

# The Rule of Law and the Government's Role in Our Lives

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Joseph Raz, [The Law's Own Virtue](#), 39 *Oxford J. Leg. Stud.* 1 (2019).

More than forty years after his first take on the value of the rule of law, Professor [Joseph Raz](#), in *The Law's Own Virtue*, has recently revised his original view and given us an insightful and very sophisticated account of this political virtue, developing a framework that connects his theory of law with his moral philosophy and his neoclassical account of intentional actions.

Previously, Raz held that the rule of law was a formal value which concerns the particular ways by which the law must guide the behavior of its subjects. The rule of law was understood in a narrow way as “essentially a negative value” which was “designed to minimize the danger created by the law itself.”<sup>1</sup> It was a value about what the government and its officials cannot do when they exercise power over their subjects. On this account, the point of the rule of law is to constrain government so the law can comply with its guiding function and enable the people it governs to go on with their lives and commit to valuable pursuits: “We value the ability to choose styles and forms of life, to fix long-term goals and effectively direct one’s life towards them.”<sup>2</sup> And the basic idea of the rule of law is that governmental action, including adjudication and any act which produces particular directives, is subjected to “general, open, and stable” norms. One of the basic requirements of the rule of law is that “the making of particular laws should be guided by open and relatively stable general rules.”<sup>3</sup>

Nevertheless, critics have argued (with some reason) that there was something missing in this normative account. Although the eight principles that Raz offered to specify the content of the rule of law play a crucial role in the explanation of the legitimacy of political power,<sup>4</sup> the value of the rule of law seems to encompass also other important principles, such as the importance of legal processes and forms of reasoning and argumentation,<sup>5</sup> and the political accountability of governmental officials toward citizens or of each citizen toward others.<sup>6</sup>

I believe that even these critics failed to capture an important aspect of the rule of law. This unnoticed yet powerful aspect refers to a more positive virtue, which Raz has pointed to in his mature reflection on the ideal of the rule of law. To achieve a complete understanding of that ideal, we must reflect on a more active dimension of the role of our government and its officials. We should consider official action as a public form of “intentional action,” in the sense that Raz described it in his defense of the “classical approach” to practical reason. In Raz’s account, “intentional action is action for a reason,” i.e., action in response to the “facts in virtue of which those actions are good in some respect and to some degree.”<sup>7</sup> Legal institutions are built and justified, if this is correct, as “responses to the requirements of practical reasonableness.”<sup>8</sup>

When we focus on arbitrary governments, we can easily notice what was missing in most of the previous conceptions of the rule of law.<sup>9</sup> What makes a government arbitrary is the absence of a proper attitude towards the reasons that apply to public actions. “Arbitrary” governmental action is action “indifferent to the proper reasons for which power should be used.” (P. 5.) The gist of the argument here, is that political action must be guided by “a purpose which could be the purpose of a government” (P. 6), and that whenever an official fails to adopt an appropriate attitude towards this type of purpose she distances herself from the ideal of the rule of law.

An important conclusion stems from the specification of the notion of arbitrary government: compliance with the rule of law is about adopting the attitude towards public policy required by the purposes of political power itself, i.e. by the goals and reasons which are capable of justifying the very existence of a coercive government. So here lies a question,

the answer to which may provide the key to understand the virtue of the rule of law: Which reasons are appropriate for the government to act upon? What kind of rational action can be capable of satisfying the requirements of the rule of law? Before answering this question, we must clarify two “crucial points” of Raz’s novel account. “First, not every failure of the government to be guided by the law is a breach of the rule of law.” (P. 6.) In other words, what matters is not that the government always get a right answer about what the law, properly construed, requires one to do. To put it in Ronald Dworkin’s vocabulary, it is rather to avoid “contempt” for the law and for the reasons that apply to a legitimate government.<sup>10</sup> If an official attempts to act on these reasons, but fails to do so because of “mistakes and incompetence,” she does not violate the rule of law, as long as she does not manifest “indifference to the reasons that should guide the government.” (P. 6.)

“Second, it would be a mistake to think that obeying the law, narrowly understood, is the only guide for the governmental action.” (P. 6.) To be sure, Raz is convinced that even when an official has discretion and the power to interpret the law or create novel norms to adjust the law to a particular situation, she must be “guided by certain reasons and must avoid others.” (P. 6.) She must not, for instance, be indifferent to the distinction between “the rights and powers of governments and the rights and powers of private owners.” (P. 6) As a government official, her action is guided by special reasons which make her action an appropriate response. She has, in other words, special responsibilities which are constitutive of the rule of law.

We can now see the full picture of the value of the rule of law: to act under the rule of law is for the government to act as a custodian of the interests of the governed. The rule of law is about a specific form of political responsibility, to perform a set of duties “in the interests of the governed.” (P. 7.) It is to recognize both a special relationship between the government and its subjects and a set of special duties. It is to act with the manifest intention to “exercise [one’s] power according to the law.” (P. 7.) In summary:

Governments conform to the rule of law when they act and exercise their power according to the law. Governments claim to be morally legitimate in part because they are constituted by a legitimate system of law, and that law provides reasons that bind the government that it constitutes. The government acts arbitrarily when not trying to follow the law. The test of conformity to the rule of law is acting with the manifest intention to serve the interests of the governed, as expressed by the law and its morally proper interpretation and implementation. (Pp. 7-8.)

This is, for Raz, the “core idea” of the rule of law. And I think this is a brilliant contribution to this important theme in legal and political philosophy.

1. Joseph Raz, **The Authority Of Law** 224 (1979).
2. *Id.* at 220.
3. *Id.* at 212.
4. The principles of the rule of law, on Raz’s early account, are that 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 should be guaranteed”; 5)“the principles of natural justice must be observed”; 6)“the courts should have review powers over the implementation of the other principles”; 7)“the courts should be easily accessible”; and 8)“the discretion of the crime-preventing agencies should not be allowed to pervert the law.” *Id.* at 214-219.
5. See eg., Neil MacCormick, **Rhetoric and the Rule of Law** (2005); Jeremy Waldron, *The Concept and The Rule of Law*, 43 **Ga. L Rev.** 1 (2008); Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in **Getting to The Rule of Law, Nomos** 50 (2011).
6. See Gerald Postema, *Law’s Rule: Reflexivity, Mutual Accountability and the Rule of Law*, **Bentham’s Theory of Law and Public Opinion** 7 (2014).
7. Joseph Raz, **Engaging Reason** 23 (1999).

8. John Finnis, **Natural Law and Natural Rights** 265 (2011).
9. In Raz's previous account of the rule of law, he believed that "many forms of arbitrary rule are compatible with the rule of law." (See Raz, **The Authority of Law** at 219). In Raz's more recent paper it seems that the rule of law is inconsistent with any form of arbitrary rule, even with those that do not directly violate a legal provision, for the rule of law requires that government never be indifferent to the appropriate reasons for the exercise of political power. I think that this change is what made Raz see what was missing in the mainstream literature on the topic of the rule of law.
10. On the distinction between "mistakes" and "contempt," see Ronald Dworkin, **Justice for Hedgehogs** 335-336 (2011).

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