The Governing Idea of the Rule of Law

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'We must realise that the rule of law doctrine has been inadequately identified. Perhaps simply only part of it was stated.' Joseph Raz, 'The Law's Own Virtue' 5.[1]

1 Three Questions

1.1 The Requirements of the Rule of Law: Is There a Unifying Rationale?

The rule of law is a contested ideal. People disagree on its content and characteristics. Despite that, there is a common core,[2] which includes that the law should be reasonably:

(1) general,
(2) clear,
(3) stable,
(4) accessible (promulgated),
(5) prospective but not retroactive,
(6) intelligible (understandable),
(7) coherent with other laws (non-contradictory), and
(8) not requiring an impossible conduct.

Sometimes it is not obvious whether a requirement should be treated as a distinct desideratum or following from or being entailed by one or more of the other principles. To give an example, it should not be too difficult or complicated to identify the law but that relates to the clarity and/or the intelligibility desiderata. In other words, the law should be *reasonably identifiable*.

The rule of law does not only apply to *rules* but also *rulings*.[3] Acts of government should be:

(9) in congruence with law, which has the characteristics stated above.

The basic idea behind the last requirement is that acts of government should be based on or compatible with the law and the law should be enforced. This entails

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1 Joseph Raz, 'The Law's Own Virtue' (2019) 39 Oxford Journal of Legal Studies 1, 5.

2 See, e.g., Jeremy Bentham, *Principles of the Civil Code* (W Tait 1843) ch XVII, 'The Power of Laws over Expectation' at <www.laits.utexas.edu/poltheory/bentham/pcc/index.html> (accessed 10 January 2023), Lon L. Fuller, *The Morality of Law. Revised Edition* (Yale University Press 1964) 39, H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) 114-115, Joseph Raz, *The Authority of Law. Essays on Law and Morality* (1st edn, OUP 1979) 214-219, John Finnis, *Natural Law and Natural Rights* (1st edn, OUP 1980) 270-271, Nigel Simmonds, *Law as a Moral Idea* (OUP 2007) 65, and Raz (n 1) 3. Raz (n 1) 8, adds requirements, such as that 'reasons for which decisions are made should be publicly declared.' See also Matthew H. Kramer, *Where Law and Morality Meet* (OUP 2004) 172, Matthew H. Kramer, *Objectivity and the Rule of Law* (Cambridge University Press 2007) 101-183, and Andrei Marmor, *Law in the Age of Pluralism* (OUP 2007) 7. Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 11-12, rejects the 'rule-book' conception of the rule of law and argues for a 'rights' conception, which 'assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole.' And that the rights 'may be enforced *upon the demand of the individual citizen* through the courts'.

3 John Gardner, *Law as Leap of Faith* (OUP 212) 208-209.

that particular or individual norms, such as orders, decrees, and decisions for relatively limited situations, should be made in accordance with laws that have these qualities. On some accounts, this or closely related requirements concerning the administration of law and institutional arrangements for upholding the law are further fleshed out and may include these:[4]

(10) Officials, including judges, should use appropriate interpretive methods consistently and rigorously to identify the law. One type of interpretive consideration should, for example, not be emphasised over another when interpreting one statutory provision, but a different interpretive consideration when interpreting another provision if there are no differences between the two that justify treating them differently.[5]
(11) Officials should administer the law consistently, objectively, and in accordance with the tenor of the rule of law, but this includes that they should not shy away from deciding.
(12) The law should be faithfully applied to the facts as they are, i.e., correctly applied.
(13) Legal rights and duties should be reasonably enforceable (legally protected), and acts should be reviewable to a reasonable extent but that encompasses courts having powers to review legal acts, including executive acts. This and the previous requirements include a reasonable possibility of correcting wrong decisions.
(14) Courts and other review bodies should be easily accessible, but this includes an affordable access on an equal basis.
(15) The judiciary should be independent and impartial. Other officials should also be impartial and professional in upholding the law.
(16) A fair or just procedure must be observed before reaching a decision, but this can include giving a fair chance to be heard, giving reasons for a decision, and reaching it promptly.
(17) Officials should be accountable for faithfully upholding the law.
(18) At least crime-preventing agencies, such as the police, prosecutors, and the courts, should not have so much discretion that it perverts the law.[6]

While the first group of desiderata concern the law as such, i.e., its desired qualities,[7] the latter group, i.e., the congruence principles, concern the

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[4] Raz (n 2) 215, states that the requirements of the rule of law 'affect the manner of government beyond what is or can usefully be prescribed by law.' Finnis (n 2) 271, states that all the requirements 'involve qualities of institutions and processes.' Gardner (n 3) 204, states that it is better to flesh the principles out rather than to squeeze them into on principle as Fuller does. For his discussion on institutional arrangements, see 210-211. Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 Georgia Law Review 1, 5, emphasis impartial administration and procedural and argumentative aspects of law. While Fuller (n 2) referred to his requirements as the inner morality of law, Adrian Vermeule and Cass R. Sunstein, 'The Morality of Administrative Law' (2018) 131 Harvard Law Review 1924, discuss them in the context of the morality of administrative law.

[5] See in this context, e.g., Fuller (n 2) 82-85.

[6] A more general version of this requirement will be discussed later, which indicates that it is, at least, also among the desired qualities of law as opposed to only one of the congruence principles.

[7] Raz (n 1) 2, states that 'the rule of law principles are not about the content of law, but about its mode of generation and application'. See in this context also Waldron (n 4) 8.

application and enforcement of the law as well as make certain demands of (some) governmental acts. More specific demands can flow from the congruence principles or the 'tenor of the rule of law', such as sufficient investigation by an authority, receiving guidance from an authority, access to information, recording and preserving relevant information, and non-frustration of legitimate expectations. The congruence principles are oriented towards the faithful and correct application and enforcement of the law. The concepts of legal certainty or legal security are often associated with them. The principles form the foundation of much of modern administrative and procedural law. A new requirement may have formed that:

(19) the law should not only be upheld but also be seen to be upheld in accordance with the tenor of the rule of law.[8]

This requirement is based on trust considerations and takes into account how the administration of law, including adherence to the other requirements, is viewed from the point of view of the citizens. The last requirement considered for now is interwoven with and reinforces the others:

(20) the generation and application of the law should be reasonably transparent.

For a community to live up to the rule of law, it is not enough that there are laws with the desired qualities and the government faithfully administers those laws. The laws need to be generally followed. Differently put, the rule of law applies to both the *rulers* and the *ruled*.[9] Often, the focus tends to be on the former due to their special role and powers. Nevertheless, the rule of law applies to individuals and their interactions; it does not only concern public law but also private law.

Some accounts on the rule of law go further than this. According to them, the rule of law requires conformity with democracy, equality, liberty, protecting human rights, and even (some aspects of) justice.[10] These accounts could be called the rule of *good* law to distinguish them from the requirements listed above.[11] It should be borne in mind that the rule of law is only one moral virtue

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8 This relates closely to the maxim that justice should not only be done but also be seen to be done.

9 See in this context, e.g., Gardner (n 3) 195, and Grant Lamond, 'The Rule of Law' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012) 495, 499. This should not be equated with a moral duty to obey the law, see Marmor (n 2) 4. That being said, if a political community lives up to the rule of law, as it is developed here, then that may matter for determining whether there is a *prima facie* moral duty to obey the law. Benjamin Zipursky, 'The Inner Morality of Private Law' (2013) 58 The American Journal of Jurisprudence 27, 31, argues that Fuller's desiderata are too narrow. Tort law, and some other branches of private law, fail to live up to them but are, nonetheless, law. See also Benjamin Zipursky, 'Torts and the Rule of Law' in Lisa M Austin and Dennis Klimchuck (eds), *Private Law and the Rule of Law* (OUP 2014) 139.

10 For an example, see Tom Bingham, *The Rule of Law* (Allen Lane 2010).

11 Raz (n 2) 210-211, Raz (n 1) 9, and Marmor (n 2) 3. Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: and Analytical Framework' (1997) Public Law 467, discusses the distinction between formal and substantive accounts of the rule of law. Gardner

out of many which a government or a legal system should strive to live up to. If conformity to, say, democracy is a part of the rule of law, then the two are not distinct virtues. It is, however, far from clear that they are a part of the same value or virtue. Little or nothing is gained by treating the rule of law as an umbrella term or a catchphrase for everything that makes a government or a legal system good, especially if they do not share a rationale. On the other hand, much can be achieved by focusing on the rule of law as a distinct virtue.[12]

Even if the rule of law is restricted to the listed requirements, i.e., excluding the rule of good law, the question arises: what makes the principles into one ideal, virtue, or doctrine as opposed to a mere list of various considerations?[13] In other words, is there a *unifying rationale* or a *governing idea* behind the requirements?

A rationale or a governing idea matters not only for unifying the requirements but also for identifying, understanding, and applying them.[14] The requirements are expressions of the rationale in diverse ways and for different situations. At least some of the requirements can be satisfied to different degrees. A criterion is needed to determine the appropriate degree of conformity.[15] The clarity requirement is an example. When is a law *reasonably* clear or clear *enough*? Not only can law be more-or-less clear, but the rule of law requires different degrees of clarity for different laws. A law imposing a duty on an authority to remove snow from roads need not be as clear as a law imposing a tax on the citizens. Other requirements do not apply in all cases. Take non-retroactivity as an example. Not all laws need to be prospective. If a government decides at the end of the year in a retroactive manner to increase the budget due to unforeseen costs, grant a tax break due to unexpected events, or increase benefits to the unemployed in light of inflation, it need not have violated the rule of law. Think also of case law evolving without causing rule of law concerns. And of the laws that should be prospective, some retroactive laws are worse than others. The prime example is retroactive criminalization of a conduct.[16] A rationale or a

(n 3) 198-211, analyses the notion of a formal account and suggests that it is best understood as a modal kind.

12 Raz (n 2) 211, and Raz (n 1) 9-11. Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1995) 377, discusses the value of the rule of law in a democracy.

13 Raz (n 1) 3, asks the same question. See also Marmor (n 2) 6. Friedrich A. Hayek, *The Constitution of Liberty* (Routledge & Kegan Paul 1990) 148, coins the term 'the governing idea' in relation to the rule of law.

14 Raz (n 2) 218, says: 'The principles do not stand on their own. They must constantly be interpreted in light of the basic idea [that the law should be capable of providing effective guidance].'

15 See, e.g., Raz (n 1) 3-4, and Raz (n 2) 215. Timothy Endicott, 'The Impossibility of the Rule of Law' (1999) 19 Oxford Journal of Legal Studies 1, argues that the rule of law is not necessarily unattainable despite law's features of being vague etc. See in this context, Raz (n 2) 222.

16 Fuller (n 2) 59, says: 'It is in the retroactive criminal statute that calls most directly to mind the brutal absurdity of commanding a man today to do something yesterday.' Zipursky (n 12) *Inner Morality* 32, points out that tort law, and indeed the common law, evolves. He also asks why vagueness is a problem for criminal law but not tort law (at 37).

governing idea is needed to assess which laws should not be retroactive and of those which are worse than others.

At least some of the requirements can be seen as having the characteristics of virtue. They lie between excesses or vices. Being reasonably stable lies between the law changing too frequently and being unchangeable. A governing idea is needed to identify the golden mean. What's more, the rule of law is not simply a matter of maximising the requirements. When adherence to one requirement is increased, another may be diminished. The requirements can be in tension with each other. More understandable rules for the citizens may have hidden costs in their application by courts. Clearer laws are also more rigid and, thereby, inflexible. Therefore, a balance needs to be struck.[17] A rationale is needed to identify an acceptable balance. Finally, the rule of law itself can be in tension with other values, such as protecting human rights and advancing justice. Sometimes we need less conformity with the rule of law to achieve other values.[18] And sometimes the correct course of action is to depart from the rule of law to advance or protect the other value.[19] A governing idea, as well as an understanding of the other value, are needed to decide when that is appropriate.

1.2 A Rule of Rules?

It has been claimed that the law is 'the enterprise of subjecting human conduct to the governance of rules.'[20] This is one possible rationale for the rule of law. As has already been noted, the rule of law is also about rulings or other acts of government, although that can be seen, from the perspective of this rationale, as flowing (ever so indirectly) from faithful application of rules. The rationale comes naturally to mind for one accustomed to thinking of law as legal rules. However, not every law is a rule, at least not in a narrow sense of the term. Laws are better thought of as norms or standards, which can be of various sorts, including principles and particular norms. More importantly, the rationale collapses the rule of *law* into a rule of *rules*.[21] On this view, there is nothing distinct about law in comparison to other types of rules.

Consider a family that visits a beach house. Tired of endless questions from the children and desiring a peaceful vacation, the parents hang up a list of rules as soon as they arrive:

(1) Everyone must be present for lunch at noon and dinner at six.
(2) The children may not go into the sea without adult supervision.

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17 Fuller (n 2) 45. Timothy Endicott, 'The Rule of Law and Online Dispute Resolution' in Alessi Facheci, Timothy Endicott, and Antonio Estelle de Noriega (eds), *Online Dispute Resolution: virtud cívica digital, democracia y derecho* (CEU Ediciones 2017) 21, discusses the tension between the need for dispute resolution and the need for conformity to the law. See also Marmor (n 2) 26.

18 Raz (n 2) 228.

19 Raz (n 2) 229, Finnis (n 2) 275, and Lamond (n 9) 499.

20 Fuller (n 2) 96 and 106.

21 See in this context, e.g., Antonin Scalia, 'The Rule of Law as a Rule of Rules' (1989) 56 The University of Chicago Law Review 1175, 1187.

(3) Everyone is responsible for making their bed each day.
… and so on.

The rules are reasonably general, clear, stable, intelligible, accessible, prospective, non-contradictory, and capable of being followed. Suppose also that the parents faithfully apply the rules throughout their stay at the beach house. Does their parenting satisfy the rule of law? The parents have set and followed rules with the desired qualities. But they are not laws, at least not in the focal sense.[22] Their parenting style may be in accordance with the rule of rules but not the rule of law. There cannot be a rule of law without law.[23]

There is also something odd about thinking about parenting in terms of the rule of law even though it involves guiding human conduct. Parents are generally not expected to or praised for setting and ruling with laws. (Although parenting involves setting some rules, parents are not even expected to rule with rules to the same extent as the state.) Even if the parents had, for example, wide discretion to depart from the beach house rules, the appropriate grievance would not be that their parenting style had failed to live up to the rule of law. Despite the fact that predictability, stability, and familiarity can be desirable in the children's lives, like they generally are for people living in a political community, the beach house rules seem to be different frum municipal laws at a deeper level. The reasons for having rules, their roles, and how they are understood and applied, even departed from, seem to be different.

This leads to the question: what, if anything, is distinct about the rule of *law* in comparison to the rule of *rules*?[24] If it turns out that there is nothing distinct about law in this regard, then the rule of law is neither a specific virtue *of law* nor a negative value that reduces the *particular* risks which the law itself creates beyond other forms of social ordering. It would merely be the virtue of ruling by setting and following rules with certain characteristics. The value or virtue of the rule of law would, then, merely be a specific expression of a more general value or virtue that applies to many other circumstances. Think of a traffic light or a road sign capable of guiding human conduct[25] or even a sign put up in front of the beach house with a red x covering a picture of mail. However, if the rule of law is distinct, then we need to identify salient and even distinct features of law that are significant for the rule of law.

1.3 Should We Have Law?

Imagine next a small, close-knit tribe that has and follows social rules, as well as acts in accordance with other social norms, beliefs, attitudes, and expectations.

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[22] Gardner (n 3) 207-208.

[23] This depends, of course, on how wide the concept of law is. Fuller's conception is wide. Hart (n 2) 349, says that Fuller's principles are 'equally applicable to any rule-guided activity such as games'.

[24] See, e.g., Lamond (n 9) 496, who states that Fuller's account focuses on what is necessary for human governance by rules but not the successful conditions of a law-governed community.

[25] Note, though, that these signs are connected to rules, more specifically, traffic law.

Members of the tribe can live together peacefully and share a community without having laws. As the beach house example suggests, other types of rules and, indeed, other types of norms are capable of guiding human conduct. They are also capable of constraining the chief or the elders of the tribe and limiting arbitrary decision-making. The question, then, becomes: why do we need law? Or what is desirable about having laws?

One view is that the rule of law has nothing to do with whether law is needed or whether it is desirable. It is a merely an account of how laws should be *if* we have laws at all.[26] But let us say that our tribe grows into a large, diverse, and a fast-paced community, which faces various and complex challenges on a regular basis. Members of this community do not share the same social rules or beliefs, and, in any case, the social rules cannot keep up with societal changes. Does the rule of law have a value, or does it offer any guidance, for situations like these?

Suppose now that our tribe has transformed into a state that has laws. There have been important scientific discoveries concerning the use of artificial intelligence and screening and editing genes for various purposes. These discoveries can have a profound impact on how the state is governed and how people live their lives and treat each other. Consequently, many diverse social issues arise for the community. Should the state enact laws to address these issues? More specifically, does the rule of law require or recommend introducing laws on the subject-matters? The rationale of the rule of law matters for answering the question. Consider again the rationale that laws should be capable of guiding human conduct. This rationale only concerns the qualities of laws when there are laws. It does not require or recommend having laws, either in general or on specific subject-matters.[27]

Three questions have now been identified: (1) Is there a unifying rationale behind the requirements of the rule of law? (2) Is the rule of law distinct from the rule of rules? (3) Does the rule of law require or recommend having laws, either in general or on specific subject matters? These questions will be addressed in what follows. First, a couple of candidates for the rationale or governing idea will be considered and partially rejected because they are incomplete. They are only partially rejected since they are still important pieces of the puzzle. Next, the rationale or governing idea will be identified, and the questions answered.

2 Pieces of the Puzzle

2.1 Guiding

One possible rationale is that laws should be capable of guiding human conduct.[28] This rationale is closely linked to the view of law as 'the enterprise of subjecting human conduct to the governance of rules.'[29] The reason why laws should not be retroactive is that one cannot be guided today by a rule introduced

[26] See Raz's account in Raz (n 2), and Gardner (n 3) 215.

[27] This view does not rule out that having law could be valuable according to some other value.

[28] Raz (n 2) 214.

[29] Fuller (n 2) 96 and 106.

tomorrow. Something similar applies, for instance, to rules that are unclear, instable, contradictory, and inaccessible. The rule of law is important because predictable or foreseeable laws enable us to plan our lives and make choices in light of them. Adhering to the rule of law respects our dignity, autonomy, or agency in that way; it treats us as rational creatures.[30] At first glance, we seem to have identified a strong candidate for the unifying rationale.

But there are problems. First, the law is a modal kind, that is a specific means or social technique.[31] It is not distinguished by its ends but by its means. The law can be used to achieve many ends. However, the law's means –its method or technique– is not limited to merely guiding. Not all laws are primarily meant to guide. The law 'as a means of social control' 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.'[32] Laws can be used as a method to decide an issue, including settling an unregulated dispute, and to correct things of the past. It can also be used to evaluate a conduct or as standard of criticism *ex post facto*, to educate, to control, to constitute an authority, and to empower. While these laws or other laws related to them can be connected, directly or indirectly, to guiding, it does not follow that their primary means is in all instances to guide and certainly not if we are mainly concerned with the citizens being guided as opposed to the officials. Unlike some other modal kinds, *law is a versatile means*. It is more like a Swiss army knife than a mere knife.[33]

Secondly, even if all laws are meant to guide, contrary to what was just said, the idea of law being capable of guiding does not, on its own, explain why some laws can be retroactive without violating the rule of law. It could be responded that those laws are ineffective rules or bad tools, i.e., not fit for purpose. But a rule that grants a tax break *ex post facto* to meet unforeseen circumstances is not an ineffective rule or a bad tool. The rule corrects a situation but is not meant to guide the taxpayers' future conduct. In line with that, it could be said that the law needs to be capable of guiding when guiding is needed. This begs the question of when guiding is needed and the idea of law being capable of guiding, all on its own, does not address that. The answer cannot simply be that the law needs to be capable of guiding when the rulers use it to guide. We rely on the rule of law to criticize the rulers for enacting laws that they treat as not being meant to guide when they should; think of retroactive crimes. Suppose that the reason why a conduct should not be criminalized retroactively is the seriousness of the way the coercive power of the state is brought to bear. The need to predict

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30 Raz (n 2) 220-221, discusses freedom and arbitrary power as well. F.A. Hayek, *The Road to Serfdom* (Routledge 1944) 75 and 87, emphasis the need to foresee with fair certainty when government can use coercive force, and the individuals' ability to plan their life. Bentham (n 2) discusses the rationale of generating expectations. For a legal system guiding, see H.L.A. Hart, *Punishment and Responsibility* (OUP 1968) 44. Fuller (n 2) 39 and 61, discusses reciprocity between the rulers and the ruled. Finnis (n 2) 272, discusses reciprocity like Fuller but also dignity and justice.

31 See, e.g., Hans Kelsen, 'The Law as a Specific Social Technique' (1941) 9 University of Chicago Law Review 75, H.L.A. Hart, *The Concept of Law* (3rd edn, OUP 2012) 40, Leslie Green, 'Law as a Means' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing 2010) 169, and Gardner (n 3) 205-211.

32 For the quote, see Hart (n 31) 40. For the point, see also 248-250.

33 Lamond (n 9) 499, notes that not all the requirements flow from law being an effective guide.

is greater in that circumstance because the potential or actual consequences of the conduct are greater. Here we have, however, moved on beyond the barebones of laws being *capable* of guiding human conduct and started to rely on reasons concerning the *desirability* of being guided (foreseeability). The same applies to an answer that expectations should not be *unfairly* upset or frustrated. An account of fairness is needed, which goes beyond law being capable of guiding. A different way to put the point (or a related point) is 'that the rule of law gives no guidance [according to this rationale] as to the required degree of compliance' to the desiderata.[34]

Thirdly, the guiding rationale seems 'to rule out changes in the law and reliance on discretion by legal authorities.' Furthermore, 'people can plan and organise their affairs on the basis of partial information, and in the face of risk.'[35] The law's ability to guide is 'much less securely connected with the rule of law principles' listed as often thought.[36]

Fourthly, some have the intuition that the rule of law requires or recommends having laws in some situations. The law being capable of guiding does not account for that intuition without being expanded to the desirability of foreseeability. Even so, the expanded idea does not explain the need for law as such as opposed to other rules or norms that can guide. It does not distinguish law from the beach house rules.

Fifthly and lastly, the guiding rationale does not always seem to be the primary idea behind the rule of law as it is commonly perceived. Sometimes the focus is on constraining or limiting the government's use of coercive power; it is about avoiding arbitrary decision-making. Even though guiding and avoiding arbitrary decisions can be seen as two sides of the same coin, at least in some circumstances, the two can come apart. Rules on the police's use of weapons and techniques for the use of force can constrain and limit the police despite being inaccessible to the citizens for security reasons.[37]

2.2 Arbitrariness

Another candidate for the rationale is avoiding arbitrary decision-making. The government should be constrained or limited in how it can bring the coercive power of the state to bear.[38] For this reason, the government should not have too much discretion. The law should be relatively clear and accessible, for instance, to effectively limit and control the government's decisions and, thereby, avoid arbitrariness. The requirement of generality limits *ad hoc* decision-making and

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34 Raz (n 1) 4.

35 Raz (n 1) 4.

36 Raz (n 1) 4-5. For an account of guidance, see Joshua Pike, 'How the Law Guides' (2021) 41 Oxford Journal of Legal Studies 169, and rejecting that law exists to guide us, Joshua Pike, 'The Law Does Not Exist to Guide Us' (2022) Jurisprudence DOI: 10.1080/20403313.2022.2141509.

37 Even though the rules are directed at the police, they could guide the citizens if they were accessible.

38 Hayek (n 30) 86, says that the government should not be given unlimited power.

the congruence principles constrain officials in their application of the law. This is a potent candidate for the rationale.[39]

Again, there are problems. First, the rule of law is not always about avoiding arbitrary decisions. To give an instance, a law facilitating the making of contracts needs to be reasonably general and stable, among other things, but the reason why has little to do with avoiding arbitrary decision-making by officials. Rather, the reason is to enable individuals to arrange their affairs. While such a law can limit the government, including the judiciary, if and when they decide on contractual disputes, the law is chiefly meant to guide individuals. The rule of law does not only limit the *rulers* but also facilitates various interactions of the *ruled*.

Secondly, the arbitrary rationale does not explain all the requirements. For instance, the requirement of stability need not reduce the risk of arbitrary decision-making by an authority, whose acts must be compatible with and based on the law. The authority applies the law at each time even though it changes frequently. Its decision is no more arbitrary for that reason alone. Being bound by law is the main constraining factor. The requirement of non-retroactive laws limits the legislature in changing its mind by committing it to standards that are laid down beforehand. However, an authority that must apply a retroactive law need not be deciding arbitrarily if it decides according to the law. It might be retorted that the requirements avoid arbitrary decision-making by the legislature but not the authority in these examples. That need not be true. A legislature that changes the law frequently or introduces retroactive law need not be acting arbitrarily, or any more arbitrarily than it would when enacting prospective and stable laws. It need not be acting, for example, for private ends or based on its whim. These requirements seem to be more about guiding, at least in some circumstances. While some of the congruence principles concern the faithful application of the law, and the arbitrariness rationale is relevant in that respect, others are focused on the correct identification and application of the law. A government may make (honest) mistakes, which there should be a reasonable chance to review and correct irrespective of worries about arbitrariness. The focus is sometimes on 'getting it right' rather than how it went wrong or why.[40]

Thirdly, the arbitrariness rationale, just as the guiding rationale, does not, on its own, furnish sufficient criteria for degrees of conformity with the requirements or distinguish between instances when it is important to avoid arbitrariness and when it is not. For example, why is it especially important (assuming that it is) that crime-preventing agencies do not have so much discretion that it perverts the law and not various other authorities that can interfere with important interests, such as limit human rights? And why does the rule of law demand a higher degree of conformity in some cases than others? Some idea about the desirability of avoiding arbitrary decision-making is needed. If the idea involves not upsetting or frustrating expectations *unfairly*,

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[39] Timothy Endicott, 'Adjudication and the Law' (2007) 27 Oxford Journal of Legal Studies, 311, offers a powerful account of the rule law in the context of avoiding arbitrary government. See also Timothy Endicott, 'The Coxford Lecture: Arbitrariness' (2014) 27 Canadian Journal of Law and Jurisprudence 49.

[40] Raz (n 1) 14, says that honest mistakes do not violate the rule of law.

then an account of fairness is needed as well as its relationship with the rule of law.[41]

Fourthly, while the arbitrariness rationale may cast some light on the need for law, it only suggests that law is needed to avoid arbitrary decision-making. According to this rationale, there is no need for laws on artificial intelligence and gene manipulation, or contracts for that matter, unless the government will or, at least, can decide on the issues. Furthermore, the arbitrariness rationale does not distinguish laws from other types of rules. They, as well as other types of norms, can constrain and control.

Fifthly, it is not always clear what is meant by 'arbitrary'. It does not mean 'random' but that could be an appropriate way to settle some issues.[42] Should I eat Italian or French tonight? Either seems fine to me, so I flip a coin. Arbitrary might refer to acting with indifference to reason. That is a very low bar as has been demonstrated by the following example: Rex, the ruler, uses public funds to buy his lover a diamond ring. He has a reason, namely his lover will be pleased with the ring. So, Rex is not acting with indifference to reason.[43] But his is not a good reason or the right kind of reason for spending public money or when he acts in his official capacity.

Perhaps, then, arbitrary means acting with indifference to *proper* reason or the purpose that justifies having the power in question.[44] Much depends on what counts as a proper reason in this context. One suggestion is 'acting with the manifest intention of protecting and advancing the interests of the governed.'[45] Government is a custodian.[46] While that rings true for how governments should act in general, it does not capture arbitrariness in the context of the rule of law. It is too wide and indiscriminating.[47] The rationale does not focus specifically on *law* and it is far from obvious why it would lead to the familiar requirements of the *rule of law* unless it is somehow fleshed out with a theory of the interests of the governed that demands that law has the desired qualities and is upheld in accordance with the congruence principles.[48] That theory would be in line with the kind of rationale we are seeking. We have not identified the rationale in a sufficient way by merely referring to the interests of the governed.[49]

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41 Raz (n 2) 222, discusses upsetting or frustrating expectations. Endicott (n 39) 318, says that upsetting expectations is not necessarily arbitrary, although *unfairly* upsetting expectations is wrong (at 320). John Rawls, *A Theory of Justice. Revised Edition* (Harvard University Press 1999, originally published 1971) 207, refers to *legitimate* expectations. Likewise, an account of what counts as 'legitimate' is needed. Hart (n 31) 276, discusses *justified* expectations.

42 Raz (n 1) 5.

43 Raz (n 1) 6-7. See also Endicott (n 39) Arbitrariness 49.

44 Raz (n 2) 219.

45 Raz (n 1) 13.

46 Raz (n 1) 7.

47 Raz (n 2) 219, previously stated: 'Arbitrary power is broader than the rule of law.'

48 A question arises as to whether the interests of the governed should be perceived collectively or individually. In the latter case, they can be in tension with each other, and the rule of law might demand different things for different individuals.

49 Gardner (n 3) 207, criticizes Fuller's account for not being specific enough.

Suppose for a moment there is a law that jewellery funded by the public purse should only be given to a person in recognition to their public service to the country. Rex buys his lover a diamond ring with public money, not because he wants to please his lover but because his lover is a much loved and admired movie star in the country and generally considered by the public to be a national treasure. The ring is the nations' way to express gratitude. Even if this would count as acting in the interests of the governed, when the role of government is considered abstractly, Rex would still have acted arbitrarily. His reason was not the reason of the law or in accordance with it. He did not faithfully administer the law as it is but acted for a different reason, which may or may not have been in the interests of the governed considered abstractly.[50]

Now suppose the law expressly authorises the leader to buy jewellery with public funds for his loved ones. If Rex buys the ring on the basis of this law, he has not acted arbitrarily in the context of the rule of law. On the contrary, his decision would be controlled and limited by a law with the desired qualities. The fact that the law is not in the interests of the governed, i.e., it is bad law in that sense, does not make his decision arbitrary. The law and by extension the decision are corrupt, but they are not arbitrary. It should be remembered that the rule of law does not encompass everything that makes a government or a legal system good; it is not the rule of good law.[51]

Moreover, not acting with indifference to proper reason seems to be subjective. We are to look at Rex's state of mind.[52] Suppose that Rex mistakenly believes that his reason is proper given his role. He believes that giving his lover a diamond ring is in the interests of the governed because if his lover is happy, then Rex is happy, and then surely his loving people will be happy. However, arbitrariness, in the context of the rule of law, is not limited to subjective reasons in this sense. The question does not always concern a state of mind but the appropriateness of the reason objectively speaking. Rex can violate the rule of law –act arbitrarily– when he is terribly mistaken about the appropriateness of his reason.[53]

This brings us closer to an understanding of arbitrariness in the context of the rule of law. Rex acts arbitrarily if he decides or acts in his official capacity, widely understood, on the basis of his whim, personal reason, or for private ends (or, put another way: will, self-interest, personal gain, vengeance, and favouritism or the decision is unwarranted)[54] as opposed to reasons controlled

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[50] Raz (n 1) 7, rules out purposes that '*any* government can legitimately do'. This is clearly not limited by whatever law happens to be in place.

[51] It is not clear why acting with the manifest intention of advancing and protecting (or serving) the interests of the governed does not entail, for example, protecting human rights and (some aspects) of justice. In other words, this rationale for the rule of law is so wide it could encompass other values as well and lead to the rule of good law. See in this context also Lamond (n 9) 499.

[52] Raz (n 2) 219-220.

[53] For a different view, see, e.g., Raz (n 1) 6.

[54] Raz (n 2) 219. For not being warranted, see, e.g., Gerald J. Postema, 'Fidelity in Law's Commonwealth' in Lisa M Austin and Dennis Klimchuck (eds), *Private Law and the Rule of Law* (OUP 2014) 18, and, in the same book, William Lucy, 'Private Law and the Rule of Law' 46.

or limited by the law.[55] That is why a decision to enrich or advance those in power, their relatives, or friends is arbitrary. This is not to say that other reasons than those based on the law can never be acted upon, but they need to be controlled or limited by the law when the rule of law requires it. Contrary to the rationale concerning the interests of the governed, not every 'public' reason matters according to this approach; not even every reason that could be proper given Rex's role and power when considered abstractly. What counts as a *proper* reason depends on whatever law there is in place. Acting with the manifest intention to protect and advance the interests of the governed is not the same as acting on the basis of law. Rex buying his lover a diamond ring with public funds is arbitrary because the act is aimed at private ends or is motivated by personal reasons instead of reasons controlled or limited by the law of his community. It is arbitrary because it is not governed by law. That is what is meant by the slogan 'government by law and not by men'.[56]

3 A Political Community Governed by Law

'"The rule of law" means literally what it says: the rule of the law.' Joseph Raz, *The Authority of Law* 212.

'As its name suggests, the ideal of the rule of law is the ideal according to which it is the law that rules.' John Gardner, *Law as a Leap of Faith* 195.

3.1 A Fresh Start

It appears that the rule of law has something to do with guiding as well as avoiding arbitrary decision-making, but it is not limited to either. It is time for a fresh start that treats the rationales as important pieces of the puzzle. The governing idea is closely associated with the literal meaning of the terms 'the rule of law' and '*rechtsstaat*', although the issue is not a semantic one. The governing idea is to rule with law (the law reigns) or a law state (a law-governed community).[57] It is *a political community governed by law*.[58] The political

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[55] Endicott (n 39) 318 and 320, connects arbitrary to the value of controlled decision-making. Endicott (n 43) states: 'In the special sense in which arbitrariness is a departure from the rule of law, a decision is arbitrary whenever the law itself ought to demand a justification other than the fact that the decision maker made it, and there is no such justification.' Hart (n 31) 273, discusses arbitrariness in the case of judicial law-making in the following terms: the judge must 'always have some general reason justifying this decision and he must act as a conscientious legislator would deciding according to his own beliefs and values.'

[56] Raz (n 2) 212. It does not mean that there should be a government without people. Hayek (n 13) 148, discusses the term arbitrary in relation to conformity with pre-existent general principles of law. He says that: 'the governing idea was that the law should be king' or '*Lex Rex*.'

[57] For the last term, see, e.g., Lamond (n 9).

[58] Lamond (n 9) 495 and 502, discusses promoting and protecting governance by law under non-ideal conditions. See also Marmor (n 2) 3. Zipursky (n 12) *Inner Morality* 44, says: 'Private law is better understood as an enterprise of empowerment than governance.' According to the account here, a political community governed by law subsumes the law's role in private law. This should be in line with his suggestion in Zipursky (n 12) *Torts* 143.

community is, among other things, committed to settling some issues with law. Disentangling three elements is illuminating: (a) to govern (b) a political community (c) with law.

3.2 Governing

To be a good means to govern is the rationale behind the requirements of the rule of law. To govern is a wider term than to guide or to avoid arbitrary decisions. Sometimes governing involves guiding human conduct, sometimes it involves controlling or limiting decision-making, sometimes it involves settling (unregulated) disputes, to evaluate or criticize a conduct, to educate, and so on. Every action that counts as governing is covered by the idea. As such, the idea subsumes and unites both the guiding and arbitrariness rationales. They are relevant when governing involves guiding or avoiding arbitrary decisions.

Like a Swiss army knife, law is a versatile means. It can be used to guide a human conduct, but it can also be used in many other ways. A law is a norm or a standard that can, but need not, come in the form of a rule. As a norm, its means is the use of norms in the various ways norms can be used to achieve different ends. To be a good means –a good tool, law needs to be *usable as the means for which it is to be used*.[59] If law is to be used to guide a human conduct, then it needs to be capable of that or effective in that regard. If law is to be used to control or limit decision-making, then it needs to be capable of that or effective in that regard. If law is to be used as some other means, then, likewise, it needs to be capable or effective as the means for which it is used. Since law is a versatile means and governing can involve many different things, law can be a good means with which to govern. The rule of law involves law being usable –a good tool, to govern with in the different ways that is done.

3.3 Political Community

A political community is a relatively complete community in the sense that individuals live a large part of their lives within it.[60] The kind of political community kept in mind here is externally independent and internally supreme. The prime example today is the state, but others can include a tribe, a village, a city, and a religious group, if they do not belong to a larger political community, as well as an empire. Yet another example is the world community. Groups or communities which are not of the right sort are, for example, a family, an association, a club as well as a tribe, a village, a city, a province, a religious group, and other units within the overarching political community, for instance, the state.

Governing a political community involves deciding how the members of the community can act and treat each other, how the coercive power of the community can be brought to bear and public interests treated as well as how the government should be organized. For a political community to be governed by

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[59] Lamond (n 9) 506, discusses the rule of law as a mixed value.

[60] Finnis (n 2) 147-150, discusses a complete community but, at least, the threshold for completeness is lower here.

law, it needs to be founded, structured, and ruled on the basis of law. This means that fundamental social issues, including how the community should be governed, are settled by law. A government is limited and controlled in its decision-making if it is committed to settling these issues with law. The rule of law constrains the use of coercive power in that way. Even though the use of coercive power is important, the rule of law also concerns how public interests and powers are treated more generally; it concerns how the political community is governed. The context of a political community, with all that it involves, should be borne in mind when assessing whether law is a good means for governing.

3.4 Law

To understand the rule of law, we must grasp some aspects of the nature of law. Among the relevant features are:[61]

(1) Law is an institutionalized normative order.[62]
(2) Law is a normative order of a political community.
(3) Law is (usually) backed by the strongest political power of the community.
(4) Law regulates fundamental social relations and community-organization.
(5) Law claims to be comprehensive, open, and supreme.[63]

Let us, briefly, consider these features. A law is a legal norm (a standard), but law is a legal system. As a body of standards forming a system, it can be used to regulate in a comprehensive and an organized manner. Law is also connected to institutions. There are, at the least, law-applying institutions.[64] Often, there are institutions that enact law, decide on issues, settle disputes, and enforce the law. Morality, for instance, is different in that respect. Furthermore, law is the body of norms of some political community,[65] and, often, the (instruments of) the political power backing the legal system decide on and enforce the norms. Often, the government has a high degree of control over the law.

Law also regulates fundamental social relations, which include marriage and other family relationships, contract and other business affairs, and core prohibitive rules, such as the ban on killing, raping, and stealing.[66] Additionally,

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61 For these features and a more detailed discussion of them, see Hafsteinn Dan Kristjánsson, 'The Plateau of Legality. What Makes Law "Law"?' (2016) 62 Scandinavian Studies in Law 15, 27-33. See in this context also Scott J. Shapiro *Legality* (Belknap, Harvard 2011) 225.

62 For law as a normative order, see, e.g., Kelsen (n 31) 43, For that as well as being institutionalized, see e.g., Raz (n 2) 42, 44, and 86. For being normative, institutionalized, and coercive, see Joseph Raz, *The Concept of a Legal System. An Introduction to the Theory of a Legal System* (2nd edn, OUP 1980) 3. For being institutionalized, see e.g., Tony Honoré, *Making Law Bind. Essays Legal and Philosophical* (OUP 1987) 20-21, 46-50, and 68, Hart (n 31) 84, and Neil McCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (OUP 2005) 23.

63 For these particular features, see Raz (n 2) 116-119, and Finnis (n 2) 267.

64 Raz (n 62) 192-193, and Raz (n 2) 44, 205, and 115.

65 See in this context, Finnis (n 2) 260, and Raz (n 2) 116.

66 See in this context, Hart (n 31) 193-200, discussing the minimum content of natural law.

law can be used to regulate other social relations and affairs than fundamental ones. It has a great regulatory capacity. The social relations in question can be between individuals that belong to different groups, such as different families, tribes, religious groups, political groups, and various clubs and associations.

Law is the inter-group norms that (usually) reflect the strongest political power of the overarching group (the political community). The 'sub-groups' and their members can be bound together with the strings of law. Thus, the law has characteristics of public or shared norms. They are shared by members (and sub-groups) of the political community. Further, law claims to be supreme and reserves a compulsory jurisdiction. The individuals or sub-groups are bound by law and law can trump their rules, so to speak. Without these characteristics, it would be difficult to unite individuals or sub-groups and cut across their regulatory spheres. The individuals or sub-groups share a political community in part by sharing law.

Other relevant features include how the law is identified and constituted. A legal norm is based on a source of law, such as a statute, a precedent, or a custom, which is identified and, partly, constituted by a *norm of recognition*. Hence, the law is constituted and identified by other norms. In other words, the law is regulated by other standards. Many other types of social rules are not. Moreover, where there are *norms of change*, the law is created, changed, or cancelled in accordance with norms that confer a power on an official or an institution. The creation of law can, therefore, be easily controlled and quick. Social conventions, in comparison, can be difficult, imprecise, and slow to change.

Now, we have identified several features of law, which can be summarized in the following way:

- A law is a norm (a standard),
- which belongs to a legal system of a political community,
- is public or shared,
- claims to be supreme, open and reserves a compulsory jurisdiction,
- is identified or constituted in part by other norms,
- can be changed with ease, quickness, and control,
- the government often has a high degree of control over it,
- it can be used to decide issues and settle disputes,
- claims to be comprehensive, can be organized, and has a great regulatory capacity,
- and is applied and enforced by institutions and often even created by them.
- As such, law enables individuals and groups to share a political community.

While not all the features are essential, they tend to be salient in sophisticated legal systems. Law *can* have all the features. Other types of rules can share one or more of these features. That is why the rule of rules overlaps, to greater or lesser extent, with the rule of law. Nevertheless, law is distinguishable from other types of rules. The rule of law is about governing with standards that have law's features.

4 The Value of the Rule of Law

'For the rule of law is not merely the rule of *rules*, it is the excellence of a particular mode of governance by rules of a particular scope and ambition.' Leslie Green, 'Globalization, Disobedience and the Rule of Law'[67]

The question naturally awakens what the value of the rule law is.[68] What is or can be good or desirable about a political community governed by law? The rule of law is the virtue of an instrument as an instrument.[69] Understood narrowly, law is a good means when it has characteristics that make it *effective* for governing a political community. In that sense, law is like a knife.[70] Sharpness is a virtue of a knife as a tool, just as being prospective is a virtue of a law as a means. The knife can be used for various ends, such as to slice a bread or stab a person. Similarly, law can be used to achieve justice as well as to oppress, to discriminate, and so forth.[71]

There are, however, two problems with the narrow understanding. First, merely being effective for governing a political community does not, any more than being capable of guiding human conduct or avoiding arbitrary decision-making, furnish a sufficient criterion for assessing conformity to different degrees of the requirements, to distinguish between laws that can and cannot be retroactive, to identify an acceptable balance between the requirements as well as to evaluate when we should depart from the rule of law to protect or advance another value. Some account of the desirability of (effective) governing is needed, just as we need an account of the desirability of foreseeability, or what counts as unfairly frustrating or upsetting expectations. The example of a knife is helpful. Sharpness need not be a good thing for all knives. Think first of your favourite kitchen knife to carve the Christmas steak and then of knives designed for kids. Sharpness is a virtue of the former but not the latter, even though the latter is a tool to cut, for example, a soft slice of bread in half. This raises the question of when or how much sharpness is a good thing. That depends on what sort of tool it is or what it is for.

This brings us to the second point. Imagine that Rex is a tyrant. He uses law to oppress his people. He enacts laws, such as that no one of a particular minority group can marry, have children, make contracts, own real estate, organize with others, and it is punishable by death to protest or disobey his laws. Suppose that the law has all the desired qualities on our list. It is accessible, stable, general etc. It is reasonably effective to govern Rex's people. It is a good tool *for Rex and his henchmen* to oppress. Being an effective law is, though, a bad thing from

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67 Leslie Green, 'Globalization, Disobedience and the Rule of Law', working paper available at <https://www.iilj.org/wp-content/uploads/2016/11/Green-Globalization-Civil-Disobedience-and-the-Rule-of-Law-2006.pdf> (assessed 10 January 2023).

68 Lamond (n 9) 504, discusses the value of law-governed community.

69 Raz (n 2) 226.

70 Raz (n 2) 225-226. H.L.A. Hart, 'Review of *The Morality of Law*' 78 (1965) Harvard Law Review 1281, at 1286, uses the example of poison being deadly.

71 Raz (n 1) 1, says that the 'law is a structure of rules, institutions, practices and the common understandings that unite them'. The 'tool' of which the rule of law is a virtue is, according to his later work at the least, understood widely.

the point of view of his people. The law's characteristics are not valuable to them. Which brings us, yet again, back to the example of a knife. Being sharp is just a fact about the knife. It is neither good nor bad without being put in the context of some purpose or value. A sharp knife is good to cut the Christmas steak but bad for kids to play with. The fact is valuable, or it is a virtue, in light of some purpose or value or in some context. Notice that this is not a question of the ends to which the knife is used but what sort of means it is. Not being too sharp makes the knife for kids a valuable tool. The kid knife can, though, be used for various ends, some of which are bad. The same applies to law. Being clear is just a fact about law which can, but need not, be valuable.

Interestingly, Rex's people are not likely to praise him for, *at least*, adhering to the rule of law, which has some moral value even though it is outweighed by the horrific laws he enacts.[72] This suggests that the rule of law is not merely about being an *effective tool to govern*, i.e., a *functional virtue*. Not all instances of being effective are in accordance with the ideal of the rule of law. The ideal of the rule of law is not merely about having the qualities on our list. It cuts deeper. The ideal is about being an effective tool to govern when effectiveness is valuable. It is about being a *good* tool in a certain sense, i.e., a *moral virtue*. It is not about all laws or all political communities that have laws but those laws that are specific kinds of means or political communities governed by law in a certain way, just like the kid knife is a specific kind of tool. Whether law is a good tool –morally virtuous, depends on whether it has characteristics that make it good or valuable in the context of governing a political community. Now the requirements of the rule of law may be valuable in light of different values, such as rationality, autonomy, and dignity. The rule of law is not about being valuable in light of just *any value* but a *specific value to law*. Which brings us to the value of the rule of law or the kind of political community praised for adhering to the rule of law.

Law as a means has a capacity to *create and maintain the conditions of civility*.[73] By that is meant an effective framework for us to live together in a political community, to share projects, and have projects of our own. There are numerous moral problems involved in living in and sharing a community with others, especially relatively complete ones. Public or shared norms, which claim to be supreme, that are applied by institutions, are identifiable, changeable, and controllable, have a great regulatory capacity, are organizable etc. are good tools to establish a common framework for individuals to share a political community.

Social rules can serve this role, especially in small, close-knit communities, such as a tribe or even a village. It has been argued, as is well known, that a pre-

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[72] Marmor (n 2) 9, states that the rule of law as only functionally good misses what makes the rule of law praiseworthy. Hart (n 2) 357, says that principles designed to maximise controlling by rules is not valued by Bentham and others for their own sake or given the title 'morality'. 'They are valued so far only as they contribute to human happiness or other substantive moral aims of the law.'

[73] Fuller (n 2) 106-107, discusses the effort to create and maintain a system 'for directing human conduct by rules.' Conditions of civility are wider. Fuller comes closer in his reply to critics (at 210), where he says: '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 this system.' Marmor (n 2) 9, discusses the value of a well-ordered society. Hayek (n 13) 145, discusses Hobbes as well as well-ordered society.

legal society has certain defects, including uncertainty about which rules are rules of the group, and secondary rules are remedies to these defects but among them is the rule of recognition that 'cures' the defect of uncertainty.[74] As is argued elsewhere,[75] the message of the story is not that wherever there is a rule of recognition, there is more certainty about the rules of the group. Members of a pre-legal society may actually know the rules better than members of a modern state with a sophisticated and a complex legal system. Instead, the message is that 'in any other conditions' than 'a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment', the simple social structure of a pre-legal society is defective.[76] It is unlikely to succeed in large, modern, diverse, and complex societies. Therefore, the lesson seems to be that we need rules that are identified in a different way to hold together such communities. Their members may not know all the rules and they, or some subset of them, need a way to identify the rules in those circumstances; law can be a good tool in *conditions of uncertainty*. Moreover, the defect of the simple social structure in a more complex society is not merely uncertainty, but a *lack of a mechanism to constitute rules*, i.e., to make it the case that it counts as the shared and supreme standard of the community. A complex and/or diverse society needs to regulate and control its rules. Norms of recognition, as well as some other secondary norms (norms of legal method), are better thought of as remedies to that defect.

More generally, there are ongoing moral problems in complex societies 'whose solutions are complex, contentious, or arbitrary.'[77] They require coordination, cooperation, *determinatio*, and adapting to changing circumstances.[78] While law is not the only means that can be used to achieve the conditions of civility, it is a good tool, especially in complex societies. Other means, such as other types of social rules, tend to be deficient in adequately solving these moral problems, at least on their own. Law has the capacity to hold complex societies together by establishing a common framework for individuals to pursue common and personal goals in a community shared with others. Law's features make it suitable to do that. In light of this, law can have value *as a tool* to govern a political community –it can be a *useful means*– in the context of establishing and maintaining the conditions of civility. The desirability of (effective) governing and the requirements of the rule of law should be identified, understood, and applied in light of this.

A few things should be underscored. Just because law has a *capacity* to achieve the conditions of civility, and that can be valuable, it does not mean that wherever there is law, the conditions obtain. Consequently, while there cannot

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74 Hart (n 31) 91-99, discusses the three defects and the three secondary rules that cure them.

75 Hafsteinn Dan Kristjánsson, *Philosophical Foundations of Norms of Legal Method*, DPhil at the University of Oxford (2022) <https://ora.ox.ac.uk/objects/uuid:9a440eed-3621-4dbf-a603-446399df1968 > (accessed 10 January 2023)

76 For the quote, see Hart (n 31) 92 and 234.

77 Shapiro (n 61) 170 and 172.

78 See in this contexts Shapiro (n 61) 163-175, John Finnis, *Philosophy of Law. Collected Essays: Volume IV* (OUP 2011) 61, Finnis (n 2) 231-260, and Raz (n 2) 163-180.

be a rule of law without law, there can be law without the rule of law.[79] Recall that we are not here merely interested in minimum superficial adherence to the requirements in the context of the existence of law but focused on when 'the legal system is legally in good shape';[80] the rule of law cuts deeper. Furthermore, law has a capacity to achieve the *conditions* of civility, i.e., to establish a common framework for us to share a political community. The content and use of this framework is, at least in part, another matter. It may be that the content of law subverts civility and contravenes other values, such as (other parts of) justice. Satisfying the requirements of the rule of law does not guarantee good law. A law may have the desired qualities but still be bad in other ways.[81] It can also have more-or-less of the desired qualities.[82]

5 Three Answers

5.1 The Unifying Rationale

The unifying rationale behind the requirements of the rule of law is a political community governed by law. The political community is committed to settling some issues with law. The governing rationale subsumes and unites the guiding and arbitrariness rationales. Since law is a versatile means, it can be a good tool to govern a political community. The value of the rule of law is the law's value as a means to create and maintain the conditions of civility; it can enable individuals to live in and share a political community by establishing a common framework of a certain sort. Obviously, much more needs to be said about the conditions of civility and its connection to the rule of law but that cannot be done here. Brief examples are in order, though.

The desirability of guiding or the unfairness of upsetting expectations is assessed in light of a law's role in governing a political community. There is a connection between (a) a desideratum, (b) the specific means for which the law is used (c) in the context of governing a political community where that is assessed in light of law's capacity to achieve the conditions of civility. A law facilitating the making of contracts needs to be (a) general and stable because (b) it is meant to guide human conduct and (c) such a law is important for

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79 Fuller (n 2) 39, states that 'total failure' in any of the requirements he lists results in something that is not properly called a legal system. On 41, he connects the requirements to the existence of law. Interestingly, the rule of law is of little help to determine which laws belong to the same system of rules and cannot be, e.g., contradictory. It cannot replace norms of recognition (and other norms of legal method) wholesale. Simmonds (n 2) 50, claims that the rule of recognition is not sufficient to constitute a legal system; the rule of law is needed as well. While a phenomenon needs to have more features of law than the rule of recognition to be law, it does not mean that there cannot be law without the rule of law, at least if we are concerned with more than superficial and minimum adherence to the desired qualities.

80 See in this context, Finnis (n 2) 270.

81 Lamond (n 2) 506, states that the rule of law is a mixed value good. See also Finnis (n 2) 274 who says: 'Thus the Rule of Law does not guarantee every aspect of the common good, and sometimes it does not secure even the substance of the common good.'

82 Fuller (n 2), e.g., on 5, discusses the morality of aspiration as opposed to the morality of duty. The rule of law concerns the former, at least if we are not merely concerned with absolute minimum conditions.

individuals to arrange their affairs and interact with others in a political community. Since the community is governed by law and the social issue is important for living in it, the law needs to be general and stable and the more important the law is for the individuals, a higher the degree of conformity is required. A law criminalizing a conduct needs to be (a) prospective (b) because it is meant to guide human conduct and avoid arbitrariness and (c) such a law involves actual or potential use of coercive force in a serious way against an individual, which is important for them to be able to predict in order to plan their life. Likewise, a law authorising an authority to interfere with human rights needs to be (a) clear (b) because it needs to control and limit and, thereby, avoid arbitrary decision-making and (c) such a law involves using the power of the state to interfere with important interests of the citizens. The rationale behind the rule of law adapts to each subject matter, including whether it concerns a criminal, constitutional, or a tort matter, as well as types of norms, such as duty-imposing and power-conferring norms.

Some of the requirements listed in the beginning of the paper can be understood in a different way in light of the foregoing. For instance, not having too much discretion is not limited to crime-preventing agencies. That is also relevant for other authorities, which can interfere with important interests. Considering this, it could be state that:

(20) the law needs to be reasonably substantive, i.e., important decisions by officials need to have a basis in law that takes a sufficient substantive stance on the main issues or does not grant them unfettered discretion.

Sometimes the substantiveness requirement is interwoven with the clarity desideratum. However, the law can be clear without taking sufficient substantive stance on the main issues or when it grants an authority too much discretion. A law can clearly grant a wide discretion. Strictly speaking, clarity and substantiveness or fettered discretion should be kept distinct. Take the following law as an example: 'The minister can decide who can import meat and under what conditions.' The law is clear, but it is substantively poor.[83] It does not limit or control the decision-making of the minister to a sufficient degree given the importance of the interest, i.e., occupation, and the level of interference with it. A political community committed to govern with law needs to have laws that take substantive stance on uses of coercive power like this; that is a part of the issue being governed by law. That is why it is not enough to merely have law; the law needs to be reasonably substantive.

The substantiveness or the fettered discretion requirement can, when it concerns the government, be seen as a part of or overlapping with a *legality*

[83] This is different from government not being able to act without a legal basis. Raz (n 2) 212, states: 'Actions not authorized by law cannot be the actions of the government as a government.' Raz (n 1) 5, says that it is in governments' nature 'that they ought to follow and apply the law'. A government can have legal power to act but, at the same time, be under a legal duty to not act, or to no act in a specific way, as well as a duty to act in a specific way. See, e.g., Hart (n 31) 68, and Gardner (n 3) 209. Furthermore, Raz (n 2) 212-213, states: 'If government is by definition, government authorized by law, the rule of law seems to amount to an empty tautology, not a political ideal.' Here it is important, among other things, to be mindful of the distinction between being authorized by law and the law being reasonably substantive or not granting unfettered discretion (as well as the principle of legality below).

principle. The rule of law covers all types of sources of law, such as enacted laws, customs, and precedents. A legality principle, on the other hand, entails that:

(21) important acts of government need a sufficient basis in a type of law that is well suited to meet the other requirements of the rule of law.

Consequently, sometimes enacted law may be the appropriate type of law or type of source of law to serve as a basis for important acts. The legality principle is here only supported by rule of law reasons and what counts as an appropriate type of source is highly context dependent. Legality principles in many legal systems may, in addition, be supported by democratic reasons.

The government can also govern with different means, such as issuing recommendations, giving guidance, issuing press releases, publicizing information, and other non-binding measures. These measures are significant in modern governance. Considering this it can said that:

(22) non-binding acts or measures without legal effects should be used in accordance with the tenor of the rule of law.

Sometimes non-binding acts or measures without legal effects have a distinct legal basis and, as such, fall squarely within the ambit of the congruence principles. When they do not, their use should not contravene or by-pass law or subvert the requirements of the rule of law. This may entail that issuing recommendations needs to satisfy some of the requirements of the rule of law, such as being clear, accessible, prospective, and so forth. The very fact that the act is non-legal or non-binding should also be clear and accessible.

5.2 Rule of Law, Not Merely Rules

The rule of law overlaps with the rule of rules, especially when the former concerns the ability of norms, often in the form of rules, to effectively guide human conduct. Law and other types of rules are similar means. That is why the beach house rules and the social rules of the tribe share some of the desired qualities with the rule of law. But the rule of law is a distinct virtue for two reasons. First, it concerns law, that is norms with law's features, but not all rules. While other rules may share some of law's features, law is distinguishable from them. Secondly, the rule of law is not merely concerned with superficial adherence to one or more of its requirements. It cuts deeper. The rule of law is about the *law's capacity* to govern a political community in the context of achieving the conditions of civility. It is not about the capacity of other rules to guide, to avoid arbitrary decision-making, or even to govern a political community. That is why the rule of law is the *specific virtue of law*.[84]

[84] For an account of the rule of law as a negative value in the sense that it reduces the particular risks that law itself creates, see Raz (n 2) 224, and Raz (n 1), e.g., 1-2, 13, and 15. Note that if the requirements of the rule of law are merely functional virtues, i.e., they make the law more effective as a guide, they could *increase* rather than *reduce* the danger of arbitrary power. The sharpness of a knife does not reduce its danger but increase it. The knife's handle reduces it.

Law's features, such as claiming to be comprehensive and supreme, having a great regulatory capacity, being organizable, changeable, controllable, and applied by institutions, can give a political power an awesome tool to govern a community and often a high degree of control over the law.[85] This entails particular risks, in comparison to other forms of social ordering, since the great usefulness of law in that regard can be used to achieve good and bad things.[86] Some of the requirements of the rule of law or some of their applications, namely those which reflect the arbitrariness rationale, can reduce the risks by limiting how the government can act. However, not all the requirements or their applications *reduce the risks created by law itself*. Some of them *facilitate the citizens* in various aspects of their lives by guiding them in their interactions with their fellow man.

The beach house rules are different. They are likely not aimed at avoiding arbitrary decision-making by the parents. They might have a value in guiding the children's conduct and bring stability to their lives. In so doing, they can also achieve a peaceful vacation for the parents. Whatever their purpose, the rules do not have all of law's features. They are not supreme or identifiable in light of other norms, for instance. Moreover, the rules are not a means to govern a political community and they do not have the capacity to achieve the conditions of civility. They are different at a deeper level. The rule of law is not about just any value that its requirements can have. Therefore, the requirements of the rule of rules are identified, understood, and applied in a different way.

To give an example, suppose one of the children intentionally throws a volleyball into and breaks the window of the adjacent beach house. The parents ground the child, which is a punishment of a sort. They can do that even though there is no beach house rule (or any rule laid down beforehand by the parents) that the children should not throw balls into windows. Assuming that the child should have understood the wrongness of its action, it cannot avoid the punishment by citing that there was no clear rule laid down beforehand prohibiting the conduct and no such rule should be introduced retroactively. However, if the state criminalizes the conduct retroactively, the child has a valid complaint in light of the rule of law.

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[85] Lamond (n 9) 502, says that the state has a special responsibility because of its degree of control over law.

[86] Hart (n 31) 202, says: 'the step from the simple form of society … into the legal world … brings its solid gains at a certain cost. The gains are those of adaptability to change, certainty, and efficiency, and these are immense; the cost is the risk that the centrally organized power may well be used for oppression'. Raz (n 2) 224, refers to the 'danger of arbitrary power'. He also states that 'the evil which is avoided is evil which could only have been caused by the law itself.' Plainly, other institutions than government can act arbitrarily. However, Raz says a government cannot act without a basis in law (a government in a legal sense). So, the danger which the rule of law can avoid is the arbitrary power of a government in the legal sense. Finnis refers to the rule of law 'as remedy for the dangers in having rulers.' See John Finnis, 'Natural Law Theories' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2020 Edition),), accessed 14 Marc 2023 https://plato.stanford.edu/archives/sum2020/entries/natural-law-theories/, section 1.3.

5.3 The Need for Law

The rule of law is not merely a virtue of law when there are laws at all.[87] It can require or recommend having laws and even having laws on specific subject-matters.[88] It makes having law *valuable* in some situations. Recall the tribe in our example at the beginning. In a small, close-knit society in a stable environment, the tribe fairs well without laws. Social rules and other types of norms are adequate to govern the political community. The conditions of uncertainty, which can plague a pre-legal society, are absent and the community can solve the moral problems it faces. However, the situation is different as soon as the tribe evolves into a larger, more diverse, and fast-paced community that faces new social issues on a regular basis. The tribe is faced with the conditions of uncertainty since the simple social structure of a pre-legal society is inadequate to deal with the moral problems involved in living in and sharing a political community. In this situation, the rule of law makes having law valuable and, therefore, requires or recommends having law to govern the community. Law is needed to establish and maintain the conditions of civility in face of ongoing, multiple, diverse, and complex moral problems, which other forms of social ordering are inadequate or less efficient in solving.

Fast forward to the tribe having developed into a state with laws and it is faced with new kinds of problems concerning artificial intelligence and gene manipulation on which there are no laws. If moral, social, religious, or political norms, beliefs, attitudes, and expectations are inadequate or inefficient in addressing the social issues, which arise from the scientific discoveries, then the rule of law makes having law on the subject matters valuable. A community committed to govern by law settles these issues with law. Moreover, law is needed on how the community should be governed. Law is not merely needed when other types of norms are inadequate but also when law's features make it especially desirable, such as the need for public or shared norms, norms that are identifiably by other norms, changeable, claim to be supreme with compulsory jurisdiction, and applied by institutions. There is no single answer for when non-fundamental social issues need to be addressed by law. That depends on the community in question, the issues which it faces, and whether other types of norms and social structures can adequately address the issues. Even though law is needed, it does not mean that *only* law should be used to address the social issues. Often, a combination of law and other types of rules is preferable. While the rule of law can require or recommend having law, it is not the only value that can do that. Justice, for instance, can point in that direction in some situations as well.

Social issues are usually not settled by law once and for all. Not only do circumstances change but also views in a political community about how they should be addressed. The need for law covers changes to the law; a political

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87 It is not clear on Raz's new account why acting with the manifest intention of protecting and advancing the interests of the governed cannot include the need for having law. Surely, that can sometimes be in the interests of the governed. Presumably, it is because it is limited to those interests that concern the law as an instrument.

88 Finnis (n 2) 217, says that the rule of law suggests 'new subject-matters for authoritative regulation.'

community *re-settles* the issue with law. Moreover, for law to be a good means to govern a political community it needs to be adaptable to diverse situations and be able to offer partial guidance even when it is difficult to describe a substantive stance on the issue in detail or clearly. Likewise, case law may need to evolve. For instance, exceptions may be recognized to rules when a court is faced with a new situation. In other words:

(23) the law should be reasonably flexible.

This requirement can be in tension with some of the others, such as the clarity and stability desiderata.

Earlier it was stated that the virtue of the rule of law lies between excesses. That also applies to the need for law. Having no law in a political community, which faces moral problems in conditions of uncertainty, is a vice. Where there is no law, there can be anarchy. Likewise, having (way) too much law is a vice. The rule of law does not require or recommend having laws on every issue or regulating every aspect of our lives with norms that have law's features. Such a community would be overly legalistic,[89] and it would also run afoul of other values, such as liberty or autonomy. The absence of the latter vice can be expressed as:

(24) the law should be non-complete as to how it regulates our lives.

Other values, such as liberty and justice, can also lead to the same conclusion.[90]

As previously noted, the rule of law is not the rule of good law. It does not require conformity with other values, such as democracy, liberty, equality, protecting human rights, and even (some aspects of) justice. These are distinct values or virtues. However, law is needed on how the community should be governed as well as some fundamental social issues and that can lead to the result that social issues concerning the other values should be addressed or settled by law. A community may choose to protect human rights by enshrining them in law or a constitution. Similarly, a community committed to democracy will have laws on some aspects of it since the rule of law involves how the community is governed. The rule of law does not only concern the desired qualities of law and how the law is upheld in a political community but also having laws at all.

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[89] See in this context, Marmor (n 2) 3.

[90] See in this context, Timothy Endicott, 'The Rule of Justice' *International Journal of Constitutional law* (forthcoming), and Hilary Nye, 'Predictability and Precedent' in Timothy Endicott, Hafsteinn Dan Kristjánsson, and Sebastian Lewis (eds), *Philosophical Foundations of Precedent* (OUP, forthcoming 2023).