their plans.

This is in line with the functions of law as H.L.A. Hart sees them. According to Hart, if law functions well, people

> are expected without the aid or intervention of officials to understand the rules and to see that the rules apply to them and to conform to them. Only when the law is broken, and this primary function of the law fails, are officials concerned to identify the fact of breach and impose the threatened sanctions.[24]

Therefore,

[20] Raz, *supra* note 2, at 214.

[21] *Ibid.*

[22] *Ibid.*

[23] *Ibid.*, at 214–215. See also *ibid.*, at 86: 'Laws guide human behaviour, help people in planning and deciding on their future course of action, and provide standards for evaluating past or planned actions'.

[24] H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon, 1994), pp. 38–39.

The principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court.[25]

F.A. Hayek described the essence of the Rule of Law in similar terms:

Stripped of all technicalities [the Rule of Law] means that government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.[26]

3. *Laws must be general*

The requirement that law should be general does not preclude government officials from enacting particular legal orders. But as Raz stresses, in order for people to be able to plan ahead on the basis of their knowledge of the law, particular orders should be enacted 'only within a framework set by general laws which are more durable and which impose limits on the unpredictability introduced by the particular orders'.[27]

Probably the most canonical rendering of the criteria of the Rule of Law as a principle of law can be found in Lon Fuller's *The Morality of Law*.[28] In addition to the criteria mentioned by Raz (generality, prospectivity, publicity, clarity and constancy through time), Fuller mentions two further criteria:[29]

[25] *Ibid*., at, 40. See also *ibid*., at 250: 'the certainty and knowledge in advance of the requirements of the law (…) is not only of importance where coercion is in issue: it is equally crucial for the intelligent exercise of legal powers (e.g. to make wills or contracts) and generally for the intelligent planning of private and public life'.

[26] F.A. Hayek, The Road to Serfdom, in Bruce Caldwell (ed.), *The Collected works of F.A. Hayek*, vol. II, *The Road to Serfdom. Text and Documents, The Definitive Edition* (London: Routledge, 2007), p. 112. In 'The Rule of Law and its Virtue' Raz endorses this interpretation of the Rule of Law by Hayek and takes it as a point of departure for his analysis of the concept (see Raz, *supra* note 2, at 210).

[27] Raz, *supra* note 2, at 216.

[28] Lon Fuller, The Morality of Law (Revised edition) (New Haven and London: Yale University Press, 1969).

[29] Fuller's eighth criterion, that there should be congruence between official action and the law, concerns the proper administration of the law and will be dealt with in Sect. IV.

1. *Laws should not require the impossible*

In order for rules to be able to guide behavior, they cannot require the impossible.[30] This also seems to be an obvious requirement if the function of law is to guide human behavior.

2. *Laws should not contradict each other.*

The previous criteria for something to be law are all about the qualities something must have in order for it to be a rule that can guide behavior. But law consists of a set of rules. And if among the rules within the set one rule would require a person to do A and another rule not to do A, then it is impossible for that person to be guided by law as a set of rules regarding doing A. And so also as a set of rules, law should not require the impossible, and therefore laws should not contradict each other. This requires law to be capable of being a system rather than merely a set of rules.

As Hart notes, these principles are usually referred to as the principles of *legality*: 'The requirements that the law (…) should be general (…); should be free from contradictions, ambiguities, and obscurities; should be publicly promulgated and easily accessible; and should not be retrospective in operation are usually referred to as the principles of legality'.[31] But there is more to the legality of law than merely these requirements of law as a system of rules.

A. Law as Authoritative Obligations

Thus far we have discussed the qualities any type of rules must have in order to be capable of guiding behavior. The next question is what distinguishes legal rules from other types of rules. Central to the idea that law is an instrument for guiding behavior is that law is regarded as a system of rules that guide people's actions by giving them reasons for action. A distinctive feature of law is the type of reason that law is supposed to be giving. According to Hart, it is a distinctive feature of law in comparison with a gunman's orders backed by threats that we are not merely forced to comply with legal rules, but that we are supposed to have an obligation to obey the law: 'All speculation about the nature of law begins from the assumption that

[30] Fuller, *supra* note 27, at 70–79.

[31] H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press 1983), p. 113, cited in Jeremy Waldron, 'The Concept and the Rule of Law', *Georgia Law Review* 43(1): p. 10.

its existence at least makes certain conduct obligatory'.[32] Thus, law is a specific type of rules in that it claims to guide behavior by creating authoritative obligations.

Hart regards it as characteristic of an obligation that social pressure is brought to bear upon people to follow rules that 'are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it' even if following the rule may go against what they may wish to do, while deviations from the rules are a reason or justification for such a reaction and for applying sanctions.[33] Alternatively, Raz claims that the essence of a legal obligation is that it offers a specific type of reason to follow the rule; namely, a content-independent, categorical and pre-emptive reason. That is, if people have an obligation to follow a rule, this means that they have a reason to follow the rule irrespective of the nature or merit of the action they require and irrespective of their personal goals and interests, and so that the reason to follow the rule is not to be added to all other relevant reasons, when assessing what to do, but should replace at least some of them.[34]

In both the social rule-based and the reason-based interpretation of the nature of a legal obligation, it is a distinguishing feature of law that it claims to offer a reason why people should follow the rule and that this reason justifies imposing sanctions if they fail to do so. The claim that law is essentially a functional concept suggests that this reason refers to some purpose that the law is supposed to serve. As said, for Hart this reason is that the rules 'are believed to be necessary to the maintenance of social life or some highly prized feature of it'. Similarly, Raz asserts that in order to be justified, it must be possible for law to claim that by their own standards people are better off by following its rules rather than the reasons for action they would have in the absence of the law. This is the core of what he calls 'the service conception of authority'.[35]

But whatever the specific purpose law is claimed to serve, if it is a distinctive feature of law that people have an obligation to follow its rules, people must be able to accept its rules as obligations. That is,

[32] Hart *supra* note 23, at 217.

[33] *Ibid.*, at 87.

[34] Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), p. 214.

[35] *Ibid.*, at 198.

they must be able to regard them as authoritative. For that reason it is necessary that legal rules have the qualities which make it possible to accept them as authoritatively binding. As Raz puts it: 'To claim authority it must be capable of having it, it must be a system of a kind which is capable in principle of possessing the requisite moral properties of authority'.[36] As Hart indicates, it is not required that people *actually* obey the law because they regard it as authoritative (they can also follow the rule out of habit, for example). But if people are not merely 'obliged' to obey the law, but may be regarded as having an obligation to obey, it must at least be *possible* that people obey the law on the ground that they regard it as authoritative. Whether law meets the conditions of being capable of having authority will therefore have to be assessed by evaluating the content of the law, with the standard of evaluation being determined by the purpose that the law must be supposed to have for the people for whom it is supposed to create obligations.

The most minimal purpose law must be supposed to have in order to be able to claim authority is that it ensures peace and security. According to Thomas Hobbes this is the essential reason for people to entrust absolute authority to the sovereign. Hobbes claims that otherwise people would be condemned to live in a 'state of nature' characterized by a 'war of all against all' which would imply life to be 'solitary poor, nasty, brutish and short'.[37] But as Hobbes emphasized, the state of war is characterized not so much by permanent fighting, but rather by a profound uncertainty about people's expectations, which makes it impossible for them to plan their lives.[38] In such a condition,

> there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society, (…).[39]

Thus, the basic reason for people to accept rules as authoritative is that it takes away people's basic insecurities and thereby enables

[36] *Ibid*., at 199.

[37] Thomas Hobbes, *Leviathan* (London: Penguin Books, 1985), p. 186).

[38] 'So the nature of War, consisteth not in actuall fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary' (Hobbes 1985, p. 186).

[39] Hobbes, *supra* note 36, at 186.

them to plan their lives and be able to form a society with a developed culture. But if this is the most minimal purpose that law must be supposed to have in order for it to be possible to claim that people have reason to accept law as authoritative, people will only have reason to accept a system of rules as authoritative if it actually enables them to live their lives in accordance with their plans. And as John Locke shows, this requires at least that people's most fundamental interests are protected: their life, liberty and property.

As Locke points out, believing that we might be better off by accepting some set of rules as authoritative, irrespective of the content of the rules, 'is to think that Men are so foolish that they take care to avoid what Mischiefs may be done them by Pole-Cats or Foxes, but are content, nay think it Safety, to be devoured by Lions'.[40]

What this analysis suggests is that content-independent criteria are insufficient to ensure that law is capable of claiming to be authoritatively binding, because meeting these requirements is not sufficient to ensure that people are able to live their lives in accordance with their plans. For law to claim to be authoritatively binding, it will be required that it can ensure that people are able to plan their lives and form a society with a developed culture. And therefore, in order to be capable of claiming authority, an authoritative system will, as a minimum, have to ensure that it protects people's fundamental interests insofar as they are central to being able to live in a society in accordance with their plans. This is the reason why ensuring fundamental rights and freedoms must be assumed to be a basic requirement of the Rule of Law.

The same conclusion also follows from the basic requirement that law should be non-contradictory. If it is an essential function of law as a system of rules that it enables people to live their lives in accordance with their plans, then the content of the law cannot be such that this basic purpose is fundamentally frustrated. Just as the substance of the law cannot be such that it simultaneously requires people to do A and not to do A, the substance of the law cannot be such that, while it is law's essential function to enable people to live their lives in accordance with their plans, it prevents them from doing just that.

[40] John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), p. 328.

Thus, the inclusion of fundamental human rights and freedoms can be seen as a minimum requirement for law to be capable of fulfilling its essential function. Therefore the U.N. description of the Rule of Law as a principle of governance rightly includes the requirement that laws should be consistent with fundamental human rights norms and standards as an essential element.

Of course this does not answer the question of which fundamental rights and freedoms should be included. Here again it is useful to keep in mind the distinction between the Rule of Law as a minimum standard for something to be law and as an aspirational standard identifying what it means to be good law. If it is an essential function of law that it enables people to live in a society in accordance with their plans, the Rule of Law as an aspirational standard requires law to optimally enable people to live in accordance with their plans. This may very well require a legal system to include not only the recognition of civil and political rights, but also the establishment of social, economic, educational and cultural conditions that are contributive to fulfilling that function.[41] But as a minimum standard, the Rule of Law requires that at least law does not frustrate people's ability to live in accordance with their plans and in that sense is consistent with basic human rights norms and standards that aim to ensure that people are able to do precisely that.

The Rule of Law as a minimum standard and as an aspirational standard are two sides of the same coin. It identifies law's good-making properties, which are implied by law's essential function, which is to guide people's actions in such a way that it enables them to live peacefully in society in accordance with their plans. It is not (as it is often presented) that there are two competing conceptions of the Rule of Law: a 'thick' and a 'thin' conception, between which we are somehow supposed to choose. The minimum standard and the aspirational standard are two answers to two questions about one and the same concept of the Rule of Law. The minimum standard is the answer to the following question: to what extent does something have to meet the requirements of the Rule of Law in order to be considered as law at all? The aspirational standard is the answer to the following question: to what extent does something have to meet these very same requirements in order to be regarded as good law?

[41] Cf. Clause 1 of the report of Committee I of the International Congress of Jurists at New Delhi in 1959, as cited and ridiculed by Raz in Raz, *supra* note 2, at 210–211.

But as we have seen, also as a minimum standard, the requirement that law is consistent with fundamental human rights norms and standards is essential to the Rule of Law as a functional concept.[42]

IV. THE RULE OF LAW AS A PRINCIPLE OF GOVERNANCE: THE REQUIREMENTS OF LEGITIMACY

With the criteria discussed in section III we seem to have a sufficiently clear idea of the essential characteristics that a system of rules must have in order to be capable of guiding behavior in such a way that it enables people to live their lives in accordance with their plans. And so if this is law's essential function, then these criteria can provisionally be seen as defining the requirements of the Rule of Law as a principle of law. The next question for a theory of the Rule of Law then is: why is governance by law an essential characteristic of good governance? What is the value of the Rule of Law as a principle of governance?

To answer this question, we will first look into the requirements of the Rule of Law as a principle of governance that are related to the requirement that governance by law should be governance by rules. Here we will use the results of our analysis of the requirements of the Rule of Law as a principle of law as discussed in the previous section and see how these transpose to requirements of the Rule of Law as a principle of governance.

The value of the Rule of Law as a principle of governance will determine the *legitimacy* of governance. As was explained in section II, the Rule of Law as a principle of governance is a normative, pre-

[42] This section draws on an argument that was developed more fully in Peter Rijpkema, 'The Inevitability of Moral Evaluation', *Ratio Juris*, 24(4) (2011): pp. 413–434. In that paper I show that legal positivism's separation thesis, which claims that determining what the law is does not necessarily, or conceptually, depend on moral or other evaluative considerations, is incompatible with its claim that law must be able to create obligations. It is further claimed that an analysis of legal positivism's basic tenets as developed by Hart shows that it is not only possible that the identification of the law depends on moral evaluation, as Hart claims, but that it is conceptually necessary that it does. In this section I have elaborated the argument underlying these claims and I have tried to show that it also implies that even if the rule of law is understood merely as the most minimal standard of legality, as advocated by Raz, it will have to include not only several formal requirements, but also certain substantial requirements, in particular that it meets some fundamental human rights norms and standards. Thus, taken together these two papers suggest that legal positivism's basic tenets imply that in order for something to be law it must meet certain substantial requirements, and whether it does can only be ascertained by a normative evaluation. In this sense the present paper further substantiates my claim that legal positivism's separation thesis is untenable. However, this paper is not aimed at undermining the legal positivist position, nor does the present argument require that the conclusions regarding the tenability of legal positivism are accepted.

scriptive principle claiming that all power relations within a society should be regulated by institutions and procedures in accordance with the fundamental principles of the Rule of Law. If governance is in accordance with these fundamental principles, it will be legitimate.

A. Governance by Rules: Respecting Persons Versus Manipulation and Management

The key to answering the question of the value of the Rule of Law is to be found in the view of man implicit in the Rule of Law as a principle of law. This point is stressed by Jeremy Waldron:

> Ruling by law is quite different from herding cows with a cattle prod or directing a flock of sheep with a dog. It is also quite different from eliciting a reflex recoil with a scream of command. The publicity and generality of law look to what Henry Hart and Albert Sacks called 'self-application,' that is, to people's capacities for practical understanding, for self-control, and for the self-monitoring and modulation of their own behavior, in relation to norms that they can grasp and understand.[43]

More generally it can be observed that governance by law is governance by treating people as persons. This was already emphasized by Locke. As he claims, 'person' 'is a forensic term, appropriating actions and their merit; and so belongs only to intelligent agents, capable of a law, and happiness, and misery'.[44] And so it can be seen that what is specific to governance by rules is that it requires people to be treated as responsible persons. Or, as Fuller formulates it:

> To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.[45]

The value (or aim) of the Rule of Law thus seems to lie in treating people as responsible persons.

1. *Manipulation*

The idea that treating people as responsible agents indeed constitutes the value of governance by law is most evident when it is contrasted

[43] Waldron, *supra* note 30, at 26–27.

[44] John Locke, *An Essay Concerning Human Understanding* (Pennsylvania State University, 1999), p. 331.

[45] Fuller, *supra* note 27, at 162.

with governance without law, which is governance by manipulation. Manipulation can be based on the threat or use of violence, or it can be based on non-violent forms of social control. As an example of the former, Waldron discusses the reign by terror of the Nazi regime. As they governed by using retroactive directives and secret decrees and by letting verbal orders override formal statues, they so fundamentally and systematically violated the basic requirements of the Rule of Law as a principle of law that this cannot be seen as governance by law, Waldron claims. Instead, governance was based on the (arbitrary) threat and use of force, intimidation and large-scale murdering. 'Rule by this sort of terror is not rule by law'.[46]

Evidently, also a system of governance by law makes use of (the threat of) force. But as Hart stressed, if the law functions well, people 'are expected without the aid or intervention of officials to understand the rules and to see that the rules apply to them and to conform to them'.[47] It is only when 'this primary function of the law' fails that the actual use of force becomes possible. Therefore, it could be argued that the threat of force in a system of governance by law is not primarily aimed at manipulating people into compliance with the norm but rather at assuring people that others will also comply with the rules, whether or not they also regard the rules as imposing obligations.

Manipulation by non-violent forms of social control is exemplified by Fuller with the reign of Rex II, the imaginary successor of Rex, the allegorical king who failed to govern by law because he failed to observe the criteria of the Rule of Law.[48] Rather than placing the powers of government in the hands of the lawyers, Rex II chooses to place them 'in the hands of psychiatrists and experts in public relations'.[49] As Waldron remarks:

> Should we say that Rex II tried a different kind of law? No: I think that we are supposed to infer that Rex II tilted away from lawmaking and the legal enterprise altogether. Henceforth, his subjects would be manipulated, treated, and ordered about in a way that would not involve the distinctive techniques, skills, and constraints of law.[50]

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[46] Waldron, *supra* note 30, at 18.

[47] Hart, *supra* note 23, at 38–39.

[48] Fuller, *supra* note 27, at 33ff.

[49] *Ibid.*, at 38.

[50] Waldron, *supra* note 30, at 17.

It would indeed be the herding and directing of people with a prod or a dog, a carrot or a stick.

Could we say that governance by public and general rules is more effective in attaining the aims of governance than governance by manipulation? Not in general. If, for example, the general aim of governance were limited to the mere aim of peace and security, it might very well be possible that this could be more effectively attained by a highly oppressive regime employing unlimited violence and manipulating social power relations. This could also be the case when the aim of governance would be to promote the private interests of the sovereign. Governance by manipulation can be highly effective in realizing numerous goals. However, the one aim that cannot be reached by governance by manipulation is the aim of enabling people to live their lives as responsible persons. Thus we can see that enabling people to live their lives as responsible persons is the essential function of governance by rules and constitutes the basic value of the Rule of Law as a principle of governance.

2. *Management*

The requirement that law should consist of public and general rules not only translates into the requirement that governance should not be based on manipulation, but also into the requirement that it should not be based on particular commands. Theoretically it may be possible to govern a society merely by particular commands, directing every action by every person by specific commands. Of course this would be highly impractical and probably even practically impossible. But in any case it would not be governance by general rules. It is tempting to transpose this requirement of law to a requirement of governance implying that like cases should be treated alike. But as Fuller warns, this would be reading too much into the principle, amounting to seeing it as a principle of fairness.[51] General laws can be highly unfair by any independent external theory of fairness or justice.

Still, governance by particular commands would be importantly different in kind from governance by law. The important difference is that governance by particular commands would take away people's ability to plan their lives in accordance with the law, which, as

[51] Fuller, *supra* note 27, at 47.

we saw, belongs to the principal function of law. As Fuller formulates it,

> law furnishes a baseline for self-directed action, not a detailed set of instructions for accomplishing specific objectives. (…) This follows from the basic difference between law and managerial direction; law is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian of the integrity of the system.[52]

Thus, the requirement of the Rule of Law as a principle of law that laws must be public and general, transposes into a requirement of the Rule of Law as a principle of governance that government should treat people as responsible persons, in contrast to both manipulating people, and to directing people by particular commands.[53]

In addition, we saw that the second basic requirement of the Rule of Law as a principle of law is that law should be stable. This requirement was seen to be essential because it enables people to plan their lives, including both their short-term and their long-term decisions. This can be seen as part of what it means to be a person under the law. It is the type of personality that 'extends itself beyond present existence', as Locke formulates it, by consciously taking responsibility for one's actions. As a person, one 'becomes concerned and accountable'.[54] Thus, as a stable system of rules, law enables people to be persons who are responsible for their lives as a whole by being able to plan their lives, living their lives in accordance with their plans and by accepting accountability for the lives they live.[55]

Next, law should not require the impossible. As a principle of law, this requirement seems almost too obvious to state, as no one can be guided by a rule requiring the impossible. However, as a principle of

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[52] *Ibid.*, at 210.

[53] One of the most vivid depictions of the antithesis of governance by law is George Orwell's *Nineteen Eighty-Four* (London: Penguin Books, 1970), both with respect to rule by violence rather than by public and general laws ('The thing that he was about to do was to open a diary. This was not illegal (nothing was illegal, since there were no longer any laws), but if detected it was reasonably certain that it would be punished by death, or at least by twenty-five years in a forced-labour camp' (*ibid.*, p. 9)), and with respect to rule by particular commands rather than by public and general rules ('"Smith!" screamed the shrewish voice from the telescreen. '6079 Smith W.! Yes, *you*! Bend lower, please! You can do better than that. You're not trying. Lower, please! *That's* better, comrade"' (*ibid.*, pp. 32–33)).

[54] Locke, *supra* note 42, at 331.

[55] Raz also acknowledges that the primary reason why observance of the Rule of Law as a principle of governance is valuable, is that this is necessary if law is to respect human dignity, which includes respecting their autonomy; their right to control their own future (Raz, *supra* note 2, at 221).

governance, not requiring the impossible is a demand that is itself almost impossible for governance by law to meet. The problem is that, as we saw, governance by law constitutes people as responsible persons. In doing so, it attributes to people some standard of accountability. This standard of accountability necessarily implies assumptions about what a person knows and believes, what he is able to infer from that, what he is able to do; in short, it necessarily implies a specific conception of the person.

For example, in law we often encounter the concept of 'the reasonable person' as a standard by which it is measured whether someone can be held liable for damages or responsible for criminal acts. Some conception of the person is also necessarily applied as a standard to infer what someone can be regarded as having intended by some action: did someone 'express his will' to conclude a contract when he nodded his head or raised his arm at an auction? Did he 'deliberately' try to kill someone?

However, there is no guarantee that people actually meet the implicit standard of the conception of the person, nor often whether he is even capable of meeting it. Sometimes the law makes room for adapting this implicit standard by mitigating the discrepancies between what are believed to be someone's actual abilities and the abilities the law assumes a person to have. But as it is hard or perhaps even impossible to determine someone's actual abilities and law cannot fully do without a preconceived conception of the person, this will often only be imperfectly realizable. Nevertheless, as an aspirational standard, the Rule of Law requires that people should as far as possible be able to meet the requirements assumed by the conception of the person implicit in law, and as a minimum standard it should at least be *possible* for people to meet these requirements.

V. WHEREVER LAW ENDS, TYRANNY BEGINS

The requirement that, in order to be legitimate, government must treat people as responsible persons also seems to be one of the main elements in the idea that governance by law is what distinguishes a legitimate sovereign from a tyrant. A tyrant is characterized by the fact that he treats people not as responsible persons, but as objects or slaves. A tyrant is not by definition violent or cruel, but he rules merely by the threat or use of force; by manipulation rather than by

law. This aspect is also at the center of the argument for the Dutch rejection of the Spanish king as their legitimate sovereign in the Act of Abjuration of 1581:

> As it is apparent to all that a prince is constituted by God to be ruler of a people, to defend them from oppression and violence as the shepherd his sheep; and whereas God did not create the people as slaves to their prince, to obey his commands, whether right or wrong, but rather the prince for the sake of the subjects (without which he could be no prince), to govern them according to equity, to love and support them as a father his children or a shepherd his flock, and even at the hazard of life to defend and preserve them. And when he does not behave thus, but, on the contrary, oppresses them, seeking opportunities to infringe their ancient customs and privileges, exacting from them slavish compliance, then he is no longer a prince, but a tyrant, and the subjects are to consider him in no other view.[56]

This text played an important role in the development of the idea of the Rule of Law. As F.A. Hayek writes in 'The Origins of the Rule of Law': 'The more I learn about the growth of these ideas, the more I am convinced of the important role which the example of the Dutch Republic played'.[57]

As was explained in the foregoing, the basic aim of the Rule of Law is to enable people to live their lives as responsible persons in accordance with their plans. This aim would be frustrated not only if people were governed by rules that do not meet the requirements of the Rule of Law as a principle of law, but also if people are frustrated by others in living in accordance with their plans. Therefore, legal systems should protect people from undue interference with their lives by others. And as was explained in section II, this requires as a minimum that people's central interests are protected by a set of fundamental rights and freedoms that everyone should respect.

But although it is of the essence of the Rule of Law that everyone should be accountable to law, the core of the Rule of Law is still seen to lie in the requirement that the process of governance by law itself should also be governed by law. This means that the promulgation and administration of the law should itself be regulated by rules that meet the requirements of the Rule of Law as a principle of law and that are properly administrated. Thus, governance should be guided

[56] Act of Abjuration, 1581. Translated from the Dutch 'Plakkaat van Verlatinghe' of July 26, 1581, on http://www.let.rug.nl/~usa/D/1501-1600/plakkaat/plakkaaten.htm.

[57] F.A. Hayek, *The Constitution of Liberty* (Chicago: The University of Chicago Press, 2011), p. 232.

by rules that are general, prospective, open and clear, stable and non-contradictory, and that are enforceable by institutions and procedures that are consistent and sufficiently efficient.

The requirement that governance by law should itself be governed by law is regarded as the second aspect that distinguishes legitimate government from tyranny. We saw that, in order to be legitimate, government must treat people as responsible persons rather than as objects or slaves, which implies that it respects their basic human rights and freedoms. In addition, legitimate government should be government, not by man, but by law. For, in Locke's famous phrase: 'Where-ever Law ends, Tyranny begins'.[58] For Locke, the two aspects are inextricably linked. The sovereign should be bound by laws that respect people as responsible persons with the inalienable rights of life, liberty and property. According to Locke,

> Tyranny is the exercise of Power beyond Right, which no Body can have a Right to. And this is making use of the Power any one has in his hands; not for the good of those, who are under it, but for his own private separate Advantage. When the Governour, however intituled, makes not the Law, but his Will, the Rule; and his Commands and Actions are not directed to the preservation of the Properties of his People, but the satisfaction of his own Ambition, Revenge, Covetousness, or any other irregular Passion.[59]

The Rule of Law as a principle of governance is thus in a double sense the antithesis of tyranny: it requires that people are treated as responsible persons rather than as objects or slaves by a government that aims to promote the general well-being rather than its own; and it requires that this is guaranteed by a system of governance by law that is itself governed by law.

VI. CONCLUSION

In this paper it was contended that many of the differences between competing versions of the Rule of Law are not so much the result of disagreement on the nature of the Rule of Law or the basic requirements it implies, but rather of the different perspectives from which it is analyzed. On the one hand, theories on the Rule of Law generally see law as a functional concept and the Rule of Law as law's good-making properties. As such, the Rule of Law can either be

[58] Locke, *supra* note 39, at 400.

[59] *Ibid.*, at 398–399.

seen as a minimum standard which something has to meet in order to be law or as an aspirational standard describing what it requires for law to function well. On the other hand, the Rule of Law can be regarded as either a principle of law or a principle of governance. As a principle of law it is a descriptive principle, identifying the requirements something has to meet in order to be (good) law. As a principle of governance it is a normative principle, prescribing how government should rule by law. In combination these two distinctions define a range of perspectives from which the Rule of Law can be described.

We saw, for example, that Raz regards the Rule of Law primarily as a principle of law and as defining the minimum standard that law has to meet in order to be able to fulfill its essential function. As a result, Raz focusses mainly on a thin account of the formal requirements of the Rule of Law. The formulation of the Rule of Law adopted by the United Nations, on the other hand, regards the Rule of Law primarily as a principle of governance and as defining an aspirational standard for the legal systems of its member states. Accordingly, its description of the Rule of Law is both thicker and more substantial.

Despite the widely divergent descriptions of the Rule of Law, ranging from formal to substantial and from thick to thin, there appears to be wide agreement on both the essential nature of the Rule of Law and at least the most basic requirements it implies: legal rules must be general, prospective, open and clear, stable and non-contradictory, and enforceable by institutions and procedures that are consistent and sufficiently efficient. These requirements are generally understood as the basic good-making properties of law regarded as a functional concept, with law's essential function being to guide people's behavior in such a way that it enables them to live their lives in accordance with their plans as responsible persons.

One requirement which remains contested among theorists concerns human rights. According to some, most notably Raz, respecting basic human rights cannot be regarded as an essential requirement of the Rule of Law. In the foregoing it was argued that it follows from law's essential function that fundamental human rights are undeniably an essential good-making property of law. As such, they are not only part of the Rule of Law as an aspirational

standard, but also define an existence condition for something to be law. In that sense fundamental human rights are inextricably linked to the Rule of Law. Once we see that they are, we are also able to understand why, since its emergence in the sixteenth century, the Rule of Law has always been regarded as the antithesis of tyranny.

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