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A CONVERSATION ON THE RULE OF LAW

I

Zhai:
Let's start with a couple of very general questions. How can we know what law or the rule of law is? People have different or conflicting answers to these questions. How can we decide which answer is correct?
Adams:
How can we know what law is or what the rule of law stands for? I think here, as with many philosophical questions, there is something of a paradox in the asking. Law is a social institution, a mind-dependent aspect of the world in which we live. So in a way the more interesting question is, how could we not know what law is, given that the practices that instantiate such an institution are our practices, and the conceptual frameworks that underlie such practices are our concepts? My answer to this question depends on a distinction made famous by Ryle, between theoretical and practical knowledge. Some person may have practical knowledge of how to get from one place to another, but be at a loss to explain the way. They may know how to ride a bike, but have no sound theoretical explanation of this ability. In the same way I believe that the capacity to use a concept is a practical ability, and what philosophers want is theoretical or propositional knowledge of that practice. These are two different kinds of understanding, and the philosophical task involves translating the one into the other. So the lawyer, the judge and perhaps the subject are able to use the concept of law, and to engage in legal practice. What the legal philosopher wants is to understand that practice in propositional terms. I think the task is essentially the same when it comes to the rule of law. For although the rule of law is neither an institutional phenomenon nor a social practice but an evaluative concept, it is a concept that we have and use as part of our legal and political practices.

II

Zhai:

Raz wrote in 1985 that law 'must be capable of possessing authority',[1] and in 1994 wrote that 'the law consists of those standards which become the standards of a political community by being enacted, endorsed, or enforced by the organs of that community'. [2]I guess that you agree with Raz on this. You write that 'law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc)',[3] and law is 'the systematized, institutionalized expression of will [of others]'.[4] You endorse Gardner's comment that 'in any legal system, a norm is valid as a norm of that system solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it'.[5] But in his Tang prize lecture (2018), Raz wrote, 'The law is a structure of rules, institutions, practices and *the common understandings* that unite them, which normally are an aspect of some social organization'.[6] Raz here adds 'the common understandings' uniting rules and practices as a major element of law. Does this show that there is some important change between his concept of law in in 1994 or 1985 and that in 2018? After all, 'the common understandings' are not the kind of thing that is source-based, capable of having authority. Do you agree with him on this addition?

Adams:

I agree with the Raz of 1994 but not 1985. The law is a set of standards that have been created through force of human agency, and either issued or endorsed by institutions. However, the notion that law must be capable of possessing authority I find a much more difficult idea to parse. The law is an authoritative institution, I think, by definition. Legal institutions have authority over us, and if they are missing this they are not legal institutions. To say that law must be capable of possessing authority is like saying that cordon bleu cooking must be capable of possessing finesse.

[1] Joseph Raz, 'Authority, Law and Morality' (1985) 68(3) The Monist 295, 300.

[2] Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 104.

[3] Leslie Green and Thomas Adams, 'Legal Positivism', The Stanford Encyclopedia of Philosophy (Winter edn 2019) <https://plato.stanford.edu/archives/win2019/entries/legal-positivism/> accessed

[4] Thomas Adams, 'The Rule of Law and Respect for Persons' in Geneviève Cartier and Mark Walters (eds), *The Promise of Legality: Critical Reflections on the Work of TRS Allan* (Hart Publishing, 2022).

[5] John Gardner, *Law as a Leap of Faith* (Oxford University Press 2012) 20.

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

I don't take Raz in 2018 to be modifying his position but I think he misdescribes the point he is trying to make. What he should have said is that law—the social kind—is a structure of rules, institutions, practices and common understandings. The law—meaning the standards in force in a community—is a set of rules, rules that are either enacted or endorsed by institutions, institutions that arise from social practices, practices that depend for their intelligibility on common understandings.

III

Zhai:
It is often said that the rule of law is an ideal for law. It seems that there is some conceptual or necessary connection between law and the rule of law, and that law enjoys epistemic priority over the rule of law. We have to know what law is in order to know what the rule of law is. But Waldron does not think so, and he says that 'we cannot really grasp the concept of law without at the same time understanding the values comprised in the rule of law'. [7]

It is also said that law may be the greatest threat to the rule of law.[8] Contra Fuller, Raz says that law, that is, a legal system, can 'violate most radically and systematically' but it cannot violate the rule of law 'altogether'.[9] If this is the case, it is obvious that the rule of law is not the *rule of law or law's rule*, isn't it?

Besides, can an individual law totally deviate from the rule of law? Not for Raz: 'the law to be law must be capable of guiding behaviour, however inefficiently'. A law necessarily conforms to some minimal legality.[10] What are these minimal requirements of legality for a directive to be a law?
Adams:
I think there are many conceptual connections between law and the rule of law. Most centrally, as Raz and Fuller made clear, the rule of law is the law's internal standard of excellence. This means, I think, that to understand the rule of law one needs to understand law, but it equally means our understanding of law is improved by an understanding of the rule of law. We know better what some practice involves when we know how things would go best, by its own lights. The rule of law is that

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[7] Jeremy Waldron, *Thoughtfulness and the Rule of Law* (Harvard University Press 2023) 40.

[8] Adams (n 4) 15.

[9] Joseph Raz, 'The Rule of Law and its Virtues' in Joseph Raz, *The Authority of Law: Essays on Law and Morality*, (2nd edn, Oxford University Press 2009) 210, 223.

[10] ibid 223-44.

standard for law.

Can there be individual laws the fail to live up to the value of legality? Yes. Retroactive law is still law and secret courts are still courts. Can the legal system as a whole fail to live up to the rule of law? In large part it certainly can and unfortunately we can see many current examples of this. On the whole? Fuller thought not. There can be no legal system without minimal adherence to legality. I think a thesis in the neighbourhood of this one is true, but not for the reason that there is some existential link between law and the rule of law. For a legal system to exist it must be effective, and for it to be effective it must adhere to some minimum degree to at least certain precepts of legality. Hence it is very hard to see how an entirely retroactive legal order could get off the ground. This, though, is a point about the efficacy of law and not about the rule of law.

IV

Zhai:
You think that the core idea of the rule of law is that *government* is subject to or constrained by law, and it is not merely that government must act according to the law. How did you reach this conclusion?

For Raz in 1977, the root idea of the rule of law is law's capability of providing effective guidance. By means of following the footsteps of great philosophers, theologians, poets and playwrights, politicians and jurists that have discussed the rule of law in the past, Martin Krygier argues (A) that the rule of law is a means we hope will help us achieve the goal of 'well-tempered power', and that 'the central problem which we want the rule of law to deal with is arbitrary exercise of significant power';[11] Gerald Postema says that the rule of law demands that those who are subject to power are provided protection and recourse against its arbitrary exercise through law's distinctive tools.[12] Endicott also says that the value of the rule of law 'lies in its opposition to arbitrariness, which is the antithesis of the rule of law'.[13] (B) Besides, Krygier and Postema say explicitly that the power that they have in mind includes social and private power, not just government power. (C) In relation to this, a very common view is that the rule of law means that social life (not just government) is regulated by

[11] Martin Krygier, 'Well-Tempered Power: "A Cultural Achievement of Universal Significance"' (2024) Hague Journal on the Rule of Law 479, 486.

[12] Gerald J Postema, *Law's rule: The Nature, Value, and Viability of the Rule of Law* (Oxford University Press 2023) 18.

[13] Timothy Endicott and Karen Yeung, 'The Death of Law? Computationally Personalized Norms and the Rule of Law' (2022) 72 (4) University of Toronto Law Journal 373, 376.

laws, or that 'all must live their lives in accordance with the law', and civil or uncivil disobedience is therefore considered as a violation of the rule of law.[14] What are your comments on (A), (B), and (C)?

My worry about the Krygier-Postema-Endicott (perhaps also Raz in 2018) thesis that 'the rule of law's point is to temper or constrain arbitrary power' is that it is self-defeating, because, depending upon your understanding of arbitrary power, there might be more effective or better ways to temper arbitrary power than the rule of law, as Krygier himself confesses: 'after a very long time of being called a "rule of law" guy, I've decided to come out. I am really a 'well-tempered power guy'; and in the same article, he says, 'if we thought we could get there [have power well-tempered] by praying … we should pray more and worry about law less'.[15]

Adams:

The idea that the rule of law is about government being constrained by law is mobilized by the following scenario: imagine some power of detention conferred on government and not subject to review by any court. This is, I take it, a quintessential problem for the rule of law and it is such a problem precisely because the law cannot be marshalled to control the activities of government. It is not enough that the government in fact happens to abide by the law in the scenario. What matters is whether the legal system is set up in such a way that it is held to account by the law.

I think I disagree with the Krygier-Postema line for similar reasons to you. The rule of law is a specific virtue for a legal system and it comes into play only when we have that form of social order (either in fact or in the offing). Moreover, it is a specific constraint on legal institutions within that social order. A subject not committed to upholding their contracts is no problem for the rule of law, but a government not committed to keeping within its legal powers is.

V

Zhai:

Many legal philosophers, when discussing the rule of law, start with the claim that it is a legal or political ideal or virtue? Is a legal ideal (virtue) the same as a political ideal (virtue)? Do you agree with them? If so, in what sense? Is this ideal or virtue negative or positive?[16] Is the rule of law

[14] Adams (n 4) 5.

[15] Krygier (n 11) 487.

[16] Adams (n 4) 11.

an independent moral value: negative, if not positive? If not, does it have any independent moral value?

Some legal philosophers (Hart, Gardner, and Raz) think that the rule of law by itself is morally inert or neutral, and its instrumental morality is entirely parasitic upon the morality of the laws that do the ruling. The corollary from this position is that we should uphold the rule of law when we believe the laws that do the ruling are good, and fight against the rule of law when the laws are bad. It seems that you agree with this position when you say that the rule of law can equally well be either an injustice or justice maximiser, depending upon the justice or injustice of the laws that do the ruling. But you also write that we should hold an oppressive and lawless government doubly accountable. You believe that the rule of the rule-of-law-compliant bad laws is better, or less bad, than the rule of the rule-of-law-violating bad laws. This shows that, unlike Hart, you (also Raz perhaps) do not believe that the rule of law is morally indifferent, and that you believe it does matter morally, if not positively, at least negatively: as you write, 'while compliance with the precepts of legality would not ensure respect for those living under law, departure would nonetheless signal disrespect'.[17] But, when a law's substance insults a person's dignity, its departure from legality will show respect instead of disrespect for this person, will it not?

In your article, you say that law is a special means to some end, and the rule of law is a principle ordering law as a means. But, means can be morally different, can't they? Some means are morally better than other means. A means of ruling that engages with subjects' agency is morally better than a means of ruling (like brainwashing or manipulating) that does not. Even if the rule of law is not an independent moral value, we can still argue that it is morally superior to other means, can't we?

Adams:

This is hard! I think that the rule of law is, to use the Razian terminology, essentially a negative virtue. By honouring it you do not necessarily do right to those subject to the law, but by breaching it you necessarily do them wrong. What is the wrong involved in failing to comply with the rule of law? It is the wrong of disrespect for agency. When the government exercises power upon you in a way that is beyond legal control it is not answerable to the very standards to which it has been announced it should be answerable. The legal system is saying one thing and doing another, and this is disrespectful to the agency of those who live under it.

[17] ibid 13.

VI

Zhai:
Many legal philosophers believe that the rule of law respects the dignity of law's subjects. You disagree with this very common belief, and argue that the rule of law only makes *law engage with* the agency of law's subjects: it can engage with their agency by manipulating or insulting it instead of respecting it.[18] Is my understanding of your position correct? How could the rule of law make law engage with the agency of law's subjects if its central concern is to constrain the government by law's means?[19] Is it possible that we could have a rule-of-law-compliant law which completely ignores or denies the agency of law's subjects?
Adams:
Yes, I don't think that a rule-of-law-compliant legal system respects the agency of those it governs. For example, the system may deny the fundamental rights of whole classes of persons, or treat them as objects, and still be compliant with the rule of law. As Matt Kramer has argued, even slavery can be compatible with legality. Provided the terms of indenture are clear, consistent and enforceable, this is a rule-of-law-compliant institution. But in no way does slavery respect the agency of those subject to it. Nonetheless, a rule-of-law-compliant legal system will at least engage the agency of those subject to it; it makes the exercise of power over them answerable to public standards, standards in the light of which they are capable of understanding their social position. To fail to do this is to disrespect agency, but to do this is not necessarily to respect agency.

VII

Zhai:
Fuller argues that law is essentially different from managerial direction:

> The directives issued in a managerial context are applied by the subordinate in order to serve a purpose set by his superior. The law-abiding citizen, on the other hand, does not apply legal rules to serve specific ends set by the lawgiver, but rather follows them in the conduct of his own affairs, the interests he is presumed to serve in following legal rules being those of society generally. The directives of a managerial system regulate primarily the relations between the subordinate and his superior and only collaterally the relations of the subordinate with third persons. The rules of a legal system, on the other hand, normally serve the primary purpose of setting the citizen's relations with other citizens and only in a collateral manner his relations with the seat of authority from which the rules proceed.

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[18] ibid 11.

[19] ibid 5-6.

What is your comment on this contrast by Fuller between two forms of social ordering?

Adams:

I think Fuller overplays the differences between these two forms of ordering. The manager may give orders to their subordinate for the sake of the company and by way of regulating their relationships with other employees, for example. In the other direction lawgivers are certainly capable of issuing orders animated entirely by their own interests. True, much of the law does not directly regulate the relationship between lawgiver and subject, but some certainly does. Much of constitutional law is like this.

VIII

Zhai:

Why do so many excellent legal philosophers tend to romanticize the rule of law, if not law itself? I was thinking that perhaps, when reading any philosophical work on the rule of law, in order to test the truthfulness of its claims, a good strategy is to ask whether they can accommodate or explain the rule of evil law. What do you think of this strategy?

Adams:

In response to your first question: I think it is hard not to romanticise something that is your life's object of study. It is healthy to avoid this, but healthy behaviours are hard to instantiate. In the case of academic lawyers, this means there is a standing disposition to revere the law or, if that proves to unpalatable then, as second best, the rule of law. Indeed, in the case of the rule of law there are structural features that encourage this thought. If we are to have law, then the rule of law is something to which we should aspire. This is different from the mistaken thought that the rule of law is itself a value to which all societies should aspire. But it is also quite close to it.

In response to your second question: I think this is a good strategy. But it is only a good strategy on the assumption that an evil legal system is capable of living up to the rule of law. I am convinced of this, but there are many out there who deny this possibility, or at the least complicate it. Fuller believed, for example, that adherence to the rule of law would lead a legal system to tend towards justice, although he never explained exactly how. Nigel Simmonds put some meat on these bones by arguing that wicked rulers would have little incentive to adhere to the rule of law. I think there is no general answer to the question of whether bad people

would have reason to abide by the standards of legality. If they want their subjects to adhere to their rules and rulings they will have reason to do so. If the arbitrary exercise of power better suits their particular purposes they will not.

IX

Zhai:

Two questions regarding Raz's theory of the rule of law.

First, in his 1977 article, Raz said, 'the rule of law is a negative virtue [or value] in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself'.[20] Waldron says, 'I think Raz is wrong about this. The rule of law is an ideal designed to correct dangers of abuse that arise in general when political power is exercised, not dangers of abuse that arise from law in particular. Indeed, the rule of law aims to correct abuses of power by insisting on a particular mode of the exercise of political power: governance through law. That mode of governance is thought to be more apt to protect us against abuse than, say, managerial governance or rule by decree. On this account, law itself seems to be prescribed as the remedy, rather than identified as the problem that a separate ideal—the rule of law—seeks to remedy.'[21] How will you adjudicate the dispute between Raz and Waldron?

Adams:

By siding with Raz. The Waldron argument has the implication that whenever we have power we had better have law because this is a necessary condition of having the rule of law. But it is not obvious to me that power is always best instantiated via the medium of law. In large modern societies this is likely true, but it is not necessarily true. The whole point of anarchism is to ask us whether we are capable of structuring our interactions in a different, less coercive and top-down, way. We can't rule this out a *priori*.

Second, it is worth recognising that law itself could never be the remedy to political power because it is a particular institutionalised form of this power. The rule of law, by way of contrast, can be the remedy to certain of the dangers of legal power because it functions as a constraint on its exercise.

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[20] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 224.

[21] Jeremy Waldron, *Thoughtfulness and the Rule of Law* (Harvard University Press 2023) 40.

X

Zhai:
Second, I am very much puzzled by Raz's Tang Prize lecture 'Law's Own Virtue'. In his 1977 paper on the rule of law, its root idea, Raz said, is law's capability of providing effective guidance. However, in his 2018 Tang Prize lecture, he says:

> (A) A commonly agreed aim of the rule of law is to avoid arbitrary exercise of government's discretionary power. And it seems that he does not think that avoiding arbitrary government is derived from, or aims to serve, law's capability of providing effective guidance, because he says (a) that 'people can plan and organise their affairs on the basis of partial information, and in the face of risk'. The risk he has in mind is that caused by the pervasive discretionary powers. And (b) that the idea of law's capability of providing effective guidance offers no general answer to the question of curtailing discretionary powers.
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> (B) 'Arbitrary government is the use of power that is indifferent to the proper reasons for which power should be used.' The proper reasons for using power are 'to promote … the interests of the governed'. Raz then concludes that 'the test of conformity to the rule of law is acting with manifest intention to serve the interests of the governed. … I will call that the core idea.'

I think that Raz's theory of the rule of law in his 2018 Tang Prize lecture is essentially different from that in his 1977 paper. Besides, this shift is unfortunate, because it will contribute to the phenomenon of 'sacrificing too many social goals on the altar of the rule of law', and to making the term rule of law 'lack any useful function'. 'Acting with manifest intention to serve the interests of the governed' may have nothing to do with law or the rule of law. Do you agree with me?
Adams:
I do. If some minister exercises a power granted to them for the sake of their political future, or to line the pockets of their friends, then there is certainly a problem with their so doing, but it is not obvious to me that this is a rule of law problem. If, say, the law is drafted in an intentionally vague manner to allow such a possibility then the rule of law is implicated, but this is because the rule of law is opposed to uncontrolled power, not because it is concerned with the reasons for which power is exercised. The idea that the rule of law has to do with the law's capacity to guide conduct is much closer to the truth, although I think of this as a downstream consequence of the rule of law's most basic animating idea: that of governance through and subject to law.

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